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# A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process

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## A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process

As a clinical teacher, I am often struck by my students' strange knack for remaining silent when a direct verbal response is required and talking incessantly when silence should be the most appropriate reaction. In an initial interview, for example, most students in a law school clinic will fail to probe adequately into the details of the controverted factual issues in the case or transaction but will chatter on nervously while the client, frozen by the emotions of the situation, painfully pauses or remains silent in her recitation of her story.<sup>1</sup> Similarly, in negotiations, some students, confronted with an experienced and confident adversary, will become wordless, paralyzed by fear of making a mistake. But other students—and for that matter, many of their experienced counterparts—view the bargaining process solely as an occasion for displaying their verbal sparring prowess, failing to pause to listen to the arguments of their adversaries or to give themselves or their opponents the “quiet time” to work together to develop creative solutions. Likewise,

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<sup>1</sup> The tendency of many inexperienced lawyers to fear pauses and silences by clients is not unique to the legal profession. See Christopher F. Sharpley, *The Influence of Silence upon Client-Perceived Rapport*, 10 COUNSELING PSYCHOL. Q. 237, 238 (1997) (“Trainee [mental health] counsellors are afraid of silence. They do not know how to react to silence and blame their lack of skills, perhaps trying to overcome it with words.”); WILLIAM D. BROOKS, *SPEECH COMMUNICATION* 131 (1971) (“The inexperienced interviewer is often afraid of pauses and silences. He tends to fill every silence, and so doing, rushes through the interview.”).

in court arguments, many students have the tendency to react to a powerful argument from an adversary or an unforeseen question from a judge as deer-caught-in-the headlights. But, when some students observe a judge skewering an opponent with tough questions or suggesting that she will rule in their favor, they, for some unexplained reason, feel the urge to interrupt and blather in support of their positions.<sup>2</sup>

In recent years an extensive literature has developed on communication styles of attorneys, recognizing that form can be as important as content in the lawyering process. These writings range from "recipe books" presenting scripts for handling common occurrences in a case,<sup>3</sup> to social science research examining the impact of communication styles on different aspects of lawyering,<sup>4</sup> to texts using that research to suggest effective methods for communicating with clients, adversaries, and decision-makers.<sup>5</sup> Most of these works assume that a lawyer's skill is almost exclusively verbal and focus primarily on how a lawyer should craft language to communicate effectively. As one commentator puts it, "Lawyers are students of language by profession. They exercise their power in court by manipulating the thoughts and opinions of others, whether by making speeches or questioning witnesses. In these arts the most successful lawyers reveal (to those who can appreciate their performance) a highly developed skill."<sup>6</sup> While this literature examines the use of language in the representation of clients, it largely ignores the role of silence in

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<sup>2</sup> The late Judge Hubert L. Will of the U.S. District Court for the Northern District of Illinois would often warn attorneys in such situations, "When you're winning, shut up! If you keep on talking, I just might change my position."

<sup>3</sup> See, e.g., KENNEY F. HEGLAND, TRIAL AND PRACTICE SKILLS IN A NUTSHELL (1978); EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS (4th ed. 1998); THOMAS A. MAUET, TRIAL TECHNIQUES (5th ed. 2000).

<sup>4</sup> See, e.g., JUDITH N. LEVI & ANNE G. WALKER, LANGUAGE IN THE JUDICIAL PROCESS (1990); WILLIAM M. O'BARR, LINGUISTIC EVIDENCE—LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM (1982); Brenda Danet, *Language in the Legal Process*, 14 L. & SOC'Y REV. 445, 453 (1980); John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 78 DUKE L.J. 1375 (1978).

<sup>5</sup> See, e.g., ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, & NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (1990); DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991); RONALD J. MATLON, COMMUNICATION IN THE LEGAL PROCESS (1988).

<sup>6</sup> FREDERICK A. PHILBRICK, LANGUAGE & THE LAW: THE SEMANTICS OF FORENSIC ENGLISH (1949).

the lawyering process. Moreover, it rarely acknowledges that words can, at times, impede communication.

When legal commentators do address the role of silence in the lawyering process, they either mention it in passing<sup>7</sup> or view it in a negative light.<sup>8</sup> Some, for example, emphasize the importance of listening skills in counseling and negotiation, but fail to scrutinize the function of silence in these communications or to identify circumstances when listening facilitates communication and when it can be harmful.<sup>9</sup> More commonly, they assume that silence on the part of a lawyer, client, or witness has a negative connotation and discourage its use for clear communication. One commentator, for instance, observes:

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<sup>7</sup> See, e.g., BINDER ET AL., *supra* note 5, at 50 (describing silence as a technique for use in client interviewing).

<sup>8</sup> Although no previous articles address silence as a communication skill in lawyering, several consider silence as a legal doctrinal issue, such as the Fifth Amendment right to remain silent and the meaning of silence in statutory structures, in contract formation, or in agency relationships. See, e.g., Dennis Kurzon, *Silence in the Legal Process: A Sociopragmatic Model*, in LEGAL SEMIOTICS AND THE SOCIOLOGY OF LAW 297 (Bernard S. Jackson ed., 1994); DENNIS KURZON, DISCOURSE OF SILENCE 51 (1998); O'BARR, *supra* note 4; Dennis Kurzon, *The Right of Silence: A Socio-Pragmatic Model of Interpretation*, 23 J. PRAGMATICS 55 (1995); Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1 (1995). While these articles consider the communicative impact of silence as a concept in argument and legal decision-making, this Article will focus exclusively on the lawyer's use of silence in communicating with clients, adversaries, and legal decisionmakers.

<sup>9</sup> See, e.g., DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS 1-25 (2d ed. 1997) (in explaining how lawyers can use the techniques of actors to enhance their courtroom performances, author provides exercises on improving speech level, strength, and endurance, but only briefly acknowledges the role of silence in acting); MATLON, *supra* note 5, at 25-26 (in discussing the art of communication in interviewing, counseling, negotiations, and trials, author limits his discussion of silence to a brief reference in regard to interviewing technique); ANDREW S. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS (1976) (in discussing the importance of listening skills in an interview, author merely notes that silence in an interview can have a variety of meanings, and cautions that it is important to be aware of the ambiguity of silence). Interestingly, while two of the most well-known texts on legal interviewing and counseling briefly discuss silence as a helpful "passive listening" technique in client interviewing, their emphasis is on "active listening," which, they assert, helps attorneys demonstrate empathy to their clients in interviewing and counseling. DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 23-37 (1977) [hereinafter BINDER & PRICE]; BINDER ET AL., *supra* note 5, at 50, 52-68. They define "active listening" as "the process of picking up the client's message and sending it back in a reflective statement which mirrors what the lawyer has heard . . . ." BINDER & PRICE, *supra*, at 25. This technique concentrates not so much on the skill of using silence to develop a relationship with the client as on the verbal skill of demonstrating to the client an understanding of her problem. In this way it only feeds into the image of the chattering lawyer.

Silence during a trial may present considerable problems for the court. By its very nature, silence is ambiguous and therefore messy. Questions about its meaning may lurk in the shadows unless the court or the attorneys assume an active role in resolving the ambiguities. For example, what does it mean when a witness is slow to answer or generally reticent? What meaning lies in the behavior of a hesitant witness—careful thinking in order to report recollections faithfully or cautious planning to fabricate a false version?<sup>10</sup>

In contrast to their legal counterparts, scholars in other disciplines have begun to recognize the significance of silence as a powerful means of communication.<sup>11</sup> They reject the notion that

<sup>10</sup> O'BARR, *supra* note 4, at 104 (emphasis omitted).

<sup>11</sup> Although it may sound like an oxymoron, a large "silence literature" has developed in a number of diverse areas over the last several decades. See, e.g., anthropological studies: Jaakko Lehtonen & Kari Sajavaara, *The Silent Finn*, in PERSPECTIVES ON SILENCE 193 (Deborah Tannen & Muriel Saville-Troike eds., 1985); Gregory O. Nwoye, *Eloquent Silence Among the Igbo of Nigeria*, in PERSPECTIVES ON SILENCE 185 (Deborah Tannen & Muriel Saville-Troike eds., 1985); K.H. Basso, 'To Give Up on Words': *Silence in Western Apache Culture*, in LANGUAGE AND SOCIAL CONTEXT 67 (Pier Paola Giglioli ed., 1972); Tmomohiro Hasegawa & William B. Gudykunst, *Silence in Japan and the United States*, 29 J. CROSS-CULTURAL PSYCHOL. 668 (1998); William J. Samarin, *Language of Silence*, 12 PRAC. ANTHROPOLOGY 115 (1965); psychological and psychiatric research: Roy C. Calogeras, *Silence as a Technical Parameter in Psycho-Analysis*, 48 INT'L J. PSYCHO-ANALYSIS 538 (1967); Gita Martyres, *On Silence: A Language for Emotional Experience*, 29 AUSTL. & N.Z. J. PSYCHIATRY 118 (1995); Sharpley, *supra* note 1; Christopher F. Sharpley, *Antecedents, Consequents, and Effects of Silence During Cognitive-Behavioural Therapy Interviews*, 24 SCANDANAVIAN J. BEHAVIOR THERAPY 1 (1995); S.R. Slavson, *The Phenomenology and Dynamics of Silence in Psychotherapy Groups*, 16 INT'L J. GROUP PSYCHOTHERAPY 395 (1966); religious studies: Ronald B. Bond, *God's "Back Parts": Silence and the Accommodating Word*, in SILENCE, THE WORD AND THE SACRED 169 (E.D. Blodgett & H.G. Coward eds., 1989); ANDRÉ NEHER, *THE EXILE OF THE WORD: FROM THE SILENCE OF THE BIBLE TO THE SILENCE OF AUSCHWITZ* (1981); Richard Bauman, *Aspects of 17th Century Quaker Rhetoric*, 56 Q.J. SPEECH 67 (1970); literary criticism: LESLIE KANE, *THE LANGUAGE OF SILENCE: ON THE UNSPOKEN AND THE UNSPEAKABLE IN MODERN DRAMA* (1984); PHILIP C. MCGUIRE, *SPEECHLESS DIALECTS: SHAKESPEARE'S OPEN SILENCE* (1985); Nathan Stucky, *Interactional Silences: Pauses in Dramatic Performance*, 21 J. PRAGMATICS 171 (1994); philosophical works: SUSAN SONTAG, *STYLES OF RADICAL WILL* 3 (1966); GEORGE STEINER, *LANGUAGE AND SILENCE* (1967); Mark S. Muldoon, *Silence Revisited: Taking the Sight Out of Auditory Qualities*, 50 REV. METAPHYSICS 275 (1996); communication studies: ADAM JAWORSKI, *THE POWER OF SILENCE: SOCIAL & PRAGMATIC PERSPECTIVES* (1993) [hereinafter JAWORSKI, *THE POWER OF SILENCE*]; Adam Jaworski, *Aesthetic, Communicative and Political Silences*, in Laurie Anderon's *Performance Art*, in SILENCE: INTERDISCIPLINARY PERSPECTIVES 15 (Adam Jaworski ed., 1997) [hereinafter Jaworski, *Aesthetic, Communicative and Political Silences*]; Helen M. Newman, *The Sound of Silence in Communicative Encounters*, 30 COMM. Q. 142 (1982); music studies: JOHN CAGE, *SILENCE: LECTURES & WRITINGS* (1961); Thomas Clifton, *The Poetics of Musical Silence*, 62 MUSICAL Q. 164 (1976); Stan Link, *Much Ado About Nothing*, 33 PERSP.

silence is simply the absence of speech and contend that silence can serve positive, as well as negative, communicative functions.<sup>12</sup> They assert that like speech, silence can have a wide variety of meanings depending upon several factors, including the mental states of the participants, the context of the discourse, and the culture within which the communication occurs.<sup>13</sup> As communication studies scholar Richard L. Johannesen observes,

Depending upon the backgrounds of the participants, the occasion, and the verbal and nonverbal contexts surrounding the silence, the following list identifies a number of typical potential meanings: (1) The person lacks sufficient information to talk on the topic. (2) The person feels no sense of urgency about talking. (3) The person is carefully pondering exactly what to say next. (4) The silence may simply reflect the person's normal rate of thinking. (5) The person is avoiding discussion of a controversial or sensitive issue out of fear. (6) The silence expressed agreement. (7) The silence expressed disagreement. (8) The person is doubtful or indecisive. (9) The person is bored. (10) The person is uncertain of someone else's meaning. (11) The person is in awe, or raptly attentive, or emotionally overcome. (12) The person is snooty or impolite. (13) The person's silence is a means of punishing others, of annihilating others symbolically by excluding them from verbal communication. (14) The person's silence marks a characteristic personality disturbance. (15) The person feels inarticulate despite a desire to communicate; perhaps the topic

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NEW MUSIC 216 (1995); marketing research: Alan G. Sawyer, *Can There Be Effective Advertising Without Explicit Conclusions? Decide for Yourself*, in NONVERBAL COMMUNICATION IN ADVERTISING 159 (Sidney Hecker & David W. Stewart eds., 1988); Frank R. Kardes, *Spontaneous Inference Processes in Advertising: The Effects of Conclusion Omissions and Involvement on Persuasion*, 15 J. CONS. RES. 225 (1988); G. Douglas Olsen, *Creating the Contrast: The Influence of Silence and Background Music on Recall and Attribute Importance*, 24 J. ADVERTISING 29 (1995) [hereinafter Olsen, *Creating the Contrast*]; G. Douglas Olsen, *The Sounds of Silence: Functions and Use of Silence in Television Advertising*, 34 J. ADVERTISING RES. 89 (1994) [hereinafter Olsen, *The Sounds of Silence*]; Jeremy Taylor & Alec MacKenzie, *The Power of Silence in Selling*, 83 BUS. Q. 38 (1983).

<sup>12</sup> See, e.g., BERNARD P. DAUENHAUER, SILENCE: THE PHENOMENON AND ITS ONTOLOGICAL SIGNIFICANCE 5 (1980); Muriel Saville-Troike, *The Place of Silence in an Integrated Theory of Communication*, in PERSPECTIVES ON SILENCE 3, 4 (Deborah Tannen & Muriel Saville-Troike eds., 1985); Deborah Tannen, *Silence: Anything But*, in PERSPECTIVES ON SILENCE 93, 94-96 (Deborah Tannen & Muriel Saville-Troike eds., 1985); Thomas J. Bruneau, *Communicative Silences: Forms and Functions*, 23 J. COMM. 17, 18-19 (1973).

<sup>13</sup> Obviously, these commentators acknowledge that some silences, just as some speech (e.g., the rambling of a poor lecturer) are not communicative. See, e.g., JAWORSKI, THE POWER OF SILENCE, *supra* note 11, at 34 (observing that not all possible types of silence are communicative); Saville-Troike, *supra* note 12, at 4 ("Just as not all noise is part of 'communication,' neither is all silence.").

lends itself more to intuitive sensing than to verbal discussion. (16) The person's silence reflects concern for not saying anything to hurt another person. (17) The person is daydreaming or preoccupied with other matters. (18) The person uses silence to enhance his own isolation, independence, and sense of self-uniqueness. (19) The silence marks sulking anger. (20) The person's silence reflects empathic exchange, the companionship of shared mood or insight.<sup>14</sup>

Moreover, these commentators reject the view that it is impossible or very difficult to guess which of these meanings apply in a particular context. Indeed, most argue that there is a grammar of silence, a set of rules structuring the relationship between verbal utterances and the unspoken, which demonstrates the function of silence in a given situation.<sup>15</sup> This grammar may seem, at first blush, more difficult to understand than the grammar of the verbal, but it still can be similarly decoded.<sup>16</sup>

The purpose of this Article is to explore the theories of silence developed in other disciplines and apply them to an understanding of silence in different aspects of the lawyering process. This Article will first consider the purposes of speech and the general relationship between utterances and silence. It will then examine the various forms and functions of silence: pauses and hesitations; intervening silences; fore and after silences; silences to communicate assent; silences to promote discussion; silence as an assertion of power; deep silences communicating intense emotions; and silences to mark interpersonal distance. Then this Article will address cross-cultural differences as to the use and views of silence. Finally, it will apply research on the functions of silence to the practice of law, focusing specifically on the skills of client communication; fact investigation; negotiation; and legal narrative.

The basic thesis of this Article is that effective lawyering requires an awareness of the significant role that silence plays in communication.<sup>17</sup> Most lawyers love to hear the sound of their

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<sup>14</sup> Richard L. Johannesen, *The Functions of Silence: A Plea for Communication Research*, 38 W. SPEECH 25, 29 (1974) (citation omitted).

<sup>15</sup> See Saville-Troike, *supra* note 12, at 4.

<sup>16</sup> See IVAN D. ILLICH, *CELEBRATION OF AWARENESS: A CALL FOR INSTITUTIONAL REVOLUTION* 46 (1970) (noting that mastering the grammar of silence is an art much more difficult learning than the grammar of sound).

