

## How Silent is the Right to Silence?

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There is no such thing as silence. Something is always happening that makes a sound.

John Cage, '45' for a Speaker'<sup>1</sup>

And then the execution began! No discordant noise spoiled the working of the machine. Many did not care to watch it but lay with closed eyes in the sand; they all knew: Now Justice is being done. In the silence one heard nothing but the condemned man's sighs, half-muffled by the felt gag.

Franz Kafka, 'In the Penal Colony'<sup>2</sup>

For Susan Sontag, silence could be 'hard' or 'soft', 'raw' or 'cooked'. Silence could convey aesthetic aspirations, philosophical ideals, the renunciation of vocation; it could be preparatory, meditative, or the ordeal itself. Silence might be a decision, a failure to decide, or the hesitation before deciding. It might be serious, dangerous, or devious. But it is rarely, actually, silent. Silence is only meaningful for what we might say about it. And, as Sontag lamented, we are always chattering: 'One recognizes the imperative of silence, but goes on speaking anyway. Discovering that one has

nothing to say, one seeks a way to say *that*.<sup>3</sup> This article examines the Australian jurisprudence of silence in the context of the 'right to silence' claimed by some criminal defendants during trial, and advances the position that, despite arduous effort to describe, classify, evaluate and protect silence, the law makes a lot of noise about a silence that isn't really there.

The most enduring contribution to an Australian jurisprudence of silence emerges from a murder trial heard in the Queensland Supreme Court that went on appeal to the High Court of Australia in 1993.<sup>4</sup> Whether inferences might be drawn from the silence of the accused is today often regarded as a settled proposition of Australian law; the answer is 'probably not'. People accused of crimes have a right to silence. In law, their silence means nothing, it adds nothing and it must not be subjected to interpretation. But the answer is persistently complicated by the ruling of a majority of the High Court in the 1993 case of the Austrian defendant, Johann Manfred Weissensteiner, accused of murdering his two sailing companions. There, the High Court ruled that, in that case, Weissensteiner's silence meant something, and if he had something to say in his defence, he should have said it. Subsequent rulings of the High Court have held that the case of *Weissensteiner* is 'rare and exceptional',<sup>5</sup> that the expectation upon the accused in a criminal trial to give evidence would occur 'seldom, if ever';<sup>6</sup> and most Australian jurisdictions now have legislation preventing adverse comments being made by the judge to the jury about a defendant's silence.<sup>7</sup> More recently, the High Court has determined that an accused's wish to remain silent might be overborne by police officers who want him to speak, and the High Court has ruled that these defendants must bear the consequences of speaking; if there is to be a right to silence, it can only be claimed by those who keep their mouths shut.<sup>8</sup> But a re-examination of *Weissensteiner* illustrates what is evident in so much of the case law: in criminal enterprises and in criminal procedure, speech and silence exist on a spectrum, and in shifting contexts. There are times when silence is impossible, and times where it is irresistible. The law is rarely sensitive to the contexts in which silence falls and those in which silence is broken. This article contributes to the emerging jurisprudence of silence. It argues that silence must be heard and interpreted, and it calls for silence to be distinguished from noise, sound, utterance and inadmissible speech. Mindful of Jacques Attali's writing on music—'the organization of noise', but also formative of

community, commonality, structure and power—this article recognises, but does not rely upon, the silencing *effect* of sound, recording and surveillance.<sup>9</sup> Also, Michel Chion's writing on cinema, and the emergence of cinematic sound from silence, dwells upon sound as *effect* (but not as cause), and describes sound as the 'added value' to vision in the production of meaning.<sup>10</sup> While both these writers recognise silence as a kind of negative space produced by sound (or noise or music or speech), this article takes a wider view of silence, encompassing all the acts of non-speaking, as well as omissions, which are imaginable and achievable in criminal process.

—WHAT WEISSENSTEINER SAID

Weissensteiner was on trial for the murder of an Austrian tourist, Hartwig Bayerl, and his English partner, Susan Zack. The couple had bought a 36-foot cutter in Cairns and were planning to sail it around the Pacific, sometime around the end of 1989. They were expecting a baby, and were headed to the Pacific to escape from an impending nuclear war and world conspiracy of Catholics and Masons. Their boat was laden with power generators and a water desalinator; they were going to live self-sufficiently. Weissensteiner was helping them to prepare the boat to sail and, in exchange for his labour, he was apparently going to join them on their trip. There was no evidence that Bayerl and Zack ever reached the Pacific; indeed there are doubts as to whether they ever left Cairns. They were never seen again, their bank accounts were not accessed and they made no further contact with their families.

Their boat, with Weissensteiner aboard, was eventually discovered in Majuro in the Marshall Islands. He had spent eight months sailing the Pacific; he was apparently turned away from Bougainville by the Papua New Guinea Navy, spent several days in Kosrae in the Federated States of Micronesia, then sailed to Kiribati before arriving in the Marshall Islands where, after three months, Interpol searches finally caught up with him. On board the boat was found Bayerl's bible, a family heirloom which he always carried with him. Also on board were Zack's antenatal vitamins, and the nappies, maternity bras and baby clothes she had bought in anticipation of her baby's birth.

In early 1990, when the boat was still in Cairns harbour, Weissensteiner spoke to an immigration official, whom he told Bayerl was visiting friends in Kuranda and would be back in Cairns at the end of the month. But on the same day, he told a

customs official that the owner of the boat was in Port Moresby. The following day, a port officer spoke to Weissensteiner; he had received an urgent message from Zack's mother, who wanted to get in touch with Susan to tell her that her younger sister had died. Weissensteiner said the boat's owners were in the Atherton Tablelands, and that he would pass on the message, although Zack never made any further contact with her family or anyone else.

In Kosrae, Weissensteiner told several people he had bought the boat from an old man in Cairns. In Kiribati, he told a customs officer that Bayerl and Zack owned the boat and they were in Cairns, but he told a police officer in Kiribati that they were in Kununurra and had lent him the boat. On the Marshall Islands he told somebody that he had taken them to Bougainville where they were smuggling arms.

