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Talking Back in Court

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Abstract: People charged with crimes often speak directly to the judge presiding over their case. Yet, what can be seen in courtrooms across the U.S. is that defendants rarely "talk back" in court, meaning that they rarely challenge authority's view of the law, the crime, the defendant, the court's procedure, or the fairness of the proposed sentence.

With few exceptions, legal scholars have treated the occasions when defendants speak directly to the court as a problem to be solved by appointing more lawyers and better lawyers. While effective representation is crucial, this Article starts from the premise that defendants have important things to say that currently go unsaid in court. In individual cases, talking back could result in fairer outcomes. On a systemic level, talking back could bring much-needed realism to the criminal legal system's assumptions about crime and punishment that produce injustice.

This Article analyzes three types of power that prevent defendants from talking back in court: sovereign, disciplinary, and social-emotional power. While sovereign power silences defendants through fear, disciplinary power silences defendants by imposing a system of order within which talking back seems disorderly. Finally, social-emotional power silences defendants by imposing an emotional regime in which self-advocacy is both a breach of decorum and an affront to the court's perception of itself as a source of orderliness and justice. The dynamics of social-emotional power are particularly critical to evaluating court reform efforts focused on improving courtroom culture. Paradoxically, the more solicitous the judge, the less the defendant may feel comfortable raising concerns that challenge the court's narrative of justice.

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INTRODUCTION

Imagine this common occurrence in the lower, criminal courts: James appeared in court at 8:00 a.m. to answer for two misdemeanor citations for trespassing and disorderly conduct. He attempted to show his citations to the court officer, who motioned for him to sit in the audience. At first, James selected a seat in the first row. The court officer quickly approached him, leaned over, and told him the first row was reserved for lawyers. James next selected the back row. While James waited, he watched the court officer admonish other members of the audience—defendants and their families—for speaking. James waited until 10:00 a.m. for his case to be called.

When his case was called, the judge instructed James to stand on an "X" made of masking tape on the floor between the tables where the public defender and the prosecutor sat. The prosecutor read the charges. The judge asked James if he understood the charges. James said yes. The judge asked the prosecutor if she was seeking jail time. The prosecutor said no and added that the state was prepared to offer James a conditional dismissal if he agreed to pay $500 in fines and stay out of trouble for six months. The judge explained to James that if he pleaded guilty to both charges today, the conviction would be suspended until the six-month status date. If James paid the $500 fine by the due date and avoided arrest, the case would be dismissed. If he failed to pay the $500 or picked up new criminal charges, the dismissal would convert into a conviction that would go on his record. James asked if he could get a lawyer. The court explained that, because the state was not seeking jail time, he did not qualify for a public defender. However, he was free to hire a lawyer and come back to court with his lawyer on another date. The judge asked James if he understood the offer. James accepted the plea offer by saying yes.

The minute-long hearing that adjudicated James's case is replicated in criminal courts across the United States every day. People charged with crimes agree to the terms of the plea offer and resolve their cases without

advocating for themselves in any meaningful way.[1] Most legal scholarship critical of criminal court practice would frame James's problem as an issue of inadequate access to defense counsel,[2] coercive plea bargaining,[3] or excessive fines.[4] All of these critiques are fundamentally correct and important to analyzing injustice in criminal legal practices.[5] What has received much less scholarly attention, however, is what defendants say and do not say during brief moments in which they speak directly to the court.[6] These moments of interaction strike me as critical and understudied aspects of criminal legal practices.

Defendants in criminal cases rarely contest the process or disposition of the case, even when they are called upon to speak.[7] They agree to plead guilty, to waive rights, pay fines, attend courses, and then they thank the court and leave. Defendants rarely talk back in court.[8] By talking back, I

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1. My experience in criminal court is derived from practicing as a public defender in Massachusetts, Washington, D.C., and Maryland, as well as supervising law students' clinical legal education in Maryland and Nevada. James's case is a composite of cases that are resolved in a similar manner every day in the lower courts.

2. *See, e.g.*, Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 297–303 (2011) (discussing the need for standards to guide defense counsel representing clients in misdemeanor cases in light of the serious collateral consequences of conviction).

3. *See, e.g.*, Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1311–15 (2018) (describing the unequal power dynamics in plea bargaining). Thea Johnson describes how plea bargaining often eclipses the fact-finding goals of criminal courts. Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 857 (2019).

4. *See, e.g.*, Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 7–9 (2018) (describing pervasive harm caused by criminal fines).

5. I use the phrase "criminal legal practices" instead of the "criminal justice system" or "criminal legal system" because the multiplicity of laws, courts, and practices cannot be described as a "system" at all. *See* Sara Mayeux, *The Idea of "The Criminal Justice System,"* 45 AM. J. CRIM. L. 55, 65 (2018); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1089 (2013) ("The criminal justice 'system' in the United States . . . is not a 'system' at all, but rather a chaotic swirl of local, county, state, and (less frequently) federal actors, all with different constituencies and incentives.").

6. An exception is Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005) (arguing that the direct speech of defendants has value independent of their attorney's ability to speak on their behalf). In the critical misdemeanor literature, self-representation is most often discussed within the context of the right to counsel and to effective representation. *See, e.g.*, Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1024 (2013) (discussing self-representation in misdemeanors).

7. *See infra* section I.B.

8. *See* BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 5 (1989) (defining talking back as speaking to a person in authority as an equal). Note that bell hooks is a pen name that the author prefers never to be capitalized. Min Jin Lee, *In Praise of bell hooks*, N.Y. TIMES: THE ENTHUSIAST (Feb. 28, 2019), https://www.nytimes.com/2019/02/28/books/bell-hooks-min-jin-lee-aint-i-a-woman.html [https://perma.cc/N3HT-5CKQ] (noting how hooks "wanted her pen name to be spelled in lowercase to shift the attention from her identity to her ideas"). I use the verb, to "contest,"

do not mean making a scene and risking being found in contempt of court (although fear of being found in contempt surely causes many defendants to hold their tongue). In her classic work on Black feminist thought, bell hooks describes "talking back" as "speaking as an equal to an authority figure."[9] hooks draws a contrast between the act of talking back and a constellation of kinds of "silence," which includes speaking in ways that say nothing to contest authority.[10] In other words, silence encompasses not only holding one's tongue but also speaking in ways that are compliant while refraining from speech that might disrupt or challenge authority.

James, for example, may have possessed information and perspectives important to the procedural and substantive issues in his case. He could have raised issues related to police conduct during the traffic stop, the facts alleged in the citation, or the fine amount set by the court. The fine of $500 may have worked insurmountable hardship for James. A critical challenge to the court's calculus in setting a fine could have been mounted by James simply saying, "If I have to pay $500, I won't have enough money for gas to take my kids to school." These sorts of challenges to the court's narrative, however, often go unsaid.

Numerous factors must push defendants to silence. In addition to more obvious reasons,[11] I argue that there are three pernicious forms of power that work invisibly to ensure that defendants do not talk back to contest either their guilt or the terms of the disposition.[12] My hypothesis builds on the work of Issa Kohler-Hausmann, whose research in courts that handle misdemeanor cases led her to conclude that misdemeanor defendants are perceived as fundamental challenges to the public order.[13] As such, courtroom procedures and the sanctions imposed are tests of the defendant's ability to demonstrate orderliness. I argue that the defendant's efforts to appear orderly *preclude talking back*. Everything that happens from the moment defendants enter the courtroom signals that their orderliness is being tested, and, thus, they should be obedient, quiet, and

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and its noun, "contestation," interchangeably with "talking back." To contest is to "call in question, dispute." WALTER W. SKEAT, AN ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 132 (1888). The word derives from the Latin word *contestari*, which means "to call to witness." *Id.* Contestation is thus tied firmly to speech, to providing information or testifying.

9. HOOKS, *supra* note 8, at 5.

10. *Id.* at 6.

11. *See infra* Part II.

12. *See infra* Part II.

13. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 5 (2018); *cf.* Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 982 (2020) (noting that, while many misdemeanor cases fit with the "managerial model" of order policing, other crimes, such as "theft, simple assault, and DUI" suggest more typical concerns of criminal legal systems).

agreeable. Insofar as they speak, they must follow the unwritten script of compliance.

I then argue that the fear of punishment is not the only factor pressuring defendants into an orderly and compliant performance. Rather, silent compliance is enforced through three related types of power—sovereign, disciplinary, and social-emotional—that work in tandem to encourage defendants to assent to all terms and accept all responsibility for failures to comply.[14] Sovereign power is the most obvious. It is the fear of the sovereign's power to punish through incarceration or other sanctions. In contrast, disciplinary power controls the individual by imposing a system of order.[15] While defendants may behave orderly out of fear that the sovereign will exercise its power to incarcerate, they may also behave orderly out of more of a social sense that they are being observed, monitored, and judged on their conduct. The procedures of the courtroom that encourage orderliness in this subtler way are a kind of disciplinary power.

Most overlooked among these three types of power that work to silence defendants is what I call social-emotional power, which imposes parameters around what types of emotions and social interactions are considered polite and permissible.[16] Courtrooms permit a narrow range of emotional expression.[17] If no one—including lawyers—appears spirited or outraged during their court hearings, defendants usually will conform their conduct and speech to the cooperative (or acquiescing) emotional tone of the courtroom. Likewise, if the judge seems short-tempered, the defendant may be hesitant to say anything that could provide the court's ire.

Paradoxically, the pressure to be agreeable may be enhanced in courts that appear the most respectful and solicitous toward defendants because contestation seems wholly inappropriate in such a friendly environment. While courtroom culture varies widely, trends toward greater procedural justice and therapeutic jurisprudence have led some judges to cultivate an atmosphere of empathy and cooperation in their courtrooms.[18] The vanguard of this trend is the problem-solving court movement, in which

14. *See infra* section II.A.

15. *See* KOHLER-HAUSMANN, *supra* note 13, at 8–9.

16. Emotions are social insofar as they are shaped by "anthropological, social and historical" context. Veronika Magyar-Haas, *Shame as an Anthropological, Historical and Social Emotion*, *in* SHAME AND SOCIAL WORK: THEORY, REFLEXIVITY AND PRACTICE 55, 57 (Liz Frost et al. eds., 2020) (discussing variations in the experience and expression of shame).

17. *See, e.g.*, Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 633–35 (2011) (describing how, while litigation involves emotions, judges and other legal professionals adhere to the belief that emotion has no place in their courtroom functioning).

18. *See infra* section II.B.

the defining feature of the court's design is its attempt to ameliorate a discrete problem like drug addiction.[19] Scholars of problem-solving courts have noted that even lawyers may feel pressured not to contest the process or the outcome in courtrooms that emphasize cooperation.[20] In these courts, the social-emotional power that keeps defendants from talking back may be entirely invisible. Defendants will feel pressure to acquiesce through diffuse social-emotional cues to cooperate. I thus reject the argument that kinder, gentler courts will elicit information from defendants that is necessary to make fair decisions and to avoid unintended harm.[21]

Concern over constraints on defendants' ability to talk back applies to felony as well as misdemeanor cases. As I have written elsewhere, defendants often speak during their sentencing hearings, yet the speech that is demanded of them is highly scripted—an expression of remorse and responsibility for the crime.[22] Defendants in felony cases may also be called upon to speak about their work, family, and living arrangements during bail and pretrial release hearings.[23] And, defendants may elect to represent themselves in both misdemeanor and felony cases provided the court finds them competent to do so.[24] Finally, in some instances, defendants may seek to use their criminal trials to make a political

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19. Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 603–05 (2016) (describing the emergence of drug courts as part of an effort to separate from the general docket cases in which the defendant's crimes were driven by substance abuse).

20. Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 47 (2000) (discussing the pressure on defense attorneys to behave as team members rather than as adversaries); Tamar M. Meekins, *"Specialized Justice": The Over-Emergence of Specialty Courts and the Threat of the New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 38 (2006) (arguing that specialty courts divest defense attorneys of their adversarial function and adopt the role of encouraging the defendant to comply with the court-ordered treatment).

21. My argument about the social-emotional constraints in the courtroom is different from the argument that emotions form the primary mechanism of power in problem-solving courts. *Cf.* Rekha Mirchandani, *Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State*, 33 L. & SOC. INQUIRY 853, 869 (2008) (challenging the hypothesis that emotions are the primary mechanism of power in therapeutic jurisprudence and observing that the judge in a problem-solving court in Salt Lake City used techniques of rational inquiry in addition to emotional engagement).

22. *See* M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 323–28 (2018); *see also* Susan A. Bandes, *Remorse and Judging*, *in* REMORSE AND CRIMINAL JUSTICE: MULTI-DISCIPLINARY PERSPECTIVES (forthcoming 2021) (manuscript at 13–15), https://ssrn.com/abstract=3535062 [https://perma.cc/Q4G5-EUCB]; M. CATHERINE GRUBER, "I'M SORRY FOR WHAT I'VE DONE": THE LANGUAGE OF COURTROOM APOLOGIES 152–53 (2014) (concluding that a "ritualized apology formula" "appears to be expected" at sentencing).

23. AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 106–07 (2009) (describing how a judge held defendant on an unaffordable bail until he agreed to provide truthful answers to questions about his work, school, age, and probation status).

24. *See* Faretta v. California, 422 U.S. 806, 835 (1975).

statement, waiving or minimizing their exercise of procedural rights—including their right to counsel—in order to present a counter-narrative.[25]

The issue of the defendant's silence is, however, more prominent in misdemeanor cases for two reasons. First, defendants charged with misdemeanors are less likely to be represented by counsel.[26] Second, misdemeanors have a dramatic impact on millions of people because they are prosecuted in both state court and municipal courts that have jurisdiction over city code violations as well as misdemeanor crimes.[27] Recent critiques of misdemeanor legal practices have thoroughly explored many aspects of this outsized segment of criminal legal practices.[28] They constitute the bulk of prosecutions in state courts.[29] Misdemeanor cases fuel mass incarceration through initial arrest, bench warrants, pretrial detention due to unaffordable bail, and jail sentences for low-level offenses.[30] Misdemeanor cases fuel mass convictions through quickly bargained guilty pleas that are completed in a hearing that lasts less than three minutes.[31] While misdemeanor prosecutions are less likely to result

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25. *See* Jenny E. Carroll, *The Resistance Defense*, 64 ALA. L. REV. 589, 599 (2013) (describing the "resistance defense" in which defendants seek to "compel acknowledgment of the procedural and substantive shortcomings of the law that failed to account for their stories").

26. *See* Hashimoto, *supra* note 6, at 1019–21 (discussing rates of self-representation in misdemeanor cases).

27. *See* Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 975–78 (2021) (describing the prevalence and scope of municipal courts); *id.* at 968 (noting that, in municipal courts, "defense attorneys are scarce to nonexistent").

28. *See* Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1091 (2013) (stating that "the current criminal justice crisis is more aptly characterized as one of mass misdemeanor processing"); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313–14 (2012) (stating that "misdemeanor processing is the mechanism by which poor defendants of color are swept up into the criminal system (in other words, criminalized) with little or no regard for their actual guilt"); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 734, 737 (2018) (stating that three misdemeanor charges are filed for every one felony charge, totaling more than 13.2 million misdemeanor cases filed per year).

29. Mayson & Stevenson, *supra* note 13, at 975 (noting that more than 75% of all criminal cases are misdemeanors); Alexandra Natapoff, *The Penal Pyramid*, *in* THE NEW CRIMINAL JUSTICE THINKING 71, 72 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (describing criminal prosecutions as a pyramid in which the wide base is made up of misdemeanor cases).

30. Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 337–39 (2016) (critiquing arrest in instances in which the suspect can be issued a citation with a court date for arraignment). *See generally* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015); JANELLE DUDA-BANWAR & JESSICA BURT, CTR. FOR PUB. SAFETY INITIATIVES, DEP'T OF CRIM. JUST., ROCHESTER INST. OF TECH., LIVING WITH WARRANTS: LIFE UNDER THE SWORD OF DAMOCLES (2019) (analyzing the practice and impact of bench warrants in Monroe County, New York); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 776 (2017) (discussing data demonstrating effects of pretrial detention on plea bargaining).

31. Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1069 (2013). A study of 1,649 misdemeanor cases in various Florida counties found that 82% of the

in incarceration than felony prosecutions, sub-carceral sanctions can be devastating. By sub-carceral sanctions, I mean any imposed punishment other than incarceration, including, for example, fines, fees, monitoring requirements, mandatory therapeutic programs, and community service. Sub-carceral sanctions are often onerous, draining defendants of money and time while they labor to comply under the constant threat of incarceration if they fail.[32] These convictions often result in devastating collateral consequences.[33] The burdens of misdemeanor prosecution fall disproportionately on Black and Latinx people, who are stopped by police, ticketed, arrested, detained, prosecuted, and punished at higher rates than other racial and ethnic groups.[34]

In these cases, it seems that defendants rarely tell the court they are simply unable to pay monetary fees or to arrange the transportation to get to a court-ordered class.[35] While no quantitative studies of defendant speech exist, ethnographies of courtroom culture are peppered with examples of unsatisfying interactions between judges and defendants.[36]

A defendant's silence is costly to both the defendant and our

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arraignment hearings lasted less than three minutes and 91% lasted less than five minutes. ALISA SMITH & SEAN MADDAN, NAT'L ASS'N OF CRIM. DEF. LAWS., THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 15 (2011), https://www.nacdl.org/getattachment/eb3f8d52-d844-487c-bbf2-5090f5ca4be3/three-minute-justice-haste-and-waste-in-florida-s-misdemeanor-courts.pdf [https://perma.cc/2WZE-RPWM]. Over two-thirds of the arraignments included a guilty plea. *Id.* at 9. As the authors put it, "[d]efendants who interact with the criminal justice system spend a great deal of time driving to the courthouse, parking, and sitting in court waiting for the judge to take the bench in exchange for three-minute hearings." *Id.* at 14.

32. *See* Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1485 (2016).

33. Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 176 (2017); Roberts, *supra* note 2, at 297–303.

34. Mason & Stevenson, *supra* note 13, at 979 (describing how the "weight of this gargantuan [misdemeanor] apparatus falls heavily on the poor and on people of color").

35. The extensiveness of direct conversations between defendants and judges was not problematized in the literature that predated the boom in critiques of misdemeanor courts, likely because the stakes of sub-carceral sanctions were perceived as too low to trigger constitutional concerns. Natapoff, *supra* note 28, at 1315 (arguing that people charged with misdemeanors "are largely ignored by the criminal literature and policymakers, they are nevertheless punished, stigmatized, and burdened by their convictions in many of the same ways as their felony counterparts"). The exception to this observation is scholarly and advocacy concern about how defendants' expressions of remorse and pleas for mercy are perceived by judges at sentencing. Hanan, *supra* note 22, at 323–28; Bandes, *supra* note 22, at 10–14; GRUBER, *supra* note 22, at 152–53.

36. *See generally* KOHLER-HAUSMANN, *supra* note 13 (discussing results of the author's mixed-method study of New York City's lower courts); NICOLE GONZALES VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016) (discussing the author's ethnographic study of Cook County Court in Illinois); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1992) (discussing the author's study of a lower court in Connecticut); BACH, *supra* note 23, at 17 (reporting on the author's eight-year journalistic investigation into various U.S. criminal courts).

understanding of the injustices perpetrated by criminal legal practices.[37] Silence prevents defendants from contesting aspects of the proceedings that are unfair or harmful to them. This may lead to worse outcomes in their cases, but it also functions as part of a larger, well-documented struggle over "narrative social power" in which the experiences of those targeted by criminal laws are ignored and devalued.[38]

In contrast, talking back allows defendants to be active participants in the public discussion of their cases.[39] Talking back illuminates criminal legal practices that are unjust, serving as an important check on institutional power. The lower courts historically have had the potential to be a "site of contestation" where power manifests not only in the outcome of cases but in courtroom performance.[40] Just as they are sites where people are prosecuted, lower courts are sites where people may be able to make "room for themselves" by asserting rights and making claims.[41] In this sense, talking back in court can be viewed as part of an important component of resistance to criminal legal practices closely tied to the U.S. history of slavery, convict leasing, and segregation.[42] Yet, these moments of potential resistance are Janus-like. While they contain the potential for contestation, they are tightly regulated by layers of power, some visible and some obscured.

This Article proceeds as follows. Part I provides an overview of trial

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37. *See* M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1219 (2020) (noting that the silencing of prisoners' speech obscures the harms of incarceration); Natapoff, *supra* note 6, at 1457.

38. Natapoff, *supra* note 6, at 1453.

39. *Id.* at 1452.

40. MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 126 (2018).

41. *Id.* at 11 (quoting BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 98–106 (2001)); *id.* at 65–67 (describing the contradictory nature of the lower courts in Baltimore during the Antebellum period when free Black people were both prosecuted and asserted their rights in civil proceedings, demonstrating how rights and power shift in individual cases even when the larger, legal structure denies rights).

