UNIVERSITY OF VAASA
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"You have the right to remain silent"
Silence as an Instrument of Power in Two Fictional US Courtrooms

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ABSTRACT

Denna studie hamnar inom området icke-verbal kommunikation. Eftersom nämnda område är väldigt omfattande har det skalats ner till att endast omfatta tystnad i denna studie. Hypotesen är att tystnad används som ett maktmedel i rättssalen, genom att den tolkas och manipuleras av de olika aktörer som befinner sig i salen. Dessa är domaren, advokaterna och vittnena samt den åtalade. Målet är att se hur denna teori fungerar i två amerikanska skönlitterära rättssalar. Analysen är baserad på två nutida romaner. Den första heter *Presumed Innocent* (1987) och är skriven av Scott Turow och den andra heter *Rules of Evidence* (1992) och den är skriven av Jay Brandon.

Som teoretisk bakgrund till denna studie används huvudsakligen William O'Barrs (1982) studie om hur tystnad tolkas i rättssalen samt Dennis Kurzons (1998) modell om hur man kan tolka om tystnad är medveten eller omedveten och att på så sätt få reda på vad tystnaden egentligen signalerar.

Slutsatsen av denna studie är att tystnad används av alla aktörer i rättssalen och att dess syfte är att vilseleda och manipulera. På basis av denna studie kan man konstatera att både domare och advokater är mycket medvetna om maktspelet i rättssalen och att dessa är flitiga användare av tystnad som ett maktmedel. Vittnena och de målsägande i dessa skönlitterära rättssalar är inte alltid medvetna om den makt de har när de väljer att inte yttra sig. Det visade sig att i de situationer som vittnen valde att inte yttra sig ofta blev till fördel för den åtalade.

KEYWORDS: Nonverbal communication, Silence, Courtroom drama, Courtroom language

1. INTRODUCTION

The word not spoken goes not quite unheard.
It lingers in the eye,
In the semi-arch of brow.
A gesture of the hand
Speaks more than words,
The echo rests in the heart
As driftwood does in the sand,
To be rubbed by time
Until it rots or shines.
The word not spoken
Touches us as music
Does the mind.

"Silent Meaning" by Senator William S. Cohen

This text was published in the *New York Times* on July 23, 1985. It is about all those messages that people exchange beyond the words themselves. As this poem by Senator William S. Cohen shows, the nonverbal side of communication is crucial and often overshadows the verbal communication that is going on (Burgoon 1989: 61). On the first encounter with a stranger many will agree that we base our first impression on appearances and signals that are not being spoken. There are naturally differences between men and women (Quilliam 2005: 54). People are commonly aware of the importance of body language, not only to be able to interpret other people's behaviour but also to gain from it and help people become more effective in life. By interpreting these signals one can analyse people's minds, thoughts and feelings. One can even make a profile of their personality. (Quilliam 2005: 6-7)

The subject I have chosen to study falls within the field of nonverbal communication in fiction. Fernando Poyatos explains that if we were to read a conversation that takes place on a page in a novel and we had to rely solely on the printed lexemes and a few punctuation marks, an important part of the human message would be lost, at least for the reader. Therefore the functions of nonverbal communication are something that we greatly take for granted and perhaps do not give much thought to even though it is a large part of the experience when reading a novel. (Poyatos 1977: 294-331) Nonverbal

communication is a large part of the interaction between people, and without it, we would be stripped naked.

I have chosen to look at one function of non-verbal communication in this study, the use of silence. The poem cited at the beginning of this chapter, is an example of voluntary silence, but what about involuntary silence, the silencing of women, for example? This will be discussed further on in the study. Dennis Kurzon (1998: 51) states that "silence is meaningful", but he also acknowledges a problem: "the central problem of silence in discourse is to discover that meaning". The aim of this study is also to find answers to the questions what is silence and does silence suggest guilt or perhaps the contrary? What message is sent when a person remains silent? How can silence be interpreted and manipulated? I will discover how silence works in a fictional courtroom. A study like this one can offer various hypotheses. One could argue that silence is used as a strategy of self-defence, a signifier of ethnic background, class or lack of education. However, the hypothesis of this study is that silence is used in the fictional US courtroom as an instrument of power both intentional and unintentional. This will be shown by O'Barr's (1982) theory that I will use as a model in the analysis. The aim of this study is to discover the meaning of silence in a certain context, the context of my choosing being the fictional courtroom.

There have been other sayings on silence as well, more poetic ones: "Silence is to speech as the white of this paper is to this print" (Harper, Wiens & Matarazzo 1978: 61). This attempt at a definition is very accurate. I have previously claimed that other nonverbal communication is also important and silence is a very good example of this communication. Silence is not something we instantly see or even focus on but it is very much present and full of meanings and interpretations. In fact, would we even see the print if it was not for the paper?

One place to look for this type of nonverbal communication is in the courtroom. I grew up watching television series like *Matlock* and *Chief Inspector Morse*; even though they were out of date even then, they were TV classics with the same suspense as any detective story. *Matlock* aired from September 23, 1986 to May 7, 1995, starring Andy

Griffith (Wikipedia: Matlock). *Chief Inspector Morse* was first a series of novels written by Colin Dexter and turned into a television series that ran from 1987 to 2000, starring John Thaw. (Wikipedia: Chief Inspector Morse) They contained a crime, a detective, a number of suspects, a trial, suspense and the solving of the mystery. Today the idea is the same but the titles of the series are different, like for instance the American series *The Practice* (1997-2004) or the British series *Midsomer Murders* that first aired in 1997 and still is running on TV. (Wikipedia: The Practice), (Wikipedia: Midsomer Murders).

There are many examples of silencing in these series; for example when the detective arresting the suspect reads them their rights "You have the right to remain silent, and anything you say or do not say may be held against you in a court of law..." In many US series the defendant has "pleaded the fifth" in the courtroom. This means that he or she has made use of their right, under the American Constitution and the Fifth Amendment, to remain silent. There are also numerous instances when the lawyers themselves are silenced by the judge "On a point of order…" or when lawyers silence a witness or each other "Objection, your honour!"

I will base my study on the analysis of silence and power in two novels: *Presumed Innocent* (1987) by Scott Turow and *Rules of Evidence* (1992) by Jay Brandon. Both these novels are partly set in the courtroom and hence include courtroom dialogue. I chose this material by these authors because they have real life experience of silence in the courtroom and they know how the legal system in America works. Therefore I assume that their literary representations of the legal system and the various dialogues in the courtroom are more realistic, technically speaking, than they otherwise might be if written by a non-lawyer.

There have been many studies done on silence from different perspectives, including psychological, sociological and sociolinguistic. Thomas J. Bruneau (1973) for example sees silence in a linguistic light. He points out three types of silence: the first one, psychological silence, is used to help the listener to understand the message through hesitations and sentence corrections. The second type is an interactive silence which

occurs as pauses that are intentional in a conversation. The third type is socio-cultural silence, which means that silence is interpreted with the help of specific cultural codes. Active silencing belongs under the third type. (Harper, Wiens & Matarazzo 1978: 67)

Muriel Saville-Troike (1995) is another scholar who has done research in the field. She says that "apart from dictionary definitions, silence means what it conveys" (1995:10). The meaning of silence varies depending on the speech community, which leads to cross-cultural misunderstandings. She argues that silence is "context-embedded" and dependant on context for its interpretation (1995: 11). This is clearly relevant to the artificial setting of the courtroom, as will be shown in the analysis. The importance of context will also be further discussed.

In her article "Silence: Anything But" (1995) Deborah Tannen explains that silence is a matter of saying nothing and meaning something. She develops the idea of silence as negative versus positive politeness. This article includes an analysis of silence and its meaning in conversational style between three New Yorkers of East European Jewish background and three non-New Yorkers. Her conclusions are that a pause becomes a silence and is negatively valued when it is too long or appears at the wrong time and place. In the courtroom this is of importance. The timing is everything, because it will be interpreted, consciously or not. Cultural differences are important for instance when the judge is a white American and the accused is of other ethnic background. Tannen also pointed out the cultural differences concerning valuation of silence and noise. Susan Sontag is another feminist critic who also has looked at silence, the silencing of women being a very active silencing. (Tannen 1995: 93-109) This will be further discussed in section 3.2.1.

Fernando Poyatos (1983), a scholar who has done extensive research on nonverbal communication and silence, offers a systematic investigation of silence which occurs between two people interacting, as in a courtroom confrontation between the prosecutor and a witness. He points out that this topic on silence and stillness has become of interest since it is such a frequent phenomenon in everyday life. He emphasises the importance of sound and the lack of sound. He illustrates this by drawing attention to

animals and even plants: “We know that plants grow; we do not perceive the growth with our eyes as it occurs but the growth is acknowledged by the mind, just as the absence of growth also is acknowledged both visually and intelligibly”. (Poyatos 1983: 215-217)

He further argues that silence is an element of interaction, and when speech is interrupted by a pause, paralanguage or kinesics still fills that gap. He explains that no pauses can truly be called *unfilled* because any actual breaks in speech are filled by paralanguage or by kinesics (such as a gesture). These activities may convey certain messages more effectively than words. Poyatos says that to be able to understand the communicative significance of silence we must understand how it functions as a sign. He states that silence performs three functions as it is being encoded. These functions are silence as a *sign proper, zero signs and carriers.* (Poyatos 1983: 224)

Poyatos (1983) gives the following example of a *sign proper:* “there was in her silence/stillness all the anguish of the situation”. In this instance we do not think of absence of sound or movement. He explains that the meaning is given by the silence itself without reference to anything else. He claims that “Silences can also act as *zero signs* signifying precisely “by their very absence” when the words, paralanguage or kinesic behaviour should be expected, as when we halt in our speech to avoid saying something or in the middle of a kinesic phrase without completing it.” Poyatos illustrates this with “the silence with which one responds to our greeting unwilling to answer verbally or kinesically.” (Poyatos 1983: 224, 227)

Another instance is the silence which occurs when we have not been heard. An example of this can be when someone calls out “Anybody home?” and there is no answer. (Poyatos 1983: 224-226) He also focuses on silences as *carriers* of the preceding sound or movement, as when a long pause follows “stop it!” and that verbal negation prolongs itself more intensely in our minds – as would a cynical smile – carried over and enlarged by the silence. It has a greater effect than if the person continues to speak. He gives the example of story telling and story reading for children. He says that it is important to give the child silences so the child can itself recreate them in his/her mind.

The carrying effect of the silence is intensified when accompanied by stillness. These two activities go hand in hand in the same way as gestures are part of speech. (226) Courtroom statements and the stories that are being told there can be very similar to the storytelling in Poyatos' example. Silences in courtrooms are important in the same way, to recreate themselves in the minds of the spectators, in this case the judge and the lawyers, not to mention the members of the jury.

There is also the idea of the high-context society vs. the low-context society. The general terms "high context" and "low context", introduced by Edward T. Hall in 1989, are used to describe broad-brush cultural differences between societies. (Beer 2003) In general, low-context societies are considered to be the US and other Western countries whereas Asia, Middle Eastern countries and Latin America are considered to be high-context countries. In a high-context society few words are needed and little needs to be said and the contrary goes for a low-context society. (Beer 2003) In other words, silence is golden in a high-context society like Japan. It needs to be said that all cultures contain "high" and "low" since these terms cannot describe a whole people. The terms "high" and "low" are more relevant in describing certain situations and environments. There are, however, certain principles that govern these two types of societies.

High-context cultures are often very traditional and concerned about issues like honour and shame. In these cultures group harmony is very important and people often dislike direct confrontation and hence avoid saying a clear "no". Evasion and inaccuracy are preferred in order to keep up appearances. Body language is very important and people tend to be evasive rather than to lose face. In a low-context society language is a way of finding and conveying information and language is not carefully watched because there is no fear of losing face. People believe in freedom of speech. (Rosenbergh 2010)

This means that a courtroom setting can be very different in the US vs. Japan. In a US courtroom people such as attorneys, the judge and witnesses do not intentionally think about nonverbal cues that they might be sending and receiving. Nonetheless the cues are very much present but perhaps not very intentional. Silences are such nonverbal cues, and two Finnish scholars have through a study shown that these cues are important.

Jaakko Lehtonen and Kari Sajavaara (1985) have carried out a study of speech behaviour in social interactions amongst Finns. They say that values regarding appropriate behaviour can be illustrated through proverbs and sayings that exist in the society. In Finland there are proverbs like “Listen a lot, speak little” and “A fool speaks a lot, a wise man thinks instead”. (Lehtonen & Sajavaara 1985: 194) Therefore the “Silent Finn” has become a popular image both in Finland and in other places. This is because the threshold of tolerance of silence varies from culture to culture. Americans fill up silences with talk because silence is not tolerated socially. In many cases when the Americans talk it is not what is being said that is important but the avoidance of silence. However, in all due respect to Americans the proverb “Silence is golden” is commonly quoted in America, but not so often lived by.

As Dennis Kurzon (1998) mentions, maxims and proverbs do not necessarily represent universal truths (54). In Finland the situation is different, since silence is socially acceptable. Lehtonen and Sajavaara also state that “in many cases, it can be the silence that contains the most important cues for the meaning of the message” (Lehtonen & Sajavaara 1985: 193, 200). In this study it will be shown that this is the case: silence often contains the most important message.

As a theoretical framework for this study I will use different sources for each section. I will start by analysing the courtroom drama genre and its conventions in chapter 2. In chapter 3 I will continue to look at silence as an instrument of power, and I will refer to William O’Barr’s study (1982) on how silence is interpreted and manipulated in the real courtroom. In this section I will also cover areas such as the silencing of women. Here I will discuss the article “Pregnant Pauses” (1995) written by Norma Mendoza- Denton. The model of how to interpret silence by Dennis Kurzon (1998) will be discussed under intentional and unintentional silence. In chapter 4, which is the actual analysis of the selected material, I will discuss how the theories discussed in the theoretical part apply to the characters in the courtroom, i.e. the Judge, the lawyers, the defendant and witnesses. In chapter 5 my findings will be concluded.

2 COURTROOM DRAMA

It is in the human nature to categorize and classify all things. Certain texts that are original in some way also share characteristics with other texts, and so they make up their own genre. Arthur A. Berger (1992: xiii) underlines the importance of genre studies because "they provide us with insights about what texts are (or should be) like, how they are created, and how they function for audiences." Berger points out that the genre makes it possible for us to see the connections between different texts as of form and content.

MacCracken (1998: 59) makes an interesting claim that "the formalization of judicial processes based on evidence and argument is a necessary precondition for the detective story." He continues by saying that "detective narratives are constructed in relation to one of the most important self-referential systems of modernity: the law."

Courtroom drama is a genre on its own, since it is played out in the courtroom. A courtroom drama concentrates on finding out the false suspect or the criminal after he or she is caught. It is all about detection taking place in the courtroom. In a classic courtroom drama the reader does not know the culprit until the climax of the story. It is the opposite of a legal thriller, where the culprit often is revealed at the beginning and the plot focuses on whether he or she will get caught. According to Catherine Mambretti: (2011) "When you read a thriller, you expect to be thrilled. When you read a mystery, you expect to be puzzled and then pleasantly surprised." (ccmambretti.com)

There are two main ingredients in a courtroom drama. The first is the courtroom itself. It is almost the main character, and its personality is determined by the character of the judge who embodies either justice or injustice. In *Persumed Innocent* (2005) we encounter a judge with a dark, dishonest past. The judge's past catches up with him during the trial and his ruling is strongly affected by that. The other ingredient is the trial: it has to be central to the plot. In most courtroom dramas the defence team and the defendant represent the innocent party. The defendant is rarely the guilty, but even if the case might be such, the defence attorney is always on the right side of the law.

