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THE PARADOX OF SILENCE: SOME QUESTIONS ABOUT SILENCE AS RESISTANCE

Dorothy E. Roberts*

INTRODUCTION

Professor Margaret Montoya's article *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse* is a fascinating exploration of the many possible interpretations of silence in legal arenas and discourse.[1] Tapping a rich literature on silence, Professor Montoya demonstrates that silence has many meanings. It signifies different things in different cultures, and it is used in a multitude of ways by women of color. Moreover, the meaning of silence changes depending on the context. Silence is not just the absence of voice; silence is "an interactive process" that responds to the conduct of other human beings.[2] Because dominant groups are often ignorant about silence's multiple meanings, they tend to misinterpret the silences of subordinated people.[3] A central theme of Professor Montoya's article is that both dominant and subordinated groups use language in their interests: traditional legal discourse "produce a centripetal force that constantly centralizes power and privilege within the hands of those dedicated to maintaining the status quo," while outsiders use language to "produce centrifugal forces that decentralize and destabilize that power and privilege."[4] Professor Montoya asserts that one of the subordinating uses of language by dominant groups is to silence outsiders.[5] She also argues that one of outsiders' tools of resistance is silence. Silence, Professor Montoya suggests, can be deployed as an anti-subordination tool

* Professor, Northwestern University School of Law; Faculty Fellow, Institute for Policy Research. B.A. 1977, Yale University; J.D. 1980, Harvard Law School. Thanks to mi hermana [my sister], Lisa Iglesias, for inviting me to participate in this Symposium and to Sarah Mervine for research assistance.

1. Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847 (2000), 33 U. MICH. J.L. REFORM 263 (2000).
2. *See id.* at 5 MICH. J. RACE & L. at 859, 33 U. MICH. J.L. REFORM at 275.
3. *See id.* at 5 MICH. J. RACE & L. at 873, 33 U. MICH. J.L. REFORM at 289.
4. *See id.* at 5 MICH. J. RACE & L. at 852, 33 U. MICH. J.L. REFORM at 268.
5. *See id.* at 5 MICH. J. RACE & L. at 853, 33 U. MICH. J.L. REFORM at 269.

for communication.[6] Thus, silence on the part of women of color contains a paradox: our silence may be a product of oppression or it may be a means of resistance against oppression.

I find Professor Montoya's claim that silence can be a resistance strategy extremely enlightening and provocative. The project of listening to the voices of outsiders and examining deviance from dominant norms from their standpoint is one of the most important tasks of critical scholars.[7] We often discover that what the dominant society labels deviance constitutes an act of resistance. Resistance theorists restore the critical notion of human agency, while recognizing the constraints of structure and hegemony; they "have attempted to demonstrate that the mechanisms of social and cultural reproduction are never complete and always meet with partially realized elements of opposition."[8] Yet this scholarly pursuit is fraught with complications and pitfalls. I have many questions about the notion of silence as resistance.

In Part I, I note the difficulty in distinguishing between silencing and silence as resistance. This difficulty has often led people in power to misinterpret the silence of people of color. Part II further explores the complications of incorporating the study of silence into resistance scholarship. I illustrate this complexity by discussing the silencing of welfare mothers and the use of language by women of color to challenge dominant medical discourse. Part III considers Professor Montoya's proposal to use silence as a pedagogical tool. Continuing my examination of silence as both liberating and accommodating, I distinguish between silence in the classroom as a method for subverting the dominant style of speech and silence as reinforcement of students' reluctance to express their opinions in class. Finally, using Professor Montoya's story about racist graffiti, Part IV emphasizes that silence may constitute complicity in marginalizing discourse rather than resistance

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6. *See id.* at 5 MICH. J. RACE & L. at 854, 33 U. MICH. J.L. REFORM at 270.

7. The work of Regina Austin and Mari Matsuda provide excellent examples of this project. *See generally* Regina Austin, *Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877 (1992); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992) [hereinafter, Austin, *"The Black Community"*]; Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

8. Henry A. Giroux, *Theories of Reproduction and Resistance in the New Sociology of Education: A Critical Analysis*, 53 HARV. EDUC. REV. 257, 259 (1983).

to that discourse. In short, silence provides a fruitful yet complicated arena of study for resistance scholars.

