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## SILENCE AND SILENCING: THEIR CENTRIPETAL AND CENTRIFUGAL FORCES IN LEGAL COMMUNICATION, PEDAGOGY AND DISCOURSE

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Margaret E. Montoya\*

*Language and voice have been subjects of great interest to scholars working in the areas of Critical Race Theory and Latina/o Critical Legal Theory. Silence, a counterpart of voice, has not, however, been well theorized. This Article is an invitation to attend to silence and silencing. The first part of the Article argues that one's use of silence is an aspect of communication that, like accents, is related to one's culture and may correlate with one's racial identity. The second part of the Article posits that silence can be a force that disrupts the dominant discourse within the law school classroom, creating learning spaces where deeper dialogue from different points of view can occur. The third part of the Article focuses on the silencing of racial issues within legal discourse and public policy debates, a silencing that is a mechanism for racial control and hegemony. The Article uses the work and imagery of Mikhail Bakhtin, a Russian literary critic, to analyze how silence can have centering and de-centering linguistic force, offering performative and communicative choices that affect racial identities.*

[T]he centripetal forces of the life of language, embodied in a "unitary language," operate in the midst of heteroglossia . . . . [L]anguage is stratified not only into linguistic dialects . . . but also—and for us this is the essential point—into languages that are socio-ideological: languages of social groups [and] "professional" . . . languages.<sup>1</sup>

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1. M. M. BAKHTIN, *THE DIALOGIC IMAGINATION* 271–72 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans. 1981). It is sometimes said that the centrifugal force is a "pseudo" force because it exists only in what physicists call rotating reference frames and not in inertial reference frames. See *Centrifugal Force: A Fictitious Force?* (visited December 13, 1999) <<http://observe.ivv.nasa.gov/nasa/space/centrifugal/centrifugal5.html>>. Consequently an observer watching a car go around a curve would observe the car being

## INTRODUCTION

Language analysis has been a topic of major concern within Latina/o Critical Legal Studies (“LatCrit”) since its inception.<sup>2</sup> LatCrit scholars have developed a number of themes in analyzing how language has been an important mechanism for the economic and cultural marginalization of Latina/o communities as well as of other communities of color.<sup>3</sup> However, language always has been, and remains, a vehicle for resistance and a resource for the collective identity of Latina/o communities.<sup>4</sup> Major LatCrit themes include 1) the connection between language and identity;<sup>5</sup> 2) the historical, geographic, and familial dimensions of language loss and forced assimilation;<sup>6</sup> and 3) the relationship between language and racial performances.<sup>7</sup>

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“forced” to the center of the curve through centripetal force while the occupants of the car would feel the centrifugal forces pushing the car toward the edge of the curve. *See id.*

2. The history of LatCrit is partially recorded in the symposia that have been published in connection with conferences and gatherings that have fostered this new school of jurisprudence and critical theory. *See* Colloquium, Representing Latina/o Communities: Critical Race Theory and Practice, 9 LA RAZA L.J. 1 (1996); Symposium, LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship, 2 HARV. LATINO L.REV. 1 (1997); Symposium, Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory, 19 CHICANO-LATINO L. REV. 1 (1998); Symposium: Latinas/os and the Law, 10 LA RAZA L.J. 1 (1998), 85 CAL. L. REV. 1087 (1997); Symposium, Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory, 53 U. MIAMI L. REV. 1 (1999); Symposium, Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections, 33 U.C. DAVIS L. REV. 1 (forthcoming 2000).

3. *See* Steven Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027 (1996); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992).

4. *See generally* THE LATINA/O CONDITION, “PART XI: ENGLISH-ONLY, BILINGUALISM, INTERPRETERS: YOU MEAN I CAN’T SPEAK SPANISH?” (Richard Delgado & Jean Stefancic eds., 1998).

5. *See* Madeleine Plasencia, “*Suppressing the Mother Tongue*”—*Anti-Subordination and the Legal Struggle Over Control of the Means of Communication*, 53 U. MIAMI L. REV. 989 (1999) (positing that language contributes to a person’s self-identity and her self-esteem).

6. *See* John Hayakawa Torok, *Finding the Me in LatCrit Theory: Thoughts on Language Acquisition and Loss*, 53 U. MIAMI L. REV. 1019 (1999) (arguing that language analysis can help clarify the racialization of Latina/o and Asian American groups by comparing racial discourses that use the White-over-Black language with those that use the “colonizing settler-over-native” language).

7. *See* Margaret E. Montoya, *Máscaras, Trenzas y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN’S L.J. 185, 219 (1994), appearing contemporaneously in 15 CHICANO-LATINO L.REV. 1, 35 (1994) (an enactment through bilingual autobiographical narratives of the idea that race is performance—how we show ourselves to the world).

Silence and silencing have been among other linguistic concepts<sup>8</sup> that have already appeared in the writings of Race Critics and LatCrits exploring the relationship between language and subordination. For example, Patricia Williams has noted that while the long silence of African Americans has been broken and their history of being spoken for is over, the struggle now is to give their stories “a hearing of [their] own” so they are not merely the ironic sound of “silent voice[s].”<sup>9</sup> In addition, the official silencing represented by the English-Only Movement through its use of law to proscribe the public use of Spanish and other minority languages has been vehemently criticized by LatCrits and others.<sup>10</sup> Some of the most significant work on silence and silencing has been done within Queer Theory, exposing the ways in which invisibility and its counterpart, inaudibility, are imposed on sexual minorities.<sup>11</sup> Queer Theory also examines discriminatory public policies that aim to silence gays, lesbians, bisexuals, and transgendered persons, such as the military’s purportedly liberal “Don’t Ask, Don’t Tell” regulations.<sup>12</sup>

Other aspects of silence, such as performative and communicative aspects, have been eloquently described by the Asian American Critics—particularly by Sharon Hom<sup>13</sup> and Margaret

8. For a superb article on accent discrimination, see Mari Matsuda, *The Voices of America: Accent, Antidiscrimination Law, and a New Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991). See also Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997).

9. PATRICIA J. WILLIAMS, *THE ROOSTER’S EGG: ON THE PERSISTENCE OF PREJUDICE* 138–49 (1995).

10. See Juan F. Perea, *Los Olvidados: On The Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995); Yvonne Tamayo, *Literal Silencing/Silenciando La Lengua*, 53 U. MIAMI L. REV. 995 (1999).

11. Some of the foundational work has been done by the Chicana writer and cultural critic Gloria Anzaldúa. See GLORIA ANZALDÚA, *BORDERLANDS, LA FRONTERA: THE NEW MESTIZA* (1987); GLORIA ANZALDÚA, *MAKING FACES, MAKING SOUL: HACIENDO CARAS* (1990) [hereinafter ANZALDÚA, *MAKING FACES*].

12. See Jewelle Gomez, *Because Silence is Costly*, in *FORTY-THREE SEPTEMBERS* (1993); Darren Lenard Hutchinson, “Claiming” and “Speaking” Who We Are: *Black Gays and Lesbians, Racial Politics, and the Million Man March*, in *BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER* 28 (Devon W. Carbado ed., 1999); Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights: The Deployment of Race/Sexual Orientation Analogies in the Debates about the “Don’t Ask, Don’t Tell” Policy*, in *BLACK MEN*, *supra*, at 283; OLIVA M. ESPÍN, *WOMEN CROSSING BOUNDARIES: A PSYCHOLOGY OF IMMIGRATION AND TRANSFORMATIONS OF SEXUALITY* 133–44 (1999).

13. See CHINESE WOMEN TRAVERSING DIASPORA: MEMOIRS, ESSAY, AND POETRY (Sharon Hom, ed. 1999) (citing the work of King-Kwok Cheung, *ARTICULATE SILENCES*:

(H.R.) Chon.<sup>14</sup> In describing the work of other Chinese women artists and writers, Hom calls attention to the “many tongues that silence, too, can speak.”<sup>15</sup> She cautions against “the logocentric privileging of ‘voice’ that can colonize the very differences we seek to recognize.”<sup>16</sup>

This Article seeks to deepen the analysis of the interplay between the subordinating aspects of being silenced and the liberatory aspects of silence, its expressive and performative aspects that are part of our linguistic and racial repertoires. Languages are not neutral vehicles for the transmission of thoughts. Instead, languages are imbedded in the history and struggles of the people who use them. I posit that silence is a crucial component of the languages of communities of color—especially those that are bi/multilingual. Bi/multilingual communities deploy silence in ways that connect them to others in their own racial/ethnic communities and distinguish them from the dominant monolingual English majority. Thus, silence can disturb and disrupt the linguistic hegemony that is inherent in and coalesces the power relations between the dominant majority and communities of color, relations that are stabilized by the ideology of White supremacy.

I relate silence within cultural discourse to silence in classroom discourse and to silence in legal discourse to show how silence and silencing are used to draw and maintain the borders of racialized power. The three concepts build on one another: One needs to have an understanding of silence and silencing as gendered and cross-cultural discourses to understand silence and silencing as pedagogical discourses; and finally one needs to understand both silence and silencing as legal discourse. (See Figure 1.) In other words, in order to understand how silence and silencing infiltrate the law and its structures and actors, one needs to understand how legal pedagogy compounds the potentialities of silence and silencing that are present in the linguistic relationships of a multiracial, polyglot, and fragmented society.

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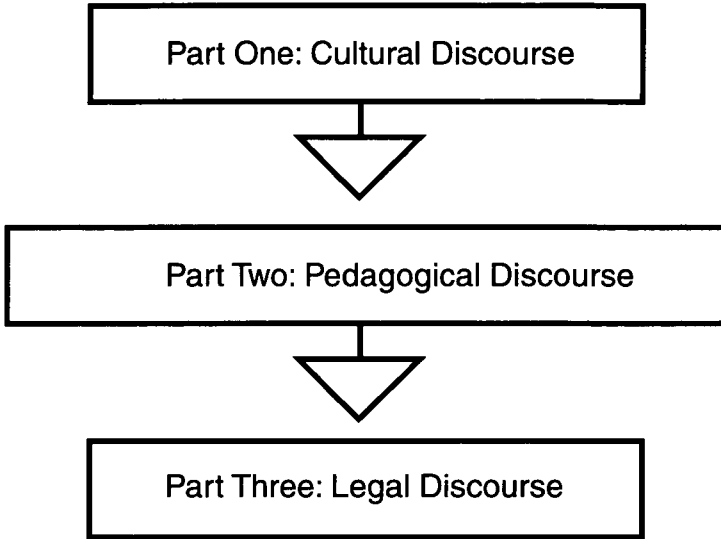
HISAYE YAMAMOTO, MAXINE HONG KINGSTON, JOY KOGAWA (1993) and the choreography of Eleanor Yung).

14. See Margaret (H. R.) Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 UCLA ASIAN PAC. AM. L.J. 4 (1995).

15. *Id.* at 9.

16. *Id.*

FIGURE 1



1. *The Imagery Of Bakhtin's Centripetal and Centrifugal Forces*—Mikhail Bakhtin, an early Twentieth Century Russian literary critic, did foundational work through his study of the novel in articulating how language is heteroglossic (literally “different tongues”).<sup>17</sup> Bakhtin contended that the meaning within language is not static; any utterance has multiple meanings.<sup>18</sup> Moreover, the meanings of words evolve over time and from place to place.<sup>19</sup> Bakhtin explains,

[L]anguage is heteroglot from top to bottom: it represents the co-existence of socio-ideological contradictions between the present and past, between differing epochs of the past, between different socio-ideological groups in the present, between tendencies, schools, circles and so forth, all given a bodily form. These “languages” of heteroglossia intersect each other in a variety of ways, forming new socially typifying “languages.”<sup>20</sup>

17. See BAKHTIN, *supra* note 1, at 263 et seq.

18. See *id.* at 272.

19. See *id.*

20. *Id.* at 291.

Bakhtin argued that meaning occurred because of this heteroglossia that both resulted from and contributed to “dialogic relationships”—the multitude of historical, social, and economic aspects of events that affected and shaped meaning.<sup>21</sup> A core characteristic of Bakhtin’s conceptualization of language was its dialogic nature. For him, language was interactive, understandable “only in terms of its inevitable orientation towards *another*.”<sup>22</sup>

Using a Bakhtinian vocabulary, I assert that legal language and legal discourse seek to be “unitary” in their rejection of certain types of “heteroglossia,” especially in their resistance to the languages and silences of subordinated groups, such as people of color, sexual minorities, and others who have been historically oppressed.

The beginning epigram from Bakhtin about the centripetal and centrifugal forces of language suggests the central theme of this paper.<sup>23</sup> I posit that the law and traditional legal discourse, grounded in an ideology of White supremacy, produce a centripetal force that constantly centralizes power and privilege within the hands of those dedicated to maintaining the status quo. On the other hand, the languages of outsiders produce centrifugal forces that decentralize and destabilize that power and privilege. (See Figure 2.) Silence and silencing are important features of this tension between the centripetal force and the centrifugal forces that inhere in language.

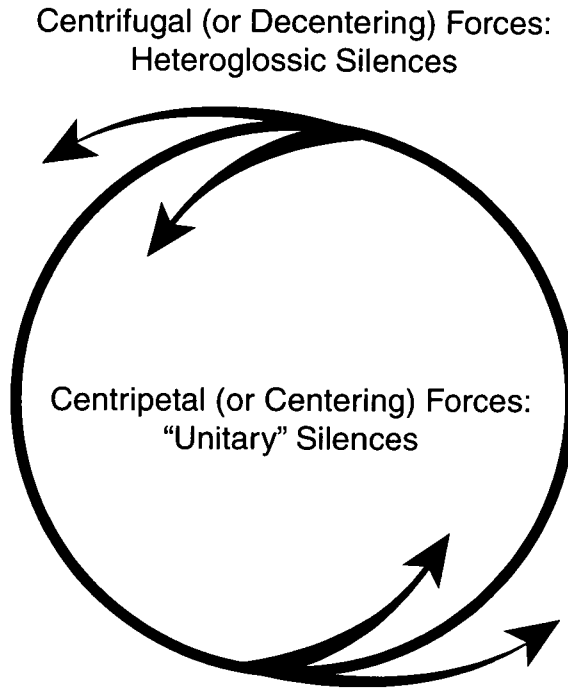
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21. *See id.* at 426.

22. GEORGE KALAMARAS, RECLAIMING THE TACIT DIMENSION: SYMBOLIC FORM IN THE RHETORIC OF SILENCE 27 (1994) (quoting Terry Eagleton, LITERARY THEORY: AN INTRODUCTION 117 (1983)).

23. Michael Holquist, a leading Bakhtinian scholar, describes the centripetal and centrifugal forces: “These are respectively the centralizing and decentralizing . . . forces in any language or culture. . . . The rulers and the high poetic genres of any era exercise a centripetal—a homogenizing and hierarchicizing—influence; the centrifugal (decrowning, dispersing) forces of the clown, mimic and rogue create alternative ‘degraded’ genres down below.” BAKHTIN, *supra* note 1, at 425.

FIGURE 2



I use the imagery of centripetal force in connection with the subordinating consequences of silencing. Throughout this Article, I develop the idea that persons and communities of color are silenced by the dominant majority, who maintain racial hegemony, in part, by enforcing a "unitary" language with a controlled and limited set of meanings. In part, this occurs by authorizing a legal pedagogy that creates a cadre of legal professionals who have been socialized to accept a linguistic regime in which the topic of race is not discussed. These legal professionals—judges, lawyers, and law professors—participate in and reproduce a legal hierarchy that depends on silence and silencing. One way that the dominant majority maintains its racial hegemony is by privileging certain types of silence (such as the constitutional right against self-incrimination)<sup>24</sup> and by ritualizing other types of silence (such as the typical responses to racialized hate speech).

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24. See generally HAIG BOSMAJIAN, *THE FREEDOM NOT TO SPEAK* (1999) (arguing that the freedom to be silent is as politically important as the freedom of speech); PETER MIRFIELD,



Comparatively, I use the imagery of centrifugal force in connection with the liberatory heteroglossic potential and reality of silence. Communities of color use silence to communicate resistance and opposition to those who marginalize them.<sup>25</sup> The meanings of silence are complex, varied, and often beyond the interpretive understanding of the dominant culture. Such resistance is also evident in the law school classroom, where students of color can withdraw their participation as a way of destabilizing the power dynamics and resisting the pressures to assimilate to the socializing norms of the credentializing experience.

2. *Organization of Article*—This Article is an invitation to notice and attend to silence as it is used by people of color, especially in classrooms. First it explores how silence and race are correlated to different language systems. Second, it analyzes how silence is experienced in the law school classroom. Finally, this Article looks at how silence is managed through legal discourse. This Article is also a preliminary and tentative exploration of silence and silencing as discursive mechanisms used by this society to sustain racial arrangements within an ideology of White supremacy.

Boaventura de Sousa Santos, a noted sociologist and sociolegal scholar, has written that silence has been neglected as an object of study by Western social scientists for these four reasons:

[First,] silence constitutes a threat not only to accepted scientific boundaries but also to established methods of social research. Second, social scientists tend to feel more confident in speculating with words about words than in speculating with words about silence. . . . Third, the usefulness of studies of silence has not yet been demonstrated, and will not be so until the language/silence rhythms in different societies begin to be decoded. Fourth, and most importantly, Western civilization is inherently biased against silence and this necessarily affects our scientific preferences and capabilities.<sup>26</sup>

Acknowledging these impediments, this Article is an attempt to develop a concatenated analysis of silence and silencing. As more fully described below, this analysis links silence as it is used in

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SILENCE, CONFESSIONS AND IMPROPERLY OBTAINED EVIDENCE (1997) (examining the source and extent of the right to remain silent).

25. See *infra* text accompanying notes 112–45 for examples of the use of silence by women of color to communicate resistance to or awareness of subordination.

26. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE, AND POLITICS IN THE PARADIGMATIC TRANSITION 148–50 (1995).

communication and performance by subordinated racial groups, usually within languages other than English, with the classroom silence of students of color as well as with the silencing of the topic of race within legal discourse.

Because silence is by its nature ambiguous,<sup>27</sup> it can be difficult to distinguish silence from silencing. That is, it can be difficult to know when someone is holding silence as a matter of will and agency in contrast to being "silenced"—made to be quiet because her verbal and/or *nonverbal* expressions are rejected, devalued, or misinterpreted. Consequently, each section provides examples of how subordinated groups are silent in courtrooms, classrooms, and as subjects of legal discourse. The analysis attempts to "decode the language/silence rhythms" in these examples, as proposed by Professor Santos.<sup>28</sup>

The first part of this paper surveys the extensive literature on silence produced within the disciplines of socio-linguistics, literature, religion, literary criticism, and music. I focus on the cross-cultural meanings of silence and its use by peoples of color, especially women of color. Silence has multiple meanings and therefore I discuss how it is invoked in different ways. More important for purposes of the racial analysis of this paper, I describe silence as a characteristic of the communication systems of people of color, especially those from non-English linguistic communities, and therefore an important mechanism by which they perform their racial identities. I argue that there is a nexus between racial discrimination and racialized bilingualism and the use of silence. The judicial opinions in *Hernandez v. New York*,<sup>29</sup> where Latinos were excluded from jury service because of their hesitancy (that is, their momentary silence) in saying that they *could* abide by the official interpretation of the testimony of Spanish-speaking witnesses, demonstrate that silence can have discriminatory consequences for language minorities.<sup>30</sup> I contend that the silence was racially coded by the prosecutor, who arrogated to himself the right to interpret the silence in a way that was detrimental to the potential jurors and devastating in its consequences for the citizenship rights of the Latina/o community.<sup>31</sup>

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27. See ADAM JAWORSKI, *THE POWER OF SILENCE: SOCIAL AND PRAGMATIC PERSPECTIVES* 69 (1993).

28. See *supra* text accompanying note 26.

29. 500 U.S. 352 (1991).

30. See *id.* at 355–58.

31. For details regarding cultural citizenship, see WILLIAM V. FLORES & RINA BENMAYOR, *LATINO CULTURAL CITIZENSHIP: CLAIMING IDENTITY, SPACE AND RIGHTS* 57 (1997).

The second part of the Article builds on the analysis of cultural discourse laid out in the first part. Utilizing the research on silence from other disciplines, I draw implications for the law school classroom, where silencing is an important aspect of the experience of many students of color. Using the work of Paolo Friere,<sup>32</sup> I posit that it is possible to teach to the silence and challenge the practices that systematically mute the voices of the students of color. Further, I propose that silence is a pedagogical tool that can be used effectively to normalize the different communication styles that are present in a classroom with racial, ethnic, and gender diversity, and to de-emphasize the dominant language patterns of the White majority. In this way silence has the centrifugal forces described by Bakhtin. The use of silence—especially by a professor who is a woman of color—carries some risk because it can create disorienting experiences that are likely to be resented by some students. On the other hand, it can be a significant positive signal to students of color that their language patterns are not deficient. Moreover, within law school clinics, the skills of client interviewing and counseling can be improved through the understanding and use of silence, especially for the significant portion of low-income clients who are from communities of color.

Finally, in the last section of the Article I examine the dynamics of silence and silencing within the larger parameters of the law and legal discourse. Using the insights about cultural discourse from the first section and racial power as it is reproduced by the discursive dynamics within law school classroom from the second section, I focus on the pervasive silencing of the topic of race as it relates to legal doctrine, institutions, and actors. Information about identity markers—racialized, gendered, and sexual facts that define reality and histories for subordinated populations—is systematically defined as irrelevant by judges, legislators, and law professors. I discuss one well-known case, *Meritor Savings Bank v. Vinson*,<sup>33</sup> and one obscure one, *Williams v. City of New York*,<sup>34</sup> to show that traditional legal reasoning ignores the racial contexts of disputes. In this way silence can have a hegemonic effect, deluding us into thinking that race, gender, sexual orientation, and other characteristics of identity do not have to be mentioned because they do not matter; their alleged transparency proves their irrelevance.

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32. See *infra* text accompanying note 186.

33. 477 U.S. 57 (1986).

34. 564 N.Y.S.2d 464 (App. Div. 1991).

In this last section, I argue that whole areas of law, such as property, criminal law, and constitutional law, are taught with a deliberate inattention to issues of race. This silence creates a worldview that is imbedded with the values and interests of White supremacy.

I conclude the Article with a personal narrative<sup>35</sup> involving hate speech. Hate speech is a particularly difficult legal injury because it implicates so much about silence and silencing. With the narrative I try to use the technique of implicature<sup>36</sup> to show how hate speech exposes the contradictions in legal practices in a particularly effective manner. I link this personal narrative to an historical one about Sor Juana Inez de la Cruz, a Seventeenth Century poet and nun who was silenced by the Catholic Church after publicly supporting the right of women to study and have intellectual freedom.<sup>37</sup> Ecclesiastical silences and silencings were as imposed and controlled by the Church in that era as legal silences and silencings are by the nation-state today.

## I. SILENCE AND SILENCING: THEIR CROSS-CULTURAL AND CROSS-RACIAL ASPECTS

### A. *Theorizing Silence And Silencing: Their Cross-Cultural and Gendered Qualities*

And so / We stay / Quiiiiiiiiet.<sup>38</sup>

Belonging to a society and participating in the political and civil life of the society are basic rights of citizens.<sup>39</sup> Being denied the right to participate and therefore to belong can have devastating consequences for a community, especially when the denial

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35. As this Article was about to go to press, I decided to delete this narrative and so informed the editors. The telling of the story had been cathartic and healing for me, but ultimately I felt that the story might have more emotional weight than this last section needed. I subsequently learned from the editors that Professor Dorothy Roberts had commented on the story in her response to my paper so I concluded it was only fair to leave the paper in the form the commentators had received it. Even now, however, deciding to break my silence about this incident is a difficult and conflicting decision for me. The narrative is in print with my daughters' consent.

36. See *infra* text accompanying note 120.

37. See *infra* text accompanying note 280–86.

38. María Herrera-Sobek, *Silent Scream*, quoted in TEY DIANA REBOLLEDO, *WOMEN SINGING IN THE SNOW: A CULTURAL ANALYSIS OF CHICANA LITERATURE* 121 (1995).

39. See generally Flores & Benmayor, *supra* note 31.

is related to one's collective relations, one's racial/ethnic identity, or one's way of being in the world as learned from one's family and community. "Cultural citizenship refers to the right to be different (in terms of race, ethnicity, or native language) with respect to the norms of the dominant national community, without compromising one's right to belong, in the sense of participating in the nation-state's democratic processes."<sup>40</sup> This section examines the way silence can be used as a racial marker, that is, as a way of being seen as different by the dominant culture or as a way of differentiating oneself from the dominant community. I demonstrate that such differences can lead to limitations on the exercise of one of the main prerogatives of citizenship, namely, the right to serve as a juror.

The spoken word is one of the primary tools of lawyers and law professors. The law demands that students and practitioners use words effectively. Communication, however, is not just a matter of using words; much of the meaning of our interactions is transmitted through nonverbal gestures, or paralingual noises that accompany our words—the smiles, frowns, eyebrow movements, the ums and the ah ha's. Silence is also one of the choices available to us in our repertoire of communicative devices. Silence, however, is differentiated from words, gestures, and utterances in that it is both the context and the background for spoken communication and part of the code of meaning.

Theories connecting silence to other elements of vocal and non-vocal communication are useful as a basis for evaluating the sociopolitical and sociolegal consequences of silence and its counterpart, voice. An analysis of silence came from Bernard P. Dauenhauer, who offered three profiles of silence: "intervening silence," as with the timing of jokes or the pacing of literary works; "fore-and-after silence," the fringe of silence that precedes and follows expressions of sound; and "deep silence."<sup>41</sup> Silence in any of these profiles can be either benign or malign; it "can be as distressing and misery-laden as it can be consoling and peace-

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40. *Id.* at 57.

41. Bernard P. Dauenhauer, *On Silence*, 3 RESEARCH IN PHENOMENOLOGY 9, 10–24 (1973). Dauenhauer further subdivided deep silence into the silence of intimates, liturgical silence, and what he called the "silence of the 'to-say.'" *Id.* at 18–24. This last mode, the "what-is-said," is embedded in the "silence of what-ought-to-be-said." *Id.*; see also Robert L. Scott, *Rhetoric and Silence*, 36 WESTERN SPEECH 146 (1972) (exploring the privilege or obligation of remaining silent and its relation to contemplation and rhetoric); Richard L. Johannesen, *The Functions of Silence: A Plea for Communication Research*, 38 WESTERN SPEECH 25 (1974) (extending the examination of silence to its role in political and civic life and in pathological settings such as counseling and psychotherapy).

bearing."<sup>42</sup> Dauenhauer's early analysis of silence ended with a statement of its characteristics: "Silence is, *inter alia* 1) a deliberate human performance. But 2) it cannot be completely performed by an individual acting alone."<sup>43</sup> This notion of silence as an interactive process is central to an understanding of silence and is consistent with the Bakhtinian view of language as dialogic.<sup>44</sup>

Deborah Tannen,<sup>45</sup> and her collaborator Muriel Saville-Troike,<sup>46</sup> were among the first to include a gendered and cross-cultural analysis in their study of silence.<sup>47</sup> Saville-Troike described silence as having different dimensions, structures, and symbolic meanings, with its use acquired in ways that are analogous to the acquisition of spoken language according to the norms of particular speech communities.<sup>48</sup> For her, silence has what she terms "dimensions": first in the sense that not all silence is communicative; that is, at times silence is merely the absence of noise.<sup>49</sup> Secondly, the use of silence is subject to the norms and conventions of different speech communities.<sup>50</sup>

As with words, the use of silence is regulated in different cultures according to age, rank, gender, and other social characteristics and may be proscribed or prescribed at different times and in different places.<sup>51</sup> Religious or meditative silence, as within the Quaker,<sup>52</sup> Church of God,<sup>53</sup> Catholic, and Hindu<sup>54</sup> traditions, illustrates variations in the manner in which silence is regulated or defined.

42. Dauenhauer, *supra* note 41, at 23.

43. *Id.* at 26.

44. *See supra* text accompanying note 21.

45. Deborah Tannen has written two best sellers but is also a prolific scholar. *See generally* DEBORAH TANNEN, THAT'S NOT WHAT I MEANT: HOW CONVERSATIONAL STYLE MAKES OR BREAKS YOUR RELATIONS WITH OTHERS (1986); YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (1990).

46. Muriel Saville-Troike is a Professor of English at the University of Arizona.

47. *See generally* PERSPECTIVES ON SILENCE (Deborah Tannen & Muriel Saville-Troike, eds., 1985).

48. *See* Muriel Saville-Troike, *The Place of Silence in an Integrated Theory of Communication*, in PERSPECTIVES ON SILENCE, *supra* note 47, at 3–18. For an annotated bibliography of early works on silence, see Emma Muñoz-Duston & Judith Kaplan, *A Sampling of Sources on Silence*, in PERSPECTIVES ON SILENCE 235 *supra* note 47.

49. *See* Saville-Troike, *supra* note 48, at 4.

50. *See id.*

51. *See id.*

52. *See* Daniel N. Maltz, *Joyful Noise and Reverent Silence: The Significance of Noise in Penecostal Worship*, in PERSPECTIVES ON SILENCE, *supra* note 47, at 121–23. Maltz writes, "[t]he concept of 'silence' was a central aspect not only of the spiritual behavior of the individual Quaker, but also of the primary form of corporate Quaker worship, the 'silent meeting'" *Id.* at 123.

53. For a novel analysis of scriptural interpretation of silence, see JOHN CARROLL BROWN, BEYOND THE SILENCE: THE ROLE OF SILENCE IN DETERMINING AUTHORITY (1999).

54. *See* Saville-Troike, *supra* note 48, at 7.

The manner in which silence is used can also depend on the extent to which information is communicated explicitly or implicitly, which can correlate with whether the culture is individualistic or collectivistic.<sup>55</sup> Linguists use the terms “low-context communication” to refer to direct and precise statements in which meanings are embedded in the messages being transmitted and “high-context communication” to language systems that involve understatements, indirect statements, and the interpretation of pauses in conversation.<sup>56</sup> Low-context communication is more characteristic of individualistic cultures, and high-context communication is more characteristic of collectivistic cultures.<sup>57</sup> Silence is highly valued in high-context cultures, while in low-context cultures, directness is valued and ambiguity will be eliminated by explicit communication.<sup>58</sup>

Another aspect of silence is its capacity to be used intentionally or inadvertently to deceive or mislead.<sup>59</sup> For example, silence is sometimes introduced as evidence in trial proceedings to determine the guilt or innocence of a defendant.<sup>60</sup> Silence, however, is nuanced and may be difficult to interpret. Saville-Troike offers the following symbolic or attitudinal meanings for silence: nonparticipation, anger, sorrow, respect, disapproval, dislike, indifference, alienation, avoidance, mitigation, concealment, mystification, dissimulation, and image manipulation.<sup>61</sup> Silence is communicative in other ways as well. For instance, it often substitutes for words in emotionally charged conversations, in delicate situations, or when the topic involves taboos.<sup>62</sup> In Japanese culture, silence is so important that there is a word, *ma*, for spaces or pauses in conversation that express meaning.<sup>63</sup> One linguist has listed the following typical meanings of silence: 1) lack of information; 2) no pressure to talk;

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55. See JOSEPH A. DEVITO, *THE INTERPERSONAL COMMUNICATION BOOK* 52 (8th ed. 1998).

56. See *id.*

57. See *id.*

58. See *id.* at 54.

59. See Saville-Troike, *supra* note 48, at 7.

60. See *id.*

61. See *id.* at 17.

62. See *id.* at 7.

63. See Tomohiro Hasegawa & William B. Gudykunst, *Silence in Japan and the United States*, 29 J. OF CROSS-CULTURAL PSYCHOLOGY 668, 669 (1998). The purpose of Hasegawa's and Gudykunst's study was to examine the use and attitudes toward silence in Japan and the United States. This study found that silence was viewed more negatively in Japan than in the United States, contrary to prevailing cultural stereotypes. See Hasegawa & Gudykunst, *supra*, at 681.

3) thinking about what to say; 4) speed of thinking; 5) avoid argument; 6) agreement; 7) disagreement; 8) doubt; 9) boredom; 10) uncertainty; 11) wondering; 12) impoliteness; 13) punishment; 14) disturbance; 15) inarticulateness; 16) concern; 17) preoccupation; 18) isolation; 19) anger; and 20) empathic exchange.<sup>64</sup>

Just as silence has meaning in verbal communications systems, it also has meaning in other systems of expression, such as the arts. Musical, theatrical, and artistic works often integrate silence as a purposeful element of the production: two extreme examples are John Cage's famous composition, "4'33," and Robert Rauschenberg's *White Paintings*.<sup>65</sup> Cage's composition consists of four minutes and thirty-three seconds of silence and Rauschenberg's canvas is perfectly blank.<sup>66</sup> Both have been described "as neutral surface[s], collecting the surrounding environment into the work itself."<sup>67</sup>

Silence is also communicative in the sense that it is learned in the same way that voiced communication is learned. The study of the acquisition of speech patterns by children reveals that in learning how to make the appropriate sounds for words, children also learn how to use silence appropriately, by being shushed at various times and places.<sup>68</sup> Speech ethnographers who inquire into "*what can be said when, where, by whom, to whom, in what manner, and in what circumstances . . . also consider who may not speak.*"<sup>69</sup>

In a recent work, Robin Patric Clair, a communication theorist, surveys previous book-length studies of silence as well as the contributions of feminist scholars to the understanding of gendered silence.<sup>70</sup> Clair then examines the ways in which marginalized groups are not only silenced by the dominant culture but also participate in the silencing of other marginalized peoples.<sup>71</sup> Clair uses sexual harassment narratives from the workplace and the university milieu to

64. See *id.* at 681 n.2. These meanings were found to be consistent for both Japanese and Americans. See *id.* at 687.

65. See Christopher Lynwood Shultis, *Silencing the Sounded Self: John Cage and the Experimental Tradition in Twentieth Century American Poetry and Music* 98 (1993) (unpublished Ph.D. dissertation, University of New Mexico); see generally Gisèle Brelet, *Music and Silence, in REFLECTIONS ON ART: A SOURCE BOOK OF WRITINGS BY ARTISTS, CRITICS, AND PHILOSOPHERS* (Susanne K. Langer ed., 1961).

66. See Brelet, *supra* note 66, at 23.

67. *Id.*

68. See Saville-Troike, *supra* note 48, at 11.

69. *Id.* at 13.

70. See generally ROBIN PATRIC CLAIR, *ORGANIZING SILENCE: A WORLD OF POSSIBILITIES* (1998).

71. See *id.*



show how individual, collective, and institutional responses can contribute to what she calls the “organization of silence.”<sup>72</sup> This phrase is intended to have Gramscian overtones because she is referring “to the ways in which interests, issues and identities of marginalized people are silenced and to how those silenced voices can be organized in ways to be heard.”<sup>73</sup> Clair’s work draws on the work of many feminists who have used silence as emblematic of women’s oppression, such as Catherine A. MacKinnon,<sup>74</sup> as well as those, such as Mary Daly,<sup>75</sup> Tillie Olsen,<sup>76</sup> Adrienne Rich,<sup>77</sup> and Audre Lord,<sup>78</sup> who have addressed silence as a central topic in their explorations of sexism and patriarchy.