When he was located in the Marshall Islands, Weissensteiner was taken into custody in Majuro and interviewed separately by both local police and an Australian police officer. He told them, in different accounts, that Bayerl and Zack were actually in Western Australia, having left Cairns before Christmas with a small backpack. He told the Australian policeman that his earlier explanations for their whereabouts were lies. While in custody in Majuro, he told a journalist, 'But they have nothing. They have no bodies. They have no proof.' Following a failed attempt to escape from custody, he was re-captured, returned to Cairns and formally charged with double murder. In an Australian prison, he told another prisoner, in German, 'They'll never find those two.'<sup>11</sup>

After doing all this talking, Weissensteiner's decision, at his trial, to rely upon his right to silence is simultaneously obvious and inexplicable. In the face of all this explaining, what more could he say? But then what might his silence mean? He did not enter the witness box to testify in his own defence, nor did he call any other evidence that would positively support any defence. At trial, his counsel cross-examined the witnesses called by the Crown, and through this questioning seemed to suggest that both the Western Australia theory and the Bougainville theory provided a reasonable doubt about the Crown's case that Zack and Bayerl were dead and that they were killed by Weissensteiner. In criminal proceedings, the Crown has the burden of proving the charges beyond reasonable doubt. A defendant does not need to do anything to assist the Crown in discharging that burden; the defendant is not obliged to do or say anything in their defence. As a matter of strategy (but not as

a matter of law) a defendant need only do or say something if it seems likely that, otherwise, the Crown might discharge its burden. Weissensteiner's defence strategy was to raise doubt by challenging or questioning the evidence adduced by the prosecution.

At the end of the trial, the judge gave directions to the jury, which made it clear that the Crown bears the onus of proving guilt beyond reasonable doubt, and that the defendant has nothing to prove. He also said that where the Crown case requires the jurors to draw certain inferences about the evidence:

Such an inference may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts which it can easily be perceived must be within his knowledge.<sup>12</sup>

The jury convicted Weissensteiner, and on his appeals to the Queensland Court of Appeal, and later the High Court of Australia, he argued that the judge had wrongly directed the jury about what inferences might be drawn from his silence.<sup>13</sup> He ultimately spent fourteen years serving his sentence in a prison in far-north Queensland before being deported to Austria.<sup>14</sup>

Weissensteiner took many opportunities to say something when he could have elected to say nothing. And he said nothing when he had the opportunity to say something. Only two of these opportunities for speaking are regulated by the law; these are the police interview and the trial itself. At the time of both these opportunities to speak, the rules of criminal procedure and the laws of evidence need to ensure the accused knows that they have a choice whether to speak or remain silent, and that they are empowered to exercise that choice freely. The accused needs to be informed of the legal consequences of both speech and silence, and they also need to understand that the law can offer them certain protections in the exercise of that choice.

But, as Johann Weissensteiner was to discover, the law chose not to protect him when he, at last, availed himself of the opportunity to be silent. The High Court, in its judgment, under strenuous exertion, tried to explain that not all silences are equally silent, and that sometimes, during silence, there is an expectation of speech. In their judgment, Mason CJ, Deane and Dawson JJ held that there is a difference between drawing an inference from silence (which is not permitted) and drawing an inference from a failure to contradict or deny facts that are within the accused's

knowledge.<sup>15</sup> While silence and failure-to-speak might sound the same, an adverse inference might only be drawn from a failure-to-speak, in circumstances where the evidence gives rise to an expectation of speech. In *Weissensteiner's* case, his failure to explain was capable of strengthening the prosecution's case, because it enabled the jury to draw the inferences that were sought by the prosecution; that is, that Bayerl and Zack were dead, and that *Weissensteiner* had killed them.<sup>16</sup>

The High Court majority held there are only limited circumstances in which it would be reasonable to expect that an accused would explain, contradict or deny the prosecution evidence. These limited circumstances would arise where the prosecution case was of sufficient weight to support an inference of guilt, and where there were certain facts within the peculiar knowledge of the accused.<sup>17</sup> The judgment of Mason CJ, Deane and Dawson JJ made the additional observation that silence, in criminal proceedings, cannot be an admission by conduct, and that silence cannot be used to fill gaps in the evidence. Silence is only evidence where it has a bearing on the probative value of other evidence.<sup>18</sup> The dissenting judgment of Gaudron and McHugh JJ agreed with the majority that the trend of judicial authority supported drawing a distinction between failure to give evidence and failure to explain the events in question, and that it was only the failure to explain that could, in limited circumstances, give rise to an adverse inference.<sup>19</sup> They agreed there were only narrow factual circumstances that could give rise to an expectation of an explanation, which could include being 'caught practically redhanded', and having 'special knowledge' of the offence above all others.<sup>20</sup> They agreed that *Weissensteiner* was one such case, but would have allowed the appeal on the grounds that the directions given by the trial judge had been defective.<sup>21</sup>

Today, legislation in most Australian jurisdictions prohibits judicial comments about the accused's silence that invite an adverse interpretation of it; in law, silence means nothing, and a judge needs to be careful what they say about silence. Section 20 of the uniform Evidence Acts states:

The judge ... may comment on a failure of the defendant to give evidence. However ... the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.<sup>22</sup>

The High Court currently regards the ruling in *Weissensteiner* as 'rare and exceptional',<sup>23</sup> and holds that the expectation of speech from a silent accused interferes with the fundamental principles of the right to silence, the presumption of innocence and the privilege against self-incrimination.<sup>24</sup> Also, in uniform Evidence Act jurisdictions, *Weissensteiner* is now inconsistent with section 20, above. Others have written that *Weissensteiner* is 'dangerous precedent',<sup>25</sup> and that its reasoning relies upon 'fine distinctions',<sup>26</sup> is 'elegant sophistry',<sup>27</sup> and even 'gibberish'.<sup>28</sup> The Australian legal scholar, David Hamer, has written that High Court judgments on silence 'defeat even the most sympathetic reading' and that, after *Weissensteiner*, 'it is euphemistic to deny that silence ... is evidence of guilt'.<sup>29</sup> Nevertheless, while distinguishing *Weissensteiner*, subsequent High Court judgments have never overruled it, and it remains a strange island of good law that nobody is now likely to visit.<sup>30</sup> Consistent with a long line of authority preceding it,<sup>31</sup> but not applied in any of the judgments which followed it,<sup>32</sup> *Weissensteiner* might represent the final moments of the law's realisation that we can only hear silence by attending to the sounds that surround it.

—CAN SILENCE BE HEARD?