<sup>17</sup> Although written communication also has its silences, see generally Saville-Troike, *supra* note 12, at 5 ("Written language is obviously also verbal and nonvocal . . . but its nonverbal dimension—signaled by spacing and punctuation—has received inadequate consideration. Writing, too, has silences. This is perhaps most

own voices and often view silence—either on their own part or on the part of their client, a witness, or an opposing attorney—as a sign of weakness. Consistent with the culture of much of contemporary society—from nonstop news/talk stations to always-within-reach cell phones to incessant background music in every aspect of our lives—many lawyers feel the need to avoid silence at all possible costs. In the process, they can get lost in all the noise. As speakers, they can easily turn off their audiences by talking too much; as listeners, their need to hear immediate responses, to fill in any silence, can create obstacles to fruitful discourse. As this Article will describe, silence frequently does not reflect a lack of knowledge or hesitancy, but provides a means for expressing feelings and ideas. Indeed, it often is one of the most effective ways of combating the noise of legal communication and reanimating the power of words.<sup>18</sup> Understanding these positive functions of silence can help attorneys better interpret silences on the part of a client, witness, or adversary; can assist them in communicating more effectively with clients, adversaries, and decision makers; and can give them an appreciation of the uses of the unspoken for persuasive advocacy.

Obviously, silence, just as verbal communication, does not always serve a positive function. At times, for instance, silence can indicate weakness, avoidance, lack of preparation, or deception. The point of this Article is not to endorse the unbridled use of silence as a means of communication or to encourage lawyers to assume that a client's or adversary's lack of response always reflects some deeper, profound meaning. I am not advocating that law schools become Trappist monasteries. Rather, this Article's thrust is to urge lawyers to become more conscious of their own

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highly developed in Japanese literature with the use of the silence marker ' . . . '). This article will concentrate solely on the subject of silence in attorneys' oral communication and not on legal writing issues. It will also not address directly the topic of "nonverbal communication," such as body language and facial expression, but will focus primarily on the function of the unspoken in communication without reference to other means by which the communicator might attempt to express herself.

<sup>18</sup> See Johannesen, *supra* note 14, at 28 (In modern society "the word has been cheapened. [S]ilence is an antidote. In silence we can reflect on the debasement of language and can prepare to reanimate the power and meaningfulness of words in human communication."); see also Terry Godlove, *Making Pauses Pregnant*, 27 PHIL. TODAY 132, 135 (1983) ("[A]s any actor or mystic could attest, silence—choosing to keep quiet—is an active, calculated human performance. A comic [for example] holds back a second or two before delivering his punch-line . . . ").



use of words and silence in their communication and to become more reflective about others' silence.

One of the foremost and prolific scholars in the area of silence research, Adam Jaworski, relates that when he began his study of the subject, he was struck by how he became like medical students studying particular diseases who diagnose themselves with the various ailments:

Of course, when I began work on silence I was also affected by a similar "disease." The more I thought about different forms and functions of silence . . . the more there was around me for the role of silence in communication. I was seeing it in my everyday encounters with others and in my perceptions of the ways people communicate and interact with each other.

It is my great hope that some of this silent disease has affected the readers of this book . . . .<sup>19</sup>

In this same vein, I hope that attorneys will catch the disease and become more sensitive to the functions of silence in their day-to-day communications.

## I

### LANGUAGE, SPEECH, AND SILENCES

Communication theorists contend that, at least for hearing individuals, there is no such thing as absolute silence. As one scholar suggests:

We are thoroughly enmeshed in layers of energy exchanges. The sonic expression of these exchanges is so constant that, for the most part, we remain unconscious of it. In short, there is no real escape from the noisy vibrancy of life. While our ears and its cochlea are our central receptors for hearing, there are no unique "points of view" to audition.<sup>20</sup>

Composer John Cage tells the story of his experience in an an-echoic chamber, a room made with special material to create as "soundproof" an environment as possible. He relates that, even under these conditions, he heard two sounds: one high (his ner-

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<sup>19</sup> JAWORSKI, *THE POWER OF SILENCE*, *supra* note 11, at 166-67. Another scholar in the area observes that when he told people that he was writing on the subject of silence, they invariably became interested and wanted to discuss the topic with him. ANDREW VOGEL ETTIN, *SPEAKING SILENCES: STILLNESS AND VOICE IN MODERN THOUGHT AND JEWISH TRADITION* xii (1994). I have had the same response in my writing of this article. Most people, especially lawyers, are excited by the subject and seem intuitively to understand its importance to our craft and our failure to use silence properly.

<sup>20</sup> Muldoon, *supra* note 11, at 284.

vous system in operation) and the other low (his blood in circulation). "Until I die," he concludes, "there will be sounds."<sup>21</sup> From a physiological perspective, therefore, silence is a relative term, and the notion of a "complete silence" is a misnomer.<sup>22</sup>

Likewise, from the standpoint of the function of language, silence is a relative term. It is not simply the absence of language.<sup>23</sup> The misconception that silence is totally apart from language arises from the mistaken belief that language is used solely to exchange information.<sup>24</sup>

Communication theorists contend, however, that in addition to the information exchange (the *ideational* function), language serves at least two other functions: *interpersonal*, and *textual*.<sup>25</sup> The ideational function represents those situations when the speaker, as observer, talks "about something": information about people, objects, actions, events, or the environment around her.<sup>26</sup> The interpersonal function concerns the interaction of the speaker with the audience. "This is the component through which the speaker intrudes himself into the context of the situa-

<sup>21</sup> Cage, *supra* note 11, at 8.

<sup>22</sup> Link, *supra* note 11, at 219:

[S]ince an absolute absence of sound is rare, if not impossible, we can accept it, reinvent it even, as a relative term. The washing machine stops and we call it silence even though now, with concentration, we hear the traffic of a very distant road. Later that night, when traffic has ceased to flow, we consider it silence to hear only the wind.

A professor at a college in rural Pennsylvania gave his students an assignment to take a walk in the countryside and try to find some silence. They all reported that they could not find it no matter how far they wandered. Karl Patten, *Teaching "Discovering Silence"*, in *SILENCE: INTERDISCIPLINARY PERSPECTIVES* 369, 371 (Adam Jaworski ed., 1997).

<sup>23</sup> See, e.g., Adam Jaworski, "White and White": *Metacommunicative and Metaphorical Silences*, in *SILENCE: INTERDISCIPLINARY PERSPECTIVES* 382 (Adam Jaworski ed., 1997) ("[S]ilence is a communicative resource whose manifestations go well beyond the absence of speech . . ."); Samarin, *supra* note 11, at 115 ("Silence can have meaning. Like the zero in mathematics, it is an absence with a function."); cf. Clifton, *supra* note 11, at 163. (Clifton observes, in regard to musical silences, that

to focus on the phenomenon of musical silence is analagous to deliberately studying the spaces between trees in a forest: somewhat perverse at first, until one realizes that these spaces contribute to the perceived character of the forest itself, and enable us to speak coherently of "dense" growth or "space" vegetation.).

<sup>24</sup> See Adam Jaworski, *Silence and Small Talk*, in *SMALL TALK* 110, 113 (Justine Coupland ed., 2000).

<sup>25</sup> MICHAEL A.K. HALLIDAY, *LANGUAGE AS SOCIAL SEMIOTIC: THE SOCIAL INTERPRETATION OF LANGUAGE AND MEANING* 112-13 (1978).

<sup>26</sup> *Id.* at 112.

tion, both expressing his own attitudes and judgments and seeking to influence the attitudes and behaviour of others.”<sup>27</sup> The textual function makes language relevant by giving it a context. It “signals whether a given text is intended as a lecture, poem, play, joke, chit-chat, or some other form of speech event.”<sup>28</sup>

Applying this theory to the legal context, consider the following transcript from an oral argument in the United States Supreme Court:

Thank you, Mr. Chief Justice, and may it please the Court:

18 U.S.C. 844(i) makes arson a Federal crime if it damages property used in interstate commerce or property used in any activity affecting interstate commerce.

The question here is whether petitioner’s arson of a private residence comes within the statute because that home received natural gas and was mortgaged and insured by out-of-state firms, and if so, whether that application of the statute to that crime is constitutional.

In the Government’s view, the power to regulate interstate commerce enables Congress to make a Federal crime out of any act that threatens or damages property having connections to interstate commerce or that interrupts or disrupts an ongoing commercial relationship with out-of-state parties. That view of the Commerce Clause would enable Congress to enact general Federal protections for virtually all property, including real property, although the general protection of property is one of the most basic core elements of an area of traditional state concern and competence.<sup>29</sup>

The ritual language at the beginning of this argument and the conventional oral argument introduction describing the legal issue are classic examples of the use of language for the textual function: “Mr. Chief Justice . . . may it please the Court: 18 U.S.C. 844(i) makes arson a Federal crime if it damages property used in interstate commerce or property used in any activity affecting interstate commerce. The question here is . . . whether that application of the statute to that crime is constitutional.” They express the context of the speech event: an appellate argument. No one, not even the most formalistic lawyer, would use this kind of language in casual, dinner conversation. The state-

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<sup>27</sup> *Id.*

<sup>28</sup> Adam Jaworski, *The Silence of Power and Solidarity*, in *Fallen Sons*, 33 *STUDIA ANGLICA POSNANIENSIA* 141 (1998).

<sup>29</sup> Transcript of Oral Argument, *Jones v. United States*, 2000 U.S. Trans. LEXIS 28, at \*1-2 (U.S. Mar. 21, 2000).

ment of the facts, that the case involved petitioner's arson of a private residence which received natural gas and was mortgaged and insured by out-of-state firms, is language used for the ideational function. It relates concrete information about the people, actions, and events of the case. The entire third paragraph serves an interpersonal function: by use of a "slippery slope" argument, the advocate attempts to persuade the justices of his position that under the government's view, the legislation would provide federal protection for virtually all property, including real property, an area traditionally within the province of the states.

As this short excerpt from the oral argument demonstrates, all communication, including discourse in the practice of law, consists of far more than exchange of information. Although information gathering and dissemination are certainly important components of lawyering in either the transactional or dispute resolution contexts, the interpersonal and textual aspects of language are also crucial to a lawyer's craft. In an interview with a client, for example, the interpersonal language used by the lawyer in eliciting information can have a significant effect on whether all the pertinent facts within the client's personal knowledge are discovered.<sup>30</sup> In a negotiation, the attorney's choice of language can set the context for the discussions by suggesting to the other side her attitude in regard to the issues on the table or telegraphing her seriousness about reaching a deal.<sup>31</sup> Finally, in a closing argument, regardless of the information the lawyer relates, her language choice can either connect with or alienate the finder-of-fact.<sup>32</sup>

Although silence, by its very nature, provides quite limited informational content about peoples, events, and actions, it can play a significant role in the realm of the interpersonal and textual functions of language. In fact, the dictionary definition of "silence" reflects the fact that silence is part of language, not totally distinct from it. The Oxford English Dictionary's defini-

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<sup>30</sup> STEFAN H. KRIEGER ET AL., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 78-83 (1999) (describing methods for formulating and organizing questions in a client interview).

<sup>31</sup> *Id.* at 272-74 (describing how the attorney's choice of negotiation style can communicate to the other side her negotiation strategy, her response to its strategy, or the eagerness to settle).

<sup>32</sup> See Gerry Spence, *Let Me Tell You A Story*, 31 TRIAL 73, 74 (1995) (urging plaintiff's attorneys to craft compelling stories in their closing arguments to bring their clients' cases to life).

tions, for example, allude to both the interpersonal functions of silence, as an alternative or response to speech,<sup>33</sup> as well as its textual functions, as a deliberate state or condition,<sup>34</sup> or even as a type of communication.<sup>35</sup>

In the context of oral communication, silence and speech are not total opposites. Rather they constitute a "continuum of forms ranging from the most prototypical instances of silence to the most prototypical instances of speech."<sup>36</sup> In a limited capacity, silence allows speech to make sense. Obviously, speech would be pure gibberish without some silences.<sup>37</sup> On a very basic level, the cessation of sound in the production of consonants creates the pattern of consonants and vowels that makes "speech." Pausing or hesitating within the stream of speech makes it possible for each speaker to take her turn. Lulls within a particular conversation give each party an opportunity to reflect on the discourse.<sup>38</sup> Without silence, speech would be nothing but endless noise and could not perform any of the functions of language. Indeed, in situations where speakers do not take a breath, engage in simultaneous discourse, or fail to take a time out from heated arguments, speech can actually be disruptive of communication.<sup>39</sup>

In a broader role, silence can have its own propositional meaning, apart from its effect on the surrounding speech.<sup>40</sup> "Just as one can utter words without saying anything, one can say some-

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<sup>33</sup> 15 OXFORD ENGLISH DICTIONARY 465 (2d ed. 1989) ("The fact of abstaining or forbearing from speech or utterance (sometimes with reference to a particular matter); the state or condition resulting from this; muteness, reticence, taciturnity[:] . . . to put to silence, to silence by argument[:] . . . silence gives consent").

<sup>34</sup> *Id.* ("[t]he renunciation of speech chosen or vowed by certain religious or monastic orders, esp. the Trappists; a period during which the members of a community or retreat renounce speech. Freq. in phr. the rule of silence"); *id.* at 466 ("[a] period of silence observed in memory of the dead, esp. the two minutes' silence kept on the anniversary of Armistice Day (11 Nov. 1918)").

<sup>35</sup> *Id.* at 466 ("*the rest is silence* . . . in allusion to the last words of the dying Hamlet (SHAKES, Ham. V. ii. 368)").

<sup>36</sup> JAWORSKI, THE POWER OF SILENCE, *supra* note 11, at 34.

<sup>37</sup> See Bruneau, *supra* note 12, at 18 ("Silence is to speech as the white of the paper is to this print.").

<sup>38</sup> PERSPECTIVES ON SILENCE xvii (Deborah Tannen & Muriel Saville-Troike eds., 1985).

<sup>39</sup> See KANE, *supra* note 11, at 19 (observing, in discussing the works of modern playwrights, that "language, rather than breaking down the walls of isolation . . . often serves to perpetuate barriers of misunderstanding").

<sup>40</sup> Saville-Troike, *supra* note 12, at 6.

thing without uttering words.”<sup>41</sup> Examples of such silences are numerous: refusing to answer a question; ignoring a tactless comment; communicating anger or resentment; acknowledging agreement with a proposal; or expressing awe or respect for the other party. And just as the meaning of speech depends in part on silences, the meaning of silences hinges largely on the surrounding utterances. A particular silence only has meaning in the context of its surrounding utterances. As one theorist puts it, the “*act of saying*” consists of two basic components: the said and the unsaid. The former component includes the actual utterance and those real and imagined ones that precede it and that follow. The unspoken presumptions and implications belong to the latter.”<sup>42</sup>

At every point in a communication, each participant in the discourse has a choice of a wide range of alternatives within the continuum of speech as noise to “absolute” silence. Although we may often imagine that our selection of a type of utterance or type of silence is some automatic mechanism, verbal communication is “fundamentally a decision-making process in which . . . a speaker . . . selects from a repertoire of available codes” which she feels is most appropriate for the particular situation.<sup>43</sup> Just as we can choose the specific words that we use to give an argument or tell a story, we can decide to pause, to hesitate, to give the other participants time to reflect, or to give a wordless response. Within the context of a particular discourse, therefore, we all have the ability to use silence as part of our language to communicate the meaning we choose.

The repertoire of codes (of either speech or silence) from which we select depends in part on the particular culture in which we are communicating. While in some cultures, for example, “density” of speech is valued, in others silence is a virtue and

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<sup>41</sup> *Id.* (citation omitted).

<sup>42</sup> JAWORSKI, *THE POWER OF SILENCE*, *supra* note 11, at 44.

A genuine emptiness, a pure silence are not feasible—either conceptually or in fact. If only because the artwork exists in a world furnished with many other things, the artist who creates silence or emptiness must produce something dialectical: a full void, an enriching emptiness, a resonating or eloquent silence. Silence remains inescapably, a form of speech . . . and an element in a dialogue.

See generally Sontag, *supra* note 11, at 11.

<sup>43</sup> Basso, *supra* note 11, at 68.

loquaciousness is considered anti-social.<sup>44</sup> As Jose Ortega y Gasset puts it, "[e]ach language represents a different equation between manifestations and silences. Each people leaves some things unsaid in order to be able to say others."<sup>45</sup> Accordingly, the decision-making process of when to use speech or silence or any combination of the codes along the noise-silence spectrum may hinge in some way on the specific community's attitudes toward silence.<sup>46</sup>

This part of the Article has described how silence is not the absence of language, but an integral part of it, especially in the realm of language's interpersonal and textual functions. It has also shown that silences can have meaning and that, within the context of any given speech act, the speaker has a choice of a full spectrum of communication tools, from "noisy" speech to absolute silence. In the next section of this Article, I will discuss specifically the different forms and functions of silence in communication.

## II

### FORMS AND FUNCTIONS OF SILENCE

#### A. *Silence as a Noncommunicative Act*

Any discussion of the functions of silence initially needs to acknowledge the obvious fact that not all silence is communication.<sup>47</sup> Communication does not occur, for instance, when a passenger on a bus sleeps wordlessly through the trip next to her seat-mate; when a visitor to an art gallery stands silently awestruck by a work of art; when a hushed courtroom sits still mesmerized by a closing argument; or when an abused woman cowers in silence when attacked by a man.<sup>48</sup> Just as not all noise is part of speech, the absence of sound does not necessarily constitute communication.<sup>49</sup>

Moreover, some silences between parties have no communicative content whatsoever but merely structure the relationship be-

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<sup>44</sup> For a full discussion of cultural attitudes toward silence, see *infra* notes 155-67 and accompanying text.

<sup>45</sup> See also JOSE ORTEGA Y GASSET, *MAN AND PEOPLE* (1957).

<sup>46</sup> See *infra* notes 210-11 and accompanying text.

<sup>47</sup> Saville-Troike, *supra* note 12, at 4.

<sup>48</sup> In regard to the silencing of subordinated classes, see *infra* note 111 and accompanying text.