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72. Clair uses Antonio Gramsci’s concept of hegemony to examine how sexual harassment narratives are framed in order to appeal to and support the perceptions and interests of those with institutional power derived from gender, racial, and economic inequalities and disparities. *See id.* at 73–98. She examines the practices of universities in handling sexual harassment complaints through “say no,” “keep a record,” and “report it” policies and characterizes them as a process of bureaucratization, commodification, and privatization. *Id.* at 99–121. She also uses the story of one man’s sexual harassment incident to explore issues of resistance and oppression as “self-contained opposites.” *Id.* at 127–34.

73. *Id.* at 187. Because Gramsci’s work on hegemony is referred to by LatCrit theorists, I offer this extended quote explaining the concept:

According to Gramsci, in order for the dominant group to control the masses both coercion and hegemony are required. No dominant group can rely entirely on coercion. For if the dominant group uses physical force and threats of death or other punitive measures as its sole means of control, it will expend huge amounts of time and energy in the control process. Furthermore, complete control through coercion is more likely to lead to resistance through revolution or rebellion because coerced people have little to lose. Eventually, systems of control become “normalized” into everyday practices, which are regulated through institutions such as the family, education, religion, systems of law and law enforcement, medicine, and general administration. These systems guarantee, “relations of domination and effects of hegemony.”

*Id.* at 47. (quoting MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 141 (1979)).

74. *See* CATHARINE A. MACKINNON, *ONLY WORDS* 3 (1993) (describing women’s suffering and pain, abuse, and terror as “unspeakable”).

75. *See* MARY DALY, *BEYOND GOD THE FATHER* 93 (1973) (referring to two kinds of gendered silence: 1) over women’s achievements in a patriarchy-controlled history; and 2) over the “arguments for and evidence of the matriarchal period”).

76. *See* TILLIE OLSEN, *SILENCES* (1978).

77. *See* ADRIENNE RICH, *ON LIES, SECRETS, AND SILENCE: SELECTED PROSE 1966–1978* (1979).

78. *See* AUDRE LORD, *SISTER OUTSIDER* (1984).

*B. Silence and Silencing: Cross-Cultural Meanings*

*It is not the case that the man who is silent says nothing.*<sup>79</sup>

Communication can be difficult even among persons with a common language and similar backgrounds and worldviews. Words have multiple meanings, and intonations and gestures can contribute to the ambiguity of expressive speech. To this complexity we can add silence; it is, in and of itself, ambiguous.<sup>80</sup>

Deborah Tannen has analyzed the negative value of silence, especially when it is being misinterpreted and misjudged by persons from different cultural traditions.<sup>81</sup> After studying the speech patterns of New Yorkers (and New York Jews in particular),<sup>82</sup> she described their conversational style as fast talkers or "crowders."<sup>83</sup> Fast talkers are associated with interrupting and making others feel upset, dissatisfied, or incompetent.<sup>84</sup> But fast talkers can also feel uncomfortable because the speech of slow talkers is punctuated with pauses, which fast talkers experience as rude silences that break the pace of the conversation.<sup>85</sup> Conversation is a process of taking turns and can be disrupted when the participants are unaccustomed to the other's use of silence.<sup>86</sup> The fast talker can be confused about whether the slow talker is silent or merely pausing before continuing, and the slow talker can end up feeling cramped.<sup>87</sup> Tannen offers the following example: "Teachers, for example, know the problem of determining whether a student who has been called on is pausing because s/he doesn't know the answer

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79. K.H. Basso, *To Give Up on Words: Silence in Western Apache Culture*, in LANGUAGE AND SOCIAL CONTEXT 67 (Pier Paolo Giglioli ed., 1972) (citing an Apache maxim).

80. See JAWORSKI, *supra* note 27, at 69. Jaworski explains that some scholars have tried contextual explanations for the meanings of silence while others have used a taxonomic approach, "providing more or less elaborate lists of possible meanings and functions of silence." *Id.* at 69-70 (citing seven scholars who have used a taxonomic approach).

81. See Deborah Tannen, *Silence: Anything But*, in PERSPECTIVES ON SILENCE, *supra* note 47, at 93-109.

82. In addition to the variations in silence, Tannen identified their particular conversational style as having these characteristics: fast rate of speech; fast rate of turntaking; persistence (i.e., if a linguistic turn is not acknowledged, try again); marked shifts in pitch; marked shifts in amplitude; preference for storytelling; preference for personal stories; tolerance of and preferences for simultaneous speech; and abrupt topic shifting. *See id.* at 102.

83. *See id.* at 106.

84. *See id.*

85. *See id.* at 106-09.

86. *See id.* at 108.

87. *See id.* at 106-09.

(silence as omission of something), or because s/he is formulating the answer (silence representing underlying action).<sup>88</sup>

Tannen indicates that the speed of conversational pacing is relative and has meaning only with reference to expectations that are largely culturally based.<sup>89</sup> So the negative valuation of the slow talker is based on the fast talker's perception that s/he has nothing to say or is unwilling to speak, while the fast talker gives the slow talker the impression of crowding out others.<sup>90</sup>

Indigenous Peoples<sup>91</sup> have been identified as one group having a greater tendency towards silence than the dominant Euro-American norm.<sup>92</sup> This image has been formed both through the studies of linguists and ethnographers as well as through widespread stereotypes and caricatures (the "silent Indian") propagated by the media.<sup>93</sup> Consider the following:

[I]t is the coupling of topic control and turn exchange that is largely responsible for the negative stereotypes held by non-Indians of Athabaskans]. We hear people say that Athabaskans are 'passive', 'sullen', 'withdrawn', 'unresponsive', 'lazy', 'backward', 'destructive', 'hostile', 'uncooperative', 'anti-social', and 'stupid'. And these are not just the attributions of ignorant bigots. Hippler, Boyer, and Boyer (1978) make these same attributions in a professional article on ethnopsychiatry . . . What the 'Silent Indian' sees on the other side of the interaction I cannot say from my own experience, but what we hear on our tapes is an almost breathless rush of talking at them.<sup>94</sup>

One of the best known studies of silence in Native communities was published by Keith H. Basso in 1972.<sup>95</sup> Basso began by acknowledging the popular image of Indigenous Peoples (or the

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88. *Id.* at 107.

89. *See id.* at 109 (stating that "fast" or "slow" speech means faster or slower than expected, and that the expectation of the conversation speed varies by culture).

90. *See id.*

91. In this paper I use the collective term Indigenous Peoples or the adjective Indigenous to refer to Native Americans, American Indians, and Canadian First Nations Peoples.

92. *See* DEVITO, *supra* note 55, at 245.

93. *See* Ron Scollon, *The Machine Stops: Silence in the Metaphor of Malfunction*, in PERSPECTIVES ON SILENCE, *supra* note 47, at 21, 24 (citing Arthur E. Hippler et al., *Tanaina Ethnopsychiatry, Past and Present: A Reflection of Cultural Personality Dynamics*, 15 INTERNORD 117 (1978)).

94. *Id.*

95. Basso, *supra* note 79.

American Indian, in his terms) as having a “strong predilection for keeping silent.”<sup>96</sup> Such impressions were based on popular literature, which describes American Indian culture as having an “instinctive dignity,” “an impoverished language,” or a “lack of personal warmth.”<sup>97</sup> Basso’s research hypothesized that silence was deployed by Apaches in response to uncertainty and unpredictability in social situations.<sup>98</sup> Specifically, Basso found that Apaches were likely to remain silent when meeting strangers,<sup>99</sup> during the early stages of courting,<sup>100</sup> upon the return of children from boarding schools,<sup>101</sup> when receiving criticism,<sup>102</sup> and during periods of bereavement.<sup>103</sup> Basso hypothesizes that silence is contextual and will be used at different times depending on the social roles of the persons involved in the communication and their status in relation to each other.<sup>104</sup> Basso concludes the article with reference to similar interpretations of the use of silence among the Navajo.<sup>105</sup>

An extensive analysis of the use of silence among the Navajo has been done in the context of Peacemaking, their well-established system of traditional dispute resolution.<sup>106</sup> The author found that there were consistently different interpretations given to silence by Navajos and by non-Navajos. Navajos used silence, aware of the “power of words,” while non-Navajos were likely to conclude that silence signaled a breakdown in the interaction.<sup>107</sup>

The novelist/poet/screen writer Sherman Alexie, a Spokane/Coeur d’Alene Indian, has also incorporated silence into his writing, going so far as to specify the length of the silences. His short story, “Dear John Wayne,”<sup>108</sup> is a fictive (and hilarious) colloquy between a 118-year-old Spokane woman and a cultural anthropologist from Harvard with a specialty in “mid- to late-twentieth-century Native American culture, most specifically the Interior

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96. *Id.*

97. *Id.*

98. *See id.* at 83.

99. *See id.* at 71.

100. *See id.* at 73.

101. *See id.* at 74.

102. *See id.* at 77.

103. *See id.* at 78.

104. *See id.*

105. *See id.* at 84.

106. *See* Leslie P. Fagre, Cross-cultural Uses and Meanings of Silence in Peacemaking Mediation in the Navajo Peacemaker Court and the Metro Court Mediation Program (1995) (unpublished manuscript on file with the *Michigan Journal of Race & Law*).

107. *See id.* at vi.

108. *See* SHERMAN ALEXIE, *THE TOUGHEST INDIAN IN THE WORLD* 189 (2000).

Salish tribes of Washington State.”<sup>109</sup> Alexie has the Harvard anthropologist in a knot about whether his “informant” is telling him the truth about having lost her virginity to John Wayne.<sup>110</sup> Intriguingly, Alexie uses parentheticals to specify the silences at several points in the conversation (e.g., twenty-seven seconds of silence, thirty-two seconds of silence, ten seconds of silence, etc.).<sup>111</sup> The reader is pulled into a reality in which silence is so important that both the author and his reader must attend to it.

Silence and silencing has been used adroitly by First Nations Peoples in Canada and by other Indigenous writers in resisting the persistent effects of the colonization of language, meaning, and communication strategies.<sup>112</sup> Living in and with the silencing of genocide and epistemicide—the killing of indigenous knowledge and languages—Indigenous writers are now writing silence into their texts as a way of “eluding the problem of colonial mimicry”<sup>113</sup> . . . by reconfigur[ing] colonial language and discourse and represent[ing] English.”<sup>114</sup> In an extended analysis of silence as a feature of Indigenous verbal and written communication, and the condition of being silenced as a result of the colonization process, the literary critic Dee Horne uses the book *Silent Words* by Ruby Slipperjack as illustrative of a narrative that “affirms First Nations and offers readers an alternative discourse and a pedagogy of silences.”<sup>115</sup>

Drawing on Homi Bhabha’s concept of the “third space,”<sup>116</sup> Horne posits that colonized peoples can produce hybrid

109. *Id.* at 190.

110. *See id.* at 192.

111. *See id.* at 189–90, 192–94, 195.

112. *See generally* DEE HORNE, *CONTEMPORARY AMERICAN INDIAN WRITING: UNSETTLING LITERATURE* (1999).

113. Mimicry has received considerable attention from post-colonial scholars, such as Homi Bhabha and Edward Said. *See* HORNE, *supra* note 112, at 3 (explaining that “[t]he colonial mimic who attempts to repeat colonizers is actually engaged in a re-presentation of them wherein the colonial mimic is still disavowed as other, as different from the colonizer”).

114. *Id.* at 52. Horne writes, “The subtitle of my book alludes to the way in which [] writers are unsettling (both in the sense of subverting and in the sense of decolonizing) mainstream literature. An underlying premise is that, although American Indians have undergone imperialism and neocolonialism, they are still being colonized.” *Id.*; *see also id.* at xvii. (explaining that “although American Indians have undergone imperialism and neocolonialism, they are still being colonized.”). I would like to express my gratitude to my colleague Kip Bobroff for providing me with this and other sources on Indigenous silence.

115. *Id.* at 53.

116. Homi Bhabha’s concept of hybridity, or a “third space,” creates “the hybrid moment of political change. Here the transformational value of change lies in the re-

texts.<sup>117</sup> These hybrid texts “challenge the colonial discourse without perpetuating it”<sup>118</sup> and “achieve a genuinely transformative and interventionist criticism of post-colonial reality.”<sup>119</sup> Horne explains:

Slipperjack creates a hybrid form of writing in which she writes in English to critique the written as well as the spoken English of colonizers, yet uses *implicature* to foreground Ojibway pedagogy. Further, she conveys Ojibway traditions not only through but also between the silent words of print. I am using *implicature* to refer to the implied meanings, the unspoken words and feelings between the lines of print. I am also drawing on Adam Jaworski’s definition in which he writes that *implicature* is the “unsaid elements of the utterance.” In *Silent Words* the unsaid utterances often include unsaid, but implied, Ojibway traditions.<sup>120</sup>

The silence of Indigenous women in Mexico has been a major topic of study for Lourdes Arizpe, a Mexican social scientist.<sup>121</sup> She notes that *campesinas* [peasant women] are reduced to caricatures, and that the homogenizing label of Indian “erase[s] their linguistic and cultural identities by lumping them all in the same category.”<sup>122</sup> In the mid-1980’s (the period about which she writes) Arizpe claims that in Mexico, unlike in Africa and Asia, the dislocation of persons from the provinces to the cities was predominantly female.<sup>123</sup> The great majority of these young women (70%) moved to the cities to work in service positions, often as domestic laborers.<sup>124</sup> These women have been multiply marginalized—through the disruptions of the colonial process and its divestiture of the lands of indigenous peoples—up to the contemporary exploitation caused by an

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articulation, or translation, of elements that are *neither the One . . . nor the Other . . . but something else besides*, which contests the terms and territories of both.” *Id.* at xix (quoting from HOMI BHABHA, *THE LOCATION OF CULTURE* 28 (1994)).

117. Horne problematizes the notion of hybridity by acknowledging its connections to assimilation. “Nonetheless, hybridization need not be assimilation—one culture dominating and taking over another culture—but can be a recognition of the interactions between cultures.” *Id.* at xvii–xviii.

118. *Id.* at xix.

119. *Id.* (citing BILL ASHCROFT, ET AL., *THE EMPIRE WRITES BACK: THEORY AND PRACTICE IN POST-COLONIAL LITERATURES* 180 (1989)).

120. *Id.* at 54.

121. See Lourdes Arizpe, *Peasant Women and Silence*, in *WOMEN’S WRITING IN LATIN AMERICA: AN ANTHOLOGY* (Sara Castro-Klarén et al. eds., 1991).

122. *Id.* at 335.

123. See *id.*

124. See *id.* at 336.

enduring agricultural crisis and an uneven pattern of industrial development.<sup>125</sup> Warning against assuming that peasant women will conceive of their oppression in terms that are similar to those of women in “rational, individualized Western culture,”<sup>126</sup> Arizpe nonetheless asserts that “violence can be named in a thousand different languages, but it is still violence . . . [and] breaking the silence is the first step.”<sup>127</sup>

Chicana literary critics, such as Tey Diana Rebolledo, and the writers they analyze have identified silence and voice as central topics in Chicana literature.<sup>128</sup> In ways that are at once similar to and different from the conditions of Mexican *campesinas*, Chicanas attribute their silence to the experience of colonization, including the religiously inspired sexual guilt of Catholicism, the patriarchal tensions in the family sphere, and the widespread lack of opportunity for education or non-exploitative employment.<sup>129</sup> Rebolledo posits that Chicanas form their identities through their writing by placing themselves within historical and political events that have implications for the Chicano/a community.<sup>130</sup>

In *Delia's Song*, Lucha Corpi uses the Third World Strike at the University of California at Berkeley as the setting for her narrative. Rebolledo writes, “Having come from a traditional Mexican American family to Berkeley in the tumultuous late 1960s, Delia seeks understanding of her role in the strike, and through this understanding, she is able to achieve the power to give herself her own shape, to control her own identity.”<sup>131</sup> Corpi describes the process of being silenced and coming, fearfully, to voice and writing:

I learned silence, painfully, slowly, as one learns to write, stroke by stroke until the letters' form and sound is etched on the whiteness of the paper, and voice uncovers its reason for being.

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125. *See id.*

126. *Id.* at 338.

127. *Id.*

128. *See INFINITE DIVISIONS: AN ANTHOLOGY OF CHICANA LITERATURE* (Tey Diana Rebolledo & Eliana S. Rivero eds., 1993); *LATINA: WOMEN'S VOICES FROM THE BORDERLANDS*, (Lillian Castillo-Speed ed., 1995); *IN OTHER WORDS: LITERATURE BY LATINAS OF THE UNITED STATES* (Roberta Fernández ed., 1994); *BREAKING BOUNDARIES: LATINA WRITING AND CRITICAL READINGS* (Asunción Horno-Delgado et al. eds., 1989).

129. *See, e.g., INFINITE DIVISIONS, supra* note 128, at 1–35 (outlining the history, tradition of, and inspiration for Chicana literature).

130. *See id.*

131. TEY DIANA REBOLLEDO, *WOMEN SINGING IN THE SNOW: A CULTURAL ANALYSIS OF CHICANA LITERATURE* 121 (1995); *see also* Marta Ester Sánchez, *Setting the Context: Gender, Ethnicity, and Silence in Contemporary Chicana Poetry*, in *CONTEMPORARY CHICANA POETRY: A CRITICAL APPROACH TO AN EMERGING LITERATURE* 1, 1 (1985) (setting Chicana literature in a social and historical context).

Silence then is simply the pause between words, the breath that keeps them alive, the secret element that spans the territory between them.