Prosecutors are almost always portrayed as the villains: they simply are not very likeable (ccmambretti.com). They are even portrayed in a way that the reader will find them unattractive. The narrator in *Presumed Innocent* (2005: 174) describes prosecutors like this: “His courtroom persona, as I have observed it over the years, is typical of many prosecutors: humorless, relentless, blandly men.” In another episode the narrator who is also the defendant describes one of the prosecutors, Tommy Molto: “Tommy is a disheveled mess. His vest, absurd by itself in July, has ridden upon his substantial belly and his shirt-sleeves stick too far out of his jacket. His hair has not been combed” (2005: 178). These are just a couple of instances where prosecutors are described in a negative manner in this particular novel.

A legal drama is by definition “a work of dramatic fiction about crime and civil litigation.” (Wikipedia: Legal drama). This type of legal drama has a subdivision: courtroom dramas. Legal dramas ignore the fact that most cases are settled out of court. On the contrary, they emphasize the trial simply because a conflict between parties makes for an interesting story. Legal dramas also focus on an obvious injustice or on a plaintiff or defendant who is unusual or interesting. This is why the “insanity defence” occurs more often in dramas than in real life. Dramas also focus on areas of the legal process that can be dramatic or at least portrayed as such. This includes oral arguments in court. Dramas totally ignore areas like researching a written legal brief. (Wikipedia: Legal drama)

Legal drama as a genre naturally has more dialogue than other genres and a larger cast of characters too. Courtrooms are filled with a mixture of professionals such as lawyers and amateur characters such as witnesses, the accused and the public. Reading a courtroom drama requires the reader to be alert due to the vast cast of characters.

Most courtroom dramas favour the defence, as do the novels in this study. By definition, if you do not know who is guilty at the beginning of a courtroom drama, then the defendant is likely not to be the one. In such a case, the defence attorney is usually the protagonist. Even when it turns out that the defendant really is guilty, the defence attorney is always someone who abides the law, always tries to do the right thing.

In neither *Rules of Evidence* nor *Presumed Innocent* can the reader know who the real villain is. In fact, all evidence shows that the accused is the one who committed the crime. Since these stories are courtroom dramas, there is another dimension to the story. The drama in the courtroom is the core of the book, the battle between the two parties. The solution or the discovery who committed the crime is of less importance. I suggest that is the reason as to why the reader cannot decide who the villain is until the author decides it is time. The reader is left in the dark until the very last page. Even so, I would argue that these novels are detective fiction and crime fiction as well as courtroom dramas. The genres and subgenres overlap.

Courtroom drama is a subtype of the mystery genre or crime fiction. The term "crime fiction" includes the detection of crimes, the criminals and their motives. Crime novels also share a common structure. First and above all there must be a crime, usually a murder. The murder leads to the investigation which leads to the outcome or judgement. Often the criminal gets caught and brought to justice.
(findmeanauthor.com/crimefiction)

2.1 Silence in Crime Fiction

Even though the novels in this study are courtroom dramas, they are, in my opinion also detective mysteries, because they fit in on the description of this kind of literature.

On the question "what is detective fiction?" Charles J. Rzepka (2005: 11) gives two examples when characterizing crime fiction: Charles Dicken's (1812-70) *Bleak House* (1853) and Ann Radcliff's (1764-1823) *The Mysteries of Udolpho* (1794). He believes that these novels illustrate three factors that are essential to detective fiction. In both these works there is a detective, there is a mystery to be solved and there is an investigation that solves the mystery. Given these criteria both *Rules of Evidence* and *Presumed Innocent* can be considered detective fiction or crime fiction. The detectives are amateurs in the sense that they are lawyers and not private eyes. However, the detective in Radcliff's novel was also an amateur.

Rzepka (2005: 11) also draws attention to the fact that neither of these authors give enough clues to the readers to enable them to solve the mystery on their own, one must wait until the author provides the solution. Granting the reader such information is, according to Rzepka (2005: 11), for many critics crucial for the detective story.

Another area to be considered is the human interest in crime in general. Mary Evans (2009: 1) states: crime is "always a topic that excites attention and engages the attention of readers or viewers." Most people would have nothing good to say about real crime but crime fiction is highly popular. There is an interesting contrast in attitude between real crime and crime in fiction. Leigh Russell (2011), a writer of crime fiction says that the interest in crime comes from the basic interest in good versus evil. He explains that all of us are faced with the conflict between good and evil at some point in our lives. We can all relate to that. Russell states the notion that many of us are aware of namely that life is not fair but we all long for a just world. (crimespreemag.com) He states: "It seems to me that the appeal of crime fiction is attributable to a combination of suspense arising from the conflict between good and evil, and the reassurance of knowing that in the end some sort of moral order will be restored." (crimespreemag.com) Russell also points out the changes that can be seen in crime fiction. Today we do not encounter heroes like Sherlock Holmes, Hercule Poirot or Superman. The heroes in today's crime novels are flawed. They reflect human nature and become more believable. The same applies to the villains who are not always portrayed as evil personified, but are damaged people who even get our sympathy at times. Russell says that the murderers he writes about "are as much victims as the people they kill". (crimespreemag.com) He continues: "Unless I see the world through my killers' eye, I can't create them as plausible characters." (crimespreemag.com)

In *Presumed Innocent* the murderer turns out to be the wife of the accused. She has murdered her husband's mistress since she believed she had destroyed their lives. As the author reveals the truth, the murderer gains sympathy even though she is guilty of a horrific crime. The author himself takes pity on her, since she is never put to justice. Her husband, the accused is acquitted and he is the only one who knows the truth.

In the sequel *Innocent* (2010) the past is catching up with the Sabichs' and it is revealed that the murderer suffers from mental illness. In *Rules of Evidence* (1992) the murderer is a young police officer who wants to help his idol, he looks up to Mike Stennet, and somehow he is put in the situation where he kills a man for Mike Stennet, who becomes the accused. This young police officer in his naivety believes he helped Stennet, making Stennet look good. The young officer is killed in a confrontation and his innocence is revealed: "The young officer on the floor by the bathroom didn't fire at all. He had his gun out and thought he was pulling its trigger, but in reality he was just screaming." (1992: 322)

According to Evans (2009: 3) crime fiction explores the origin of human actions. She also says that today writer's do not think of only one person to be "the rotten apple in the social barrel" now they draw attention to the condition of the whole social barrel. Russell (2011) sums it up as the following: "As detectives become less than perfect, and villains become increasingly three dimensional characters, there is still a clear line between pursuit of justice and morally unacceptable conduct. With moral guidelines prevailing less in society, perhaps the popularity of crime fiction is not only more understandable, but more important than ever in helping provide us with a moral compass for real life." (crimespreemag.com)

In all kinds of fiction nonverbal communication is present. In crime fiction every gesture, nod and glance has a meaning. Silence has meaning in crime fiction on many different levels. Even when silence technically is a pause, that moment of silence has meaning depending on the given context. A simple example of this would be the following. A lawyer asks his client if he is guilty of murder.

> Lawyer: Did you do it? Did you kill her?
> Client: No. [---] No I did not.

This illustrates how a pause or a silence can work. First the client answers "no" and then he pauses and repeats his "no". Doing so, he emphasizes his "no" answer. A simple "no" would not have the same effect even though the meaning technically is the same.

The client could have chosen to be silent all together, not answering the question at all. As will be seen in 3.2.2 such a silence would be interpreted as a "yes" even though the client has not admitted guilt. If the author chooses to put in other nonverbal features the example may look like this:

> Mr. Smith walks towards his client looking him straight in the eyes. 'Did you do it', he whispers. 'Did you kill her'? His eyes were glued on his client as if he was getting ready to be confided a secret. His client grinned looking Smith right in his eyes before he nonchalantly walked out of the room in silence.

In this example the reader gets many clues as to how to interpret the silence. The words *grinned* and *nonchalantly* suggest to the reader that the client in fact is guilty and that he is not ashamed of it either, even though he has not said the actual words. If I were to exchange the words *grinned* and *nonchalantly* with *smiled* and *slowly* the meaning would be quite different because then the reader would not be certain that the client in fact is guilty. This illustrates the importance of describing nonverbal communication or body language in a written text. Without these clues the reader would be left in the dark not being able to draw conclusions, which is the whole point when reading crime fiction at least. The reading experience would be rather boring without them.

Sir Arthur Conan Doyle uses nonverbal communication in the Adventures of Sherlock Holmes. Doyle himself explained:

> By a man's fingernails, by his coat sleeve, by his boots, by his trouser, knees, by the calluses of his forefinger and thumb, by his expression, by his shirt-cuffs, by his movements, by all of these things, a man's calling is plainly revealed. (Pease 2004: 1)

Doyle was perhaps before his time and this quotation is still relevant. Doyle makes use of body language when words do not seem enough when trying to find out the truth. In *The Adventure of the Blue Carbuncle* (1891), Doyle makes use of eye contact to identify the criminal's real identity.

> 'My name is John Robinson,' he answered, with a sidelong glance. 'No, no; the real name,' said Holmes, sweetly. 'It is always awkward doing business with an *alias.*' A flush sprang to the white cheeks of the stranger. 'Well, then,' said he, "my real name is James Ryder.' (Doyle 1891: 210)

As suggested by Doyle, the sidelong glance indicates a lie. Susan Quilliam (2005:13) among others supports the notion that a liar avoids eye contact. Doyle provides us with several examples of nonverbal communication in crime fiction. I will look at three examples. The first example is from *The Boscombe Valley Mystery* first published in *The Strand Magazine* in 1891 as the fourth out of 12 mysteries in *The Adventures of Sherlock Holmes.* (Wikipedia: The Boscombe Valley Mystery)

> The man who entered was a strange and impressive figure. His slow, limping step and bowed shoulders gave the appearance of decrepitude, and yet his hard, deep-lined, craggy features and his enormous limbs showed that he was possessed of unusual strength of body and character. His tangled beard, grizzled hair, and outstanding, drooping eyebrows combined to give an air of dignity and power to his appearance, but his face was of an ashen white, while his lips and the corners of his nostrils were tinged with a shade of blue. It was clear to me at a glance that he was in the grip of some deadly and chronic disease. (Doyle 1891: 171, 172)

It is fair to say that Doyle had an eye for detail. From just a glance at the man's appearance, Holmes could immediately draw the conclusion that this man was very ill. A few lines down the page the old man asks Holmes why he wished to see him. As he did so "he looked across at my companion with despair in his weary eyes, as though his question were already answered." Holmes answers by saying: "'Yes'", said Holmes, answering the look rather than the words. "It is so. I know all about McCarthy." (Doyle 1891: 172) Again, his eyes say it all, no words were actually needed. Holmes always draws conclusions based upon people's appearances. In fact, studies show that we all do so, aware of it or not. Quilliam (2005: 13-15) gives a detailed description of this. In Doyle's *A Case of Identity* the third of the mysteries printed in Strand Magazine (1891), Sherlock Holmes sees a young woman from his window. After a long description of her appearances he concludes:

> From under this great panoply she peeped up in a nervous, hesitating fashion at our windows, while her body oscillated backwards and forwards, and her fingers fidgeted with her glove buttons. [---] I have seen those symptoms before, said Holmes, throwing his cigarette into the fire. Oscillation upon the pavement always means an *affaire de coeur*. (Doyle 1891: 148)

Of course Holmes was right and shortly after the Lady in the street laid out her problem before Mr. Holmes. The woman's fidgeting with her buttons and her moving back and forth in the street all suggested that she was nervous about something. Holmes could even conclude her problem was a matter of the heart. "Fidgeting" is accepted by many to be a sign of nervousness. Quilliam (2005: 107) states that fidgeting is a classic sign for nervousness.

The third example and the most interesting one is when Holmes gives Dr. Watson a lesson in nonverbal communication. This episode takes place in the same story, *A Case of Identity*. The Lady has now left Holmes and Watson and Holmes tells Watson he found the Lady to be "most instructive" as Watson replies: "You appeared to read a good deal upon her, which was quite invisible to me." Holmes answers:

> Not invisible, but unnoticed, Watson. You did not know where to look, and so you missed all that was important. I can never bring you to realise the importance of sleeves, the suggestiveness of thumbnails, or the great issues that may hang from a bootlace. Now what did you gather from that woman's appearance? Describe it. (Doyle 1891: 153)

Watson describes what he had seen, mostly the colours of her dress and so forth. Holmes replies: "It is true that you have missed everything of importance, but you have hit upon the method, and you have a quick eye for colour. Never trust to general impressions, my boy, but concentrate yourself upon details." (Doyle 1891: 152) Holmes then continues describing the woman in detail and what conclusions they were to draw from it. Doyle gives us all a lesson in Nonverbal Communication here. Watson sees the large picture whereas Holmes sees details. This is an important distinction when interpreting nonverbal signals.

No doubt authors use this knowledge in their writing, especially earlier crime fiction. It is often up to the reader to notice the details in order to solve the mystery. The author is mostly kind enough to explain these details, usually on the last pages of the book. In film, these details are easier to spot since cameras usually zoom in on the important details the viewer is meant to see.

Now I will continue and take a look at some general thoughts on nonverbal communication and how silence is a function of discourse. I will also touch on the subject of silence and power and the silencing of women. In section 3.2.2 I will take a look at O'Barr's (1982) study on how silence can be interpreted and manipulated in court. Following O'Barr in section 3.2.3 is Dennis Kurzon's (1998) model on how to determine whether a silence is intentional or unintentional.

3 NONVERBAL COMMUNICATION AND SILENCE

In *The Definitive Book of Body Language* (2004: 10-13) written by Allan and Barbara Pease, there are quotations that are meant to illustrate the importance of body language in our communication. “Get it off your chest. Keep a stiff upper lip. Stay at arm’s length. Keep your chin up. Shoulder a burden. Face up to it. Put your best foot forward. Kiss my butt.” Different studies show different data concerning how much of our communication is nonverbal versus verbal. However, the overall number is leaning towards 60/40 in favour of nonverbal communication. When someone claims to have a “gut feeling” or a “hunch” it means that the spoken words and the body language do not match and then we become suspicious of the truth in what we have been told. (Pease 2004: 13)

Nonverbal Communication is a vast area of study and it is not necessary to go through all the aspects in this study since this thesis focuses on “silence”. However, Pease makes an important point that covers all areas of nonverbal communication. Pease argues that “all *gestures* should be considered in the context in which they occur.” (Pease 2004: 23) Of course, this is true of all signals of nonverbal communication. To illustrate this point Pease gives the example of a man sitting at a bus terminal. He has his arms and legs crossed and his chin down. It is a cold day in winter so this would logically mean that the man is cold and freezing. Were this man to sit in the same position at a table listening to someone trying to sell him an idea, his body language would suggest that the person is feeling negative or rejective. (Pease 2004: 24)

Pease also adds that it is important to consider a “person’s physical restrictions and disabilities” when interpreting their body language. For instance, an obese person would not be able to cross his or her legs and women wearing short skirts sit with their legs crossed. (Pease 2004: 25) The question that remains is how to interpret what is really happening. Pease says: “It is all about matching what you see and hear in the environment in which it all happens and drawing probable conclusions.” (Pease 2004: 2) Again, the environment or the context is of great importance. This point is further strengthened by Searcy, Duck and Blanck (2009: 41) who explain that nonverbal

behaviours such as “the shifty eye, shuffling feet, hesitancy in tone of voice [---]” by a witness or a defendant are regarded by judges and lawyers to be signs of guilt or untrustworthiness. However, if the same individuals show these signs outside the courtroom, they may be interpreted as “eccentric, humorous, and perfectly appropriate in their context.” The focus for everybody is to determine someone’s guilt or innocence, sociability is irrelevant as is pleasure (Searcy, Duck and Blanck 2009: 43). In this thesis the courtroom is the given context and it is strongly defined.