Noise gives context to silence; it is silence's interpretive apparatus. The classicist and political scientist, Danielle Allen, has written about the convertible meanings of silence, and its vulnerability to having its meaning substituted for another—quite different—meaning: 'The trouble with silence—what makes it politically difficult to make sense out of it—is that it can mean yes or no.'<sup>33</sup> Allen has written also about silence in Franz Kafka's 'In the Penal Colony', his short story about the final hours of the operation of a judicial system in which silence has a crucial function during both judgment and punishment. 'In the Penal Colony' belongs to Kafka's much-scrutinised writing on the theme of law and punishment; it has been studied, variously, as a parable about submission, or at least the gestures through which submission might be demonstrated,<sup>34</sup> as a work of religious judgment<sup>35</sup> or as written in a void of faith,<sup>36</sup> as a 'pornological' account of sadism and masochism<sup>37</sup> or about the violence of language,<sup>38</sup> as a precursor to Foucault's construction of the body through inscription<sup>39</sup> or an account of legal order displaced onto a machine.<sup>40</sup> In this section

of the article, I draw upon Allen's analysis of Kafka's story for its recognition of the role of silence in criminal investigation, process and penalty.

In Kafka's story, an eminent voyager visits a penal colony where an officer, loyal to the former commandant and nostalgic for his punitive spectacles, shows him the penal apparatus, a gruesome machine. The officer is both judge and executioner, but he knows that he is about to conduct his final execution; the condemned man, apparently unaware of his offence and his sentence, stands beside them as the system of justice is explained to the voyager.

'He doesn't know the sentence that has been passed on him?' 'No,' said the officer ... 'There would be no point in telling him. He'll learn it on his body'. ... 'But surely he knows that he has been sentenced?' 'Nor that either,' said the officer, smiling at the explorer as if expecting him to make further surprising remarks. 'No,' said the explorer, wiping his forehead, 'then he can't know either whether his defense was effective?' 'He has had no chance of putting up a defense,' said the officer, turning his eyes away as if speaking to himself and so sparing the explorer the shame of hearing self-evident matters explained.<sup>41</sup>

The officer says that the condemned man, a servant, had committed an act of insubordination, having fallen asleep while on duty and not begged pardon when awoken by his master cracking a whip across his face. The officer explains:

'That's the evidence. The captain came to me an hour ago, I wrote down his statement and appended the sentence to it. Then I had the man put in chains. That was all quite simple. If I had first called the man before me and interrogated him, things would have got into a confused tangle. He would have told lies, and had I exposed those lies he would have backed them up with more lies, and so on and so forth. As it is, I've got him and I won't let him go'.<sup>42</sup>

In the penal colony, by denying the accused the opportunity to speak, the system prevents the accused from taking the opportunity to tell lies. Lies, in this system of justice, are not differentiated from any other exculpatory or inculpatory speech of the accused: the confession, the explanation, the justification, the alibi, the apology. It is all just noise, and the officer doesn't want to hear any of it. Here is a system of justice that demands silence; its legitimacy and its respect derive from its silent



conduct, and it goes to imaginative lengths to achieve its necessary silence. The apparatus, invented by the former commandant, has three mutually reliant components: the Bed, the Designer and the Harrow. Together, they work to restrain, gag, torture and then silence the condemned prisoner. Kafka's officer points to the apparatus:

'Here at the head of the Bed, where the man, as I said, first lays down his face, is this little gag of felt, which can be easily regulated to go straight into his mouth. It is meant to keep him from screaming and biting his tongue. Of course the man is forced to take the felt into his mouth, for otherwise his neck would be broken by the strap'.<sup>43</sup>

Allen writes,

The harrow and the felt [gag] do not collaborate merely in order to silence; their art is more diabolical. They first provoke the condemned to voice, and then silence him ... The penal apparatus therefore *orchestrates* the force of voice, and its death, its final descent into silence.<sup>44</sup>

Kafka describes a justice system which simultaneously knows that the accused will want to cry out, and knows that there is nothing that can be said that needs to be heard. The apparatus does not operate in complete silence; rather it allows us to hear the prisoner's muffled screams. This is not silence, but an absence of speech; nevertheless it makes a dreadful noise.

Within the complex modern jurisprudence of silence, there is one emerging theoretical analysis that seems sensitive to this approach. Here, the accused must keep silent so that we cannot hear them telling lies. Once they speak, we will worry that they are lying, and so we demand their silence and offer some limited protection in exchange for their keeping quiet. Daniel J. Seidmann and Alex Stein, professors of economics and law respectively, defend the right to silence on the grounds that it works to protect the innocent, and also that it prevents us from listening to lies told by guilty people.<sup>45</sup> In this defence they draw an analogy to game theory, advancing an argument that has attracted spirited resistance and debate.<sup>46</sup> They begin with the proposition that innocent people tell the truth, whereas guilty people fear being caught lying. Some innocent people find themselves unable to produce evidence that supports their innocence and, in these circumstances, they will exercise their right to silence. If the right did not exist, innocent people would

need to give exculpatory statements, and guilty people would need to give false exculpatory statements. This would create a ‘pooling’ effect, in which all uncorroborated exculpatory statements would be regarded as lacking in probative value, and innocent people would bear the burden of this pooling by being exposed to wrongful convictions. The availability of the right to silence, in these circumstances, thus operates to protect innocent people by removing the distorting effects of having their exculpatory statements disbelieved. It also prevents guilty people from having to tell lies. Here, the gag functions to protect the system of justice. What Allen calls Kafka’s ‘essential feature of the apparatus’, the gag in the defendant’s mouth, ‘the revolting silencer’,<sup>47</sup> enables the process to take effect without noisy intrusions that might otherwise distract, confuse, destabilise, or challenge the central assumptions of the system: guilt and punishment.