42. *See, e.g.*, Chaz Arnett, *Race, Surveillance, Resistance*, 81 OHIO ST. L.J. 1103, 1137–38 (2020) (discussing Black resistance to state surveillance in both historical and current contexts); Monica C. Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV. 197, 206–07 (2019) (describing Black men running from the police as a form of resistance); Kathryn Miller, The Myth of Autonomy Rights 55–59 (Nov. 5, 2020) (unpublished manuscript) (on file with author) (arguing that the defendant's assertion of trial rights can best be understood within the historical framework of resistance to slavery); Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1564 (2015) [hereinafter Ristroph, *Regulation*] (arguing that "[r]ights claims [under the Fourth, Fifth, and Sixth Amendments] are a form of resistance to the state"); Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601, 605 (2009) [hereinafter Ristroph, *Respect*] (arguing that "the Hobbesian right to resist punishment provides a useful conceptualization of what it means to treat wrongdoers with respect").

court procedure that highlights why defendants are in a position to speak directly to the court, particularly in misdemeanor cases in which defendants are more likely to either not have a lawyer or to speak for themselves despite having lawyers appointed. I point out how defendant speech could provide important information to the proceeding. Part II describes how sovereign, disciplinary, and social-emotional power work to press defendants into performances of orderliness that preclude talking back, with particular emphasis on the way in which socio-emotional power can shape behavior and speech to conform with the tone of the courtroom. Part III elaborates on the ethical and epistemic importance of defendant speech and argues that contestation in the courtroom is essential to understanding and remedying injustices.

I. SPEAKING FOR THEMSELVES

This Part describes structural features of criminal cases that make it possible and desirable, yet exceedingly difficult, for defendants to talk back in court. I begin with an overview of the law and courtroom practices that result in criminal defendants speaking directly to the court for the reader unfamiliar with criminal proceedings. Defendants represent themselves for a variety of reasons. Some defendants are not constitutionally entitled to appointed counsel, others face practical impediments to exercising their right to counsel, and others decline counsel. I then discuss the life of a criminal case to point out the moments at which both unrepresented and represented defendants may talk directly to the court, what they are expected to say, and what benefit might derive from talking back.

In the intellectual framework of bell hooks, the opposite of talking back is not silence but following the script: "I was never taught absolute silence, I was taught that it was important to speak but to talk a talk that was in itself a silence."[43] One thus finds that it is not quite right to say that defendants are speechless, even though they may be admonished by the judge and their lawyers (if they have lawyers) to be silent.[44] Speaking is no better than silence if one is just following a script that does not challenge the court's decision, narrative, or practice.

Defendants say things that accord with the court's script, whether because their lawyers insist, or because they pick up on the cues and power dynamics of the court.[45] M. Catherine Gruber ultimately came to this conclusion in her study of federal sentencing hearings. During their

43. HOOKS, *supra* note 8, at 7.

44. *Cf.* Natapoff, *supra* note 6, at 1449–50 (stating that defendants rarely speak in court).

45. *See infra* Part III.

sentencing allocutions, most defendants seem to know that an expression of remorse is what is called for.[46] Gruber concluded that the right to speak at sentencing is not a right to speak one's mind because that might lead to more punishment.[47] Rather, the allocution is part of the play, a speech designed to validate the proceedings through the defendant's acceptance of the judgment and punishment.[48] The defendant is called upon to speak only in ways that "validat[e] a system in need of reform."[49] In this regard, Gruber's observations accord with Michel Foucault's historical account of "gallows speeches," in which the condemned admitted his responsibility for the crime and the fairness of the punishment just before being put to death.[50] The gallows speech, like the scripted speech expected of today's defendants, was designed to assure the listener that the sentence of death was fair.

Conversely, in some instances, refusing to speak when called upon to recite a script can be more of a challenge to criminal legal practices than scripted speech. Silence can be resistance.[51] This was well understood in English criminal legal practices in William Blackstone's time.[52] Lord Blackstone recounts defendants being crushed under heavy weights if they refused to enter a plea of guilty or not guilty at arraignment.[53] The heavy weights—*peine forte et dure*—were not intended as a punishment, but rather as a literal pressure to force the defendant to speak at arraignment, indicating acceptance of the court's jurisdiction.[54] The defendant would be released from torture if they agreed to plead guilty or not guilty. If, on the other hand, the defendant did not agree to enter a plea, they would be crushed to death by the weight.[55] While silent refusals are not a focus of this Article, their mention helps to show that the speech/silence divide is not the issue. The issue is whether defendants can speak to authority in the courtroom in ways that advance their interests

46. *See* GRUBER, *supra* note 22, at 146–47.

47. *Id.* at 160.

48. *Id.*

49. *Id.*

50. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 65 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

51. *See, e.g.*, Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, U. CHI. LEGAL F. 295, 302–03 (2016) (arguing that silence functions as resistance within the context of the Fifth Amendment right against self-incrimination).

52. KATHRYN TEMPLE, LOVING JUSTICE: LEGAL EMOTIONS IN WILLIAM BLACKSTONE'S ENGLAND 125 (2019) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *319).

53. *Id.*

54. BLACKSTONE, *supra* note 52, at *318–20, *322; TEMPLE, *supra* note 52, at 136 (noting that *peine forte et dure* "forces [defendants] to express their compliance with authority").

55. BLACKSTONE, *supra* note 52, at *322.

and challenge the process.

While lawyers speak for their clients' interests, I wish to reiterate that the orientation of this Article is not the importance of effective assistance of counsel for all defendants. Acknowledging both the gravity of the consequences of misdemeanor cases and the ameliorating effects of advocacy, misdemeanor scholars have called for effective representation.[56] Better representation could be accomplished through increased funding for public defense, enhanced cultures of excellence in public defender offices,[57] pooling and sharing of defender resources,[58] and, of course, prosecutorial changes that reduce the numbers of misdemeanor cases prosecuted.[59]

Conscientious lawyers are careful to relay their clients' concerns to the court, and to amplify their clients' voices without distorting their meaning.[60] Zealous representation, however, does not necessarily address

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56. Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 738 (2017) (arguing that public defender offices should not neglect misdemeanor cases); Roberts, *supra* note 28, at 1097–100 (discussing the value in advocacy to slow down the flood of misdemeanor cases); Hashimoto, *supra* note 6, at 1019. The American Bar Association (ABA) has argued that the solution to failures to provide counsel and inadequate counsel is to better fund public defenders and court appointed counsel, to limit their caseloads, to ensure their independence, and to provide them with standards, training and oversight. AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 41–43 (2004) [hereinafter ABA SCLAID].

57. Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1781, 1784 (2016) (arguing that sub-standard indigent defense is exacerbated by a culture of defeatism spurred by a combination of underfunding and structural impediments to zealous representation).

58. In another article, I address the benefits of statewide public defender offices for pooling resources, establishing a culture of advocacy, and shoring up political power to secure funding and mandate. Eve Hanan, *Big Law, Public Defender-Style*: *Aggregating Resources to Ensure Uniform Quality of Representation*, 74 WASH. & LEE L. REV. ONLINE 420 (2018).

59. *See, e.g.*, FAIR & JUST PROSECUTION, BRENNAN CTR. FOR JUST. & THE JUST. COLLABORATIVE, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 5, 10 (2018), https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf [https://perma.cc/5N6H-NUE3] (encouraging prosecutors to critically evaluate whether to file charges in certain cases, and especially in misdemeanor cases).

60. While narrative has long been an important part of legal advocacy, some legal scholars began in the 1990s to explicitly argue that lawyers should amplify their clients' stories rather than supplanting them with the lawyer's narrative. *See, e.g.*, Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619, 632 (1991) (encouraging lawyering strategies that "affirm a client world infused with the values of autonomy, community, and participation"). For a thorough discussion of the relationship between the client's story and the lawyer's construction of a successful theory of the case, see Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994). Centering the defendant's narrative in case theory is part of a broader move toward client-centered lawyering. *See* Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 371, 375–400 (2006) (describing the history and scope of influence of the concept of client-centered

the concern that this Article raises about how defendants are restrained from talking back in court. Speaking for oneself in court has inherent value, which is reflected in the constitutional right to represent oneself,[61] and to testify at trial.[62] It is also reflected in the federal rule-based right to speak at one's sentencing hearing in order to "present information to mitigate the sentence."[63] Moreover, as Professor Alexandra Natapoff has so aptly put it, while attorneys speaking on behalf of their clients act as a "proxy for defendant autonomy,"[64] "[d]efendant speech . . . has personal, dignitary, and democratic import beyond its instrumental role within the criminal case."[65]

A. Defendants Without Lawyers

While anyone who can afford to hire an attorney is entitled to have retained counsel represent them in criminal cases, the right of those who cannot afford an attorney to have counsel appointed is more circumscribed.[66] The Sixth Amendment guarantees the right to appointed counsel for anyone charged with a felony,[67] and for anyone charged with a misdemeanor who is facing loss of liberty.[68] Thus, if the state is not

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lawyering as "one of the most influential doctrines in legal education today"). The effectiveness of attorneys telling client narratives may also be illustrated in the converse. *See* RACHEL SWANER, CASSANDRA RAMDATH, ANDREW MARTINEZ, JOSEPHINE HAHN & SIENNA WALKER, CTR. FOR CT. INNOVATION, WHAT DO DEFENDANTS *REALLY* THINK? PROCEDURAL JUSTICE AND LEGITIMACY IN THE CRIMINAL JUSTICE SYSTEM, at vii, 37 (2018) (surveying former defendants describing inability to get a lawyer, speak to a public defender, or convey information through the lawyer to the court before the entry of a guilty plea).

61. Faretta v. California, 422 U.S. 806, 834 (1975) ("The right to defend is personal."). Note that the right to self-representation may be curtailed if the court concludes that the defendant "lacks the mental capacity to conduct his defense without the assistance of counsel." Indiana v. Edwards, 554 U.S. 164, 176 (2008).

62. Rock v. Arkansas, 483 U.S. 44, 49 (1987) (finding that a defendant in criminal case has right to testify).

63. FED. R. CRIM. P. 32(I)(4)(a)(ii).

64. Natapoff, *supra* note 6, at 1482.

65. *Id.* at 1450.

66. Appointed counsel can be provided through three methods: (1) a county or state public defender office staffed with full-time public defenders; (2) a system in which the county or state awards a contract to an attorney or organization to represent some or all defendants who are deemed indigent; or (3) a system in which individual private attorneys are assigned to and paid for individual cases. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 31 (1995).

67. Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963).

68. Right to counsel under the Sixth Amendment to the U.S. Constitution attaches only if the defendant will be incarcerated after conviction. Alabama v. Shelton, 535 U.S. 654, 655–57 (2002) (noting that defendants have a right to counsel if they may be sentenced to incarceration or receive a

seeking jail time, the defendant is not entitled to a court-appointed attorney.[69] Often, the decision whether the defendant has the right to appointed counsel occurs in the way described in the opening vignette of James's case.[70] The prosecutor announces that the state is not seeking jail time, and the court informs the defendant that counsel will not be appointed. The sanctions that the court can impose on an uncounseled defendant (who did not waive the right to counsel) are limited to sub-carceral sanctions like fines and probationary terms.[71] Of course, states are free to provide greater rights to counsel than the federal constitution requires,[72] and the American Bar Association (ABA) encourages local jurisdictions to appoint defense counsel in cases not covered by constitutional mandate, particularly because convictions trigger collateral consequences in the areas of immigration status, employment and licensure, housing, and education, but jurisdictions vary dramatically.[73]

Regardless of the source of the right to counsel—constitutional or statutory—examples of courts failing to honor the right abound. Some counties simply fail to provide defendants with counsel to which they are entitled.[74] In some cases, appointed counsel miss court dates, leaving

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suspended sentence of incarceration); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "absent a knowing and intelligent waiver [of counsel], no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial").

69. *Shelton*, 535 U.S. at 654, 655–57. In Florida, for example, the judge is required to certify that she will not impose a sentence of incarceration in cases in which the defendant is not appointed counsel. Hashimoto, *supra* note 6, at 1029.

70. *See supra* Part I.

71. Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that a defendant who was punished with fine had no right to counsel even though the statute under which he was charged permits imprisonment for the crime).

72. New York, for example, extends the right to counsel for all crimes. *See* Stream v. Beisheim, 311 N.Y.S.2d 542, 542 (App. Div. 1970); People v. Witenski, 207 N.E.2d 358, 360 (N.Y. 1965).

73. STANDARDS FOR CRIM. JUST.: PROVIDING DEF. SERVS. § 5-1.2 (AM. BAR ASS'N 1992) [hereinafter ABA, PROVIDING DEF. SERVS.], https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services.pdf [https://perma.cc/L4KX-5QRS]; STANDARDS FOR CRIM. JUST.: DEF. FUNCTION § 4-1.2(b) (AM. BAR ASS'N 1993) [hereinafter ABA, DEF. FUNCTION], https://pdc.idaho.gov/wp-content/uploads/sites/11/2016/06/ABAStandardsfortheDefenseFunction.pdf [https://perma.cc/CBT7-PPTQ]; NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, THE DEFENSE § 13.1 (NAT'L LEGAL AID & DEF. ASS'N 1973) [hereinafter NAT'L ADVISORY COMM'N]; GUIDELINES FOR LEGAL DEF. SYS. IN THE U.S. § 1.1 (NAT'L LEGAL AID & DEF. ASS'N 1976) [hereinafter GUIDELINES], https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/Standards/National/nlada-guidelines-for-legal-defense-systems-1976.pdf [https://perma.cc/3YE7-R8QW].

74. *See, e.g.*, Roberts, *supra* note 33, at 186 (discussing South Carolina Supreme Court justice who instructs lower court judges to ignore their constitutional obligation to appoint counsel in

defendants to resolve their cases without representation.[75] Some judges have been observed pressuring defendants to waive their right to counsel in order to resolve the case more expeditiously.[76] A judge, for example, might tell a defendant that the court will not impose jail time if the defendant waives the right to an attorney and pleads guilty on the spot.[77]

Further, defendants who qualify for appointed counsel may choose to represent themselves if they are competent to do so.[78] The choice, upon closer inspection, often seems less than voluntary.[79] Although the waiver of the right to counsel must be intelligent and voluntary, some defendants may erroneously waive their right.[80] The court is not obliged to inform the defendant of all of the possible advantages of counsel (except on the eve of trial in some cases).[81] Although national standards recommend that judges clearly inform defendants of their right to counsel,[82] and not simply assume that a willingness to proceed without a lawyer signals a knowing, intelligent, and voluntary waiver,[83] many observers have noted courts routinely accepting guilty pleas from uncounseled defendants in the absence of a clear waiver of the right to counsel.[84]

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misdemeanor cases); Hashimoto, *supra* note 6, at 1022–25 (discussing state practice of failing to appoint constitutionally required counsel in misdemeanor cases).

75. BACH, *supra* note 23, at 103–04. In one case, a defendant pleaded guilty before her lawyer arrived at court, although this clearly violated the defendant's Sixth Amendment right to counsel. The judge later admitted this was "absolute error." *Id.*

76. *Id.* at 126 (recounting a case in which judge said to the defendant, "You can get a lawyer . . . if you wish to . . . . On the other hand, if you were to admit to [the crime], which I'm not suggesting you do at this stage and you are not obligated to do at any stage, but if you pled guilty, I would impose a fine [only]").

77. *Id.*

78. The right to self-representation in federal criminal prosecutions is codified in 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."), and, in state criminal prosecutions, as a constitutional right under the Fourteenth and Sixth Amendments, *see* Faretta v. California, 422 U.S. 806, 835 (1975). The colloquy to establish if waiver of counsel is knowing and voluntary does not, however, require a full colloquy from the court on the advantages of counsel except on the eve of trial in some cases. Iowa v. Tovar, 541 U.S. 77, 87 (2004).

79. *See, e.g.*, Hashimoto, *supra* note 6, at 1033 (reporting study that found that 60% of defendants were not informed of the benefits of representation before waiving their right to counsel).

80. *Faretta*, 422 U.S. at 835.

81. *Tovar*, 541 U.S. at 87.

82. *See* ABA, PROVIDING DEF. SERVS., *supra* note 73, § 5-8.1; ABA, DEF. FUNCTION, *supra* note 73, §§ 4-2.1, 4-2.2, 4-2.3; GUIDELINES, *supra* note 73, §§ 1.2, 1.3, 1.4; NAT'L ADVISORY COMM'N, *supra* note 73, § 13.3.

83. ABA, PROVIDING DEF. SERVS., *supra* note 73, § 5-8.2(a).

84. In 2004, the ABA Standing Committee on Legal Aid and Defense heard testimony about a practice in a Georgia county in which defendants were given a complicated form that included an

Still other defendants proceed without a lawyer because they do not qualify for appointed counsel but cannot afford the rates charged by private attorneys.[85] The threshold for qualifying financially for a public defender varies dramatically by state and often by courthouse or judge. The ABA reported that nonuniform and budget-driven determinations of indigency result in failure to appoint counsel to people unable to afford attorneys in some jurisdictions.[86] Even if they qualify for appointed counsel, defendants may be charged a fee.[87] Studies demonstrate that the fee discourages defendants from requesting appointed counsel, especially when no information is provided about how to obtain a fee waiver or when the information provided about fee waivers is confusing.[88] A 2011 Florida study documented that defendants entering the court for arraignment were provided with a written notice stating that the fee for a public defender would be $50 for defendants who plead guilty at arraignment, and $350 for defendants who plead not guilty and request a trial date.[89] No doubt such a notice will discourage both requests for appointed counsel and pleas of not guilty.

Considering the math, it is understandable that a person charged with a crime might seek to resolve their case on their own rather than accrue fees. Assuming that the defendant pays a $50 fee and pleads guilty at arraignment after a two-minute consultation with the public defender, that defendant has essentially paid the public defender more than $20 per minute—a rate of $1,200 per hour—for their legal services.[90] Contesting the charges and asserting one's right to a trial triggers $300 in additional fees and the added expense and inconvenience of returning to court. It is no wonder that a defendant faced with this menu of fees might choose to waive the right to counsel.

The cumulative effect of the constitutional and statutory limits on the

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admission of guilty, guilty plea colloquy, and waiver of right to counsel, and told that their case would not be called until they signed the "form." ABA SCLAID, *supra* note 56, at 25.

85. *See* BACH, *supra* note 23, at 106 (recounting examples of a judge intentionally pushing defendants to retain counsel "as opposed to saddling the county with the expense" of appointed counsel to which the defendants were entitled).

86. ABA SCLAID, *supra* note 56, at 12.

87. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-499.09 (2020) (indicating that the court may order the defendant to pay a $25 fee); ARIZ. R. CRIM. P. 6.4 (indicating that the counsel fee may be waived upon showing of substantial hardship). Illinois permits courts to charge defendants up to $500 for a misdemeanor and $5,000 for a felony. 725 ILL. COMP. STAT. 5/113.-3.1 (2021).

88. *See* ABA SCLAID, *supra* note 56, at 13 (discussing fee for appointed counsel services in various states and counties, noting instances in which defendants unable to pay are put on onerous payment plans or jailed for failure to pay for their court appointed counsel).

89. SMITH & MADDAN, *supra* note 31, at 18.

90. *Id.*

right to counsel, combined with practical failures and financial disincentives, result in millions of defendants representing themselves in the lower courts every year.[91] In some states, over half of defendants in misdemeanor cases represent themselves or proceed with inadequate representation.[92]

The high levels of unrepresented defendants have been a constant since at least the 1970s. In his 1979 study of New Haven's lower courts, Malcolm Feeley found that 40% of defendants did not have an attorney.[93] Court officials underestimated how many defendants were self-represented, Feeley thought, because they were "invisible, often slipping through the court quietly by pleading guilty at first appearance or failing to appear altogether."[94] Sub-carceral and also often subaudible, these defendants constitute at least three-quarters of the people targeted for prosecution in the U.S.[95]

B. What's My Line: Defendants Speaking in Court

What follows is a road map of the typical criminal case resolved through a guilty plea.[96] Moments when the defendant either has the opportunity or the obligation to speak are noted. Crucially, this section demonstrates that even defendants who are represented by counsel are often in a position to speak directly to the court because their attorney is either not present or the hearing requires the defendant to speak.

1. First Appearance, Pretrial Release and Bail Hearing, and Arraignment

The law is unsettled regarding whether the defendant has the right to

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91. Mayson & Stevenson, *supra* note 13, at 975 (estimating approximately thirteen million misdemeanor cases filed per year).

92. ABA SCLAID, *supra* note 56, at 26 (providing testimony from Washington, New Mexico, and California). The latest (although dated) Bureau of Justice Statistics report states that approximately one-third of people charged with misdemeanors proceed without a lawyer. CAROLINE WOLF HARLOW, OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., NCJ 179023, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 3, 5 (2000), https://www.bjs.gov/content/pub/pdf/dccc.pdf [https://perma.cc/ND2K-MPC5] (noting that 38.4% of federal misdemeanants and approximately one-third of defendants in the largest seventy-five counties in the country represented themselves).