<sup>49</sup> *Id.*

tween them. Two strangers, for example, standing wordlessly on a subway platform maintain silence to refrain from, not engage in, communication. Or a bride and a groom seek to avoid any contact on their wedding day to avert any bad luck. And in a house of worship, courtroom, or public ceremony, observers are often expected to be quiet because of institutional expectations.<sup>50</sup> In numerous other similar situations, we all use silence to prevent the initiation of verbal interaction or to maintain social distance.<sup>51</sup>

In discussing the forms and functions of silence, this Article will focus primarily on the communicative functions which it serves.

## *B. Silence as a Means for Structuring Communication*

### *1. Pauses and Hesitations*

In the film, *Pulp Fiction*, after thirty-three seconds of silence passes during a conversation between two of the characters, the following dialogue occurs:

Mia: Don't you hate that?

Vincent: Hate what?

Mia: Uncomfortable silences. Why do we feel it's necessary to yak about bullshit? In order to be comfortable?

Vincent: I don't know. That's a good question.

Mia: That's when you know you found somebody really special, when you can just shut the fuck up for a minute. Comfortably share silence.<sup>52</sup>

As this interchange reflects, pauses and hesitations can be perceived by listeners as either a benefit or detriment to communication. From a psycholinguistic standpoint, they give speakers the opportunity to structure their communications. They slow down the temporal sequence of speech to allow a speaker to have time to clarify the content of her utterance both for herself and for the listener.<sup>53</sup> Pauses and hesitations also facilitate turn-taking within the conversation by giving a listener the chance to respond to another participant.<sup>54</sup> Moreover, long pauses after a

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<sup>50</sup> Bruneau, *supra* note 12, at 41; The Second Foundation, *Silence is Deadly*, in THE EIGHTH LACUS FORUM 350, 350-51 (1981) (observing that "[e]ven an atheist is quiet during a sermon!").

<sup>51</sup> See *infra* notes 143-55 and accompanying text.

<sup>52</sup> PULP FICTION (Mirimax 1994).

<sup>53</sup> See generally Bruneau, *supra* note 12, at 23-27.

<sup>54</sup> See generally JAWORSKI, THE POWER OF SILENCE, *supra* note 11, at 16.



speaker's speech can often influence the direction of an ongoing conversation by suggesting the need for a transition to another topic.<sup>55</sup>

Nevertheless, because pauses and hesitations may suggest tentativeness, they are often experienced as "uncomfortable silences." Indeed, in one study, eighty-six percent of the participants reported feeling uncomfortable when silences occurred in their day-to-day interactions. "[T]hey reported feeling a 'pressure to talk' coupled with 'fear of disapproval by others.' Apparently a concern of many people, during silences, is that their conversation partner will 'think that they are stupid,' (or lacking in certain uncommunication skills)."<sup>56</sup> Speech makes discourse determinate by including definite observations, claims, and assertions about perceived reality. Silence, in contrast, is often indeterminate, reflecting a possible lack of knowledge and inviting new interpretations and responses.<sup>57</sup> We are not quite sure what the speaker is thinking and are left to guess at her meaning. Put succinctly, the lack of utterances may make us feel uncomfortable.

Despite this discomfort, however, pauses and hesitations can actually be beneficial. A number of commentators have criticized the phenomenon which Mia refers to in *Pulp Fiction* as the necessity we feel to "yak about bullshit." This tendency, at least in Western culture, to fill up silences with speech, they contend, ignores the benefits of pauses and hesitations in communication. First, silences increase our awareness of what we are saying. Our ability to process the information we are uttering—to translate the reality we are observing or experiencing into words—can often be enhanced by slowing down our speech and imposing silence.<sup>58</sup> And our ability to take appropriate turns, to listen and respond appropriately, is diminished as pauses and hesitations are decreased. As the French poet Max Picard observed:

Today words no longer rise out of silence, through a creative act of spirit which gives meaning to language and to the silence, but from other words, from the noise of other words. Neither do they return to silence but unto the noise of other words, to become immersed therein.

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<sup>55</sup> See Stucky, *supra* note 11, at 177-83.

<sup>56</sup> Newman, *supra* note 11, at 148.

<sup>57</sup> John McCarthy, *Silence: Descriptions and Queries*, 27 PHIL. TODAY 143, 145 (1983).

<sup>58</sup> See Bruneau, *supra* note 12, at 22.

Language has lost its spiritual quality; all that remains is its purely acoustic quality.

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Nobody listens to him as he speaks, for listening is only possible when there is silence in man; listening and silence belong together. Instead of truly speaking to others today we are all waiting merely to unload on to others words that have collected within us. Speech has become a purely animal, excretive function.<sup>59</sup>

The second virtue of pauses and hesitations in conversation is similar to the first: they encourage exploration of thoughts. By providing time for continuing or probing thought, these structural silences keep matters "open" for the speaker.<sup>60</sup> A famous quotation from the *Ethics of the Fathers* encapsulates this notion succinctly: "[Rabbi Gamliel's son] Shimon taught, 'Throughout my life I was raised among the scholars, and I discovered that there is nothing more becoming a person than silence.'"<sup>61</sup> Precisely because pauses and hesitations may indicate a lack of knowledge or certainty—an attribute most scholars want to avoid—we often clutter our speech with utterances but, in the process, inhibit close examination of the issues under discussion. Hesitancy can often lead to more serious reflection by the speaker.<sup>62</sup>

Finally, pauses and hesitations give us a better ability to correct and fine tune our language. By avoiding pauses and hesitations, we can become dissociated from the feelings we have and the thoughts we want to communicate. As Susan Sontag observes, silence provides "a kind of ballast, monitoring and even correcting language when it becomes inauthentic."<sup>63</sup> When we

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<sup>59</sup> MAX PICARD, *THE WORLD OF SILENCE* 168, 174 (Stanley Godman trans., 1952).

<sup>60</sup> Sontag, *supra* note 11, at 19-20; see generally The Second Foundation, *supra* note 50, at 354-55 (The article observes that "humans are neurologically organized such that they cannot successfully pay attention to both external verbal input and (conscious) internal verbalization. . . . One cannot both produce speech and understand speech at the same time.").

<sup>61</sup> Max. J. Ruttenberg, *Teachings of the Sages*, in SIDDUR SIM SHALOM 602, 609 (Jules Harlow ed., 1989).

<sup>62</sup> MAX. VAN MANEN, *RESEARCHING LIVED EXPERIENCE: HUMAN SCIENCE FOR AN ACTION SECTION PEDAGOGY* 112 (1990) ("[I]n interview situations it is often more effective to remain silent when the conversation haltingly gropes forward. Out of this space of silence a more reflective response often may ensue than if we try to fill the awkwardness of the silence with comments or questions that amount to little more than chatter.").

<sup>63</sup> Sontag, *supra* note 11, at 20.

write a document, we usually have the opportunity to edit our language to communicate as clearly as possible. With most conversational speech, however, we have no such opportunity. Pauses and hesitations give us the chance to clarify our speech.

## 2. *Intervening Silences*

A second form of silence which structures communication is "intervening silence."<sup>64</sup> While pauses and hesitations are primarily unintentional interruptions of the sequence of speech reflecting an effort to find the correct word or meaning, intervening silences are intentional attempts to punctuate words, phrases, or sentences to highlight the content of speech.<sup>65</sup> Of all the senses, only hearing gives the appearance of progressing through time; silences can give a pattern to this temporal flow.<sup>66</sup> Consider, for example, a comedian's telling of a joke. The silence before the punchline commands the audience's attention, stops what could be a monotonous flow. Without this silence, the joke could fall flat. Similarly, the tension created by the storyteller's silence before the suspenseful climax draws the listener's attention.

Philosopher Bernard Dauenhauer, who coined the term "intervening silences," notes that these punctuating silences can function in two ways: rhythmically and melodically.<sup>67</sup> In their rhythmic function, they provide recurring silences throughout a discourse, weaving a pattern into the speech. In their melodic function, they give a contour to the speech: depending upon their number, placement, and duration, they speed it up, slow it down, give it a sense of heights and depths.<sup>68</sup>

Both types of intervening silence aid in focusing the listener's attention on the content of the speech. "Everyone has experienced how, when punctuated by long silences, words weigh

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<sup>64</sup> See generally DAUENHAUER, *supra* note 12, at 6-9.

<sup>65</sup> *Id.* at 9 ("[T]he duration of the intervening silence is, within limits, at the discretion of the author of the utterance."); Sontag, *supra* note 11, at 20.

<sup>66</sup> Muldoon, *supra* note 11, at 279.

<sup>67</sup> DAUENHAUER, *supra* note 12, at 6.

<sup>68</sup> See Jaworski, *Aesthetic, Communicative and Political Silences*, *supra* note 11, at 23 (observing that "pauses add to the poetic character of everyday talk"). Of course, speakers can also give a rhythmic cadence to their speech with recurring patterns of words or phrases. Trial attorneys, for example, often choose a particular mantra in their closing arguments to highlight the theory of their case, for example, Johnnie Cochran, Jr.'s rhyming mantra in his closing argument in the O.J. Simpson case, "If it doesn't fit, you must acquit!" David Margolicklos, *Simpson's Lawyer Tells Jury That Evidence 'Doesn't Fit'*, N.Y. TIMES, Sept. 28, 1995, at A1.

more; they become almost palpable.”<sup>69</sup> In fact, one study of radio advertising appears to support this proposition.<sup>70</sup> In that study, the subjects listened to different commercials: (1) some with background music throughout; (2) others with no background music; and (3) still others with background music that cut to silence just before essential information is presented and resumed after the presentation. The researchers found that in the third scenario, the subjects had a greater retention of the information presented.<sup>71</sup> The “background silence,” by interrupting the noise for a few seconds right before the presentation, drew the listener’s attention and made the information more vivid. Moreover, the perceived importance of the information presented was increased in the noise-silence-noise advertisement.<sup>72</sup>

### 3. *Fore and After Silence*

Related to intervening silences, a third form of structuring silences is “fore and after silence.” Within a discrete utterance, intervening silences make particular sound phrases (words, phrases, and sentences) distinct from every other sound phrase. In contrast, fore and after silences make every particular utterance distinct from another utterance.<sup>73</sup> They serve a framing function for speech: fore silences provide the open space immediately before the utterance begins, and after silences furnish an interval immediately after the utterance.<sup>74</sup> They give a silent backdrop for all communication.<sup>75</sup>

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<sup>69</sup> Sontag, *supra* note 11, at 20.

<sup>70</sup> Olsen, *Creating the Contrast*, *supra* note 11, at 29.

<sup>71</sup> *Id.* at 41.

<sup>72</sup> This effect was significant, however, only for an attribute of a product that a subject initially thought was least important. *Id.* at 42.

<sup>73</sup> DAUENHAUER, *supra* note 12, at 11.

<sup>74</sup> *Id.* at 10-11.

<sup>75</sup> From a philosophical perspective, silence provides a backdrop for our lives.

It is silence that outlines and overbounds the world, as it does our own lives. We emerge from silence, and return to it. In our daily lives, at certain moments, the tumble of words ceases, and we find lurking outside each sentence is a silence. Often we ignore it or fend it off, for the silence makes us uneasy. Yet we know when we have passed through words, there is a stillness waiting.

DAVID J. WOLPE, IN SPEECH AND IN SILENCE: THE JEWISH QUEST FOR GOD 183 (1992); see also VAN MANEN, *supra* note 62, at 112 (“Speech rises out of silence and returns to silence . . . . Not unlike the way that an architect must be constantly aware of the nature of space out of which and against which all building occurs, so

Both fore silences and after silences serve important functions for communication, especially for formal and artistic presentations. Fore silences provide an anticipatory alertness before the utterance.<sup>76</sup> Consider, for instance, the suspense felt by an audience sitting in silence immediately before a symphony performance or a distinguished scholar's lecture. The audience feels the tension of the realization that from this silence a creative process has the potential for beginning, what the theologian Andre Neher calls "energetic silence."<sup>77</sup> Indeed, some of the impact that the sounds or utterances eventually make are an "echo of the silence," a validation of the anticipation.<sup>78</sup> As the American poet Howard Nemerov has observed, "The activity of the great poets [is that] their language . . . comes out of silence and speaks the silence."<sup>79</sup> Without this open space before the utterance, we may experience discomfort, a feeling that we have not had an adequate opportunity to prepare ourselves for the speech.<sup>80</sup>

While fore silences provide anticipatory suspense before the utterance, after silences allow us to savor the utterance.<sup>81</sup>

[After silence's benefit] as a phenomenon appears when one realizes that had it not occurred when it did, had the utterance continued, the utterance would have lost rather than gained in expressive force. . . . The size of a canvas is not irrelevant to the picture painted on it. They need to fit each other. And too long a tale of one's arthritic aches benumbs rather than moves the audience.<sup>82</sup>

While during an utterance the listener is usually focusing on the discrete points being made, after silence enables her to digest

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the human scientist needs to be aware of the silence out of which and against which all text is constructed.").

<sup>76</sup> DAUENHAUER, *supra* note 12, at 11.

<sup>77</sup> NEHER, *supra* note 11, at 40. Neher relates how any artist's creation develops from this "energetic silence": "The artisan knows this tension, now long drawn-out and now electric, which precedes the splendor of the act; the artist knows it too, as does whoever ponders over a work and elaborates it slowly until it suddenly leaps forth out of his hands or his brains."

<sup>78</sup> See Clifton, *supra* note 11, at 168 (observing this phenomenon in musical performance but noting, "that it occurs in speech too, when one articulates in words what was just implied in a pregnant silence").

<sup>79</sup> Patten, *supra* note 22, at 372.

<sup>80</sup> DAUENHAUER, *supra* note 12, at 11.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 10. Daunhauer continues, "[O]ne can recognize the distinctive character of after-silence by assuming, for example, that Eliot's *The Waste Land* is a well-crafted unity and then asking himself: What would happen to *The Waste Land* had Eliot not ended it where he did?" *Id.* at 11.

the entire utterance.<sup>83</sup> Moreover, it provides her the time to develop her own interpretation of what was said.<sup>84</sup>

### C. Silence as a Means for Communication

Most structuring silences have no propositional content. The bulk of pauses and hesitations are not volitional and, while they may communicate a meaning to the listener (for example, considered reflection, a lack of knowledge, permission for turn-taking), the speaker, by using these silences, usually does not intend to communicate a particular message. Intervening silences, on the other hand, may be intentional, but again the purpose is not to convey a message but rather to affect the meaning of the surrounding speech. Likewise, fore and after silences may be consciously produced but are made primarily to frame the particular utterance for the audience.

Some silences, however, do have propositional content.<sup>85</sup> Indeed, communication theorists assume that "a person cannot *not* communicate . . . listeners and observers will attach meaning to the silence whether the sender wishes or not."<sup>86</sup> Many silences are produced consciously and are meant to convey a particular meaning or message to the listener. In this way, they become a nonverbal utterance in the interaction between the parties. The message intended by the "speaker" for this silence and the meaning imputed to it by the listener will, of course, in large part depend on the particular context of the discourse. As the following discussion will show, depending upon the situation, different

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<sup>83</sup> See Link, *supra* note 11, at 251 (noting that "[s]ilence is to music what those extra two steps back are to a large pointillist painting: a means of completion").

<sup>84</sup> Consider this illustration from film:

The final frames of the classic movie *Queen Christina* focus on Greta Garbo's face. Garbo, as the queen sailing from Sweden to self-imposed seclusion after her lover's assassination, stands solitary at the ship's prow, staring silently into her future. . . . Her expression has been interpreted variously as epitomizing noble resignation, suppressed mourning, nostalgic recollection, or an exquisitely nuanced synthesis of complexly related emotions like regret, remembrance, and self-assurance. The director, Rouben Mamoulian asked some years later for the key to this sensitively wrought moment, explained what he had sought from his star. After several takes had failed to register exactly the right emotion, he recalled, "I told her to think of absolutely nothing at all." That vacancy became the empty receptacle into which viewers have poured their own interpretations.

ETIN, *supra* note 19, at 18-19.

<sup>85</sup> Saville-Troike, *supra* note 12, at 6-7; Maria Sifianou, *Silence and Politeness*, in *SILENCE: INTERDISCIPLINARY PERSPECTIVES* 64, 65 (Adam Jaworski ed., 1997).

<sup>86</sup> Johannesen, *supra* note 14, at 29 (citation omitted).

types of silence can communicate significantly different, if not totally opposite, messages.<sup>87</sup> In some circumstances, for example, they may be used to encourage more open discussion between the parties,<sup>88</sup> while in others they may serve to create barriers between the speaker and listener.<sup>89</sup> The potential meanings of silence, however, are not arbitrary. Like utterances and noise, they are constrained by both logical and experiential parameters and are subject to comprehension by the sensitive listener.<sup>90</sup>

This ability of silence to have diverse meanings, however, is no different from the communicative process when it comes to speech. In some situations, for instance, the utterance "Nice Shirt" between two friends will have one meaning in the chatting context and another one in the teasing context.<sup>91</sup> For purposes of this Article, it is important to understand the different meanings that silence can have in particular contexts and identify ways that speakers can send those silent communications more clearly so that listeners can become more sensitive to the intent underlying those messages.