The officer’s worry—that once the accused is afforded the opportunity to speak, everything will end up in a ‘confused tangle’—is echoed in other scholarship that engages with legal silence in criminal proceedings. This confusion, in modern Australian case law, centres around the inferences that might be drawn from the silence of the accused. Can silence be *used* as evidence? Legal scholar David Hamer’s analysis illustrates the confusion that arises once the accused has the opportunity to speak, but doesn’t take it. Hamer’s work argues that the use of silence as criminal evidence can be either ‘weak’ or ‘strong’.<sup>48</sup> The ‘weak’ use of silence means the silence itself has no probative value; however, the incriminating evidence might be more readily believed because of it. Where silence has a ‘strong’ use in proving a case is where genuine adverse inferences are drawn; that is, the silence has probative value on its own.<sup>49</sup> Hamer’s aim is to measure the extent to which silence proves guilt. Further, where adverse inferences from silence are prohibited by law, Hamer attempts to calculate how much probative value has been lost to the prohibition.<sup>50</sup> Hamer’s analysis also factors in other variables, such as the burden of proof in criminal matters—beyond reasonable doubt—for the purpose, at least theoretically, of enabling us to calculate the probability of a conviction, given the prosecution evidence, so as to determine whether the accused ought to give exculpatory evidence or can safely elect to remain silent. Hamer argues that the difficulty of conducting the probative value assessment has given rise to the extreme complexity of High Court judgments in this area, including *Weissensteiner*.<sup>51</sup>

In large part, but not entirely, the complexity of Australian jurisprudence arises from the recognition that, in recent case law, the gag is applied to the trial judge.<sup>52</sup> The 'right to silence', whatever it is, seems most commonly to be litigated in appellate cases about the words spoken by the trial judge to the jury. The High Court cases that followed *Weissensteiner* are intent upon scrutinising what the trial judge said about the silence of the accused. In *RPS v The Queen*,<sup>53</sup> *Azzopardi v The Queen*,<sup>54</sup> and again in *Dyers v The Queen*,<sup>55</sup> the High Court examined the judicial comments to the jury about the accused's silence and ruled in each case, by majority, that the comments impinged upon the right to silence.<sup>56</sup>

Chief Justice Gleeson wrote a dissenting judgment in *Azzopardi*, reasoning that it was misleading to call silence a 'right'; rather it is an 'immunity'. He described the 'right to silence' as 'a convenient description of a collection of principles and rules: some substantive, and some procedural; some of long standing and some of recent origin'.<sup>57</sup> He said, invoking *Weissensteiner*, that the choice to remain silent was not a choice without adverse effect.<sup>58</sup> He noted that a criminal suspect or accused had many opportunities for speaking—during the police investigation, in instructing his lawyers, in response to accusations, and during trial—and that everything said, or not said, had consequences for what followed. He said the decisions about how to conduct the defence were 'tactical', and that each choice was met with an opportunity gained, or opportunity foreclosed: 'Whether the decision is to speak or remain silent, it is rarely devoid of consequences.'<sup>59</sup> Justice McHugh, dissenting separately, also argued that silence was not a 'right', but rather one of the 'immunities' protecting criminal defendants; the specific immunity at stake here was the privilege against self-incrimination.<sup>60</sup>

Despite his robust and exhaustively researched position in *Azzopardi*, McHugh J was again forced to disagree with the majority of the High Court the following year, in *Dyers*. In *Dyers*, the High Court majority endorsed their decisions in *RPS* and *Azzopardi*, effectively gagging trial judges from saying anything adverse about the defendant's silence. They also expanded the principle, limiting what could be said not only about the silence of the accused, but also the silence of potential witnesses. Dyers, in his defence to sexual assault charges, had advanced an alternative theory of the facts, in which he claimed to be with a woman named Wendy Tinkler at the time of the alleged sexual assault, but she was not called as a witness.

The majority of the High Court allowed the appeal, reasoning that the trial judge's comments to the jury interfered with the right to silence of the accused, his presumption of innocence and the Crown's burden to prove the charge beyond reasonable doubt. They thought that the trial judge's words had wrongly suggested that the defendant may have had some obligation to call a witness in support of his alternative theory of the case.<sup>61</sup>

As he had in *Azzopardi*, McHugh J handed down a strident dissenting judgment: 'Today, a majority of the Court again wields the anathema. They pronounce as heresy a principle that criminal lawyers have preached for nearly 200 years.'<sup>62</sup> In *Dyers*, McHugh J was alone in demanding the right to silence only be claimed by those who are actually silent. He reasoned:

the appellant did not remain silent. He asserted that he was with Ms Tinkler at the relevant time. Accused persons who make statements before or during a trial may often find that their subsequent silence leaves them open to adverse comments that could not be made if they had remained silent.<sup>63</sup>

He distinguishes this from genuine silence, 'silence maintained', which could not invite an adverse inference.<sup>64</sup>

Maintaining silence, literally keeping one's mouth shut, is the object of the apparatus in the penal colony. The machine and its operator recognise that initially—in fact, for two hours—there will be resistance to keeping quiet, which is the purpose of the gag. However, the prisoner's gradual realisation of the futility of voice, and his eventual submission into silence, is his pathway to enlightenment. Kafka's officer says:

'The first six hours the condemned man stays alive almost as before, he suffers only pain. After two hours the felt gag is taken away, for he has no longer strength to scream ... Nothing more happens than that the man begins to understand the inscription, he purses his mouth as if he were listening.'<sup>65</sup>

The point is to eliminate the chatter, to forego interpretation and analysis and commentary and simply be quiet. It is a system of justice that demands silence also from its observers, who are described as closing their eyes and listening: 'They all knew: Now Justice is being done.'<sup>66</sup>

Kafka here advances a jurisprudence of silence as yet unrecognised by appellate courts; it demands a literal silence, one which is meaningful and universally understood to perform a crucial role in the criminal process. In the Queensland Supreme Court in 2011, in the matter of *R v GAJ*, the court considered the appeal of GAJ who had been convicted by a jury of the rape and sexual assault of his step-niece.<sup>67</sup> She had testified; he had not. He had not spoken to police during their investigation. The trial judge had not directed the jury about his silence. The trial judge had told the jury, 'the choice for you is really between the complainant's evidence and nothing'.<sup>68</sup> On appeal, the Queensland Court of Appeal held that this direction, essentially a failure to direct the jury about the accused's silence, had breached the High Court's ruling in *Azzopardi*, which had said:

it will almost always be desirable for the judge to warn the jury that the accused's silence in court is not evidence against the accused, does not constitute an admission by the accused, may not be used to fill gaps in the evidence tendered by the prosecution, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt.<sup>69</sup>

In other words, the accused's silence must be accompanied by exhaustive judicial speech; the jury must be rigorously tutored in all of the inferences that are unavailable from silence. They cannot be left at large to experience the silence for what it is: the work of a judicial apparatus. In *GAJ*, the trial judge simply noted that the accused had said 'nothing', and said nothing further about it. To say nothing about 'nothing', the appellate court feared, would leave a jury to speculate that 'nothing' means something, and so must receive prolix instruction in what 'nothing' cannot mean.