When a person is speaking, he/she uses different physical cues, some intentionally some unintentionally. Silence may co-occur with other nonverbal means of communication. For instance, a person raises his/her eyebrows but is silent. They could be saying “I have my doubts”. Silence cannot co-occur with speech, but it can function as an alternative device. It is a nonverbal device but takes on a different role from other nonverbal devices. These can co-occur with speech but also with silence, as the example of raising an eyebrow proves. Simply put, we have speech and silence and we have a number of nonverbal devices which occur with one or the other. Silence can also be unintentional because sometimes people are silent without meaning anything by it. So in fact, intentional silence is the right counterpart to speech. (Kurzon 1998: 9-11) Intentional and unintentional silence will be further discussed in section 3.2.3.

There has been considerable research done on silence, with interpretations ranging from a hesitation phenomenon to nonverbal communication. In 1962 Donald S. Boomer and Allen T. Dittman carried out an experiment on 25 adult native speakers of English and were able to draw a distinction between hesitation and juncture pauses. The results of the study stress the importance of analyzing pauses only within the context of their occurrence. Also in 1962, James N. Farr reviewed ways in which silence may aid or disrupt business transactions. Silence not only invites others to speak but may also do the opposite: when unexpected it can cause tension and anxiety. (Duston-Munoz & Kaplan 1995: 235)

This can be related to the courtroom as well. For instance, Farr (1962) quoted in Duston-Munoz & Kaplan (1995: 235, 238) suggests that silence is invoked by managers

in three situations, the first one being when managers wish to “encourage subordinates to reason out arguments before presenting them” and secondly “encourage subordinates to present their arguments” and also to “increase the chance of uncovering emotionally weighted information”. This is what lawyers do in the courtroom.

In 1973 Vernon J. Jensen quoted in Hall & Bucholtz (1995: 238-239) wrote that silence may take on several roles in the communication process. It can in certain situations communicate and shield a full range of emotions. He states that silence can be used to express judgement, continuing that silence may be associated with thoughtfulness or even the absence of thought. However, these functions are defined by their linguistic and social contexts. These are functions that will be encountered in the courtroom. Silence is not always a power tool but can also indicate thoughtfulness, as Jensen said. However, a reader is never left in the dark about what type of function the particular silence has; it is not in the interest of the author to keep the reader guessing. I am now strictly referring to the context of the courtroom and courtroom drama.

In 1982 William M. O’Barr quoted in Duston-Munoz & Kaplan (1995: 241) discussed some of the legal aspects of silence, such as the right to remain silent, refusing to remain silent and silencing the record. He considers silence during the trial process and the numerous ways in which silence can be interpreted and manipulated. His findings can be used to support the argument that silence is used as an instrument of power in a highly intentional way. The study done by O’Barr will be further discussed in section 3.2.2.

3.1 Silence as a Function of Discourse

Anne Walker-Graffam (1995: 55) states: “Depending who is doing the observing, silences which occur as part of speech carry different weight.” Walker has shown interest in how speakers use and perceive silence during the construction of dialogue. She has looked at the two-faced nature of silence. On the one hand, the speaker needs to organize thought, while on the other, the hearer needs to put a motive to the silence

which occurs in speech. Walker made a study of the impressions of witnesses that lawyers form during legal proceedings. She found out that hesitation takes on different forms which have different effects on the hearer, and that hesitation is often a feature that is misunderstood by attorneys, and also that a witness who pauses before answering a question is subject to negative attitudes.

Walker refers to a manual for lawyers by Barist (1978) quoted in Walker-Graffam (1995:56) where defence lawyers give the following instructions to their clients before they are brought to the stand to be questioned by the opposing counsel:

1. Do not answer a question you do not understand.
2. Talk in full, complete sentences.
3. Do not answer a compound question unless you are certain that you have all parts of it in your mind.
4. Never express anger or argue with the examiner.
5. Think before you speak.

All these instructions show the value of silence. They also show that a witness may need time to consider a question before answering it and plan what is to be said. All emotions are also prohibited. It is curious though that, even though these instructions are present, silence is given a negative attribute. Some lawyers claim that it indicates that the witness is thinking up a lie, and that extreme slowness is unconvincing. (Walker-Graffam1995: 57) I have found in this study that defence lawyers are in fact very pro silence. Even during pre-trial interrogations defence lawyers stress the importance of silence. In *Presumed Innocent* (2005:192) the defence lawyer, Stern, drags out his client from the room in order to quiet him, when merely telling him is not enough.

3.2 Silence and Power

There are many ways of defining power. Janet Holmes and Maria Stubbe (2003: 3) define it in a following way “Power is a concept which includes both the ability to

control others and the ability to accomplish one's goals." Language is a crucial means of enacting power and also very important when constructing social reality. Holmes and Stubbe's research on power in the workplace led them to conclude that status alone is not the only source of power. Relative power needs to be assessed not only in the particular social context in which an interaction takes place, but more particularly in the specific discourse context of any contribution. Holmes and Stubbe's research is based on material gathered from various workplaces in New Zealand. This includes board meetings and personnel meetings on the factory floor. Their analysis showed that despite these various settings, talk amongst people involves the dimensions of power. Every interaction involves professional status and authority in relation to others. They argue that all interaction in a workplace involves power. (Holmes & Stubbe 2003: 4-5, 165)

The workplace in focus in this study is the courtroom where power is very much part of the interaction between the people within the court walls. Holmes and Stubbe focused on talk, i.e. what was being said in different encounters. In this study the focus is on what is not being said, or what is being said when not actually uttered in words. This is equally important as "talk" in establishing power patterns. Power structures are in other words reflected by silence. The person who has the right to speak in a certain situation and the person who is doomed to listen show who has the power in that situation. In a courtroom setting, power is often used to silence people.

As Holmes and Stubbe (2003: 4-5) explained, the opinion of a dominant group is regarded as the objective opinion and their rules are considered to be the relevant ones. The rules of other groups are excluded. Those who have no power have to remain silent. This is a silence that is forced upon an individual, and he or she has not chosen to be silent. The workplace is rather similar to the courtroom in which there is also a group with more power than others. The judge and the lawyers clearly have more power than the accused and the witnesses.

3.2.1 Silencing of Women

The term “powerless speech” derives from a study of differences between male and female witnesses. As may be guessed, the term applies to women and its counterpart “powerful speech” applies to men. O’Barr refers to Robin Lakoff who has studied differences in women’s and men’s speech. Lakoff discovered there are actual manuals available in court that explain how women witnesses behave and hence how they should be treated differently from men. One point in the manual states the importance of being extra courteous to women and to avoid making them cry. A crying woman, even though she is lying, does no case any good. Further points were made that women are prone to exaggerate and make their testimonies sound incredible. Moreover, it was mentioned that women tend to avoid a direct answer to a damaging question. (O’Barr 1982: 61-63)

Intrigued by this Lakoff made a list that described features of women’s language. O’Barr took those features and carried out his own study on women’s language in court. His findings were that so called women’s language was neither characteristic of all women nor limited to only women. His conclusions were that the issue of powerless language was more a feature concerning social status than of gender. However, more women did speak so called powerless language than men since men tend to have higher social status than women. It can be mentioned that this study was done in courts in North Carolina. (O’Barr 1982: 69-71)

Women are often portrayed as speaking powerless language, especially the typical secretary in a witness stand. Of course, the secretary does not have the same social status as the defendant often has, or the lawyer. In *Presumed Innocent* (2005: 247-253) we have an example of this in Eugenia Martinez, the former secretary of the accused. Her testimony is followed by another woman, a landlady, Mrs. Krapotnik, who “refuses to answer questions and narrates free-flow.” The description of her testimony is also typical female, according to Lakoff’s study. (O’Barr 1982: 63) Also, the description of the women’s physical appearances is described in a manner that it is obvious that they are not women of high social status. “She is heavy-bosomed and garishly made up. Her

hair is reddish, teased out so that it stands like a shrub, and her jewellery is thick." (Turow 2005: 253)

Does the style in which the witness speaks have consequences for the trial? O'Barr's (1982: 74-75) study showed, that the jury was less favourable of women and men whose language consisted of powerless features. In *Presumed Innocent* (2005: 252, 254) Mrs. Martinez is caught up in her own lies and Mrs. Krapotnik is forced off the witness stand since nothing she said was relevant. Both characters are silenced. Their testimonies were relevant and they did have the information that was needed for the outcome of the case. However, the author chose to belittle them, make them "powerless" in speech and through different nonverbal cues make them unbelievable and silly.

In *Rules of Evidence* (1992) the main character is a man with powerful language and a man in a powerful situation who is instantly believed by the jurors and has a great impact on the outcome of the trial. The man in question is Raymond Horgan the third. The author even gives him more credibility by giving him a suffix. He also describes Horgan in a very different manner than the women previously discussed: "Horgan's hands are folded. In his blue suit and finest public manner, he looks serene. All his beguiling charm is present; his candor. His gruff baritone is reduced one marking on the volume register in an effort at understatement." (1992: 259) The author emphasizes that this man will tell the truth with the words *serene* and *candor*. This is clearly a strategy form the author to overdo the descriptions of each individual. It turns out that in fact, this man is not very truthful at all. Nevertheless, the point has been proven.

Mendoza- Denton (1995: 52-53) lists research carried out in the 1970's and 1990's on differences between men and women in interaction. The first study to be mentioned is a study that was conducted in the United States (1975) by Candace West and Donald Zimmermann on conversational interaction between the sexes. Their findings were that men interrupted women more often than they interrupted other men and also more often than women interrupted both women and men. Zimmerman and West drew the conclusion that men are more likely to show dominance and power in conversation. Another study mentioned was carried out in 1978 by Pamela Fishman, who found that

topics introduced by men were successful 96% of the time while women's topics succeeded only 36% of the time. Today, about 30 years later, these findings are not extraordinary at all since most acknowledge the fact that men tend to show dominance in conversation.

This being said, the results are not consistent from one study to the next. Researchers Deborah James and Sandra Clarke (1993) cited in Mendoza-Denton (1995:53) compared similar studies and found that some studies even show that women interrupt men more often than men interrupt women. This problem arises when groups are simply divided into "male" and "female". One has to examine the details: women derive from different ethnic groups, age populations, and geographical backgrounds, and in some studies the only thing the women have in common is their sex. Another factor that needs to be taken into account is the language behaviour within contextualised settings. This is why the circumstantial details surrounding these tests are of importance.

In a setting outside the courtroom it would be natural to expect that women would interrupt men more often than men would interrupt women. The setting being the courtroom where we presume that the woman is on a witness stand, the situation is reversed. From Robin Lakoff (O'Barr 1982: 63) we learned that women seldom get straight to the point especially if they are in an incriminating situation. Under these circumstances men do interrupt women since they are looking to withdraw a specific answer from the woman.

Norma Mendoza-Denton (1995: 53) took silence issues into consideration among other issues when analysing the Hill-Thomas hearings from 1991. Anita Hill, an African American professor, accused Clarence Thomas, an African American Judge, of sexual harassment. The hearings evoked a debate concerning issues of race, gender, sexuality and power. The public was outraged at the Senate Judiciary Committee's treatment of Anita Hill. In particular many women believed when watching the hearings that Anita Hill was treated unfairly. Many factors contributed to this public opinion, and Mendoza -Denton discusses a few of them, namely the rapid-fire interrogation style, questions with unwarranted presuppositions, topic shifts and the avoidance of verbal

acknowledgement. Her variables for the analysis were gap length, simple yes/no questions versus tag questions, concise answers, changes of topic and acknowledgements. However, gaps between question-and-answer (and the other way around) were also very significant.

Mendoza-Denton found that after many of Thomas's statements the senators employed longer gaps. This made it possible for his words to "sink in" and to show the audience the weight of his words. After Anita Hill's statements there were shorter gaps to give the impression of them being of less importance. The questions given to Hill were made rapidly, giving her little time to think, and when the senators found themselves in an uncomfortable situation they simply shifted topic. Mendoza-Denton explains that "a careful record of topic changes can help determine who controls the structure and nature of the information in the discourse setting." (Mendoza-Denton 1995: 58)

This was also discovered in the analysis, after the lawyer by his line of questioning had gotten the witness to say what he wanted, he stressed the statement's importance by being silent, and so the words would sink in to the minds of the jurors. However, there were instances where a lawyer would be silent, as in not comment on the witness's words, just to show they were not dignified with an answer. This example from *Presumed Innocent* illustrates this. Doctor Kumagai, an expert witness on the stand is cornered by the defence lawyer and says:

> 'Do you accuse me, Mr Stern?' It is some time before Stern speaks. 'We have had enough unsupported accusations for one case,' he says. Then, before resuming his chair, Stern nods in the direction of the witness, as if to dismiss him. 'Doc-tor Kumagai', he adds. (2005: 337)

The way in which the questions were asked also played a significant role. Thomas was asked simple yes/no questions in contrast to Hall, who was asked tag questions. Tag questions consist of a statement followed by a question and hence can be a way of introducing assumptions. Here follow two examples from Mendoza-Denton's study of the ways in which Thomas and Hall were questioned. The first example is an extract

where Hall is being questioned. The way in which Anita Hill was asked the question gave the impression that she was struggling with her testimony.