### 1. *Silent Communication to Manifest Assent*

The most popular understanding of silence as communication is the belief that the failure of one party to a communication to respond to another party implies assent. "Silence on the part of the auditor is frequently taken to mean agreement with the speaker. Since one is usually led to speak when something is wrong . . . silence suggests that one sees nothing wrong, that he gives assent to what exists."<sup>92</sup> The old legal maxim derived from Roman law, *qui tacet consentire videtur* ("silence implies con-

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<sup>87</sup> This phenomenon is revealed in the fact that within the very same culture different proverbs can exist reflecting totally divergent attitudes toward silence. In our own culture, for example, individuals may say in some circumstances, "silence is golden" but in others, "the squeaky wheel gets the grease." See Saville-Troike, *supra* note 12, at 9; see generally Jonathan Charteris-Black, 'Still Waters Run Deep'—*Proverbs About Speech and Silence: A Cross-Linguistic Perspective*, 1 DE PROVERBIO (1995), at [http://info.utas.edu.au/docs/flonta/DP%2C1%2C2%2C95/SPEECH\\_SILENCE\\_PROVERBS.html](http://info.utas.edu.au/docs/flonta/DP%2C1%2C2%2C95/SPEECH_SILENCE_PROVERBS.html).

<sup>88</sup> See *infra* notes 96-110 and accompanying text.

<sup>89</sup> See *infra* notes 143-55 and accompanying text.

<sup>90</sup> Daniel N. Malz, *Joyful Noise and Reverent Silence: The Significance of Noise in Pentecostal Worship*, in PERSPECTIVES ON SILENCE 113, 133 (Deborah Tannen & Muriel Saville-Troike eds., 1985).

<sup>91</sup> Jaworski, *Aesthetic, Communicative and Political Silences*, *supra* note 11, at 17.

<sup>92</sup> J. Vernon Jensen, *Communicative Functions of Silence*, 30 ETC 249, 254 (1973).

sent") reflects this notion.<sup>93</sup> Also, in many other cultures, in particular ritual contexts, silence by a listener is regarded as consent.<sup>94</sup>

A danger exists, however, in over-reliance on this notion. As will be demonstrated in the following sections, silence by a listener in response to a demand or request by a speaker can have many more meanings than consent. Indeed, even in the legal setting, "silence implies consent" is not mechanically applied. Courts look to the full context both before and after the silence to determine its meaning.<sup>95</sup>

## 2. *Silent Communication to Encourage Reflection and Promote Discussion*

As discussed previously, silences can increase our awareness of what we are saying.<sup>96</sup> But they can also communicate to the listener the desire for further reflection and discussion. Communication scholars theorize that lengthy interactive silences allow listeners to make inferences and judgments about what has and has not been said, to reflect on the possible meanings of both verbal and silent messages, and to come to their own conclusions.<sup>97</sup>

Studies in two very diverse areas support this theory. The first research concerns silence in advertising strategy.<sup>98</sup> In that study, researchers compared the effectiveness of open-ended advertisements (those that omitted the ultimate conclusion) and closed-ended ads (those that explicitly stated the conclusion). Different

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<sup>93</sup> HERBERT BROOM, *SELECTION OF LEGAL MAXIMS* 787 (1882).

<sup>94</sup> See, e.g., Nwoye, *supra* note 11, at 189. In describing marriage proposals in Igbo society, the author relates,

When the actual proposal is made . . . it is always made in the presence of other people, usually the girl's parents and relatives. . . . If the girl accepts the proposal she simply turns shyly and runs away to rejoice in the protective seclusion of her room. She is neither supposed nor expected to say yes or no. If she turns down the offer, she just stands there for as long as the suitor considers it decent to stay . . . .

<sup>95</sup> In a classic handbook of legal maxims, for example, the author, in defining *qui tacet consentire videatur*, notes, "[s]uch silence may be inferred from a party's subsequent conduct." BROOM, *supra* note 93, at 787; see generally Tiersma, *supra* note 8, at 57-74.

<sup>96</sup> See *supra* notes 58-63 and accompanying text.

<sup>97</sup> See Bruneau, *supra* note 12, at 29.

<sup>98</sup> Allen G. Sawyer & Daniel J. Howard, *Effects of Omitting Conclusions in Advertisements to Involved and Uninvolved Audiences*, 28 J. MARKETING RES. 467 (1991).



subjects were given two different advertisements for a brand, one which encouraged the subjects to decide for themselves which brand they should use and the other that explicitly argued that they should buy that particular brand.<sup>99</sup> Subjects were then asked a series of questions about the specific ad they had been given asking for recall of the substance of the ad, their perception of the ad, their attitudes toward the product, and their beliefs as to the accuracy of the ads. The researchers found that overall the open-ended ads were more effective than those that were closed-ended: more subjects exposed to the open-ended advertisement felt the brand was superior, had a more positive attitude toward the brand, and had a higher purchase intention for the brand than those who saw the close-ended ad.<sup>100</sup> The explanation for these results, the researchers hypothesized, was that open-ended ads, by giving the subjects the silence to reflect and generate conclusions, involved them more fully in the reasoning process than closed-ended ads.<sup>101</sup> They also theorized, however, that open-ended ads only had this effect when the ad motivated the audience to process the message to a conclusion and when it was structured to allow for the intended conclusion.<sup>102</sup>

This study supports the proposition that silence in discourse or in the case of this research, silence as to the ultimate conclusion to be drawn, can actually induce the listener to reflect on the speaker's message. Such incentives, however, only result if the speaker encourages the listener to process the message. In addition, the speaker must provide enough information to allow the listener to come to a conclusion.

A second group of studies, analyzing silences in psychotherapy, supports these findings. These studies have shown that effective interviews contain more silences than those that are less effective.<sup>103</sup> They have found that when counselors in therapy

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<sup>99</sup> In this study, the researchers provided the subjects with print copy of the advertisements, not oral recordings. *Id.* at 469. Although the analysis in the present article is focused on silences in oral communication, this study is helpful to our understanding of how people react to silent incentives to reflect on language, be it oral or written.

<sup>100</sup> *Id.* at 471-72.

<sup>101</sup> *Id.* at 467.

<sup>102</sup> *Id.* at 472.

<sup>103</sup> *See, e.g.*, Sharpley, *supra* note 1. For this study, effectiveness was measured by the client's assessment of the rapport developed throughout the interview with the counselor. *Id.* at 240; *see also* Sharpley, *supra* note 11; John J. Cook, *Silence in Psychotherapy*, 11 J. COUNSELING PSYCHOL. 42 (1964).

sessions fill in the silence with words, they interfere with the client's freedom to process the issues raised in the counseling session.<sup>104</sup> Clients report that they feel greater rapport when they can think, free of intrusion by the therapist. These silences, though, are most effective during the "work" stages of sessions rather than the initial sessions.<sup>105</sup> This latter finding is similar to the study of open-ended advertising: silence encourages reflection and response only after a predicate had been laid by speech which urges reflection.

Not only can silence encourage processing of the message by the listener, but it can also coax her into expressing herself. Many participants in discourse have the common misconception that the more one speaks, the more one encourages the listener to respond. Many of us become anxious when a listener does not immediately reply to our speech and, before she can answer, we add more words to encourage a verbal reaction. At times, however, excessive talk, repetitious haranguing, and more verbiage can actually terminate the communicative process. Silences can signal that the lines of communication remain open and that no one has the intention of closing them. "Too much" speech, on the other hand, can have the effect of terminating discourse.<sup>106</sup> In a negotiation for the sale of a house, for example, silence may keep the door open to further discussions while further arguments in support of a position may suggest intransigence.<sup>107</sup>

Indeed, some scholars assert that silence can not only encourage free discussion but also can help to minimize differences between disagreeing parties. As one commentator puts it, "[C]ultivation of the conscious habit of silence allows communicators to appreciate more fully the abstracting process of emphasizing similarities while leaving out differences. . . . [Silences] retard[ ] the probability of uncritical 'signal' responses."<sup>108</sup> Often in disputes when we do not give ourselves time to reflect and the other person the opportunity to respond, we end up say-

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<sup>104</sup> Sharpley, *supra* note 1, at 238.

<sup>105</sup> *Id.* at 243.

<sup>106</sup> JAWORSKI, *THE POWER OF SILENCE*, *supra* note 11, at 48. Most of us have found ourselves in situations when we are conscious that we jabber on too long, frustrated that we are not persuading the listener, aware that we should stop talking, but unable to control ourselves.

<sup>107</sup> Also, in the workplace context, some commentators suggest that silences by supervisors can coax subordinates to think for themselves and to act more independently. See, e.g., Bruneau, *supra* note 12, at 40.

<sup>108</sup> Johannesen, *supra* note 14, at 27.

ing things that make matters worse.<sup>109</sup>

A cautionary note, however, is in order. People who fill their discourse with an inordinate amount of silence can actually discourage open communication. An interesting study of the behavior of participants in small group discussions highlights this point. The researcher found that the participants in discussions viewed silent members (those who did not speak unless spoken to) in a more unfavorable light than not only those who made positive contributions (those who encouraged participation and tried to resolve the conflict) but even those who made negative contributions (those who discouraged participation and resolution). Apparently, participants viewed negative members as contributing more to the resolution of the issues than those who remained silent.<sup>110</sup> To promote communication, then, silence must be used in the context of sufficient information exchange so that discourse is encouraged.

### 3. *Silent Communication to Assert Power*

Much recent legal scholarship focuses on silence as an attribute of subordinated people and classes: for example women, persons of color, and gays.<sup>111</sup> The inability of these persons to speak in social and political interactions (or the inability of more powerful persons to listen to them when they do speak) is perceived as a lack of power. These types of silences are beyond the scope of this Article because they neither structure communication nor have intentional communicative content. If anything, they reflect an absence of communication, a fear of speaking in the face of dominating power.

Despite the existence of these subordinated silences, it is important to recognize that in certain contexts silence can actually communicate an assertion of power.<sup>112</sup> In situations when speech is expected, a communicator, by refraining from words,

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<sup>109</sup> See JAWORSKI, *THE POWER OF SILENCE*, *supra* note 11, at 24.

<sup>110</sup> Thomas J. Knuston, *An Experimental Study of the Effects of Orientation Behavior on Small Group Consensus*, 39 *SPEECH MONOGRAPHS* 159, 163, 165 (1972).

<sup>111</sup> See, e.g., Mark A. Godsey, *Educational Inequalities, the Myth of Meritocracy, and the Silencing of Minority Voices: The Need for Diversity on America's Law Reviews*, 12 *HARV. BLACK LETTER J.* 59 (1995); Tracey E. Spruce, *The Sound of Silence: Women's Voices in Medicine and Law*, 7 *COLUM. J. GENDER & L.* 239 (1998); Susan Stefan, *Silencing the Different Voice: Competence, Feminist Theory and Law*, 47 *U. MIAMI L. REV.* 763 (1993).

<sup>112</sup> See generally Dennis Kurzon, *When Silence May Mean Power*, 18 *J. PRAGMATICS* 92 (1992).

can attempt to take control of the discourse. She communicates, in essence, "As much as you may want me to respond, I'm just not going to do it!" Consider, for example, on a very basic level, the situation when a close friend or family member hurts another's feelings. Her maintaining of unusual silence in the face of surrounding conversation can call attention to and communicate her anger, sometimes with more power than words.<sup>113</sup> Or in the negotiation context, the strategic use of silence by one of the parties in response to an initial offer can send a message to the opposing party that such an offer is not worth acknowledging.<sup>114</sup>

Even when the silent communicator is in a subordinated social position, silence can constitute an assertion of power. A suspect in police custody or a hostile witness at a deposition, for example, can refuse to answer or evade questions by the detective or the lawyer:

By withholding a response the addressee is challenging the speaker, and also challenging the speaker's status vis-à-vis him or herself. . . .

. . . [T]he silent addressee is saying in effect to the questioner that "you need me to give the information you want. I am not cooperating with you, and you cannot make me." If the aim [of the questioning] is to obtain as much information as possible from the addressee who starts off in a disadvantageous position, then an experienced addressee may try to snatch the power away from the questioner by refusing to answer—by keeping silent.<sup>115</sup>

Additionally, silence can communicate an assertion of power by demonstrating dissent. Strategic use of silence by dissenters in a public setting where words are expected can draw attention to the protest and register a judgment of disapproval.<sup>116</sup> In one demonstration against George Wallace during his 1968 presidential campaign, for instance, the protesters decided simply to hold up black placards of mourning in silent protest. Wallace, who needed audience response, even heckling, to stimulate his combative style, was left baffled and ineffective.<sup>117</sup>

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<sup>113</sup> As Robert U. Johnson wrote, "You hesitate to stab me with a word, and know not Silence is the sharper sword." Bruneau, *supra* note 12, at 27.

<sup>114</sup> The Second Foundation, *supra* note 50, at 353.

<sup>115</sup> Kurzon, *supra* note 112, at 94.

<sup>116</sup> Jensen, *supra* note 92, at 254.

<sup>117</sup> Johannessen, *supra* note 14, at 32. In February 1968, a silent protest by 2,500 members of Clergy and Laymen Concerned About Vietnam at Arlington National Cemetery communicated a powerful message of serious dissent against the Vietnam

As with other communicative silences, however, context is significant in assessing whether or not silences exerting power actually communicate their message. The use of silence as an assertion of power, too, can be effective only if it violates expectations.<sup>118</sup> For this reason, if, for example, a person is usually taciturn around her friends, her use of a silent persona in a particular situation is unlikely to send the message that she feels hurt or that she wants to control the relationship. Moreover, such silences may only have their desired effect if they are followed by a clear verbal expression or conduct which confirms their meaning.

In the later 1970s, for example, President Carter attempted to use silence strategically to capture the nation's attention on his energy policy, but failed precisely because of his inability to give his silence meaning.<sup>119</sup> In July 1979, after an unsuccessful summit of the major industrial nations on energy policy, President Carter canceled a scheduled address to the nation in which he was to have revealed new energy initiatives. For ten days he remained in seclusion at Camp David, holding a "domestic summit" at the end of which he finally gave his speech. President Carter's intent was to capture the nation's attention for that speech.<sup>120</sup> But when the speech did not live up to the public's expectations for the outline of an aggressive policy, the public saw the president's prior silent hiatus as a sign of passivity.<sup>121</sup> As one commentator put it, "[b]ecause silence generates mystery and uncertainty, President Carter's silence was perceived as confirmation and continuation of an increasingly cloudy persona, 'giving the appearance of wavering yet again.'"<sup>122</sup> For a silence to assert power, then, clarity must be imposed on its natural ambiguity.

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War. When the Military District of Washington refused the organizations' request for a prayer service at the cemetery, the organizers chose a silent demonstration as an alternative. Edward B. Fiske, *Dr. King Leads 2500 at Arlington in Silent Prayer for Dead*, N.Y. TIMES, Feb. 7, 1968, at 17. As a participant at that demonstration, I felt that the impact was much greater than the sound of speech precisely because of my preconceived notion that a large crowd of war protesters—especially one composed of many clergy—would be very loud.

<sup>118</sup> Barry Brummett, *Towards a Theory of Silence as a Political Strategy*, 66 Q.J. SPEECH 289, 295 (1980).

<sup>119</sup> *Id.* at 297-302.

<sup>120</sup> *Id.* at 301.

<sup>121</sup> *Id.* at 302.

<sup>122</sup> *Id.* at 298 (citation omitted).

#### 4. Silent Communication of Deep Emotions

As discussed previously, one of the functions of language is ideational: to exchange information about people, objects, and events.<sup>123</sup> By attempting to communicate our knowledge of this information concretely and unambiguously, speech usually serves this function much better than silence.<sup>124</sup> But precisely because this mode of speech conveys certainty of perception, it is often inadequate to communicate certain very strong emotions. Words are used as symbols to convey the knowledge we wish to impart to a listener. At times, however, we have knowledge of an experience we are undergoing but cannot find the words to articulate it.<sup>125</sup> In everyday parlance, we are “left speechless.” The only symbols we have to convey this message are “deep silences.”<sup>126</sup>

“Deep silences” can communicate strong emotions loudly and with great clarity. The powerful effect of Edvard Munch’s *The Scream* or the horse in Pablo Picasso’s *Guernica* arises from its depiction of deep silence:

Surely, much of the shock of . . . *The Scream*, arises because it defies conventional visual language or rhetoric, because the screamer’s mouth is actually open. Similarly, the horse in Picasso’s *Guernica*, open-mouthed in terror, in pain, and in protest, is memorable not only because it is so powerfully depicted but also because we expect visually depicted terror to scream in the eyes, not the mouth.<sup>127</sup>

By “hearing” the sounds of the silence in these paintings, we understand the anguish portrayed.

Or consider the depiction of the prophet Elijah’s experience of God in the Bible. After Elijah successfully defeated the false prophets of Baal by having God perform pyrotechnic stunts before the people, they reject God. In despair, the prophet runs

<sup>123</sup> See *supra* note 26 and accompanying text.

<sup>124</sup> See *supra* notes 34-35 and accompanying text.

<sup>125</sup> ROBIN PATRIC CLAIR, *ORGANIZING SILENCE: A WORLD OF POSSIBILITIES* 6 (1998):

Tacit knowledge is the phenomenon of knowing without being able to articulate what we know. At times, we may discover that we are unable to articulate an experience, but others are able to articulate it for us. At other times, the experience simply cannot be articulated in everyday language and only the talents of an artist can render it visible.

<sup>126</sup> DAUENHAUER, *supra* note 12, at 16-22.