I have feared you so, Silence, my oldest enemy, my dearest friend. I surrendered my tongue to you once, freely, and I learned your secret. I learned to write.<sup>132</sup>

María Herrera-Sobek echoes a similar theme in “Silent Scream:”

There is  
 So much pain  
 Inside our throats  
 We are afraid  
 That if we speak  
 We'll yell  
 We'll shriek  
 We'll moan  
 We'll scream  
 We'll cry  
 And so  
 We stay  
 Quiiiiiiiiet.<sup>133</sup>

Chicana writers such as Corpi and Herrera-Sobek have focused on the forced silencing experienced by some women. Another prominent Chicana writer, Gloria Anzaldúa, has written both about this type of gendered silencing as well as the opprobrium expressed toward Chicana girls and women who do speak up. Few authors write as elegantly as Anzaldúa, with her weaving together of Spanish and English, prose and poetry, the words of *la niña buena* and those of *jotos* and *machos*.<sup>134</sup> This is nothing short of her

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132. REBOLLEDO, *supra* note 131, at 123 (quoting LUCHA CORPI, DELIA'S SONG 150 (1995)). For a different construction of learned silence through the loss of language, the attenuation of family ties, and the harboring of secrets, see Richard Rodriguez, *Aria, in HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ* 11 (1981). In his subsequent memoir, a more nuanced book, Rodriguez remembers an incident concerning his own prejudices about silence. He is challenged by three Asian students in his Freshman English course at Berkeley: “We think, Mr. Rodriguez, that you are prejudiced against Asian students. Because we do not speak in class.” Rodriguez admits, “I did have a bias, an inevitable American bias, that favored the talkative student.” RICHARD RODRIGUEZ, *DAYS OF OBLIGATION: AN ARGUMENT WITH MY MEXICAN FATHER* 173 (1992).

133. María Herrera-Sobek, *Silent Scream*, quoted in REBOLLEDO, *supra* note 128, at 123.

134. Translation: words of “good girls” and those of “gays” and “dykes.”



invention of a hybrid language for *mestizaje*<sup>135</sup> /a hybrid language for the practice of hybridity.<sup>136</sup> Anzaldúa mourns the loss of language, culture, and land; the loss is coupled with the imposition of heterosexuality, “unaccented” English, and a tradition of stifling silence in the Mexicano/Chicano culture of the Borderlands.<sup>137</sup> “[H]ablar pa’ ‘tras, repelar. Hocicono, repelona, chismosa; having a big mouth, questioning, carrying tales are all signs of being *mal criada*. In my culture they are all words that are derogatory if applied to women—I have never heard them applied to men.”<sup>138</sup>

Anzaldúa’s words jerk me back into childhood memories. I am about eight years old; my sister María Elena is seven. Our neighbor, Don Archibeque, has nicknames for us. Mari he calls “brinca-charcos;” by “puddle-jumper” I understand him to mean that she is Tomboyish, more active than little Chicanitas should be. He calls me “sabelo-todo” or “know-it-all.” My childish exuberance is bruised by his words. I know he is chiding me not only for acting too smart but more importantly for not knowing my place as a girl, for talking too much, for not holding my tongue.

But lessons like these are hard-wired into us, and they are not easily unlearned. I hear the words that once crushed my spirits spill out of my mouth. I hear myself chiding my daughter, irrationally angry at her for being too much like me. “Sabelo-todo,” I hear myself say. You would think that I would know better. You would think that the memory of my being silenced as a child for not being sufficiently girlish would now silence me as an adult woman so that the cycle does not reproduce itself.

This reverie prompted by Anzaldúa’s writing involves one of those linguistic fissures experienced by persons who live between two cultures. Living between two cultures often has the sensation of a slippage in vocabularies, meanings, and experiences. Asian Pacific American women have written about this feeling, sometimes describing it as being at a “loss of words.”<sup>139</sup> Zhong Xueping, born and raised in Shanghai but educated in the United States and now a professor at Tufts University, was a delegate to the Fourth

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135. *Mestizaje* is the Spanish word for hybridity, referring to racial mixing or miscegenation. The word has become a metaphor for cultural and disciplinary syncretism evident in the writing of many Chicano/a writers and scholars.

136. See generally RENATO ROSALDO, *CULTURE & TRUTH: THE REMAKING OF SOCIAL ANALYSIS* 216–17 (1989).

137. See ANZALDÚA, *How to Tame a Wild Tongue*, in *BORDERLANDS/la frontera: THE NEW MESTIZA* 53 (1987).

138. *Id.* As Gloria Anzaldúa often writes without translating, and this Article honors her decision not to do so.

139. *Roundtable on the Fourth World Conference on Women and the NGO Forum, 1995*, in *CHINESE WOMEN TRAVERSING DIASPORA*, *supra* note 13, at 240.

World Conference on Women in Beijing.<sup>140</sup> In describing reunions with relatives after prolonged separations, Zhong reminisces about the misconceptions her relatives and the local people had about a women's conference and her participation in it.<sup>141</sup> The rumors that were circulating suggested that the international meeting was bringing dangerous elements into China, but any attempt to explain that the meeting was organized to discuss women's issues reduced it to a meeting dealing with trivial matters.<sup>142</sup> Thus, the two formulations that were available to her to explain what she was doing visiting China as an academic from the United States would be understood either as "dangerous foreign elements" or "trivial women's matters."<sup>143</sup> Zhong reflects on the ambiguities of communication and the wisdom of silent self-interrogations as she ponders her loss of words:

Maybe feeling speechless is a normal reaction in these situations. Why should I have felt the impulse to explain? Should I have tried harder? Do I necessarily know any better? . . . I may have more access to information than these people [her aunt and other local people], but do I know better simply because I have access to certain knowledge? These may be rhetorical questions echoing some of the debate familiar to us in the United States, but my wondering did keep my mouth shut and my ears open when in China and continues to keep me "sober" when I speak.<sup>144</sup>

Professor Margaret Chon, reviewing Sharon Hom's book and citing to the previous quote, refers to this slippage in language and meaning by observing that "silence is a response to discursive antagonisms created by being between two or more cultural positions."<sup>145</sup>

The foregoing analyses are presented in order to show the differences and similarities among women of color, especially among those who share the relative privilege of the academic

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140. *See id.* at 211.

141. *See id.* at 238–40.

142. *See id.* at 239.

143. *Id.*

144. *Id.* at 240.

145. Margaret Chon, *Being Between: A Review Essay of Chinese Women Traversing Diaspora: Memoirs, Essays, and Poetry*, 17 *LOY. OF L. A. ENT. L.J.* 571, 574 (1997) (Professor Chon admits the challenge to her identity as an Asian American woman lawyer that these stories about the diasporic experience represent with their disruptions of language, identity, locus, and epistemology.).

life. However, it would be a mistake to conclude that silence and the condition of being silenced as a woman is an experience that is universally shared by women of color. bell hooks is a notable example of a writer who has taken issue with this construct of gendered silence. She explains,

[I]n black communities (and diverse ethnic communities), women have not been silent. Their voices can be heard. Certainly for black women, our struggle has not been to emerge from silence into speech but to change the nature and direction of our speech, to make a speech that compels listeners, one that is heard.<sup>146</sup>

Hooks writes about the need for defiance and resistance in the speech of Black women. She found her strength in first “talking back” as a child, seeing youthful courage as the seed for the indomitability of spirit that writing as an independent thinker would require.<sup>147</sup>

*C. Silence as Cultural Expression and Silencing as Cultural Suppression  
or Silence as Racial Marker and Silencing as Racial Privilege*

[T]he removal of the last two Latino jurors for what in the end is simply their proficiency in the Spanish language, should not be sanctioned.<sup>148</sup>

As mentioned at the beginning of this Article, both Race Crits and LatCrits have done extensive work on language-based discrimination.<sup>149</sup> Building on this previous work, I assert that nonverbal components of communication, including silence, provide the basis on which Latinos and other non-English speakers are racially categorized and subjected to ill treatment. The *Hernandez* case, described below, is a particularly overt example of what I assert is a misinterpretation of linguistic minorities’ intended

146. bell hooks, *Talking Back*, in ANZALDÚA, *MAKING FACES*, *supra* note 11, at 207, 207–08.

147. *See id.*; Cf. Audre Lorde, *The Transformation of Silence into Language and Action in SISTER OUTSIDER* 40, 41 (1984) (Facing cancer, she writes, “death . . . the final silence . . . might be coming quickly . . . without regard to whether . . . I had only betrayed myself into small silences.”).

148. *People v. Hernandez*, 553 N.Y.S.2d 85, 93 (1990) (Kaye, J., dissenting).

149. *See supra* text accompanying notes 2–10.

communications, with discriminatory consequences for both the potential jurors in the case and more generally for linguistic minorities. I believe this type of miscommunication and misreading of silence is frequent and contributes to the stereotyping of linguistic minorities, given the widespread misunderstanding of the meaning of silence, pausing, and hesitations in the speech patterns of non-English speaking communities.

In describing what happens when Whites *hear* the languages of people of color, I am drawing liberally from the discursive and epistemological model employed by the Canadian sociologist Sherene Razack, who critically examines what happens when Whites *look* at people of color.<sup>150</sup> Razack exhorts us

[To] ask[] questions about *how* relations of domination and subordination stubbornly regulate encounters in classrooms and courtrooms. . . . We need to direct our efforts to the conditions of communication and knowledge production that prevail, calculating . . . who can speak and how they are likely to be heard . . . .<sup>151</sup>

Razack argues that this imperial gaze, this frame for seeing the world, is deeply connected to the identity of the colonizers and their sense of superiority.<sup>152</sup> I am making a related argument with respect to the identifying characteristics of the languages of people of color. The silences, pauses, and hesitations that punctuate their verbal sounds function as audible markers of race and ethnicity. In the *Hernandez* case the pauses and hesitations are the linguistic characteristics that allowed the prosecutor to dismiss the Latinos from the juror pool.<sup>153</sup> When, as in this instance, silence functions as a racial marker for Latinos, the right to silence Latinos functions as racial privilege for the prosecutor. The prosecutor arrogated to himself, with the eventual sanction of the state and federal courts of appeal, the right to interpret the Latinos' silence as contradicting their spoken words. I contend that this act of withdrawing civic rights because of Latinos' linguistic differences is racial privilege and an act of racial subordination.

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150. See SHERENE H. RAZACK, *LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS* (1998).

151. *Id.* at 10.

152. *See id.*

153. *See Hernandez v. New York*, 500 U.S. 352 (1991).

### 1. *Dionisio Hernandez v. New York*

a. *The Supreme Court decision*—The case of *Hernandez v. New York* came before the Supreme Court on appeal from the New York Court of Appeals, which had affirmed the defendant's conviction on two counts of attempted murder and criminal possession of a weapon.<sup>154</sup> Defendant challenged the conviction on the basis of *Batson v. Kentucky*<sup>155</sup> as a violation of his equal protection rights because the prosecution used its peremptory challenges to exclude Latinos from the jury. The Court affirmed the judgment of the New York state courts and held that the prosecutor had offered race-neutral explanations for excluding the Latinos from jury service.<sup>156</sup> To quote Justice Kennedy, "the prosecutor did not rely on language ability without more, but explained that the specific responses and the *demeanor* of the two individuals during *voir dire* caused him to doubt their ability to defer to the official translation of Spanish-language testimony."<sup>157</sup>

What follows is an analysis of what the Court was referring to as "demeanor." I argue that the prosecutor was interpreting the hesitancy on the part of the potential jurors—their pausing before speaking, their silence—in a manner that was consistent with his worldview. Indeed, I think the prosecutor did not know enough about nonverbal communication, particularly cross-cultural communication, to understand that silence, pauses, and hesitations are encoded with meaning in relation to the words and the language being spoken. I further assert that silence with its multiple meanings is an unexplored aspect of linguistic discrimination.

The point is that the prosecutor lacked the information to know what the Latino jurors meant by their silence; after all, they were never asked about it. I do not claim to know with any exactness what they were communicating nonverbally. What I am questioning, however, is the unequivocal certainty with which the prosecutor drew his conclusion.

b. *The Facts in Hernandez v. New York*—On a fateful day in 1987, Dionisio Hernandez fired several gun shots at his girlfriend, Charlene Calloway, and her mother, Ada Saline.<sup>158</sup> Three shots

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154. See *id.* at 355.

155. 476 U.S. 79 (1986) (requiring a three-step inquiry into claims that a prosecutor has used peremptory challenges in a constitutionally discriminatory manner).

156. See *Hernandez*, 500 U.S. at 352.

157. *Id.* at 360 (emphasis added).

158. See *id.* at 355.

struck Ms. Calloway.<sup>159</sup> In aiming at her mother, Hernandez instead hit two men who were in a nearby restaurant.<sup>160</sup> All of the victims survived.<sup>161</sup>

At trial, the prosecutor exercised his peremptory challenges to dismiss four potential jurors, who constituted all of the panel members who were Hispanic (although the prosecutor was uncertain whether one who was surnamed Mikus was Hispanic).<sup>162</sup> The prosecutor, in volunteering his reasons, explained:

I felt that from their answers they would be hard pressed to accept what the interpreter said as the final thing on what the record would be, and I even had to ask the Judge to question them on that, and their answers were—I thought they both indicated that they would have trouble, although their final answer was they could do it. I just felt from *the hesitancy in their answers* and their lack of eye contact that they would not be able to do it.<sup>163</sup>

After extended discussions among the attorneys and the judge, the trial court judge twice rejected the motion for a mistrial. On appeal, the New York Court of Appeal, in a memorandum opinion, affirmed the trial court's rejection of the defendant's *Batson* claim on the ground that the prosecutor had provided race-neutral reasons for his peremptory strikes sufficient to rebut the Latino defendant's prima facie showing of discrimination.<sup>164</sup> The New York Court of Appeals affirmed, accepting the explanation from the prosecutor that potential jurors Mikus and Gonzales<sup>165</sup> "each had given him a basis to believe from words and *actions* that their Spanish language fluency might create difficulties in their accepting the official court interpreter's translation of the testimony of the Spanish-speaking witnesses."<sup>166</sup>

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159. *See id.*

160. *See id.*

161. *See id.*

162. *See id.* at 356.

163. *Id.* at 357 n. 1 (emphasis added). For a penetrating analysis of "how responses to subordinate groups [including the cultural rules of eye contact] are socially organized to sustain existing power arrangements," see RAZACK, *supra* note 150, at 10.

164. *See People v. Hernandez*, 528 N.Y.S.2d 625, 626 (N.Y. App. Div. 1988).

165. There were four Latino jurors, two of whom, Muñoz and Rivera, were excused because both had brothers who had been prosecuted by the same District Attorney's office, and there was thus a doubt that they could be unbiased. *See New York v. Hernandez*, 553 N.Y.S.2d 85, 86 (1990).

166. *Id.* (emphasis added.)

2. *A Linguistic Contextualization*—Many scholars have analyzed the *Hernandez* case.<sup>167</sup> Some have focused on the discriminatory effects of this judicial opinion on bilingual, especially Spanish-speaking, individuals and communities.<sup>168</sup> One scholar has critiqued this series of opinions from the point of view of cognitive science and sociolinguistics, arguing, *inter alia*, that it is not possible for a bilingual person to “put aside” one language in favor of another.<sup>169</sup> Another scholar has focused on the importance of the *Hernandez* case to an understanding of how nonverbal or demeanor testimony is used to assess credibility, both with respect to potential jurors during *voir dire* and witnesses during trials, by prosecutors, judges, and juries.<sup>170</sup>

While I completely agree with the analysis about the bilingual person’s inability to turn off her understanding of a language in which she is fluent, I want to emphasize a different aspect of the communication that occurred between the potential jurors and the prosecutor. Namely, I want to focus on the hesitancy, the silence with which they responded and which the prosecutor interpreted as an answer in the negative. The prosecutor is quoted by the Court of Appeals as replying, “I didn’t feel, when I asked them whether or not they could accept the interpreter’s translation of it, I didn’t feel that they could. They each looked away from me and said *with some hesitancy* that they would try. . . .”<sup>171</sup> It must be noted that the prosecutor decided not to believe the words of the potential jurors who had assured him that they could accept the official interpreter’s version. Why then did the prosecutor disbelieve their words and choose instead to give a particular meaning to their demeanor, that is, their lack of eye contact and their hesitancy?

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167. See *infra* notes 168–70.

168. See Alfredo Mirande, ‘Now That I Speak English, No Me Dejan Hablar [I’m Not Allowed to Speak]’: The Implications of *Hernandez v. New York*, 18 CHICANO L. REV. 115 (1996); Andrew McGuire, *Peremptory Exclusion of Spanish-Speaking Jurors: Could Hernandez v. New York Happen Here?*, 23 N.M. L. REV. 467 (1993); Lisa J. Soto, *The Treatment of the Spanish Language and Latinos in Education in the Southwest, in the Workplace and in the Jury Selection Process*, 3 HISPANIC L.J. 73 (1997); Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L.REV. 1 (1992); Salvador Mendoza, Jr., *When Maria Speaks Spanish: Hernandez, the Ninth Circuit and the Fallacy of Race Neutrality*, 18 CHICANO L.REV. 193 (1996).

169. See Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 Wisc. L. REV. 761.

170. See Sarah B. Clasby, *Understanding Testimony: Official Translation and Bilingual Jurors in Hernandez v. New York*, 23 U. MIAMI INTER-AM. L. REV. 515 (1991–92).

171. *Hernandez*, 553 N.Y.S.2d at 86, 109, 118 (emphasis added).