(1) Specter: Professor Hill, you testified that you drew an inference that Judge Thomas might want you to look at pornographic films, but you told the FBI specifically that he never asked you to watch the films, *is that correct?*
Hill: He never said, "Let's go to my apartment and watch films or go to my house and watch films." He did say, "You ought to see this material."
Specter: But when you testify that, as I wrote it down, "We ought to look at pornographic movies together," that was an expression of what was on your mind –
Hill: That was the inference that I drew, yes, with his pressing me for social engagements, yes.
Specter: That's something he might have wanted you to do but the fact is flatly, he never asked you to look at pornographic movies with him.
Hill: With him? No he did not. (Mendoza-Denton 1995: 56)

The second example shows how Thomas is questioned, and how it seems that he performs with ease:

(2) Hatch: Did you ever say to her in words or substance something like: "There is a pubic hair in my coke"?
Thomas: No, Senator.
Hatch: Did you ever refer to your private parts in conversation with Professor Hill?
Thomas: Absolutely not, Senator.
Hatch: Did you ever brag to Professor Hill about your sexual prowess?
Thomas: No, Senator.
Hatch: Did you ever use the term "Long Dong Silver" in conversation with Professor Hill?
Thomas: No, Senator.
Hatch: Did you ever have lunch with Professor Hill in which you talked about sex?
Thomas: Absolutely not. (Mendoza-Denton 1995:57)

As seen from the above examples, Thomas did not have to put much effort into his answers, and since he was the accused party, he did not have to offer any explanations just denial. The lawyers asked him leading questions that had a "correct" answer. Hill, on the other hand, had brought the charges and needed to make her position clear by

providing a great deal of detailed information in her answers. The lawyers asked questions that contained false assumptions and so she had to elaborate her answers to a greater extent than Thomas, who provided only concise answers. (Mendoza- Denton 1995: 55-59)

Pauses after Thomas's testimony played an important role. He received positive feedback throughout the hearings, something that was not given to Anita Hill. The third example illustrates this when Thomas is being questioned:

(3) Thomas: Senator, there is a big difference between approaching a case subjectively and watching yourself being lynched. There is no comparison whatsoever. (gap: 2.36 seconds)
Heflin: Ah yes (sighs) (gap 1.12 seconds)
Hatch: I may add that he has personal knowledge of this aswell, and personal justification … for anger. (Mendoza-Denton 1995: 60)

The senators or the lawyers give Thomas's statement extra weight by providing two long silences. The senators also provide acknowledgement of his statement by nodding thoughtfully when being silent. Senator Hatch even interrupts the hearing only to provide extra positive feedback. The case was quite the opposite for Anita Hill, because whenever she made a statement that was good, the senators quickly changed the topic. (Mendoza-Denton 1995: 60) Robin Lakoff (1995) explains in her article "Cries and Whispers: The shattering of the Silence" (Hall & Bucholtz 1995: 27) that topic change and "interruption in conversation is encouraged by, and encourages, power imbalance." So, whenever the lawyers noted a shift in power balance to their disadvantage they interrupted and changed the topic, hence gaining back the power. This feature was also present in the two novels discussed in the analysis part.

There were many silences in the study on the Thomas-Hill hearings, and Norma Mendoza- Denton draws attention to the silence of people who were not allowed to speak, such as expert witnesses on harassment or other harassed women. As been shown, silence occurred as positive feedback to Thomas's statements. Mendoza-Denton also discusses in her study the silencing of "Black women's experiences within the

larger feminist enterprise and the silence of Hill, whose narrative was constrained by socio-political forces that had already decided how she must speak" (Mendoza-Denton 1995: 64)

Robin Lakoff (1995) writes about women in public discourse, which includes all kinds of talk in public settings, for instance court rooms. Lakoff states that over the past years women have begun to achieve true public "desilencing". In the O.J. Simpson murder case the chief prosecutor was a woman, Marcia Clark. Clark was known as being both sharp and aggressive, but the media chose to focus on her *as a woman* rather than as a prosecutor. She was regularly called a "bitch" by male courtroom observers for simply doing her job. The defence lawyers did the same thing without drawing attention. The media also discussed Clark's appearance in court: are her skirts too short? Is her hair too curly, her red suit too red? Here we suddenly have a change in power structure. What happened when the woman is in a typical male power situation? (Hall & Bucholtz 1995: 30) In the novels in this study there are two examples of such women. This will be discussed in the analysis part.

3.2.2 Interpretation and Manipulation of Silence in Court

In court, interpretation is central. The mere existence of a court relies on the fact that it interprets "the issues that bring people before it" (O'Barr 1982: 97). The court decides which side wins; it interprets the case laid before it and overrules all other interpretations by other individuals. This is the grand scheme of things. One can break this down into smaller parts and say that witnesses interpret the past, their recollections. Lawyers interpret the facts laid before them; their opening remarks as well as their summations are interpretations they hope will be accepted by the jurors and judge. The jury interprets everything said by witnesses and lawyers. It decides on whose interpretation they interpret to be the right one.

O'Barr (1982: 98) points out that silence raises questions like: "Why is one witness slow in responding and why does another not respond at all?" O'Barr (1982: 98) set out to discover how "the court as an institution and the individuals who make it up attempt

to influence and manage the meaning of silence." I shall briefly look at his findings within the American system.

Every defendant has to make a choice whether to testify or to remain silent. If the defendant testifies, they expose themselves to cross-examination. However, if the defendant chooses to remain silent this "shall not create any presumption against the defendant." (O'Barr 1982: 98) This means that if a defendant chooses to remain silent, it should not be interpreted that the defendant has something to hide. The lawyers must abide by this. However, the interpretations that take place in the minds of the jurors remain unknown. The jurors are warned about this, but some may still consider the silence of a defendant as something negative, even a sign of guilt. (O'Barr 1982: 98) O'Barr (1982: 99) shows how the court may sometimes interpret a *no* answer as a *yes*.

O'Barr (1982) refers to the case of *The People of the State of Illinois v. Isabella Nitti et al.* In this case Isabella Nitti and Peter Crudelle were charged with the murder of Isabella's husband Frank Nitti. Crudelle remained silent through most of the procedure but did utter the words "bullshit" when he heard how he supposedly got rid of Frank Nitti's body. Mrs. Nitti was Italian and hence had an interpreter, who asked her if she had killed her husband. Mrs. Nitti's answer was: "Whatever Charlie said, that is true." The "Charlie" Mrs. Nitti referred to was her son, Charlie Nitti. He stated that both his mother, Mrs. Nitti and Mr. Crudelle had in fact murdered Mr. Nitti. The situation now was that Isabella Nitti and Peter Crudelle had not denied that they had killed Mr. Nitti. The court allowed this to be admissions of the truth of the accusations. An admission is different from a confession where the accused admits guilt. An admission is "a statement by the accused of a pertinent fact, or facts that in connection with other facts tends to prove guilt." Both Mrs. Nitti and Mr. Crudelle were convicted, but on appeal their convictions were reversed. The meaning of this silence was further explored by the appeal court. (O' Barr 1982: 99)

The court pointed out that silence under such circumstances as in the State v. Nitti case is not to be regarded as evidence of guilt but "should be used to give meaning to the reply or lack of a reply from the accused." The court established that an accused person

who had been given the opportunity to deny any accusation would be expected to do so, unless the accusation was in fact true. The court further took into consideration the context in which the accusation was made. Unless the witness or person in question was not on the witness stand it was less likely that he or she would shout out their denial. (O' Barr 1982: 100)

In this particular case the court decided that adequate opportunity, had in fact, not been given to the accused to deny the accusations. Uttering "bull shit" by Crudelle was simply a reaction of how absurd he found the accusation. The court also said that the defendants had not fully understood the situations in which they were silent and hence their silences were not voluntary. (O'Barr 1982: 100) This example shows how important silence is and how much power it holds. By being silent the couple were acquitted. If they had claimed to be not guilty instead of being silent the outcome could have been very different. This shows that silence can also be used by the defendant too as an instrument of power. In the Nitti case it is, however, difficult to say whether the accused couple understood the power they withheld, or whether they were saved mostly because of luck and the law that interpreted their silence in their favour.

O'Barr (1982: 101) continues "[a] counterpoint to the right to be silent is to refuse to be silent in court." An accused person may choose to remain silent but cannot speak up when he or she chooses. Court etiquette and various legal procedures decide when a person may speak. O'Barr draws attention to yet another case where one defendant, Bobby Seale, on several occasions refused to remain silent. Seale was charged with conspiring to cross state lines and start a riot. He was on many occasions cited by the Judge for several counts of contempt of court. He was sentenced to four years in prison for this alone, not including the actual crime he was charged for. It would be logical to think that Bobby Seale started a riot in the courtroom considering the harsh punishment he was given. Below is an extract of one of the occasions where he held the court in contempt:

> Mr. Seale: I have the right to stand up and speak in my own behalf, I do. You know that.
> The Court: You know you do not have the right to speak while the Judge is speaking.
> The Court: I direct you, sir, to remain quiet.
> Mr. Seale: And just be railroaded?
> The Court: Will you remain quiet?
> Mr. Seale: I want to defend myself, do you mind, please?
> The Court: Let the record show that the defendant Seale continued to speak after the court courteously requested him to remain quiet.
>
> (O'Barr 1982: 102)

These remarks and others similar to these resulted in Seale's being bound and gagged and taken from the courtroom and cited for contempt of court. O'Barr maintains that this shows the power that the court held through the judge to demand silence and punish all who do not obey. This treatment can also be bestowed on lawyers and spectators who do not obey the rules of the courtroom. The court shows that it clearly interprets silence and that it has a meaning. In this case the court says that silence means respect for the court and the legal system. (O' Barr 1982: 102) In this case the accused was gagged, which is a very effective way to silence a man. Moreover, the court did not take the context into account as they did in the Nitti case where it was said that since the accused couple were not on the witness stand, they were unlikely to shout out their denial. In the Seale case the accused was not on the witness stand and he did shout out his innocence. Evidently silence would be the right approach when being accused of a crime. Also, no one took into consideration that this man was in an unfamiliar setting, he was one of the "non- regulars" (Searcy, Duck, Blanck 2009: 50) unaware of the rules and codes within this context. In this case, the court used an enforced silence as a very effective instrument of power.

Silencing the record is another way to remove a remark as though it had not been made. A lawyer may want to remove a part of a witness' testimony and so ask the judge to strike it from the record. If the judge agrees he or she will instruct the jurors to forget the remark. The record has been silenced as to the matter but the official record contains the remark and the objection. (O'Barr 1982: 102) It is somewhat absurd to think that

members of the jury will forget something that has been said when instructed to do so. The remark may become even more interesting to the jurors, who may find themselves thinking about it and discussing the matter amongst themselves. The meaning of silencing the record from a strictly legal point of view is that the remark that is struck out cannot affect the verdict in any way. O'Barr (1982: 102) takes a neutral stand and says that whether this affects the minds of jury members one does not know. I would argue that one does know. Of course the jury cannot put aside comments they have heard since it is not in the human nature to do so. This situation when a judge silences the jury will be discussed in chapter 4.

O'Barr continues by looking at silence during the trial process. He asks questions such as "What does it mean when a witness is slow to answer or generally reticent?"; "What meaning lies in the behaviour of a hesitant witness careful thinking in order to report recollections faithfully OR cautious planning to fabricate a false version?" (1982: 104) Very recently there was an episode of a new TV-series *Revenge (*2011-2012) on TV. One scene was from a trial where an innocent man is falsely charged with numerous crimes. His best friend, one of the people framing him, is put on the witness stand. He is asked to tell his side of the story and he tells the court of an insider job, a man who has among other things laundered money in the firm. The lawyer asks him who that particular man is. There is silence as the accused desperately looks at his supposed friend on the witness stand. The witness looks back at the man. There is a long silence until he finally points a finger at the accused saying that is the man. This silence was not a sign of "careful thinking", but a very effective silence to emphasize the man's guilt. Most TV series uses silence in this way.

O'Barr (1982: 105) speaks of silence that belongs to a person and also silence that is part of the communication system. Other silences, he says, may be difficult to assign a certain place. He explains that the time between a question and its answer or the opposite, between an answer and the next question, is called "response lag". This time the lag is broken either by the person who answers the question or the person who asks the questions, in this case the lawyer or the witness. This is ambiguous in that it is difficult to determine whether the silence is part of the next person's turn to talk or

simply a moment where the speaker may choose to continue speaking. This can be interpreted differently by the persons involved. The following example illustrates this:

> W: …and I looked around, and they was [sic] behind me.
> W: Then
> L: Did you say anything to any of those fellows at that time about you taking part in robbing the Fast Food Store?
> W: No.
>
> (O'Barr 1982: 106)

The words "Then" and "Did you" were spoken simultaneously. The witness clearly thinks he or she is expected to continue speaking. However, the Lawyer thinks he or she is supposed to continue since in fact, the witness has stopped speaking in such a place where one easily can interpret the silence in such a way. (O'Barr 1982: 107) The lawyer can be assumed to be well aware that the witness is planning to continue his or her testimony but the lawyer sees an opportunity to interrupt and lead the testimony in a desired way. If the lawyer was a defence lawyer, the testimony would certainly be rehearsed and such an occurrence would not be so likely. Since the lawyer and the witness speak simultaneously the lawyer is cross examining, and hence the testimony is not rehearsed. This would also support the idea that the lawyer is anxious to take the testimony in a special direction not letting the witness explain matters so that it would be damaging to the case.

A *response lag* should not be mistaken for a *pause*. A pause is an ambiguously assigned silence. In some cases it is clear that a silence belongs to one specific person, and then it is considered to be a pause. At the same time it is proper to mention a *lapse* as well. A lapse is a period of public silence caused by recesses or bench conferences. (O' Barr 1982: 107) The differences between these become more evident when reading a novel for instance. The author does want the reader to know what kind of silence is used.

Because there are many kinds of silence, there is also great opportunity to manipulate its meaning. In a witness-lawyer exchange in court this might happen and it can be difficult

to detect such behaviour. The next example from O'Barr (1982: 107-108) will show this:

> W: …I said, 'What do you want?' He said, 'I want your money.' So I say, 'Well, there's the cash register.' (2, 7 seconds of silence)
> L: Then what happened? (0, 9 seconds of silence)
> W: Then he caught the gun on the boy, the boy was kind of obstinate about trying to go in my cash register. So in a little bit I said, 'Do what the man tell you to.' He had a pistol. And then he, he, he still kept the gun over the boy and, uh, he ran over to the cash register. And he unloaded all that was in there. (1, 4 seconds of silence)
> L: Then what next occurred? (0, 5 seconds of silence)
> W: Then he was still at the counter.

The lawyer requests the witness to continue and so the witness does. In doing this, the lawyer wants the witness to interpret the seconds of silence as his own pauses and the witness accepts this suggestion. This is a clever way to encourage a witness to keep on speaking. These possibilities of manipulating the system and gaining a desired interpretation of silence exist for both lawyers and witnesses. It all comes down to the skills they have to be able to manipulate silence to their own advantage. (O' Barr 1982: 108) Lawyers are more inclined to manipulate such a silence than the average witness would be.

