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Essay

DEFENDANT SILENCE AND RHETORICAL STASIS

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Silence disrupts the classic arrangement of argumentation by preventing the traditional narrowing of issues—i.e., the identification of points of stasis. This burdens the side against which silence is deployed. When the defendant invokes the right to silence, the prosecution must address every possible defense. In those rare instances where a defendant's silence may be raised by the prosecution, the defendant may be put in a position of concession on multiple fronts. In either case, the economy of argument anticipated by classical rhetoric is lost.

ESSAY CONTENTS

I. INTRODUCTION 21

II. STASIS CATEGORIES IN RHETORIC 21

III. STASIS AND THE RIGHT TO SILENCE 23

IV. CONCLUSION..... 26



DEFENDANT SILENCE AND RHETORICAL STASIS

STEPHEN E. SMITH*

I. INTRODUCTION

The rhetorical term stasis (also status) refers to the point at which battle is joined between two parties in judicial argument.¹ It is the disputed point between the parties out of a sea of potential disagreements; it is the focal point of the parties' energies.² For example, the point of stasis in a civil contract suit may be whether there was performance or whether a failure to perform constituted a breach. In rare cases, it may also be both, though it is an unusual disagreement where at least some points are not agreed or stipulated—we save our energy for particular issues, the points of stasis.

A criminal defendant who asserts his right to silence may take advantage of stasis opportunities. The invocation of the right to silence disclaims any particular dispute, putting the prosecutor to proof on all possible underlying issues. On the other hand, a prosecutor who points to the defendant's silence at trial, when that is permitted, can take away the advantage. In the prosecutor's hands, silence may operate as a concession by the defendant on all possible issues. In either case, silence may disrupt traditional rhetorical approaches to argument.

II. STASIS CATEGORIES IN RHETORIC

While there are many described categories of stasis, this Essay posits a commonly used set of four: conjectural, definitional, qualitative, and translative.³

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¹ See LINDA WOODSON, *A HANDBOOK OF MODERN RHETORICAL TERMS* 57 (1979) (referring to status and stasis as both meaning “[t]he proposition, or definition, or critical issue to be considered in a piece of discourse”). This type of argument differs from a deliberative or epideictic argument.

² See Antoine Braet, *The Classical Doctrine of Status and the Rhetorical Theory of Argumentation*, 20 *PHIL. & RHETORIC*, no. 2, 1987, at 79, 81 (“During the preparation of their speeches both parties imagine that they are in the courtroom. . . . [T]hey anticipate their opponent's arguments and decide on their reaction to them. In this way, they ultimately deduce . . . the crucial question that the judge must answer.”).

³ See Braet, *supra* note 2, at 83 (discussing the four statuses that “giv[e] the defense [of denial] some substance”). See generally CICERO, *DE INVENTIONE, DE OPTIMO GENERE ORATORUM & TOPICA* (H.M. Hubbell trans., Harvard Univ. Press 1949) (c. 85 B.C.E.) (discussing four categories of stasis). Other writers have come up with different categories. See Janet B. Davis, *Stasis Theory*, in

Conjectural stasis concerns whether an act or incident took place.⁴ In a murder case for instance, the alleged victim may be missing. Is she dead, or is she secretly eloping in Tahiti? The point of stasis in this case is conjectural—did the thing happen?

Definitional stasis is a point of contention over what the thing is or should be called.⁵ In our murder case, let's say the body has been found and an impression from a ring on the defendant's finger is found on her chest. There is no doubt that she is dead, and (let's posit) that the defendant was physically responsible for the death. Was it murder? Was it manslaughter? Was it an accident? When we seek to define the act, we engage a stasis of definition.

Qualitative stasis addresses the nature of the act. Justification, for instance, is a question of qualitative stasis.⁶ Here, the argument is not about the occurrence of the act, or what it might otherwise be called, but why it should be excused. In our murder case, the defendant may assert that the alleged victim had come at him with a knife, and while he performed the act and intended to harm the victim, the quality of the act was defensive.

Finally, translative stasis is a point of disagreement over place, i.e., jurisdiction.⁷ Our defendant may argue, "wait a minute, this (allegedly) happened in Nevada, not California. Why do you think you can prosecute me?"