To demand speech about silence, to say something about nothing, invokes what Susan Sontag termed 'devious silence'.<sup>70</sup> Literal silence, she recognised, forecloses the possibility of making art, and so the artist engages in a 'rhetoric of silence', and here she draws upon André Breton's notion of the 'full margin', in which the central area remains blank, but the periphery is filled.<sup>71</sup> This invites an obvious analogy with legal judgment: a jurisprudence of silence cannot be a jurisprudence of nothing. Law's authority demands language, words, speech acts and text. Appellate case law, then, provides reams of commentary about silence, scribbled margins crowding the

empty space within, stentorian pronouncements about silence. Not unlike Kafka's apparatus, which is supposed to operate silently but instead has begun to make a creaking sound, all of this noise is distracting us from experiencing legal acts of silence as meaningful.

Furthermore, all this noise is distracting us from grasping silence's meaning. Scholars, dramatists, musicians and philosophers all concede that the meaning of silence can be ambiguous, but it is only lawyers who demand that silence means nothing. Actually it is not that silence means nothing; it is that the law must *refuse* interpretation. Refusal functions as parsimony in the face of silence's plenitude. Silence offers a suffocating overabundance of meaning of which the courts primly, wordily, decline to partake.

—TOWARDS A JURISPRUDENCE OF SILENCE

Legal philosophers, legal semioticians and other legal scholars offer a plethora of perspectives from which we might examine silence, if we could. J. Dyson Heydon, when a law professor, prior to his elevation to the High Court bench, wrote that drawing inferences from silence was a matter of 'logic and common sense'.<sup>72</sup> Andrew Palmer, a law professor and barrister, agreed that there is 'a robust Benthamite common sense' that underlies the kind of reasoning evident in *Weissensteiner*.<sup>73</sup> But for the legal philosopher Louis Michael Seidman, silence co-exists with freedom.<sup>74</sup> Sometimes we are silent because 'language imprisons us';<sup>75</sup> sometimes we are silent because we are alienated. He wrote, 'for speech to be truly free, there must also be silence. Whilst in some contexts, silence *is* freedom, in others, it is the necessary frame for freedom.'<sup>76</sup> For the legal philosopher Marianne Constable, the right to remain silent following arrest preserves 'the trial as a space of proper speech', in which anything that has been said 'has been uttered in conditions proper to speech'.<sup>77</sup> Constable's book, *Just Silences*, examines the operation of language and justice, and the spaces in which silence—specifically because of its ambiguity—collaborates with language in drawing modern law towards justice. Constable evaluates the potential for silence, as well as other contexts in which language is absent, to enable us to recognise the limitations of speech (or language or text) for achieving justice.

In her scholarship on refugee claims made on the basis of sexuality, English legal scholar Toni Johnson has examined how silence operates in asylum hearings in the United Kingdom.<sup>78</sup> Her work resists those asylum decisions in which it was determined that a claimant might live without persecution in their home state if they live 'discreetly'; in effect, these decisions order gay or lesbian asylum seekers to keep quiet and stay in the closet.<sup>79</sup> During their hearings, however, Johnson observes that some of these claimants deploy a 'tactical silence' of their own, taking advantage of the ambiguity of silence in the legal process.<sup>80</sup> Here she begins to develop the idea of silence as a strategy of subversion, what she terms a 'restive silence'.<sup>81</sup>

Scholars within the field of discourse analysis agree that, in the face of an accusation, a denial is expected. The forensic linguist Georgina Heydon explains that there are rigid and well-established rules in conversations, governing turn taking and what are called 'preferred responses' when taking one's turn.<sup>82</sup> When taking one's turn, silence in response to an accusation is interpreted as a failure to deny, and an admission. She reasons that the invocation of the right to silence goes against all the rules we follow in the management and interpretation of conversation.<sup>83</sup>

Dennis Kurzon, a scholar of legal language and legal semiotics, has surveyed the main studies of silence from the fields of psychology, sociolinguistics and sociology.<sup>84</sup> Silence might operate as a conversational mode, for instance while listening to others speak, or in a refusal to respond.<sup>85</sup> It might be used to allow an encoder to help a decoder decipher a message.<sup>86</sup> Silence may function in recognition of specific cultural codes, such as religious rites.<sup>87</sup> Silence may be interpreted by its context or silence might be recognised as existing on a continuum with speech.<sup>88</sup> Linguistics scholar Jef Verschueren offers eight explanations for silence:

1. speaker temperamentally disinclined to talk
2. speaker unable to decide what to say
3. speaker unable to speak because of amazement, grief, other strong emotion
4. speaker does not have anything to say
5. speaker has forgotten what s/he is going to say
6. speaker silent because others are talking
7. speaker is concealing something
8. speaker is indifferent.<sup>89</sup>

Kurzon, though, argues that there are only two kinds of silence: intentional and unintentional.<sup>90</sup>

In writer George Prochnik's quest to discover how various individuals and groups have dealt with oppressive and unwanted noise, he noticed that early twentieth-century philosophy was very preoccupied with silence.<sup>91</sup> He cited Wittgenstein ('Whereof one cannot speak, thereof one must be silent'), Heidegger ('Above all, silence about silence') and Max Picard ('silence points to a state where only being is valid'), and notes that these philosophies 'resonate with this idea of an incommensurability between truth and our powers of expression'.<sup>92</sup> Examinations of silence feature also in the work of Max Scheler, who wrote, 'Persons, in fact, can be silent and keep their thought to themselves, and that is quite different from simply saying nothing. It is an active attitude.'<sup>93</sup> The philosopher Bernard Dauenhauer distinguishes what he calls silence as a 'positive phenomenon' from silence that is a negative or derivative phenomenon; derivative silence is a 'foil' to speech, or a 'mere gap' between words. For Dauenhauer, the difference between negative and positive silence is the difference between a pause and a silence in a Harold Pinter play; the pause punctuates the speech, or sets its pace; the silence operates as a theme, or a shift between themes.<sup>94</sup>

Perhaps of most significance for a jurisprudence of silence is what Dauenhauer calls 'deep silence' which refers to 'the silence of the to-be-said'. He describes it as 'silence beyond all saying, the silence of the what-ought-to-be-said in which what-is-said is embedded. Or perhaps better, the silence of the to-be-said tests all that is said.' Here he introduces the phenomenon of 'tact', the 'not-to-be-said', reflecting sensitivity to a situation.<sup>95</sup> The silence of the accused reflects their knowledge of how—in circumstances of suspicion, accusation or guilt—they ought to behave. Tactful conduct acknowledges that if one has nothing useful to say, one ought to hold one's tongue.