<sup>127</sup> ETTIN, *supra* note 19, at 24; see also Saville-Troike, *supra* note 12, at 7-8 (“The Japanese term *haragei* ‘wordless communication’ captures the essence of this . . . type of silence. There is a belief that as soon as an experience is expressed in words (oral or written), the real essence disappears.”).

to Mount Horeb for assurance from God. The text then reads, "[T]he Lord was not in the wind; and after the wind there was an earthquake, but the Lord was not in the earthquake; and after the earthquake fire, but the Lord was not in the fire, and after the fire, the *thin voice of silence*."<sup>128</sup> For the prophet, then, God speaks not in the noise of wind, earthquake, or the pyrotechnic stunts before the prophets of Baal, but in a different kind of utterance: a *voice* of silence.

Deep silences occur in several types of situations. First, they will often come in reaction to unexpected conditions such as a tragic report of a sudden death, illness, catastrophe, joyous news of the birth of a child, accomplishment of a friend or family member, or personal success. Faced, on the one hand, with the uncertainty and ambiguity of isolation, bewilderment, or terror, or, on the other hand, with overwhelming feelings of happiness, we frequently feel that words are unnecessary, that the circumstances "speak for themselves."<sup>129</sup> Moreover, in those situations utterances are simply inadequate to convey the message because words, in their very concreteness, fail to express the depth of our feelings.<sup>130</sup> In some traditions, for example, it is the custom in a mourner's home for a visitor merely to walk in, go to the bereaved and stand for a short time, then find a seat among the mourners and join them in mutual silence. Any words, either from the mourner or the visitor, might actually increase the grief.<sup>131</sup> One rabbi reports how a mourner confided to him that she "wanted to escape from her visitors' well-intentioned chatter. All their attempts to comfort or to distract prevented her from

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<sup>128</sup> 1 *Kings* 19:11-12. This translation of the Hebrew is based on a reading by Andre Neher. NEHER, *supra* note 11, at 84. While the usual rendering of the Hebrew "kol demamah dakah" is "a still small voice," Neher's version, "the thin voice of silence" presents the literal translation.

<sup>129</sup> See PAUL GOODMAN, *SPEAKING AND LANGUAGE: DEFENSE OF POETRY* 5 (1971) ("John Dewey points out that to many people 'It is repellant to speak of any consummatory event.' Such an event is to be enjoyed, or mourned, in itself . . . We say of a beautiful scene, a sunset, that 'it speaks for itself,' meaning that it doesn't speak and neither need we.").

<sup>130</sup> See generally JAWORSKI, *THE POWER OF SILENCE*, *supra* note 11, at 163; KANE, *supra* note 11, at 180; Robert L. Scott, *Rhetoric and Silence*, 36 W. SPEECH 146, 147 (1972). The inadequacy of words to represent certain situations is reflected in Wittgenstein's famous maxim: "What we cannot speak about we must pass over in silence." LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 151 (David Francis & Brian I. McGuiness trans., 2d ed. 1971).

<sup>131</sup> Nwoye, *supra* note 11, at 186. A similar custom is followed in traditional Jewish houses of mourning. ABNER WEISS, *DEATH AND BEREAVEMENT: A HALAKHIC GUIDE* 115 (1991).

focusing on her feelings, as she desired.”<sup>132</sup> And finally some people feel that in these emotionally-laden situations, it is almost physically impossible to speak. In Apache culture, for example, silence is expected from those who are very sad because speaking is considered to require too much of a physical effort for those burdened by intense grief.<sup>133</sup>

A second type of deep silence communication occurs between two intimates. Words help to create connections between people, but once those relationships are developed, words may become superfluous.<sup>134</sup> To lovers or old friends, while some information exchange is obviously necessary in discourse, often the purpose of their conversation is not primarily ideational but interpersonal.<sup>135</sup> For intimates, words may be unnecessary<sup>136</sup> and may actually be considered intrusive in the relationship.<sup>137</sup> As one commentator puts it, “It is not through speech or acts but through silence that the deepest bonds are cemented. One sure fruit of this communion of silence is that it invites the deepest and most intimate of confidential sharing.”<sup>138</sup>

A third and final type of deep silence is the silence of hatred and anger. While the lack of utterance between two people can reflect intimate communion, that silence—even between the same two individuals—can suggest deep estrangement. Consider Graham Greene’s description of a husband’s ruminations about the silence with his wife:

He sat down in his usual chair and the usual silence fell between them. Normally he felt the silence like a comforting shawl thrown round his shoulders. Silence was relaxation, silence meant that words were unnecessary between them—their love was too established to need assurance; they had taken out a life insurance policy in their love. But this night . . . silence was like a vacuum in which he couldn’t breathe; silence was a lack of everything, even trust, it was a foretaste of the tomb.<sup>139</sup>

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<sup>132</sup> Bradley Shavit Artson, *The Art of Silence*, 14 *TIKKUN* 28 (1999).

<sup>133</sup> Basso, *supra* note 11, at 78.

<sup>134</sup> FRANZ ROSENZEIG: HIS LIFE AND THOUGHT 12 (Nahum H. Glatzer ed., 1972) (“[U]nion occurs in silence in only; the word unites, but those who are united fall silent.”).

<sup>135</sup> DAUENHAUER, *supra* note 12, at 17.

<sup>136</sup> Sidney J. Baker, *The Theory of Silences*, 53 *J. GEN. PSYCHOL.* 145, 158 (1955).

<sup>137</sup> Jensen, *supra* note 92, at 250.

<sup>138</sup> ROBERT T. OLIVER & DOMINICK BARBARA, *THE HEALTHY MIND IN COMMUNION AND COMMUNICATION* 153 (1962).

<sup>139</sup> GRAHAM GREENE, *THE HUMAN FACTOR* 95 (1978).



When some people feel betrayed or hurt by a remark or another's conduct, their emotions may be so intense that they may treat the relationship as dead and feel that any verbal exchange would be worthless. They are not merely using silence as a weapon in an argument to persuade the other party or as a "time out" for reflection.<sup>140</sup> By withdrawing from words, they are communicating the rupture in the relationship.

Similar to other communicative silences, whether a particular silence is a deep silence in reaction to an unexpected event, one of intimacy, or one of hatred, will depend on its context. The utterances prior to the silence and the circumstances surrounding it will, of course, help in an understanding of its meaning.<sup>141</sup> But it is important to recognize that a deep silence has its own meaning apart from the utterances: that the communicator's intense emotions have made her feel that words are inadequate, unnecessary, or impossible to express.<sup>142</sup>

### 5. *Silent Communication to Mark Interpersonal Distance*

In the previous section, I discussed how deep silences can reflect the intimate relationship of lovers or old friends. In some circumstances, however, silence can actually be used in an opposite manner: to mark interpersonal distance between the parties to a discourse.<sup>143</sup> In everyday communication, words often help to develop and maintain connections between communicators. By abruptly refraining from or terminating utterances, the speaker can send the message, "I don't want to get any closer."

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<sup>140</sup> See *infra* notes 153-54 and accompanying text (discussing silence as a weapon—"the silent treatment"). For a description of silence as a means for reflecting on the discourse, see *supra* notes 96-105 and accompanying text.

<sup>141</sup> DAUENHAUER, *supra* note 12, at 16.

<sup>142</sup> Another form of deep silences, not very relevant to this particular study, is the silence associated with divine forces beyond us. In some religious sects, deep silence is considered the highest form of reverence for God precisely because words are so associated with the concrete, material world. See, e.g., Artson, *supra* note 132, at 28 (quoting Rabbi Abraham Joshua Heschel, "to become aware of the ineffable is to part company with words"); Bauman, *supra* note 11, at 72 (discussing the Quaker belief that "the less one said, the less risk he entailed of departing from the truth and endangering his soul"). Other commentators have observed, however, that in some religious sects, the exact opposite is true: that sheer noisiness can reflect reverence for the divine. See, e.g., Bohdan Szuchewycz, *Silence in Ritual Communication*, in *SILENCE: INTERDISCIPLINARY PERSPECTIVES* 239, 248 (Adam Jaworski ed., 1997) (discussing how silence and noise have become functional equivalents for participants in Catholic Charismatic Renewal).

<sup>143</sup> Jaworski, *supra* note 28, at 145.

Silence strategically communicates the desire to maintain distance. What distinguishes deep silence between intimates and silences marking interpersonal distance is context.<sup>144</sup>

Silences marking interpersonal distance arise in a number of settings. One of the most common forms of such silences is communication between strangers upon meeting for the first time. Before engaging in full-blown discourse with a new acquaintance, for instance, people often test the waters with limited conversation on inconsequential subjects interspersed with long silences. In essence, they are saying, "We may be in close spatial proximity, but before we get any closer in this relationship, let's keep our emotional distance until we feel more comfortable with each other."<sup>145</sup> Indeed, in some cultures, individuals who launch into uninhibited conversations upon meeting strangers are viewed with suspicion because they intrude too quickly into their listener's space.<sup>146</sup>

Another form of silence marking interpersonal distance is what one commentator labels "formulaic": "routine responses to face threatening acts when verbal formulae are not readily available."<sup>147</sup> When individuals are unsure of how to respond to ambiguous comments or conduct by others, they may remain silent to gauge the situation and determine whether or not to respond or terminate discourse. Before plunging into a concrete utter-

<sup>144</sup> See Jaworski, *Aesthetic, Communicative and Political Silences*, *supra* note 11, at 27 (Discussing Wolfson's "bulge" theory, the author observes, "With regard to the dimension of distance between interactants (from intimate to distance), people employ similar linguistic forms at the extreme ends of the continuum.").

<sup>145</sup> See Jaworski, *supra* note 28, at 145.

<sup>146</sup> Basso, *supra* note 11, at 72-73. Basso observes that in Western Apache culture,

a typical reaction to such individuals is that they "want something," that is, their willingness to violate convention is attributed to some urgent need which is likely to result in requests for money, labor or transportation. Another common reaction to talkative "strangers" is that they are drunk.

If the stranger is an Anglo, it is usually assumed that he "wants to teach us something" (i.e., give orders or instructions).

*Id.*; see also George R. Saunders, *Silence and Noise as Emotion Management Styles: An Italian Case*, in PERSPECTIVES ON SILENCE 165, 172-73 (Deborah Tannen & Muriel Saville-Troike eds., 1985) (finding that children in a small Italian village are trained "to deal with greetings and direct questions [by strangers] by replying in rote, formal, respectful phrases, and then to be silent"). But see Tannen, *supra* note 12, at 93 (observing that New Yorkers, more than any other Americans, like to talk to strangers within hearing distance, for example, while waiting in lines or sitting in restaurants).

<sup>147</sup> Jaworski, *supra* note 24, at 121.

ance, they keep their emotional distance. Examples of such silences include reactions to embarrassing comments,<sup>148</sup> highly delicate subjects,<sup>149</sup> or socially-awkward situations.<sup>150</sup>

Related to formulaic silences are those used to avoid conflict. At times, when individuals are engaged in a highly emotional disagreement, one or more of the parties will refrain from utterance to give themselves the distance to disengage from the conflict. Their purpose is not to reflect on the discourse or develop an appropriate response, but to avoid further confrontation.<sup>151</sup> By giving the parties social distance, silence allows them to "let off steam," to release the tension of the situation.<sup>152</sup>

The final form of silences marking interpersonal distance is the use of silence as a weapon. Here a party does not use silence to avoid conflict but rather as a strategic maneuver in an ongoing conflict. Use of the "silent treatment" sends a message of indifference or even outright disdain for the party, her conduct, or her position on an issue.<sup>153</sup> In fact, "[s]uch silent treatment of the opponent may be even more powerful than uttering the harshest of words and drives many people crazy."<sup>154</sup> In some communities, entire groups of individuals use the silent treatment to shun

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<sup>148</sup> *Id.* (examining the formulaic silences in the banter of George and Martha in Edward Albee's *Who's Afraid of Virginia Woolf?*).

<sup>149</sup> Saville-Troike, *supra* note 12, at 7.

<sup>150</sup> As an alternative to silence, a person caught in a situation which she considers socially-awkward may resort to "small talk." Such utterances are little different from silence marking social distance. The purpose of both is to keep social distance until the awkwardness passes. See generally Jaworski, *supra* note 24, at 121.

<sup>151</sup> Saunders, *supra* note 146, at 178 (Saunders found that in a small Italian village, "[i]n arguments, when one of the participants ceases to respond, observers are quick to urge the others to drop the matter. Perhaps this is implicit recognition of the seriousness of matters when people become silent.").

<sup>152</sup> Ironically, noise can fulfill that same function. One researcher has found, for example, that in at least some cultures, family members use chatter about inconsequential matters to avoid conflict.

The noisy-avoidance style has the cathartic effect of allowing the expression of real affect, but by focusing it on inconsequential issues, permits the participants to return relatively quickly to an emotional equilibrium, and thus avoids destructive effects on family relations. The silent style allows people to avoid confrontation when fully satisfactory solutions to the issues are unlikely.

*Id.* at 177. This phenomenon is just another illustration of how silence and speech are not total opposites but merely constitute points on a continuum of forms of communication.

<sup>153</sup> Joseph A. DeVito, *Silence and Paralanguage as Communication*, 46 ETC 153, 154 (1989).

<sup>154</sup> JAWORSKI, THE POWER OF SILENCE, *supra* note 11, at 48.

a member, to mark interpersonal distance against an individual who has breached some social norm.<sup>155</sup>

#### *D. Cross-Cultural Views of Silence*

In the previous section, this Article discussed the functions of silence both to structure and provide propositional meaning to communication. Throughout this analysis, it has noted the importance of context—the surrounding utterances, the setting, the participants’ relationship—in interpreting a particular silence’s meaning.<sup>156</sup> Indeed, depending on context, the same silence can have totally different meanings.<sup>157</sup>

Besides the particular situational setting, cultural context can also have a significant bearing on a silence’s meaning.<sup>158</sup> For a person to communicate with individuals from an unfamiliar society, she must not only be able to interpret the literal content of different utterances but also know the kinds of “codes, channels and expressions [which are used] in what kinds of situations . . . [an] ‘ethnography of communication.’”<sup>159</sup> In regard to silence, she needs to grasp what particular functions silence plays within that culture and to understand that different cultures have different interpretative norms for giving meaning to specific acts of silence.<sup>160</sup> A lack of awareness of these norms can lead to significant misinterpretations of silence.

A good example of the problems that can arise from such misunderstandings occurred during a period of tension between Egypt and Greece a number of years ago. Egyptian pilots radioed their intention to land their plane at a Cypriot airbase, and the Greek air traffic controllers responded with silence. While the Greeks intended their silence to indicate refusal of the

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<sup>155</sup> See, e.g., Bruneau, *supra* note 12, at 17 (referring to the shunning custom among the Amish); Matt Ackerman, *Husband Shunned for Declining to Give a Get Won’t Get A Dime*, N.J.L.J., July 5, 1999, at 2, available at LEXIS, News Library, NJLAWJ File (describing ruling of a rabbinical board that a husband be ostracized from his community for his failure to grant his wife a Jewish divorce); *Religion A to Z*, CANADA & WORLD BACKGROUNDER, Dec. 1999, at 3-66, available at LEXIS, News Library, Curnws File (describing Jehovah’s Witness’s practice of “disfellowshipping” for members who engage in serious violations of the church’s teachings).

<sup>156</sup> See *supra* note 42 and accompanying text.

<sup>157</sup> See *supra* note 91 and accompanying text.

<sup>158</sup> Samarín, *supra* note 11, at 116; Sifianou, *supra* note 85, at 74.

<sup>159</sup> Basso, *supra* note 11, at 69.

<sup>160</sup> *Id.* (“For a stranger entering an alien society, a knowledge of when *not* to speak may be as basic to the production of culturally acceptable behavior as a knowledge of what to say.”); Sifianou, *supra* note 85, at 74.

permission to land, the Egyptians interpreted the silence as assent. When the plane landed, the Greeks fired on the plane, resulting in the loss of several lives.<sup>161</sup>

While a number of studies have been conducted on the meaning of silence in different cultures,<sup>162</sup> the only major generalization that can be drawn concerns the divergent attitudes in high context and low context cultures. In high context cultures (such as Japan and Arab countries), individuals rely most heavily on how a statement is said rather than the content of what is said; in low context cultures (such as Germany and the United States), people rely primarily on the substance of what is uttered.<sup>163</sup> While in high context societies, the parties rely a great deal on nonverbal communication and pay less attention to detail, in lower context societies, they focus on the words and literal meaning of the communication.<sup>164</sup> Consistent with these broad definitions, researchers have found that while individuals in high context cultures unconsciously use silence in their everyday conversations to send "scripted" messages about their feelings, communicators in low context cultures do not have such embedded scripts in their communications to send subtle silent messages but tend to use silence strategically, making conscious choices of when to refrain from speech.<sup>165</sup>

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<sup>161</sup> Saville-Troike, *supra* note 12, at 10-11.

<sup>162</sup> See, e.g., Basso, *supra* note 11 (Western Apaches); Howard Giles et al., 'Talk is Cheap . . . ' but 'My Word is My Bond': Beliefs About Talk, in *SOCIOLINGUISTICS TODAY: INTERNATIONAL PERSPECTIVES* 218 (Kingsley Bolton & Helen Kwok eds., 1992) (comparison of beliefs about talk and speech of Caucasian American, Chinese American, and foreign Chinese students); Hasegawa & Gudykunst, *supra* note 11 (comparison of silence in Japan and America); Lehtonen & Sajavaara, *supra* note 11 (Finland); Nwoye, *supra* note 11 (Igbo in Nigeria); Samarin, *supra* note 11 (Gebya in the Central African Republic); Saunders, *supra* note 146 (Italian village); Sifianou, *supra* note 85 (comparison of attitudes toward silence in Greek and English society); Tannen, *supra* note 12 (comparison of speech and silence patterns of Eastern European New Yorkers at a Thanksgiving dinner).