A lawyer who puts his own witness on the witness stand can for instance say: "Take your time and tell us as best as you can remember." (O'Barr 1982: 108) Such a statement will undoubtedly soften any silence from the witness when telling his or her story. Conversely, a lawyer may also show his or her disgust and disapproval by his or her tone of voice when a witness from the opposite side refuses to answer a question or is slow in doing so. A lawyer might say something like this: "Your honor, let the record show that on repeated occasions this witness did not answer the questions put to him when he was courteously requested to do so." (O'Barr 1982: 109) Again, the lawyer draws the attention to the silence of the witness and clearly he is directing this not only to the judge but to the jury. A lawyer can cleverly do the same trick in his summation by saying:

> ‘Ladies and gentlemen of the jury, you saw before you that every opportunity was given to this witness to tell his version of the facts. He said very little. Sometimes nothing at all. I suggest to you that there is a very good reason why….’
>
> (O’Barr 1982: 109)

In this instance the lawyer serves a plate full of doubt to the members of the jury. The lawyer points out that they must have *seen* how this witness refused to answer; they must have seen it with their own eyes. The lawyer most courteously points out that *every opportunity* was given to the witness to tell his or her version of what happened. The lawyer takes it as far as to suggest why the witness behaved in such a manner. Considering the members of the jury being ordinary people, they most certainly can be manipulated to think the lawyer, who is an authority, must be right. In court, it is fair to say that lawyers are very busy interpreting silences to their advantage and are fast in establishing their interpretations as facts, even though there may not be any truth in it. They construct meanings to silence that may not even exist. A “reticent witness” is a dream scenario for any lawyer, because he has “free range to interpret the witness’s spoken intentions”. (O’Barr 1982: 109) Yes, to some extent this is true especially when the lawyer sums up the case before the jury. However, in the previously discussed Nitti case this strategy did not work. It is fair to say that the outcome of a trial has much to do with the skills of the lawyers and witnesses, and very little to do with the law.

The following scenario is described in O’Barr’s (1982: 110) study. It is a rape case and the prosecuting lawyer sums up the case as follows:

> ‘This experience of being here in court was a most difficult experience for this young woman. You saw her embarrassment as you heard her describe how she was raped. Think of how difficult it was to go to the police and to tell about it in the first place. Think of what it must have been like when…How would **you** react if you were in her place?’

The Prosecution is clearly on her side and pleads to the emotions and pity of the jury. The defence lawyer on the other hand wants to interpret her silence in his client’s favour, the alleged rapist.

> ‘You saw how slow the prosecution witness was to testify. Was it perhaps because she didn’t know the answers to the questions she was asked? Was it because it didn’t happen the way she says? Or, perhaps, because it didn’t happen at all?’
>
> (O’Barr 1982:110)

The only thing the lawyer has to do is raise reasonable doubt and cast some shadow on the credibility of the woman. He or she might succeed in doing so. Again, it is a question of a power game between lawyers.

It is clear that silence in the real courtroom is a “messy” thing (O’Barr 1982: 104). Do lawyers, witnesses and judges use the same strategies in the fictional as in the real courtroom? If silence is used as an instrument of power in the fictional courtrooms, it is logical to presume that this will be made clear in the analysis part. The author wants the readers to see these strategies because they are essential to the story, and they want the readers to draw certain conclusions from them. I will continue on the subject that silence has got meaning and look at Dennis Kurzon’s (1998) model for interpreting silence.

3.2.3 Intentional and Unintentional Silence

When a person is given a question they have a choice between speech and silence. This choice creates a meaning, in other words, silence has got meaning (Kurzon 1998: 25-26).We will now focus on when a person chooses to remain silent. Kurzon divides silence into two groups; unintentional silence and intentional silence.

According to Kurzon, the silent person has no control over his silence. He argues that this silence is caused by psychological reasons. This might be stuttering, shyness or embarrassment over the fact that they do not know the answer and do not want to appear as ignorant. The person in question may be worried about his self-image. Even the situation in itself may be stressful enough to make any person silent. Such situations may be close questioning, like at the police station or in court. Embarrassment and shyness are relatively easy to detect, and many signs can display those emotions. They

may be fidgeting, shifting in one's place as to create distance and avoiding eye-contact. Some people's shyness shows in that their faces turn red, blushing. This is a situation that very well might turn up in court and lawyers have experience of it and should be able to detect such unintentional silence. That being the case, a good lawyer or judge may coax the silent witness into speaking by different means. The lawyer must narrow the distance between him or herself and the silent witness. This will make the witness more at ease and more willing to respond. (Kurzon 1998: 33-36) Reconsider the example previously by O'Barr (1982: 110) regarding the rape case, where the lawyer took advantage of a possible unintentional silence and turned it against the witness. Again, it all comes down to a game between the lawyers.

From TV the public is familiar with the "bad cop/good cop" routine. The "bad cop" questions the silent witness and tries to scare the truth out of the witness by intimidation and threats. If this does not work, the "good cop" comes in and the "bad cop" leaves the room. The "good cop" trashes the "bad cop" saying things that he is known for his bad behaviour and treats everybody like "shit". He then starts acting very friendly towards the witness, might even offer him a coffee or cigarette. (Kurzon 1998: 34) Often both on TV and in real life this routine works. The questioner has to gain the witness's trust and find means to overcome the factors to why shy silence is shown.

Silence can also be unintentional in the way that "I cannot say anything" means "I am not allowed to say anything." (Kurzon 1998: 40) This would indicate that other sources have authority and power over the silent person or witness. Such sources may be a person, persons or a code of honour. Kurzon (1998: 40) mentions the "*omertá,* or the code of silence of the Sicilian Mafia. This "is expressed as an unwillingness to testify in court, or to have any official contact with the authorities." This unwillingness to speak may also show in the witness, that he or she is afraid. Again, these are psychological blocks that may be overcome by a good interrogator. This is a phenomenon often seen on TV and also in novels. Even though Kurzon (1998: 40) refers to "psychological blocks" they are more than that. The person may in fact be afraid of his or her own life or his or her family. It is more a question of self-preservation. In such series there is often a story concerning witness protection.

Kurzon (1998: 44) gives three modal interpretations of silence. First, the unintentional silence which means “I cannot speak”. He divides intentional silence into two categories: internal silence, which is about willingness (“I will/shall not speak”) and external silence (“I must/may not speak”). In fiction the two last mentioned, intentional silences, is widely used, especially “external silence” when a witness feels threatened by someone. In *Presumed Innocent* (2005) we encounter intentional internal silence, where the accused remains silent knowing his wife is the murderer. He does not want her to go to prison, for the sake of their son.

Kurzon (1998) also provides a model of how to interpret this silence and he points out that this model is on a “question-answer routine in an institutional, e.g. judicial, setting”. The model starts with the silent witness being asked a question. If they choose to respond, they signal their presence by answering the question verbally or verbally admitting they do not know the answer to the question asked. The witness may show a non-presence by verbally stating he refuses to answer the question or by remaining silent. If the witness verbally states he refuses to answer, this is intentional silence. If the witness remains silent, it is up to the questioner to establish whether this silence is unintentional or intentional. If it is unintentional, the questioner can use different methods in order to get an answer. If the silence is intentional, it should be interpreted modally. (Kurzon 1998: 44, 46) This is a good model to use in for instance a courtroom.

Kurzon (1998) takes this further and says that it is important to establish whether there is a pattern of silence. To be able to do that, the questioner must ask more than one question. If the first question has been answered and the witness does not admit ignorance, we may assume that the witness in fact knows the answer to the following question. However, if the witness has not answered a series of questions and we have ruled out any reasons for unintentional silence such as psychological reasons, we must interpret this as an intentional silence. We may assume the witness knows the answer but refuses to say it. (Kurzon 1998: 49, 50)

With the help of this model we can only draw the conclusion that the silent witness is hiding information but we cannot know for certain what this information is, and we can

only guess. We can for instance draw the conclusion that a person is guilty when he or she is accused but there is no denial. Kurzon (1998: 51) says that “a denial is more informative than silence, so silence implicates that the accused admits guilt” but he also admits the dilemma that “silence is not as informative as an admission, so the silent accused must be denying guilt.” Again this is what happened in the Nitti case referred to by O’Barr (1982). The accused’s silence was interpreted as guilt and later overruled, since silence is not as strong as an admission.

The so-called right of silence is the core of the American legal system and this fact has reversed many verdicts. Kurzon takes the example of a case from 1964 Griffin v. California. The defendant, known as Griffin, did not testify in court and hence he was found guilty of the murder of one Essie Mae. He did, however, speak at the hearing at which he was sentenced to death. The defendant was, in fact, seen in the same alley where the body of Essie Mae was found. The judge told the jury that if the defendant knew something that would clear him from suspicion but did not convey these facts or evidence, it would be acceptable for the jury to draw conclusions that were not in favour of the defendant. The judge also pointed out that it was up to the Prosecution to beyond any reasonable doubt prove that the defendant was guilty. The Prosecutor pointed out that if anybody ought to know what happened to Essie Mae, it would be the person who was seen in the same alley, the defendant. This would naturally lead the jury to believe Griffin was guilty. (Kurzon 1998: 52, 53)

The case was put to the Supreme Court on appeal. The question whether the judge had violated the Fifth Amendment was raised. The conclusion was that, in fact, the Fifth Amendment had been violated. It was established that the defendant did have knowledge but the court should not have commented on the possible interpretations of the defendant’s silence, not even drawn any attention to them. The court should not have put this as evidence against the defendant. The verdict was hence reversed. However, had the jury drawn those interpretations without the court’s help and come to a guilty verdict, it would not have been reversed in the Supreme Court. (Kurzon 1998: 53) This stresses the importance of the interpretation of silence. The court tried to use the accused’s silence against him and it seemed to work. However, the law (the Fifth

Amendment) gives the accused the right to be silent. We must remember that the accused very well may have been guilty, but in this case he used silence as an instrument of power in court. If he did it intentionally we do not know.

It is therefore in order to draw conclusions and interpret silence according to Kurzon's model but one may not say them out loud. This would result in one violating the right to silence. To interpret this case according to Kurzon's model, we can state that the defendant, Griffin, had knowledge of the murder. He was non-present because he chose not to say whether he knew anything about it or not. If, in fact, he did not know, then his silence could be interpreted as "I don't know". But if he did know, one could draw the conclusion that he was either unable to speak or able not to speak. At this point the jury might interpret his silence as that he did not speak because he did not want to incriminate himself because he was guilty and that he left it up to the Prosecution to prove it. Another interpretation would be that Griffin knew who was in the alley, someone he himself knew and did not want to reveal. In this case the judge pointed out that the defendant's silence would naturally be interpreted as guilt. (Kurzon 1998: 54) A formal error, it seems, got Griffin acquitted.

By studying Kurzon's model, it would not be difficult to establish whether a silence is intentional or unintentional. If the silences are intentional the general idea is that the person is hiding something. The problem lies within the legal world where silence can have a number of interpretations. Each side tries to benefit from silence and the prosecution is the side who most often does so. As Kurzon (1998: 58) argues it is up to the jury to draw their conclusions from their interpretations of evidence laid before them, the silence of the accused at police interrogation and the silence of the accused in court.

Kurzon (1998: 58) points out that what happens is that the noun *silence* turns into a verb *to silence* (my italics). In these cases, as in many others, the law *silences* the prosecutor and sometimes the judge. This model can be applied to the analysis in section 4. It will of course be a result of a very deliberate move on the author's part. I will now continue

to the actual analysis of different representations of silence in two fictional US courtrooms.

4 SILENCE IN THE COURTROOM IN *PRESUMED INNOCENT* AND IN *RULES OF EVIDENCE*

Legal systems vary from country to country and so do the proceedings held in court. This is reflected through the two crime novels that are the material of this study. This chapter consists of two parts. The first part describes and analyses how the court room is set up in the United States and what codes and phrases are used in these courtrooms hence also in the courtrooms in the two crime novels. I will also analyse silence in these courtrooms and discuss what the rules are. The Fifth Amendment will be discussed in this chapter as well. I will also describe how communication works in such a specific context as the courtroom. In the second part of this chapter I will look at specific examples of silence carried out by different actors in the courtroom.

4.1 American Courts

There are two types of courts in America, the appellate court and the trial court. Appellate courts do not use juries or hear evidence. Therefore, in an appellate court, there is neither a witness stand nor jury box, and the bench is a great deal larger to accommodate multiple judges or justices. The trial court, on the other hand, is the court most people are acquainted with through the media, and the type of court that is portrayed in the material used in this analysis.

In the American trial court there is a judge who sits on the bench, a raised desk. He has the highest position in the room. The judge wears a plain black robe and may use a gavel to keep order, this too being a way of communicating without words. He is the only one who can interrupt anyone at any time. Others must seek permission from the judge to interrupt others. Next to the bench are the witness stand and the desks where the court clerk and the court reporter sit. The courtroom is divided into two parts by a waist-high wooden barrier known as the bar. The bailiff stands against one wall and keeps order in the courtroom. (Wikipedia: Courtroom)

Searcy, Duck and Blanck (2009: 48) point out that the layout of the American courtroom suggests "the theoretical equivalence" of the prosecution and the defence as they are placed in equal distance from the judge. The Jury is placed alongside the proceedings as the spectators are seated alongside the court of a football game. The Jury members are also spectators. When a witness enters the room he or she is seated in a spotlight position.

Apart from the parties to the case and the witnesses, only the lawyers can literally pass the bar (court personnel and jury members usually enter through separate doors), and this is the reason why the term "the bar" has come to refer to the legal profession as a whole. There is usually a podium between the two tables where the lawyers may stand when they argue before the judge. The other side of the bar is open to the general public and there are usually seats for curious spectators. (Wikipedia: Courtroom) The appearance of courtrooms is explained in great detail in novels. After all, the author is not likely to assume that every reader has knowledge of this. In *Presumed Innocent* (Turow 2005: 224) the appearance of the courtroom is described as follows:

> Spectators have crammed themselves into every linear inch available along the public benches. There are four full rows of press, five sketch artists at the head. The judge's staff, his secretary and law clerks, who are not ordinarily present are in folding chairs against the rear wall of the courtroom, next to his chambers door. Bailiffs, armed for this solemn occasion, are positioned at the forward corners of the bench beside the marble pillars.

The language heard in the courtroom and other legal settings contains many standardized expressions and set phrases. The Supreme Court of Nevada has published a list of phrases on their home page, listing as many as 230 different phrases used in the courtroom. There are certain phrases that express commands or technical requests such as "Will the defendant please rise?"; "You have exhausted that subject, please move on."; "You may cross-examine, counsel"; "You may inquire, Mr. X. "and "You may proceed." (Supreme Court Nevada)The most frequent phrase in the novels in this study is without doubt "Objection, your honour". This creates a more interesting dialogue in

the novels and at the same time it explains parts of the plot to the readers that might be overseen otherwise.

Phrases that express a request for information, requiring a yes or no answer are phrases such as “Directing your attention to People’s exhibit (one, etc.) in evidence, can you tell the Court what is exhibit (one, etc.)?” or “Do you solemnly swear (or affirm) that the answers you are about to give, touching upon your qualifications to serve as jurors in this case now before the court, will be the truth, the whole truth and nothing but the truth, so help you God?”. Outside the court, during interrogation before the trial, phrases that request information are: “You have the right to remain silent. Anything you say may be held against you in a court of law. You have the right to consult your lawyer and insure his [sic] presence at your interrogation. If you want a lawyer and can’t afford one, one will be appointed to you. Do you understand each and every right that has been explained to you? Having all these rights in mind, do you wish to talk to me now?” Other expressions used to request information are “How do you plead?” and “What, if anything, did you say?” Requests for permission could be “Could we have a sidebar?” and “May I approach the bench?” The courtroom is, besides these expressions, full of statements such as “At this time the defence rests.” and “Objection, your Honour, leading.” (Supreme Court Nevada)

Most of these expressions require an individual to speak or seize speaking. I found in my study that “Objection, your honor” is a frequently used phrase when a lawyer wants to silence a witness. Often the question must then be rephrased. Even so, it evokes the suspicion of the jury members as to what was so damaging that the witness was not allowed to say it. The damage is done.