A sensitivity to silence—its performance, its absence and its interpretation—would transform the jurisprudence of silence. To fully grasp what silence is, where its limits lie and what might be done with it, is law's ongoing project. Since *Weissensteiner*, Australian appellate courts have urged that we smother silence with words. This doctrine prevents silence from simply being heard. Silence, wherever it occurs in law's jurisdiction, must be explained and explained and explained. In this



babble of explanation law misbelieves that it protects silence; further, it often misattributes the term 'silence' to certain kinds of noise. Law's commentary forecloses the possibility that silence might be deliberately ambiguous, that it might invite speculation, or that inferences demand to be drawn from it.

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—NOTES

<sup>1</sup> John Cage, '45' for a Speaker', in John Cage, *Silence*, Wesleyan University Press, Middletown, 1973, p. 191.

<sup>2</sup> Franz Kafka, 'In the Penal Colony', in Franz Kafka, *The Complete Short Stories*, ed. Nahum N. Glatzer, trans. Willa and Edwin Muir, Minerva, London, 1992.

<sup>3</sup> Susan Sontag, 'The Aesthetics of Silence', in *A Susan Sontag Reader*, Penguin, Harmondsworth, 1983, pp. 187–8.

<sup>4</sup> *Weissensteiner v R* (1993) 178 CLR 217; [1993] HCA 65.

- <sup>5</sup> *Azzopardi v R* (2001) 205 CLR 50; [2001] HCA 25 at [68] per Gaudron, Gummow, Kirby and Hayne JJ.
- <sup>6</sup> *RPS v R* (2000) 199 CLR 620; [2000] HCA 3 at [27] per Gaudron ACJ, Gummow, Kirby and Hayne JJ
- <sup>7</sup> Evidence Act 1995 (NSW) and Evidence Act 1995 (Cth), section 20(2); Evidence Act 2011 (ACT), section 20(2); Evidence Act 2001 (Tas), sections 20(2) and (3); Evidence Act 2008 (Vic), section 20(2).
- <sup>8</sup> *Tofilau v R*; *Marks v R*; *Hill v R*; *Clarke v R* (2007) 231 CLR 396; [2007] HCA 39, *Em v R* (2007) 232 CLR 67 [2007] HCA 46, *Carr v State of Western Australia* (2007) 232 CLR 138; [2007] HCA 47. See Jeremy Gans, 'Silence in the High Court', *Public Law Review*, vol. 19, no. 1, 2008, pp. 5–11.
- <sup>9</sup> Jacques Attali, *Noise: The Political Economy of Music*, University of Minnesota Press, Minneapolis, 1985, pp. 3–20.
- <sup>10</sup> Michel Chion, *Film: A Sound Art*, trans. Claudia Gorbman, Columbia University Press, New York, 2009, p. 37; Michel Chion, *Audio-Vision: Sound on Screen*, ed. & trans. Claudia Gorbman, Columbia University Press, New York, 1994, pp. 5–24.
- <sup>11</sup> In *Weissensteiner*, in the joint judgment of Mason CJ, Deane and Dawson JJ, they write that he actually told the prisoner 'Die kan die zwei nicht finden', which the prisoner translated as 'They'll never find those two', but which the judges say is more accurately translated as 'They cannot find those two', at [18].
- <sup>12</sup> Cited in *Weissensteiner* at [21], per Mason CJ, Deane and Dawson JJ.
- <sup>13</sup> *Weissensteiner v R* (1992) 62 A Crim R 96.
- <sup>14</sup> 'Austrian man deported after serving jail time for murder', *ABC News Online*, 1 September 2004, <<http://www.abc.net.au/news/2004-09-01/austrian-man-deported-after-serving-jail-time-for/20361644>>.
- <sup>15</sup> *Weissensteiner*, at [33], per Mason CJ, Deane and Dawson JJ.
- <sup>16</sup> *Weissensteiner*, at [40], per Mason CJ, Deane and Dawson JJ. The case has been the subject of a book which argues that Weissensteiner was innocent: Ulrike Rainer, *Flucht vor Armageddon: Der Fall Weißensteiner*, Miltzke, 2000.
- <sup>17</sup> See particularly the judgments of Mason CJ, Deane and Dawson JJ at [32]–[41]; Brennan and Toohey JJ at [7]–[9].
- <sup>18</sup> *Weissensteiner*, at [33], per Mason CJ, Deane and Dawson JJ.
- <sup>19</sup> *Weissensteiner*, at [11]–[14], per Gaudron and McHugh JJ.
- <sup>20</sup> *Weissensteiner*, at [17], per Gaudron and McHugh JJ.
- <sup>21</sup> They said that the directions had been given in terms of a failure to give evidence, rather than a failure to explain facts. Further, the directions were not confined to Weissensteiner's areas of 'special knowledge' (his possession of the boat and his contradictory accounts of their whereabouts), but extended to other aspects of the Crown case (his failure to explain the couple's whereabouts) which did

not give rise to the expectation of an explanation, as there was no basis for assuming that he had 'special knowledge' about their whereabouts; at [25]–[26], per Gaudron and McHugh JJ.

<sup>22</sup> Evidence Act 1995 (NSW) and Evidence Act 1995 (Cth), section 20(2); Evidence Act 2011 (ACT), section 20(2); Evidence Act 2001 (Tas), sections 20(2) and (3); Evidence Act 2008 (Vic), section 20(2).

<sup>23</sup> *Azzopardi v R* (2001) 205 CLR 50; [2001] HCA 25 at [68], per Gaudron, Gummow, Kirby and Hayne JJ.

<sup>24</sup> *RPS v R* (2000) 199 CLR 620; [2000] HCA 3, *Azzopardi v R* (2001) 205 CLR 50; [2001] HCA 25, *Dyers v R* (2002) 210 CLR 285; [2002] HCA 45.