93. FEELEY, *supra* note 36, at 181–82.

94. *Id.* at 182.

95. Mayson & Stevenson, *supra* note 13, at 975.

96. Ninety to ninety-five percent of all criminal cases resolve through plea bargaining. LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., RESEARCH SUMMARY: PLEA AND CHARGE BARGAINING 3 (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf [https://perma.cc/8K57-GK8X].

have counsel present during the defendant's first appearance. The Sixth Amendment right to counsel is said to "attach[]" at the defendant's first appearance before a neutral magistrate when probable cause is determined.[97] Somewhat counterintuitively, the right to have counsel *appear* on one's behalf is not coextensive with the right to counsel *attaching*. Defendants only have the right to have counsel present on their behalf during what the Supreme Court calls "'critical' stages" of the proceedings.[98] Critical stages are defined as any proceeding in which lack of representation "would impair defense on the merits if the accused is required to proceed without counsel"[99] and where counsel can "help avoid that prejudice."[100] There remain unanswered questions about whether the defendant's first appearance is a critical stage, triggering the right to the appearance of counsel. In *Rothgery v. Gillespie County*,[101] the U.S. Supreme Court stopped short of finding that the defendant's appearance at a probable cause hearing is a critical stage, even though the right to counsel attaches at first appearance.[102] As a result, defendants in many jurisdictions may be unrepresented during their first appearance in court.

Pretrial release decisions are often made during the defendant's initial appearance or at arraignment. Although a hearing to decide whether to incarcerate someone pretrial intuitively seems to be a critical stage—triggering the appointment of counsel—the Supreme Court has no holding squarely on point.[103] As a result, although state laws and practices vary, defendants often represent themselves at the very important moment when the court decides whether they can go home and continue to live their lives before the case is adjudicated. Presenting evidence that the defendant is stable and law-abiding is crucial to ensuring pretrial liberty.

While laws and practices vary, most release decisions are made considering a plethora of factors about the defendant's prior criminal

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97. Rothgery v. Gillespie Cnty., 554 U.S. 191, 212–13 (2008). A neutral magistrate then must decide whether the documents filed by the police or the prosecutor's office establish, on their face, probable cause to believe that the crime was committed, and that the person charged committed the crime. *See* Gerstein v. Pugh, 420 U.S. 103, 120–22 (1975). Probable cause can be determined by a grand jury, although the use of grand juries has decreased over time. *See* Suja A. Thomas, *The Missing Branch of the Jury*, 77 OHIO ST. L.J. 1261, 1270 (2016).

98. Montejo v. Louisiana, 556 U.S. 778, 786 (2009) (first citing United States v. Wade, 388 U.S. 218, 227–28 (1967); and then citing Powell v. Alabama, 287 U.S. 45, 57 (1932)).

99. *Gerstein*, 420 U.S. at 122 (first citing Coleman v. Alabama, 399 U.S. 1 (1970); and then citing *Wade*, 388 U.S. at 226–27).

100. *Coleman*, 399 U.S. at 9 (quoting *Wade*, 388 U.S. at 227).

101. 554 U.S. 191 (2008).

102. *Rothgery*, 554 U.S. at 212–13 & n.17.

103. *See* Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513 (2013).

record and the stability of the defendant's ties to the community. So, for example, whether the defendant is a flight risk depends in part on whether the defendant has a home, a job, and a family.[104] The defendant's prior record may also contain information about whether the defendant is a flight risk or a danger to the community.[105] In these inquiries, the defendant may have relevant, important information to share with the court that could be weighed in the decision whether the defendant should be released. Moreover, in jurisdictions in which the court orders defendants to pay a financial bond or bail, defendants can speak about their ability to pay and request a bail that will not result in wealth-based detention.[106]

Even if defendants have attorneys at their bail hearings, they may not have had time to consult with their new lawyers before the hearing. As a result, the court may—again, depending on the jurisdiction—inquire directly of defendants whether they have a home and employment as well as the reasons for any prior failures to appear in court.[107] Or, put differently, one can imagine that a defendant who felt empowered to speak might pipe up to offer important information that the court or the defense attorney did not know.[108]

At the arraignment, the formal charges are read, and the defendant is required to enter a plea of guilty or not guilty to the charges. Because arraignment is a critical stage, the defendant who is otherwise entitled to appointed counsel has the right to have counsel present.[109] Remember, however, that the right to have counsel appear on one's behalf at arraignment is subject to the important circumscription described above.[110] Misdemeanor defendants often are *not* entitled to

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104. *See, e.g.*, MD. R. 4-216.1(f)(2)(C) (indicating that the release decision must consider multiple factors including, inter alia, "the defendant's family ties, employment status and history, financial resources").

105. *Id.* 4-216.1(f)(2)(B).

106. *See, e.g.*, *id.* 4-216.1(e)(1) (indicating that the judge must consider defendant's ability to pay before setting a financial condition).

107. An inquiry into the defendant's work, living arrangements, and ties to the community is relevant to determining whether the defendant poses a risk of flight. *See, e.g.*, Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 985–86 (2020) (discussing factors deemed relevant to the risk of flight in various state pretrial release regimes). It follows that the defendant must answer directly if the defendant is unrepresented or if defense counsel does not know the answers to the court's questions.

108. A related argument can be made that defendants who refuse to answer the judge's questions about their criminal, work, and personal history may be punished with high bail and detention. BACH, *supra* note 23, at 106–07 (describing how a judge held a defendant on an unaffordable bail until he agreed to provide satisfactory answers to questions about his work, school, age, and probation status).

109. Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (identifying arraignment as a critical stage).

110. *See supra* section I.A.

court-appointed counsel despite their indigency if the prosecutor is not seeking incarceration upon conviction.[111] Also, as discussed above, some courts may fail to provide constitutionally mandated counsel at this phase.

Arraignment hearings are particularly critical in a world in which plea bargaining is the norm and trials the exception.[112] Many defendants—especially in misdemeanor cases—enter a plea of guilty at arraignment. A 2011 Florida study, for example, documented that 70% of defendants, often unrepresented by counsel, pleaded guilty at arraignment.[113]

2. Plea Bargaining and Sentencing Hearings

Whether at the arraignment or at a subsequent court date, defendants will almost invariably be presented with a plea offer that they will accept, even if they have no say in its terms and no idea what to say.[114] Because plea offers usually come before any meaningful discovery or litigation of legal issues, defendants must decide whether to accept an offer without ever having told anyone their side of the story.

In some courts, unrepresented defendants must negotiate directly with prosecutors or be informed of the prosecutor's offer from the judge and then be asked—in open court—if they accept it.[115] Feeley, for example, describes defendants lined up to discuss possible plea deals with the prosecutor.[116] He notes that the prosecutors could be "aggressive and blunt" with self-represented defendants,[117] and that "only particularly enterprising defendants argue with a prosecutor."[118] In another, contrasting example, he heard a prosecutor tell an unrepresented defendant, "Don't fuck around. Take a small fine. Why come back again

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111. *Id.*

112. *See* DEVERS, *supra* note 96, at 3 (noting that 90–95% of all criminal cases resolve through plea bargaining); Missouri v. Frye, 566 U.S. 134, 140 (2012) (noting the right to effective assistance of counsel in plea bargaining).

113. SMITH & MADDAN, *supra* note 31, at 15. Defendants who pleaded guilty at arraignment were three times as likely not to be represented by counsel. *Id.* at 18 ("These findings raise significant concerns that unrepresented defendants, particularly those not subject to pre-arraignment custody, underestimate the non-immediate yet serious and long-term consequences of misdemeanor convictions.").

114. Roberts, *supra* note 33, at 174; Hashimoto, *supra* note 6, at 1032–34.

115. A report on the right to counsel in Texas documents prosecutors speaking directly to defendants in a manner that encourages defendants to resolve their cases without counsel. ANDREA MARSH & SUSANNE PRINGLE, TEX. FAIR DEF. PROJECT, THE WAY FORWARD: RECOMMENDATIONS FOR IMPROVING INDIGENT DEFENSE IN TEXAS ON THE FIFTIETH ANNIVERSARY OF *GIDEON V. WAINRIGHT* 16 (2013), https://law.yale.edu/sites/default/files/area/center/liman/document/the-way-forward.pdf [https://perma.cc/RUZ3-XX8C].

116. FEELEY, *supra* note 36, at 183.

117. *Id.*

118. *Id.* at 184.

or perhaps two or three times?"[119] The prosecutor then asked the defendant if he had any money, and the defendant simply nodded.[120] While these exchanges did not occur in open court, they raise the same concern as exchanges between judges and defendants.

The self-represented defendant who is offered a plea deal may want to discuss the allegations in the case, which will result in the court explaining that the only appropriate time to contest the allegations is at trial. The time to talk about the case never arrives.[121] This stands in some contrast to civil practice, in which robust discovery and motions practice may provide a context in which both sides can articulate their perspective.[122] In criminal court, most cases are resolved without the defendants ever expressing what they wanted to say about their cases.[123]

Moreover, even represented defendants may not have discussed the facts of the case with their lawyers prior to accepting a plea offer. In some courthouses, court-appointed counsel simply repeat the prosecution's plea offer to their clients without conducting a longer legal consultation.[124] For example, a 2004 ABA report described the practice in a county in Louisiana where "the public defender will introduce himself to his client, tell him the 'deal' that has been negotiated, and ask him to 'sign here.'"[125] The pressure to accept the plea offer quickly and without debate is pronounced for defendants who are arrested and held in custody until their arraignment. Frequently, misdemeanor defendants who have been held on bail are offered a plea deal at arraignment in which they will receive a sentence of "time served" and be immediately released from jail provided they plead guilty.[126] The promise of immediate release encourages

119. *Id.* at 183.

120. *Id.*

121. Natapoff, *supra* note 6, at 1464–66.

122. *See, e.g.*, Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1, 23–26 (2021) (comparing the advantages of civil litigants to the limited rule-based rights of criminal defendants).

123. If a defendant attempts to speak about the facts of the case during a pretrial hearing, the judge will invariably tell him to be silent so as not to incriminate himself. Natapoff, *supra* note 6, at 1458, 1464–66. When defense attorneys discuss plea offers directly with prosecutors, they may engage in a back-and-forth over the facts and the charges. *Id.* at 1462. This occurs off the record and usually without the defendant. *Id.*

124. In one interaction between an attorney and client, the short time that the defendant had to accept the plea was spent in a dispute between the attorney and client about whether the attorney had *ever* spoken to the client before. *See* BACH, *supra* note 23, at 17.

125. ABA SCLAID, *supra* note 56, at 16. In response to seeing the same kind of "processing"—as opposed to lawyering—in Atlanta, Georgia, esteemed death penalty lawyer Stephen Bright remarked, "This is obviously not legal representation. This is processing. High school students could do this." *Id.*

126. ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL

defendants to quickly enter a plea of guilty without further debate.[127]

If the defendant accepts the plea offer, the defendant's required speech to the court is entirely scripted and indeed *must not* contain objections to issues that would otherwise be litigated, like the police conduct at arrest or the facts of the case.[128] Instead, the defendant follows a script. Guilty plea colloquies follow a script in which defendants must be asked in open court whether they understand the rights that they are waiving, including the right to a jury trial, the right against self-incrimination, the right to call witnesses, the right to cross-examine adverse witnesses, and the right to hold the government to the burden of proving guilt beyond a reasonable doubt.[129] The judge generally asks, "Do you understand that you are waiving the right to . . . " and the defendant answers, "Yes." Any deviation from the script may cause the plea to fail.[130] One defendant, for example, was asked by the judge whether a certain punishment was acceptable in exchange for his guilty plea.[131] When the defendant said in response, "Acceptable," the court said, "Excuse me? . . . How do you plead to the charges?"[132] So scripted is the interaction that the defendant should not pick up on the judge's cues and language, but know to simply say, "Guilty." And, of course, refusing to admit that the facts are sufficient for a jury to find the defendant guilty at trial would cause the plea to fail.

The scripted nature of the plea colloquy renders it useless as an opportunity for defendants to challenge the proceedings or the government's narrative of the case. Amy Bach, a journalist who spent eight years researching U.S. criminal courts, reported a plea colloquy in which the defendant said, "Yes, ma'am" to each question the judge asked during the plea colloquy even though the terms of the plea the judge recited were different (worse) than those she had agreed to with the

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INJUSTICE SYSTEM 157 (2019). In three states, Alec Karakatsanis witnessed "hundreds of defendants in minor misdemeanor cases plead guilty without a lawyer just so that they could finally get out of jail after weeks in a cage because they were too poor to pay for their release pending trial." *Id.*

127. *See, e.g.*, MARSH & PRINGLE, *supra* note 115, at 15 (describing Texas counties in which defendants are encouraged to plead guilty to secure immediate release). Arguably, when a defendant held in custody pleads guilty to "time served," they are already serving a carceral sentence and should thus be entitled to a lawyer. While such a plea deal should theoretically trigger the right to appointed counsel, no Supreme Court holding is directly on point, and many defendants plead guilty under such conditions with no attorney advising them.

128. *See* GRUBER, *supra* note 22, at 155.

129. *See, e.g.*, FED. R. CRIM. P. 11(b)(1)(B)–(F) (listing the rights the trial judge must inform the defendant of in order to accept a plea of guilty).

130. *See* Natapoff, *supra* note 6, at 1463–64.

131. BACH, *supra* note 23, at 108.

132. *Id.*

prosecutor.[133] The defendant—like many, I am sure—was simply adhering to the script even when the deal agreed to was different than the sentence being put on the record during the plea colloquy.

Sentencing hearings occur after plea bargains are struck as well as after trials resulting in a guilty verdict. The judge imposes the sentence either after a plea negotiation or after a finding of guilt at trial.[134] While, in some jurisdictions, judges are bound by the sentence agreed upon by the prosecutor and the defendant (which the judge must either accept or reject but not deviate from), in other jurisdictions, judges make the final decision about the sentence, treating the plea agreement's sentence as a recommendation only.[135]

Before the judge makes a sentencing decision, the judge may engage in a direct inquiry of the defendant about factors relevant to sentencing. Sentencing is traditionally a time when defendants in all criminal cases—even those represented by counsel—may speak directly to the court. Federal criminal procedure, for example, provides defendants with a rule-based right to speak at sentencing, called the right to allocution.[136]

Interestingly, while the defendants allocute without a script like the one during the plea colloquy, defendant statements at sentencing seem scripted because their comments are so narrow in range. In her study of defendants' allocutions—all of whom were represented by counsel—M. Catherine Gruber found that defendants usually apologize, take responsibility for the crime, assess their own conduct, and acknowledge the harm they caused.[137] The sentencing court seems to expect—and even demand—a certain type of speech from defendants about responsibility and remorse.[138]

Apart from the most serious felonies, cases in state and local courts rarely reserve the time or carry the same gravitas as the federal sentencing hearings that Gruber observed. But a second type of defendant allocution

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133. *Id.* at 19. The defendant's lawyer was not in the courtroom at the time and had asked another attorney unfamiliar with the case to stand in for him. *Id.*

134. *See, e.g.*, FED. R. CRIM. P. 11(c)(4)–(5) (indicating that the judge may accept or reject plea agreement); MD. R. 4-243(b)–(c)(3) (indicating that the court shall inform the parties that it is not bound by the plea agreement).

135. Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 373–75 (2016) (describing binding and nonbinding plea agreements).

136. Green v. United States, 365 U.S. 301, 304–05 (1961) (holding that defendants have a rule-based right to speak at sentencing); *cf.* Hill v. United States, 368 U.S. 424, 424–29 (1962) (holding that denial of opportunity to allocute at sentencing did not amount to a constitutional violation).

137. GRUBER, *supra* note 22, at 46–64.

138. Hanan, *supra* note 22, at 319.

that she described—offering mitigating evidence and arguments—applies to state court sentencing hearings.[139] Because sentencing decisions are often discretionary, speaking up about feasibility and fairness of the punishment could be effective.[140] Judges are free to choose from a range of sanctions.[141] While courts have rules and formal structure, much of what happens depends on what Malcolm Feeley refers to as "folkways" or "informal 'rules of the game.'"[142] Interpersonal exchanges matter, and one can see examples of "cooperation, exchange, and adaptation."[143] Even if the jurisdiction employs sentencing guidelines, the court may deviate from the guidelines based on its assessment of the defendant and the case.[144]

Although sub-carceral sanctions may be less concerning than imprisonment, their impact can be devastating. The burdens of these sub-carceral sanctions fall disproportionately on communities that are aggressively policed—usually low-income Black and Latinx communities.[145] Theresa Zhen describes the impact of fines and fees in relation to class and race:

> [M]any individuals expend time, energy, and money to resolve prior court debts in ways that middle class white people do not (by virtue of their economic and racial privilege)—trying to keep up with extended payment plans, performing countless hours of "community service," enduring the harassing collections attempts by private collections agencies, forfeiting their driving privileges, and navigating multiple agencies to reinstate their

139. Gruber found that defendants in federal court also often stated whether they agreed with the sentence and offered the court reasons why their sentences should be less based on personal and familial factors, but that these comments seemed unwelcome in the court. GRUBER, *supra* note 22, at 103 (summarizing the types of mitigation arguments that defendants make during their sentencing allocutions).

140. Roberts, *supra* note 33, at 175, 190 ("[J]udges have enormous discretion in misdemeanor sentencing, guided only by the statutory maximum in most jurisdictions.").

141. DUDA-BANWAR & BURT, *supra* note 30, at 16–19.

142. FEELEY, *supra* note 36, at 57–58. Feeley also describes the court as an "*open* system, exposed to continuing and not always predictable influences from its environment." *Id.* at 19 (emphasis in original).

143. *Id.* at 57; *see also id.* at 16 (noting that while in many ways, lower courts may seem to function like a bureaucracy, they are not really bureaucracies because they are not closed systems with "clear agreement on organizational goals").

144. *See, e.g.*, Blakely v. Washington, 542 U.S. 296, 313–14 (2004) (holding that mandatory sentencing guidelines are unconstitutional in state prosecutions); United States v. Booker, 543 U.S. 220, 259 (2005) (holding that federal and state judges have discretion to depart from sentencing guideline recommendations).

145. Mayson & Stevenson, *supra* note 13, at 1020 ("[M]isdemeanor enforcement disproportionately targets the poor and the disenfranchised, and especially poor people of color."); *see also id.* at 979.

driver's licenses.[146]

Other sub-carceral sanctions can create insurmountable burdens on the defendant's limited resources. Repeat trips to the courthouse, monitoring sites, classes, and community service can pose transportation, childcare, employment, and health challenges.[147] Even before sanctions are imposed, the defendant is burdened by the misdemeanor court process. In his seminal book, *The Process is the Punishment*, Malcolm Feeley argued that being required to come to court, to wait for one's case to be heard, and to otherwise comply with the court's procedural orders all amount to a kind of punishment.[148] As a result, one is punished before the formal punishment begins.

Information about the defendant's financial well-being or work and family obligations may result in a different sentencing decision, one that is more tailored to the defendant's circumstances.[149] Although the cases move quickly, the lower court judge is focused on whether and how much to monitor, sanction, or attempt to rehabilitate the misdemeanor defendant through an "alphabet soup" of programs.[150] In such a context, a relatively quick presentation of the reasons why fines, fees, and programs are not appropriate or feasible for the defendant is possible. Although some jurisdictions set flat fees for certain offenses, others permit fees to be graduated based on the defendant's ability to pay.[151] Unlike contesting

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146. Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 199 (2019) ("[T]raffic courtrooms teem with minority people who cannot afford to pay their tickets, or who are slapped with a failure to appear or pay."). If a defendant is found to not have the ability to pay the fine, the United States Supreme Court has opined that the court may impose modified sanctions, such as extended payment plans, reduction of the amount of the fine, and conversion of the fine into hours of public service. Bearden v. Georgia, 461 U.S. 660, 672 (1983).

147. *See* Zhen, *supra* note 146, at 188, 213–14. These hardships placed on defendants are what Issa Kohler-Hausmann calls "procedural hassle." KOHLER-HAUSMANN, *supra* note 13, at 183.

148. FEELEY, *supra* note 36, at 199–243 (identifying the pretrial burdens as something experienced as a punishment).

149. Kohler-Hausmann elaborates on Feeley's observations, generating a new insight: lower court judges assess multiple aspects of the case and the misdemeanor defendant in order to decide on the level of monitoring and type of rehabilitative intervention. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 624 (2014).