<sup>163</sup> RAYMOND COHEN, *NEGOTIATING ACROSS CULTURES* 19-32 (1991).

<sup>164</sup> David A. Victor, *Cross-Cultural Awareness*, in *THE ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS* 97 (James R. Sikenat & Jeffrey M. Aresty eds., 1994).

<sup>165</sup> See Hasegawa & Gudykunst, *supra* note 11, at 679. These different attitudes are reflected in a story about an American law professor who visited Japan several years ago to teach in one of its law schools. In one of his first classes, after reviewing some introductory matters, he started to use the Socratic method and asked the class a question. The students, all of whom were proficient in English, remained silent for much of the class hour. The professor, believing that the students were simply engaged in a game of chicken, played along and remained silent for the remainder of the class hour. After the class, the professor confided to a Japanese colleague that

It is important, however, not to stereotype too broadly a culture as "silent" or "talkative." A study of communication in an Italian village, for instance, found that, contrary to popular belief, Italians can be very silent and that expressions of exuberant noisiness and dark silence can serve the same function. The researchers found that members of the community used both of these methods of expression to manage emotionally intense situations, avoiding conflict either with noisy exclamations or intense silence.<sup>166</sup> In another study, the researchers found that while the use of silence appears to be more embedded in everyday conversational techniques of Japanese than Americans, the Japanese had a more negative attitude toward silence when communicating with strangers than Americans.<sup>167</sup> The major conclusion, then, that can be drawn from these studies is that "it is not talk or silence as abstract entities which are valued [in a particular culture], but the amount, the content, the timing, and the manner in which the talk and silence are produced."<sup>168</sup>

### III

#### FUNCTIONS OF SILENCE IN THE LAWYERING PROCESS

The ability to communicate well is obviously critical to almost every aspect of the lawyer's craft.

[M]uch of a lawyer's work [is] involved [in] dealing with people—listening to clients, developing rapport with them, handling them, . . . persuading judges or opponents, and so on . . . . The skills of the successful lawyer lay in mastery of the human interaction[—] . . . how to listen, how to persuade, how to meet emotional and psychological needs of clients, opponents, judges, indeed, everyone they deal[ ] with professionally.<sup>169</sup>

As the previous part demonstrated, silence, as well as speech, plays a critical role in the communication process. It not only structures the way we communicate, but it also generates its own

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the class was a total failure. A short time later, the Japanese professor returned to inform the American that the students felt that this was one of the most profound classes they had ever had. They had never before seen a teacher allow so much time for contemplating an answer. Dan Rosen, Grants for and Experiences in Teaching and Researching Abroad: Focus on Japan, Address at the Annual Meeting of the American Association of Law Schools (Jan. 5, 1991).

<sup>166</sup> Saunders, *supra* note 146, at 177-78.

<sup>167</sup> Hasegawa & Gudykunst, *supra* note 11, at 678.

<sup>168</sup> Sifianou, *supra* note 85, at 77.

<sup>169</sup> Gary S. Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5 (1975).

meaning. An understanding of how the various functions of silence operate in the lawyering process, then, is essential to the skills used in interacting with clients, opponents, judges, juries, and other decision-makers. In this part, I endeavor to provide such an analysis.

Throughout the prior discussion, this Article has focused on the importance of context—both situational and cultural—in interpreting the meaning of a particular silence.<sup>170</sup> No mechanical rules exist for interpreting silences in human interactions.<sup>171</sup> Depending upon the specific setting, silence can have one of a diverse number of meanings. As we will see, the silences involved in lawyer communication are no different. Their meanings will hinge, in large part, on the nature of the participants; the setting of the communication; surrounding utterances; and the intent and expectations of the parties.

This fact does not, however, make an analysis of the functioning of silences in the lawyering process a fruitless task. As many commentators contend, language itself is inherently indeterminate depending in large part on the speaker's and listener's context for its meaning.<sup>172</sup> Even with those limitations, attempts are made to develop a variety of oral advocacy techniques that lawyers can employ on a context-specific basis. Similarly, this analysis of silence in the lawyering process strives to identify possible meanings that silences can have in their interactions so that they can determine, within the context of the particular communication, how best to use silence or respond to its use by their audience. While it can be argued that interpreting silences may be a more daunting task than deciphering words,<sup>173</sup> the following analysis will show that a lawyer's comprehension of silences will

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<sup>170</sup> See *supra* notes 42, 156-67 and accompanying text.

<sup>171</sup> As this analysis will show, blanket assertions such as, "[s]ilences of up to fifteen seconds [in client interviews] will generate delayed answers," ALAN LERNER ET AL., *LEGAL INTERVIEWING* 81 (1999), fail to recognize the diverse functions which silence can play in communication.

<sup>172</sup> See Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 302 (1990) ("[P]eople frequently do not say precisely what they mean, [and] even when they do, what they have said will inevitably leave some room for interpretation."). This article does not intend to enter into the fray over the extent to which language is indeterminate. Compare *id.* with Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). It only accepts the indisputable proposition that, to some extent, all oral communication, both verbal and silent, is indeterminate.

<sup>173</sup> See *supra* note 16 and accompanying text.

assist her in communicating her messages and understanding those she receives.

### *A. Silences in Interviewing and Counseling of Clients*

In an initial interview of a client, a lawyer has a number of goals: (1) to form an attorney-client relationship; (2) to determine the client's goals; (3) to gather as much as the client knows about the facts; and (4) to reduce the client's anxiety without being unrealistic.<sup>174</sup> Whether or not the lawyer is successful in meeting these goals depends in large part on her ability to make the client feel comfortable, to encourage the client to communicate freely, and to remove inhibitions to communication, such as authority, cultural, psychological, or social barriers.<sup>175</sup> Her capacity to respond to and use silences is essential to each of these skills.

#### *1. Responding to Client Pauses and Hesitations*

As demonstrated earlier, pauses and hesitations can actually be very helpful to a speaker in communicating her message. They can aid her in becoming more aware of what she is saying; they can encourage her to explore her thoughts and feelings; and they can assist her in fine tuning her utterances.<sup>176</sup> In many interviews, especially in their initial stages, the client's pauses and hesitations serve these functions. If, for example, she is embarrassed to discuss her problem with a stranger or fears the attorney as an authority figure, pauses and hesitations can give her time to become more comfortable with the setting and explore her feelings.<sup>177</sup> If she is experiencing uneasiness in confronting the fact that she has to handle this legal problem, these silences can assist her in coming to grips with the fact that she cannot avoid her situation. If she is uncertain as to her memory of the particular events, pauses and hesitations can help her clarify her

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<sup>174</sup> KRIEGER ET AL., *supra* note 30, at 64-65.

<sup>175</sup> *Id.* at 65-66; see generally Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321, 321-23 (1998) (describing stresses faced by a client coming to an initial interview).

<sup>176</sup> See *supra* notes 58-63 and accompanying text.

<sup>177</sup> As discussed previously, an individual can use silence to mark interpersonal distance. See *supra* notes 143-55 and accompanying text. Many clients, especially those who have never used the services of an attorney before or who enter an interview with cynicism about the legal profession, will probably come to the interview with much distrust.



memory.<sup>178</sup>

To use pauses effectively, however, a lawyer must overcome the popular misconception that silence is a failure in communication. As described previously, speakers feel a pressure to talk and fear that they will be considered inadequate as communicators if the discourse does not flow. Listeners feel uneasy, unsure of what the speaker is trying to say, and impatient to hear her thoughts or feelings.<sup>179</sup> Pressured to talk, the speaker may not sufficiently process her thoughts and feelings and may not communicate her full message; impatient to hear more information, the listener may fill up the silence with her own talk.

In fact, this phenomenon often occurs in lawyer interviews of clients.<sup>180</sup> Lawyers feel that the interview must flow smoothly, and any gaps reflect badly on their own skills.<sup>181</sup> They tend to fill in the pauses and hesitations with their own words, responding to pauses and hesitations with quick follow-up questions, thereby interfering with the client's ability to reflect on her thoughts and feelings and convey her story completely.<sup>182</sup> By rushing the client, they also send the message that she needs to fill in the gaps quickly, to refrain from any further pauses and hesitations. Finally, they discourage the client from thinking independently of the lawyer's views of the case. Ultimately, this kind of response to pauses and hesitations can impede the development of a solid rapport with the client.<sup>183</sup>

The problems resulting from "filling in" pauses and hesitations are similar to those attendant to lawyer interruptions of their clients during interviews. A recent study on the effect of such interruptions in the initial phases of client interviews, which

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<sup>178</sup> Obviously, pauses and hesitations in telling her story can also suggest that the client is fabricating a story. See O'BARR, *supra* note 4, at 108-10. In an initial interview, however, a lawyer precipitously drawing such an inference can seriously undermine the creation of a lawyer-client relationship.

<sup>179</sup> See *supra* notes 56-57 and accompanying text.

<sup>180</sup> See BINDER ET AL., *supra* note 5, at 50. This problem is not limited to the legal profession. See *supra* note 1.

<sup>181</sup> Cf. Sharpley, *supra* note 1, at 238 (identifying interviewing problems of inexperienced psychological trainees).

<sup>182</sup> See *id.* (observing that the "tendency for the trainee counsellor to 'fill' the silence with words [interferes] with the client's freedom to mull over issues raised by the counselling interaction"); BINDER ET AL., *supra* note 5, at 50; BROOKS, *supra* note 1, at 131.

<sup>183</sup> See Sharpley, *supra* note 1, at 243 (data in regard to psychological counselor trainees showed overall that silence was associated with increased client-perceived rapport).

presents its own empirical data and reviews research on interruptions in initial physician-patient interviews, highlights the adverse consequences of not allowing the client/patient to tell her complete story.<sup>184</sup> It gives the classic example of this type of professional interruption:

Physician: What brings you here today?

Patient: My head is killing me.

Physician: Have you had headaches before?

Patient: No.<sup>185</sup>

By prematurely interrupting the patient's account of his condition with the closed-ended question, "Have you had headaches before?" the study observes that physicians risk losing relevant information from the patient, perhaps about other ailments or psychological problems.<sup>186</sup> Moreover, they run the danger of developing a premature, incorrect diagnosis of the patient's condition.<sup>187</sup> Similarly, the tendency of some lawyers to fill in client pauses and hesitations thwarts the client from processing her thoughts and feelings and revealing as full a story as possible. Like the interrupting physician, the lawyer who is uncomfortable with silence may not obtain all the relevant information about the case and may actually develop erroneous hypotheses about theories of the case.

To remedy this problem, lawyers need to overcome their discomfort with pauses and hesitations in discourse and their desire to rush along the flow of the interview.<sup>188</sup> Especially at the beginning of an interview, a lawyer needs to be sensitive to the possible barriers between the client and herself and should view pauses and hesitations as opportunities for the client to reach his own comfort level, not as a failure to move the interview. She should avoid filling in the spaces with rephrased, probing, closed-ended questions or, even worse, attempting to complete the client's thoughts.<sup>189</sup> Instead, a lawyer should allow the client to

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<sup>184</sup> Gellhorn, *supra* note 175.

<sup>185</sup> *Id.* at 337 (citing Howard B. Beckman & Richard M. Frankel, *The Effect of Physician Behavior on the Collection of Data*, 101 ANNALS INTERNAL MED. 692, 693 (1984)).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> In terms of the impact on the length of the interview, studies in the medical field show that allowing clients more control over their interviews has no statistically significant impact on the elapsed time of the interview. *Id.* at 340.

<sup>189</sup> See *id.* at 347; BROOKS, *supra* note 1. Obviously, there will be occasions when the client pauses or hesitates because the lawyer has asked a confusing question or

continue speaking either by maintaining and using her own silence, non-verbal facilitators (e.g., nodding or leaning forward), or words of encouragement (e.g., "Yes?" "Uh-huh" "It's ok. Take your time").<sup>190</sup>

In response to pauses and hesitations, even "active listening" can thwart the client's thought process. Active listening is "the process of picking up a client's message and sending it back in a reflective statement which mirrors what you have heard."<sup>191</sup> This technique demonstrates to the client that the lawyer understands what she is saying. When a client pauses or hesitates during the account of her story, however, it is usually unclear what message is being sent. Accordingly, any attempt to reflect it back to the client is fraught with the danger that the lawyer has misinterpreted its meaning. Especially in the beginning of an interview, active listening can be dangerous if it impedes the client's full expression of her thoughts and feelings.<sup>192</sup>

## 2. *Using Silences to Promote Gathering of Information*

In most interview situations, even after the client has been encouraged to express his full story, gaps will exist in regard to key matters. The client may gab on with no pauses or hesitations, indicating no desire for further reflection, but the lawyer will have met a roadblock to obtaining essential information. The client, for example, will be adamant, "I just can't remember the date. It was just too long ago!" Or the client may be sending mixed messages about his goals. Despite numerous probing questions on the subject, at one point, the client may want to go to trial at any cost; at another, he may just want to get on with his life and "forget the whole thing." Or the client may be uncertain

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the client simply does not understand what is being asked. In those circumstances, follow-up questions will need to be asked. But, especially given the tendency of most lawyers to want to fill in silences, lawyers should be cautious about jumping to conclusions that every pause or hesitation has resulted from the imprecision of their questions and should try to reformulate the question only when it is clear that the original one was confusing.

<sup>190</sup> BROOKS, *supra* note 1; BINDER ET AL., *supra* note 5, at 50.

<sup>191</sup> BINDER ET AL., *supra* note 5, at 52.

<sup>192</sup> See Gellhorn, *supra* note 175, at 347 (warning against a lawyer's restating the content of a client's previous statement in the opening moments of an interview because it "cut[s] off expression of new concerns and prematurely define[s] the focus of the dialogue"). Gellhorn does suggest that lawyers encourage complete client responses with nonjudgmental statements such as, "You seem uncomfortable." *Id.* It is highly possible, however, that such statements actually might heighten the client's feelings of discomfort.

whether to retain this particular attorney at this time: "I'm not positive whether we're going to incorporate at this time so it's probably premature to get a lawyer."

In response to such uncertainty, silence can actually promote further reflection on and discussion of these and similar issues.<sup>193</sup> When faced with a client who is unable to remember key facts, to make up his mind about a course of action, or to decide whether or not to enter into a retainer agreement, lawyers tend to want to ask more questions; to try to clarify points; or to probe further. Although these techniques can, at times, be very helpful, too much talking can actually be distracting for the client. It can deter clients from drawing their own conclusions and can discourage them from freely expressing their thoughts and feelings.<sup>194</sup>

To use silence effectively to promote client reflection and decision-making, the lawyer must create a clear context for the silence. As the previously discussed studies of the psychological counseling process showed, the therapeutic use of silence to promote patient reflection is most helpful in the "work" stages of a session after the initial phase is complete.<sup>195</sup> Unless the patient knows the issues on which she is working, the silence may seem bewildering. Other research urges therapists to try to explain clearly to the patient the purpose of the silence. For instance, one commentator suggests that the counselor allay any anxiety about the silence with comments such as, "If you are unable to talk about these things now, it's all right if you remain silent. When you are able to, then you can speak about them."<sup>196</sup>

Applying these insights to law practice, the lawyer should let the client know what information is sought; what work the client has to do; or what specific issues must be decided. She should also give the client a message allowing him to take the time to reflect about the information required or the decision to be made. If possible, the interview should be recessed for this purpose.

Lawyers need to be clear in using silence as a tool for encouraging reflection lest the client start to feel anxious. If the client does not understand that the lawyer's silence has a purpose or feels that the silence has gone on too long, he may feel embar-

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<sup>193</sup> See *supra* notes 98-107 and accompanying text.

<sup>194</sup> *Id.*

<sup>195</sup> See *supra* notes 103-05 and accompanying text.

<sup>196</sup> Calogeras, *supra* note 11, at 42.

rassed, unsure whether the lawyer is floundering; whether she even cares about his problem; or whether the lawyer disapproves of something he said.<sup>197</sup> Counseling literature is replete with suggestions as to the proper length of time for such silences: three to six seconds;<sup>198</sup> up to fifteen seconds;<sup>199</sup> or four to twenty percent of a two-minute segment of the session.<sup>200</sup> Since a "stop-watch" approach to interviewing and counseling would obviously interfere with the development of rapport with a client, mechanical rules in regard to the precise time for these silences are not very helpful. The appropriate time for these silences will depend on the context of the situation: the complexity of the issue involved; the comfort level of the client; the success of the client in remembering information or making a decision; and any looming time pressures. The client's nonverbal cues, reflecting either concentrated thinking or uncomfortable fidgeting, should give the lawyer some guidance regarding when to move on with the session.

### 3. *Handling Client Deep Silences*

Often in the midst of an interview or counseling session, a client will communicate her feelings and thoughts with deep silences. A battered spouse in a domestic violence case, for example, might interrupt her description of her partner's abusive conduct with a silence reflecting the immensity of the pain she feels. A widow, recovering from the recent death of her husband, might have great difficulty discussing the distribution of his estate because of her grief. In the midst of the litigation of a case or the transaction of a deal, a totally unforeseen event might occur that radically changes the status of the case or the relationship of the parties and has a deep emotional impact on the client: a significant motion may be granted or denied; property sought to be acquired by the client may be condemned; or an unantici-

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<sup>197</sup> See generally MALTON, *supra* note 5, at 25-26; Sharpley, *supra* note 11, at 4. As discussed previously, formulaic silences are used to communicate to the listener that a person is unsure how to respond to ambiguous comments or conduct by another. See *supra* notes 147-50 and accompanying text. Without understanding the context of a lawyer's silence in an interview, a client might infer that his comments have made the lawyer feel uncomfortable.