<sup>25</sup> Andrew Palmer, 'Silence in Court: The Evidential Significance of an Accused Person's Failure to Testify', *University of New South Wales Law Journal*, vol. 18, no. 1, 1995, p. 150.

<sup>26</sup> *RPS* at [20]; *Bridge v The Queen* (1964) 118 CLR 600 at 605; *Weissensteiner*, at [22], per Mason CJ, Deane and Dawson JJ, all references identified by David Hamer in his article 'The Privilege of Silence and the Persistent Risk of Self-incrimination: Part II', *Criminal Law Journal*, vol. 28, no. 4, 2004, p. 211.

<sup>27</sup> D. J. Harvey, cited by Hamer, Part II, p. 211.

<sup>28</sup> R. Cross, cited by Hamer, Part II, p. 211.

<sup>29</sup> Hamer, Part II, p. 213.

<sup>30</sup> But note that Hamer has written 'Despite the majority's protestations to the contrary [in *RPS* and *Azzopardi*], *Weissensteiner* and the strong-use theory have effectively been overruled': Hamer, Part II, p. 214. Of course, in jurisdictions that are subject to the uniform Evidence Acts, the enactment of s20(2) makes a *Weissensteiner*-style inference impermissible anyway.

<sup>31</sup> Palmer, p. 130 and footnote 3.

<sup>32</sup> *RPS v R* (2000) 199 CLR 620; [2000] HCA 3, *Azzopardi v R* (2001) 205 CLR 50; [2001] HCA 25, *Dyers v R* (2002) 210 CLR 285; [2002] HCA 45.

<sup>33</sup> Danielle Allen, 'Anonymous: On Silence and the Public Sphere' in *Speech and Silence in American Law* ed. Austin Sarat, Cambridge University Press, Cambridge, 2010, p. 116.

<sup>34</sup> Walter Benjamin, 'Franz Kafka: On the Tenth Anniversary of his Death', in Walter Benjamin, *Illuminations*, ed. Hannah Arendt, Schocken Books, New York, 1968/2007, p. 133ff.

<sup>35</sup> Erwin R. Steinberg, 'The Judgment in Kafka's "In the Penal Colony"', *Journal of Modern Literature*, vol. 5, no. 3, 1976, pp. 492–514.

<sup>36</sup> Margot Norris, 'Sadism and Masochism in Two Kafka Stories: "In Der Strafkolonie" and "Ein Hungerkünstler"', *MLN*, vol. 93, no. 3, 1978, pp. 430–47.

<sup>37</sup> Gilles Deleuze and Félix Guattari, *Kafka: Toward a Minor Literature*, trans. Dana Polan, University of Minnesota Press, Minneapolis, 1986.

<sup>38</sup> Malynne Sternstein, 'Laughter, Gesture, and Flesh: Kafka's "In the Penal Colony"', *Modernism/Modernity*, vol. 8, no. 2, 2001, pp. 315–23.

- <sup>39</sup> Judith Butler, 'Foucault and the Paradox of Bodily Inscriptions', *The Journal of Philosophy*, vol. 86, no. 11, 1989, pp. 601–7, esp. p. 603.
- <sup>40</sup> Andreas Gailus, 'Lessons of the Cryptograph: Revelation and the Mechanical in Kafka's "In the Penal Colony"', *Modernism/Modernity*, vol. 8, no. 2, 2001, pp. 295–302; Scott McClintock, 'The Penal Colony: Inscription of the Subject in Literature and Law, and Detainees as Legal Non-Persons at Camp X-Ray', *Comparative Literature Studies*, vol. 41, no. 1, 2004, pp. 153–67.
- <sup>41</sup> Kafka, pp. 144–5
- <sup>42</sup> *Ibid.*, p. 146.
- <sup>43</sup> *Ibid.*, p. 143.
- <sup>44</sup> Danielle Allen, 'Sounding Silence', *Modernism/Modernity*, vol. 8, no. 2, 2001, p. 332.
- <sup>45</sup> Daniel J. Seidmann and Alex Stein, 'The Right to Silence Helps the Innocent: A Game-theoretic Analysis of the Fifth Amendment Privilege', *Harvard Law Review*, vol. 114, 2000, pp. 431–510.
- <sup>46</sup> Critical literature about Seidmann and Stein's article is listed in Alex Stein's response, in Alex Stein, 'The Right to Silence Helps the Innocent: A Response to Critics', *Cardozo Law Review*, vol. 30, no. 3, pp. 1115–40, on p. 1116 at footnote 2.
- <sup>47</sup> Allen, 'Sounding Silence', p. 326.
- <sup>48</sup> Hamer, Part II. But also David Hamer, 'The Privilege of Silence and the Persistent Risk of Self-Incrimination: Part I', *Criminal Law Journal*, vol. 28, no. 3, 2004, pp.160–78.
- <sup>49</sup> Hamer, Part I, pp.163–5.
- <sup>50</sup> *Ibid.*, p. 163
- <sup>51</sup> Hamer, Part II, pp. 211-215
- <sup>52</sup> See Katherine Biber, 'On Not Speaking: The Right to Silence, the Gagged Trial Judge and the Spectre of Child Sexual Abuse', *Alternative Law Journal*, vol. 30, no. 1, 2005, pp. 19–23.
- <sup>53</sup> (2000) 199 CLR 620; [2000] HCA 3
- <sup>54</sup> (2001) 205 CLR 50; [2001] HCA 25
- <sup>55</sup> (2002) 210 CLR 285; [2002] HCA 45
- <sup>56</sup> Each of these cases originated in the criminal courts of New South Wales and much of the High Court's attention was devoted to legislation that applies in NSW, but not in Queensland, where Weissensteiner's trial was held.
- <sup>57</sup> *Azzopardi*, at [7], per Gleeson CJ
- <sup>58</sup> *Azzopardi*, at [7], per Gleeson CJ
- <sup>59</sup> *Azzopardi*, at [8], per Gleeson CJ
- <sup>60</sup> *Azzopardi*, at [117]–[124], per McHugh J
- <sup>61</sup> The trial judge had said:

'Where it appears to you, as judges of the fact, that there is a witness who could be expected to have been able to give relevant evidence on some aspect of the case, but that witness has not been called, you are not entitled to speculate upon what that witness might have said if the witness had been called.