There are necessarily overlaps—or grey areas—between the categories of stasis. It may be asked, for instance, where criminal intent questions belong—are they definitional or qualitative?

As a logical matter, the categories of stasis are progressive and at odds with one another.⁸ If the agreed point of stasis is definitional, then the previous point of conjectural stasis is conceded. If the battle is joined at the point of qualitative stasis, then the points of conjectural and definitional status are both conceded. Translative stasis is an exception from this progressive relationship: where the argument should take place is largely independent of the other stasis categories and does not require their concession.

Consideration of these points of attack is a part of the job for any lawyer engaged in a dispute. Whether he or she is thinking of them in

ENCYCLOPEDIA OF RHETORIC AND COMPOSITION 693, 693–95 (Theresa Enos ed. 1996) (describing thirteen points of stasis set forth by Hermogenes).

⁴ Davis, *supra* note 3, at 693–94.

⁵ *Id.* at 694.

⁶ *See id.* (providing an example of assault where the defendant must take the stasis of quality as the site of the argument in order to address mitigating circumstances).

⁷ *Id.*

⁸ Braet, *supra* note 2, at 83; *see also* DAVID ZAREFSKY, ARGUMENTATION: THE STUDY OF EFFECTIVE REASONING pt. 2, at 119 (2d ed. 2005) (describing the progressive nature of stasis).

terms of rhetorical categories (probably not) is beside the point. The economics of argumentation require assessment of a case's stasis points.

These points must be considered for at least two reasons. First, of course, they determine the strengths and weaknesses of a case. Where are argument resources best deployed? Will it be more fruitful to focus on whether the thing occurred, or whether its occurrence is subject to excuse? Second, it is typically folly to join a case at every point of stasis. Preservation of the party's and counsel's credibility are at stake—you cannot say you did not do it *and* did it in self-defense and expect to gain the audience's favor. Elections must be made in most disputes.

III. STASIS AND THE RIGHT TO SILENCE

The stasis question is complicated, however, when the issue of silence enters the calculus. It is unremarkable to note that the Fifth Amendment provides criminal defendants a right against self-incrimination.⁹ This is widely regarded as a right to silence.¹⁰ Silence affords unusual stasis opportunities to defendants who invoke it and to prosecutors when they are permitted to point to it.

By standing silent, a defendant keeps stasis options open. The typical justification for remaining silent is to avoid revealing information that will help the prosecution make its case.¹¹ But it can have additional benefits. When a defendant remains silent, no point of stasis is immediately apparent. The questions of conjecture, definition, quality, and translation are all left open. This has two effects. First, the prosecution must expend more resources, as it is unable to focus on particular investigative targets, and instead must address each potential point of stasis. Second, the defense has the converse opportunity to develop defenses along each stasis category.¹²

⁹ U.S. CONST. amend. V.

¹⁰ *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (identifying the constitutionally protected right to silence and describing procedural safeguards designed to protect it).

¹¹ *See, e.g.*, *Howes v. Fields*, 132 S. Ct. 1181, 1186 (2012) (reporting that in a Fifth Amendment self-incrimination case the defendant “eventually confessed to engaging in sex acts with the boy”).

¹² Rule 3.1 of the Model Rules of Professional Conduct protects defense attorneys pursuing a stasis-motivated approach to representation, providing:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

MODEL RULES OF PROF'L CONDUCT R. 3.1 (2012). In essence, this rule provides that no point of stasis must be conceded by a defendant's attorney. Even if the defendant's unspoken, true focus is a point of

Keeping these lines of argument open is a key reason for maintaining silence as a defendant. When silence is maintained, the defendant is cipher. He may be a focus or target of investigation (and, of course, there may be evidence against him in whatever quantity), but he has not indicated where and how he may attempt to find his way out from under a charge.

When the defendant speaks, however, this flexibility may be lost. In a recent case before the Supreme Court, sheriffs interrogated the defendant, a prisoner, about allegations of sexual abuse committed against a minor before his incarceration.¹³ After five to seven hours of questioning, the defendant confessed to engaging in sex acts with the boy.¹⁴ When the defendant made his statement, he lost alternatives. Confessing to the acts gave up his ability to engage conjectural stasis because he conceded the act happened. He likely lost at least some of his ability to proceed at the point of definitional stasis—sex acts with a minor may provide some definitional leeway, but any possible definitions are likely criminal ones. He also lost most of his opportunities to argue qualitative stasis. Lastly, there are few excuses or justifications for sex acts with minors, so his confession likely established jurisdictional prerequisites for his prosecution—the point of translative stasis.

