



Silence and Attunement in Legal Performance

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Abstract

Whilst the law maintains a right to silence, the sensorial and performative dimensions of that silence are seldom considered. This paper adopts an interdisciplinary approach, informed by legal theory and scholarship in the performing arts, such as theatre, performance studies, and music, as a way of understanding how silence plays in the court. The paper offers a typology to navigate the interpretation of silence in legal performance—both verbal and environmental—and to frame discussion of silence's impact on the legal audience. The author concludes that silence is used and experienced in a similar way in legal and theatrical performance, namely as a means of attunement. The paper contributes new insights into the existing scholarship on acoustic jurisprudence and invites listening to the gaps in speech, the pauses, the background noise, and the silence in the court.

Keywords: silence, right to silence, law, performance, attunement

Résumé

Bien que la loi protège le droit au silence, les dimensions sensorielles et performatives de ce silence ne sont que très rarement prises en compte. Cet article adopte une approche interdisciplinaire fondée sur la théorie juridique, les études sur la performativité, la musique et les arts de la scène, comme le théâtre, afin de comprendre comment le silence a un effet dans les tribunaux. L'article propose une typologie sur l'interprétation du silence dans les performances juridiques—qu'elles soient verbales ou environnementales—et pour encadrer la discussion par rapport à l'impact du silence sur le public juridique. L'auteure conclut que le silence est utilisé et vécu de la même manière dans les représentations juridiques et théâtrales, à savoir comme un moyen d'harmonisation. L'article contribue à l'élaboration de nouvelles connaissances en jurisprudence acoustique et invite à écouter les lacunes dans le discours, les pauses, le bruit de fond et le silence dans les tribunaux.

Mots clés : le silence, droit au silence, droit, performance, harmonisation

Prologue

In the transcript of *R v Hickey*, a murder trial in the Australian state of New South Wales, sits forty seconds of silence.¹

[Pause for forty seconds]

That silence could be sustained for a full forty seconds during trial struck me in reading this portion of the trial transcript. The transcript does not pause; its text carries on. Yet this pause was present in the live performance. I have invited you to recreate that courtroom experience so that you could feel it and practice it for yourself. We cannot know what that silence felt like; we only read it and recreate it *ex post facto*. Silences of varying lengths are always present in live performance, legal or otherwise; their shape and contours incapable of being captured in the (tran)script beyond that of a textual direction like that above.

Perhaps the most famous silence in performance is John Cage's *4'33"*, wherein the performer enters the stage but does not play their instrument for four minutes and thirty-three seconds.² In this work, Cage invites the audience to listen to and in silence. Whilst Cage is regarded as a musical composer, he was a true interdisciplinarian, influenced by artist Robert Rauschenberg whose work *White Paintings* (Figure 1), a series of canvases in solid white, formed the background to one of Cage's first "happenings" or performance art events, *Theatre Piece*.³ Rauschenberg's work may be regarded as a pictorial representation of the sound of silence. Within the work, Rauschenberg reverses positive and negative space so that the negative space becomes the central content, finding presence in absence, which is what Cage sought to do in his work. There have been many words written about Cage's silent work, but most salient is composer Kyle Gann's conclusion that *4'33"* requires "a new approach to listening."⁴ For listening demands that we hear silences, not simply voices;⁵ that we attune ourselves to the gaps in speech, the background noises and the silence in the court.

Juxtaposing a legal case to an artistic performance hints at the interdisciplinary approach that informs this paper. Despite calls at the turn of this century for law to be reconceptualized as a performing art,⁶ law and performance is still an emerging field of scholarship. The "performative turn" has been apparent in social

¹ Noted in Julie Stubbs and Julia Tolmie, "Race, Gender, and the Battered Woman Syndrome: An Australian Case Study," *Canadian Journal of Women and the Law* 8 (1995), 149.

² The length of the work is the average length of canned music or muzak pieces, popularized over the first part of the twentieth century. Cage was vocally resistant to muzak and its intrusion into public spaces, such as elevators, public transport, and the suspension of broadcasts. See Dennis Kurzon, "Peters Edition v Batt: The Intertextuality of Silence," *International Journal for the Semiotics of Law* 20 (2007), 301.

³ "John Cage," *The Art Story*, accessed 4 June 2018, <http://www.theartstory.org/artist-cage-john-artworks.htm>.

⁴ Kyle Gann, *No Such Thing as Silence: John Cage's 4'33"* (New Haven: Yale University Press, 2010), 11. It is worth noting here the etymological relation of audience to hearing.

⁵ Sheena Malhotra and Aimee Rowe, *Silence, Feminism, Power: Reflections at the Edges of Sound* (Basingstoke: Palgrave Macmillan, 2013), 14.

⁶ Jack Balkin and Sanford Levinson, "Law as Performance," in *Law and Literature: Current Legal Issues*, ed. Michael Freeman and Andrew Lewis (Oxford: Oxford University Press, 1999), 729.

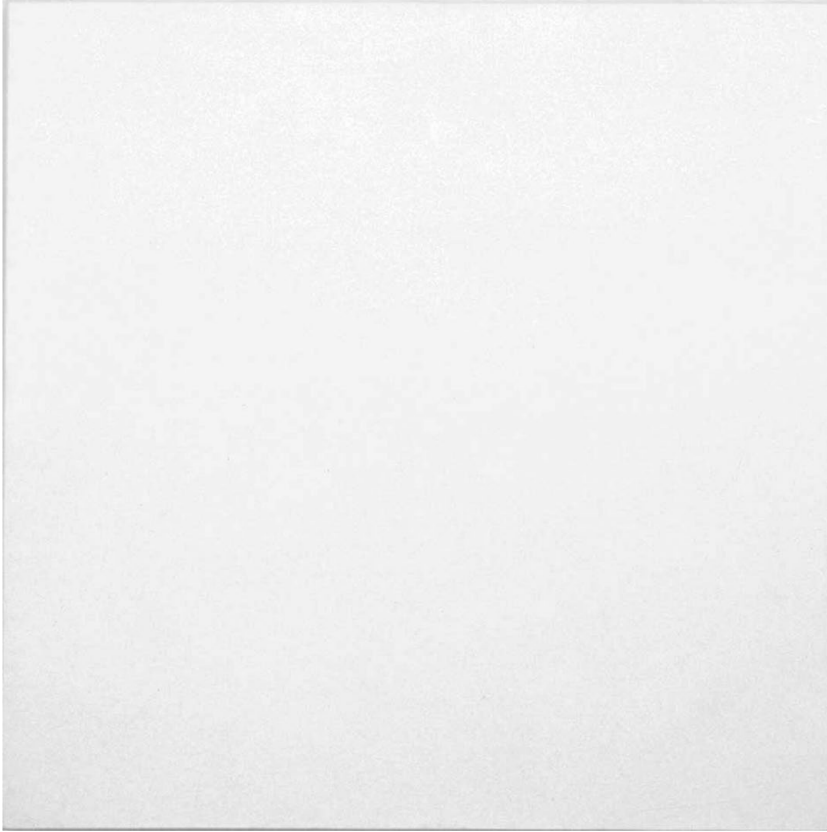


Figure 1 Robert Rauschenberg, *White Painting*, 1951; Oil on canvas; 48 x 48 inches (121.9 x 121.9 cm); Robert Rauschenberg Foundation; © Robert Rauschenberg Foundation.