Linguists and legal scholars have studied many aspects of nonverbal communication, including kinesics (also called body language), paralanguage (the sounds of oral language, such as pitch, tone, and volume), and proxemics (the space between speakers and the placement of such objects as chairs, desks, etc., to enhance the effectiveness of the communication).<sup>172</sup> In fact they contend that most of the meaning—from sixty to more than ninety percent of a communicated message—is contained in the nonverbal conduct of the speaker.<sup>173</sup> Despite the historical importance that has attached to demeanor in the assessment of credibility, psychologists who study deception conclude that credibility cannot be accurately determined through nonverbal behavior.<sup>174</sup>

The prosecutor dismissed the Latinos in the *Hernandez* case for what he concluded was deception—namely, that their claim that they could abide by the official interpretation of the Spanish testimony was belied by their hesitancy in responding and their lack of eye contact.<sup>175</sup> But if the above-mentioned social science research is accepted, the Latinos' demeanor did not accurately reflect their cognitive processes.

I do not contend, however, that the prosecutor should have read the Latinos' lack of eye contact and their silence in the face of his questioning as having no importance. To the contrary, given the nexus of language and culture to race and especially the link between performance and racial identities, I posit that such differences as the cultural rules about eye contact and silence are the types of markers that denote racial boundaries. The Latinos were

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172. See, e.g., Jeffrey D. Smith, *The Advocate's Use of Social Science Research into Nonverbal and Verbal Communication: Zealous Advocacy or Unethical Conduct?* 134 MIL. L. REV. 173, 174–76 (1991).

173. See *id.* at 174 n.2.

174. See Marcus Stone, *Instant Lie Detection? Demeanour and Credibility in Criminal Trials*, 1991 CRIM. L. REV. 821, 829 (1991) (Stone concludes that demeanor cannot be the basis for assessing the credibility of witnesses. "There is no known physiological connection between the brain processes of a lying person and any bodily or vocal signs . . . . Anxiety or relaxation, even if detected correctly, cannot be relied on to indicate veracity."); Olin Guy Wellborn, III, *Demeanor*, 76 CORNELL L. REV. 1075, 1104 (1991) (After acknowledging how entrenched the notion that jurors and judges can discern sincerity or deception is in legal discourse, the author concludes that many experiments with thousands of subjects have shown that people do not in fact have the capacity to detect falsehoods or errors by observing nonverbal behaviour.); Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1159 (1993) (arguing that extensive social scientific empirical research demonstrates that "typical subjects are unable to use the 'manner and conduct' of a speaker to successfully detect deceptive information on any reliable basis").

175. See *infra* text accompanying notes 178–79.



explicitly “otherized”<sup>176</sup> in this racialized incident and as a result of this *Batson* inquiry.<sup>177</sup> The prosecutor, joined by the judge and the defense counsel, depended on a variety of racialized stimuli—their last names and probably their somatic and sartorial appearances (skin, hair color, and clothing styles), as well as how they sounded through the Spanish they spoke and the nonverbal behaviors they exhibited—to conclude that a racialized inquiry about their exclusion as jurors was necessary. Their nonverbal behaviors, including their silence, was one of the racial markers relied upon to categorize them and then to exclude them as jurors.

The racial categorizing that occurred in that courtroom depended not only on how Whites look at people of color but also how Whites *hear* people of color. So that when Sherene Razack exhorts us “to ask questions about *how* relations of domination and subordination stubbornly regulate encounters in courtrooms”<sup>178</sup> and to “direct our efforts to the conditions of communication and knowledge production that prevail, calculating” who can speak and how they are likely to be heard,<sup>179</sup> she is connecting this conceptual frame relied on by Whites, this way of seeing and *hearing* the world, to the racial superiority that forms the identities of the dominant White majority. This way of seeing and hearing the world—of not hearing the silences of the Latinos as communicating anything other than what the prosecutor said they meant—evidences the racial privilege of the legal actors (including the prosecutor and the judges at trial and in the subsequent appeals). In Bakhtinian terms, the prosecutor and the judges imposed an interpretation on Latinos’ silence that had centripetal effects, eliminating the possibility for multiple

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176. The notion of “otherizing” has been described in this way:

[A] kind of consensus has emerged that members of the dominant group—no matter how ‘intimate’ . . . their sense of involvement with the people concerned, no matter how deep their proposed interest in the subject—will represent *nothing but* the assumption of their own kind . . . [T]here will be a tendency, as James Clifford put it, ‘to dichotomize into we-they contrasts and to essentialize the resultant other.’

Mick Gidley, *Representing Others: An Introduction*, in REPRESENTING OTHERS: WHITE VIEWS OF INDIGENOUS PEOPLES 1, 2–3 (Mick Gidley ed., 1992).

177. Once a *Batson* challenge is invoked and the trial judge determines that there is a good faith allegation by the defense counsel that the prosecutor has used race as a reason for eliminating potential jurors, the prosecutor is required to come forward with race-neutral explanations. *Hernandez v. New York*, 500 U.S. at 359–59. For this reason, such a colloquy is a clear example of a racialized incident, a moment in which race becomes the focus of the judicial deliberations. See *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

178. RAZACK, *supra* note 150, at 10.

179. *Id.*

(or heteroglossic) meanings to their silence. Consequently, if silence was a racial marker for the Latinos, their silencing instantiated the racial privilege of the dominant majority through the actions of the prosecutor and the judges.

## II. SILENCE AND SILENCING AND PEDAGOGICAL DISCOURSE

The first part of this Article attempts to develop an argument that links silence to racial identities both in terms of how Whites see and *hear* non-Whites and in terms of how people of color present themselves to the world. Drawing on the work of sociolinguists and other scholars, I have argued that one's use of silence is an aspect of communication that, like accents, is related to one's culture and that, in some situations, may correlate with one's racial identity. I build on this cross-cultural analysis of silence and silencing in this next section, linking the dimensions of silence and silencing within cultural discourse with those of pedagogical discourse within the law school classroom.

### *A. Silence in the Law School Classroom*

The answer lies in the complex nature of silence, itself. Silence can signify nothing, or it can communicate a great deal, all depending on context.<sup>180</sup>

At different times during the academic year, I remind students that the architecture and design elements of our law school magnify some voices and silence others. I point out that the "well" at

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180. *Kaufman v. Sup. Ct. of Orange Cty.*, 64 Cal. Rptr. 2d 264, 268 (Cal. Ct. App. 1997). Irving Kanarek, Charles Manson's attorney, was sued by José and Hermalinda Rangel for malpractice, fraud, and breach of contract. *See id.* at 266. He represented himself but then ended up in a mental institution. *See id.* The Rangels' lawyers failed to inform the trial judge about Kanarek's institutionalization and absence at the hearings. *See id.* The trial judge entered a default judgment, and the lawyers proceeded to recover their fees from the Client Security Fund of the California State Bar. *See id.* at 265. Later, Kanarek was released, and he sued, alleging, *inter alia*, abuse of process. The Rangels' attorneys defended, saying that, under California's litigation privilege protecting *communications* made in or out of court, they had the right to remain silent about Kanarek's hospitalization. *See id.* The appellate court overturned the trial judge, writing, "silence in the face of a duty . . . communicated something substantial." *Id.* at 269; *see also* Martin Paskind, *The Question of Silence in Civil Lawsuits*, ALBUQUERQUE JOURNAL, June 16, 1997, at 5.

the front of the room, the podium, and the directional and raked seating are all intended to give prominence to the professor's voice. I note that even though the room is designed with a half-circle seating arrangement, it is difficult for the students to talk among themselves. Their bodies are oriented toward the front of the room in order to see the eyes, hear the voice, and read the face of the professor rather than those of the other students. I make comparisons between the classroom and the courtroom, where official hierarchy and deference is even more rigidly enforced than in most classrooms; in courtrooms, silence is gaveled into existence and maintained, like in churches, as part of the protocol of the space.

I use this architectonic analysis to make us all aware of how silence and voice are regulated in the law school classroom; we are socialized to speak and not to speak at certain times and in certain places. But silence is not experienced, understood, or used in the same manner by all law professors and law students. We come into the world of legal education with individual propensities toward and different collectivized understandings and norms about silence. To this context of personal experience, we add new information and experiences about silence and our in/ability to voice ourselves in legal spaces and legal discourses.

During the period from 1988 to 1992, feminists within the legal academy wrote about silence as a persistent aspect of classroom dynamics and the experience of feeling silenced reported by many White women law students (and significant numbers of both male and female students of color).<sup>181</sup> This scholarship prompted a

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181. See Taunya Lovell Banks, *Gender Bias in the Classroom*, 14 S. ILL. U. L.J. 527 (1990); Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137 (1988); Leslie G. Espinoza, *Constructing a Professional Ethic: Law School Lessons and Lesions*, 4 BERKELEY WOMEN'S L.J. 215 (1989-90); Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law Schools*, 5 BERKELEY WOMEN'S L. J. 1 (1990); Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies and Legal Education or "the Fem-Crits Go to Law School"*, 38 J. OF LEGAL EDUC. 61 (1988); Ann C. Scales, *Surviving Legal Education: An Outsider's Guide*, 15 VT. L. REV. 139 (1990); Judy Scales-Trent, *Sameness and Difference in a Law School Classroom: Working at the Crossroads*, 4 YALE J.L. & FEMINISM 415 (1992); Janet Taber, et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209 (1988); Morrison Torrey, Jackie Casey, & Darin Olson, *Teaching Law in a Feminist Manner: A Commentary from Experience*, 13 HARV. WOMEN'S L.J. 87 (1990); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988); Stephanie M. Wildman, *The Classroom Climate: Encouraging Student Involvement*, 4 BERKELEY WOMEN'S L.J. 326 (1989-90). For one study that found no significant differences, however, between male and female student satisfaction levels with the law school experience, see Lee E. Teitelbaum et al., *Gender, Legal Education and Legal Careers*, 41 J. LEGAL EDUC. 443 (1991).

number of panels at academic meetings that considered the issue of silence in the classroom.<sup>182</sup> Today there is wider acknowledgment, among feminists and non-feminists, that many female students (and male students of color) are reluctant to speak in the classroom.<sup>183</sup> Several recent surveys have confirmed this, but there seems also to be more acceptance of this reality and less current scholarship aimed at naming, describing, and altering it.

I have found that the silence in the classroom has a different feel once it is named for the students. Once I raise silence as a topic and analyze silence as volitional, meaningful, and culturally relative, I find that the students become more aware of silence and occasionally deploy it as a communicative strategy. I occasionally stand at the podium and hold silence while noting the time. The first time I do this, I can feel the tension among the students. They do not know what is expected of them; sometimes one of the more gregarious students will begin talking. After I hold silence long enough so that they have all "heard" it, I ask them to estimate how long we have been quiet. Although I rarely hold silence longer than fifteen seconds, their estimates are frequently double or triple the time. I take the opportunity to teach about silence and to talk about its cultural and linguistic characteristics. I discuss various meanings of silence. For example, I explain that the pause before one speaks can be of various lengths, and that longer pauses do not necessarily mean that the speaker is waiting to be "saved" from her muteness. I also mention devices such as implicature.<sup>184</sup> I explain that some students are prepared to answer quite rapidly while others are slower in preparing a response. Despite the conventional wisdom that overvalues quickness, I announce that I will wait for those who do not think aloud and who need more time to collect their thoughts before speaking. My purpose is to give those who need more time the opportunity to pause and process their thoughts without having to fear that they will be interrupted by

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182. See, for example, the Classroom Climate Panel at the 20th National Conference on Women and the Law, as well as a January 1991 workshop on law school curricula organized by the Women and the Law Project, American University, Washington College of Law.

183. See generally Lani Guinier, et al, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994). There is also wider acceptance of the idea that silence has a politics and that women have been systematically silenced. Jaworski notes that women have used the following techniques to break their silence: "[t]hey introduce into their writing elements of intuitive knowledge and associative thinking; they rely heavily on the use of neologisms; and they rename old concepts, alter the meaning of words (often based on their etymology), and alter syntax." JAWORSKI, *supra* note 27, at 122.

184. See *supra* note 120 and accompanying text.

those who are quicker to speak (the “crowders”).<sup>185</sup> I want to help the students hear each others silences and defeat the tendency to reach negative conclusions about pauses and hesitancy.

Once classroom silence is introduced as a pedagogical technique and concern, students are more able to interpret their own silences, their meanings, and whether their silences are volitional. I often have former and current students come talk to me about the panic they are experiencing, their fears about speaking in class, or their perception that they are not heard or that their silences expose their failures. I have done practice sessions with students in which we rehearse what they will say, sometimes by having them ask for time to pause before answering: “Give me a moment while I gather my thoughts.”

Because verbal adroitness is so valued as evidence of legal ability, silence in the law school classroom can be menacing and anxiety-producing for both teachers and students. Nonetheless, teachers and students can become better communicators through a greater understanding of silence. For those of us who are working under the aegis of LatCrit theory and praxis, creating learning spaces where deeper dialogue from different points of view regularly occurs is a pressing objective. If we are to disrupt the centripetal forces of the dominant legal discourse, we must learn new skills, new ways of thinking together. Silence can be such a disruptive influence.

### *B. Silence in the Law School Classroom as Part of a Freirean “Culture of Silence”*

One of the most influential educational theorists of the late Twentieth Century is Paulo Freire, a Brazilian teacher and writer.<sup>186</sup> He is widely known for his critique of what he termed “banking” education.<sup>187</sup> This method of education considers students to be:

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185. See *supra* notes 81–90 and accompanying text.

186. See PAULO FREIRE, EDUCATION FOR CRITICAL CONSCIOUSNESS (1973); PAULO FREIRE, PEDAGOGY OF HOPE: RELIVING PEDAGOGY OF THE OPPRESSED (1995), PAULO FREIRE, PEDAGOGY OF THE OPPRESSED (1970).

187. See Tom Heaney, *Issues in Freirean Pedagogy* (visited May 12, 2000) <<http://nlu.nl.edu/ace/Resources/Documents/FreireIssues.html>> (on file with *The Michigan Journal of Race & Law*); Mark K. Smith, *Paulo Freire and Informal Education* (visited May 12, 2000) <<http://www.infed.org/thinkers/et-freir.htm>> (on file with *The Michigan Journal of Race & Law*).

Passive learners receiv[ing] deposits of pre-selected, ready-made knowledge. The learner's mind is seen as an empty vault into which the riches of approved knowledge are placed. This approach is also referred to as "digestive" . . . education.<sup>188</sup>

Freire argued that schools supported the status quo by ignoring racism, sexism, the exploitation of workers, and other forms of oppression; blocked social change; and inhibited the development of "conscientization," a learning process by which a person becomes aware of oppression and how to become a part of a collective process to resist oppression and change the world.<sup>189</sup> Freire observed that traditional education functions to control the conduct of large groups of people without "the overt force of a police state, [by adapting] learners to kinder, gentler controls: career choices (specialization), authority (dependency) and the good life (consumerism)."<sup>190</sup>

Freire also names and describes a "culture of silence:"

A characteristic [of] . . . oppressed people in colonized countries, with significant parallels in highly developed countries. Alienated and oppressed people are not heard by the dominant members of their society [who] . . . prescribe the words to be spoken by the oppressed through control of the schools [], thereby effectively silencing the people.<sup>191</sup>

By quoting the work of Paulo Freire in the context of an analysis of the dynamics of the law school classroom, I am not drawing a simplistic analogy between the conditions in the *favelas* of Brazil and those in the elite environment of law schools in the United States. There is, however, a similarity in the silencing of students, here and there, that is connected to a hegemonic method of education that is intended to produce students who are dedicated to the maintenance of the status quo, even though that status quo is oppressive to them.

The pedagogical techniques that are utilized in the law school classroom, which is designed architectonically and epistemologically to be hierarchical, have been repeatedly shown to alienate

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188. Heaney, *supra* note 187.

189. *Id.*

190. *Id.*

191. *Id.*

and silence students, especially students of color and women from different backgrounds. Because of the effects of legal education, law students have been described as “becom[ing] belligerent, hostile, argumentative, and demanding”<sup>192</sup> and suffering from a high level of clinical depression.<sup>193</sup> Another scholar with an explicitly feminist perspective has observed that there is a *quid pro quo* in law school: “you get a graduate degree in a relatively short period of time[, and] . . . the appearance of power. People will listen to what you say. The *system’s* reward in this bargain, if it has trained you right, is that you won’t say anything, really, or at least nothing threatening to it.”<sup>194</sup>

This silencing in the law school classroom is centripetal in the Bakhtinian sense because of the strong imposition of one *right* way of *thinking/speaking as lawyers*. The notion of a legal heteroglossia, a multiplicity in the meanings, formats, linguistic formulae, etc., is virtually heretical. The law school classroom is characterized by its silences and the overt silencing of anything that is not legal orthodoxy. For the most part, current legal education is the same as it was one hundred years ago when it was implemented by Dean Christopher Columbus Langdell at Harvard Law School: It still depends on a limited set of materials—appellate opinions—that are discussed in a certain manner—through the Socratic method, using a purportedly objective, decidedly dispassionate, and typically adversarial approach. Silence, particularly that of students of color and women, can potentially have centrifugal effects in the form of resistance to the oppressiveness of the indoctrination and professionalization. But more often, silence is a form of self-censoring, resulting in centripetal, or power-centering, effects.

### *C. Silence and Silencing in the Clinic: An Enactment*

Silence, and waiting till people are ready to give information, are also central to Aboriginal ways of seeking any substantial information.<sup>195</sup>

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192. Espinoza, *supra* note 181, at 218.

193. *See id.*

194. Scales, *supra* note 181, at 140–41.

195. Diana Eades, *Legal Recognition of Cultural Differences in Communication: The Case of Robyn Kina*, 16 LANGUAGE AND COMMUNICATION 215, 218 (1996).