150. KOHLER-HAUSMANN, *supra* note 13, at 241.

151. *See generally* SHARON BRETT & MITALI NAGRECHA, CRIM. JUST. POL'Y PROGRAM, HARVARD L. SCH., PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3759204 [https://perma.cc/LZJ7-32VE] (arguing for policy changes to the imposition of monetary sanctions, including graduated fines and fees); Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53 (2017) (discussing implementation of graduated fines and fees). Depending on the state or county, inquiries into the defendant's ability to pay can be so detailed and comprehensive that they have been accused of invasiveness. Zhen, *supra* note 146, at 202 (noting that Alabama's ability

guilt, which triggers delays and multiple trips to the courthouse,[152] arguing that the defendant should not be incarcerated, cannot pay a fine, or deserves to be given the opportunity to complete a drug treatment program can be argued and resolved during the sentencing hearing.

In many busy courtrooms, defendants would fare better than their lawyers in pushing for reduced sub-carceral sanctions. When attorneys do not have time to interview their clients, it increases the chances that the client, not the attorney, will have relevant information to share with the court. Bach recounts instances in which no one in the courtroom could tell whether the defense counsel on duty in a courtroom was representing specific defendants, so disengaged was the attorney from the individual cases.[153] Furthermore, even diligent defense attorneys might be so overburdened that they do not have time to listen to, digest, and recount their clients' stories to the court.[154] This phenomenon increases the chance that the judge will turn directly to the defendant with questions about the proposed sentence. In these instances, whether a defendant has a car, a job, a cell phone, or the ability to pay a fine may be information that an attorney simply does not know. It is no wonder, then, that judges—especially conscientious judges—turn directly to defendants to ask whether they can pay the fine or arrange transportation to a class or community service.

Yet, defendants in the lower court may seem speechless at sentencing. Jenny Roberts describes a case in which a defendant who did not qualify for a public defender remained silent during the sentencing hearing, "not sure what he should add."[155] In the unscripted moments of a sentencing hearing, it is exceedingly difficult for defendants to speak up to the authority of the court and say that the fine, fee, program, or other sanction is not feasible or fair.[156]

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to pay inquiry includes anything owned, including jewelry, and Connecticut's inquiry is a form over six pages long).

152. Kohler-Hausmann recounts a misdemeanor trial for a young man accused of jumping a turnstile. Kohler-Hausmann, *supra* note 149, at 665–66. He made fourteen court appearances before the trial date, where he was found not guilty. *Id.*

153. BACH, *supra* note 23, at 94–95, 103–05. In two anecdotes recounted, the defendant was permitted to plead guilty by the judge because the judge assumed the duty attorney was representing the defendant. *Id.* Apparently, the attorney's lack of verbal advocacy and lack of physical presence by the defendant's side during the hearing was not unusual in instances in which he was the attorney of record. *Id.* In the case recounted, he was *not* the defendant's lawyer. *Id.*

154. Natapoff, *supra* note 6, at 1451.

155. Roberts, *supra* note 33, at 174.

156. *See infra* Part II.

3. Status Hearings and Violation Hearings

After sentencing, many defendants will be required to return to court for status dates to determine whether they have completed the requirements of the sub-carceral sanctions.[157] Defendants often represent themselves during status hearings, even if they were appointed counsel for adjudication and sentencing.[158] So, for example, when a defendant returns to court to report whether they have paid fees, attended mandatory programs, or passed a drug test, counsel is often not present. The defendant offers proof of compliance and explains any failures directly to the court. For defendants who must report on a multitude of sub-carceral tasks, like fines, classes, drug testing, and so forth, post-sentencing status hearings can be the longest exchanges between the court and the defendant.[159] Aspects of the original sentence may be revealed to be unfair or unworkable, such as a requirement to attend a class not accessible by public transportation for a defendant with no car.

More importantly, it is usually within the judge's discretion how to respond to a failure, whether to incarcerate, extend the time for compliance, impose more sanctions, or to simply dismiss the case.[160] Short of incarceration, the court may impose additional conditions and monetary sanctions for failure to comply with the initial terms of the sentence even without counsel present.[161] Judges have the discretion to issue a bench warrant for the defendant who does not appear, and to take any number of actions with regard to the original sentence, including granting the defendant more time to complete its requirements or to

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157. Status hearings often are discussed within the context of problem-solving courts. *See, e.g.*, JAMES L. NOLAN, JR., LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT 18 (2009) (describing direct and personal engagement between a judge and defendant on multiple status dates).

158. The defendant usually has the right to counsel for hearings on the revocation of probation and imposition of a sentence of incarceration. Gagnon v. Scarpelli, 411 U.S. 778, 787–88 (1973). The right to counsel does not extend to other types of status hearings in which the defendant is appearing before the court after adjudication. *See id.* at 788 (declining to find a bright-line rule that defendants have the right to counsel in all probation revocation proceedings). In the context of problem-solving courts that typically require defendants to appear for numerous status hearings, defense counsel may be absent. *See, e.g.*, Quinn, *supra* note 20, at 63–65 (noting that appointed counsel is often not present for status dates).

159. This assertion is based on my observations as a public defender in Massachusetts as well as my observations while directing a misdemeanor defense clinic in Nevada.

160. *See infra* Part II.

161. C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42–43, 58 (2015) [hereinafter FERGUSON REPORT], https://www.justice.gov/sites/default/files/crt/legacy/2015/03/04/ferguson_ findings_3-4-15.pdf [https://perma.cc/34C7-XTSD] (discussing failure to appear fees and other add-on sanctions imposed on defendants who did not comply with the court's initial orders).

impose jail time on a defendant who fails to fulfill the requirements.[162]

An important issue should be noted at this point. Even though a defendant was not initially facing jail time, and thus not appointed a lawyer for arraignment, plea negotiations, and sentencing, the defendant may be facing jail time if they fail to comply with sub-carceral sanctions.[163] At this point, the defendant most likely has the right to an attorney,[164] but the factual question of guilt and the terms of sentence have already been settled long before receiving legal assistance.

As the above account of criminal trial practice makes clear, at numerous points in the process, defendants could—at least in theory—provide information and perspectives that would challenge the court's decisions and process. They could challenge pretrial detention, the amount of bail, the sanctions the court contemplates imposing, and the consequences the court considers following a failure to meet those conditions. But, instead, their speech occurs in scripted ways that do not provide an opportunity to say anything at all.

Of course, simple reasons play a part in explaining why defendants do not say much when called before the court. In some instances, defendants are physically unable to speak because they are absent from the courtroom or otherwise cannot be heard.[165] Defendants with counsel are often cautioned by their attorneys to be quiet out of fear of self-incrimination.[166]

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162. DUDA-BANWAR & BURT, *supra* note 30, at 16–17.

163. Although a person cannot be incarcerated for a non-willful failure to pay pursuant to *Bearden v. Georgia*, 461 U.S. 660, 674 (1983), in practice, many people experience fee and fine related incarceration. This occurs when a jurisdiction ignores *Bearden*. *See, e.g.*, FERGUSON REPORT, *supra* note 161, at 48–49 (describing judge incarcerating without an ability-to-pay hearing for defendants who appeared for their compliance date but who had failed to pay fines). It also occurs when a judge finds the failure to pay willful. *See, e.g.*, Zhen, *supra* note 146, at 207–08 (discussing instances of racialized distrust of Black defendants' inability-to-pay claims). And, finally, it occurs when a defendant fails to appear in court on a compliance date because the defendant does not have the money that they owe the court. *See, e.g.*, DUDA-BANWAR & BURT, *supra* note 30, at 7 (describing the bench warrant process in Monroe County, New York). In the latter case, a bench warrant may be issued. *Id.*

164. Alabama v. Shelton, 535 U.S. 654, 674 (2002) (holding that the court must appoint a lawyer before a hearing to determine whether suspended sentence should be imposed); *see also* Gagnon v. Scarpelli, 411 U.S. 778, 791 (1973) (holding that a due process right to counsel can be triggered in probation violation cases when the defendant could be incarcerated based on the violation).

165. They have not been brought into the courtroom from lockup and their hearing (erroneously) proceeded without them. BACH, *supra* note 23, at 100 (describing the entry of a plea of guilty to "time served" without the defendant being brought into the courtroom). Or, the courtroom may be designed to prevent defendants from speaking. In some courtrooms in Massachusetts, for example, defendants sit in a plastic box in the courtroom from which they can neither hear, nor be heard. KARAKATSANIS, *supra* note 126, at 101 (describing courtrooms in Roxbury, Massachusetts).

166. Natapoff, *supra* note 6, at 1471 (discussing "troublesome client stories" (quoting John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 103 (1999) (arguing that the right against

Moreover, defendants may have a realistic fear that engaging in any behavior that delays or challenges the proceedings may result in punishment.[167] Stage fright that strikes new lawyers will apply with greater force to most defendants.[168] Furthermore, defendants do not know what type of advocacy is possible, a problem exacerbated by courtrooms in which the defense attorneys themselves do not appear to advocate zealously and thereby do not set a good example for the pro se defendant.[169] Making speech more difficult is the pace at which misdemeanor cases are heard. With less than three minutes dedicated to each hearing, "it is unlikely that [defendants' questions] will be answered because the prosecutor and defense attorney have already turned their attention to the next case."[170]

Looking deeper, however, yields insights into other, less obvious reasons for the absence of defendants' speech in court. The defendant's inability to talk back is not due solely to the defendant's lack of expertise or to the pace of court proceedings. Rather, silence in court is enforced through diffuse systems of power. In the next Part, I address how multiple forms of power prevent defendants from talking back.

II. VIOLENCE, ORDER, AND TENDERNESS

In this Part, I consider three types of power that are at work to silence defendants' speech: sovereign, disciplinary, and social-emotional. How the silencing happens, I argue, is not so much through conscious decisions (although courts may explicitly and consciously silence some defendants) but through the working of different kinds of power. Although the state's power to arrest and punish looms large, other types of power also silence defendants.

In particular, the disciplinary power—originally described by Michel Foucault—coaxes people into a state of compliance without explicit threats of punishment.[171] The jumping-off point for my argument about the impact of disciplinary power on defendants' ability to speak in court is the work of Kohler-Hausmann, who persuasively argues that misdemeanor courts are in the business of judging whether defendants

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self-incrimination and the right to have counsel speak on one's behalf are twin instruments designed to protect defendants from conviction and punishment))).

167. *See infra* Part II.

168. *See generally* Hanan, *supra* note 22 (discussing the inhibiting effects of courtroom formality in relation to defendant's allocution at sentencing).

169. KARAKATSANIS, *supra* note 126, at 102 (identifying "one of the great, silent fears of public defenders: that the judge would be upset by her request and would not be as lenient").

170. FEELEY, *supra* note 36, at 156.

171. *See* FOUCAULT, *supra* note 50, at 135–38.

demonstrate orderliness.[172] Kohler-Hausmann, however, does not scrutinize the defendant's speech in court and how the disciplinary measures affect speech.[173] I argue that, given the lower court's focus on orderliness, any form of talking back in court—meaning speaking to authorities as equals—risks seeming *disorderly*. To be perceived as disorderly is to risk becoming the target of further punishment, sanctions, and monitoring.

Critically, this disciplinary power is compounded by social-emotional power in the courtroom. Rather than express their needs and contest the unfairness of the disposition, which risks appearing disruptive and disorderly, defendants perform mildness, agreeability, and order by following the court's scripts or keeping silent. Indeed, defendants may "over-correct" out of concern that, through implicit biases, any disagreement on their part will be perceived as belligerent or noncooperative. The demand for mildness and agreeability may be invisible in courtrooms that emphasize informality and therapeutic aid for defendants. As Mae Quinn and other scholars of specialty courts argue, the court's focus on treatment and expressions of praise for defendants who comply with treatment further enforces the emotional norm of cooperation over contestation.[174]

Importantly, all three types of power work together. Sovereign power—the power of violence—is a primary driver of compliance. The legitimate fear of the sovereign's power to punish surely leads defendants to conform to the disciplinary and social-emotional cues of the courtroom. But I wish to make another argument: Disciplinary and social-emotional power have free-standing influence on behavior, even without the threat of punishment. We follow rules and adopt emotional tones appropriate to

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172. KOHLER-HAUSMANN, *supra* note 13, at 61 (arguing that misdemeanor courts "sort and regulate people over time").

173. Kohler-Hausmann mentions that the defendant's performance of orderliness includes following courtroom norms like sitting quietly to wait for one's case to be called. *Id.* at 216–17 (characterizing sitting and waiting as part of the defendant's disciplinary training). It is possible that defendants speak less in the courts that she studied than they do in other courts. Her research was conducted in New York, a state that grants the right to counsel for all persons charged with crimes regardless of the potential penalty. *See* Stream v. Beisheim, 311 N.Y.S.2d 542, 546 (App. Div. 1970); People v. Witenski, 207 N.E.2d 358, 361–62 (N.Y. 1965). Yet, at least in some counties in New York, variations in eligibility requirements for appointed counsel led to a lawsuit and subsequent consent decree. N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., CRITERIA AND PROCEDURES FOR DETERMINING ASSIGNED COUNSEL ELIGIBILITY 2–10 (2016), https://www.ils.ny.gov/sites/ils.ny.gov/files/Eligibility%20Criteria%20and%20Procedures%20FINAL%20FULL%20April%204%202016.pdf [https://perma.cc/D85V-D84W].

174. Quinn, *supra* note 20, at 49. Eric Miller argues that drug courts are designed to de-emphasize the power to say "no" to government intrusion. *See* Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 418–19 (2009) (noting the de-emphasis of due process in drug courts but recommending a different solution in the form of specialized grand juries).

the social context not simply out of fear of punishment. As a result, even if the threat of punishment is reduced, defendants are unlikely to talk back in court.

A. Sovereign Power

Critiques of legal regimes usually focus—for good reason—on what Foucault called sovereign power, which is the coercive power of the state to punish and to force action through court orders.[175] Bluntly put, it is the power of violence.[176] The state's power to exercise violence is far from subtle in criminal law. Violence begins with the police encounter.[177] Police exercise violence when they stop and arrest regardless of whether their actions are lawful.[178] That they are endowed with the power to physically restrain, detain, and spirit people away to jail cells signals the extent of sovereign power. And, of course, their seeming impunity to consequences for their own illegal actions when they harm or kill people only heightens the impression of their sovereignty.[179]

A person can be arrested for any crime—even a crime for which no period of incarceration may be imposed upon conviction.[180] Indeed, even failing to wear a seatbelt may lawfully result in arrest.[181] As a result, the threat of caging—a loss of liberty and all of the degradation, violence, and fear endemic to incarceration—remains an ever-present threat no matter how trivial the ordinance or law violated.[182] Moreover, the threat remains so long as the case is open. As discussed in Part I, a defendant upon whom sub-carceral sanctions are imposed risks arrest and incarceration for

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175. FOUCAULT, *supra* note 50, at 48–49 (discussing punishment as a manifestation and display of the sovereign's power).

176. *See generally* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1607 (1986) (making explicit the force behind court orders and noting in particular that "most prisoners walk into prison because they know they will be dragged or beaten into prison if they do not walk").

177. Harmon, *supra* note 30, at 327–28.

178. Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 UNBOUND: HARV. J. LEGAL LEFT 109, 111–12 (2013) (describing policing and prosecution as acts of violence, lawful or unlawful).

179. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 66–67 (2017).

180. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (finding no Fourth Amendment violation where petitioner was arrested for the crime of failing to wear a seatbelt, a crime not punishable by jail time).

181. *Id.*

182. KOHLER-HAUSMANN, *supra* note 13, at 184–85 (discussing impact of arrest from a sociological perspective as a "ceremony of degradation" and "role dispossession" (first citing Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOCIO. 420, 424 (1956) (describing court proceedings as ceremonies of degradation); and then citing ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 14 (1961) (describing the "role dispossession" that occurs when apprehended and incarcerated))).

failure to comply with the conditions the court imposed. In sum, there is never a time when the threat of being physically seized and caged in a cell is not present.

It is not hard to imagine how fear of the court's power to incarcerate might lead a pro se defendant to be agreeable, and even to agree to pay an unaffordable fine, all the while thinking, "I have no choice but to find a way to pay that."[183] Moreover, the threat of being found in contempt of court may inhibit defendants. Part of the court's sovereign power is the power to punish parties and attorneys for failing to obey court orders.[184] A defendant might fear that they will be charged with contempt should they interrupt the judge or otherwise disrupt the rapid resolution of the case even if the defendant's contemplated interruption could not legitimately serve as grounds for a contempt charge.[185]

Short of contempt charges, defendants correctly assess that they can be punished for rejecting plea offers and asserting their trial rights.[186] In criminal cases, defendants possess little power against the state. En masse, defendants could "crash" the misdemeanor system by refusing to plead guilty, thereby forcing the prosecution to decide which cases were serious enough to pursue.[187] But individual defendants are punished for rejecting plea offers and otherwise asserting their rights.[188] In other words, defendants are "*coerced* to plead guilty because the penalty for exercising

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183. At its extreme, sovereign power over defendant speech sometimes includes the threat of sanctions for contempt, removal from the courtroom, gagging, or electrical shock to control defendants in the courtroom. *See, e.g.*, United States v. Durham, 287 F.3d 1297, 1301–02 (11th Cir. 2002) (describing use of electric shock on a defendant during trial as causing pain and keeping defendant from conferring with his attorney or participating in his defense).

184. Criminal contempt risks chilling advocacy efforts and, thus, should be reserved for situations in which an attorney or party obstructs the proceedings. *In re* McConnell, 370 U.S. 230, 233–34 (1962). The classic example is in the trial of the Chicago Seven, in which the trial judge found the defendants and defense counsel guilty of 159 instances of contempt of court for their conduct during the trial, and defendant Bobby Seale guilty of sixteen additional counts of contempt. JOHN SCHULTZ, THE CHICAGO CONSPIRACY TRIAL 372 (Univ. of Chi. Press 2009) (1993).

185. *See* Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1450 (2009) (discussing contempt charges as one of several types of crimes of "obstinacy" that manifest resistance to the processing of criminal cases).

186. Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978) (finding no constitutional violation where rejection of plea offer led to enhanced penalties sought under a recidivist statute). *Contra* North Carolina v. Pearce, 395 U.S. 711, 725 (1969) (holding that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial").

187. *See* Roberts, *supra* note 28, at 1094–95.

188. *Bordenkircher*, 434 U.S. at 364–65 (finding no constitutional violation where rejection of plea offer led to enhanced penalties sought under a recidivist statute). *Contra Pearce*, 395 U.S. at 725 (holding that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial").

their constitutional rights is simply too high to risk."[189]

The defendant may be further convinced that silence is the best option by witnessing the court express anger toward defense counsel who advocate zealously for their clients. In the Ferguson courts, for example, the Department of Justice found that defense counsels' "[a]ttempts to raise legal claims [were] met with retaliatory conduct."[190] Judges threatened to incarcerate defense counsel who asserted their client's trial right and attempted to cross-examine witnesses.[191] Even without the direct threat of sanctions, defense counsel may be coaxed into cooperativeness in order to preserve cordial relations with the prosecutor, hoping for mercy toward the client and future clients.[192] If defense counsel cannot contest the process or the prosecution, how can defendants?

Finally, as elaborated upon in the discussion of social-emotional power later in this Part, even courts that emphasize rehabilitation, rather than punishment, rely on sovereign power for defendants who do not comply with treatment. As Judge Calabrese explained regarding the use of incarceration in the Red Hook community court, incarceration is a "tool" that the court uses to "get[] the person to understand [what will happen] if he or she continues down that road."[193] In other words, the threat of violence is always part of the sovereign's power even if it is not exercised in the moment. Just underneath the surface of every court directive—even the court officer's request that the defendant must sit still and be quiet in the audience—is the threat of incarceration.

B. Disciplinary Power

Foucault's idea of disciplinary power is helpful to understanding why defendants may remain silent or compliant even in instances when the fear of incarceration is not top of mind. Disciplinary power works in concert

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189. NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018) (emphasis in original), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/K4H2-S3YN].

190. FERGUSON REPORT, *supra* note 161, at 43. The Ferguson court is a municipal court which has been described as serving the primary function of generating revenue from traffic citations. THOMAS HARVEY, JOHN MCANNAR, MICHAEL-JOHN VOSS, MEGAN CONN, SEAN JANDA & SOPHIA KESKEY, ARCHCITY DEFS., ARCHCITY DEFENDERS: MUNICIPAL COURT WHITE PAPER 11–12 (2014).

191. FERGUSON REPORT, *supra* note 161, at 44.

192. Charlie Gerstein points out that failing to vigorously defend a client in order to preserve relations with the prosecutor constitutes an ethical violation. Charlie Gerstein, *Dependent Counsel*, 16 STAN. J. C.R. & C.L. 147, 166–67 (2020).