sciences and humanities since midway through the last century as “performance theorists recognize the ubiquity of cultural performances, and encourage the analysis of performances in many diverse fields and disciplines.”⁷ Richard Schechner, a pioneering scholar of performance studies, argues that “theatre is but one of a complex of performance activities, which also includes rituals, sports and trials (duels, ritual combats, courtroom trials),”⁸ situating trials within the performative spectrum as theatre and ritual.⁹ As Kate Leader writes, “the metaphor of

⁷ Nicole Rogers, “The Play of Law: Comparing Performances in Law and Theatre,” *Queensland University of Technology Law and Justice Journal*, 8, no. 2 (2008), 431.

⁸ Richard Schechner, *Performance Theory* (London: Routledge, 2003), 179. See also Victor Turner, *Dramas, Fields and Metaphors: Symbolic Action in Human Society* (Ithaca: Cornell University Press, 1974).

⁹ Legal performance is readily recognized as social performance by a number of performance scholars, including Erika Fischer-Lichte, *Theatre, Sacrifice, Ritual: Exploring Forms of Political Theatre* (London: Routledge, 2005) and Dwight Conquergood, “Lethal Theatre: Performance, Punishment and the Death Penalty,” *Theatre Journal*, 54, no. 3 (2002).

trial as theatre and performance is pervasive.”¹⁰ However, the relation between law and performance has not always been comfortable. As Julie Peters explains, “law’s history is marked by an oscillation between the antinomies of theatricality and antitheatricality, in a relationship of attraction–revulsion—a kind of *fort-da*.”¹¹ Rejecting the parenthetical divide between performance and law, I try to give space for the two disciplines—legal and performance studies—to speak to each other and, in doing so, offer new insight into legal performance and, in this instance, how silence plays in the court. “Legal performance” is a term I borrow from Nicole Rogers and Julie Peters to describe the idea of court proceedings as performance.¹² As Peters describes it, configuring law as performance is “an alternative way of studying the law, more attentive to the material, affective and aesthetic textures of legal process.”¹³

The article explores the different interpretations of silence in legal performance and silence’s impact on the legal audience. I start with silence as a listening device accompanied by a discussion of what happens when the listening audience breach the silence. This leads to an exploration of silence in legal speech and, in particular, how pauses in speech can have meaning. This is followed by a move away from silence in language to silence in the environment of legal performance, exploring relatively uncharted territory away from the existing scholarship that considers silence mostly as an absence of speech. An exploration of dead and noisy silence, to use the lexicon of sound recording analysis, tests assumptions around whether silence is the right condition for legal performance. I conclude that silence is used and experienced in a similar way in legal and theatrical performance, namely as a means of attunement.

Listening to Silence

Silence is a recurring element in legal performance. There is a right to silence (which is ironically often exercised by stating it in words). There is silence in the court. Silence affects and, in particular, attunes the audience to the legal performance.

¹⁰ Kate Leader, “Closed-Circuit Television Testimony: Liveness and Truth-telling,” *Law Text Culture*, 14 (2010), 314. Other noteworthy texts on legal performance include Alan Read, *Theatre and Law* (London: Palgrave Macmillan, 2015); Peter Robson, “Theatre and Law in the Twenty-First Century” in *Cultural Legal Studies: Law’s Popular Cultures and the Metamorphosis of Law*, ed. Cassandra Sharp and Marett Leiboff (Abingdon: Routledge, 2015), 113–132; Marett Leiboff, “Theatricalizing Law,” *Law and Literature*, 30, no. 2 (2018).

¹¹ Julie Peters, “Legal Performance: Good and Bad,” *Law, Culture and the Humanities*, 4, no. 2 (2008), 198. See also Peter Goodrich, “Spectres of Law: Why the History of the Legal Spectacle has Not been Written,” *UC Irvine Law Review* 1, no. 3 (2011), 808. This is discussed further in Julie Stone Peters, “Law as Performance: Historical Interpretation, Objects, Lexicons, and Other Methodological Problems,” in *New Directions in Law and Literature*, ed. Elizabeth Ankle and Bernadette Meyler (New York: Oxford University Press, 2017), 193–209.

¹² Rogers, “The Play of Law”; Peters, “Legal Performance Good and Bad.” I should note that my focus is on performance and theatricality in the court, rather than performativity of the kind discussed by John Austin in his theory of speech acts. Parker’s critique of Austin is that his focus on performative utterances ironically tends to ignore the performative dimensions of speech: James Parker, *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (New York: Oxford University Press, 2015), 121. “Legal performance” could also capture performances in law-making chambers, legal offices, and other arenas that are subject to legal regulation.

¹³ Peters, “Law as Performance: Historical Interpretation,” 196. To that, it might be added the creative and dramatic elements of legal process.

Thus it deserves listening to; both listening “causally” to obtain information about its context and “semantically” to obtain information about its meaning.¹⁴ Distilling the nature of silence is difficult. In his seminal work, *Acoustic Jurisprudence*, legal scholar James Parker argues that to do so “depends on quite a refined sense of legal oratory, one that is as sensitive to its rhythms and ellipses as its content.”¹⁵ Silence is much more open to interpretation than words, and yet this article cannot but reduce the phenomenon to words.¹⁶ As sociolinguist Adam Jaworski writes, “paradoxically... its study is only possible when it is broken.”¹⁷

Despite the many words written on the right to silence, silence as a political act or right,¹⁸ silence as a virtue, and silence as a spiritual zen,¹⁹ few scholars consider courtroom silence in its aesthetic sense. In searching for an understanding of the aesthetic dimension of silence in legal performance, we can here turn to performance scholars. As actors well know, silence can be filled with action and unspoken dialogue as much as words or noise can.²⁰ Indeed, as legal scholar Gary Watt comments, “silence is so much more eloquent than words very often”²¹ and, as Bret Rappaport suggests, “can be more persuasive than the speech that surrounds it.”²² Watt goes on to suggest that in deploying silence in legal performance, lawyers need the knowledge and awareness of theatrical actors.²³ I propose to adopt this view by suggesting that legal performers can learn from theatrical performers in this respect.