I. MISINTERPRETATIONS OF SILENCE

First, it seems very hard to distinguish between silencing from oppression and silence as resistance to oppression. As Professor Montoya observes, silence "is, in and of itself, ambiguous."[9] Indeed, many of Professor Montoya's examples of silence are misinterpretations of outsiders' nonverbal communication.[10] The stereotype and caricature of native peoples as "the silent Indian" arose largely from faulty and arrogant studies by White ethnographers.[11] Peasant women in Mexico were similarly caricatured by researchers who erased their linguistic identities through the homogenizing label of Indian.[12] Lawyers for Robyn Kina, an Australian Aborigine charged with murdering her partner, misconstrued their client's Aboriginal way of communicating.[13] They were far more successful at learning Kina's story when, assisted by the sociolinguist Diana Eades, they employed Aboriginal methods of seeking information, including "silence, and waiting till people are ready to give information."[14] Black Americans, on the other hand, have a tradition of deliberately using ambiguous language to conceal their thoughts from White people.[15]

Professor Montoya also uses *Hernandez v. New York*[16] to illustrate the discrimination against linguistic minorities that results from

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9. Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 863, 33 U. MICH. J.L. REFORM at 279.

10. *See infra* notes 11–20.

11. *See* Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 864, 33 U. MICH. J.L. REFORM at 280.

12. *See id.* at 5 MICH. J. RACE & L. at 867, 33 U. MICH. J.L. REFORM at 283.

13. *See id.* at 5 MICH. J. RACE & L. at 886–88, 33 U. MICH. J.L. REFORM at 302–04.

14. *Id.* at 5 MICH. J. RACE & L. at 887, 33 U. MICH. J.L. REFORM at 303 (quoting DIANA EADES, LANGUAGE IN EVIDENCE: ISSUES CONFRONTING ABORIGINAL AND MULTICULTURAL AUSTRALIA 27–28 (1995)).

15. *See* LAWRENCE W. LEVINE, BLACK CULTURE AND BLACK CONSCIOUSNESS: AFRO-AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM at xiii (1977) (quoting slave song: "Got one mind for white folks to see, 'Nother for what I know is me. He don't know, he don't know my mind"); *see also* Dorothy E. Roberts, Rust v. Sullivan *and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 635–36 (1993) (discussing the use of counter-stories that resist and subvert the dominant version of reality).

16. 500 U.S. 352 (1991).

misunderstanding their silence, pausing, and hesitation.[17] In *Hernandez*, the United States Supreme Court held that a prosecutor's use of peremptory challenges to exclude Latinos from the jury did not violate the Latino defendant's equal protection rights because the prosecutor offered a race-neutral explanation.[18] The prosecutor justified the peremptory strikes on grounds that the jurors hesitated when asked whether their Spanish fluency would make it difficult for them to accept the official court interpreter's translation.[19] Professor Montoya posits that the prosecutor misconstrued the jurors' hesitancy—or silence—as a negative response.[20] This miscommunication became the basis for excluding the Spanish-speaking jurors and denying the defendant his right to a fair trial by a jury of his peers. These examples show that the silence of people of color is easily and often misunderstood.

II. ACCOMMODATION OR RESISTANCE?

This ambiguity should make scholars cautious about their own interpretations of silence. Resistance scholarship requires us to discern the transformative potential of what is largely a response to subjugation.[21] The distinction between what is compelled and what is defiance is not always apparent. Moreover, some conduct that superficially appears to oppose the dominant structure actually supports it.[22] In searching for subversive acts, we risk helping to reproduce the social order by mistakenly valorizing behaviors that

17. *See* Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 873–79, 33 U. MICH. J.L. REFORM at 289–95.

18. *See id.* at 5 MICH. J. RACE & L. at 874, 33 U. MICH. J.L. REFORM at 290 (citing *Hernandez*, 500 U.S. at 352).

19. *See id.* at 5 MICH. J. RACE & L. at 875, 33 U. MICH. J.L. REFORM at 291 (citing *Hernandez*, 500 U.S. at 357 n.1).

20. *See id.* at 5 MICH. J. RACE & L. at 877–79, 33 U. MICH. J.L. REFORM at 293–95.

21. I discuss the complexities of seeing resistance in Dorothy E. Roberts, *Deviance, Resistance, and Love*, 1994 UTAH L. REV. 179 (1994), responding to Regina Austin, *"A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147 (1994).

