

## Introduction: The Strangest Right

“YOU HAVE THE RIGHT TO REMAIN SILENT.” One could make a pretty good argument that these words, drawn from the Supreme Court’s famous decision in *Miranda v. Arizona*,<sup>1</sup> have had more impact on the public imagination than any other phrase in the history of constitutional adjudication. But what a strange right this is. Of all the activities that are especially worthy of protection, that define us as human beings, foster human potential, and symbolize human ambition, why privilege silence?

Even when it does not hide criminal misdeeds, silence often connotes alienation, exemplified by *Bartleby*’s laconic and enigmatic refusal to explain his noncooperation,<sup>2</sup> or frustrating inarticulateness, as when *Billy Budd* violently lashes out because he cannot speak.<sup>3</sup> Silence is always defined by what is lacking. It is what we hear when nothing is spoken, what we communicate when we have nothing to say. By itself, silence is altogether meaningless, gaining significance only when supplemented by speech, as when *Sherlock Holmes* explains why the dog did not bark in the night,<sup>4</sup> or when *John Irving* tells us why the *Alice Jamesians* cut out their tongues.<sup>5</sup>

At least, at first, it seems that a person who remains silent is passive. He does nothing to work his will on the world, to create, or to share with others. Silence is not about the striving, aspiration, and connection that we normally associate with human fulfillment. Instead, it is often about emptiness and loneliness. It is the dead who are silent. How can this void form the core of a basic human right?

The ambition of this book is to provide a defense of, an explanation for, and limits on a right to silence. My argument is complex, and I cannot hope to capture all of it in this brief introduction. My basic claim, though, is simple enough. It has two branches. First, silence can be an expression of freedom, and when it is, it is not alienating at all.

This is so, at least in part, because sometimes language imprisons us. The limitations of human speech deny us access to important experiences

and thoughts. Some kinds of silence can be liberating because they are efforts to transcend these limitations. For example, a contemplative silence can produce understanding, acceptance, and wisdom. In individual relationships, silence is not only sullen. Sometimes, it is the deepest form of communication.

Similarly, a defiant silence can demonstrate determination, courage, and will. For example, a long line of martyrs from a variety of faith traditions have given up their lives rather than renounce their god. I admire the courage Dashiell Hammett, who went to jail rather than name names,<sup>6</sup> and of the thousands of anonymous draft resisters who refused to take a military oath that was a prelude to participation in an immoral war. These silences speak to us. They are a manifestation of connection, commitment, and meaning. When we are free in this deepest sense, we are able to communicate by how we act and by who we are. Words only get in the way.

Second, even when silence is the result of alienation, we need to protect it in order to give meaning to speech. Put slightly differently, for speech to be truly free, there must also be silence. While in some contexts, silence *is* freedom, in others, it is the necessary frame for freedom. Words have meaning only when there is space between them, and when we insist on filling in the space, we are left with nothing but babble. It is therefore important to remain silent when there is nothing to say. When one confronts an ineffable mystery, breaking a silence only brings speech into disrepute.

The linkage between silence and freedom is apparent in a variety of different contexts, and I explore many of them in the pages that follow. At first these contexts may seem disparate, but in fact they pose a common set of problems. In Chapter 2, I set out an analytic framework that helps explicate the connections and that I will use throughout the rest of the book. It turns out that problems of silence and freedom map onto common categories in political thought, including views associated with classical liberalism and classical republicanism.\* For present purposes,

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\* It is important to understand that these categories, and additional categories discussed below, are meant to be analytic tools, rather than descriptions of real thinkers. They are useful for organizing the discussion, and they reflect widely shared sensibilities, but most of us have views too complicated to be captured by these fairly crude distinctions.

we can define classical liberalism as a political stance emphasizing a sharp distinction between public and private and insisting that freedom is associated with a private sphere. In contrast, classical republicanism is a stance emphasizing deliberation about the common welfare as a human good and identifying freedom with collective self-governance. Speaking very generally, classical liberalism pushes us toward a right to silence, while classical republicanism pushes us toward a duty to speak.

These two positions sometimes stalemate each other, but it may be possible to break out of the stalemate, or at least deepen the analysis, by considering two more skeptical views that are, in some sense, deformations of the liberal and republican positions. I label these views radical libertarianism and pervasive determinism. Radical libertarians hold that in a meaningless and absurd universe, nothing constrains human choice. In contrast, pervasive determinists emphasize the ubiquity of power and large-scale, impersonal forces that determine human action. In complex ways, both of these stances help us to understand a right to silence in circumstances where republican and liberal views fail to capture all of our intuitions about how things are.

With this analytic structure in place, I turn to specific contexts in which the linkage between silence and freedom is controversial. Chapter 3 concerns forced apologies. Although apology plays a crucial role in maintaining the illusion of human connection, I argue that the right to silence in the form of a right not to apologize is equally crucial.

Chapters 4 and 5 take up the issues of self-incrimination and confession. Here, my claim is that silence protects the freedom to choose between public obligation and private commitment. Surprisingly, though, in this context, silence as freedom does not necessarily translate into a legal right to remain silent. Sometimes when the law requires speech, it confronts us with the necessity of making an authentic choice for silence.

Chapter 6 turns to the problem of torture. Here, my thesis is that the torture prohibition can best be understood in terms of a right to silence. In this context, the right is essential to preserve the distinction between mind and body on which (the illusion of?) human freedom depends.

In Chapter 7, I discuss a right to silence as an adjunct to the right to speech protected by the First Amendment. On the conventional account,

the First Amendment protects a right to silence in order to make speech truly free. There is something to this account, but, surprisingly, it turns out that in at least some situations, coerced verbalization is actually a form of silence, and the option of remaining silent is actually a form of coerced speech.

Chapter 8 considers suicide. At least from a secular perspective, the choice of death is a choice for endless silence. Yet I argue that some suicides can speak to us and that, in the case of all suicides, there is a necessity to remain silent about the choice for silence.

Chapter 9, a brief conclusion, focuses on the difficulty of maintaining silence about silence itself.

There are two introductory words of caution about my project: First, readers who like the hard edges of legal argument and have no taste for paradox are bound to be disappointed. I believe that silence, speech, freedom, and oppression have dialectical relationships with each other, and the form of my argument is designed to emphasize this characteristic. Silence is a right, but it also comes with an obligation: to speak quietly or not at all in the face of doubt and mystery. Hence, I have no desire to bludgeon the reader into conclusions through the force of speech. This book is intended as more of a meditation than a brief for a position. It has silences and gaps of its own, which, I hope, are sufficiently capacious and profound to allow the reader freedom to reach her own conclusions.

This leads to the second caution: I do not pretend that I have finally resolved the paradox of silence. Precisely because silence is absence, there is a certain futility that attaches to any effort to give it meaning. Nothing I say in the pages that follow, therefore, can dispel a basic contradiction at the core of my project. The problem is that this account, as tentative as it is, nonetheless, disturbs a silence. It could not be otherwise, because silence can never defend itself. Only by resort to its opposite can silence assert its importance.