In legal studies, unlike in theatre and performance studies, we seldom exercise our conscious capacity to attune ourselves to the various ways in which silence can be meaningful. To riff off Simon and Garfunkel, comprehending the sound of silence requires a deep listening that goes beyond hearing, and yet, ironically, hearing is the word used to describe many legal proceedings.²⁴ Understanding the significance of silence to legal performance is an ongoing project²⁵ and one that

¹⁴ James Parker, “Gavel,” in *International Law’s Objects*, ed. Jessie Hohmann and Daniel Joyce (Oxford: Oxford University Press, 2018).

¹⁵ Parker, *Acoustic Jurisprudence*, 205–206.

¹⁶ Susan Sontag, *Styles of Radical Will* (London: Secker & Warburg, 1969), 22–23; John Pratt, “Mind the Gap: An Examination of the Pause in Modern Theatre” (PhD diss., Edith Cowan University, 2012), 88. I am reminded of Hamlet’s flippant dismissal of “words, words, words” (*Hamlet*, II.ii.183).

¹⁷ Adam Jaworski, *Silence: Interdisciplinary Perspectives* (Berlin: Mouton de Gruyter, 1997), 381, 392. See also the comment of Simone Voegelin that “when I am talking [about silence], the very thing I am describing is erased by my voice”: *Listening to Noise and Silence: Towards a Philosophy of Sound Art* (New York: Continuum, 2010), 90.

¹⁸ See, e.g., Malhotra and Rowe, *Silence, Feminism, Power*, 13; Basak Ertur, “Matters of Silence,” *Law and Literature Review* 18, no. 2 (2012), 148.

¹⁹ See, e.g., Nam June Paik’s work *Zen for Film*, <https://vimeo.com/11271804>.

²⁰ Quoted in Pratt, “Mind the Gap,” 55.

²¹ Quoted in Sean Mulcahy, “Acting Law | Law Acting: A Conversation with Dr Felix Nobis & Prof Gary Watt,” *Exchanges* 4, no. 2 (2017), 193.

²² Bret Rappaport, “‘Talk Less’: Eloquent Silence in the Rhetoric of Lawyering,” *Journal of Legal Education* 67, no. 1 (2017), 289.

²³ Quoted in Mulcahy, “Acting Law | Law Acting,” 194.

²⁴ Jean-Luc Nancy suggests that listening may entail a greater sense of comprehension and sensorial appreciation than mere hearing may: *Listening* (New York: Fordham University Press, 2007), 63. See also Peter Szendy, *Listen: A History of Our Ears* (New York: Fordham University Press, 2008), 141.

²⁵ Biber, “How Silent is the Right to Silence?” 163.

requires us to listen. Really listen. In so doing, it requires those within legal performances to develop attunement practices and a mode of embodied listening, which may be foreign to practitioners of the law.²⁶

Embodied Attunement

In *Justice as Attunement*, legal scholar Richard Dawson argues that attunement is at the heart of doing justice.²⁷ Though Dawson does not provide a strict definition, attunement in legal performance may mean orienting oneself or paying close attention to meaning.²⁸ Similarly, fellow legal scholar Sara Ramshaw in her work on justice and improvisation argues that attunement to what is beyond the determinate is necessary for law's operation,²⁹ and that the act of listening in law and performance "demands attunement."³⁰ Attunement entails an "intense form of commitment and responsibility to—as well as interaction with—all that surrounds: people, environments, nature and the sounds of daily life."³¹ This kind of spatial attunement is well captured in anthropologist Kathleen Stewart's notion of "atmospheric attunement," which she describes as "an intimate, compositional process of dwelling in spaces."³² Stewart describes attunement as "absorption, a serial immersion in little worlds... attending to what might be happening"³³ and a mode of engagement through bodies in space.³⁴ The legal and broader scholarly engagement with the notion of attunement suggests that it entails both a self-focused orientation or attention and an outwardly-focused orientation to that which surrounds.

The attunement process of silence, I wager, thus has two stages to it. First, the silence creates focus or attention; then, it disperses that attention to the

²⁶ On law and the body, see Marett Leiboff, "Towards a Jurisprudence of the Embodied Mind: Sarah Lund, *Forbrydelsen* and the Mindful Body," *Nordic Journal of Law and Social Research* 2, no. 6 (2015), 82–87.

²⁷ Richard Dawson, *Justice as Attunement: Transforming Constitutions in Law, Literature, Economics and the Rest of Life* (Abingdon: Routledge, 2014), 5.

²⁸ Ibid, xvii, though noting that meaning itself "is in constant motion." Peter Goodrich notes that "attunement" suggests popular music (tune), electronics (tuning to frequencies of wavelengths which are unseen but observable by other means), psychological or social concentration (attuned, or sensitive to something unobservable), and transpersonal or religious ecstasy (at-one-ment)": "The New Age Man: Merlin as Contemporary Occult Icon," *Journal of the Fantastic in the Arts* 5, no. 1 (1992): 62. A similar discussion of the multiple meanings and etymologies of attunement can be found in Lisbeth Lipari, *Listening, Thinking, Being: Toward an Ethics of Attunement* (University Park: Pennsylvania State University Press, 2014), 206–207. I am grateful to Sara Ramshaw for bringing this latter work to my attention.

²⁹ Sara Ramshaw, *Justice as Improvisation: The Law of the Extempore* (Abingdon: Routledge, 2013), 41, 82, citing Peter Fitzpatrick, "Access as Justice," *Windsor Yearbook of Access to Justice* 23, no. 1 (2005), 9, and Peter Fitzpatrick and Richard Joyce, "Copying Right: Cultural Property and the Limits of (Occidental) Law" in *New Directions in Copyright Law: Protection of Traditional Knowledge and Culture*, ed. Fiona Macmillan (Cheltenham: Edward Elgar, 2007), 173.

³⁰ Ramshaw, *Justice as Improvisation*, 89.

³¹ Daniel Fischlin and Ajay Heble, *The Other Side of Nowhere: Jazz, Improvisation, and Communities in Dialogue* (Middletown: Wesleyan University Press, 2004), 11, quoted in Ramshaw, *Justice as Improvisation*, 89. See also F. Smith, *The Experiencing of Musical Sound: Prelude to a Phenomenology of Music* (New York: Gordon & Breach, 1979), 17–18.

³² Kathleen Stewart, "Atmospheric Attunements," *Environment and Planning D: Society and Space*, 29 (2011), 445. I am grateful to Stacy Jones for bringing this work to my attention.

³³ Ibid, 449.