Criminal trial procedures follow a certain pattern. Both the prosecution as well as the defence have the right to demand a jury trial. In serious cases the jury consists of 12 people and in minor cases it consists of six people. Both the defence and prosecution select the jury through a question and answer process. This process is very thoroughly explained in *Presumed Innocent.* “So in they come, seventy-five people, twelve of whom will soon be in charge of deciding what happens to my life. Nothing special, just

folks." (Turow 2005: 226) The narrator continues: "Ernestine calls sixteen to sit in the jury box, and directs the remainder to the first four rows on the prosecution side, from which the bailiffs have dismissed the spectators amid great grumbling, sending them to form a waiting line out in the hall." The judge directs the prospective jurors explaining that they must think of the defendant as innocent. He addresses a man sitting in the front row:

> 'Mr. Mahalovich. Did Mr. Sabich commit the crime that he is charged with?', 'I wouldn't know, Judge.', 'Mr. Mahalovich, you are excused. Ladies and gentlemen, let me tell you again that you are to presume Mr. Sabich is innocent. I am the judge. I am tellin you that. Presume he is innocent. When you sit there, I want you to look over and say to yourself, There sits an innocent man.' (Turow 2005: 226-227)

The judge is very thorough in explaining that they all must think of Mr. Sabich as an innocent man. He brilliantly illustrates the Fifth Amendment in a manner that its meaning becomes clear. He asks an elderly lady:

> 'Now, don't you thin, ma'am, that an innocent person oughta get up there and tell you it's not so?' The lady is torn. She saw what happened to Mahalovich. But you don't lie to a judge. She touches her dress at the collar before she speaks. 'I would think so,' she says. 'Of course you would. And you have to presume that Mr. Sabich thinks the same thing, since we're presuming that he's innocent. But he doesn't have to do that. Because the Constitution of the United States says he doesn't have to. And what that means is that if you sit as jurors in this case, you have promised to put that thought out of your mind. Because Mr. Sabich and his lawyer, Mr. Stern, may decide to rely on that constitutional right. The folks who wrote the Constitution said, God bless you, sir, God bless you, Mr. Sabich, you don't have to explain. The state's got prove you guilty. You don't have to say a thing you don't want. And Mr. Sabich can't really receive that blessing if any of you have it in your mind that he should explain anyway.' (Turow 2005: 227)

Next the judge takes up the matter of publicity and has to excuse six people who cannot put aside what they have read in media. After this the judge, as well as the lawyers are free to ask anything they can think of. They are asked everything from what TV shows they watch to who are in charge of the monthly bookkeeping in the home. This process is called *voir dire* and is a "subtle psychological game of figuring out who is predisposed to favour your side." (Turow 2005: 229) The narrator explains what the

defense is looking for: “We need jurors bright enough to appreciate the legal standard and strong enough to forthrightly apply it, people who will not convict merely because they are suspicious.” (Turow 2005: 229) For this reason the defense aims for younger jurors. The defense also believes that “they may be more in tune with some of the nuances of male and female relations that so strongly flavour the case.” “On the other hand, he has said, older people will have more immediate respect for my past attainments, my position, and my reputation.” (Turow 2005: 229) There are many details to take into consideration when selecting a jury. At the end the defence gets to dismiss ten people and the prosecution six people without explaining why. Each of the jury members bring in their own ideas about the ways a person shows guilt. This is one of the reasons why lawyers are very careful during jury selection, and they try to find out the values and expectancies the jury members have.

Evidence is admitted or excluded in advance of the trial. In *Presumed Innocent*, the prosecution’s main evidence is a glass found at the murder scene with the defendant’s fingerprint on it. However, this very crucial piece of evidence is lost and hence cannot be part of the case. Both sides make opening statements to the jury and judge. (nolo.com). As seen on TV, the prosecutor often begins by explaining what he/she plans to prove and why. Phrases heard are “The facts will show…” or “The defendant will testify that…” The next step is to introduce a witness and make the witness look credible when telling the story. The prosecutor will draw attention to evidence that is favourable to his/her position. This is carried out by direct examination. The defence then cross-examines the witness or witnesses. (nolo.com)

A lawyer never asks a question he or she does not know the answer to and never lets a witness surprise him or her. After the defence is done the prosecution can re-examine its witnesses. When the prosecution is finished presenting its case, “the prosecution rests”. (nolo.com) The defence can also call their own witnesses and the procedure is repeated with examinations and cross-examinations. When the defence finishes presenting its case, the “defence rests” (nolo.com). The prosecutor makes a closing argument by laying out the evidence as to why the jury should deliver a guilty verdict. The defence also makes a closing argument showing how the evidence should make the jury render a

not guilty verdict. The Prosecutor has the final word and can again put forward arguments to why the jury should reach a guilty verdict. The Judge might speak directly to the jury referring to specific laws the jury must consult etc. The Jury then tries to reach a verdict behind closed doors. In serious cases the jury must be unanimous, 12 out of 12 jury members must agree on the verdict. If not, the jury "hangs", which means the case may be retried. If the verdict is 'guilty' the judge may reach a verdict on the spot or set the sentencing for another day. (nolo.com) Criminal trial procedures like the ones discussed in this section are very much portrayed in the novels in this study. Scott Turow is very thorough when explaining different procedures to the reader through the narrator, the defendant Rusty Sabich, who himself is an attorney.

A description of the phrases and proceedings in the courtroom has now been given. They are important in the sense that one becomes familiar with the language used in the courtroom and what they mean as well as the order in which things occur. I also consider it to be important to understand the courtroom's importance to all this, the importance of context. Searcy, Duck and Blanck (2009: 43, 47) discusses this and also talks about the "courtroom regulars" meaning the judge and the lawyers. The "non-regulars" are the witnesses and often the defendant.

Searcy, Duck and Blanck (2009: 47) continue by explaining that the difference between these two groups is that the regulars are used to the context, they are familiar with it and know its rules. The non-regulars, who also include the jury, are not used to this context. In addition to that, they also bring in their own expectations concerning trial procedures. Often these expectations derive from the television courtroom or popular dramas. The authors focus their article on the jury. The dilemma for lawyers is that every member of the jury enters the courtroom with their own set of norms and expectations that are formed in a different context or environment, adding this to the problem that there is no normal flow of interaction in the courtroom, the conversations taking place are by no means equal. As Searcy, Duck and Blanck (2009: 52) says: "One person (lawyer) frames the issues that the other (witness) answers within the frames of reference set by the questioner." In other words, the process is in much controlled by the lawyer. The

lawyers are also aware of the disposition the non-regulars are in and take full advantage of that to win their case.

For the jury it is an almost impossible task to determine the credibility of a witness, watching a staged interview lead by a "regular" (the judge and lawyers). Searcy, Duck and Blanck 2009: 47) Of course, this is where nonverbal cues come into the picture. However, the witness and the defendant are also non-regulars so they behave according to expectations from their familiar contexts. At this point it is difficult to say if the nonverbal signs they show derive from the fact that they are lying or from the possible fact that they are uncomfortable in the context.

4.1.1 Silence in Court

In court there occur many types of silence. The lawyers can silence each other and the witness, and the judge can silence the lawyers. The phrase "Objection, your honour" is used when lawyers silence each other and the witness. However, the witness can also silence him or herself by "pleading the Fifth". The Fifth Amendment is part of the American Constitution and reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (FindLaw.com) (my italics)

This amendment to the Constitution of the United States deals with the rights of accused criminals by providing for due process of law, stating that no person may be forced to testify as a witness against him or herself. None of the characters in the novels in this study pleads the Fifth at trial, but in Presumed Innocent Rusty Sabich remains silent during pre-trial investigations. (Turow 2005: 154)

Silence is regarded as more significant in certain situations than in others and it is highly significant in the courtroom or in the field of law. In Legal Discourse Dennis Kurzon (1998: 51) talks about the so called “right of silence”. The common assumption is that when a person remains silent, he or she is hiding information, and further, since a direct denial is more informative than silence, this silence must indicate guilt. However, this works in both ways: silence is not as informative as an admission either, so the accused could be denying guilt by remaining silent. The dilemma is obvious: silence can be misinterpreted and therefore there are limitations on the interpretations of the silence of the accused. (Kurzon 1998: 51-52) In the Finnish system it is simpler. What you do not say is not taken into consideration, from personal experience as the plaintiff. There are in other words no universal principles.

In the American legal system, where there sometimes is a jury who decides on the verdict, silence is not to be commented on by either side. If the accused remains silent, the prosecution usually benefits from pointing out various interpretations of this fact. (Kurzon 1998: 57- 58) This is quite contrary to the Finnish system. Instead, it is the task of the jury to reach a verdict on the basis of evidence; this could include the silence of the accused during police interrogation. The analysis of the material will show how this is portrayed in the courtroom novels. From TV shows and novels it is easy to get the impression that most cases are tried in front of a jury. This is quite the contrary in real life where only a small per cent of all cases are tried in front of a jury.

Kurzon (1998: 58) explains that in court there is not only the state of silence but also the act of silencing. The noun turns into a gerund and this extension changes the nature of silence. The person who has this power in court is the judge when coming to his or her decision. The person affected by it is the person who is not allowed to speak; this person may change depending on circumstances. For instance, in literature the author may silence one of the characters or may choose to use indirect speech instead of giving the original words.

4.1.2 Representations of Speech and Silence in the Fictional Court Room

The novel imitates life; it does not mirror it. (Page 1973: 1-2) It is important to remember that descriptions of the legal system and the courtroom differ from that in real life and that the courtrooms as well as the legal proceedings in the novels differ in many regards. The author may construct his/her own legal settings and rules to suit his/her story. However, authors are known to do research in order to be able to set their story in an authentic environment. It is also important to keep in mind that in this analysis I am dealing with representations. The aim is to entertain, not to find out the real culprit.

The material chosen for this study was written by two lawyers; therefore I assume that the legal system and the proceedings depicted in the novels will be technically accurate. It should also be noted that the literary style modifies the legal proceedings, for instance the questioning in court. In a real court room the lawyers may ask the same question thirteen times in order to get the answer he/she is trying to receive. In the novel this is not very likely to happen since the author controls both the lawyers' questions and the witnesses' answers. This type of interrogation is not needed for the story although it is vital in an authentic context.

The authors do not include every detail in their story, they simply choose the scenes that they consider are of importance to the plot as well as the dramatic scenes that are meant to entertain the reader. A new reality is hence created in the novel. Every detail, such as a description of speech, is important, and can never be dismissed as irrelevant. Every word of a novel carries a certain weight of significance and hence also every silence does so. However, this may not resemble the discourse of everyday life. In everyday life conversations consists of many small words that are in fact surplus, this phenomenon is called tendency. (Page 1973: 1-2) In a novel all these are taken away by the author, otherwise a novel of 200 pages would be considerably longer and extremely boring.

The representation of speech in fiction plays an important role: according to Page it is the closest "imitation of reality" in the novel. (Page 1973: 3) Dialogue brings the text to

life and is a tool used by the author to create certain impressions of, for instance, a character. Nevertheless, we need to bear in mind that it is in fact pure imitation. There is a great difference between actual speech and a written dialogue. One obvious reason for this is that spoken language is regarded as acceptable in spoken form but not acceptable in a written text. A written dialogue does not necessarily include things such as errors in speech, repetitions, hesitations and grammatical incompleteness as a spontaneous dialogue does. However, the author may choose to incorporate such features in his/her text for a purpose. In spontaneous dialogue the speaker says things unrehearsed, in contrast to the author, who very carefully plans the dialogue. (Page 1973: 6-7) Especially in a courtroom dialogue, speech is carefully planned, sometimes to withhold information from the reader for greater suspense, things that would be obvious in a real court.

Another aspect that has to be taken into consideration is that the author does not have a shared context available. The author has to incorporate the context into the text, which means that the text and dialogue will be more detailed than in real life. In real life the speaker and the listener are normally in the same place at the same time and therefore share the context. Hence dialogue in a novel will be more descriptive than in real life. A third aspect is phonological one: a written text cannot represent the variety of speech, features of the spoken language such as stress, tempo, volume and intonation. However, authors do have means of expressing such features in their own way. According to Page (1973: 8-9) the author may use direct statements outside the dialogue such as “she sighed”. Page’s points are particularly relevant to the representation of silence, which is a feature that cannot be heard in a written text, so the author must try to convey this silence by other means. He says “Silences are indicated as breaks in speech which the author may fill by describing different kinds of behaviours. In other words, the author fills the silence verbally: “he paused”. The author can also make use of a series of suspension points “…” sometimes several lines long.” (Poyatos 1988: 298, Saville-Troike 1995: 5)

In this study where the object of analysis is two novels and not reality, I am dealing with representations of speech and silence in a purely fictional courtroom. The findings

on whether silence is used as an instrument of power and in that case how it is used as such, are based on fictional events, not real life court dramas.

4.2 Representations of Silence in Two Fictional US Courtrooms

I will now proceed and look at how the strategies discussed in the previous chapters. I will examine silence from the perspectives of different actors such as the judge, the accused, the lawyers and the witnesses.

4.2.1 Silence and Power in S. Turow's *Presumed Innocent*

I will begin to see how silence and power is portrayed in Scott Turow's novel *Presumed Innocent.* The plot of the book is that Carolyn Polhemus is found brutally murdered in her home. The chief deputy Rusty Sabich, also the victim's former lover, starts an investigation only to find he is being framed for Carolyn's murder. He is put on trial and the question is whether he has in fact been framed or is he the real murderer.

The author makes it clear from the beginning of the trial what type of judge will be ruling. He is in no way neutral in this case. First of all, he has a past as a defence lawyer. The narrator tells us: "The habits of twenty years as a defence lawyer, in which he regularly manhandled and belittled prosecutors and police, have never left him on the bench." (Turow 2005: 195) The judge will tend to favour the defence as will be shown. Secondly, the judge shares a long past and partnership with one of the prosecutor's witnesses, Raymond Horgan. When Horgan takes the stand the prosecution does not handle the questioning very well, the Defence objects and the judge tells the prosecution to rephrase their question.

> 'Rephrase it, Mr. Molto. Is it something that the witness would have expected Mr. Sabich to tell him, based on the witness's understanding of his office's practices?' I can see that Raymond is having the impact I long feared. When the question is as the judge suggested, Raymond buries me. (Turow 2005: 262)

The accused, Sabich, refers to the long friendship between the judge and the witness and explains the implications of it. This is the only instance when the judge is helpful to the

prosecution. He does, on the contrary, on several occasions silence the prosecution. The prosecution wants to put one of their prosecutors, Mr. Molto, on the witness stand, but the judge refuses to do so. The judge is afraid that Molto will reveal something about the B-file, which incriminates the judge himself. He also silences the defence more than once for this specific reason. “I do not wanna be hearin any more about about that file” and ”move on to another area of inquiry, because I have not heard near enough to let you go chasin that hare all over the courtroom at this time.” (Turow 2005: 295, 359) The hare refers to the B-file.