22. For example, some types of Black lawbreaking, such as civil disobedience of Jim Crow laws or informal economic activity that violates city licensing laws, may subvert racist institutions, while others, such as drug dealing in Black communities, may reinforce these institutions. *See generally* Austin, *"The Black Community," supra* note 7.

perpetuate the dominant mindset.[23] Writing about resistance, then, is a worthwhile but tricky business. Can we tell the difference between silence that is coerced by repression and silence that is an act of resistance? Does outsiders' silence in response to dominant speech challenge the status quo or simply acquiesce in it? Professor Montoya wisely counsels that we should study silence: "[W]e can learn to hear silence in oral and written communications and inquire into its meanings."[24] Professor Montoya is right that our ultimate task is not to figure out a theoretical distinction between subjugation and resistance, but to listen to those who have been silenced so that we might learn how to work toward a more just society.

My sense, however, is that most of the instances of silence Professor Montoya describes reflect its subordinating rather than its liberating aspect. Perhaps my impression arises from my familiarity with Black women who have been punished for their refusal to remain silent.[25] Professor Montoya quotes bell hooks who also questions the notion of silence as resistance: "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."[26] Thus, it might be more fruitful for resistance scholars to explore ways of making Black women's subversive speech more effective, rather than focusing on their silence.

A. Silencing Welfare Mothers

Two examples of Black women's encounters with dominant discourse illustrate my questions about seeing silence as a form of resistance. First, I discuss the silencing of Black welfare mothers as part of a ritual of humiliation by the bureaucrats who supervise

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23. *See id.* at 1780 ("A praxis based on a literal association of lawbreakers with race-war guerillas could be justified only by a gross magnification of the damage black criminals actually inflict on white supremacy and a gross minimization of the injuries the criminals cause themselves and other blacks.").

24. Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 911, 33 U. MICH. J.L. REFORM at 327.

25. *See infra* notes 27–51 and accompanying text.

26. Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 872, 33 U. MICH. J.L. REFORM at 288 (quoting bell hooks, *Talking Back*, *in* MAKING FACE, MAKING SOUL/HACIENDO CARAS: CREATIVE AND CRITICAL PERSPECTIVES BY WOMEN OF COLOR 207, 207–08 (Gloria Anzaldua ed., 1990)).

them. Second, I discuss the use of language by women of color to challenge dominant medical discourse.

Dependence on the government for public assistance has subjected many women of color to silencing and humiliation by state agents.[27] Welfare mothers have been forced to assume a submissive stance lest offended caseworkers cut them from the rolls.[28] Lucie White has told the poignant story of her client's use of a submissive identity as a survival strategy during a welfare hearing challenging her purchase of Sunday shoes for her daughter.[29] Noncompliant recipients risk not only financial sanctions but also brutal retaliation at the hands of welfare office security guards.[30]

Lucie White has also noted in another article that the litigation process, the dominant way of settling welfare recipients' claims, has the effect of silencing poor people.[31] The courtroom is a foreign setting that employs discourse to which most poor people are not accustomed.[32] The judges and lawyers in authority constantly interrupt recipients' stories and interpret them according to unfamiliar rules and norms.[33] In addition, the courthouse evokes feelings of terror for many poor people because they associate it with jail and eviction, rather than justice.[34]

LaJoe, one of the mothers in Alex Kotlowitz's *There Are No Children Here*, experienced such a silencing encounter when welfare fraud investigators charged her with unlawfully sharing her apartment with her husband.[35] LaJoe barely refuted the charges because she did not understand them or the process that was supposed to determine her guilt or innocence: "She spoke so softly that the

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27. *See* Lucie E. White, Goldberg v. Kelly *on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 867 (1990) (noting the constitutional remedy in *Goldberg v. Kelly* "has not compelled the government to treat recipients with dignity").

28. *See* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 5 (1990).

29. *See id.*

30. *See* THERESA FUNICIELLO, TYRANNY OF KINDNESS: DISMANTLING THE WELFARE SYSTEM TO END POVERTY IN AMERICA 24 (1993).

31. *See* Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 543 (1987–1988) [hereinafter White, *Mobilization on the Margins*].

32. *See id.* at 542–43.

33. *See id.*

34. *See id.* at 543.