³⁴ Cf. Shigenori Nagatomo, *Attunement Through the Body* (Albany: State University of New York Press, 1992), 195.

background noise. Seth Kim-Cohen captures this well in his account of Pauline Oliveros's notion of "deep listening" or attuning to the sound-in-itself in contrast to his notion of "surface listening" or attuning "to encompass adjacent concerns and influences."³⁵ However, these listening practices need not be distinct or strictly sequential. As actor trainer Phillip Zarrilli describes, attunement is the ability to *both* "inhabit one's body-mind and remain sensorially and perceptually alert" to "the performance environment."³⁶ In the moment of attunement created by silence, one is thus both inwardly focused and also publicly aware of or alert to the surrounding environment.³⁷ Zarrilli goes on to argue that attunement creates "a state of fuller attentiveness," in which one is alert to one's surroundings and prepared to react to stimuli.³⁸ In attunement, one is present and alive to stimulation. The other senses become elevated and responsive to the surrounding environment.³⁹ One can drop out of attunement when one's attention is diverted.⁴⁰ Conversely, attunement can return in a snap moment of arrest or "habitual pause in a tempo,"⁴¹ like the silence that breaks voice or noise. Zarrilli, who is famous for his psychophysical actor training method draws in part from philosopher Shigenori Nagatomo,⁴² whose work *Attunement Through the Body* advances the idea that attunement is a "somatic knowing between the personal body and its living ambience."⁴³ Attunement is thus an embodied practice, not an experience purely of the mind. Zarrilli's notion of the "body-mind" captures this anti-dualism. Breathing and emotion can give rise to a heightened sense of attunement;⁴⁴ as can stillness, which theatre-maker Anne Bogart suggests creates spatial awareness and attention to others within space.⁴⁵

I recall a time being locked in an anechoic hearing test chamber, striving to hear, trying to tune into sound in a space of silence. As author Meghan O'Rourke writes, "to hear ourselves, we sometimes have to flee ourselves, diving into silence until we're comfortably alone with the noise within."⁴⁶ Silence provides a moment

³⁵ Seth Kim-Cohen, *Against Ambience and Other Essays* (New York: Bloomsbury, 2016), 134. I am grateful to James Parker for bringing this work to my attention.

³⁶ Phillip Zarrilli, "An Enactive Approach to Understanding Acting," *Theatre Journal* 59, no. 4 (2007), 646.

³⁷ Meghan O'Rourke, "The Noise Within," *New York Times Style Magazine*, 12 November 2017, 149. For a further discussion of the concept of the "body-mind" see Phillip Zarrilli, "Toward a Phenomenological Model of the Actor's Embodied Modes of Experience," *Theatre Journal* 56, no. 4 (2004), 661–64.

³⁸ Phillip Zarrilli, "Senses and Silence in Actor Training and Performance," in *The Senses in Performance*, ed. Sally Banes and Andre Lebecki (New York: Routledge, 2007), 61.

³⁹ *Ibid.*, 61–62.

⁴⁰ *Ibid.*, 62.

⁴¹ Stewart, "Atmospheric Attunements," 452. See also, in relation to musical improvisation, Ramshaw, *Justice as Improvisation*, 61–62, 67.

⁴² Zarrilli, "Senses and Silence in Actor Training and Performance," 67.

⁴³ Nagatomo, *Attunement Through the Body*, 196.

⁴⁴ *Ibid.*, 203.

⁴⁵ Anne Bogart and Tina Lindau, *The Viewpoints Book: A Practical Guide to Viewpoints and Composition* (New York: Theatre Communications Group, 2005), 70–71, 114. The relation between silence and stillness is also discussed in Murray Schafer, *The Soundscape: Our Sonic Environment and the Tuning of the World* (Rochester: Destiny Books, 1977), 254. This observation also has resonances with the work of theatre-maker Jerzy Grotowski on the body.

⁴⁶ O'Rourke, "The Noise Within," 149.

to hear oneself.⁴⁷ In the chamber, I attuned in to my body, not only the noise within but how silence *felt* (slight goose bumps on my skin) and *tasted* (slight metallic taste in my mouth).⁴⁸ These sensory manifestations are linked to anxiety and may express the fear that I felt in being in this dark, quiet, claustrophobic space.⁴⁹ In moments of silence, other senses beyond the hearing are elevated. There is a truly multi-sensory experience to silence. Author George Prochnik suggests that “silence is for bumping into yourself.”⁵⁰ In silence, I reacquainted myself with my body. The absence of voice calls attention to the body—its facial configurations, sweat, movement, etc.—and invites the audience to read the body. For example, a pause in testimony at the recent defamation trial concerning the actor Geoffrey Rush called attention to the testifier’s head turn.⁵¹ From tuning in to my body, I then tuned out to the sounds in the space around me, minute as they may be.⁵² The quietness enhanced my perception and enabled me to hear more acutely.⁵³ I was more connected to my acoustic surroundings; even the most innocuous of noises became something of interest.⁵⁴ Silence attunes one both internally (to the body) and externally (to the space).

Verbal Silence

In almost all legal performances, there is silence as a speaker—I shall refer to them as an actor, as they are not always speaking—speaks. It is worth noting audience is not a static concept in legal performance. There are many legal actors who play the role of audience at some point. The common law judge is audience during most proceedings but then a powerful actor at their end, as is the jury. The lawyers oscillate between acting and spectating. The testifier is the archetypal “poor player that struts and frets his hour on the stage and then is heard no more” receding, if they please, to the gallery.⁵⁵ The public gallery is certainly an audience to the proceedings, but at times acts within them as they stand to welcome the judge.

This form of silence between actor and audience may be referred to as *conversational or floor-sharing silence*, where the actor speaks and the audience are silent except for certain non-verbal reactions such as laughing, clapping, and mmhmm-ing that let the actor know they have been heard. A particularly amusing example

⁴⁷ Voegelin, *Listening to Noise and Silence*, 79.

⁴⁸ Voegelin feels that silence “enters me and pulls on me, inside out, stretching my nervous system through thin layers of skin, hooking my inner flesh to the very outskirts of my body”: *Listening to Noise and Silence*, 86.

⁴⁹ It may have also been the confined space that triggered this taste of anxiety. The link between silence and terror, fear and other heightened emotional states is discussed further in Schafer, *The Soundscape*, 256; Voegelin, *Listening to Noise and Silence*, 85.

⁵⁰ George Prochnik, *In Pursuit of Silence: Listening for Meaning in a World of Noise* (New York: Doubleday, 2010), 27.

⁵¹ Lane Sainty, “Geoffrey Rush Accuser Eryn Jean Norvill Brings Calm to a Courtroom Drama,” *Buzzfeed*, 3 November 2018, <https://www.buzzfeed.com/lanesainty/eryn-jean-norvill-testimony-geoffrey-rush-defamation>.

⁵² Voegelin, *Listening to Noise and Silence*, 117–18.

⁵³ *Ibid.*, 85.