<sup>198</sup> BROOKS, *supra* note 1, at 131.

<sup>199</sup> LERNER ET AL., *supra* note 171, at 81.

<sup>200</sup> Cook, *supra* note 103, at 46.

pated eviction notice may be served. Stunned by such events, the client may be left speechless.

As described earlier, these silences are not meant to structure the client's utterances or to signal his attempts to recover memory or consider a decision. Rather, they reflect the client's inability to find words to convey his message. They convey the message that he has deep emotions about his experience which he simply cannot articulate at that moment.<sup>201</sup>

Recognition of deep silences can be helpful to a lawyer in several respects. In terms of rapport, an empathetic response to the emotions reflected in the silence can strengthen the lawyer-client relationship.<sup>202</sup> Even if the lawyer believes she would not have the same feelings in similar circumstances, she cannot ignore the impact of the experience on the client. At the very least, when faced with a deep silence, a lawyer should not embark immediately on probing, informational questions. She might want to engage in "active listening," mirroring the feelings with a reflective response, such as "You must feel real grief about the death of your husband," for the widow left speechless discussing his estate.<sup>203</sup> Especially in cases when the client is obviously distraught, the lawyer might merely join the client in her silence. Since the client feels that his experience cannot be verbalized, these circumstances may not be the occasion for the lawyer to display her wonderful verbal skills. In fact, the lawyer's own deep silence may be the most appropriate message to the client that she understands his emotions.<sup>204</sup>

In regard to information-gathering, such silences can be very important to a complete understanding of a case. They may indicate areas for fact investigation.<sup>205</sup> If, for instance, in a sex discrimination case, a client's account of her interactions with a particular co-worker is punctuated with long silences, an inference can be drawn that possibly emotionally-laden issues exist between them. The silence may only mean that the client wants to protect a friend from becoming involved in the case or that she fears that the co-worker will not corroborate her story. But it

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<sup>201</sup> See *supra* notes 123-26 and accompanying text.

<sup>202</sup> BINDER ET AL., *supra* note 5, at 55-57 (recommending that lawyers show sensitivity to a client's unstated feelings).

<sup>203</sup> See *id.* at 57-59.

<sup>204</sup> In some cultures, for example, a silent response to a grieving person is the accepted norm. See *supra* note 131 and accompanying text.

<sup>205</sup> See *infra* note 227 and accompanying text.

may also suggest that the co-worker was involved in the discrimination and that the client has great difficulty describing her experiences with him. These silences then may call for further sensitive questioning of the client or interviews with other witnesses to the interactions. Deep silence may also suggest the need for the client to reappraise his strategy in a case. If, for instance, he reacts in prolonged deep silence in response to an unforeseen circumstance in a hotly-contested case (e.g., an adverse ruling of a motion or a heated rejection of an offer), the lawyer may want to explore alternative strategies with the client.

#### 4. *Interpreting Silences in Client Counseling*

Most of the literature on client counseling devotes extensive discussion to techniques for providing clients with the necessary information for making a decision; communicating evaluations of different options; responding to questions; and handling difficult issues such as the decision by a client to choose an option the lawyer considers extremely unwise.<sup>206</sup> It usually addresses the topic of the client who has difficulty deciding between different options or defers to the lawyer.<sup>207</sup> It does not, however, discuss the issue of the silent or near-silent response of a client in counseling. Often, a client, especially one who is inexperienced with the legal process or who wants to avoid the issues involved, will respond to an attorney by saying simply that he agrees to a particular offer. He may simply nod approval. Or he may quietly mumble, "Sounds okay to me."

Many lawyers, especially inexperienced ones, may interpret such responses as assent. As discussed previously, the popular notion in American society, and especially the talkative legal culture, is that silence signifies agreement.<sup>208</sup> If the client does not want to talk about the different options, the lawyer assumes that he is satisfied with the offer on the table and that there is no reason for continuing the dialogue.<sup>209</sup> But, as the review of the different meanings of silence has shown, a client's minimal re-

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<sup>206</sup> See, e.g., BINDER ET AL., *supra* note 5, at 258-375; KRIEGER ET AL., *supra* note 30, at 207-24.

<sup>207</sup> BINDER ET AL., *supra* note 5, at 350-56.

<sup>208</sup> See *supra* notes 92-95 and accompanying text.

<sup>209</sup> Often in a law school clinic, a student will report indignantly to her supervisor that the client "seemed" to agree to an offer the previous day but now has "changed his mind." While the client may have in fact changed his mind, the student may not be aware that she misinterpreted the client's initial minimal response as agreement.

sponse in a counseling session may actually be subject to a wide variety of interpretations: that the client is tentative about his decision and wants to reflect on it; that he is emotionally upset by the offer but cannot express his feelings at that moment; or that he simply wants to avoid a conflict with a lawyer he feels has ignored his interests.

A lawyer, then, needs to be sensitive to these quiet moments in counseling. She should not jump to conclusions about the meaning of a minimal response or nod. Especially with clients who have been disempowered in much of their lives, the lawyer should try to encourage the client to articulate her feelings to confirm the meaning of the silence. Often, it is helpful to ask the client to describe explicitly the bases for his decision. The client may pause or hesitate in his response, but the lawyer should give him the opportunity to reflect fully on his initial response.

##### *5. Cross-Cultural Issues in Interviewing and Counseling*

For a lawyer both to interpret properly the meaning of a client's silences and to use silence effectively herself, she must have some broad understanding of the functions of silence in the client's culture. As discussed previously, different cultures can have significantly diverse attitudes toward the use of silence in given situations.<sup>210</sup> Just as a lawyer can be severely disadvantaged if she tries to communicate without an interpreter with a client who only has limited proficiency in her language, interviewing and counseling a client from a different culture without any sensitivity to issues of silence can interfere significantly with the discourse. In an initial interview, for instance, a client from a culture where only limited conversation is the norm between strangers might be put off by a very talkative attorney. If that same client responds to probing questions with silence or minimal information, the lawyer needs to understand that the client may be marking social distance and that the development of a relationship may take more effort than lively colloquy.<sup>211</sup>

##### *B. Interpreting Silences Discovered in Fact Investigation*

In approaching fact investigation in a case, one of the greatest dangers is jumping to conclusions. While at first glance the meaning of a particular fact in a case may seem self-evident, fur-

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<sup>210</sup> See *supra* notes 156-68 and accompanying text.

<sup>211</sup> See *supra* notes 145-46 and accompanying text.



ther investigation and analysis may undermine the initial assessment. A "fact" can only be accurately evaluated in its full context. A client injured in an automobile accident, for example, may state in an initial interview that he is certain the light was green in his direction. The credibility of that fact, however, may depend in large part on the client's ability to observe the fact (e.g., weather, lighting conditions, possible obstructions); on his capacity to remember the other details surrounding the accident; on his reputation for truthfulness; and on the corroboration of his story by other persons present.<sup>212</sup> Unless a lawyer suspends judgment about the meaning of particular facts until she has developed a full picture of the parties and events, her perspective can be significantly skewed.

This danger of jumping to conclusions is very prevalent when lawyers confront silences in witnesses' stories. Throughout the fact investigation of a case—either informal interviews or formal depositions—lawyers encounter a wide variety of silences in the different stories being told. In a landlord-tenant dispute, for example, the tenant may allege that the conditions in the entire apartment building were dangerous to the occupants' health and safety, but no other tenant ever made complaints to the landlord. In a commercial case, a party may fail to respond to invoices sent to him by a purported seller but denies owing anything on the account.<sup>213</sup> A criminal defendant may not respond when a co-defendant says, "If we are caught, we are caught;"<sup>214</sup> or a wife, who has obtained a protective order prohibiting her husband from contacting her, may respond in silence when he shows up at the house and let him enter.

Additionally, lawyers face silence in the manner in which different witnesses tell their stories. A witness on the stand may pause and hesitate frequently throughout her description of the critical events in the case. Or the deponent at a deposition may sit in stony silence for a long period when confronted with damaging evidence, hesitating to answer even the least controversial questions.

The traditional law of evidence has developed some interpre-

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<sup>212</sup> See KRIEGER ET AL., *supra* note 30, at 161-64.

<sup>213</sup> See *Megarry Bros., Inc. v. United States*, 404 F.2d 479, 488 (8th Cir. 1968) (failure of the defendant to respond to two invoices could be admitted into evidence to show that the invoices were not disputed).

<sup>214</sup> See *United States v. Flecha*, 539 F.2d 874, 876 (2d Cir. 1976) (holding that the co-defendant's statement could not be considered an adoptive admission).

tive rules for some of these silences, many of which unfortunately jump to conclusions as to the meaning of the particular silence. One rule, for example, allows for silences to be interpreted as “adoptive admissions”: When a statement is made in the presence of a party containing assertions of facts which, if untrue, the party would under all the circumstances naturally be expected to deny, failure to speak [is considered] an admission.<sup>215</sup> Under this rule, it could be argued that the criminal defendant in the above hypothetical adopted the co-defendant’s admission by his silence. Another rule maintains:

If a written statement is given to a party and read in the presence of others, the party’s failure to deny its assertions may be received as an admission, when under the circumstances it would be natural for the person to deny them if he or she did not acquiesce.<sup>216</sup>

This rule might allow the seller in the hypothetical to introduce evidence of the failure to respond to the invoices to show that the buyer admitted owing for the goods. Another rule provides that the absence of complaints from similarly-situated customers as to alleged defects in goods and services can support an inference that the defects did not exist.<sup>217</sup> Pursuant to this rule, the landlord in the hypothetical could attempt to introduce evidence of the silence by the other tenants to show that the conditions in the building were not as deplorable as alleged.

Although this Article will not attempt to evaluate the validity of these evidentiary rules as legal doctrine,<sup>218</sup> it is important to point out that they all reflect an understanding that in situations where response is usually expected, silence indicates consent to an adverse condition or statement made in the witness’ presence. These rules include limiting language allowing for an examination of the surrounding “circumstances,” but clearly assume that most people would give a verbal response when confronted with a partner’s confession, demand letters for payment, or defective living conditions.<sup>219</sup> In these and similar circumstances, evidence

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<sup>215</sup> 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 262, at 167 (5th ed. 1999).

<sup>216</sup> *Id.* at 170.

<sup>217</sup> *Id.* § 250, at 110.

<sup>218</sup> For a discussion of these doctrinal issues, see Tiersma, *supra* note 8, at 74-80.

<sup>219</sup> Courts have attempted to create specific safeguards from the misuse of these rules. For example, for an adoptive admission to be admitted into evidence:

(1) the statement must have been heard by the party claimed to have acqui-

of silence may be admissible to demonstrate acquiescence.

Even in contexts where the evidentiary rules do not apply (planning of a case, counseling of a client, negotiations between parties, or informal administrative hearings), most attorneys' approach to fact analysis incorporates the assumption underlying these rules. Like many talkative Americans, they view the failure to respond to a statement or condition against a person's interest as consent. As this Article has demonstrated, however, such inferences about silence are far too simplistic. Indeed, in some cultures and contexts, silence may actually constitute disagreement or dissent with an adverse statement or condition.<sup>220</sup> A more nuanced approach to the fact analysis of silences requires an examination of all the circumstances surrounding the silence without presuppositions as to whether most people in that situation would verbalize their response.

To accomplish this task, the circumstantial evidence model suggested by Binder, Bergman, and Moore can be very helpful.<sup>221</sup> In most instances where lack of utterance crops up in versions of witnesses' stories, the silence, by its very indeterminate nature, is circumstantial, not direct, evidence. Similarly, the fact that a witness pauses and hesitates during the telling of her story is circumstantial evidence in regard to her memory, powers of observation, or emotional state. To determine what this silence means, whether it reflects the silent person's agreement, dissent, confusion, some other message, or no communication at all, the observer needs to draw an inference.<sup>222</sup>

Binder, Bergman, and Moore's model assesses circumstantial evidence by requiring an explicit statement of (1) the evidence

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esced; (2) it must have been understood by the party; . . . (3) the subject must have been within the party's knowledge; . . . (4) [p]hysical or emotional impediments to responding must not be present[;] (5) [t]he personal makeup of the speaker, e.g., young child . . . may be such as to make it unreasonable to expect a denial[;] . . . the statement itself must be such as would, if untrue, call for a denial under the circumstances.

2 STRONG ET AL., *supra* note 215, § 262, at 168-69. Even these safeguards, however, suggest that silences under these circumstances would be an unusual occurrence.

<sup>220</sup> See *supra* notes 115-17, 161 and accompanying text.

<sup>221</sup> See DAVID A. BINDER & PAUL BERGMAN, *FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF* 82 (1984); ALBERT J. MOORE ET AL., *TRIAL ADVOCACY: INFERENCES, ARGUMENTS AND TECHNIQUES* 5 (1996).

<sup>222</sup> MOORE, *supra* note 221, at 2 ("[D]irect evidence, if accepted as accurate, proves a material fact without the need for an inference. By contrast, circumstantial evidence, even if accepted as accurate, proves a material fact only if a factfinder draws one or more inferences from the evidence.").

itself; (2) the inference sought to be drawn from the evidence (conclusion); and (3) the generalization that connects the evidence to the conclusion.<sup>223</sup> They give the following simple illustration about an observation of Bob crying:

<i>Evidence</i>	<i>Generalization</i>	<i>Inferred Conclusion</i>
Bob is crying.	People sometimes cry when they are sad.	Bob is sad. <sup>224</sup>

Obviously, a number of inferences can be drawn from the fact that Bob is crying: that he has been peeling onions; that he just received joyous news; or that he just finished watching *Sleepless in Seattle*. As the chart demonstrates, the accuracy of the inference depends upon the soundness of the generalization. To assess the validity of the generalization, the model requires an analysis of the circumstances under which the generalization would be accurate and those under which it would be less accurate. Accordingly, it suggests adding the terms *especially when* and *except when* to the generalization and considering whether any additional contextual facts either support or weaken it in the case.<sup>225</sup>

Applying this model to inferences about silence, a lawyer in the above landlord-tenant hypothetical would make the following analysis:

<i>Evidence</i>	<i>Generalization</i>	<i>Inference</i>
Silence of other tenants about conditions in the building.	When tenants are silent about conditions in their building, they have no problems.	No problems with conditions in the building.

The articulation of the generalization about silence, however, is not the end of the analysis. In fact, it might be based solely on the observer's particular schema or cultural bias. It may not be valid, for example, if the other tenants are all undocumented aliens who fear that any complaints to the landlord might result in deportation or if they are all relatives of the landlord who will not complain because of family loyalty. These are the *except whens*. On the other hand, this generalization may be particu-

<sup>223</sup> BINDER & BERGMAN, *supra* note 221, at 82.

<sup>224</sup> MOORE ET AL., *supra* note 221, at 5.

<sup>225</sup> BINDER & BERGMAN, *supra* note 221, at 94-97.

larly accurate if the tenants are very sophisticated about housing issues and have no ties whatsoever with the landlord. These are the *especially whens*.

The most important point of this analysis is that the original assumption of the lawyer in regard to the generalization was based on her own attitude toward silence. This hunch might be accurate in this situation, but careful fact analysis involves more than an innate belief about the purposes of silence. As this Article has shown, such beliefs are often unfounded. Thorough fact analysis requires an examination of the different functions of silence in the full context of the particular situation.

The description of the forms and functions of silence outlined in Part II of this Article can be very helpful in using this *except when/especially when* analysis to examine both silences in the manner in which stories are told and those that lawyers confront in the stories themselves. Consider some examples.

**PAUSES AND HESITATIONS.** While pauses and silences can indicate tentativeness or even outright deception, they also can suggest serious reflection.<sup>226</sup> Accordingly, interpreting the meaning of a witness' pauses and hesitations during a deposition, for example, requires more than the quick assumption that she is fabricating her story.<sup>227</sup> That supposition might be supported from some *especially whens*: occurrence of the hesitations only when the witness is confronted with damaging testimony or inconsistencies, and general vagueness in the utterances she gives. But it might be weakened by facts showing a generally reflective attitude throughout the deposition and evidence that the witness' conversational style in other situations contains such gaps.

**DEEP SILENCES.** An individual confronted with an unexpected or emotionally intense experience might be left speechless.<sup>228</sup> If, for example, a crime victim fails to report to the police immediately after the incident or if an individual grieving for his recently-deceased parent does not respond promptly to an urgent business inquiry, it may not be accurate for the lawyer to assume that the witness has fabricated his story. Again, the full context of the situation needs to be considered: whether these individuals displayed any other signs of emotional distress; whether they

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<sup>226</sup> See *supra* notes 58-62 and accompanying text.

<sup>227</sup> See O'BARR, *supra* note 4, at 108-09.

<sup>228</sup> See *supra* notes 123-42 and accompanying text.

freely discussed the matters with other people; or whether they generally handle stress in this manner.

**SILENCES MARKING SOCIAL DISTANCE.** The failure of a person to communicate comfortably with another individual might suggest any number of meanings, for instance, the parties are strangers; the silent person is unsure how to respond to the other; she wants to avoid outright conflict; or she is giving the other person “the silent treatment.” In analyzing such silences to prepare a case, a lawyer needs to consider the prior relationship of the parties, the details of their interactions before the silence, and the patterns of behavior of the silent partner with other persons in similar situations.