35. *See* ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA 96 (1991).

four inquisitors had to lean forward to hear her."[36] Kotlowitz describes the silencing impact this humiliating experience had on LaJoe:

> Confused and upset, LaJoe walked silently out of the room, slamming the door behind her. She would later apologize to her inquisitors for her impoliteness, but she wouldn't offer much defense against the department's charges. She didn't deny that Paul occasionally stayed over. She didn't ask whether she was entitled to legal counsel. She didn't ask whether she would get money to feed her children. She didn't ask for a caseworker to come out and look at her home. Now, as she made her way through the labyrinth of desks, she wondered how to break the news to the kids.[37]

Professor White proposes that lawyers help their clients speak out by providing "parallel spaces" outside the formal litigation process where they can "speak their own stories of suffering, accountability and change, free from the technical and strategic constraints imposed by the courtroom."[38]

B. Challenging Dominant Medical Discourse

Doctor-patient communication provides another context where women of color have been penalized for refusing to be silent. Professor Montoya uses research on silence in doctor-patient interactions to illustrate the potential for miscommunication in asymmetrical power relationships.[39] These studies conducted by feminist researchers in doctors' offices confirm her hypothesis about the dual nature of silence. Sue Fisher and Alexandra Dundas Todd have demonstrated in their studies of doctor-patient communications that medical decisions reflect the social and political context in which they are made.[40] Fisher and Dundas Todd

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36. *Id.*
37. *Id.* at 97.
38. White, *Mobilization on the Margins*, *supra* note 31, at 546.
39. *See* Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 885–86, 33 U. MICH. J.L. REFORM at 301–02.
40. *See* ALEXANDRA DUNDAS TODD, INTIMATE ADVERSARIES: CULTURAL CONFLICT BETWEEN DOCTORS AND WOMEN PATIENTS 66–70 (1989) [hereinafter DUNDAS TODD, INTIMATE ADVERSARIES]; SUE FISHER, IN THE PATIENT'S BEST INTEREST: WOMEN AND THE POLITICS OF MEDICAL DECISIONS 17–19 (1986) [hereinafter FISHER, BEST INTEREST]; Sue

discovered that the physician's authority shapes the way language is used during a medical interview, often enabling physicians to persuade and dominate women patients.[41]

Race, class, and gender all affect the nature of these interactions. Dundas Todd found in her observations of doctor-patient encounters that "the darker a woman's skin and/or the lower her place on the economic scale, the poorer the care and efforts at explanation she received."[42] These women were more likely to be considered "difficult" and "to be talked down to, scolded, and patronized."[43]

In *Reconstructing the Patient: Starting with Women of Color*, I suggest that the experience of both racism and sexism profoundly affects the relationship women of color have to medical practice and may encourage opposition to its oppressive aspects.[44] The political dimension of doctor-patient communications that feminist scholars identified is more apparent when the patient is a woman of color.[45] These women receive inferior care and, because they often rely on public clinics, they are less likely to enjoy private, protective relationships with their doctors.[46] Moreover, these women may be more willing to resist medical supervision because they are more suspicious of doctors' claims of beneficence.[47] Thus, examining communication between women of color and their physicians may provide insight into modes of resistance. I do not see silence, however, as a tool these women use; rather, I see these women as adopting a language that challenges the dominant terms of medical practice.

In her field study of the cultural meaning of prenatal diagnosis in New York City, for example, anthropologist Rayna Rapp discovered race and class variation in women's descriptions for their

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Fisher & Alexandra Dundas Todd, *Friendly Persuasion: Negotiating Decisions to Use Oral Contraceptives, in* DISCOURSE AND INSTITUTIONAL AUTHORITY: MEDICINE, EDUCATION AND LAW 3 (Sue Fisher & Alexandra Dundas Todd eds., 1986) [hereinafter Fisher & Dundas Todd, *Friendly Persuasion*].

41. *See* DUNDAS TODD, INTIMATE ADVERSARIES, *supra* note 40, at 47–75; FISHER, BEST INTEREST, *supra* note 40, at 59–89; Fisher & Dundas Todd, *Friendly Persuasion*, *supra* note 40, at 3.

42. DUNDAS TODD, INTIMATE ADVERSARIES, *supra* note 40, at 77.

43. *Id.*

44. *See* Dorothy E. Roberts, *Reconstructing the Patient: Starting with Women of Color, in* FEMINISM AND BIOETHICS 116, 117 (Susan M. Wolf ed., 1996).