193. NOLAN, *supra* note 157, at 14; *see also id.* at 19 (describing sanctions for failing to follow the treatment plan in mental health court).

with sovereign power to coax people to behave in particular ways in order to create "docile" subjects.[194] Contrasting the spectacle of public executions to the inner workings of modern prisons, Foucault argued that punishment had become "a school rather than a festival," where the punished and the public were trained to obey the laws in a methodical—rather than spectacular—way.[195] Foucault observed that prisoners are subject to regimented schedules and endless rules.[196] Their ability to comply with the schedules and rules, Foucault noted, was closely monitored. To make this point, Foucault used Jeremy Bentham's architectural design for a panopticon prison, in which the prisoners can be viewed from one central location.[197] Aware that they are visible (even if not always under surveillance), the prisoners know that the state's power over them is ever-present even in the absence of an immediate threat of force.[198]

Foucault argued that the panopticon model was not limited to the architectural design of prisons but also applies to institutions like schools and the military.[199] Disciplinary power flourishes in any enclosed space that becomes a "protected place of disciplinary monotony."[200] Consider the courtroom as a panopticon. At first blush, it seems that the audience observes the judge and lawyers. But, as one sits in the audience, one realizes that the court officer surveils the audience, sometimes requesting that people sit in different locations, be quiet, turn off their phones, or take their children outside. The judge, centrally located and often seated at a higher elevation, may surveil the audience when a case is called, and may watch the defendant step up to the front of the courtroom to be heard. Even if the judge rarely looks out, the ability to surveil the room from the bench confers the power of the panopticon because the audience knows that—at any moment—the judge could glance up and see them.[201] The ability to surveil the whole courtroom for compliance is an essential part of the

194. *See* FOUCAULT, *supra* note 50, at 136.

195. *Id.* at 111.

196. This was particularly so in the "Philadelphia model" penitentiary. *Id.* at 123–26.

197. *Id.* at 200.

198. *Id.* at 201.

199. *Id.* at 205 (describing the panopticon as "polyvalent in its applications"). Here, I disagree with Kohler-Hausmann's claim that Foucault's disciplinary power is different from managerial justice in the lower courts because the courts do not constantly surveil. *See* KOHLER-HAUSMANN, *supra* note 13, at 8–9, 222. Foucault was clear that the panopticon was not architectural, but a "generalizable model of functioning" that defined "power relations." FOUCAULT, *supra* note 50, at 205.

200. FOUCAULT, *supra* note 50, at 141.

201. *Id.* at 201 (noting that surveillance need not be continuous if the ability to surveil is known by the objects of discipline).

disciplinary power of the panopticon.[202]

Of course, it is debatable whether criminal courts function as an orderly system. The rules in the courtroom may be unwritten and variable. As one former defendant reported, "I knew some of the rules, but I don't know all their rules because every day they come up with a different rule. . . . Like Monday, they might let you wear your hair rag all week long, the following week, no head rags, no do-rags, stuff like that."[203] Yet, courts are orderly in that they move along predictable lines of time and activity. Order in this sense means an "arrangement" or "system," and derives from the Latin word, *ordiri*, which is associated with setting up a loom for weaving.[204] Like a loom strung long ago, one case after another is threaded through in the same manner. By fitting each defendant into a capsule of the three-minute hearing, the court succeeds in "transform[ing] the confused, useless or dangerous multitudes into ordered multiplicities."[205] To expand the hearing's length or content by talking back would disrupt the pace and sequence of case processing, causing disorder.

Indeed, Foucault specifically identified the "time-table" as a way to regulate people by setting rhythms and engaging them in "cycles of repetition."[206] Time is the province of judge, whose time is not to be wasted but always to be used efficiently. Thus, although the defendant may wait on the bench for hours for the case to be called, the defendant must be present at the exact moment when his case is called so as not to interfere with the orderly proceedings of the court.[207] Moreover, movement is curtailed: gestures and movement that are not directly related to accomplishing the goal at hand are strongly discouraged.[208] Defendants are expected to sit quietly and stand to approach the bench only when asked. In this environment, talking back would disrupt the function of the court by prolonging the hearing and changing the script.

As a result, even before the court orders the defendant to comply with conditions of release or probationary terms, the court may accomplish its goal of training through the courtroom's panopticon effect. A defendant

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202. *Id.* at 197 (arguing that the "enclosed, segmented space, observed at every point, in which the individuals are inserted in a fixed place, in which the slightest movements are supervised, . . . constitutes a compact model of the disciplinary mechanism").

203. SWANER ET AL., *supra* note 60, at 33.

204. SKEAT, *supra* note 8, at 405 (defining "order").

205. FOUCAULT, *supra* note 50, at 148.

206. *Id.* at 149.

207. KOHLER-HAUSMANN, *supra* note 13, at 216.

208. *Id.* at 8 (describing Foucault's view of a prison as a place where "movements are constantly observed and corrected").

who is late for court may be admonished in public and have the case called last, increasing the defendant's waiting time by hours. A defendant who speaks loudly or whose cell phone rings from the audience will be openly admonished by the court or by the court officer.[209] A defendant who approaches the front of the courtroom before the case is called to get the attention of a lawyer will be admonished and ordered to sit down. A defendant who sits in an area reserved for attorneys will be asked to move to seating for the public. A defendant who, when the case is called, stands in the wrong place, will be instructed exactly where to stand. A defendant who mutters disagreement or shakes their head during the reading of the charges will also be admonished to be silent. Surveillance and correction of the defendant's conduct in court signals in no uncertain terms that what is expected from the defendant is not spirited argument in the adversarial tradition but, rather, good behavior.

More to the point, the disciplinary power of the court may foreclose even the thought of talking back. The combination of regimentation and oversight trains people to behave in orderly ways. In the words of Foucault:

> He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle in his own subjection.[210]

Eventually, thought Foucault, the prisoners in the prison's panopticon would internalize the regimented structure and behave as if they are being watched.[211] They would discipline themselves, thus becoming docile subjects.[212] According to Kohler-Hausmann, the emphasis on the disciplinary function of criminal courts is most obvious in the lower courts that handle misdemeanor cases.[213] Misdemeanor crimes are often disturbances of public order, such as disorderly conduct, obstructing a sidewalk, trespassing, low-level drug possession, open containers of

209. *Id.* at 216–17.

210. FOUCAULT, *supra* note 50, at 202–03.

211. *Id.* at 201 (noting that, through the illusion of perpetual monitoring, prisoners begin to monitor themselves).

212. The same disciplinary structure functions in other spheres of governed social life. The subject—whether of the workshop, orphanage, school, prison, or military—was expected to internalize compliance and accept penalties for failures in many areas. These include, inter alia, areas related to "time (latenesses, absences, interruptions of tasks)" as well as behavioral lapses, including "impoliteness, disobedience" and mistakes of speech, attitude, and physical appearance and gesture. *Id.* at 178.

213. KOHLER-HAUSMANN, *supra* note 13, at 4–5 (arguing that the misdemeanor court model is "managerial" rather than "adjudicative").

alcohol, traffic offenses, and unlicensed work.[214] All of these crimes seem to have something to do with "demeanor"—the opposite of "misdemeanor." A misdemeanor, then, is an error of demeanor, a breach of what is expected in orderly social life. As such, misdemeanors trigger a "presumption of the need for social control."[215] Underlying this is an idea of an unruly underclass that is "impoverished, chaotic, lawless, drug-infested, and ruled by violence."[216] Defendants are expected to (and know they are expected to) dispel any inkling that they fit within the description of the unruly underclass.

The lower, criminal courts monitor and manage misdemeanants using several surveillance techniques.[217] They surveil defendants' behavior both in the courtroom and through observing whether the defendants can complete tasks ordered by the court, with or without any formal adjudication of guilt.[218] These tasks create an obstacle course of "procedural hassle" through which defendants demonstrate whether they can function in an orderly way.[219] The procedural hassles include complying with court orders, appearing for court dates, showing up to court on time, waiting for the case to be called.[220] Through their compliance, defendants demonstrate to the court that they do not need further supervision.[221] A defendant's failure to follow court orders triggers

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214. The Department of Justice Report on the Baltimore Police Department documented the most common misdemeanor arrests: disorderly conduct, trespassing, resisting arrest, hindering an officer, failure to obey an officer, and making a false statement to the officer. C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 55–56 (2016), https://www.justice.gov/crt/file/883296/download [https://perma.cc/V3B3-2VAK]. Another common charge the report noted was gaming (playing dice). *Id.* at 56.

215. KOHLER-HAUSMANN, *supra* note 13, at 77–78.

216. *Id*. at 228 (quoting Elijah Anderson, *The Iconic Ghetto*, 642 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 9 (2012)).

217. In these cases, wrote Feeley, "adjudication is little more than a book-keeping ritual, a formality necessary to terminate a problem which for all practical purposes has already been resolved." FEELEY, *supra* note 36, at 24.

218. That adjudication has wholly given way to monitoring and managing is highlighted by Kohler-Hausmann's data demonstrating that conviction rates in New York have not kept pace with increases in misdemeanor arrests. Rather, courts increasingly agree to dismiss cases on the condition that the defendant complete certain tasks like treatment programs and monetary payments. Kohler-Hausmann, *supra* note 149, at 642 (showing that the conviction rate for misdemeanors in New York fell from 44% to 19% in the era of "broken windows" policing).

219. KOHLER-HAUSMANN, *supra* note 13, at 183.

220. *Id.* at 218–219.

221. *Id.* at 5. Kohler-Hausmann refers to it as "managerial justice" as distinct from Foucault's disciplinary power and, thus, would probably disagree with my characterization of the lower courts as similar to Foucault's analysis of prison. She cites to another study distinguishing the looser power structures of policing with Foucault's "total institution" of the penitentiary. *Id.* at 8–9 (citing Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOCIO. REV. 339, 355 (2009))

the imposition of more court orders—perpetual payment of portions of fines, and numerous days spent waiting in the audience for one's case to be called.[222]

Disciplinary power is thus subtle and diffuse, but, once identified, we can see how the court orders to return to court, pay a fine, or take a class do more than tax defendants' time, money, and liberty. The process is the punishment,[223] but the process also is the training, shaping the defendant into a compliant and orderly person. My further argument is this: Orders that require the defendant to complete tasks outside of the courtroom, such as paying a fine or taking a class, encourage the defendant to behave cooperatively in the courtroom. The tasks cause defendants to internalize the disciplinary process, rendering defendants much less likely to talk back in court.

Returning to Foucault, again, the central aim of disciplinary power is that the person eventually imposes discipline on themselves without any direct threat from the sovereign. To determine whether this internalization has occurred, some courts—particularly those focused on rehabilitation—may demand verbal confirmation from the defendant. For example, drug courts may require the defendant to verbally "demonstrat[e] the recovering self."[224] Defendants in drug court are expected to announce that they are addicts and to answer questions about their perspectives on authority in very particular ways.[225] In one instance, researchers observed a judge prodding a defendant to agree that he had become "[h]umble" and "willing to listen."[226] Prodded to say "the right things," defendants demonstrate that they have internalized the court's discipline, or at least understand that such a showing is what is expected of them when they are

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(explaining that policing in Philadelphia led targets of police to be "less like captives in a Foucauldian panoptic power regime and more like fugitives within porous social and physical spaces"). Foucault, however, did not envision perpetual surveillance in an architectural panopticon as the only example of disciplinary power. Instead, he noted that the potential for being observed coupled with techniques of discipline were the hallmark of disciplinary power. FOUCAULT, *supra* note 50, at 203.

222. KOHLER-HAUSMANN, *supra* note 13, at 1 ("[C]omparatively trivial infractions entangle people in the tentacles of the criminal justice system, impose burdens to comply with judicial processes, require time away from work and children, entail fees and fines, and generate records that can be accessed by potential employers, landlords, or other important decisions makers.").

223. This is the title of Malcolm Feeley's seminal book on the lower courts. *See* FEELEY, *supra* note 36.

224. Stacy Lee Burns & Mark Peyrot, *Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts*, 50 SOC. PROBS. 416, 430 (2003); *id.* at 417 (arguing that therapeutic culture infiltrating legal settings results in "areas of human life [being] open to judicial exploration" including the "mind, psyche and soul of the individual" (quoting JAMES NOLAN, REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 183–84 (2001))).

225. *Id.* at 424 (reporting instance of a judge denying further participation in drug court to a defendant who would not announce in open court that he was an addict).

226. *Id.* at 431 (emphasis omitted).

called upon to speak in court.[227] As the next section discusses, the power of the court is enhanced even more by the social-emotional aspects of its interactions with the defendant.

C. Social-Emotional Power

Like all social spaces, the courtroom has an emotional tone and a range of emotional expressions that are permitted or frowned upon. This is perhaps the most subtle form of power that silences defendants in the courtroom, and one that is the most difficult to define. It influences not just what defendants must do but also *how they must do it.* The defendant's emotional tone, expressed through attitude, countenance, and demeanor, as well as words (if any), will be part of what the court considers in determining how much monitoring, control, and supervision to impose. This can be thought of as the defendant's social-emotional performance. The expected social-emotional tone is communicated to the defendant through a variety of courtroom cues as well as through the court's more dramatic reactions to defendants who display forbidden emotions or otherwise appear agitated in ways that disrupt the court's perception of itself as an orderly place.

1. The Impact of Stigma on Courtroom Behavior

The layout of the courtroom, combined with the structured roles played by courtroom professionals, influences "what people say and the way that they say it."[228] The social-emotional regime of the courtroom dictates who can express which emotions to whom. As a general matter, courts permit only "minimal emotional display."[229] What emotions may be displayed depends on the person's role in the courtroom. Righteous anger on behalf of victims may be expressed by the prosecutor, and then by the judge at sentencing.[230]

Defendants, however, have much less leeway to express emotion, in part due to the stigmatized role they play in the courtroom.[231] Being arrested, charged with a crime, and brought before a tribunal of judgment is a "degradation ceremony" in which the defendant plays the person who is degraded.[232] The defendant—the stigmatized person starring in the

227. *Id.* at 432.

228. GRUBER, *supra* note 22, at 22.

229. *Id.* at 23.

230. *Id.*

231. *Id.*

232. Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOCIO. 420 (1956).

court's degradation ceremony—is likely to feel anxious and "unanchored"[233] in court.[234] The anxiety is well-founded. Others may be quick to read "unintended meanings" into the stigmatized person, perceiving the defendant as "either too aggressive or too shamefaced."[235] To compensate, the defendant may try to appear less stigmatized by behaving just like the courtroom professionals in spite of the fact that their internal reaction to being prosecuted likely engenders strong emotions.[236] Without daily experience in the criminal court, defendants "tap into cultural notions of appropriate language for this context to a degree greater than usual."[237] Gruber, for example, noted that about half of the defendants who spoke at sentencing used "politeness markers" such as "please," "thank you," and referring to the judge as "sir," or "ma'am," or "Your Honor."[238]

Moreover, to manage the stigmatized role, the defendant may feel particularly concerned with avoiding feelings of shame and the attendant assaults on dignity that come with admitting, for example, that one does not have money to pay a fine or transportation to get to a community service center. Managing how one is perceived by others by regulating one's emotional expression may thus become a central preoccupation of the defendant in court.[239] Orderliness is not generally considered an emotion, but, I argue, certain emotions are readily associated with orderliness: mildness, politeness, and agreeability. Displaying these emotions assists the defendant in managing the stigma of criminal identity in court.

In contrast, straying from the appropriate spectrum of emotional expression may lead to further shaming. In an observational study of drug courts, researchers noted a judge who reprimanded a defendant for crying in open court while describing her relapse into drug use.[240] Interpreting the tears as an attempt to use emotion to manipulate the outcome of the status hearing, the judge told her, "Cut the garbage and save the tears

233. GOFFMAN, *supra* note 182, at 18.

234. GRUBER, *supra* note 22, at 23.

235. GOFFMAN, *supra* note 182, at 18.

236. *Id.* at 41–42.

237. GRUBER, *supra* note 22, at 23–24.

238. *Id.* at 126. Interestingly, almost all lawyers addressing the court used these terms of politeness consistently. *Id.* This seems to suggest that defendants are less accultured to the court's rules of decorum than their attorneys.

239. And, indeed, in jury trials, juries may judge the defendant's demeanor an important variable in their verdicts. *See* Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 582 (2008) (describing the impact of the defendant's demeanor at counsel table as influencing jurors).

240. Burns & Peyrot, *supra* note 224, at 427–28.

because they are not doing a thing for me."[241] This exchange could be interpreted narrowly to mean that the judge did not credit the authenticity of the defendant's tears. Indeed, the judge turned to the audience and said, "Notice how she stopped crying when I told her to?"[242] The exchange could also be interpreted more broadly as a prohibition against emotional pleas for mercy. Other defendants observing the hearing likely would decide to calibrate their tone and exclude pleas for understanding or mercy. It is reasonable to expect that observing the judge reprimand defendants who express certain emotions will lead other defendants to shape their emotional expression to the preferences of the court.

The above example raises another inhibiting aspect of the defendant's stigmatized role in the courtroom. Stigma has what has been called a "spoiling effect" on the defendant's credibility.[243] The listener may interpret the defendant's speech more negatively than the speech of others who do not carry the stigma of being charged with a crime.[244] Interpreting another person's emotional cues is difficult, but the overlay of stigma makes it more likely that the court will view the defendant's display of emotion in a cynical light. Kohler-Hausmann recalls, for example, a judge stopping mid-plea colloquy because the defendant was smiling.[245] The judge told the defendant to sit in the audience and wait for a second call when, apparently, he should complete his change of plea and sentencing without smiling. Perhaps the defendant smiled to communicate to the court that he was not a threat, or because he was relieved to have the case resolved in a way acceptable to him. But the court seemed to interpret his smiling as disrespect or as a failure to feel somber and shame-faced during an adjudication of criminal guilt.

Moreover, one could liken the judge's rebuke described above to a parent telling a child to wipe the smile off of their face. Infantilizing defendants by directing them not to smile and not to cry further entrenches the social-emotional power of the court. Shaming coerces submission, and is thus a strategy for inhibiting the behavior of others in the courtroom.[246]

Given the subjectivity involved in interpreting other people's feelings,

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241. *Id.* at 427.

242. *Id.* at 428.

243. GRUBER, *supra* note 22, at 23 (citing GOFFMAN, *supra* note 182); *id.* at 149 (describing the stigma of being a defendant in a criminal case as having "a tainting effect that causes the defendant to be viewed as an unreliable narrator").

244. *Id.*

245. KOHLER-HAUSMANN, *supra* note 13, at 216.

246. Heidi L. Maibom, *The Descent of Shame*, 80 PHIL. & PHENOMENOLOGICAL RSCH. 566, 567–68 (2010) (arguing that shame is a social, heteronomous emotion that descends into submission in ways that are directly affected by social rank).

racial bias certainly must play a role in skewing judicial assessments of some defendants' demeanor and tone.[247] Black people charged with crimes may be particularly at risk of both misinterpretation and ill will in judicial assessments of their courtroom demeanor and speech.[248] In particular, a judge may view similar actions and words as disorderly when coming from a Black defendant but neutral when coming from a white defendant.[249]

It is deeply inhibiting to worry that one's statements, demeanor, and emotional tone in court might be misinterpreted.[250] Anticipating disbelief, defendants may remain emotionally muted and unwilling to speak. This phenomenon may be exacerbated for Black defendants who are attuned to stereotype threat, meaning the awareness and concern that one will be judged unfairly according to an existing stereotype.[251] L. Song Richardson and Phillip Atiba Goff note that stereotype threat "often provokes anxiety, leading to physical and mental reactions that are difficult, if not impossible to volitionally control such as increased heart rate, fidgeting, sweating, averting eye gaze, and cognitive depletion."[252] Aware of biases equating Blackness with disorder and danger, Black defendants may curtail their anger, resistance, frustration, and agitation in order to reduce the chance that they are perceived in stereotypical ways. But the problem is by no means limited to Black defendants. Jamelia Morgan notes, for example, that people seen as outside the norm, such as people with disabilities or people transgressing traditional gender roles, often are treated as disorderly by criminal legal practices.[253] In an effort not to be judged in accordance with this disorderly stereotype, many people will be reticent to talk back in court. The result is "testimonial quieting," meaning

247. Hanan, *supra* note 22, at 329.

248. Jennifer Saul, *Implicit Bias, Stereotype Threat, and Epistemic Injustice*, *in* THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE 235 (Ian James Kidd, José Medina & Gaile Pohlhaus eds., 2017).

249. *See* Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. (forthcoming 2021) (manuscript at 21–22) (on file with author). In this Article, I do not capitalize "white" when referring to white people, a practice of keeping with the style guidelines of the Associated Press and other sources of journalism. *See* David Bauder, *AP Says It Will Capitalize Black but Not White*, ASSOCIATED PRESS NEWS (July 20, 2020), https://apnews.com/article/entertainment-cultures-race-and-ethnicity-us-news-ap-top-news-7e36c00c5af0436abc09e051261fff1f?fbclid=iwar3ce_jafescsctubg3wt-wvgyoga_ckqgjxnbe6rikneugst5bshdi8b9k [https://perma.cc/62HL-ZV4F]. Capitalizing "white" risks legitimizing a white identity mythologized by white supremacists. *Id.*

250. A defendant's speech may be "muted" when he talks about his experience, but his speech is misunderstood because it does not fit into the law's linguistic framework. Shirley Ardener, *Ardener's "Muted Groups": The Genesis of an Idea and Its Praxis*, 28 WOMEN & LANGUAGE 50 (2005).