It may seem odd that a defendant could remain silent and still keep the stasis of qualification in play. If a defendant is silent regarding a justification for his actions, does he lose the ability to claim it? Where is the benefit of silence if you must breach it to take advantage of a point of stasis? To the extent this is true there may, indeed, be no benefit to silence vis-à-vis this category of stasis. In many cases, however, it is not true.

For example, self-defense is a typical justification that fits within the stasis of qualification. As a matter of criminal law, the defendant may not need to establish that an act was done for self-defense. Accordingly, he need not forgo his silence to establish the justification. For instance, California criminal jury instructions provide, in pertinent part, that “The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of <insert crime(s) charged>.”¹⁵ Accordingly, silence may be maintained

definitional or qualitative stasis, he may decline to indicate that, requiring the prosecution to address every avenue.

¹³ *Howes*, 132 S. Ct. at 1185.

¹⁴ *Howes*, 132 S. Ct. at 1186. The Court reversed the United States Court of Appeals for the Sixth Circuit and upheld the district court’s denial of the motion to suppress, holding that the interrogation was a non-custodial interrogation as the defendant was permitted to return to his cell at any time. *Id.* at 1185, 1188–89, 1194.

¹⁵ JUDICIAL COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS § 3470 (2013). The instruction continues in the following bench note:

while qualitative stasis is retained.

A defendant's silence may also benefit the prosecution, however. For instance, in *Salinas v. Texas*,¹⁶ the prosecutor at trial pointed to the defendant's silence as evidence that he had participated in the murder of two brothers.¹⁷ The defendant remained silent when asked if a ballistics report would link shell casings to a gun he possessed.¹⁸ The United States Supreme Court held that a suspect who remains mute has not done enough to put police interrogators on notice that he or she is invoking his or her Fifth Amendment right.¹⁹ As a result, the prosecutor was permitted to point out the defendant's silence. In such a case, the trier of fact may, as the prosecutor hopes, interpret that silence in a particular way.

What did the prosecutor get from his ability to remark upon silence? The jurors were expected to infer that the defendant's silence indicated that yes, the shells were from his gun. This took various points of stasis out of the defendant's control. Rather than requiring the prosecution to present evidence of elements sufficient to render certain points of stasis irrelevant, this "silence evidence" could enable the prosecution to shift the burden (practically if not technically) to the defendant. The jurors could conjecturally infer from the "silence evidence" that the act had occurred and that the defendant had been the actor. They could further infer that the act, definitionally, was murder (or a homicide of some type). After all, if it were something else, say, an accident, the defendant would have spoken. The same reasoning applies to qualitative stasis—if defendant were contesting it, he would speak, would he not? "I acted in self-defense!"

When the prosecution is able to point to silence in the course of a trial, it is relieved of having to detail even the most basic question—"what is its argument?" Instead, the defendant is placed in the position of having to face every possible point of stasis. Practically, this may require defendants to abandon silence once trial arrives. The stasis-related ambiguity of their previous silence requires them to speak to remove that ambiguity.

Instructional Duty: The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a sua sponte duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case. When the court concludes, however, that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, it should ascertain whether defendant wishes instruction on this alternate theory.

Id.

¹⁶ 133 S. Ct. 2174 (2013). *Salinas* is the muse that inspired this Essay.

¹⁷ *Id.* at 2178.

¹⁸ *Id.*

¹⁹ *Id.* at 2180–81.

IV. CONCLUSION

In the hands of either side to a dispute, silence disrupts the classic arrangement of argumentation. The traditional narrowing of issues may be lost. This creates burdens on the side against which silence is deployed. The prosecution is left with the burden of addressing every possible angle of defense. In those rare instances where the defendant's silence may be raised, he or she may be put in a position of concession on multiple fronts or lose the ability to remain silent. In either case, the economy of argument anticipated by classical rhetoric is lost.