Law professors, lawyers, and law students can benefit from learning to utilize silence when communicating in cross-cultural relationships and settings. While there is very little research concerning silence in the clinical scholarship produced in law schools, silence and its connection to interpersonal skills in the health industry has received considerable attention.<sup>196</sup>

The use of silence in doctor-patient communications has been widely studied, both in the treatment of somatic illnesses and psychiatric conditions.<sup>197</sup> This research can help us inquire into analogous situations involving lawyers and clients. Some studies report the lack of information disclosed to patients for their decision-making. For example, one study in a family practice clinic of a teaching hospital examined the process by which women and their doctors decided whether to perform pap smears.<sup>198</sup> The doctor's authority and medical knowledge creates an asymmetrical power relationship with the patient that can manifest itself in terms of whether or when the woman undresses for the procedure or whether she is referred to a specialist.<sup>199</sup> Poor communication results in conflict between the female patient and her doctor, conflict that is often negotiated through silence.<sup>200</sup> This phenomenon was also described in a historical study of the relationship between doctors and patients.<sup>201</sup> The author concludes:

The history of the physician-patient relationship from ancient times to the present bears testimony to physicians' caring dedication to their patients' physical welfare. The same history, by its account of the silence that has pervaded this relationship, also bears testimony to physicians' inattention to their patients' right and need to make their own decisions. . . . Challenging the long-standing tradition of silence requires nothing less than uprooting the prevailing authoritarian value and belief systems and replacing them with more egalitarian ones.<sup>202</sup>

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196. See *infra* notes 197–206.

197. See LEWIS BERNSTEIN & ROSALYN S. BERNSTEIN, *INTERVIEWING: A GUIDE FOR HEALTH PROFESSIONALS* 91 (3d ed. 1980); LUCILLE HOLLANDER BLUM, *READING BETWEEN THE LINES: DOCTOR-PATIENT COMMUNICATION* (1972); Evelyn Liegrier, *The Silent Patient*, 61 *THE PSYCHOANALYTIC REVIEW* 229 (1974).

198. See Sue Fisher, *Doctor-Patient Communication: A Social and Micro-Political Performance*, 6 *SOCIOLOGY OF HEALTH AND ILLNESS* 1 (1984).

199. See *id.* at 14, fig. 1.

200. See *id.* at 1.

201. See JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* 2 (1984).

202. *Id.* at 28.



More recently, the relationship between doctors and patients has been changed by several forces, such as the rise of health consumerism and health care marketing.<sup>203</sup> These forces have been the impetus for focusing on patient satisfaction, especially in light of new research demonstrating that different types of communication can produce positive clinical outcomes.<sup>204</sup> Because of the accelerated changes that have overtaken the medical profession, physicians have had to become better communicators, and using silence has proven to be a key technique that helps them interact effectively with their patients.<sup>205</sup> Doctors report that taking more time with patients, listening to them, and learning to be quiet is as important to the patients, especially those with life-threatening illnesses, as empathy and care.<sup>206</sup>

Doctors are not the only professionals who could benefit from utilizing silence in practices associated with empathy and care. The efficacy of using silence when lawyers are interviewing clients from indigenous or aboriginal cultures has been analyzed by Diana Eades, an Australian socio-linguist.<sup>207</sup> She was responsible for groundbreaking work in the case of *The Queen v. Robyn Bella Kina*,<sup>208</sup> in which the Queensland Court of Criminal Appeals accepted socio-linguistic evidence and established the necessity of having cultural differences in communication accommodated in the representation of linguistic minorities.<sup>209</sup>

According to an account by Eades, Robyn Kina was charged with the murder of her male partner of several years.<sup>210</sup> She was represented by lawyers from the Legal Aid Commission and Aboriginal Legal Services, government run legal offices that are grossly understaffed.<sup>211</sup> In the period of eight months before her trial, she was interviewed by six different solicitors or barristers.<sup>212</sup> She pleaded not guilty but was convicted in one of the shortest murder trials in

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203. See James J. Hughes, *Organization and Information at the Bed-Side: The Experience of the Medical Division of Labor by Hospital Inpatients 5-6* (1994) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

204. See *id.*

205. See MARGARET GERTEIS ET AL., *THROUGH THE PATIENT'S EYES: UNDERSTANDING AND PROMOTING PATIENT-CENTERED CARE* (1993).

206. See *id.*

207. See Eades, *supra* note 195, at 215.

208. See Queensland Court of Appeal, 29.11.93 (No. 221) (unreported).

209. See *id.*

210. See Eades, *supra* note 195, at 216.

211. See *id.*

212. See *id.*

Queensland history, requiring only three hours of evidence and fifty minutes of jury deliberations.<sup>213</sup>

Years later, her case became the subject of considerable public interest when she was featured on a television special on victims of domestic abuse who kill their violent partners.<sup>214</sup> Her story came to light because the interview techniques employed by journalists were different from those used by her lawyers.<sup>215</sup> Eades analyzed the interactions in this way:

In 1988 Kina was communicating in an Aboriginal way. The lawyers who interviewed her were not able to communicate in this way, and they were not aware that their difficulties in communicating with her involved serious cultural differences . . . . The way that lawyers are trained and the way they generally interview clients is not conducive to Aboriginal ways of communicating. On the other hand, the way that the TV journalists and the counselor communicated with Kina was quite similar, as it happens, to Aboriginal ways of communicating.<sup>216</sup>

The following summary accounts for the way that Aboriginal people seek information:

. . . [I]n situations where Aboriginal people want to find out what they consider to be significant or certain personal information, they do not use direct questions. It is important for Aboriginal people to respect the privacy of others, and not to embarrass someone by putting them 'on the spot.' People volunteer some of their own information, hinting about what they are trying to find out about. Information is sought as part of a two-way exchange. Silence, and waiting till people are ready to give information, are also central to Aboriginal ways of seeking any substantial information.

Although we can recognise these ways of seeking information in Standard English, we use them in mainstream society only

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213. *See id.*

214. *See id.*

215. *See id.* at 217.

216. *Id.*

in sensitive situations. In Aboriginal interactions these are the everyday strategies used to seek substantial information.<sup>217</sup>

The story that eventually emerged was that Kina had been the victim of years of physical abuse, including hair pulling, kicking, and anal rape.<sup>218</sup> On the day of the murder, her partner threatened to rape her fourteen-year-old niece.<sup>219</sup> When he lunged at Kina with a chair over his head, she stabbed him once in the chest.<sup>220</sup> He staggered back, fell, and died shortly after.<sup>221</sup> A successful appeal was subsequently initiated by the Attorney General.<sup>222</sup>

While Diana Eades' work involved the highly differentiated context of Australian aboriginal persons being represented by White, English-monolingual lawyers, some of the lessons derived from that situation are equally applicable in the United States and of benefit to both Whites and non-Whites, as well as to bilingual lawyers and law students. The clinical skills of client interviewing and counseling can be improved through a greater understanding and use of silence.

In some clinics at the University of New Mexico Law School, we now introduce the concept of silence and the importance of listening for silence as clients disclose the emotional and often disturbing details of their legal problems. Drawing on the work of Diana Eades, we offer two formats for interviewing: the scripted interview and the uninterrupted narrative. The scripted interview is the more typical interview style of lawyers in which the student uses a series of open- and closed-ended questions to learn the client's story. The uninterrupted narrative interview allows the client to set the pace and determine the organizational framework for the story, with the clinical student holding an attentive and respectful silence.

The *Robyn Kina* case is distributed to UNM clinical students along with information about the gendered and cross-cultural aspects of silence. Students need to understand the socio-linguistic and literary dimensions of silence; they need to hear silences—their own and those of others—and give silence its communicative importance before they are prepared to experiment with it as part

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217. *Id.* at 218 (citing a handbook Eades wrote to assist lawyers in Queensland to communicate more effectively with their Aboriginal clients).

218. *See id.* at 216.

219. *See id.*

220. *See id.*

221. *See id.*

222. *See id.* at 225.

of their interviewing techniques. The shared and/or divergent cultural backgrounds of the client and the clinical student, the nature of the legal problem, and the purpose of the interview all help in determining what interview format is most appropriate.

*D. Silence and Silencing in the Law School Classroom: A Synthesis*

As I indicated earlier, my analysis in this second section on pedagogical discourse depends on the first section in which I explain that silence has importance from both linguistic and racial performative perspectives. Using silence as a heteroglossic technique in the classroom is context-sensitive; students may respond differently to the technique because silence is culturally relative. The dynamics of silencing are very difficult to alter because the hierarchical effects are so pervasive after just a few weeks of law school. It is difficult, therefore, to move out of a “banking” method of teaching and to create a more egalitarian learning environment. Nonetheless, an increased awareness of the silencing effects of traditional teaching methods in the classroom may help mitigate law students’ sense of alienation from their studies and work.

Moreover, an awareness of silence and the silencing effects of the “banking” method can disrupt the hegemonic racial dynamics of the classroom. It is likely that students of color, including monolingual-English, African American students, bring different linguistic, thus heteroglossic, backgrounds into the classroom; their backgrounds may include different orientations towards silence and voice. Creating a classroom conversation about the “culture[s] of silence” can validate the students’ lived experiences and normalize the cadences and rhythms of english.<sup>223</sup> These pedagogical interventions can have centrifugal effects—decentering effects on the linguistic and racial dynamics of the classroom.<sup>224</sup>

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223. I have borrowed this capitalization counter-convention from BILL ASHCROFT ET AL., *supra* note 119. The editors note the “need to distinguish between what is proposed as a standard code, English (the language of the erstwhile imperial centre), and the linguistic code, english, which has been transformed and subverted into several distinctive varieties throughout the world.” *Id.* at 4.

224. My analysis quite probably depends on classrooms that have a critical mass of students of color. With the re-segregation of higher education that is increasingly the reality for many institutions because of judicial and electoral policies, the imperative of altering the racial and linguistic dynamics may be somewhat diminished.

*E. Silence as a Racialized Performance in the Law School Classroom*

*During the Spring 2000 semester I taught a seminar on Race, Racisms and the Law. The class was highly diverse with students from varied racial, linguistic, and geographic backgrounds with differing ideological commitments. One of the more vocal students was a self-described "Chicano nationalist."<sup>225</sup> He was passionate, provocative, and controversial, and his comments improved the class by leading me to include discussions on internal and external U.S. colonies and on assimilation as co-optation, especially the socialization and professionalization of scholars of color.*

*Midway through the semester I distributed a version of this Article and led the students in a discussion of racialized silence. This student was noticeably quiet. He was also silent during the next class meeting. During a break I heard one of the students ask him why he was not participating. He responded that he agreed with my analysis that silence can be a form of resistance against the curriculum and pedagogy of the law school classroom and he had, therefore, decided to remain silent.*

*I overheard this conversation. Perhaps I was meant to overhear it. I was perplexed and vexed by his self-silencing, asking myself—but why in this class, why in my class? This class was, after all, an opportunity to talk about the oppressive aspects of the curriculum and the pedagogy.*

His silence was very effective from many perspectives. First, his silence was performative in the sense of being self-conscious, calculated, and an exercise of power.<sup>226</sup> Second, his silence was performative in the sense of seizing the attention of his fellow students and making them and me aware that he was communicating without words. Third, his silence was a challenge to the classroom dynamics as they simultaneously both defied and reproduced the traditional content and format of the law school classroom. After all, the subject may have been Race and Racisms, but the materials studied were mostly cases, statutes, and law review articles, and the discussion in many ways depended on a legal vocabulary, on pre-suppositions and norms that support a capitalistic and imperialistic

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225. I provided these pages to the student and asked for his response. I received an e-mail from him telling me that he had no comment. I interpreted his message to mean he did not object or explicitly agree with my version. Nevertheless, his enigmatic response was a sophisticated use of implicature.

226. See RICHARD POIRIER, *THE PERFORMING SELF* (1992) (challenging static meanings and readings of literature and offering instead an approach to literature that accepts its political qualities and explores the potentiality of performance as a process of self-discovery, self-watching, and self-pleasuring). Literature with this self-involved way of reading is offered as "an object lesson for other more distinctly political or social performances." *Id.* at xxi.

political system, even though we were attempting to expose such norms and assumptions.

This example illustrates several points I am making about silence and silencing. First, his silence was a powerful form of communication. It attracted the attention of the class and demanded to be interpreted. Second, his silence was racialized and performative. This student often peppered his remarks with Spanish phrases and spoke forcefully from a perspective that was framed by his Chicano identity. I understood his silence to be a similar reference to his bilingual background, to his recognition that silence has a different and nuanced valence within the Indo-Hispano culture of Northern New Mexico and that he was consciously placing himself within that frame with his calculated silence. By doing so, he was using silence to mark himself racially, as he had often done with his spoken Spanish. Finally, his silence was ambiguous in that it was difficult to know whether he was silent or silenced, whether he was exercising power or experiencing powerlessness. Perhaps the point of his performance for purposes of this analysis is that these are not either/or situations. Perhaps silence and silencing sometimes, although not always, operate simultaneously.

I would like to think that his reading of this Article expands his performative choices so he can make a strategic move from feeling silenced to deliberately holding silence. Consequently, his internal script that interpreted the silence has been altered.

### III: SILENCE AND SILENCING AND LEGAL DISCOURSE

[Sor Juana's] work tells us something, but to understand that something we must realize that it is utterance surrounded by silence: the silence of the *things that cannot be said*.<sup>227</sup>

This section discusses the centripetal and centrifugal forces within the language of the law. The previous section focused on the silencing within the law school classroom of certain sectors of the classroom—women and persons of color particularly. This section focuses on the silencing within legal discourse and public policy debates of certain ideas and topics, most notably issues of race.

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227. OCTAVIO PAZ, SOR JUANA, OR THE TRAPS OF FAITH 5 (1988).

I contend that the silencing of race throughout the legal system, in classrooms and in courtrooms, is one of the principal mechanisms for maintaining the ideology of White supremacy. It is the practice of hegemony through education. From a Freirean perspective, students are denied the ability to participate in liberatory education because of this systemic silencing about racism and other types of oppression.

Issues are systematically and consistently framed within legal discourse to elide issues of race (as well as sexual identity, class, and other identity characteristics).<sup>228</sup> The silencing of racialized information is largely why the law feels alien and alienating to those for whom race or other identity characteristics are reality-defining and often the starting point for legal analysis.<sup>229</sup> Maintaining silence about facts or aspects that are reality-defining often makes one feel complicit in one's own marginalization. Moreover, this silence, which is imposed through the norms of legal discourse, diminishes one's ability to deploy silence for a range of other communicative strategies. That is, it is more difficult to be silent, to hold silence as a strategy of resistance and agency when silence is *de rigueur* anyway.

The silencing of information about race, gender, and other identity characteristics operates at two levels: at the level of individual disputes—what I am calling the “micro level,” where incidents in which race is arguably relevant are resolved with a resolute inattention to, and silencing of, the racial aspects; and at the level of whole areas of law, the “macro level,” which determines how these areas of the law are defined and how disciplinary and professional worldviews are formed. One way that White supremacy is maintained is through multiple levels of obfuscation and elision. In this instance White supremacy is maintained by maintaining a world view in which race does not matter and therefore does not have to be discussed, especially by those legal actors—judges, prosecutors, legislators, and lawyers—who make and enforce the rules by which this society is regulated and governed.

In 1988 Lucinda Finley wrote a passionate plea to feminists “to grapple with the nature of law itself . . . and the extent to which its language and its process of reasoning are built on male concep-

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228. See *infra* text accompanying notes 229–54.

229. See Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education* 11 NAT'L BLACK L.J. 1–14 (1989) (arguing that a “perspectiveless” norm in the law school classroom burdens minority students by creating the dual dilemmas of objectification and subjectification).

tions of problems and of harms and on male . . . methods of analysis."<sup>230</sup> In 1989 she responded to her own exhortation with an article that analyzed women's silence in the law and the connection of legal reasoning and discourse to that silence.<sup>231</sup> Finley argued that legal language and reasoning are male and patriarchal, and that efforts at making meaningful change are hampered by the fact that the law constitutes a certain social reality for the powerful by making social arrangements appear normal, neutral, and inevitable.<sup>232</sup> This androcentric quality of legal language presents women with a dilemma. Devising a woman-centered legal language is not a feasible alternative, but neither can the law realistically be abandoned.<sup>233</sup> Finley asserts, "[l]aw will continue to reflect and shape prevailing social and individual understandings of problems, and thus will continue to play a role in silencing and discrediting women."<sup>234</sup> Finley concludes that "critical awareness of the dilemma is itself important."<sup>235</sup>

Finley's description of legal language and legal discourse is even more salient when applied to White supremacy. As Professor Crenshaw argues, issues are systematically and consistently framed<sup>236</sup> within legal discourse to elide the race and class characteristics; legal education requires fundamental change in order to eliminate the hegemonic effects of legal language and legal discourse.<sup>237</sup>

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230. Lucinda M. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 NW. U. L. REV. 352, 384 (1988).

231. See Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989). Finley explains "discourse" as a "term[] used in poststructuralist theory, especially as developed in the work of Michel Foucault, [that] 'is not a language or a text but a historically, socially, and institutionally specific structure of statements, terms, categories, and beliefs.'" *Id.* at 888 n.12.

232. See *id.* at 886 *passim*.

233. See *id.* at 906.

234. *Id.*

235. *Id.* at 909.

236. Gregory Bateson coined the term *frame* "to explain how individuals exchange signals that allow them to agree upon the level of abstraction at which any message is intended." Deborah Tannen, *What's in a Frame? Surface Evidence for Underlying Expectations*, in *NEW DIRECTIONS IN DISCOURSE PROCESSING* 137, 141 (Roy O. Freedle ed., 1979).

237. At about the same time that Lucinda Finley was writing about the patriarchal nature of legal language and legal discourse, Kimberlé Crenshaw was devising a similar racialized analysis and urging that more attention be paid to issues of race in legal education. See Crenshaw, *supra* note 229, at 1-14.