251. L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 124–28 (2014).

252. *Id.* at 124.

253. Morgan, *supra* note 249.

the decision not to speak when one senses it will be futile or dangerous to speak.[254]

Defendants also take cues from the cases called before their case. A defendant watching the proceedings may see that some defendants are given more of an opportunity to speak than others. In surveys and interviews with former criminal defendants in Ohio and New Jersey, researchers found that the judge invited some defendants to speak but "cut off" others.[255] Specifically, participants with substance abuse issues or a criminal history described fewer invitations to speak.[256] In another series of interviews with people who had active bench warrants for failing to appear in court, interviewees "described a system that did not respect, empathize, or show concern for who they were and their situation," sometimes pointing to instances in which the judge did not permit the person "to explain himself and his situation."[257] One interviewee explained why he did not even try to explain his situation to the judge:

> [T]here's no sympathy, there's no empathy, just you do the crime you're going to do the time, so anything else I'm dealing with personally I just feel like it's going to be looked upon and deemed irrelevant so it doesn't matter . . . . [258]

In such a setting, social-emotional power dampens defendants' expression of emotion through shaming and other social cues. The court may, for example, demonstrate the social-emotional demeanor expected of the defendant through its disregard and hostility. In her ethnography of Chicago's largest criminal court, Nicole Gonzales Van Cleve found that self-represented defendants, "[w]ithout litigating skills, a law degree, and the cultural know-how to navigate their own trial, . . . were often laughed at like bumbling idiots."[259] In these impossible situations, talking back risks unknown consequences. Defendants work hard to appear muted and controlled, and struggle to avoid the court's disapprobation.

2. Emotions that Threaten the Court's Sense of Order

The court may forbid—through social-emotional cues and punishment—speech that challenges the court's sense of orderliness.

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254. Saul, *supra* note 248, at 235.

255. SWANER ET AL., *supra* note 60, at vii.

256. *Id.*

257. DUDA-BANWAR & BURT, *supra* note 30, at 16.

258. *Id.*

259. VAN CLEVE, *supra* note 36, at 43. In what Van Cleve describes as a fear of "encroachment" into their professional territory, lawyers and judges will often shame the defendant requesting to proceed pro se by asking him a question about the law that he cannot answer. *Id.* at 177–78.

Before providing examples, I would like to return to the theme of the court's order to note a seeming paradox. While defendants are held accountable for slips in their orderliness, it is not at all clear that the courtroom is a place of order. Even a casual observer will note that the tumult in the courtroom rarely comes from the defendants.[260] The idea of the court as a place of orderliness is just that: an idea. It is an emotional, imaginative idea of order that is often belied by the chaotic and indecorous proceedings in actual courtrooms. In this sense, the courtroom's efforts at orderliness can be understood as more than just a way for courts to process cases efficiently. The emotional—perhaps normative—aspect of the idea of orderliness is a symbol of the law's legitimacy; it is an emotional and ideological commitment to an idea of balanced justice that, of course, may never be achieved in the cases before the court.[261]

As such, judges may experience deep, personal affront when a defendant violates their sense of courtroom order. In some lower courts, judges manifest their commitment to order by enforcing rules of decorum against the defendant amidst the seeming chaos. In a study conducted by the Center for Court Innovation, for example, a defendant recounted the judge's ire and threats when the defendant answered, "Yes," rather than, "Yes, sir."[262] After the judge had admonished the defendant to say, "Yes, sir," the defendant "slipped up and . . . said 'yes' again."[263] In response the judge said, "If you say 'yes' again . . . you'll face 30 days in jail."[264] This is an example of the threat of sovereign power—the power to incarcerate—deployed to protect the court's sense of itself as a place of order and decorum.

Defendant displays of agitation threaten the court's sense of its own orderliness.[265] Although it is an extreme case of a judge insisting on order, the well-publicized incident in which a Texas judge used a stun belt on a

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260. Malcolm Feeley described the lower courts he studied as "chaotic and confusing," "crowded," and "dingy." FEELEY, *supra* note 36, at 3. But, the observation dates back centuries. Lord Blackstone was an early critic of the chaos in the courthouse of Westminster Abbey, with its "drowsy bench" and "babbling Hall." William Blackstone, *The Lawyer's Farewell to His Muse*, *reprinted in* 1 S.L. REV. 212, 213 (1901); *see also* ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 190–91 (1930) (noting the criminal court's "bad physical surroundings, the confusion," etc.).

261. TEMPLE, *supra* note 52, at 183 ("Terry Lee Morris represented this chaos: his behaviors flew in the face of any ideas we might have about judicial decorum . . . .").

262. SWANER ET AL., *supra* note 60, at 33–34.

263. *Id.* at 34.

264. *Id.*

265. TEMPLE, *supra* note 52, at 184. At the same time, Feeley noted New Haven lower court judges who complained about having no power over the noisiness and disorder of their courtrooms. FEELEY, *supra* note 36, at 69–70 (noting that, "[i]f the judge were to insist upon order, he would only call attention to his weakness and inefficacy").

voluble defendant is worth analyzing.[266] The defendant, Morris, repeatedly asked the trial judge to recuse himself and asked that new counsel be appointed for trial.[267] The judge responded by asking Morris, "Are you going to behave?"[268] When Morris continued his requests for new counsel and for judicial recusal, the judge responded, "Are you going to answer my questions?"[269] When the defendant persisted in his requests, the judge to ordered the deputy to stun the defendant.[270] Traumatized after being stunned several times for continuing to request new counsel and judicial recusal, Morris refused to return to the courtroom and the trial continued without his presence.[271]

Although the appellate court ultimately held that a stun belt may not be used for courtroom decorum (but only for security reasons) the decision highlighted, in dicta, the court's imagined orderliness juxtaposed with the imagined chaos of the criminal class:

> When the trial judges of this State don their robes and ascend the bench each morning, those with criminal dockets are often confronted with defendants who are rude, disruptive, noncompliant, belligerent, and in some cases, even murderously violent. In the face of this reality, Texas trial judges shoulder another heavy burden: the burden to tame the chaos before them, impose order, and uphold the dignity of the justice system.[272]

As discussed above, it is not clear that the appellate court's characterization of either the court's orderliness or the defendant's disorderliness is accurate. It is, however, clear that orderliness and decorum function as an emotional regime in the courtroom—a power that excludes certain ways of acting, particularly emotional expressions of the agitation that are a normal part of contesting unfairness.[273] The defendant who seems agitated while speaking to the judge is sending out ripples of disturbance not just through the proceedings, but also through the court's concept of itself and of justice.

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266. Morris v. State, 554 S.W.3d 98 (Tex. App. 2018).

267. *Id.* at 103.

268. *Id.* at 104–05.

269. *Id.*

270. *Id.*

271. *Id.* at 104–05.

272. *Id.* at 102. The court in *Morris v. State* went on to cite *Illinois v. Allen*, in which the Court said that the trial judge could have (a) warned the defendant he would be removed, (b) cited him for contempt, and (c) bound and gagged him. 554 S.W.3d 98 (Tex. App. 2018) (citing Illinois v. Allen, 397 U.S. 337, 344–45 (1970)). The latter option, the *Allen* Court warned, was fraught with constitutional concerns. *Allen*, 397 U.S. at 344–45.

273. TEMPLE, *supra* note 52, at 185 ("[T]o the extent that certain emotions go outside the bounds of what is recognized, they are outlawed, banished from the law, forced out or treated as invisible.").

People who catalyze change are called agitators, after all.[274] Through their agitation and outbursts, they are "trying to tell us something about a system that has broken down."[275] Morris is an extreme example because, depending on how you interpret his resistance, he may have been refusing to participate in the proceedings. In Kathryn Temple's analysis:

> A prisoner who refuses bodily, emotionally, and cognitively to submit to the court's authority and thus exposes the social contract in all its fragility, one who exercises his individuality against law's desire to categorize and dispose of "cases," takes on an outsized importance and cannot be ignored, especially during times when the law feels itself under threat.[276]

Less dramatic than stun belts, returning a defendant to lock-up or setting a high bail on an agitated defendant are more common methods of enforcing decorum in the courtroom. In a well-publicized video, a teenager caught shoplifting, who laughed and then made an obscene gesture and comment to the judge, was disciplined through the imposition of a higher, monetary bail and then was found in contempt and sentenced to thirty days in jail.[277] In the video, the audience can be heard gasping and laughing as the judge punished the defendant's failure to comply with the decorum he expected her to display over the video feed from the jail to the courtroom.[278] Moreover, mere expressions of judicial apathy and curtness may prevent defendants from talking back. Defendants—demonstrating normal sensitivity in reading the emotional tone of the courtroom—may know that they are expected not to agitate by disrupting the order of the proceedings or challenging the decisions of the court. They perform not only by showing up and waiting as they are told, but by behaving in a mild and agreeable way when called up by the judge, agreeing with the decisions of the court when called upon to assent.

Defendants learn about the efforts at orderliness in the courtroom when they attempt to interject during a formalistic part of the hearing, such as during the recitation of the charges or the plea colloquy.[279] Defendants who stray from the script will be quickly—sometimes sharply—redirected

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274. *Id.* at 186.

275. *Id.*

276. *Id.* at 131.

277. Debra Cassens Weiss, *Laughing Teen with Jewelry "Like Rick Ross" Gets 30 Days for Flipping Off Judge*, A.B.A. J. (Feb. 6, 2013), https://www.abajournal.com/news/article/laughing_teen_with_jewelry_like_rick_ross_gets_30_days_for_flipping_off_jud [https://perma.cc/8H7G-9NMM].

278. *Id.*

279. Natapoff, *supra* note 6, at 1464 (noting that defendants who stray from the scripted colloquy by saying, for example, that they were coerced by the threat of a longer sentence after trial, will see the entire proceeding stopped "until the 'correct' yes or no answer is given").

to their lines.[280] This "formalistic" way of verbally engaging may give defendants the impression that unscripted comments are irrelevant and unwelcome at any point in the hearing.[281] The formalism also signals to the defendant that any deviations from the script—especially through contestation or disagreement—will not be tolerated.

The social-emotional element of the performance—mildness, politeness, and agreeability—matters to understanding how difficult it may be for a defendant to say anything unscripted. Short of agitating and weeping, defendants may be reluctant to ask that the court to consider financial or other life circumstances, or to question why the court would require money from indigent people at all. Indeed, persuasion, negotiation, and contestation require a degree of disagreement, of friction between the way things are going and the way the speaker wants them to go.[282] This friction is also essential to ensuring that marginalized voices—like the voices of criminal defendants—contribute to our understanding of how criminal courts impact people under their jurisdiction.[283] Paradoxically, this type of friction may be all the more difficult in courts that attempt to set a welcoming tone that permits open dialogue, as discussed in the next section.

D. Silencing in Kinder, Gentler Courts

Of course, not all courtrooms are presided over by judges who intimidate, disbelieve, and shame the defendants. In some courtrooms, defendants are given a greater opportunity to speak. Imagine a judge committed to listening and listening well to the defendants who come before the court. The judge courteously asks the defendant to speak, eliciting information, and checking to make sure the defendant does not have any questions, or anything left to say that has not been said. Will defendants be willing not only to ask questions but also to raise concerns and contest the proposed disposition in this kinder, gentler court? In this section, I turn to why kinder, gentler courts almost certainly silence contestation through diffuse, social-emotional power as well as through disciplinary power and the threat of the sovereign's power to punish.

In an effort to improve how courts are perceived and to increase

280. *Id.*

281. *Id.*

282. Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1622 (2017) (discussing organized contestation of criminal legal practices).

283. *See* José Medina, *Toward a Foucaultian Epistemology of Resistance: Counter-Memory, Epistemic Friction, and Guerilla Pluralism*, 12 FOUCAULT STUD. 9, 12 (2011) (arguing that a "vibrant and feisty epistemic pluralism" is the hallmark of epistemic function).

compliance with court orders, many courts have attempted to improve courtroom culture.[284] Lower courts are encouraged to, inter alia, enhance the "procedural justice" in the courtroom,[285] and to think about the law's purpose and effect from a therapeutic perspective.[286] My argument is that both procedural justice and therapeutic jurisprudence reduce the appearance of sovereign and disciplinary power while, at the same time, enhancing the court's social-emotional power. The court's enhanced social-emotional power makes it difficult for the defendant to swim against the tide of courtesy and cooperation in the courtroom. Although judges in these treatment-oriented courts still have the power to incarcerate, that power may not be top of mind for the defendants appearing before them.[287] Nevertheless, the defendant may find it exceedingly difficult to disagree with court's edicts, even when warmly invited to speak. I will address procedural justice first, and then therapeutic jurisprudence.

Procedural justice is a term used to describe the subjective opinion of a layperson that a tribunal seemed fair and respectful.[288] A legal process will be perceived as procedurally just if (1) the litigants have an opportunity to speak; (2) the decision maker seems neutral; (3) the litigants feel respected; and (4) the litigants feel that the process and result were clearly explained.[289] In his seminal book on procedural justice, Tom Tyler made clear that procedural justice does not mean that the proceedings or the outcome is fair in any objective sense. The point of procedural justice, instead, is to increase laypeople's confidence in and allegiance to the legal system.[290] Tyler argues that the belief in the legitimacy of legal authority will lead to law abiding behavior.[291]

The behavioral effect of procedural justice is endorsed by the court

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284. For an excellent critique of neo-rehabilitation, see Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189 (2013).

285. Greg Berman & Julian Adler, *Toward Misdemeanor Justice: Lessons from New York City*, 98 B.U. L. REV. 981, 992 (2018) [hereinafter Berman & Adler, *Toward Misdemeanor Justice*]. The authors have also written using similar strategies to reduce mass incarceration. GREG BERMAN & JULIAN ADLER, START HERE: A ROAD MAP TO REDUCING MASS INCARCERATION (2018) [hereinafter BERMAN & ADLER, START HERE].

286. Therapeutic jurisprudence is an area of legal scholarship that studies how to "minimize [law's] antitherapeutic effects" and "increase law's therapeutic potential." Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1062–63 (2003).

287. Mae Quinn made this point in her article on practicing as a public defender in drug treatment courts. Quinn, *supra* note 20, at 50–52.

288. John Thibault, Laurens Walker, Stephen LaTour & Pauline Houlden, *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974).

289. Berman & Adler, *Toward Misdemeanor Justice*, *supra* note 285, at 993.

290. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 143 (Princeton Univ. Press 2006) (1990).

291. *Id.*

reform movement. A publication from the Center for Court Innovation recommends the following steps be taken to ensure procedural justice:

> To address voice and respect, judges could use scripts with each defendant to ask if there is anything about the case or defendants' personal circumstances they should know about before making a decision. The script could also provide the judge with reminders for non-verbal cues such as maintaining eye contact, having a minimum appearance time for each defendant, and speaking directly to the defendant.[292]

In a report on Red Hook Community Court, procedural justice is discussed as both a feature of the court and as a variable responsible for reduced recidivism.[293] As the report explains,

> The greater the degree of perceived procedural justice, the more likely it is that defendants and litigants will be satisfied with criminal justice authorities and their decisions, view authorities as legitimate, and defer to or comply with the decisions made by the judge and others in authority.[294]

The report highlights two aspects of procedural justice designed to reduce recidivism: (1) encouraging defendants' participation in the disposition, and (2) requiring judges to "appear benevolent, caring, motivated to treat parties fairly, and sincerely concerned about people."[295]

In this way, procedural justice literature unapologetically embraces Foucauldian disciplinary power and social-emotional power.[296] The more the defendant feels that that they were well-treated, the less likely the defendant is to question or challenge the court's dispositional orders. Moreover, the greater the feeling of procedural justice, the more likely the defendant is to accept to the court's sanctions as necessary steps in the process of demonstrating orderliness.[297] From the perspective of disciplinary power, procedural justice's invitation to speak on one's own

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292. SWANER ET AL., *supra* note 60, at viii.

293. CYNTHIA G. LEE, FRED L. CHEESMAN, II, DAVID B. ROTTMAN, RACHEL SWANER, SUVI LAMBSON, MIKE REMPEL & RIC CURTIS, A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER 88 (2013), https://www.courtinnovation.org/sites/default/files/documents/RH%20Evaluation%20Final%20Report.pdf [https://perma.cc/SD2E-SE6K] ("Procedural justice is a key mechanism through which the Justice Center aims to achieve reductions in recidivism.").

294. *Id.* at 8 (citing TYLER, *supra* note 290, at 105, 156–57).

295. *Id.*

296. *See supra* section II.B.

297. Ethnographers observing Red Hook court describe dialogue between defendants and courtroom professionals (including judges) that they did not observe in traditional courts. LEE ET AL., *supra* note 293, at 86. One defendant giving a favorable opinion about Judge Calabrese said, "I got a good feel from Calabrese because of the fact that he likes to interact and get your opinion." *Id.*

behalf to a benevolent and attentive judge is part of the training. From the perspective of social-emotional power, procedural justice shapes the defendant's demeanor and conduct to the emotional tone of the courtroom—mild and agreeable.[298]

A court implementing principles of procedural justice may encourage defendants to speak more freely to the court. This seems to be born out in a study from the Center for Court Innovation in which 65% of the defendants interviewed felt that they had an opportunity to express their views and 69% stated that "the judge listened to [their] side of the story before making a decision."[299] One participant in the study noted that his judge listened to him: "[The judge] could have smoked me but he actually listened and paid attention to my background and was like, 'You know what. He not a bad kid, it was just fucked up circumstances.'"[300] No doubt a welcoming judge can create an environment in which some defendants feel free to speak. This does some good if the defendant provides information that helps the court make fairer decisions. But the speech that is encouraged is not speech that talks back or speech that contests the prosecution in any way. Instead, it is an opportunity to speak that makes defendants *feel* they have input when they may not.[301]

Feeling empowered to speak is a poor substitution for having the power to contest the proceedings and challenge the court's narrative of crime and punishment. The informality of the courtroom may feel inviting, but that does not mean that the proceedings or outcome will be fairer than in a more formal, less friendly courtroom. Forty years ago, Richard Abel argued that coercion is disguised in less formal settings.[302] A mediation session, compared, for example, with a formal court hearing, creates a backdrop of collegiality that prompts agreeability. Thus, the transition from formal to informal procedures does not reduce state control. Rather,

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298. Moreover, if Foucault is correct about how disciplinary power is internalized to create docile subjects, procedural justice will make it more likely that the defendant views the court's requirements and fair even if they are unattainable in their requirements of her time and money. FOUCAULT, *supra* note 50, at 136–37 (describing the creation of docile bodies through disciplinary practices).

299. SWANER ET AL., *supra* note 60, at 12. Overall, 80% stated that they felt respected by the court. *Id.*

300. *Id.* at 35 (alteration in original).

301. GRUBER, *supra* note 22, at 160 (noting that defendant allocutions at sentencing do not clearly result in any benefits to the defendant while, at the same time, serving to validate punitive practices and to fool defendants into feeling they are "protected").

302. 1 RICHARD L. ABEL, THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 5–6 (1982) ("The primary business of informal institutions is social control. Consequently, the central question must be: Do they expand or reduce state control? The authors in this volume agree with Foucault that informal justice increases state power. Informal institutions allow state control to escape the walls of those highly visible centers of coercion—court, prison, mental hospital, school—and permeate society.").

the informality can conceal state control, making it difficult to see and even more difficult to contest.[303]

Patricia Williams makes a similar argument, pointing out that informality typically harms Black people due to power imbalances resulting from white supremacy.[304] In contrast, legal formality can protect by positioning the person as "a bargainer of separate worth, distinct power, sufficient *rights*."[305] In other words, formality is not alienating when it is part of an acknowledgment that the people involved in the matter are endowed with rights. Applying Williams's point to defendants in criminal cases, the injustices of criminal prosecution are not due to estrangement between judges and defendants causing judges not to understand the needs of the defendant but instead are due to the inability of defendants to assert and protect their rights.[306]

The trend toward therapeutic jurisprudence shares some of the characteristics of procedural justice. David Wexler, the pioneer of the field, made the important observation that it matters how judicial actors treat people, and it matters how the formal substantive and procedural aspects of law impact people's mental health.[307] In the context of criminal prosecutions, therapeutic jurisprudence has been applied in the creation of specialty courts charged with addressing categories of offenses[308] or defendants.[309] These courts attempt to improve criminal court practices so that they accomplish rehabilitative goals and do not cause

303. ABEL, *supra* note 302, at 6–7 ("Informal institutions control by disorganizing grievants, trivializing grievances, frustrating collective responses. Their very creation proclaims the message that social problems can be resolved by fiddling with the control apparatus once more, that it is unnecessary to question basic social structures. But informal institutions also foster disorganization much more directly, by instructing each party that he can, and must, resolve the controversy alone."). Richard Delgado has argued that alternative dispute resolution, for example, is a type of informalism that exacerbates inequalities that might find better protection in the formal rule structure of the courtroom. Richard Delgado, *The Unbearable Lightness of Alternative Dispute Resolution: Critical Thoughts on Fairness and Formality*, 70 SMU L. REV. 611 (2017).

304. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 148–51 (1991).

305. *Id.* at 148 (emphasis in original).

306. *Id.* at 148–151 (countering the critical legal theory endorsement of needs over rights and informality over formality). This point is especially salient if criminal legal practices are part the "products of social forces and people who wanted them that way." *Id.* at 158.

307. David B. Wexler, *The DNA of Therapeutic Jurisprudence*, *in* THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE 3, 3–4 (Nigel Stobbs, Lorana Bartels & Michel Vols eds., 2019) (describing how substantive and procedural laws as well as and legal practices can be therapeutic or "anti-therapeutic," using the example of civil commitment for mental health crises).

308. Eric J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 FED. SENT'G REP. 127, 129 (2007) (discussing the adoption of therapeutic jurisprudence and principles to problem-solving courts).

309. Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481 (2017) (discussing a genre of problem-solving courts that prosecute defendants who share a trait, like military veterans).

unintended harm.

A large body of scholarship critiques whether problem-solving courts achieve their goals and whether their costs to defendants in time, privacy, and (sometimes) fees outstrip their benefits.[310] At best, these courts link defendants to important social services.[311] While many people charged with low-level crimes may be in need of social services, critics question whether criminal court—with its power to shame and incarcerate—is the proper place for these services.[312] Despite criticism, the techniques of problem-solving courts are of broad relevance because they are increasingly implemented in traditional criminal courts.[313]

Like procedural justice, therapeutic jurisprudence enhances the judge's power to keep defendants on script and away from talking back. In his scholarship on reentry courts (a type of problem-solving court), Eric Miller describes the disciplinary and social-emotional power of the judge as "collateral judicial authority."[314] This type of authority "emanates from the repeated interactions between the judge and the variety of court officers and other players."[315] In addition to the court's power to order conduct and incarcerate, the judge exercises social-emotional power by attempting to "establish a dynamic, personal relationship with each offender."[316] Miller goes on to say:

> [T]he judge may also engage in an informal "theater" of personal suasion, in which the court setting, the official robes, the state seal, and the other symbols of office combine with some form of individualized relationship between client and judge to provide an opportunity to intervene to change the client's way of thinking and acting.[317]

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310. Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1489 (2004).

311. Miller, *supra* note 308, at 127 (describing managerial orientation in some problem-solving courts).

312. Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1614 (2012) (critiquing the therapeutic jurisprudence model of criminal specialty courts as conflating traditional criminal justice goals with therapeutic goals and suggesting a diversion of cases to extra-judicial therapeutic programs).

313. NOLAN, *supra* note 157, at 21 (describing "cross-fertilization" between regular and specialty courts).

314. Miller, *supra* note 308, at 128.

315. *Id.*

316. *Id.*

317. *Id.* Miller quotes another source stating the judge must be "confessor, taskmaster, cheerleader, and mentor; in turn exhorting, threatening, encouraging and congratulating the participant for his or her progress, of lack thereof." *Id.* (quoting *Drug Treatment Options for the Justice System: Hearing Before the Subcomm. on Crim. Just., Drug Pol'y, & Hum. Res. of the H. Comm. on Gov't Reform*, 106th Cong. 16 (2000) (testimony of Judge Jeffrey Tauber)).

This social-emotional, or "relational," power is amplified through repeated court appearances.[318] The defendant in problem-solving court meets with the judge multiple times in order to foster a relationship in which the defendant feels personally and emotionally accountable to the court.[319]

This personal engagement between the judge and defendant can be rehabilitative, particularly because it emphasizes "emotions, empathy, [and] healing."[320] But the bond created is designed to rehabilitate the defendant, not to encourage the defendant to contest the court's process or decisions. For example, Wexler suggests that judges could incorporate therapeutic jurisprudence into sentencing hearings by asking the defendant to "justify" a lesser sentence and suggest terms of probation.[321] The defendant's solicited "input" is confined to a narrow topic of what punishment is deserved.[322] The dialogue between the judge and the defendant will be less formal than the plea colloquy, but it is not at all clear that there is room for contestation or debate about the process, conviction, or the fairness of imposing any punishment at all.[323]

To be sure, the judge in many problem-solving courts may be "warm, friendly, and accessible."[324] And this environment may encourage defendants to speak more freely. But two problems appear likely. First, the social-emotional tone of the courtroom all but ensures that defendants will feel obligated to cooperate rather than contest, as described above. The chance to speak for oneself should matter. And the chance to speak should be enhanced by informal, friendly judges. Paradoxically, however, the opposite is possible. The danger is that the more friendly the judge, the more pressure the defendant may feel to accommodate the judge. Social-emotional power, wielded through procedural justice and therapeutic jurisprudence, works with disciplinary power to encourage

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318. Miller, *supra* note 174, at 426 (employing the terms "relational" and "productive" to describe the types of diffuse power exercised by judges in problem-solving courts).

319. Terance D. Miethe, Hong Lu & Erin Reese, *Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings*, 46 CRIME & DELINQ. 522, 529 (2000) (explaining rationale for multiple meetings between the defendant and judge in a drug court in Las Vegas).

320. NOLAN, *supra* note 157, at 32; *id.* at 18 (describing direct and personal engagement between the judge and defendant on multiple status dates).

321. Wexler, *supra* note 307, at 5.

322. *Id.*

323. In other articles, I have argued that defendants are expected to display remorse and offer only apologies and amends during sentencing hearings, *see* Hanan, *supra* note 22, and in restorative justice meetings, *see* M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123 (2016).

324. NOLAN, *supra* note 157, at 2 (relaying description of Judge Calabrese by staff at the Red Hook Community Court).

gratitude and agreeability and discourage contestation.

Defendants are unlikely to see examples of contestation from the courtroom professionals in most problem-solving courts because adversarial justice is perceived as incompatible with therapeutic jurisprudence.[325] In therapeutic jurisprudence, the rhetoric of social work substitutes for legal rhetoric.[326] Treatment-based proceedings in a problem-solving court appear to be collaborative at first, with the judge, prosecutor, probation officer, caseworker and defense attorney working together to determine the best course of treatment.[327] When the goals of the defendant and the treatment team diverge, however, the institutional and social arrangements of problem-solving courts make it difficult for the defense attorneys to assert their client's interests adverse to the treatment team's goals.[328] If it is difficult for attorneys trained in adversarial lawyering to protect their clients from the team, it is almost impossible for defendants who rely on the behavior and climate of the courtroom when they make decisions about how to act and what to say.

The scenario of diverging goals points to the second problem: the danger that the therapeutic courtroom suddenly will turn punitive because of the defendant's failure to comply with court orders. While the goal of the therapeutic court may be the defendant's rehabilitation, failures of the defendant to comply result in escalating forms of coercion until the rehabilitative goals of the court are overpowered by the punitive goals.[329] As one problem-solving court official explained, "We combine punishment and help."[330] Although the judge encourages, cajoles, and

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325. BACH, *supra* note 23, at 6 ("Collegiality and collaboration are considered the keys to success in most communal ventures, but in the practice of criminal justice they are in fact the cause of system failure.").

326. Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 343–44 (1999). This dynamic has been demonstrated in the juvenile court system, designed to focus on "benevolent rehabilitation and socialization in lieu of retributive punishment." Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1271 (1998). It took decades for the Supreme Court to acknowledge the due process concerns under the surface of a superficially therapeutic and nonadversarial court process that often resulted in year of incarceration. Casey, *supra* note 310, at 1470–71; *In re* Gault, 387 U.S. 1 (1967).

327. Casey, *supra* note 310, at 1463.

328. *See* Meekins, *supra* note 20, at 3–5 (defenders expected to accept defendant's waiver of rights and collaborate with court personnel as part of the treatment team); *see also* Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 264 (2008) (explaining how "coercive power is central to the therapeutic problem-solving court model"). Some scholars have noted that defendants fail to comply with treatment and are sentenced to a series of ever-lengthening periods of incarceration to compel compliance with treatment. Casey, *supra* note 310, at 1499.

329. Richard C. Boldt, *The "Tomahawk" and the "Healing Balm": Drug Treatment Courts in Theory and Practice*, 10 U. MD. L.J. RACE RELIGION GENDER & CLASS 45, 65 (2010).

330. NOLAN, *supra* note 157, at 13.

urges defendants to comply with treatment, the power to incarcerate is always present.

Perhaps the combination of persuasion followed by the threat of force is nothing new. In relaying Blackstone's description of *peine forte et dure*, Temple reminds us that early English defendants were coaxed and encouraged to enter a plea in court before they were taken to be tortured.[331] And, should the defendant agree to enter a plea, he would be released from torture and permitted to do so.[332] This early example demonstrates, according to Temple, that "both terror and tenderness [are] juridical technologies meant to manage resistance."[333] The social-emotional power of persuasion and kindness control behavior in tandem with the state's power to punish. Likewise, the modern defendant's compliance is procured through the combination of social-emotional pressures, the disciplinary structure of performing tasks while under surveillance, and the fear of the sovereign's power to punish.

IV. THE VALUE OF TALKING BACK

In this Part, I analyze ways in which talking back in court could influence criminal legal practices: (1) fairer handling of individual cases; (2) educating lawyers and judges about the impact of criminal legal practices, thereby influencing legal analysis, court practice, and policy; and (3) reinstating contestation as a necessary part of pluralistic democracy.

Although not the focus of this Article, it has also been argued that contestation has an ethical dimension as an assertion of the humanity of the speaker. Talking back is a demonstration of agency, establishing the defendant as a person rather than an object.[334] The silenced person is unable to participate in an activity essential to being human: communicating information to others.[335] People charged with crimes understand early in the process that they are excluded as conveyers of

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331. TEMPLE, *supra* note 52, at 125; BLACKSTONE, *supra* note 52, at *320 (describing that the court must explain three times what will happen if the defendant does not enter a plea and give them a few hours to think it over before commencing torture).

332. BLACKSTONE, *supra* note 52, at *322.

333. TEMPLE, *supra* note 52, at 114. Perhaps this shortens the conceptual gap between tenderness and tenderizing.

334. JOSÉ MEDINA, THE EPISTEMOLOGY OF RESISTANCE: GENDER AND RACIAL OPPRESSION, EPISTEMIC INJUSTICE, AND THE RESISTANT IMAGINATIONS 84–86 (2013) (discussing the ethical, epistemic and political implications of epistemic injustice). While not relying on José Medina's work, Natapoff notes similar benefits of defendant's speech. Natapoff, *supra* note 6, at 1452.

335. MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 137 (2007) (explaining the significance of undermining someone as a knower to moral philosophy).

knowledge.[336] Jack Henry Abbott described the courtroom experience at the beginning of his training to be silent: "A prisoner begins his 'training' in an American courtroom. He is told to shut his mouth unless spoken to. He is told he is a fool if he tries to be his own lawyer."[337] The ability to talk back, in contrast, accords with "personal dignity and choice, democratic participation, expressive freedom, and the ability to be heard."[338]

The assertion of one's humanity through talking back in court fits within the understanding of criminal legal practices in the U.S. as inextricably intertwined with the history of slavery, convict leasing, segregation, and the backlash against the civil rights movement.[339] As Dorothy Roberts observes, "[t]he pillars of the U.S. criminal punishment system—police, prisons, and capital punishment—all have roots in racialized chattel slavery."[340] With this in mind, legal scholars have linked resisting surveillance, arrest, prosecution, and punishment to political resistance of racial subordination.[341] Within this framework, talking back, meaning speaking to an authority figure as an equal, has particular value and salience.

Nonetheless, top of mind for the reader may be the nagging question of whether anyone cares about the harm that criminal legal practices work

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336. Natapoff, *supra* note 6, at 1450 ("Defendant speech, however, has personal, dignitary, and democratic import beyond its instrumental role within the criminal case.").

337. JACK HENRY ABBOTT, IN THE BELLY OF THE BEAST: LETTERS FROM PRISON 110 (First Vintage Books 1982) (1981).

338. Natapoff, *supra* note 6, at 1476 (discussing the relationship between First and Fifth Amendment values); *see also* Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 925 (1995). Arguably, the dignitary value of defendant speech is embodied in the defendant's right to self-representation. Faretta v. California, 422 U.S. 806, 823 (1975) (stating defendant has a right to "conduct his cause in his own words" (quoting 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 211 (2d ed. 1909))); McKaskle v. Wiggins, 465 U.S. 168, 177 (1984) (noting that "the core of a defendant's right of self-representation" is the "specific rights to make his voice heard" but trial court may appoint standby counsel).

339. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW (2010) (arguing the criminal legal system perpetuates racial subordination through the facially race neutral tool of mass incarceration).

340. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 20 (2019) ("First, today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained.").

341. *See, e.g.*, Arnett, *supra* note 42, at 1137–38 (discussing Black resistance to state surveillance in both historical and current contexts); Bell, *supra* note 42, at 206–07 (describing Black men running from the police as a form of resistance); Miller, *supra* note 42, at 54–59 (arguing that the defendant's assertion of trial rights can best be understood within the historical framework of resistance to slavery); Ristroph, *Regulation*, *supra* note 42, at 1564 (arguing that "[r]ights claims [under the Fourth, Fifth, and Sixth Amendments] are a form of resistance to the state"); *see also* Ristroph, *Respect*, *supra* note 42, at 605 (arguing that "the Hobbesian right to resist punishment provides a useful conceptualization of what it means to treat wrongdoers with respect").

on the targets of prosecution. In other words, it is unclear whether talking back in court will lead to fairer outcomes. I weave my thoughts on this question throughout the discussion, assuming, first, good faith on the part of legal actors and then analyzing the same questions assuming bad faith (or indifference) on the part of legal actors.

A. The Perils and Potential for the Defendant

To illustrate the value of talking back, I return and add to the vignette of James. Imagine that James stands before the court and responds to the proposed offer that his case will be dismissed if he pays a fine of $500 by telling the judge that $500 is too much for him. He is a full-time caregiver for his grandmother, taking her to regular doctor appointments. He works for a rideshare company part-time, but only makes $250 per week at that job. He tells the court that he pays for car insurance and regular repairs of his twenty-year-old car and buys his grandmother groceries. If we assume good faith—that the court intends to be fair—then listening to defendants talk about hardship may add needed realism to the judge's sentencing decision. Without knowing that James carried the financial and caretaker responsibilities in his family, the judge may genuinely not have imagined $500, paid in, for example, six monthly installments, would be excessive for James. The extent of the hardship might truly surprise and perplex the judge and cause the judge to change the fine amount.[342]

The harm to the defendant can be described both in terms of sentencing realism and in terms of legal principles. The real impact of the sentence is more severe for James than for a defendant with more discretionary income.[343] Indeed, if paying the fine caused James to fall behind on car payments, for example, and lose the car that he needs to earn money as a rideshare driver, the fine could ruin him. A fine that ruins the defendant financially may be unconstitutional under the excessive fines clause of the Eighth Amendment.[344] In a strictly legal sense the absence of contestation from defendants degrades the court's ability to foreground the rule of law

342. *See* JANE ADDAMS, DEMOCRACY AND SOCIAL ETHICS 13 (Anne Firor Scott ed., 1964) (describing how perplexity upon having one's views challenged through exposure to other people's lives can lead to interrogating one's beliefs, a process Addams contended is necessary for democracy).

343. *See generally* Colgan, *supra* note 151.

344. Criminal fines are limited by the Eighth Amendment's prohibition against excessive fines, meaning fines are unconstitutional if they are disproportionate or, perhaps, if they lead to financial ruin. Timbs v. Indiana, 586 U.S. __, 139 S. Ct. 682, 694 (2019) (Thomas, J., concurring) (noting that fines that are ruinous are excessive under the Eighth Amendment (quoting 2 ROBERT VAUGHAN, THE HISTORY OF ENGLAND UNDER THE HOUSE OF STUART: INCLUDING THE COMMONWEALTH 801 (1840))); Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin,"* YALE L.J.F. 365, 367–68 (2020).

and constitutional issues.[345] In a broader sense, the absence of contestation from defendants prevents courtroom professionals from understanding the impact of their rulings on defendants as well as their families and communities.[346] Understanding the defendant's finances may thus be a "cognitive minimum[]" that the judge must have to exercise the court's authority to impose fines fairly and constitutionally.[347]

It may be argued that judges and prosecutors are aware of the harm caused by criminal prosecution, monetary sanctions, incarceration, and the collateral consequences of convictions. If that is the case, listening to the defendant in court will not produce different results because it will not produce new knowledge. While this argument may have explanatory power in some instances, it does not consider that awareness fluctuates. A judge may be aware of financial hardship, and yet not manage to keep that awareness top of mind during sentencing. The way in which things we know can slip from awareness has been described as the "unknown knowns."[348] The phrase "unknown knowns" plays on Former Secretary of Defense Donald Rumsfeld's descriptions of three other categories: known knowns, known unknowns, and unknown unknowns.[349] The fourth category that this list omits includes the things that we know yet fail take into consideration when making decisions. What the judge understands of the hardship caused by the court's orders may fall within the category of the "unknown knowns," that is, "things that were . . . easily knowable, or indeed known" but which the judge did not think of in the critical moment of decision.[350] To the extent that the harms inflicted in court are the product of unknown knowns, moments that force conscious awareness could overcome what otherwise appears to be apathy.

So far, so good. The next question is more difficult. What about the judge who either does or does not credit the testimony of defendants like James? At its worst, the result of the defendant's contestation could be the

345. *See* Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57 (1998) (defending the adversary system as a method of defending individual rights and dignity); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (describing how private settlement misses the value of litigated dispositions in which a public institution "explicate[s] and give[s] force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them").

346. Natapoff, *supra* note 6, at 1498–99; *id.* at 1490 (observing that defendant speech about the impact and fairness of criminal legal practices is often notably missing from court proceedings).

347. MEDINA, *supra* note 334, at 24.

348. Geoffrey Wheatcroft, *A World in Denial of What It Knows*, N.Y. TIMES (Dec. 31, 2011), https://www.nytimes.com/2012/01/01/opinion/sunday/unknown-knowns-avoiding-the-truth.html [https://perma.cc/PL9Y-GF7S] (discussing "unknown knowns" as common, political phenomena).

349. Donald H. Rumsfeld, U.S. Sec'y Def., Press Conference at NATO Headquarters (June 6, 2002), https://www.nato.int/docu/speech/2002/s020606g.htm [https://perma.cc/HP8Z-7YQN].

350. Wheatcroft, *supra* note 348.

imposition of more severe penalties, including incarceration. As discussed in Part II, the court's sovereign power to use violence extends to imposing harsher penalties when the defendant rejects a plea offer. Other examples of the judge's wrath at defendant comportment in court highlight the sovereign power to punish for talking back.[351]

In order to benefit from contesting speech, the judge, as a listener, must feel curious about others and perplexed when the words of others challenge the listener's worldview.[352] Not all listeners—and not all judges—are willing to take such a "critical experiential approach" from the bench.[353] Lack of awareness and intransigence form a loop of reinforcement that can be difficult to break.[354] Moreover, some courtroom professionals may have a vested interest in remaining unaware of information that challenges their routine practices.[355] Understanding, for example, how often prison is brutal and cruel makes a judge's job of sentencing defendants more fraught.[356] Likewise, accepting how devastated many defendants and their families are from criminal justice debt makes the daily practice of imposing fines more fraught.[357] We can assume, then, that there are some situations in which the court is impervious to information that challenges its world view and, thus, defendants talking back in court changes nothing for the defendant or the judge.

Another, bad faith possibility is that the judge simply does not believe James's account of his hardship based on stereotypes that the judge holds about people like James. Imagine that, when James explains his limited income and financial obligations, the judge responds, "I see you have new sneakers and a leather jacket on. You were able to afford those on your income, so I am sure you can do this. If not, you can always complete fifty hours of community service picking up trash."[358] As I discuss in another

351. *See supra* Part II.

352. MEDINA, *supra* note 334, at 19–20.

353. *Id.* at 20. Elsewhere, I rejected a direct causal relationship from knowledge acquisition to policy changes. Hanan, *supra* note 37.

354. MEDINA, *supra* note 334, at 85 (noting that intellectual advancement does not automatically lead to ethical and political improvement).

355. *Id.* at 34, 109 (describing the epistemic challenges presented by "needing not to know").