⁵⁴ Sontag, *Styles of Radical Will*, 13; Lyn Gardner, “Silence that Speaks Volumes in the Theatre,” *The Guardian*, 4 June 2010, <https://www.theguardian.com/stage/theatreblog/2010/jun/03/silence-in-theatre?>

⁵⁵ *Macbeth* V.v.2381–2383.

of this is in the proceedings of *Eight Mile Style v New Zealand National Party*, a copyright infringement case where the entire court sits in silence to listen to Eminem's *Lose Yourself*.⁵⁶ In watching the video footage of this moment of trial, one can see the discomfort and perhaps even bemusement in the audience—the intrusion of song into the legal soundscape is foreign⁵⁷—but nonetheless the convention of conversational silence is maintained, albeit the actor's words are pre-recorded music coming through a laptop.

Legal linguist Dennis Kurzon argues that there is here a contract between speaker and listener, that one is silent while the other speaks.⁵⁸ For a listener to break silence while another is speaking is to breach that contract, and the possibility of breach lends a powerful potency to the performance. This is well depicted in the proceedings of *R v Johnson*, where, during the trial, the accused interrupted the speaker by variously breaking out in bird and animal noises and a rendition of Tag Team's *Whoomp! (There It Is)*.⁵⁹ The disruption of the convention of conversational silence is an act of violent defiance and arguably leads the performance into catastrophe. What is significant in this moment is that the audience are breaking the "fourth wall," the invisible barrier that separates the audience from the actors, which is (for the most part) firmly entrenched in legal and theatrical performance spaces. The accused are both breaking the fourth wall and breaking the contract of conversational silence.

Just as there is audience silence, there is also the silence of the actor in legal performance; in particular, *meaningful silence*, where something is being thought but not heard.⁶⁰ This might occur where a witness pauses to consider an answer or where a judge pauses to contemplate documents or when the court pauses to look at images in evidence or when a lawyer pauses to allow their words to sink in.⁶¹ Theatre critic Lyn Gardner observes that, in moments of silence in the theatre, "the audience holds its breath"⁶² and it feels like time slows. Silence slows time or, rather, time in silence feels longer. In this moment, the actor's—and audience's—sensations are heightened. The actor can feel the gaze of their audience, and the audience hold their breath with a palpable feeling of anticipation for what is to come next.

To apply this theatrical understanding of pause to the legal performance, let's examine the sabotage trial of Nelson Mandela wherein the defendant made his now famous "I Am Prepared to Die" speech from the dock. Reflecting on the finale of his speech, Mandela observed:

⁵⁶ "Eminem's 'Lose Yourself' Played for Lawyers, Judge in New Zealand Court," Newshub, published 2 May, 2017, <https://www.youtube.com/watch?v=8HuLcgwwTo8&t=95s>.

⁵⁷ Parker, *Acoustic Jurisprudence*, 91.

⁵⁸ Kurzon, "The Intertextuality of Silence," 288–90.

⁵⁹ As documented in the contempt of court judgment, *DPP v Johnson* [2002] VSC 583 (20 December 2002) [32]–[34], [46].

⁶⁰ Parker, *Acoustic Jurisprudence*, 205; Kurzon, "The Intertextuality of Silence," 291–92; Pratt, "Mind the Gap," 56.

⁶¹ In reality television, there will often be a significant pause before a decision is handed down. In *Ru Paul's Drag Race*, hostess-cum-judge Ru Paul commands "Silence!" of her fellow judges at the completion of deliberations and before the drag queens are brought in for judgment. See also Mladen Dolar, *A Voice and Nothing More* (Cambridge: MIT Press, 2006), 157.

⁶² Gardner, "Silence that Speaks Volumes in the Theatre."

I had been reading my speech, and at this point I placed my papers on the defence table, and turned to face the judge. The courtroom became extremely quiet. I did not take my eyes off Justice de Wet as I spoke from memory the final words... The silence in the courtroom was now complete. At the end of the address, I simply sat down. I did not turn to face the gallery, though I felt all their eyes on me. The silence seemed to stretch for many minutes. But in fact it probably lasted no more than thirty seconds.⁶³

Here the actor, Mandela, commands the stage and, perhaps more importantly, commands the silence. His gestures—placing papers on a table, turning to face the judge—demand a silence in the courtroom, a silence that is completed through his act of ending speech and sitting. Meanwhile, his audience sit in silence, taking a moment to attune to what has been said and its impact in the court space. In this moment, “silence uses the listener as a tool of the orator instead of just as a passive audience member... [The] silence is powerful because it penetrates the listener’s mind by giving meaning to what was already heard.”⁶⁴ The audience become participatory in the shared silence, lending it even greater power.

The silence is then broken, as Mandela describes:

Then from the gallery I heard what sounded like a great sigh, a deep collective “ummmm,” followed by the cries of women... Justice de Wet, as soon as there was order in the courtroom, asked for the next witness. He was determined to lessen the impact of my statement.⁶⁵

Here the actor’s silence is broken by three sounds—the audience’s hum, cries, and another actor’s words. The cries can be read as an emotional reaction to the actor’s words and are a significant non-verbal act in their own right, but the hum and judge’s words interest me more. I suggest that both are ways of processing this silence. The hum may be read as a release of tension that has built up during the silence but also an attempt to bring noise back to the courtroom where words could not suffice to respond to this powerful silence. Justice de Wet’s words, on the other hand, are a means of cutting through the impact of the defendant’s statement, but also cutting the impact of the silence that follows. The question can be asked: “Did Justice de Wet seek to use the next witness to silence either Mandela’s words or the silence just after them?”⁶⁶ I suggest here that Justice de Wet’s interruption sought to do both. Ironically, the judge used words to silence the silence, silencing through noise. The noise of the audience and, in particular, the judge thus served to make the moment of silence all the more powerful, in turn raising questions of what is more powerful or disruptive—holding or breaking silence.⁶⁷

Of course, not all silence in legal performance has the power or intentionality of Mandela’s. There is also “the *anxious silence* you get when an actor forgets his

⁶³ Nelson Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela* (London: Little, Brown & Co, 1994), 354, quoted in Dawson, *Justice as Attunement*, 228.

⁶⁴ Rappaport, “Talk Less,” 289.

⁶⁵ Mandela, *Long Walk to Freedom*, 354, quoted in Dawson, *Justice as Attunement*, 228.

⁶⁶ Dawson, *Justice as Attunement*, 228.