*A. Macro-level Silences and Silencing in Legal Discourse*

The Framers [of the Constitution] sought to mute the controversies and contradictions surrounding race and slavery by omission. They tried to erase the issue. . . . This eracism infects legal education and limits its effectiveness. . . . We must learn to talk about the deep issues in law and culture, to openly debate them rather than smother them in silence.<sup>238</sup>

Many law students arrive at law school with intentions of engaging in social change through public interest work but leave after three years with commitments to careers with law firms and corporate America.<sup>239</sup> This pernicious change in personal values and commitments away from progressive lawyering toward law firms and other organizations that support the status quo reveals the hegemony of law school socialization. This socializing works by creating a certain professional worldview that is supported by explanations of how the law facilitates and maintains social arrangements—a silencing, in effect. If students' perceptions and aspirations are formed within a disciplinary discourse largely uncharted with respect to race or gender, then students are deprived of a basic understanding of the ways in which the law maintains the current allocation of power and privilege along racial and gender fault lines.

Property law, a course taught in virtually every law school to every first year law student, serves as a good example of the socializing process of law school. In this society, the most significant forms of property in most people's lives are wage income, home ownership, and employer-funded pension plans. Yet, most students complete two semesters of property classes with virtually no understanding of the historical or contemporary explanations for the wide disparities in property ownership between Whites and persons of color or the role the law has played in residential segregation. Moreover, there is virtually no mention of the colonization project of the United States, conducted through war and intrigue, that divested native/indigenous peoples from their lands, and conquered one-third of the territory of Mexico, all of Puerto

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238. Dirk Tillotson, Constitutional Eracism (unpublished manuscript on file with author).

239. See ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND (1992).

Rico, and the Pacific islands of Guam, the Phillipines, and Hawai'i.<sup>240</sup> Instead, students are drilled with the particularities of future interests, the Statute of Uses, and acquiring title over wild animals. In short, the law of property, as currently conceived, does not provide an analysis for students about property, power, and White supremacy—either in terms of how the larger society came to collectively own the land and resources that is now the United States, or how White people came to individually own most of the land and the resources of the country.

George Lipsitz uses the term “the possessive investment in whiteness”<sup>241</sup> to describe the

relationship between whiteness and asset accumulation in our society, to connect attitudes to interests, to demonstrate that white supremacy is usually less a matter of direct, referential, and snarling contempt than a system for protecting the privileges of whites by denying communities of color opportunities for asset accumulation and upward mobility.<sup>242</sup>

Lipsitz's analysis supports my contention that silence and silencing in legal discourse is crucial in the maintenance of White supremacy, because lawyers, who are often strategically positioned throughout society to unmask, disrupt, and subvert it, overwhelmingly choose to benefit from it. Legal discourse and law school's socialization ensures it. The “[c]ollective exercises of power that relentlessly channel rewards, resources, and opportunities from one group to another”<sup>243</sup> are rendered invisible, normal, and inevitable so long as race remains an inappropriate topic for classroom discussion and legal discourse in general, and so long as law students are not given the analytical tools and straightforward data about these wealth-producing and wealth-allocating processes. This is the case even though those collective exercises of power are facilitated through legal procedures and legal institutions.

Property law could be reconceptualized and reframed to describe the workings of legal structures and processes that maximize the opportunities for Whites to become home owners and wealth

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240. See generally RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* (1993); HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES 1492–PRESENT* (1999).

241. GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* (1998).

242. *Id.* at viii.

243. *Id.* at 20.

accumulators, while minimizing the opportunities for non-Whites to enjoy the same social benefits. As described by Lipsitz, public policy after the New Deal Era denied the farm worker and domestic labor sectors that were disproportionately minority the protections that were extended to Whites under the Wagner Act and the Social Security Act.<sup>244</sup> The trade unions negotiated higher wages, medical insurance, pensions, and job security, but, because of their blatantly discriminatory practices, Whites were overwhelmingly the beneficiaries.<sup>245</sup> It was federal housing agencies that most directly employed racist practices to prevent minorities from benefiting from a massive post-war housing boom and federally subsidized loan funds.<sup>246</sup> The Federal Housing Agency (“FHA”) and private lenders diverted housing loans toward White communities, thereby creating White suburbs and abandoned communities of color.<sup>247</sup> Through a plethora of public investment projects in urban renewal, highway construction, and the expansion of water supplies and sewage facilities, societal resources to meet the housing and shelter needs of White residential enclaves were allocated at the expense of communities of color.<sup>248</sup> Lipsitz provides the following example: “The Federal Housing Administration and the Veterans Administration financed more than \$120 billion worth of new housing between 1934 and 1962, but less than 2 percent of this real estate was available to nonwhite families—and most of that small amount was located in segregated areas.”<sup>249</sup> Such interlocking policies as red-lining, sales of substandard housing, and foreclosures, overseen by the FHA and the Department of Housing and Urban Development, destroyed the housing markets in inner-cities.<sup>250</sup> If all of this were not enough, state and local governments placed in these communities “prisons, incinerators, toxic waste dumps, and other projects that further depopulated these areas” and led to decreased political power.<sup>251</sup>

Property law is not the only law school subject in which White supremacy, its analysis of race, and its allocational consequences go unexamined. Criminal law and constitutional law are also not subjected to a comprehensive and systematic analysis of how they

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244. *See id.* at 5.

245. *See id.*

246. *See id.* at 6–7.

247. *See id.*

248. *See id.*

249. *Id.* at 6.

250. *See id.* at 8.

251. *Id.*

construct and sustain the imbalance in racial relations in this society. Criminal law is the law school subject in which race is dealt with most explicitly, largely because a disproportionate number of the defendants are men of color.<sup>252</sup> More than in other subject areas, the insights from the perspective of a critique of White supremacy, such as the demonizing of juveniles of color through the over-policing of communities of color,<sup>253</sup> the criminalization of childbearing for drug-addicted mothers,<sup>254</sup> the use of racial profiling in policing,<sup>255</sup> the wrongful association of drug usage with communities of color, or the lack of adequate legal representation (even in death penalty cases),<sup>256</sup> have been integrated into the conventional discourse about crime in this society. Unfortunately, however, stereotypes about people of color as violent and predatory are reinforced in the law school curriculum by what is said as well as what is left unsaid. The relentless pressure to get through the conventional topics, especially since the multistate bar exam further structures what is to be taught and how students are to be socialized and professionalized with inattention to race,<sup>257</sup> leaves little time to establish a sociolegal context that connects the criminal justice system to the de/formation of racial relations.

Constitutional law is an area in which race has been central both to the framing of the document and the subsequent interpretation of its provisions by the Supreme Court and the other federal courts. Yet the word *slavery*, representing the single most pressing and divisive issue among the delegates at the Constitutional Convention, is not even mentioned, despite its centrality to the framing process.<sup>258</sup> This "omission of references to or acknowledgment of

252. See generally KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT AND OTHER MICROAGGRESSIONS* (1998).

253. See generally BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* (1999).

254. See generally LAURA E. GOMEZ, *MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE* (1997).

255. See David Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 MICH. J. RACE & L. (forthcoming 2001); David Harris, *Factors For Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994).

256. See generally LOUIS P. POJMAN, *THE DEATH PENALTY: FOR AND AGAINST* (1998); AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: *THE DEATH PENALTY IN TEXAS: LETHAL INJUSTICE* (1998).

257. See Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927 (1997).

258. See Tillotson, *supra* note 238, at "Introduction" (unpaginated article). Tillotson notes that James Madison considered climate as one of two causes that divided the States; the other difference among them was their division "principally from the effects of their having or not having slaves." *Id.* at note 35 (citing PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY* 23 (1981)).

racial issues that either implicitly or explicitly present themselves” has been dubbed “eracism.”<sup>259</sup> Constitutional law is everywhere taught as the allocation of powers between the federal government and the state and the separation of powers among the three branches of government.<sup>260</sup> Yet whether with respect to the threat of secession to federalism, the relation of slavery to the Commerce Clause, or the *Dred Scott* case to judicial review, racial issues might vaguely be hinted at within cases and texts, but meaningful racial implications are usually completely ignored.

While this section focuses on three examples of basic law school courses that typically ignore issues of race, the examples are somewhat idiosyncratic, because virtually any course could be chosen from virtually any law school for a parallel analysis of the elisions of race. This type of organization is both a matter of decisions by individual law professors and evidence of a broader discourse of law embedded within a White racial context that is rendered transparent and therefore almost impossible to name and problematize. That is the centripetal force and the hegemony of this “un-raced” discourse.

### B. Micro-level Silences and Silencing in Legal Discourse

Not only is legal doctrine developed to obfuscate the importance of the racial context to entire areas of law, but this silence is maintained in particular disputes. Legal actors—judges, lawyers, scholars, deans, and professors—are socialized to maintain a decorum that protects this silencing. In this section, I use two cases as examples of situations in which the race of the parties is never mentioned in the published opinions. Given the importance of *Meritor Savings Bank v. Vinson*<sup>261</sup> to the development of the law of sexual harassment, it should not be surprising that some attention has been paid, particularly by feminists, to the fact that the race of neither party is referenced in the opinions of the vari-

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259. Tillotson, *supra* note 238, at n.2. Eracism is described as a “power play . . . a rewriting of our shared history as an exclusive and ostensibly objective or ‘perspectiveless’ text. It is a dangerous form of historical revisionism that seeks to deny the standing of certain groups. It elevates the history of some and denies that of others. It colors the constitutional nation as White, or ‘transparent,’ simultaneously denying the existence of other perspectives or colors.” *Id.* at Section 3 (1) (unpaginated article).

260. See e.g. LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW ch. 2 (3d ed. 2000).

261. 477 U.S. 57 (1986).

ous courts that considered the issues. The other example I provide is a little known tort case, *Williams v. City of New York*.<sup>262</sup>

Perhaps the best known case involving gender discrimination and sexual harassment is the *Vinson* case. Yet the District Court, the D.C. Circuit, and the Supreme Court never mention that the women who were harassed and the harasser are African American. The incidents involving the abuse occurred in the 1970's, and the case was litigated in the 1980's, before intersectionality theories,<sup>263</sup> which argue for the linkage between and among such identity markers as race and gender, had become familiar in scholarship by Race Crits and Fem Crits.

Even today, few discrimination cases have been filed effectively and prosecuted alleging discrimination on the basis of both race and sex. The early requirement that women of color choose between these characteristics in order to ground a discrimination claim created an unnecessarily high hurdle.<sup>264</sup>

What is interesting for purposes of this examination of silence and silencing is the resistance of White feminist scholars and contemporary casebook editors to recognizing the potential salience of race in the legal arena. The commentaries of legal feminists regarding the issue of race in the *Vinson* case are particularly instructive. In 1991, Professor MacKinnon wrote:

As I mentioned, both Mechelle Vinson and Lillian Garland are African-American women. Wasn't Mechelle Vinson sexually harassed as a woman? Wasn't Lillian Garland pregnant as a woman? They thought so. The whole point of their cases was to get their injuries understood as "based on sex," that is, because they were women. The perpetrators, and the policies under which they were disadvantaged, saw them as women. What is being a woman if it does not include being oppressed as one? When the Reconstruction Amendments "gave Blacks the vote," and Black women still could not vote, weren't they kept from voting "as women?" When African-American

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262. 564 N.Y.S.2d 464 (N.Y. App. Div. 1991).

263. See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Harris, *supra* note 181, at 604.

264. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L. J. 365 (analyzing *Rogers v. American Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981) in which an airline was permitted to prohibit the hairstyle of a Black woman whose hair was braided into "corn rows." In alleging a discrimination claim under Title VII, she was required to elect whether the basis for the mistreatment was her race or her sex.)

women are raped two times as often as white women, aren't they raped as women? That does not mean their race is irrelevant and it does not mean that their injuries can be understood outside a racial context. Rather, it means that "sex" is made up of the reality of the experiences of all women, including theirs. It is a composite unit rather than a divided unitary whole, such that each woman, in her way, is all women. So, when white women are sexually harassed or lose their jobs because they are pregnant, aren't they women too?<sup>265</sup>

In a series of open letters published in the same volume, one woman responded to MacKinnon's discussion of the *Vinson* case, stating, "[a] limited concept of experience "as a woman" is implicit in your treatment of Mechelle Vinson's agency in the formulation of sexual harassment legal doctrine. Mechelle Vinson brought action against her employer as a woman, but more accurately as a Black woman."<sup>266</sup> In 1992, another commentator observed,

The Supreme Court opinion in *Meritor v. Vinson*, purports to look at the record as a whole, yet it fails to make any mention of the fact that Mechelle Vinson was African-American. The Court demonstrated no perception of the interplay between racial and sexual discrimination as directed against women of color, or the potential impact of that interplay on Vinson's credibility. Yet, "discrimination against women of color often operates differently, is fueled by different factors and results in different stereotypes, than discrimination against either men of color or white women." The Court's failure to discuss Vinson's race reveals their perspective that it was not legally significant or even relevant. One legal commentator suggests that "only white people have been able to imagine that sexism and racism are separate experiences."<sup>267</sup>

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265. Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?* 4 YALE J.L. & FEMINISM 13, 20 (1991).

266. *Open Letters to Catharine MacKinnon*, 4 YALE J.L. & FEMINISM 177, 180 (1991).

267. Sarah A. DeCosse, *Simply Unbelievable: Reasonable Women and Hostile Environment Sexual Harassment*, 10 LAW & EQUALITY 285, 294 (1992) (quoting Mary E. Becker, *Symposium: The Law and Economics of Racial Discrimination in Employment: Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 78 GEO. L.J. 1659, 1675-76 (1991); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 604 (1990)).

While these and other scholars have written about Mechelle Vinson's racial background,<sup>268</sup> I have found only one reference that notes that the harasser, Sidney Taylor, was also African-American.<sup>269</sup> Students of employment discrimination are not likely to know about the racial context of the *Vinson* case because virtually none of the basic hornbooks or casebooks makes any mention of it.<sup>270</sup> It is difficult, if not impossible, for teachers and students to interrogate the decision by the Courts to elide information about race if the information is not available to them. Consequently, their mindset about legal discourse and the salience of race within it is not likely to be challenged or changed.

As I have become more sensitized to this silence about race, I have noticed it even in situations in which the racial context is obviously salient. For example, *Williams v. City of New York* is a personal injury and wrongful death case where the decedent's mother sought to recover damages from the City of New York for the negligence of the Manhattan & Bronx Surface Transit Operating Agency.<sup>271</sup> The decedent, Thomas Williams, was a twenty-year-old high school graduate who had been working at McDonald's for three years.<sup>272</sup> He lived with his mother, who suffered from arthritis, and his four nieces and nephews.<sup>273</sup> He helped with the chores, cared for the children, bought his own clothes, and planned or hoped to begin college soon.<sup>274</sup> He earned approximately \$4500 per year and contributed fifty dollars per week to the household and ten dollars worth of groceries.<sup>275</sup>

The jury entered a verdict in the gross amount of \$600,000 (or \$510,000 net, reduced by 15%, the decedent's share of the fault).<sup>276</sup>

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268. See Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1027 n.105 ("Black women who have tried to get relief under Title VII because they are black and female have had mixed results."); Alan R. Kabat & Debra S. Katz, *Racial and Sexual Harassment Employment Law*, in II ALI-ABA COURSE OF STUDY MATERIALS: CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 547, 554 (1999).

269. See Anna Maria Marshall, *Closing the Gaps: Plaintiffs in Pivotal Sexual Harassment Cases*, 23 L. & SOC. INQUIRY 761, 776 n.24 (1998)

270. See MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 185, 587, 627, 641, 643, 655, 657, 662-71, 684 (1997) (failing to mention race whenever the *Vinson* opinion is referenced or reproduced); Harold S. Lewis, Jr., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW 180-94 (1997) (same).

271. 564 N.Y.S. 2d 464, 464-65 (App. Div. 1991).

272. See *id.* at 465.

273. See *id.* at 465-66.

274. See *id.*

275. See *id.* at 465.

276. See *id.*



On appeal, the Supreme Court of New York reduced the gross damages to \$325,000 (or \$276,250 net), after concluding that the decedent had never gained consciousness after the accident and therefore was not entitled to recover damages for the pain and suffering element of the personal injury claim.<sup>277</sup>

In computing the loss of support, the jury can consider anticipated lifetime earnings and loss of services to the household and the beneficiary's life expectancy.<sup>278</sup> In this case, if we assume a life expectancy of his mother of seventy years and a current age of forty years, the loss of her son's life is worth about \$760 per month. Is race not relevant when considering these elements? Would a White son with aspirations of college in the context of responsible life habits be valued equally? Is it likely that juries do not notice the race of plaintiffs or their representatives? Actuarial tables are routinely shown with racial and gender data because life expectancy and work-life expectancy are both a function of one's race and gender in this society and others.<sup>279</sup> Yet the legal actors in the *Williams* case concluded that race did not matter and should not be mentioned.

The norms and behaviors of professionalism—the prevailing worldview—that are authorized and preferred within the dominant and purportedly race-neutral discourse impede students from understanding that race is often salient in the resolution of issues that seemingly have nothing to do with race. For example, most tort cases, such as the *Williams* case, fail to mention the race of the wrongful death victim, even though the victim's race is likely to be a factor in the determination of the worth of the decedent's life. Making it uncomfortable for those in the legal profession to talk about race in any situation makes it unlikely that it will receive a systemic and intensive analysis.

### C. A Synthesis of Silence and Silencing in Legal Discourse

In the first two sections of this Article my analysis focused on individual and cultural dimensions of silence and silencing within different linguistic areas from a pedagogical perspective. My pur-

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277. See *id.* at 465–66.