45. *See id.* at 117.

46. *See id.*

47. *See id.*

amniocentesis decision.[48] Most middle-class women (who were disproportionately White) accepted amniocentesis in words that resembled traditional medical language. Poorer Black women, on the other hand, "were far less likely to either accept, or be transformed by, the medical discourse of prenatal diagnosis."[49] These women often explained their decision either to use or to reject amniocentesis in terms of nonmedical systems of interpreting their pregnancies, including religion, visions, and folk healing.[50] Rapp concluded that "[p]aradoxically, White middle-class women are both better served by reproductive medicine, and also more controlled by it, than women of less privileged groups."[51]

Doctors' dismissive or even antagonistic attitudes toward patients of color may be partly retaliation for their opposition to dominant medical norms. There is evidence, for example, that doctors are more likely to force medical treatment upon minority patients. A national survey published in 1987 discovered twenty-one cases in which court orders for involuntary cesarean sections were sought, eighty-six percent of which were granted.[52] Eighty-one percent of the women involved were women of color, and all were treated in a teaching-hospital or were receiving public assistance.[53] Like the women in Rayna Rapp's study, some women forced to undergo surgery explained their refusal to follow the doctor's orders in nonmedical terms. For example, Jessie Mae Jefferson rejected her doctor's recommendation of cesarean delivery because of her religious belief that "the Lord has healed her body and that whatever happens to the child will be the Lord's will."[54] Judges and doctors often dismiss these explanations not expressed in the dominant medical language as illegitimate. They describe pregnant women of color who refuse medical treatment as angry,

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48. *See* Rayna Rapp, *Constructing Amniocentesis: Maternal and Medical Discourses, in* UNCERTAIN TERMS: NEGOTIATING GENDER IN AMERICAN CULTURE 28, 30 (Faye Ginsburg & Anna Lowenhaupt Tsing eds., 1990).

49. *Id.* at 31–32.

50. *See id.*

51. *Id.* at 40.

52. *See* Veronika E.B. Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 N. ENG. J. MED. 1192, 1192 (1987).

53. *See id.*; *see also* Janean Acevado Daniels, *Court-Ordered Cesareans: A Growing Concern for Indigent Women*, 21 CLEARINGHOUSE REV. 1064, 1065 (1988) (comparing general distribution of cesarean sections with that of cesareans performed pursuant to court order).

54. Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457, 459 (Ga. 1981). For a discussion of this and other forced cesarean section cases, see Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205, 1240–46 (1992) [hereinafter Ikemoto, *Perfect Pregnancy*].

irrational, fearful, stubborn, selfish, and uncooperative.[55] The medical model of childbirth interprets these women's words in a way that justifies the doctors' control.

The paradox Rapp noted with respect to amniocentesis decisions is present in the context of forced medical interventions as well. It appears that White middle-class women more readily consent to their doctors' recommendations of cesarean surgeries, even though these surgeries are performed at excessive rates.[56] Women of color, on the other hand, appear more willing to reject their doctors' orders, as well as the dominant medical language.[57] I suspect their opposition stems both from an alternative cultural view of birth and their distrust of medical authority. Nancy Ehrenreich suggests that the court-ordered treatment of women of color may constitute a coercive response to their acts of resistance to doctors' control of their childbearing.[58]

III. SILENCE AS PEDAGOGICAL TOOL

Professor Montoya proposes that law professors use silence as a pedagogical tool to challenge the stifling effects of the dominant communication style of the White majority.[59] Professor Montoya asserts that silence "can be a significant positive signal to students of color that their language patterns are not deficient."[60] Because of silence's ambiguity, this use of silence also raises questions. What exactly is the purpose of our deliberate use of silence?

One possibility is that by employing silence, the professor subverts the dominant style of speech in law school classrooms. By

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55. *See* Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487, 502 (1992); Rapp, *supra* note 48, at 33.

56. *See* Council on Ethical and Judicial Affairs, *Black-White Disparities in Health Care*, 263 JAMA 2344, 2345 (1990) (reporting that five-year study of deliveries in four New York City hospitals found that "private patients were more likely than clinic patients to have a cesarean section, even though the private patients were less likely to have medical problems or to be delivered of low-birth-weight babies"); Linda R. Monroe, *Affluent Women Twice as Likely as Poor to Have Cesarean Births*, L.A. TIMES, July 27, 1989, at 3.