⁶⁷ Malhotra and Rowe, *Silence, Feminism, Power*, 13.

or her lines⁶⁸ and goes searching for words⁶⁹ or stumbles crudely over a line or is delayed in acting due to technical problems such as a jarring video-link. An example of this kind of silence is Lord Neuberger's delivery of the Brexit judgment wherein His Honour said, "The issue in these proceedings have [sic] nothing to do, ah, with whether the UK should exit from the EU," pausing after "proceedings" and briefly at the "ah" perhaps realising he has misused "issue" in the place of "issues" (and thus "have" in the place of "has") but unable to correct what has been spoken without further embarrassment. The break in speech is ostensibly to allow the actor to pause, collect himself and attune back into what he is to say. The interruption of sound—temporally much sharper than a pause for effect—also shocks the audience back into sensation. Sontag argues noise perforates silence, but in this instance silence perforates noise.⁷⁰ There is also *silence for effect*, the separation out of words or actions for emphasis,⁷¹ thus "furnishing or aiding speech to obtain its maximum integrity or seriousness."⁷² An actor will know that an intelligent use of pause lends greater presence. To quote Mladen Dolar, "silence works as the efficient support which endows the few chosen words with their proper weight."⁷³ Pauses are common in phrasing and used to effect by skilled rhetoricians.⁷⁴ It allows the audience a short space to comprehend what has been said and to ascribe meaning to it.

Silence creates tension as noise is momentarily suspended, but it also allows the audience to break and reattune,⁷⁵ what is said to sink in, and the actor to test their reception.⁷⁶ Actor and storyteller Felix Nobis says:

I think [silence] can speak, it can recalibrate the listener, it can give the listener opportunity to find themselves within the story... It's a matter of timing, tuning in to the audience and then finding a moment to... break the tension... There's an element of orchestrating that suspension of tension and then pulling it back.⁷⁷

It is interesting, in this passage, that Nobis deploys musical metaphors to discuss the actor's control over silence. The actor is "tuning" into the audience and "orchestrating" the deployment of silence. There is a level of artistry to what the legal performer does (and this is certainly evident in Mandela's performance

⁶⁸ Gardner, "Silence that Speaks Volumes in the Theatre" (emphasis added). See also Pratt, "Mind the Gap," 57.

⁶⁹ Pratt, "Mind the Gap," 11.

⁷⁰ Sontag, *Styles of Radical Will*, 11. See "Article 50 'Brexit' Cases," UK Supreme Court, published 24 January 2017, https://www.youtube.com/watch?v=Q6YcixV_0Sc&feature=youtu.be&t=108

⁷¹ Pratt, "Mind the Gap," 78. See also Rappaport, "Talk Less," 299–300.

⁷² Sontag, *Styles of Radical Will*, 20.

⁷³ Dolar, *A Voice and Nothing More*, 154.

⁷⁴ For example, radio talk show host Rush Limbaugh complained strongly when pauses were cut from his radio broadcast against his will. See Alex Kuczynski, "Radio Squeezes Empty Air Space for Profit," *The New York Times*, 6 January 2000. I am grateful to Christina Spiesel for bringing this to my attention. See also the discussion of radio silence in Voegelin, *Listening to Noise and Silence*, 114.

⁷⁵ Pratt, "Mind the Gap," 70; Mulcahy, "Acting Law | Law Acting," 194.

⁷⁶ Pratt, "Mind the Gap," 57.

⁷⁷ Quoted in Mulcahy, "Acting Law | Law Acting," 194. Composers describe silence in a similar way. See Julie Sutton, "The Pause that Follows: Silence, Improvised Music and Music Therapy," *Nordic Journal of Music Therapy* 11, no. 1 (2002), 30. See also the discussion of how actors and comedians time and charge their pause in Pratt, "Mind the Gap," 57–65.

discussed above). It is, as Nobis describes, “a matter of timing.” However, against the discussion of Mandela’s silence as a moment of tension that is broken by the hum of the audience and words of the judge, Nobis inverts this idea to suggest that it is the words of performance that create tension in the audience and the silence of the actor that operates as a circuit-breaker, a space for “the audience to move or to cough if they’ve been holding that in for that long.”⁷⁸ Silence in performance operates in a dimorphic sense: it can both create and ease tension in the audience and the actor. Thus silence has a beneficial effect on the legal audience and offers them an opportunity to connect to what is being said, particularly so given the complexity of legal language.

Here it might be useful to distinguish between silence and pause in performance as a way to explore this dimorphism. A pause is a temporary hold or break; silence has a degree of permanence.⁷⁹ It is the temporality or timing that differentiates the two. Dashes, ellipses, full stops and commas are all means of capturing pauses—or breaks—in theatrical and legal scripts (transcripts, judgments, etc.), whereas silences are usually indicated by a separate stage direction. An actor will typically count out the length of a pause or silence in beats, and there will be a noticeable difference in the number of beats between the two. Beats separate silence from pause; it is the length that creates discomfort.⁸⁰ The difference between pause and silence in theatre is that “the pause punctuates the speech, or sets the pace; the silence operates as a theme, or a shift between themes.”⁸¹ A pause suggests action will continue; a silence holds no such promise but perhaps a change in the direction of the action.⁸² In the performance at Mandela’s trial, the audience sit in silence for thirty seconds—which, as experienced in the pause at the commencement of this paper, is quite a long time—but then, perhaps uncertain of when or whether this silence could end, break into noise as the tension induced by such long silence could not possibly be sustained. A similar reaction occurred during performance artist Laurie Anderson’s performance of *Violin Solo* where, during a pause of fourteen seconds, some of the audience laughed nervously and clapped, seemingly uncertain whether the piece had finished.⁸³ If poorly executed, it is possible to experience *tedious silence*, where the pause lapses into *longueur*.⁸⁴ In such moments, silence drags time and the audience’s impatience manifests as restlessness. Indeed, much of the legal performance is spent in this kind of silence—long breaks in proceedings, pauses to read, waiting for equipment to be set up. In this sense, it might be said that silence is the condition *de jure*.

Environmental Silence

The discussion so far has focused principally on voice. Silence in legal performance is not merely the absence of speech; there are other types of silence

⁷⁸ Quoted in Mulcahy, “Acting Law | Law Acting,” 194.

⁷⁹ Pratt, “Mind the Gap,” 12, 29–30.

⁸⁰ The same sort of idea exists in musical composition. See Ramshaw, *Justice as Improvisation*.

⁸¹ Biber, “How Silent is the Right to Silence?,” 163.

⁸² Pratt, “Mind the Gap,” 30, 68–70; Mulcahy, “Acting Law | Law Acting,” 194.

⁸³ Jaworski, *Silence*, 22.

⁸⁴ Pratt, “Mind the Gap,” 57.

outside the rhetorical. Thus it is fitting to branch out to focus on other sounds in the courtroom and into the spatialization of silence. In *Acoustic Jurisprudence*, Parker refers to the International Criminal Tribunal for Rwanda's Audio-Visual Redaction Manual, which lists different types of silence to determine which should be redacted from audio transcripts of tribunal proceedings. The first of these is *dead silence*, where there is no noise or sound.⁸⁵ An example of this may be where a tape was recording while the audio was not on in the courtroom. Musician Mike Batt's work *A One Minute Silence*, which is a recorded minute of silence and is distinguishable from Cage's 4'33" as no background noise can be heard in the recording, may be another example. However, whether one can truly experience dead silence is debatable, as discussed further below.