In this particular novel, the judge plays a central role in the plot and the outcome of the story. At the beginning of the trial the judge explains the right to remain silent to the jury. He explains to the jury that they must think of the accused as innocent, that it is the state or the prosecutor who has to prove without reasonable doubt that the accused is guilty. He directly tells the jury: “Ladies and gentlemen, let me tell you again what you are to presume. Mr. Sabich is innocent. I am the judge, I am tellin you that. Presume he is innocent. When you sit there, I want you to look over and say to yourself, there sits an innocent man.” (Turow 2005: 226- 227) The trial system is being explained for the reader. These are the actual rules in real life and in this piece of fiction.

The judge goes on asking a member of the jury: “Now don’t you think, ma’am, that an innocent person, oughta get up there and tell you it’s not so?” The jury member does not know how to answer this correctly but says: “I would think so.” The judge simply responds to her that it is natural she would say that but the fact is he does not have to testify at all. The judge explains: “Because the Constitution of the United States says he doesn’t have to. And what that means is that if you sit as jurors on this case, you have promised to put that thought out of your mind.” (Turow 2005: 227) The judge has in a very strong and deliberate way told the jury how to interpret the potential silence of the accused or the defendant. This clearly results in the jury’s sympathies for Mr. Sabich, the accused who declares: “The divorced schoolteacher actually smiles at me as she takes her seat.” (Turow 2005: 232) The schoolteacher is one of the jury members. The judge has in so many words told the members of the jury to regard the accused as innocent, and to interpret his silence as innocence.

Throughout the trial both the prosecution and the defence objects to questions being asked by the other. In these instances it is up to the judge to sustain the objection or to overrule it. In these instances the judge has power over the jury to decide what they can take into account and not. For instance, the prosecutor asks a witness a leading question, which is followed by an objection from the defence. Larren, the judge, corrects Nico, the prosecutor, in front of the jury: “The question was clearly improper, Larren says. It is stricken and the jurors are ordered to disregard it.” (Turow 2005: 248) In this instance the judge also silences the record. This particular question from the prosecution was a deliberate move from their part, even though they were well aware that it would be objected to and overruled.

At another instance the judge threatens to strike all cross-examination on a certain subject regarding a certain piece of evidence. The judge does this because he is afraid that his past as a corrupt officer will come out. For the reader this is not clear at this point in the book, but becomes clear as the story evolves. At the end of the trial the judge dismisses the case because of poor evidence. This ruling comes as a surprise even to the defence. (Turow 2005: 281, 366)

The judge does not want to take any chances that the jury would reach a guilty verdict, and that is why he himself uses the power as a judge and dismisses the case: “I have no doubt that your verdict would be a ringing not guilty. But Mr. Sabich should not have to live with this spectre a moment longer.” (Turow 2005: 366) At the end of the book, the narrator, the accused reflects on the trial. He has figured everything out and this is where the author wants the reader to understand what has just taken place. The accused, Rusty Sabich talks to his defence lawyer:

> And so it was more and more important for Larren to end the trial. He could never take the chance of letting you go into that file, as you kept saying you wanted to do. Larren didn’t know what would come out, but the worst thing, of course, was the truth. (Turow 2005: 380)

Larren is the judge and the file Rusty Sabich talks about holds the evidence that the judge has been corrupt in his early career. Sabich also draws some conclusions from the acts of his defence lawyer, Mr Stern. He knows about this file and the contents, and he wants the judge to know that he knows. As it is, the accused, Mr Sabich is only a bystander, reporting to the readers what takes place and why.

The defence team consists of Mr. Alejandro Stern, also called "Sandy". His partner is the young, good looking Mr. Kemp. Throughout this novel the defence attorney is very consistent in that he wants his client to remain silent at all times. Mr. Sabich, who works as a Prosecutor, is torn. He would like to state his point of view. The following paragraph illustrates this:

> The next day I voluntarily provided a blood sample downtown. But I never testified. Stern and I had our one serious dispute about that. Sandy repeated the accepted wisdom that an investigation target accomplishes nothing by pre-trial statements except to prepare the prosecutor for the defense. In his own gentle way, Stern reminded me of the damage I had already done with my outburst in Raymond's office. (Turow 2005: 154)

It is clear that Sabich is used to different tactics than Stern. Stern makes it clear that he does not tolerate for his client to speak since everything he might say may be held against him. Sabich explains: "…he told me not to talk to anyone about the charges and, in particular, to make no more outraged speeches to prosecutors; he told me to avoid reporters…" (Turow 2005: 155) Stern makes it clear on several occasions that silence is the best strategy when going to trial. At one point he explains to his client, Sabich: "The state is further disadvantaged because you were, in essence, a political employee, a jury will not believe that, and *for our purposes should not be told that*." (Turow 2005: 158, my italics) Here the defence lawyer wants to withhold some facts from the jury that per se is not damaging, but the jury might draw wrong conclusions from it. On one occasion Stern silences his client, the accused Sabich: "Sandy give me a corrosive glance. With his hand on my forearm, he puts me back down in my seat. I will have to learn: it is not my place to speak." (Turow 2005: 199) In the same scene in the courtroom the judge speaks to the accused Sabich who: "…look at Sandy, who nods, before I answer. I thank

the court. I tell him I will listen. My lawyer will speak." (Turow 2005: 199) As a reader, one draws the conclusion that the author, through the eyes of the accused, tries to convey the importance of silence. It is clearly better to say nothing at all than risk having your words turned against you.

It is interesting to notice that Stern is the most silent person in the whole novel. The reader is told very little about Stern and how he is as a person and how his private life is. The only thing the reader is told is that he is a good lawyer and married to Clara. In a way he is rather mysterious and fascinating. He has a clear strategy but he does not tell anyone about it, not the reader and not his client. It later becomes evident that he has his reasons for withholding his plans.

During the trial Stern is the one who uses silence as an instrument of power the most in order to win his case and this is described through the eyes of the accused. This can be seen when the prosecution is interrogating one of their witnesses. The prosecutor is walking on thin ice and the judge notices and disapproves: "In his agitation, the judge glances now and then in Sandy's direction, a signal for Sandy to object, but Stern is quiet." (Turow 2005: 234) The judge gives the defence every opportunity to object, he even signals the defence to do so. "More important, Nico is at the point in oration where he is saying things that Stern knows he may not prove." (Turow 2005: 234) However, Stern chooses silence. He has a good reason for this strategy.

Choosing to be silent, Stern knows that the prosecutor, Nico, will make his own argument weak and his case even weaker. Stern brilliantly uses silence also in the other way around. After the prosecution has questioned a witness the judge ask s for a recess, but Stern wants to proceed. He explains: "Sandy is unwilling to let Nico's remarks accumulate force on reflection." (Turow 2005: 235) The strategy is to move on as quickly as possible so the jury do not have any time to reflect on what has being said, they need new thoughts to ponder upon.

Stern's strategy runs even deeper. He does not object to anything the prosecutor is saying, even though the judge himself signals he can. When it is Stern's turn to speak he

does so in a very unfavorable way to the prosecution. However, the prosecution cannot object since "…Sandy endured his opening without complaint." (Turow 2005: 236) This suggests that there is some unspoken code between lawyers to be "falsely" courteous.

Stern even uses silence in his opening argument. He turns to the jury: "why offer a circumstantial case, a case that is supposed to show guilt beyond a reasonable doubt and does not? Sandy stops. He tilts his head. …. He speaks softly. Why? Is the last thing that he says." (Turow 2005: 237) He ends his argument with a rhetorical question followed by silence. He wants the jury to linger upon this thought and draw the conclusion that his client is innocent. In fact, he just told them that this is the conclusion to draw.

Stern also silences one of the prosecution's witnesses, not by objecting, but by making the witness withdraw her own testimony during a cross-examination. Stern asks her: "Didn't you testify five minutes ago, madam, that Mr Sabich called Ms Polhemus 'my angel'? Eugenia draws herself up in the witness stand, fierce and proud. 'No way', she says loudly." (Turow 2005: 248) She cannot admit to eavesdropping. Eugenia is portrayed as rather silly with low credibility, a feature discussed in *Silencing of Women.* Obviously she comes from a low social status in society. It is an effective way to silence her.

As the trial goes on Stern questions one of the prosecution's witnesses and he clearly knows he is going too far with his questions. The prosecutor objects and before the judge has a chance to sustain the objection Stern withdraws the question, why? The narrator states: "He's made his point to the jury." (Turow 2005: 252) The trial is a contest for the jury's liking. The first day in court is in favor of the defence. On the second day the prosecution steps up bringing their witness, Raymond Horgan to the stand. Horgan, clearly on the prosecution's side gives a strong testimony. The defence objects and the accused gives the reason for the objection: "A good tactic, if for no other reason than to break the rhythm now and draw the jury back to yesterday." (Turow 2005: 261) The lawyers are struggling to win over the jury.

When the prosecution is becoming desperate they choose to put Sabich's psychologist on the stand. The defence obviously objects, since he might reveal secrets that Sabich has told him in confidence, secrets whether he killed Carolyn Polhemus or not. Based upon how the prosecution proceeds, the defence decides to agree to the witness taking the stand, assuming that they might benefit from his testimony after all. (Turow 2005: 360-363)

When the trial reaches its end, the question whether the accused Sabich should testify or not, comes up again. His lawyer explains the situation to him from his point of view: "Rusty, I prefer to see the defendant take the stand. No matter how often and how insistently jurors are told that they must not hold a defendant's silence against him, it is an impossible instruction to follow. A jury wants to hear a denial, particularly when the defendant is a person accustomed to presenting himself in public."However, he continues explaining that he is against it. "We both know this, Rusty: Two groups of persons make good witnesses. Those who are essentially truthful. And skilled liars." Stern explains that he knows Sabich is hiding something and since he is not a skillful liar the prosecution will notice that and things will turn out badly for him. (Turow 2005: 340) Reading this it is not certain that even the defence regards Sabich as innocent; they are simply doing their job. As a reader one does not know the truth either.

In this novel the defence shows great knowledge in how to use silence as an instrument of power. I will continue by looking at how the prosecutor and witnesses master the art in the same courtroom. More correctly, how the author wants the prosecution to master the art of using silence as an instrument of power.

The prosecutors are Nico Della Guardia and Tommy Molto. They do not use silence as an instrument of power as frequently or as skilfully as the defence does. This is shown by the following example: the prosecution calls Mrs Krapotnik to the stand, the victim's former land lady. She has previously pointed out Mr Sabich as one that used to visit the victim at her home. When she takes the stand "she refuses to answer questions and narrates, free flow." The prosecuting lawyer interrupts her over and over again: "Madam, Nico says, not for the first time." (Turow 2005: 253) The prosecution tries to

get Mrs Kraptonik off the witness stand. They want to silence their own witness because she is doing more damage than good to their case. The narrator explains: “The lady is beyond control. He does not bother asking about the night Carolyn was murdered. Any identification Mrs Kraptonik made at this point would be sorely impeached by her prior failures.” (Turow 2005: 254) Instead, the prosecutor wants her to point out the one she has seen at Carolyn’s. She points out everyone except Sabich. The judge and the jury all laugh at the expense of the prosecution. Again, the female witness has been ridiculed and silenced.

The prosecution do, however, show some attempt in using silence to their advantage. They have called Ms Martinez, Sabich’s former secretary, to the stand. Their intention is to make her tell about any contact between the accused and the victim. Della Guardia asks a leading question, knowing Stern will object. The judge sustains the objection and tells the jury to forget the question. This is part of Della Guardia’s strategy. He only wants to signal the witness. (Turow 2005: 248) It works and the witness bluntly reveals what the prosecution hoped for.

The prosecution fails using their strategy once more when asking Sabich’s psychologist whether Sabich told him he killed Carolyn. The prosecutor knows this is a question that is out of line and he expects Stern to object. The judge is enraged but Stern has recognized this strategy and refuses to silence the prosecution. In fact, the defence makes it clear that the prosecution can proceed asking the question. At the same time the prosecution withdraws their question because they do not want an answer. (Turow 2005: 364) They want to raise doubts in the minds of the jury, which they would have if the defence had chosen to object, and hence silence the witness from answering the question.

The expert witness in this case is the pathologist, Dr Kumagai. When cross-examined by the defence he avoids answering questions by saying “I don’t know about that”. (Turow 2005: 326) At another instance he states he has a failing memory. Kumagai answer one question: “Could be, but you ask what I remember. I don’t remember that.” (Turow 2005: 326) On several occasions during the cross-examination he does not

answer the questions. (Turow 2005: 336-337) The questions require simple yes or no answers. Answering *no* would suggest he is professionally incompetent and answering *yes* would mean he has withheld evidence. He chooses to remain silent. This would be intentional silence according to Kurzon (1998: 44, 46). Eventually, he is forced to answer the questions and the State does not have a case anymore.

4.2.2 Silence and Power in J. Brandon's *Rules of Evidence*

I will now continue with a discussion on *Rules of Evidence* by Jay Brandon. This novel is a about the white police detective Mike Stennet who is accused for killing a black drifter. His defence attorney is Raymond Boudro, a black criminal lawyer. Boudro believes Stennet to be a racist but his instinct for justice makes him take the case. This turns out to be a fight in court between the prosecution and the defence.

In this novel, the judge does not take on a very active role. She is not part of the plot in the same way as in Turow's novel. This may explain why there is not so much input from the judge during this particular trial. However, the judge does make an input on an occasion when she thinks the defence is lacking skill and effort. The narrator says: "The voice that answered was crisp, authoritative, and unexpected. Wait, Judge Byrnes snapped. For the first time she took her eyes off Raymond, to ask the witness, [---]." (Brandon 1992: 255) The background to this input from the judge is that she believes that the defence is not giving the accused a fair defence, if any at all. She steps in, taking the role as the defence.

At the end of the trial the judge herself silences the prosecutor on the behalf of the defence. "Counsel, the judge said sharply, not waiting for an objection that wouldn't come." (Brandon 1992: 290) The judge is clearly annoyed with the defence for not doing its job.

The author makes use of silence in the courtroom in a very descriptive way. This is shown in the following passage:

> ‘As a matter of fact, I thought it might *be* cash,’ Stennett said. ‘That would fit the profile. Guy on the street corner, gathering a crowd, showing something, big wad of cash in his pocket …’
> ‘So you thought it was cash not a weapon.’
> ‘Possibly.’
> ‘And a black man with a lot of money just has to be a drug dealer, *doesn’t he*, Officer?’
> Stennett wanted to say it. You could see the words in his mouth. Becky was tense on the edge of her chair, willing her witness to *keep quiet,* but the cop wasn’t looking at her, he was looking at Raymond, at the taunting look in his eyes. And Stennet said it: ‘Not necessarily. He could be a pimp.’
> That *silence* was beautiful. Raymond *held it,* staying on his feet, *not asking another question, the conductor of silence.*
>
> (Brandon 1992: 33, my italics)

The white police detective Stennett is put on the stand as a witness for the State. In the scene above, Stennett is being questioned by the defence attorney Raymond Boudro. Becky is the prosecuting attorney. Since Stennett is the main witness for the prosecution, he desperately tries to explain himself but is interrupted by the defence, who brilliantly leads the questioning where he wants it to go. Boudro then asks a question, a statement followed by a question tag, making an assumption and making it seem as if Stennett was struggling with his testimony. Becky sees where the situation is heading and silently hopes Stennett will remain quiet in order not to incriminate himself. Stennett makes a mistake when not looking at his attorney so he can see the expression in her eyes; rather he looks at Boudro, who has a taunting look in his eyes who is certainly well aware that he does too. Stennett makes a fatal move and speaks. He does not only answer the question with a simple “no” as he should. He is uncertain and even thinks out loud the unspeakable when he says, “he could be a pimp”. Raymond Boudro enjoys the silence which follows, deliberately not asking another question so that the statement made can sink in with everyone. The narrator states: “The silence was beautiful and he held it”. (Brandon 1992: 33) Boudro has just branded a white police detective a racist. Boudro has a clear strategy, which he follows and it works. When it is his turn to cross he does not because: “He’d decided that as soon as Becky begun her redirect. He’d already made the best impression he could. There was no point in diluting the effect of that testimony by trying for more and failing.”