'But where the witness is a person, who, in the ordinary course, you would expect one of the parties to have called to support what they are asserting in their evidence and there is no satisfactory explanation for the failure of that party to call that witness, you are entitled to draw the inference that the evidence of that witness would not have assisted the party who you have assessed should have called that witness': Cited in *Dyers*, at [109] per Callinan J.

<sup>62</sup> *Dyers*, at [25], per McHugh J. He goes on to say: 'It is the principle that, if the jury think that the accused should have called a witness and there is no satisfactory explanation for the failure to call the witness, the jury are entitled to draw the inference that the evidence of the witness would not have assisted the accused. It is heresy, the majority hold, because there is no expectation that the accused will either give evidence or call other persons to give evidence. Given the decision in *Azzopardi*, I must accept the premise. But I do not accept the conclusion that the majority draws from that premise.' See generally [25]–[26], per McHugh J.

<sup>63</sup> *Dyers*, at [39], per McHugh J.

<sup>64</sup> *Dyers*, at [40], per McHugh J, citing *Petty v The Queen* [1991] HCA 34; (1991) 173 CLR 95 at 102, per Mason CJ, Deane, Toohey and McHugh JJ.

<sup>65</sup> Kafka, pp. 149–50.

<sup>66</sup> *Ibid.*, p. 154.

<sup>67</sup> *R v GAJ* [2011] QCA 141.

<sup>68</sup> Cited in *GAJ*, at [24], per Margaret McMurdo P.

<sup>69</sup> *Azzopardi*, at [51], per Gaudron, Gummow, Kirby and Hayne JJ.

<sup>70</sup> Sontag, p. 188.

<sup>71</sup> *Ibid.*

<sup>72</sup> J.D. Heydon, 'Silence as Evidence', *Monash University Law Review*, vol. 1, p. 53. J.D. Heydon is also author of *Cross on Evidence*, one of the leading Australian commentaries on evidence law, currently in its eighth Australian edition, LexisNexis Butterworths, Chatswood, 2010, where the silence of the accused, and judicial comments about it, are discussed at pp. 775–82.

<sup>73</sup> Palmer, p. 137. But he later makes the point: 'Indeed a convincing case could be mounted that the law of evidence largely exists to counteract common sense rather than to reflect it', on p. 138, citing further support in his footnote 35.

<sup>74</sup> Louis Michael Seidman, *Silence and Freedom*, Stanford University Press, Stanford, 2007.

<sup>75</sup> *Ibid.*, pp. 1–2.

<sup>76</sup> *Ibid.*, p. 2.

- <sup>77</sup> Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law*, Princeton University Press, Princeton, 2005, p. 150.
- <sup>78</sup> Toni Johnson, 'On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings', *Social and Legal Studies*, vol. 20, no. 1, 2011, pp. 57–78.
- <sup>79</sup> Johnson, pp. 58, 61–3.
- <sup>80</sup> *Ibid.*, p. 59.
- <sup>81</sup> *Ibid.*, pp. 58, 59–60.
- <sup>82</sup> Georgina Heydon, 'When Silence Means Acceptance: Understanding the Right to Silence as a Linguistic Phenomenon', *Alternative Law Journal*, vol. 32, no. 3, 2007, p. 150. The notion of 'preference' does not, in discourse analysis, contact the suggested 'correct' response; rather that there are, in a technical sense, a limited range of possible responses to the initiation and, in the absence of a response, there arises the assumption that the initiation has been rejected.
- <sup>83</sup> G. Heydon, pp. 149–53. See also Roger W. Shuy, *The Language of Confession, Interrogation and Deception*, Sage, Thousand Oaks, 1997, in which he acknowledges the power asymmetry in certain conversations, where ordinary 'conversational rules' are modified because of the status disparity between speakers, pp. 7–8. See also Roger W. Shuy, *Creating Language Crimes: How Law-enforcement Uses (and Mis-uses) Language*, Oxford University Press, New York, 2005.
- <sup>84</sup> Dennis Kurzon, *Discourses of Silence*, John Benjamins Publishing Co, Amsterdam, 1997, pp. 19–21. But see also his work on situational silence: Dennis Kurzon, 'Moment of Silence: Constitutional Transparency and Judicial Control', *International Journal for the Semiotics of Law*, vol. 24, 2011, pp. 195–209.
- <sup>85</sup> Kurzon, *Discourses of Silence*, p. 19, citing Gurevich, 1989.
- <sup>86</sup> Kurzon, *Discourses of Silence*, p. 19, citing Bruneau, 1973.
- <sup>87</sup> Kurzon, *Discourses of Silence*, p. 19.
- <sup>88</sup> Kurzon, *Discourses of Silence*, p. 21, citing Saville-Troike, 1985, and p. 21, citing Jaworski, 1993. See also Adam Jaworski (ed.), *Silence: Interdisciplinary Perspectives*, Mouton de Gruyter, Berlin and New York, 1997.
- <sup>89</sup> Jef Verschueren, *What People Say They Do With Words: Prolegomena to an Empirical-conceptual Approach to Linguistic Action*, Ablex Publishing, 1985, cited in Kurzon, *Discourses of Silence*, p. 20.
- <sup>90</sup> Kurzon, *Discourses of Silence*, p. 20.
- <sup>91</sup> George Prochnik, *In Pursuit of Silence: Listening for Meaning in a World of Noise*, Doubleday, New York, 2010. Prochnik's book is part of an expanding contemporary popular fascination with noise and silence; as an introductory list, consider: Garret Keizer, *The Unwanted Sound of Everything We Want: A Book about Noise*, Public Affairs, New York, 2010; Kyle Gann, *No Such Thing As Silence: John Cage's 4'33'*, Yale University Press, New Haven, 2010; Salomé Voegelin, *Listening to Noise and Silence: Towards a*

*Philosophy of Sound Art*, Continuum, New York, 2010; George Michelsen Foy, *Zero Decibels: The Quest for Absolute Silence*, Scribner, New York, 2010.

<sup>92</sup> Prochnik, p. 45.

<sup>93</sup> Cited in Bernard P. Dauenhauer, *Silence: The Phenomenon and its Ontological Significance*, Indiana University Press, Bloomington, 1980, p. vii.

<sup>94</sup> Dauenhauer, pp. 4–5.

<sup>95</sup> *Ibid.*, pp. 19–20.