There is also *noisy silence*—a seeming contradiction in terms—where background noises can be heard whilst nothing is said.⁸⁶ Silence and noise are seemingly antithetical, but silence can often expose noise. This is explored in lawyer-turned-artist Jack Tan's work *Waiting for Hearing to Begin* (Figure 2), the title of which plays on the notion of hearing as both a legal process and an auditory experience. The work is a printed textile score and choral recording that "demonstrates the sounds heard in a courtroom prior to the entry of the judge. General chatter, footsteps, doors creaking, pens dropping, bangs and other background noises." In *Acoustic Justice*, a series of performances, presentations and experiments curated by James Parker and artist Joel Stern (Figure 3), a stenographer captures this noisy silence in words—"coughing," "restlessness," etc. Parker describes how "the constant hum of strip-lighting, air-conditioning units, and computer fans... [anchor the audience in] a very particular kind of institutional space and mode of life."⁸⁷ It is interesting that these "noisy silences" are rarely transcribed in the records of legal proceedings, though the video recording and transmission of legal proceedings allows us to attune to these different noises.

In the courtroom, noise is inescapable. To quote Cage, "there is no such thing as silence. Something is always happening that makes a sound."⁸⁸ Cage invites his reader to listen to "the sounds that happen to be in the environment" for "there is always something to see, something to hear" in any space.⁸⁹ There is always the background noise in space which, when given attention, is transformed from the mundane to the extraordinary, from the background to the fore.⁹⁰ Indeed, "in any present moment there is always something to attune to."⁹¹ Even when listening to a blank recording, such as Batt's *A One Minute Silence*, or when waiting for a legal performance to begin, one can still hear

⁸⁵ Parker, *Acoustic Jurisprudence*, 205.

⁸⁶ Ibid; Kurzon, "The Intertextuality of Silence," 290.

⁸⁷ Parker, *Acoustic Jurisprudence*, 183.

⁸⁸ John Cage, *Silence: Lectures and Writings by John Cage* (London: Boyars, 1978), 191.

⁸⁹ Ibid, 8.

⁹⁰ Dawson, *Justice as Attunement*, 28.

⁹¹ Stewart, "Atmospheric Attunements," 451.

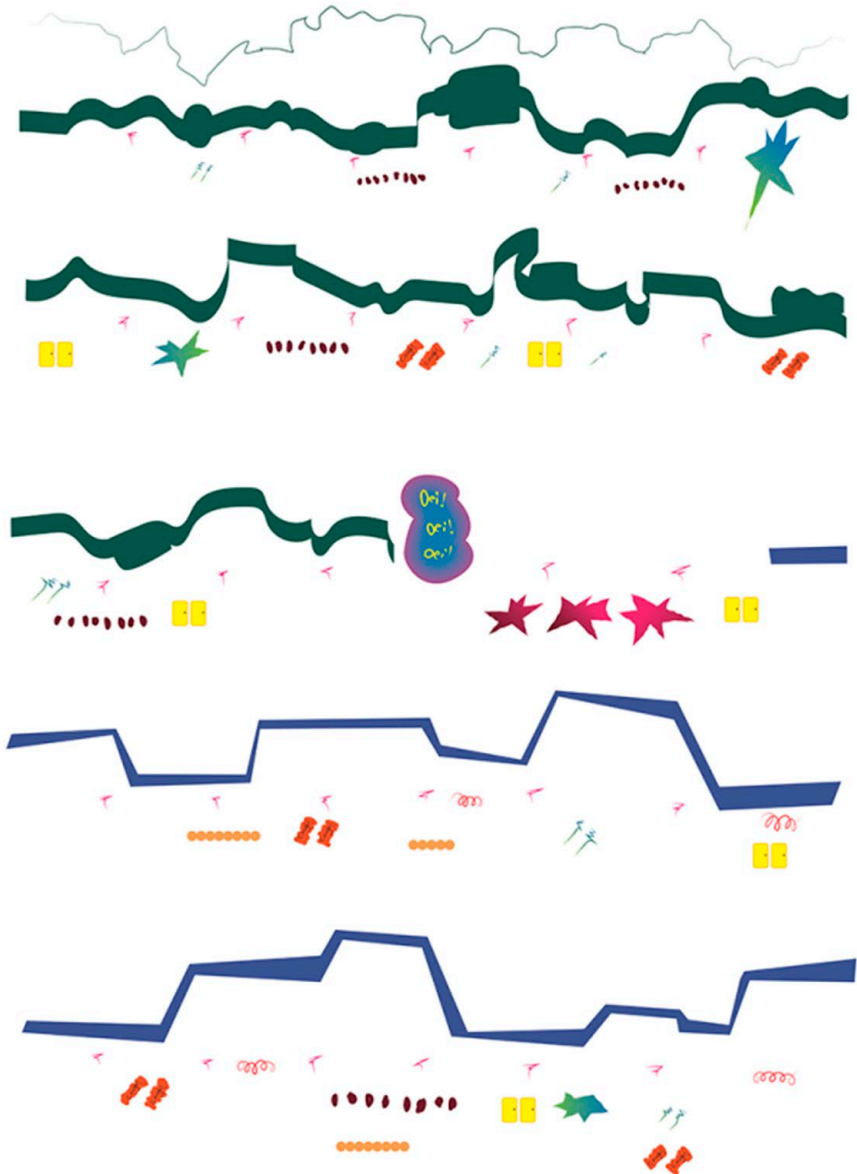


Figure 2 Jack Tan, *Hearings (Waiting for hearing to begin)*, 2016.

noises in the listening environment. A blank canvas or an empty space is still filled with meaning.⁹² A performance “space is never empty... [but] filled with invisible tensions.”⁹³

⁹² Peter Brook, *The Empty Space* (London: Penguin, 2008).

⁹³ Pratt, “Mind the Gap,” 3.



Figure 3 Sean Dockray, *Acoustic Justice*, Liquid Architecture, 2017; Federal Court of Australia, Melbourne. Photo: Keelin O’Hehir.