(Brandon 1992: 35) Boudro realizes that silence can be used to stress a point previously made.

Later in the story Boudro takes on the role as Stennet's defence lawyer when Stennet himself becomes the accused. Throughout the trial and surrounding events Boudro has a clear strategy. The narrator gives it to us: "Silence was the best course. Raymond knew it." (Brandon 1992: 87)The narrator explains this further on: "Sometimes Raymond's most effective weapon was this hostile silence, glaring as if he were too dumbstruck to respond." (Brandon 1992: 116) In this instance, silence is described as an "effective weapon". A weapon is also an instrument of power, which this thesis emphasizes.

When talking off the record with the prosecutors Boudro does not reveal too much information, but just enough to make them insecure about their case, or more accurately, his case. The narrator explains this:

> If a defence lawyer had a viable defense he'd usually give the prosecutor at least a peek at it, in hopes of getting a better plea bargain offer, or a dismissal. Raymond gave her nothing. [---] He left her looking irritated and uncertain, like a woman about to pick up a phone and call an investigator. Exactly as he wanted her. (Brandon 1992: 158-159)

The dilemma of a silent witness is portrayed in this novel. Boudro does not know whether his client is guilty or not and tries to figure it out during the trial. The narrator tells us: "Stennet shook his head. Raymond was studying him for a pattern. Lots of liars were like that. Did he speak when he was telling the truth but only nod or shake his head when he was lying?" (Brandon 1992: 165) In other words, Boudro tries to establish whether his client is lying or not. He is aware of the theory that liars tend to behave in a certain way or give away signals that indicate that they are telling lies. Quilliam (2005: 72-73) explains what signs to look for when trying to determine whether a person is telling the truth or not.

It has become apparent that lawyers ask questions for the sake of the question and not so much the answer. They know the other side will object and the judge will sustain the

objection, but that is irrelevant. The question still lingers in the minds of the jury members. The following is an example of this:

> Raymond asked deliberately, 'Would Mike Stennett's reputation lead you to believe he's the kind of man who would kill someone and then carelessly leave a gun with his fingerprint on it right next to the victim's body?' At Becky's urging, Tyler was on his feet before this question was finished. 'Objection, Your Honor. That calls for hearsay. And, uh, speculation. 'Sustained', said Judge Byrnes, giving Raymond a look as if he'd gotten away with something in spite of her ruling. (Brandon 1992: 231)

Raymond Boudro only wants the jury to hear the question. He wants to raise doubts in the jury's minds that his client cannot possibly be a murderer not to mention a careless one. The judge realizes Boudro's strategy and therefore she gives him "the look". (Brandon 1992: 231)

The defence decides to put the accused on the stand and the accused explains the importance of that: "Oh, I'm gonna testify, don't worry about that. I know what the jury thinks if the defendant sits there and exercises his right not to incriminate himself." (Brandon 1992: 242) However, Raymond has another view of the matter: "Sometimes letting them speculate about it is better than climbing up on the stand and shooting yourself in the foot right in front of them." (Brandon 1992: 242) It is clear that the lawyer thinks that silence is the best strategy.

At a very crucial point in the trial when the accused himself takes the stand he remains silent regarding the only thing that could give him an alibi, his source. Boudro knows that he cannot reveal his source and withdraws his question. The point is merely to get the accused to sound sincere and believable. (Brandon 1992: 284-285) The accused takes on an intentional silence, choosing to remain silent. He knows the answer but does not want to answer. There is a code of honour between the source and the police. The lawyer, Boudro, knows this. However, he silences the witness since it was never his motive to put him on the spot, he just wants the jury to take pity on him.

At another instance the accused hesitates before giving an answer and Boudro is upset. "*Damn you,* Raymond thought. *Say it or don't but don't sit there looking like you're trying to decide the best thing to say."*(Brandon 1992: 287) This silence is interpreted as hesitation by the lawyer, and he assumes everyone else also interprets it that way. This is clearly a negative thing to do as was explained (O'Barr 1982: 98) in the theory part.

The author also shows the dilemma the accused faces when on the stand. The lawyer asks a simple yes or no question and the accused knows that either way he is trapped, because he is not allowed to explain why he answers as he does. The following example illustrates this:

> 'Would you admit it if you had?' Becky asked. There was no good way to answer the question. He couldn't say no, and if he said yes he'd sound unbelievable. Becky let him chew it over for long seconds before saying, summoning all the contempt she could, 'I pass the witness.' (Brandon 1992: 291)

In this case, the answer is not of importance for the prosecution. They know the witness could not answer the question asked. They forced him to silence and it turned out in their favour.

Rebecca Schirhart is one of the prosecutors in this story. She holds a typical male power position and is described as cute and timid, an intelligent upcoming lawyer. Her private life is in turmoil and she is given a small role in the whole scheme of things, even though she is one of the lawyers. Lakoff (1995: 30) was discussed in the theory part regarding women in such situations. Her theory seems to be accurate in novels too. Women are being desilenced in the way that they take higher positions in society but they are still being silenced since the focus lies on the fact that they are women and not that they are for instance lawyers. Carolyn Polhemus, the prosecutor from *Presumed Innocent* (2005) is another woman that matches this description. She is described as an attractive blonde, wearing nice suits with short skirts. She is described as intelligent and career conscious. She is good at her job and she will do anything to get it done. She uses her good looks to her advantage and has several suitors with whom she toys around

with. She is described as cold and unsympathetic. She is silenced in a very definite way when murdered.

At the beginning of the book, Becky Schirhart, is prosecuting a case and has Mike Stennet as a witness for the State. Stennet is about to lose his temper on the stand and Becky notices and silences him: “Stennet: “If this is true, I think it’s because statistics will show”… Becky didn’t let him finish. Your honor” (Brandon 1992: 32) Schirhart deliberately silences her own witness since she believes what he will say will incriminate him.

Becky Schirhart will continue having the role as the prosecutor throughout the book. In the trial against Stennet, where Boudro is his defence lawyer, Becky has a partner named Tyler Hammond. The prosecutors are well aware of the impacts of silence. In this case they bring every detective on the police force to the stand to give testimony at the trial. What they say is of no importance to their case. However if they did not testify it could have negative consequences for the State’s case. The narrator says: “Becky was experienced enough to know that jurors who wondered why someone hadn’t been called might start inventing things that missing witness might have testified.” (Brandon 1992: 231) In this case silence could be devastating.

The game of tactics that is fought between the defence and the prosecution comes forth in the following episode where the prosecution is questioning the pathologist. Becky asks the witness a series of questions, expecting an objection. “’Someone was trying to hurt him’, Becky added, and paused, expecting objection. ‘So did the judge.’” (Brandon 1992: 234) She goes on questioning the witness: “That was another spot for an objection, but none came, though Raymond was paying close attention.” (Brandon 1992: 235) Becky continues with her strategy nonetheless. She calls Stennet’s former partner to the stand. She asks: “’Did you ever know him to beat a suspect?’ There were pulses of silence. Becky felt a moment of panic and wanted to withdraw the question. Judge Byrnes looked sharply at Raymond.” (Brandon 1992: 237) At this point even the judge wants Raymond to object. Raymond rises slowly to his feet and objects. “’Finally’” Becky thinks and explains: ‘A good question can be more effective than an

answer, especially if the other side objects. You ask the question to draw the objection, to let the jury know the other side doesn't want them to hear that answer.'" (Brandon 1992: 238)

Becky continues asking a question that she expects to be objected to. This time, however, Raymond knows what she is trying to accomplish. "This time Raymond didn't take the bait. He sat there with his legs stretched out in front of him looking indifferent to both the question and the answer, as if he already knew. Becky looked at him and saw he wasn't going to rise." (Brandon 1992: 238) In fact, Raymond plays the game very well and asks a startling question. He asks straight out whether he, the witness, thinks that Stennet killed the victim. Consequently the narrator says: "Becky and the judge both looked alarmed." (Brandon 1992: 238) No one could object to this question, which was a question normally asked by the prosecutor. Becky could not object since the jury might think she didn't like the answer. (Brandon 1992: 239)

At this point it can be remembered that the jury are the ones who are being silenced all the time. They can never ask questions and follow up what they think are loose ends. They can never ask the question Raymond asked even though that is the question they all want to ask. This is noted by the narrator too. "Jurors looked interested; it was a question they would have asked if they could." (Brandon 1992: 239) The game played in the courtroom by lawyers has its similarities with a poker game. It is about keeping a straight face so the opponent cannot call your bluff. Sometimes it works and sometimes it does not. Sometimes also the prosecution is on the winning side as this extract shows:

> Tyler steeled himself to ask the objectionable question. Becky had written it out for him. 'Officer, what happened was, someone wiped the gun clean of fingerprints but missed that one spot. Wouldn't you say that's what happened?' Raymond objected to that as calling for speculation, but the answer wasn't the point. The question had been. Tyler felt rather pleased with himself. He had learned a trick. (Brandon 1992: 252)

Again, the prosecution gains from the witness's silence. The prosecution only wanted to plant a seed of doubt in the minds of the jury. The question had been raised and the jury was made to wonder about it.

Sometimes the best strategy is to be as concise as possible instead of extensive explanation. This is shown by the prosecution: "Tyler let silence comment on that while he resumed his seat." (Brandon 1992: 261) Here Tyler lets silence do the work for him. There is no need to stress anything or repeat oneself, silence does that for you in a very effective way.

At times the prosecution may have to call in a witness to prove a certain point in the case, but this witness may not always be the ideal witness. It is difficult to be certain what the witness will say. The following extract illustrates this: "'Keep a rein on him', Becky had said to Tyler. 'The old man loves to talk. Don't let him open himself up to any side issues. He's our whole case. We want to expose him to Boudro as little as possible.'" (Brandon 1992: 258) Yet again, the importance of silence is stressed. This man holds the main evidence to the prosecution's case. He is their only eye-witness to the crime that was committed. He is put on the stand to point out Stennet as the murderer. However, this man is very talkative and tends to utter pieces of information that the defence might benefit from. He could say something that will be held against him and threaten his credibility. The prosecution is aware of this danger so they want him to as direct and short as possible so the defence cannot follow up on his statements.

Their fear turns out to be justified as they experience a sudden dilemma when their star witness does reveal a piece of new evidence, unknown to both sides. The witness states that the person he saw killing the victim had a scar on his shoulder. The prosecution have two choices, either to ask the accused to show the scar, or not ask the accused to show the scar. Everyone in court expects the prosecution to ask the defendant to show his shoulder since it is their witness on the stand. If indeed he has got a scar on his shoulder the prosecution have most certainly won the case. If they ask him to display the shoulder only to find he does not have a scar, their witness will lose all his credibility and they stand with a weak case. If they do not ask him to show his shoulder, the jury will most definitely wonder why. In this instance one would argue that silence is not the best way to go.

This episode creates a dilemma for the defence too, who is unaware of a potential scar. Boudro does not know whether his client has a scar or not. If he lets the prosecution ask for a display of the shoulder and he does not object, he is taking a great risk. If he objects to the prosecution's request, the jury will wonder why. Boudro knows this and at the prosecution's request he asks the judge for permission to approach the bench, hoping the jury will not notice this as an objection. The prosecution is on the winning side, however, because they know that the jury knows they wanted to see the scar even if the judge would not permit it. (Brandon 1992: 262-264) In this case both the prosecution and the defence would want to silence the witness before saying anything about an alleged scar, but none of them has a chance to do so. This causes quite a dilemma for both sides, not to mention the accused. Silence in this case is not even a choice. Choosing silence would be the wrong move for both parties. In this case, silence could be very damaging.

5 CONCLUSIONS

O'Barr (1982: 110) writes: "Like speech, silence is communication. And like words their absence may have many meanings" An attempt to prove this point has been made in this analysis.

My conclusions from this study are that silence indeed is used as an instrument of power in both the actual court as O'Barr's study showed, but also in the fictional court. In a real life court I would assume that people in general or the "non-regulars" (Searcy, Duck & Blanck 2009: 43) do not understand the role that silence plays in these situations. People may choose to remain silent for different reasons but the outcome is almost always to their benefit. Hence the accused and the witnesses have great power in this instrument without necessarily knowing it. The "regulars" (Searcy, Duck & Blanck 2009: 43) as the judge and the lawyers are very much aware of the impact silence has. I would argue on the basis of this study that lawyers do use it to their advantage if possible; in fact, they seize every opportunity they can to do so.

My conclusions are that the judge has the most power in the courtroom as to determine what can be said and not. He alone can silence the defence and the prosecution as well as the record. In *Presumed Innocent* this power is more obvious since the judge has a personal interest in the trial since his own reputation is at stake so he manipulates the course of the trial by silencing the defence and the prosecution as suits him. He even silences the jury at the end of the trial. For the judge the possibility to silence is his instrument of power. It has to be noted that no one has that same power over the judge.

I can conclude that a trial is not so much about finding the accused guilty or not guilty as much as it is a power game between the judge and the lawyers. This is a thought that is expresses by the narrator in *Rules of Evidence* (1992: 14): "It's just a game. You gotta loosen up your attitude. […] Make it numbers, make it cattle through the chute." The narrator is being even more frank about the legal system: "In plea bargaining, real guilt or real innocence isn't a factor. It doesn't matter if you're innocent if the State can prove you guilty. It doesn't matter if you're guilty if the State can't make the case." (Brandon 1992: 110) These statements made by the narrator are reflections of the legal

system and trials held in court. It is clearly a game that is played and the most skilful one wins. This is a reason to why silence is used to manipulate in court and indeed used as an instrument of power, by all parties.

Further studies could be conducted on this topic. One could analyse silence as an instrument of power in fiction written by non-lawyers compared to real life lawyers. One could also bring in other aspects of nonverbal communication into the study as gestures and physical appearances or clothing. These things are often described in much detail and do have meaning. If one desire to take the study further one could compare the use of silence as an instrument of power in the novel versus the film version of that novel. *Presumed Innocent* was made into a movie in the early 1990s starring Harrison Ford. (imdb.com) Also Michael Connelly's *The Lincoln Lawyer* was made into a movie in 2011 starring Matthew McConaughey. (michaelconnelly.com) One could also look at how court "regulars" and "non-regulars" (Searcy, Duck & Blanck 2009: 43) behave nonverbally in the novel compared to the film version.

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