57. *See* Ikemoto, *Perfect Pregnancy*, *supra* note 54, at 501–02; Rapp, *supra* note 48, at 33.

58. *See* Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 520–65 (1993).

59. *See* Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 879–82, 33 U. MICH. J.L. REFORM at 295–98.

60. Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 856, 33 U. MICH. J.L. REFORM at 272.

breaking through the fast-paced aggressive banter, typically dominated by White male students, silence allows less aggressive students of color to compose their thoughts and to participate. A recent opinion piece by Robert Schaeffer, the Director of Public Education for FairTest, a group advocating testing reform, explained why virtually all the contestants on the popular game show *Who Wants to be a Millionaire* are White men.[61] The selection process begins with a call-in qualifying round in which candidates are asked three multipart general knowledge questions.[62] A contestant has only ten seconds to respond to each question by pressing the telephone keypad.[63] This type of testing is likely to favor White men and to rule out women and people of color:

> A large body of research on standardized testing shows that responding quickly to recall-based, multiple choice items in a high-pressure setting is a skill in which men in general, and brash White men in particular, excel. Women do better when time constraints are relaxed, when subtleties matter, and when "strategic guessing" is not rewarded.[64]

The same is true for many minorities.[65]

This insight on how standardized testing puts outsiders at a disadvantage supports Professor Montoya's suggestions for law teaching. It suggests that the fast pace of law school discussions, like standardized testing, may be more comfortable for White male students than for others and that the pauses created by silence may encourage female and minority students to participate more.

Another interpretation of Professor Montoya's proposal is that professors should affirm the silence of students of color by modeling similar communication patterns.[66] I am more skeptical of this possible pedagogical method. I imagine many students of color who are silent have answers and opinions racing through their minds but are too intimidated or uncomfortable to articulate them. Professor Montoya recounts student confessions to her

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61. *See* Robert Schaeffer, *Who Wants to Be a Contestant?*, N.Y. TIMES, Feb. 19, 2000, at A15.
62. *See id.*
63. *See id.*
64. *Id.*
65. *See id.*
66. *See* Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 879–82, 33 U. MICH. J.L. REFORM at 295–98.

about panic attacks caused by the fear of speaking in class.[67] Our goal for these students of color should be to help them speak up more rather than to encourage them to remain silent.

One reason Professor Montoya gives for the silence of students of color is the elision of race, gender, and sexual orientation from traditional legal reasoning. Professor Montoya explains, "[t]he 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."[68] My experience in the classroom suggests that students of color themselves can help to incorporate racialized information into the curriculum. For the last two years I have had no African American men in my first-year criminal law class. I notice their absence most at the very end of the course when we discuss *People v. Goetz*.[69] The case concerns the reasonableness of Bernhard Goetz's belief that deadly force was necessary when four Black teenagers approached Goetz on a New York City subway car asking for money. Everyone knows the issue that made this case so explosive was whether it was reasonable for Goetz to take into account the race of the teenagers in deciding that his life was in jeopardy.[70] If no student is willing to bring this question to the forefront, I do. But the ensuing discussion is markedly different when there are no Black men in the class than when there are, especially if they are willing to speak up. Black male students often add a missing perspective, explaining from their own experience the dangers of using racial stereotypes about Black criminality as a basis for determinations of reasonableness.

At Rutgers Law School in Newark, where I previously taught, a strong minority student program ensured that there were always vocal Black students in my classes. The school's affirmative action program sought to admit a substantial number of minority and disadvantaged White applicants. It also offered programs during the school year to help students admitted through this process excel in class work and participate in classroom discussion and other school activities. One year a particularly militant Black man took a

67. *See id.* at 5 MICH. J. RACE & L. at 882, 33 U. MICH. J.L. REFORM at 298.
68. *Id.* at 5 MICH. J. RACE & L. at 892, 33 U. MICH. J.L. REFORM at 308.
69. 532 N.E.2d 1273 (N.Y. 1988).
70. On the reasonableness of stereotypes of Black criminality, see generally Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (analyzing the proclaimed "reasonableness" of stereotypes of Black criminality).