Retired Australian High Court Justice Michael Kirby describes a space of silence as “the right situation” for court proceedings.⁹⁴ While most courts try to block out environmental noise and create a condition of silence through architectural devices such as glazed windows or insulation, others are re-embracing environmental noise, which was always present in historical and indigenous courts. The Neighbourhood Justice Centre in Collingwood, Australia, for example, is deliberately designed to allow people in court to hear the sounds of children playing in the nearby schoolyard.⁹⁵ In an article on the Centre’s website, a visitor during a court tour describes, “While some might say that you shouldn’t be able to hear outside noise, that it’s distracting, the sound of normal life is a reminder that the court is part of, not separate to, the life of the community.” Moments of silence in legal performance at the Neighbourhood Justice Centre allow the audience to attune to the outside and recognize the connection of law to its community. Of course, such sound bleed can also distract from the legal proceedings and, further, undermine the court’s solemnity.⁹⁶ Environmental noises outside the court offer a provocative challenge to the authority of the court, whereas other environmental

⁹⁴ Quoted in Kat Crossley, “Working Hardly: Random Facts about the Gavel,” *Survive Law* (blog), 12 September 2012. See also Parker, *Acoustic Jurisprudence*, 133. This can be contrasted to the noisiness of other justice spaces, such as prisons. Indeed, there is “an auditory spatial disjuncture between courtroom and prison space”: Carolyn McKay, *The Pixelated Prisoner: Prison Video Links, Court “Appearance” and the Justice Matrix* (Abingdon: Routledge, 2018), 79.

⁹⁵ See also Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Abingdon: Routledge, 2011), 29–31.

⁹⁶ McKay, *The Pixelated Prisoner*, 79–80.

noises within the court such as computer fans and strip lighting instantiate the court's position within the bureaucratic sphere of the state.

Through his work, Cage makes environmental noise an object of art. Gann describes 4'33" as "an act of framing, of enclosing environmental and unintended sounds in a moment of attention."⁹⁷ Silence frames sound and sound frames silence.⁹⁸ Cage's silence is thus a tool for the creation of a "listening space"—a space for concentration and attunement.⁹⁹ The act of listening demands attunement to background noises of the civic soundscape in which the legal performance is situated.¹⁰⁰ Whilst knowledge, culture and context affect listening, legal performance participants are often called to forget their background under the pretence that justice is best served blind.¹⁰¹ As I have argued elsewhere, blinding—or, in this case, deafening—oneself to context "only serves to hide the human consequences of detached legal(istic) judgment."¹⁰² Blocking out or ignoring background noise can deafen the audience to a contextualized appreciation of the legal performance and its connection to the broader civic community. Through *attuning* oneself to the background noise in legal performance and listening, one can instead begin to connect to oneself and others in the space around.¹⁰³

Conclusions

Conversational silence allows the audience to attune to what the other is saying; silence for effect attunes—Nobis says it recalibrates—the audience to the story; in moments of anxious silence when the words are lost, the audience attune to the speaker, willing them to speak; and in noisy silence, the audience attune to the background noises and appreciate law's location within the civic and bureaucratic space. Silence in legal performance thus operates to attune the audience to the proceedings in the same way as it brings the audience in when used in theatrical performance. This is not to say that silence is the only means of attunement in legal performance. The motion of rising when a judge enters the court is another powerful call to attention as is the rap of the gavel on the bench.¹⁰⁴ Notably, however, these moments are aimed at inducing silence—the gavel quite directly operates as a silencer and the call to rise is in part an act to create a listening space for the legal performance. The legal audience's vocal response to both moments is one of silence.

In *Listening, Thinking, Being: Towards an Ethics of Attunement*, communications scholar Lisbeth Lipari sketches out what I take to be four effects of attunement.¹⁰⁵ Firstly, there is the relational, the way in which attunement connects us

⁹⁷ Gann, *No Such Thing as Silence*, 11.

⁹⁸ Voegelin, *Listening to Noise and Silence*, 88–89; Schafer, *The Soundscape*, 257.

⁹⁹ Voegelin, *Listening to Noise and Silence*, 101.

¹⁰⁰ Dawson, *Justice as Attunement*, 89.

¹⁰¹ *Ibid.*, 7; Sean Mulcahy, "Can a Literary Approach to Matters of Legal Concern Offer a Fairer Hearing than that Typically Offered by the Law?," *Law and Humanities* 8, no. 1 (2014), 111–12.

¹⁰² Mulcahy, "Literary Approach to Matters of Legal Concern," 7.

¹⁰³ Dawson, *Justice as Attunement*, 5–7; Voegelin, *Listening to Noise and Silence*, 110–11.

¹⁰⁴ The gavel is discussed further in Parker, "Gavel."

¹⁰⁵ Lipari, *Listening, Thinking, Being*, ch. 8.

to our bodies, space, and the other bodies in space. Secondly, there is the patience and, I would expand on this, the responsibility that attunement entails. Silence creates the possibility of responsible listening, and engaging deeply with the other voices and sounds within and around a legal performance space. Thirdly, there is the invention, the possibility of change and transformation that attunement provides. Silence forces one to face an abyss without voice or sound and, as James Boyd White suggests, invent something anew and, in doing so, transform our listening: “the moment of silence [is] where transformation and invention can take place.”¹⁰⁶ I have previously suggested that silence creates a listening space, but here I venture further to suggest that this space holds potential for change and transformation. Silence changes the state of the audience and transforms them into attentive listeners attuned to the performance and its surrounding environment. Finally, Lipari reminds her reader that attunement is impermanent. One is always switching in and out of listening, drifting in and out of concentration, letting things come and go. One drops in and out of listening; it cannot be sustained for long.

An exploration of silence in legal performance leads to the conclusion that silence creates a space of listening or attunement and enables participants in the legal proceeding to pay attention to meaning and the surrounding environment.¹⁰⁷ It also “provides the condition to build understanding.”¹⁰⁸ It is an opportunity to let the words and noises sink in and, in so doing, to comprehend their meaning. It entails a form of responsible listening, attuned to all that surrounds,¹⁰⁹ and requires those within the legal performance to “be actively engaged in listening to others”¹¹⁰—both voices and sounds. It is impossible to decisively conclude what went on in the testifier’s mind in the forty seconds of silence in the proceedings for *R v Hickey* or how those within the proceedings responded to this silence, whether they sat in concentration or drifted in and out. The practice of attunement may nonetheless offer a way of understanding silence and noise within legal performance and its surrounds. Here I hope to have pointed out some directions to understanding the power of silence in the court and invited you to listen and attune yourself to silence in legal performance.

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¹⁰⁶ James White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: University of Wisconsin Press, 1985), 174. See also Sutton, “The Pause that Follows,” 31.

¹⁰⁷ Pratt, “Mind the Gap,” 70; Mulcahy, “Acting Law | Law Acting,” 194.

¹⁰⁸ Voegelin, *Listening to Noise and Silence*, 87.

¹⁰⁹ Fischlin and Heble, *The Other Side of Nowhere*, 11.

¹¹⁰ Nathan Crawford, *Theology as Improvisation: A Study of the Musical Nature of Theological Thinking* (Leiden: Brill, 2013), 98.