278. See EDWARD J. KIONKA, TORTS IN A NUTSHELL 370 (1992).

279. See e.g., *Expectation of Life and Expectation of Death, by Race, Sex, and Age, 1999*, in AM. JUR. 2D DESK BOOK 435 (2000).

pose in discussing the silencing of the topic of race within legal discourse was to demonstrate the effects of silence and silencing outside of a specific communicative context and in a complex multi-cultural situation. In this section, I develop several related ideas: 1) throughout this society (and it may be equally true in many other societies) there is an amnesia about the historical connections between the law and the racial divisions in the society; 2) this amnesia is reinforced by the law schools who teach the law as though it were race-neutral; and 3) legal actors—lawyers, judges, legislators, and law professors—maintain this silence, valorizing this race-neutral illusion with norm-setting consequences for the entire society. The result is that this society has no widely accepted vocabulary for a discourse on race.

I began this section with a quote from Octavio Paz, referring to the Seventeenth Century Mexican nun and poet, Sor Juana Inéz de la Cruz. Paz, her biographer, writes that during her lifetime, her poems were widely read in Mexico, Spain, and the entire Spanish-speaking world.<sup>280</sup> More recently she has again come into literary vogue as a brilliant writer, an iconoclast, and a feminist.<sup>281</sup> She lived an extraordinary life, first, as a favorite of royalty of New Spain (as Mexico was then known), and later, as a famous and controversial intellectual.<sup>282</sup> She is said to have had every type of gift and talent: she was beautiful, elegant, articulate, courageous, and blessed with an unusual breadth of intelligence. Unexpectedly, she gave up the world and entered a convent where

[s]he [wrote] love poems, verses for songs and dance tunes, profane comedies, sacred poems, an essay in theology, and an autobiographical defense of the right of women to study and cultivate their minds.<sup>283</sup>

At the height of her international fame, however, she “gives up everything, surrenders her library and collections, renounces literature, and finally . . . dies at the age of forty-six.”<sup>284</sup>

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280. See Paz, *supra* note at 227, at v.

281. See CARLOS FUENTES, *THE BURIED MIRROR: REFLECTIONS ON SPAIN AND THE NEW WORLD* 201–04 (1992).

282. See *id.* at 203 (“She won praise and fame, but promptly saw the difficulties of being a woman writer in colonial Mexico. Not only would she face male opposition and ecclesiastical oversight, but her time would be drained and her security challenged.”).

283. Paz, *supra* note 227, at 1.

284. *Id.* at 2.

During Sor Juana's life, she was silenced onto death. Her writing was imbedded in silence: "the silence of the *things that cannot be said*."<sup>285</sup> Her writings are examples of a forced implicature. Paz cautions us that:

When we read Sor Juana, we must recognize the silence surrounding her words. That silence is not absence of meaning: on the contrary, what cannot be said is anything that touches not only on the orthodoxy of the Catholic Church but also on the ideas, interests, and passions of its princes and its Orders. Sor Juana's words are written in the presence of a prohibition; that prohibition is embodied in an orthodoxy supported by a bureaucracy of prelates and judges.<sup>286</sup>

Today, unlike Sor Juana, public intellectuals are no longer at the theological mercy of the Catholic Church, its Bishops, and inquisitors.<sup>287</sup> But I contend that there is a legal orthodoxy with its bureaucracy of professors, lawyers, and judges who seek to, and do, exercise a similar control over public discourse and debate as the Church did in the Seventeenth Century.

This is the ultimate centripetal effect of racialized silences. The legal bureaucracy has declared public debate a race-neutral zone and enforces it through its design of legal education and legal institutions.

The orthodoxy on racial silence is so diffused and its effects so implicated in legal processes that it all is of one piece. Noting the implication of Sor Juana in her own silencing, Octavio Paz writes: "[U]sually the author is part of the system of tacit but imperative prohibitions that forms the code of the *utterable* in every age and society . . . . [T]ransgressions were, and are, punished with severity."<sup>288</sup> Unlike the Church's orthodoxy of the Seventeenth Century, today's orthodoxy on race and silence hardly depends on enforcement through a sovereign. In and out of the law's bureaucracies (in and out of law classrooms, in and out of faculty meetings, in and out of courtrooms), we are effectively silenced about race, racism, and oppression.

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285. *Id.* at 5.

286. *Id.* at 6.

287. Even Sor Juana, although silenced at the time, was ultimately victorious given the contemporary prominence of her work and the resonance of her voice. See Fuentes, *supra* note 281, at 203 ("Yet she defeated her silencers. Her baroque poetry had the capacity to hold forever the shapes and words of the abundance of the New World. . . .")

288. Paz, *supra* note 227, at 6.

*D. Silence and Silencing: A Personal Narrative*

The date is Monday, April 11, 1995; there is a faculty meeting scheduled for 4 p.m. I am in my third year of teaching; many days I feel I am not doing well. My first Article has been published,<sup>289</sup> but at times I feel oddly diminished by it in the eyes of my colleagues. I conclude that most have not read it and that those who have merely dismiss it. It is not really legal scholarship, they say. I am advised to write a traditional article showing that I can analyze cases or interpret statutes. But I am a story teller and a yarn weaver; it comes to me through imitation, from sitting near my grandfather's wheelchair to listen to his folktales<sup>290</sup> and at my grandmother's kitchen table to hear her hilarious *mitotes y chismes* about neighbors, friends, and relatives. Stories defined my childhood world; they drew the lines for me around what was funny, polite, and irreverent. As kids, we learned about the adult world through stories—about pregnancies, break-ups, illness, death, and even sex, in the vaguest of terms. And so stories become the way I make sense of my adult world—my life as a student, a lawyer, a mother, and now as a professor. Professor. By May 1995, the title no longer seems so strange when I see it next to my name. Professor Montoya. I am growing to like teaching, writing, and public speaking.

But I digress. On this April afternoon, I enter the women's bathroom on the second floor of the law school. I am in the bathroom stall when my eye catches my name scrawled on the door. I feel myself inhale, my heart is racing, my eyes fill with tears. There is graffiti covering the top third of the door. It has been marked through, but with the door at an angle, I can make out the words. I am having trouble breathing, my knees are buckling, my ears are buzzing, my eyes and nose are leaking. I read the words: **IF YOU LIKE HEAD / AND HAVE A BIG BLACK DICK / PROF. MONTOYA WILL GIVE IT A LICK.**

I make it down to the Dean's office. I am crying incoherently. I tell him there is graffiti about me, in the women's bathroom. He does not ask what it says. I realize he does not want to know. Instead, he instructs his assistant to go see about it. She returns and says it has been taken care of. I try to compose myself for the faculty meeting. I sit in the chairs against the wall rather than at the table. During the Dean's report, he tells the faculty that there has been an incident. A resolution is introduced, deploring the

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289. See Montoya, *supra* note 7.

290. See generally 1 & 2 JUAN B. RAEI, CUENTOS ESPAÑOLES DE COLORADO Y NUEVO MEXICO (SPANISH FOLK TALES OF COLORADO AND NEW MEXICO) (1977) (publishing a collection of stories like the oral ones of my grandfather).

incident. Someone wants to know what has happened. Another colleague says that she saw the graffiti, and it was a vile expression of racism and sexism. Someone sitting next to me passes me a note that says, "time for máscaras."<sup>291</sup> Finally, I say that the graffiti was about me, but I don't give any details.

Are you wondering why I was silent? In retrospect, I was silent because I had been well-trained, even in situations of intense emotions. I read the signals of those around me; I knew how to act—I knew to be silent.

After the meeting, a colleague drives me home. I fall into my husband's arms. I cannot talk; he does not know what has happened. I cry for what seems like hours. Finally, he or I or both of us together decide to go buy some spray paint and return to the law school. By now, all that remains is darkly blackened words. I hear the bee-bees in the spray paint as my husband stands next to me removing any trace of the offending words. That is his intent. He wants it to be gone, as do I. That night I write the following:

*An Open Letter to a Graffiti Writer:*

*On Monday afternoon, I found your message in the women's bathroom. I have no other way of reaching you so I have decided to respond to you with an open letter. Graffiti of the kind you wrote is hate speech and it can only be countered by being responded to. Silence in the face of hate speech makes us all complicit.*

*We are part of a community that is charged with delicate and weighty responsibilities. As a law school, we are charged with studying the norms and the rules we use to regulate the behavior of all of us who come together as a society. We place a high value on our ability to listen to diverse opinions and to work towards consensus, or when disputes occur to resolve them. As a community, we strive to communicate about difficult issues. As lawyers, effective communication is our product and our process.*

*Graffiti is the antithesis of what we aspire to at this law school. Graffiti is anonymous, public, secretive, intentional and harmful. Graffiti<sup>292</sup> is a grenade. Graffiti may hit the intended target but it also splatters all those exposed to it.*

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291. See Montoya, *supra* note 7. ("Máscaras," the Spanish word for masks, appears in the title of my first article and refers to the mechanisms used by people of color to deflect the effects of racism and other forms of subordination.)

292. Today in retrospect I would correct this to say "hate speech is a grenade."

*I try to picture you writing the vulgar words. It must have been scary. If you had been caught, the penalties would have been severe, possibly leading to expulsion. What could I have done to provoke you to engage in such risky behavior? What button did I press that so angered you that you decided to strike out at me and in striking out at me put yourself in jeopardy.*

*You and I are now linked in a way we were not before. When I walk through the forum or the lunchroom, I will wonder if you are watching me, perhaps waiting to attack again. I can't stop you. I can offer you an alternative. You have gotten even. You have hurt and embarrassed me and I have to assume that you felt hurt by me in the past.*

*I invite you to write back or to suggest another way for us to communicate. Anonymously if you prefer.*

—Prof. Montoya

*I never sent the letter. Three days later I went to the campus police to file a complaint. I wanted the incident investigated and knew that I would have to initiate the process. When I told the officer in charge that I wanted to complain about a hate crime, he misunderstood me and led me outside, thinking I said I wanted to complain about a hit and run. I was handed a clipboard and told to fill out a complaint form. I filled it out, but I never filed it. I still have it in a folder.*

*Today that bathroom door remains a silent reminder of that April day. I can still see the tiny streaks that formed when my husband sprayed away those cruel words. In my mind, I see the words each time I enter that bathroom. Today I feel a certain bond with that space—we were both defiled, the space and I. I never stopped using that bathroom; I did not want the incident to have power over me. But it has. Even now as my fingers tap out these words. I have been very conflicted, to the point of a day-in-bed-migraine, as I contemplated writing about this.<sup>293</sup> It is hard to know what gives me greater power—holding silence or breaking silence. Perhaps it would be best to be silent and not spread this story, a story that gives birth to thoughts that I cannot even imagine. Finally, I have decided that this incident silenced me, that my silence has not been volitional. Perhaps that was its purpose.*

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293. See WENDY S. HESFORD, FRAMING IDENTITIES: AUTOBIOGRAPHY AND THE POLITICS OF PEDAGOGY 94–118 (1999) (analyzing the risks of constructing women and members of other marginalized groups as victims rather than as agents of their own destinies, risks that are implicit in the use of autobiographical practices, especially within academia that “too often resorts to policy as its major paradigm of action.” *Id.* at 118.)

*Were it to happen again, I tell myself that I would react very differently. I would insist on taking a picture of the offending words, blowing it up poster-size or bigger, and even hanging the toilet stall door in the forum, in the center of the law school, for all to see. I truly do believe that hate speech must be seen, heard, experienced, and, most importantly, responded to. My instincts were correct that unhappy night when I wrote my open letter.*

We can be socialized into silence even when we have been trained to deal with ugly incidents involving race and genitalia and sex. We can be deluded into a sense of false propriety by hate speech. The virulent racism and sexism (homophobia and other prejudices) of hate speech are too often covered over with silence. For all the reasons I have been exploring in this Article, I contend that the legal culture that we participate in, with its language, discourse, practices, and courtesies, inveigles us into silence about incidents having to do with race, and most especially about incidents having to do with race, genitalia, and sex acts. Round and round we go; legal actors locked in dances to the lyrics of "Don't ask, Don't tell."

Part of the explosive potential of racialized hate speech is that it threatens to blow the lid off the silence that is typically maintained over public discourse and legal discourse. The centripetal power of legal discourse is tested during these episodes when the legal structures, institutions, and actors are forced to confront the tremendous centrifugal force of hate speech. Suddenly there is racism at its nakedest. But our training and socializing wins the day, and silence descends.

The orthodoxy on racial silence is so diffused and its effects so implicated in legal processes that it all is of one piece. Noting the implication of Sor Juana in her own silencing, Octavio Paz writes: "[U]sually the author is part of the system of tacit but imperative prohibitions that forms the code of the *utterable* in every age and society . . . . [T]ransgressions were, and are, punished with severity."<sup>294</sup> Unlike the Church's orthodoxy of the Seventeenth Century, today's orthodoxy on race and silence hardly depends on enforcement through a sovereign. In and out of the law's bureaucracies (in and out of law classrooms, in and out of faculty meetings, in and out of courtrooms), we are effectively silenced about race, racism and oppression.

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294. PAZ, *supra* note 227, at 6.

## CONCLUSION

This Article attempts to develop a theory about silence and silencing as they relate to race relations in a polyglot and multiracial society like the United States. This theorizing is done within the developing traditions of the anti-subordinationist movement called LatCrit (or Latina/o critical legal theory). Consequently, this Article draws primarily on scholarship, histories, narratives, and life experiences from the Latina/o world.

Borrowing Bakhtinian vocabulary, this conceptualization of silence and silencing incorporates the imagery of rotational forces, i.e., the centripetal and centrifugal forces, to describe the centering or de-centering effects of language. The centripetal force is linked to the notion of a "unitary" language, one that allows only limited meanings for words and for nonverbal cues, such as silence. The centrifugal force is linked to "heteroglossia," the multi-tongued meanings that are available for words and other codes within languages that are free to draw from the experiences of people and their diverse life experiences. While these forces are typically conceived in opposition to one another, I prefer to think of them as more relational than binary. Other students of Bakhtin agree that:

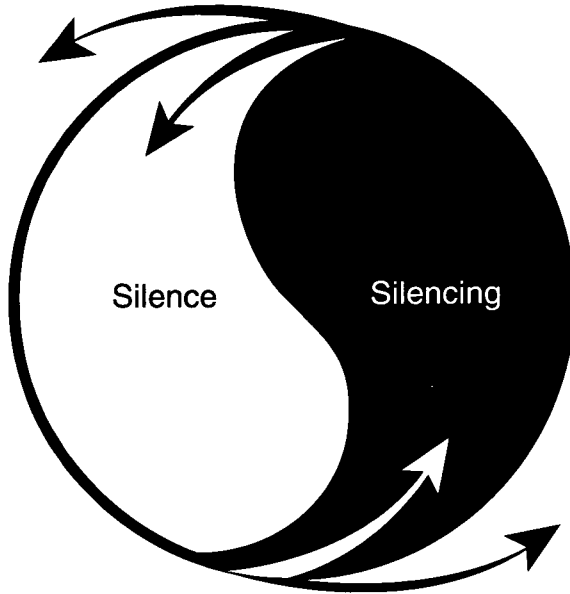
[his] sense of duality does not arise from, nor does it depict, a concept of binary opposition, but rather leads in the opposite direction and stresses the fragility and ineluctably historical nature of language . . . . The discursive interaction Bakhtin illustrates, therefore, certainly suggests the presence of forces that oppose and struggle; however, it seems to resemble the reciprocal and unending dynamism, say, of Taoist *yin* and *yang* tendencies more than a dichotomous process. . . .<sup>295</sup>

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295. KALAMARAS, *supra* note 22, at 27 (internal quotations omitted).

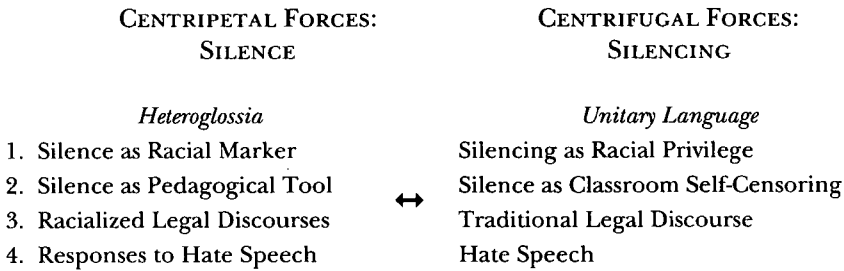


FIGURE 3



The following tabular display of the various aspects of discourse that I have discussed in this Article may clarify the comparison of these forces. (See Figure 4.) However, this type of display has the tendency to be viewed as binary, which is why I have placed it here in close proximity to the *yin/yang* symbol that I think better illustrates my analysis. (See Figure 3.) Because classroom silences can be volitional or imposed or both at once, I have shown this relationship with a double arrow.

FIGURE 4



Antonio Gramsci theorized that “[h]egemony . . . operates in a dualistic manner: as a general conception of life for the mass of people, and as a scholastic programme or set of moral-intellectual principles which is reproduced by a sector of the educated stratum.”<sup>296</sup> Consequently, because of the role that academics play in the production and maintenance of the forces of hegemony, I think it is particularly appropriate that LatCrits consider the hegemonic effects of the law school classroom and of legal discourse, more generally.

LatCrits and other progressive scholars of color can use silence in a counter-hegemonic manner, namely, we can learn to hear silence in oral and written communications and inquire into its meanings; we can learn to hold silence as a means of resistance or as a way of communicating counter-majoritarian values; and we can teach with and about silence in order to introduce courtesies and modes of behavior that disrupt and subvert the dominant conventions.

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296. Carl Boggs, *THE TWO REVOLUTIONS: GRAMSCI AND THE DILEMMAS OF WESTERN MARXISM* 161 (1984) (citations omitted).