White student to task for suggesting that it was reasonable for Goetz to base his decision on racial stereotypes. He went on to instruct his classmates on the damaging impact this sort of thinking has on people like him. After class, a White female student cornered me to complain about how I had handled the discussion. She advised me that I should have silenced the Black student because his comments about White racism were offensive to White students. (Other White students, on the other hand, told me they found the discussion enlightening.) I responded that the Black student had added important and relevant insight on the question of reasonableness and it would have been wrong for me to forbid him to speak.

IV. SILENCE AS COMPLICITY

It is not clear that silence will aid in inserting forgotten aspects of identity into the classroom discussion. Indeed, Professor Montoya recognizes that maintaining silence about our reality in the face of the dominant discourse is not only difficult, but may make us "*complicit* in one's own marginalization."[71] Far from being a tool of resistance, silence in the classroom or the courtroom may be a form of accommodation.

Professor Montoya's personal story about silence and silencing illustrates this point. Professor Montoya's response to the vicious graffiti in the bathroom was not to remain silent. She reported the incident to the dean.[72] When she found the dean's response inadequate, she took further action. First she and her husband returned to the school and covered the graffiti with black spray paint.[73] Then she wrote an open letter to the graffiti writer.[74] Significantly, she included the following statement condemning silence: "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.*"[75]

However, Professor Montoya never published the letter. Even today, she grapples with the paradox of silence I highlight here: "It

71. Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 892, 33 U. MICH. J.L. REFORM at 308 (emphasis added).
72. *See id.* at 5 MICH. J. RACE & L. at 905, 33 U. MICH. J.L. REFORM at 321.
73. *See id.* at 5 MICH. J. RACE & L. at 906, 33 U. MICH. J.L. REFORM at 322.
74. *See id.*
75. *Id.*

is hard to know what gives me greater power—holding silence or breaking silence."[76] Reading her gripping story, I understand the pressure to remain silent, to avoid stirring up any more attention to the damaging words. Yet I find it hard to see silence as resistance in this case. How did remaining silent give her "greater power"? In the end, Professor Montoya concludes that her silence was not voluntary, but the very objective of the graffiti writer.[77] She states that, were the incident to happen today, she would broadcast the offending words rather than keep quiet about them.[78] Thus, although Professor Montoya considers the possibility that holding silence might be a form of resistance, she concludes that in this instance silence constituted just the opposite—complicity with the very forces that sought to degrade her.

Professor Montoya's story about the graffiti illustrates perfectly the risks inherent in interpreting silence as a form of resistance. It might be tempting to see her silence as a voluntary response that gave her power against the perpetrator's act of subordination. But Professor Montoya's subsequent reflections reveal that this misinterprets her ambiguous reaction. In fact, her silence was not an act of defiance, but a *silencing* intended by the writer. Acquiescence in the will of the oppressor by maintaining silence can even constitute complicitous participation in one's own subordination. This does not mean that silence is never an act of resistance. But Professor Montoya's experience highlights the care scholars must take in interpreting silence as resistance.

CONCLUSION

Professor Montoya includes in her essay a strong message against silence: "We must learn to talk about the deep issues in law and culture, to openly debate them rather than smother them in silence."[79] This will only happen when our students of color speak up and resist the silencing impact of the dominant discourse. Although silence may sometimes be a means of resistance, silence is often the very objective of subordinating forces. Remaining silent in the face of injustice may even turn people into accomplices in

76. *Id.* at 5 MICH. J. RACE & L. at 907, 33 U. MICH. J.L. REFORM at 323.
77. *See id.*
78. *See id.* at 5 MICH. J. RACE & L. at 908, 33 U. MICH. J.L. REFORM at 324.
79. *Id.* at 5 MICH. J. RACE & L. at 894, 33 U. MICH. J.L. REFORM at 310 (quoting Dirk Tillotson, Constitutional Eracism (unpublished manuscript, on file with author)).

injustice. Black women's experience in welfare and doctors' offices shows that silencing is a powerful tool to reinforce subordination, while language can be a powerful tool to resist the dominant mindset. As scholars, we must be attendant to the risks of misinterpreting silence. As professors, we must study our students' modes of communication to determine which perpetuate their own silencing and which resist it. We must develop a repertoire of pedagogical tools, including silence, to help them resist more. Professor Montoya's thoughtful exegesis on silence makes an important contribution to this project.