356. Hanan, *supra* note 37, at 1205–10.

357. At the same time, reducing fines and fees can run afoul of institutional funding goals. The fines collected may be a necessary stream of revenue for the local government. JACKIE WANG, CARCERAL CAPITALISM 153–70 (2018).

358. James is now caught in a cycle familiar to people living in lower income, over-policed neighborhoods, who are cited more often for minor offenses and traffic violations, leading to hundreds and thousands of dollars in fines. Zhen, *supra* note 146, at 199 ("[T]raffic courtrooms teem with minority people who cannot afford to pay their tickets, or who are slapped with a failure to appear or pay.").

article, defendants in criminal cases are often the victims of testimonial injustice,[359] meaning that they are either not invited to provide information or they are disbelieved when they speak because of prejudicial beliefs held by the listener.[360] James is a member of a stigmatized and discredited group: criminal defendants. The court may have discredited his words not based on a fair assessment of his personal credibility but, rather, on a stereotype about "people like" the speaker.[361]

If James is Black or Latinx, his speech to the court may be doubly discredited based on racial or ethnic stereotypes.[362] According to Theresa Zhen, Black defendants are particularly likely to be discredited when they attempt to explain to the court why they do not have the ability to pay a fine.[363] The judge's comment about James's expensive sneakers harkens to the social construct of an "undeserving poor"—people who are poor through their choices rather than because of lack of opportunity.[364]

Moreover, judges who distrust defendants categorically will be unlikely to provide opportunities for defendants to speak.[365] This

359. *See generally* Hanan, *supra* note 37. The term "epistemic injustice" was coined by Miranda Fricker. FRICKER, *supra* note 335, at 1.

360. FRICKER, *supra* note 335, at 1.

361. *Id.* at 23. Fricker addresses the listener's innocence and culpability at length, but this discussion is not relevant to this Article. *Id.* at 20–27.

362. In another context, I have discussed the likelihood that implicit bias may cause judges to discredit Black defendant's expressions of remorse. *See* Hanan, *supra* note 22.

363. Zhen, *supra* note 146, at 205 (discussing how the mental construction of two categories of poor people—the deserving and the undeserving poor—is applied to legal determinations of whether a defendant's failure to pay a fine was willful, and, thus, punishable with incarceration). Because only a willful failure to pay a fine can be punished by incarceration, the court's determination whether a defendant's failure to pay was willful is the difference between incarceration and freedom. Bearden v. Georgia, 461 U.S. 660, 663–64 (1983) (court must consider defendant's ability to pay before revoking his probation and imposing a sentence of incarceration for failure to pay). Zhen relays instances in which judges found failure to pay willful where (1) a defendant living solely on social security income admitted that he tithed at church; (2) the defendant appeared to have spent money on his "physical appearance[]"; and (3) the defendant appeared to have spent money on "manicured nails." Zhen, *supra* note 146, at 208, 213.

364. *See* Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1558–59 (2012) (citing MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 27–35 (1989)) (discussing the racialized and politically motivated characterization of Black women who receive public assistance as unwilling to work and manipulative). The ugliest racialized iteration of the "underserving poor" may be the 1990s trope of the "welfare queen," who spent profligately her government subsidies while refusing to work. To the extent that discrediting testimony about inability to pay based on race or class-based stereotypes, it can be classified as testimonial injustice. *See* Bryce Covert, *The Myth of the Welfare Queen*, NEW REPUBLIC (July 2, 2019), https://newrepublic.com/article/154404/myth-welfare-queen [https://perma.cc/SS7G-QEBK] (discussing political use of an incident of welfare fraud to create a generalized myth that Black Americans abuse the public assistance programs and refuse to work).

365. FRICKER, *supra* note 335, at 130–32 (describing "pre-emptive testimonial injustice").

pre-emptive silencing means that any information learned about the defendant must come from other sources.[366] A former defendant described the experience of being silenced and objectified in court:

> The most recent time that I went, I really felt dehumanized. [The judge] didn't give me any opportunity to say anything, he was just like, "You," and he like, reads my rap sheet off and was like, "You're fucked up. Why would you keep on doing this, it really shows us that you don't have any respect for the court." I'm like "Dude, you have no idea what that rap sheet even means." He completely misinterpreted it, the way that he explained it, and didn't give me any opportunity to defend myself.[367]

In the above example, the court's sources of information about the defendant were limited to his criminal record and the allegations in the case. The defendant was objectified—the object of study but not considered a credible source of information.[368]

Prejudices leading to testimonial injustice are not completely immune from challenge. Talking back provides defendants with the opportunity to highlight their individual identities while "simultaneously pushing into the background" their stigma of being a defendant in a criminal case.[369] The more James speaks to fill in the details of who he is, the less the court relies on stereotypes and stigma to assess his credibility and orderliness. Implicit biases—like all unconscious associations—are often triggered by inadequate information and ambiguity.[370] The idea that defendants are untrustworthy or that some people are poor because they are bad at managing money are implicit fillers that can be displaced by actual knowledge about a person's life. In this sense, talking back by confronting the court with one's life circumstances has the potential to displace the prejudicial assumptions made by the court. If multiple defendants describe financial hardship, judges might begin to credit the exigencies of poverty and take a more critical eye toward the imposition of fines in individual cases.

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366. Fricker compares studying a silenced person to studying an object like a tree felled in the forest that cannot speak, but its rings can be counted to know its age. FRICKER, *supra* note 335, at 132–33; *see also* FRANTZ FANON, BLACK SKIN, WHITE MASKS 109 (Charles Lam Markmann trans., 1967) (1952) ("I came into the world imbued with the will to find a meaning in things . . . and then I found that I was an object in the midst of other objects.").

367. SWANER ET AL., *supra* note 60, at 30 (alteration in original).

368. *See supra* section II.A.

369. GRUBER, *supra* note 22, at 153.

370. Hanan, *supra* note 22 (discussing implicit biases as triggered by ambiguity and lack of information).

B. Educating Legal Professionals

Defendant speech can pose important challenges to how criminal legal practices are understood on a systemic level.[371] Courtrooms, like other public institutions, often operate in ignorance of how their practices affect people. When a social group does not have an opportunity to describe their experiences—or have those descriptions credited—it creates a hermeneutical lacuna: an area of social life that is "obscured from collective understanding."[372] This is an issue of epistemic injustice, which I discuss in greater depth in a separate article in relation to incarceration.[373]

Through silence, criminal legal systems develop narratives, norms, and practices with little appreciation for the experiences of people charged with crimes.[374] Defendants are thus "excluded from broader social narratives that give meaning to systemic precepts such as fairness, deterrence, and punishment."[375] Being excluded from the conversation "affirmatively shapes the law in ways that further disadvantage" the excluded group.[376]

Returning to the vignette of James's $500 fee, the judge may hold an erroneous understanding not just of James's financial circumstances, but also of the impact of fines and fees on many of the people in the courtroom, who are most likely in a much lower socioeconomic class than the judge,[377] and upon whom fines and fees are imposed disproportionately.[378] In this example, hermeneutical injustice can be described as a lack of epistemic clarity about how fines and fees affect low-income people in general. [379]

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371. VAN CLEVE, *supra* note 36, at 177; Simonson, *supra* note 282 (discussing the democratic mechanisms of contestation and debate within the framework of criminal justice reform).

372. FRICKER, *supra* note 335, at 158.

373. Hanan, *supra* note 37.

374. *See, e.g.*, Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. REV. 1597, 1616–27 (2015) (discussing how stories of people subject to discriminatory police actions were deployed in "the anti-stop and frisk movement"). For a seminal article discussing the role of narratives in challenges dominant views of legal regimes, see Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

375. Natapoff, *supra* note 6, at 1452.

376. *Id.* at 1501.

377. *See* Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 142 (2013).

378. *See* Daniel S. Harawa, *How Much Is Too Much? A Test to Protect Against Excessive Fines*, 81 OHIO ST. L.J. 65 (2020).

379. MEDINA, *supra* note 334, at 31 (describing decision-makers who never hear critiques of their

Hermeneutical injustice frustrates policy improvements. To put it differently, imagine that ten defendants in a row told the judge, "I can pay that but it will mean my daughter cannot attend afterschool programs;" and "I can pay that but we will not be able to buy fresh fruit for the kids' lunches for these five months;" and "I can pay that but I will have to take the bus because I can't afford this and gas and insurance for the car;" and "I can pay that but I will have to go off my prescription medication because I cannot pay these fines and pay the co-pay for them." If only one defendant complains of the impact of a $500 fine, the court might assume the defendant was an outlier experiencing bad financial luck. If, however, every defendant raises concrete examples of financial hardship, what may have seemed like bad luck now looks more like systemic injustice that the court's rulings should account for.[380] If defendants spoke openly about the harm that fines and fees worked on their lives and their families, fines and fees are more likely to be viewed as a social injustice. Evidence would mount to support the credible claim of advocates and scholars who have labeled criminal fees and fines as a "faux-taxation scheme that circumvents the traditional political process and is predicated on racially discriminatory stops."[381]

Expanding beyond the example of fines and fees, to the extent that defendants feel comfortable saying what has happened to them during their arrest, in the jail, and in court, they educate legal actors about the harms caused by criminal legal practices. Some of the harms may be the product of idiosyncratic luck, but other harms may be systemic injustices that merit amelioration. In sum, an advantage of defendant speech is to add to our collective knowledge about the impact of criminal legal system policies, from policing to punishment. In contrast, silencing defendants impedes our ability to see harms and define injustice.[382] As Sharon Dolovich and Alexandra Natapoff have argued: "[T]his reality [of criminal legal practices] is lived by flesh-and-blood human beings, a fact

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actions as "ruling without resistance"). In-depth journalism like Barbara Ehrenreich's *Nickle and Dimed* and, more recently, Jessica Bruder's *Nomadland* chronicle the financial struggles largely invisible to wealthier people. *See* BARBARA EHRENREICH, NICKLE AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001); JESSICA BRUDER, NOMADLAND: SURVIVING AMERICA IN THE TWENTY-FIRST CENTURY (2017).

380. JUDITH N. SHKLAR, THE FACES OF INJUSTICE 80–82 (1990) (arguing that the line between bad luck and injustice is drawn by societies in response to their understanding of various, concrete harms).

381. Zhen, *supra* note 146, at 179 (describing how the racial economic divide is exacerbated by over-policing, leading to citations for traffic and minor crimes, leading to a disproportionate amount of fines and fees owed by people of color).

382. KARAKATSANIS, *supra* note 126, at 147 (arguing that lawyers must "catalog, appreciate, and interrogate the negative costs" of criminal legal practices in order to evaluate the injustice of those practices accurately).

that the standard focus on formal rules and processes tends to ignore, but which must be front and center in any morally adequate understanding of the criminal system."[383]

C. Contestation and Democracy

Talking back in court is good for the democratic aspects of criminal legal practices.[384] Judicial decisions are not a matter of public opinion, of course.[385] But, the plurality of "the people" served by the judicial branch includes defendants, their families, and their communities.[386] The judge is thus not the only audience in court. Everyone in the courtroom is the audience for the defendant's speech. Illustrating the importance of the criminal court as a public sphere, attorney and director of the Southern Center for Human Rights, Steve Bright, stood up from his seat in the audience of a criminal court one day and asked the judge to speak up.[387] Initially, the judge reacted defensively, ordering Mr. Bright to stand before the court, which Mr. Bright eventually did.[388] He took the opportunity to remind the court of its function as a transparent, public forum, stating:

> People have a right to hear what is going on. We're all here, missing work, having left our children in the care of others. And we want to hear what is going on in court today. You are denying us our right to listen to a public hearing. So if you wouldn't mind, please speak up.[389]

Although few trials occur, the courtroom remains a public space where the government's actions can be viewed and judged.[390] Many in the audience of the criminal court will have the opportunity to participate in other aspects of criminal law, like voting for candidates who will pass or

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383. Sharon Dolovich & Alexandra Natapoff, *Introduction*, *in* THE NEW CRIMINAL JUSTICE THINKING 1, 9 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

384. Legal scholars continue to debate the relationship between democracy and criminal legal practices. *See generally* Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 524 (2020) (applying a "democracy/bureaucracy framework" to analyze areas of political transition in criminal justice).

385. Indeed, some legal scholars have critiqued mass incarceration as an excess of democratic influence on criminal law's sense of fair punishment. *E.g.*, RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 5 (2019).

386. *See generally* Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019).

387. BACH, *supra* note 23, at 35.

388. *Id.* at 35–36.

389. *Id.*

390. Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014).

repeal criminal statutes, voting for the next District Attorney, and, in some states, voting for judges. Defendants who talk back in court contest the fairness of criminal legal practices, providing the audience with more information upon which to exercise their voting and speech rights.[391]

The voices of the people most affected by criminal legal practices often go unheard.[392] In low-income communities—many of them primarily Black or Latinx—more than half of the men are under criminal supervision, including prison, parole, or probation.[393] This form of "governing through crime" makes the need for democratic participation through speech all the more essential.[394]

Importantly, democracy's emphasis on pluralism as a source of strength suggests that the exclusion of certain people and perspectives from public discourse degrades democracy.[395] Dissent and protest are essential ways of ensuring that all perspectives are heard.[396] Especially because criminal legal practices are shaped by insiders: police, lawyers, judges, prison guards, parole officers, and other bureaucrats,[397] pluralistic public critique is essential. While it is true that people affected by criminal legal practices are increasingly invited to speak to lawmakers and agencies that oversee criminal justice, their participation does not always

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391. MEDINA, *supra* note 334, at 5–6; *see also* Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1387 (2017) (arguing that the ethical life of society should be reflected in the laws, and, inter alia, that lay citizens take part in it and see their sense of justice at work in criminal legal systems).

392. *See generally* Hanan, *supra* note 37.

393. In 2018, 4.5 million people in the U.S. were under some form of community supervision based on a criminal court case, and 2.3 million people were in prison. ALEXI JONES, PRISON POL'Y INITIATIVE, CORRECTIONAL CONTROL 2018: INCARCERATION AND SUPERVISION BY STATE (2018), https://www.prisonpolicy.org/reports/correctionalcontrol2018.html [https://perma.cc/G827-MZAH]. In 2015, 30% of people on supervision were Black and 13% were Latinx. BUREAU OF JUST. STAT., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2015 (2016), https://www.bjs.gov/content/pub/pdf/ppus15_sum.pdf [https://perma.cc/3A8H-HCLQ].

394. Natapoff, *supra* note 6, at 1490 (citing Jonathan Simon, *Crime, Community and Criminal Justice*, 90 CALIF. L. REV. 1415, 1416–17 (2002)); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 165 (2001). Natapoff argues that defendant speech is a "First Amendment opportunity," and not just a "Fifth Amendment problem." Natapoff, *supra* note 6, at 1492.

395. *See* David Alan Sklansky, *Populism, Pluralism, and Criminal Justice*, 107 CALIF. L. REV. 2009, 2011–12 (2019) (noting that the motto "E Pluribus Unum" implies that "criminal justice policies that dehumanize criminal suspects, criminal defendants, and incarcerated people" are a threat to democratic governance because they exclude these groups from "the People" who govern).

396. CHANTAL MOUFFE, AGONISTICS: THINKING THE WORLD POLITICALLY (2013) (arguing the benefits of a particular type of contestation in politics).

397. Simonson, *supra* note 282, at 1610 (criticizing the anti-democratic tendencies of criminal legal practices that are "run and maintained by privileged insiders" and "rarely responsive to the interests of the poor populations of color most likely to come into contact with the system").

include the kind of open contestation that can occur in the courtroom setting.[398]

Defendants speaking for themselves in court is not the same as an organized social movement,[399] but it is resistance, and a kind of resistance that does not just land on the ears of the courtroom professionals, but on the ears of the public in the audience as well.[400] The goal is not necessarily to build consensus around a particular issue. Rather, defendants talking back represent diverse and multiple points of resistance to criminal legal practices.[401] Because power is diffuse and multifaceted, resistance must be "present everywhere in the power network."[402] "Hence," thought Foucault, "there is no single locus of great Refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary. Instead there is a plurality of resistances, each of them a special case."[403] Even sporadic, disorganized talking back provides useful contestation to diffuse power through the multiplicity of voices.[404]

CONCLUSION

When one considers not just sovereign power, but also disciplinary and social-emotional power, it becomes apparent that simply inviting defendants to speak in court will not produce effective opportunities for defendants to talk back. Displaying orderliness and agreeability is paramount in courtrooms, whether they are friendly or unfriendly in their approach to defendants.

Ameliorating the injustice of defendant silencing might be achieved by

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398. *Id.* at 1612.

399. Organized groups watch police, collect money to pay bails, and protest in public spaces to demonstrate direct resistance. *Id.* at 1617–19 (arguing the value of organized resistance to criminal legal practices).

400. *See* Carroll, *supra* note 25.

401. MEDINA, *supra* note 334, at 13–14; *see also* Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 549–50 (2015) (arguing in favor of more diverse participation in public decision-making); Elizabeth Anderson, *The Epistemology of Democracy*, 3 EPISTEME 8, 12 (2006) (describing conditions under which a random group of diverse people would solve problems more satisfactorily than a specialized, homogenous group); Hélène Landemore, *Deliberation, Cognitive Diversity, and Democratic Inclusiveness: An Epistemic Argument for the Random Selection of Representatives*, 190 SYNTHESE 1209, 1212–19 (2013) (arguing that diversity of perspectives is an advantage in deliberations).

402. 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 79 (Robert Hurley trans., Vintage Books 1990) (1976).

403. *Id.*

404. MEDINA, *supra* note 334, at 289 (citing MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE, 1975–1976 (Mauro Bertani, Alessandro Fontana & François Ewald eds., David Macey trans., 2003) (1997)) (discussing plurality of views as part of the "insurrection of subjugated knowledges").

better legal representation in the lower courts.[405] But it is not clear that lawyers fare better than defendants in resisting the pressure to be agreeable. Because they are institutional actors who interact with the same prosecutors and judges every day, defense attorneys often feel compelled to appease those with power over their clients rather than press issues that the prosecutor and judge might view unfavorably.[406] Indeed, lawyers are susceptible to the same power dynamics as defendants, particularly disciplinary and social-emotional power. This may be why they often press their clients to be silent and decorous.[407] And, lawyers fear some forms of sovereign power. In a case in which a judge threatened to incarcerate an attorney for cross-examining the police officer during a bench trial, the lawyer acknowledged that, knowing that the judge had incarcerated lawyers for advocacy before, he tempered his defense of his client.[408] This fear of losing everything from professional status in the courtroom to liberty silences defense attorneys as well as defendants.

Another possibility for improving dispositional advocacy for misdemeanor defendants is the assistance of lay advocates who can assume the risk of being seen as disorderly and disruptive when the misdemeanor defendant cannot.[409] In the context of reducing and tailoring sub-carceral conditions, community advocates and family members may be better equipped to understand the defendant's circumstances and communicate them to the court than either the defendant or an attorney unfamiliar with the defendant. Initiatives such as the Participatory Defense Movement are equipped to take on such a challenge.[410]

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405. There is certainly an argument to be made for providing representation to all criminal prosecutions, particularly because the collateral consequences of conviction can be so severe. Roberts, *supra* note 2, at 277 ("Yet the consequences of even the most 'minor' misdemeanor conviction can be far reaching, and include deportation, sex offender registration, and loss of public housing and student loans.").

406. BACH, *supra* note 23, at 6 ("When a lawyer is forced to choose between performing vigorously in his role as an adversary and maintaining easy and necessary professional institutional and relationships, he often opts for the path of least resistance, which undermines justice for some.").

407. Natapoff, *supra* note 6.

408. FERGUSON REPORT, *supra* note 161, at 44.

409. Cara H. Drinan, *Getting Real About* Gideon*: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1339–41 (2013) (comparing the role of nurses and physician's assistants to the potential role of non-attorney advocates in criminal cases); Donald A. Dripps, *Up from* Gideon, 45 TEX. TECH L. REV. 113, 127–28 (2012).

410. The amplification of the voices of people charged with crimes also occurs through community-based efforts like the Participatory Defense Movement. Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715 (2018); Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281 (2014). Founded by Raj Jayadev, the Participatory Defense Movement assists the defendant's family members and community members

Given the multiple layers of power at work in the courtroom setting, it is difficult to see a way for defendants to talk back in court. Yet, their voices are paramount to cataloging catalog the costs, harms, and injustices attendant to being the target of criminal prosecution.

in organize to assist in the defense. Moore et al., *supra*, at 1284–85. The movement rests on the claim that, while expertise has merit, the community that supports the defendant is a source of knowledge and social power that is valuable to the defendant's case. Godsoe, *supra*, at 719; Moore et al., *supra*, at 1284–85. Defendant family and community members can organize to "humanize" and "contextualize" the defendant, two important aspects of dispositional advocacy. Godsoe, *supra*, at 720.