**DIFFERENT CULTURAL ATTITUDES TOWARD SILENCE.** In a situation where the lawyer is analyzing stories about silences of individuals from another culture or is examining a witness from another culture, it is very important that she investigate the norms of that person’s culture about silence before drawing inferences about their meaning. An individual from a high context culture, for example, might use fewer words in describing an automobile accident than a person from a low context culture.<sup>229</sup> That discrepancy, however, does not mean that they observed or experienced the situations differently. They are just communicating their messages with different kinds of codes. An essential aspect of the fact analysis process is deciphering both the verbal and silent parts of those codes.

### *C. Using and Responding to Silences in Negotiations*

#### *1. Silences to Promote Discussion*

The goal of any lawyer in a negotiation should be to communicate persuasively with the other side.<sup>230</sup>

Negotiation is not just a series of offers, counteroffers, and concessions. Nor is it limited to the identification of interests, generation of options, and development of solutions. The energy that fuels both of these processes—what moves parties to concessions or mutual solutions—comes from communication about the parties’ rights and powers.<sup>231</sup>

Some lawyers, however, ignore this goal and instead seek to prevail in a negotiation by pummeling the other party with

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<sup>229</sup> See *supra* notes 163-65 and accompanying text.

<sup>230</sup> KRIEGER ET AL., *supra* note 30, at 228.

<sup>231</sup> *Id.* at 297.

words. They assume that by the sheer force of their arguments and threats, they can force the other side into agreement. By ignoring the persuasive aspects of the negotiation process, they run the risk of inviting counterthreats, pressuring the other side into terminating the discussions, and damaging any ongoing relationships between the parties.<sup>232</sup>

Productive communication in negotiation requires the ability to listen to the concerns of the other party and to try to convince it to change its position. Whether the lawyer is using an adversarial strategy (concentrating on obtaining concessions from the other side for the distribution of limited resources) or a problem-solving strategy (focusing on developing solutions that can integrate the resources of both sides),<sup>233</sup> the lawyer's aim is to motivate the other party to make an agreement on terms as favorable as possible to her client. "Negotiation is not a monologue with the other party's lawyer as a passive audience. Rather, it is a dialogue in which [each lawyer tries] to persuade the other party to reach a mutually agreeable decision on issues."<sup>234</sup>

To accomplish this purpose, an appreciation of the role of silence in communication is essential. As demonstrated in Part II, silence can be an effective tool in promoting discussion between parties. Lengthy interactive silences can give listeners the opportunity to draw their own inferences and make their own judgments about what has been said and then come to their own conclusions.<sup>235</sup> As the study of closed-ended versus open-ended advertising suggests, the more opportunity the listener has to make her own decision, the more committed she may become to that decision.<sup>236</sup> Additionally, such silence, by signaling that the lines of communication are still open, can coax the listener to express herself.<sup>237</sup>

Both of these functions of silence can be very helpful in both

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<sup>232</sup> See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 136-37 (2d ed. 1991); see also John L. Graham & Roy A. Herberger, Jr., *Negotiators Abroad—Don't Shoot from the Hip*, 61 HARV. BUS. REV., July-Aug. 1983, at 160 ("Influenced by their frontier past, many American business people come to the negotiating table with a do-or-die attitude that often defeats their purpose. They tend to 'shoot first; ask questions later.'").

<sup>233</sup> For a general description of these two types of strategies, see KRIEGER ET AL., *supra* note 30, at 231-34.

<sup>234</sup> *Id.* at 228.

<sup>235</sup> See *supra* note 97 and accompanying text.

<sup>236</sup> See *supra* notes 98-102 and accompanying text.

<sup>237</sup> See *supra* notes 106-07 and accompanying text.

adversarial or problem-solving negotiations. In a typical adversarial negotiation, for example, one party will give an offer, the other side will immediately respond with a rejection or counter-offer, and the first party will quickly give its response. Silence by either party, however, can give both sides the chance to reflect on the merits of the different proposals, to consider the arguments given, and to develop a response. Although many lawyers fear that the failure to respond rapidly sends a message of weakness, silences can actually signal significant power when used along with strong presentations and responses. They can suggest that the lawyer is so certain of the legitimacy of her position that she is willing to give the other side the opportunity to reflect on it.<sup>238</sup> By indicating that the lawyer is fully considering the other side's positions, silences can also send the message that the lawyer is negotiating in good faith. Moreover, by giving the lawyers themselves the opportunity to reflect on the direction they are going, silence can often prevent them from "saying too much." Often, in the heat of a negotiation, a lawyer will make an argument, disclose some information, or propose an offer she would not have made if she had given herself a chance to reflect fully on its consequences.

In a problem-solving negotiation, silence gives the parties the opportunity to develop different options and reflect on possible solutions. It can establish the environment for mutual brainstorming by coaxing the other party to express herself. A common problem in negotiation is the failure of the parties to give themselves "creative time" to generate options and develop solutions.<sup>239</sup> As one commentator recommends for handling parties who are reluctant to engage in problem-solving:

If [the other side does] not respond, you may feel a growing discomfort from the silence. In normal conversation, when you see that your question has made your companion uncomfortable, you let him or her off the hook by breaking the silence.

You should resist this temptation and wait for an answer from your negotiating counterpart . . . . Let the silence and discomfort do their work. The other side may eventually respond with information about their interests, or a possible option, or a relevant standard. The moment they do, they are engaged in

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<sup>238</sup> Cf. Taylor & MacKenzie, *supra* note 11, at 39 (describing silence as a powerful tool for salespersons).

<sup>239</sup> WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION 88 (1993).



the game of problem-solving negotiation.<sup>240</sup>

In any negotiation, silence can also keep the channels of communication open when the parties may be nearing an impasse. If emotions are starting to flare or threats and counterthreats are escalating, silence can often be helpful to avoid deepening of the conflict. In those situations, verbal discourse has the potential of entrenching the parties' positions and embittering their relationship even further.<sup>241</sup> Silence gives the parties the opportunity to mark social distance, reevaluate their positions, and separate emotions from actual interests. As one commentator advises negotiators, "Instead of getting mad or getting even, focus on getting what you want. Don't react: Go to the balcony."<sup>242</sup>

Too much silence, however, can actually be harmful to the negotiation process. Overuse of silence by a lawyer in a negotiation can make her opponent feel uncomfortable and can actually send a signal that she is refusing to negotiate or withdrawing from negotiations.<sup>243</sup> Unless her goal is to use silence strategically to assert power,<sup>244</sup> silence is most effective to promote discussion in a negotiation when the lawyer provides a clear context for it. For instance, in a problem-solving negotiation, if a lawyer has not initially set the agenda for brainstorming by identifying her client's interests and proposing some possible solutions, premature silence leaves an ambiguous message as to her desire to proceed seriously with the discussion. Or, if in the midst of the passions of threats and counterthreats in a negotiation, a lawyer simply stalks out of the room in silence, it is unclear whether she is terminating the bargaining or just taking a respite. A preface to such a walkout such as, "Let's just take a break to cool off" would help to clarify the situation.

## 2. *Use of Fore and After Silences in Negotiation*

In Part II, this Article discussed the framing function of fore and after silences.<sup>245</sup> Fore silence provides listeners anticipatory alertness before an utterance; after silence allows listeners time

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<sup>240</sup> *Id.* at 88-89.

<sup>241</sup> JAWORSKI, *THE POWER OF SILENCE*, *supra* note 11, at 24-25 ("It is easier to undo silence than it is to undo words.").

<sup>242</sup> URY, *supra* note 239, at 169.

<sup>243</sup> See The Second Foundation, *supra* note 50, at 351; see also *supra* note 110 and accompanying text.

<sup>244</sup> See *supra* notes 114-17 and accompanying text.

<sup>245</sup> See *supra* notes 73-84 and accompanying text.

to savor or process an utterance that has just been made. While fore and after silences are most relevant to formal, artistic presentations,<sup>246</sup> they can also be very effective in developing a strategy for negotiation.

In most negotiations, timing issues create an important backdrop to the discussion of substantive issues. Each party needs to make a decision as to when serious bargaining should begin and when it should end. In addition, negotiators frequently face deadlines imposed either by the circumstances of the case (e.g., the date the buyer needs the goods); by third-party requirements (a scheduled trial date); or by the parties themselves (an offer that expires on a given date).<sup>247</sup> A party's strategy for handling these timing decisions and maneuvering around these deadlines can be crucial to its success in the negotiations.<sup>248</sup>

Appreciation of fore and after silences can be very important in devising a timing strategy for negotiation. In many cases, a dispute or transaction does not become "ripe" for a deal until the conditions allow for it: for example, necessary information has been disclosed; emotional obstacles have been overcome; potential outcomes have become clearly apparent; or deadlines loom imminent. A lawyer's strategic use of fore silence in initiating the negotiation process can help her use ripeness issues to her advantage. By withholding or delaying a commitment to negotiations until the lawyer believes the issues are ripe for bargaining, she raises suspense as to her intentions and increases the potential for her opponent's alertness to and consideration of her eventual offer. Indeed, a silent and delayed response to an over-anxious adversary's offer can actually be perceived as an assertion of power.<sup>249</sup> Rushing into an offer and blathering about positions before the issues are ripe can suggest either that a party is too eager to settle, that it does not fully understand the substantive issues, or that it has no serious intent to bargain in good faith.

Likewise, a lawyer can use after silence to its strategic advantage. When a lawyer is successful in persuading an adversary to

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<sup>246</sup> See *infra* notes 274-75 and accompanying text.

<sup>247</sup> KRIEGER ET AL., *supra* note 30, at 268.

<sup>248</sup> *Id.*

<sup>249</sup> See *supra* notes 114-17 and accompanying text. As in other contexts, too much fore silence can have the opposite effect. If the issues are ripe, and the party delays too long in responding to an adversary's offer, the adversary may assume there is no chance for a settlement and walk away from the bargaining process.

consider a proposal, she needs to know when to stop her utterances and allow the adversary to savor and process the discourse. Negotiation scholars observe that a stumbling block to many negotiated settlements is the failure of one party to allow the other to save face. As one commentator warns negotiators:

Even if you are able to satisfy the other side's substantive interests, they still may not agree. After all, a negotiation does not take place in a social vacuum. There is always a constituency or audience whose opinion the other side cares about—their boss, their organization, their colleagues, their family and friends, or their own internal critic. Naturally they don't want them to think they have given in.<sup>250</sup>

While one method to help an adversary save face is to explain to him how the proposed deal addresses both parties' interests, another way is silence. After a lawyer's arguments have had an effect on the other side, the best strategy might be to end discourse, leaving any additional arguments implicit or unsaid. If, for example, a lawyer representing a plaintiff in an employment discrimination case obtains a tentative agreement to her client's reinstatement in exchange for a waiver of damages, silence after the agreement may assure the deal while continued heated rhetoric about the defendant's blatant disregard for the civil rights statutes does not allow for any face-saving by the defendant. Indeed, it carries the risk of inflaming the other side's emotions and breaking the deal. Just as a lawyer needs to gauge when to make an initial negotiation offer, she needs to know when to end her bargaining presentations and to allow the arguments to have their effect.

### 3. *Formulaic Silences in Closing the Deal*

As demonstrated in Part II, "formulaic silences" may be used by parties to handle ambiguous social situations. Unsure of how to respond to the particular circumstances, one or both of the parties may remain silent to gauge the situation for a time, to determine whether and how to respond.<sup>251</sup> The parties do not wish to terminate the discourse but want to give themselves some room to assess the whole picture.

Similar situations can arise in the process of crafting a negotiated agreement. The parties may agree to most of the terms of

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<sup>250</sup> URY, *supra* note 239, at 119.

<sup>251</sup> See *supra* notes 147-50 and accompanying text.

the deal but may come to an impasse on some peripheral issue which may break the agreement. While traditionally most negotiation texts recommend that each of the precise terms of an agreement be memorialized in writing to clearly govern the future conduct of the parties,<sup>252</sup> in some situations, silence as to the precise terms may be the only option for preserving the deal. "Constructive ambiguity", the drafting of language that is open to several interpretations, may help the parties salvage an agreement.<sup>253</sup> In a constructive discharge employment discrimination case, for example, the parties may agree to the employee's reinstatement but may have reached an impasse on the issue of whether her immediate supervisor will be replaced. The parties may agree to language which is silent on the identity of the employee's supervisor but which provides assurance that "the employer will take all reasonable steps to remedy any hostile work environment." In so doing, the parties, for the sake of reaching an agreement, postpone consideration of the issue with the hope that the problems in the work environment will not again arise. The ambiguity inherent in the silence as to the identity of the supervisor allows the parties to attempt to redevelop their relationship and work out the problem without the necessity of an immediate concrete solution.<sup>254</sup>

#### *4. Silences in Cross-Cultural Negotiations*

Because persuasive communication is essential to the success of any negotiation, the ability of the parties to understand the signals that each of them sends and receives is crucial. Part II shows, however, how diverse cultures can attribute radically different meanings to silence.<sup>255</sup> In cross-cultural negotiations, then, a party needs to understand the ways in which the other side uses and perceives silence. Otherwise, she may send incor-

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<sup>252</sup> See DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* 167 (1989).

<sup>253</sup> CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 155 (1997).

<sup>254</sup> Obviously, such an agreement entails risks and benefits for both parties. On the one hand, the issue may reoccur. The employer may not replace the supervisor, and the employee may allege that the discrimination is continuing in breach of the agreement. On the other hand, if the impasse on this issue leads to further heated litigation, the relationship between the parties may be severely damaged. Silence on this issue has the potential for preserving this relationship.

<sup>255</sup> See *supra* notes 158-61 and accompanying text.

rect messages to that party or misinterpret what that party is trying to communicate.

In American-Japanese negotiations, for example, the Japanese negotiators may interrupt their arguments with long periods of silence, especially in response to an impasse.<sup>256</sup> The American conversational style, however, consists of few long silent periods. Americans can become uncomfortable with the long Japanese silences and have been found to react in two ways: either they make a concession,<sup>257</sup> or they continue to talk without learning anything more about the Japanese negotiators' views.<sup>258</sup> By filling silent periods with words, American negotiators can actually hurt their bargaining positions.<sup>259</sup>

When a lawyer negotiates with an opponent who speaks a language that she does not understand, she employs an interpreter. Likewise, a lawyer who bargains with an adversary from a different culture needs to research the forms and functions of silence in that culture. She must understand the nonverbal, as well as verbal, context of the discourse.

*D. Using Silences to Craft Persuasive Legal Narratives: "Who Then Tells A Finer Tale Than Any of Us: Silence Does."*<sup>260</sup>

Thus far, I have described how an understanding of the different functions of silence can be helpful in developing rapport in client interviewing and counseling; in interpreting the meanings of silences discovered in fact investigation; and in executing an effective negotiation strategy. Additionally, an appreciation of the functions of silences in communication can assist lawyers in developing persuasive legal narratives. In this section, I describe

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<sup>256</sup> Graham & Herberger, Jr., *supra* note 232, at 164.

<sup>257</sup> This finding supports the notion that silence in negotiation can be used to assert power. See *supra* notes 114-17 and accompanying text.

<sup>258</sup> Graham & Herberger, *supra* note 232, at 164.

<sup>259</sup> *Id.* These commentators note, however,

[W]hile handling silent periods is a problem for American negotiators, for Brazilians it is even worse. American conversational style is orderly and efficient—that is, each speaker takes his or her turn, with few silent periods. In Brazilian conversational style, particularly during the persuasion stages of negotiations, bargainers often speak simultaneously, fighting for the floor. To the American eye Brazilians appear to be poor listeners and rather rude.

*Id.*

<sup>260</sup> ISAK DINESEN, *LAST TALES* 100 (1957).

specific ways in which silences can enhance the impact of a lawyer's story.

Throughout much of their practices, lawyers are storytellers. In negotiations, oral arguments, opening statements, and closing arguments, they try to present facts in a manner that will persuade the particular audience (the other attorney, judge, jury, or agency officials). This process requires attorneys not only to marshal facts in a structure that will meet the applicable legal standards, but also to organize and present them as a compelling narrative.<sup>261</sup> The goal of such narratives is not merely to establish a legal claim or defense or relate a sequence of events. Rather, "[b]y focusing on specific details and ignoring others, by highlighting certain tensions between characters and the circumstances in which they find themselves, by arranging events in a certain order, or by using particular language or symbols, a story attempts to endow the facts with a given meaning [for the particular audience]."<sup>262</sup>

Because silence is a basic component of our language, an understanding of its operation is essential to the craft of effective storytelling. In fact, a fairly large literature has developed on the subject of silences in fiction, drama, the cinema, and other storytelling arts.<sup>263</sup> Applying the findings of these studies to the legal setting, this section will explore how silences can be used to create effective legal narratives.

### *1. Intervening Silences in Legal Narrative*

As shown in Part II, intervening silences are intentional punctuations of words, phrases, or sentences to highlight the content of the speech either rhythmically or melodically.<sup>264</sup> Rhythmically, they provide recurring silences throughout a discourse and weave a pattern throughout the speech. Melodically, they give a contour to the discourse, slowing or speeding it up and giving it a sense of heights and depths.<sup>265</sup> Both of these functions can give everyday talk almost a poetic character.<sup>266</sup>

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<sup>261</sup> KRIEGER ET AL., *supra* note 30, at 114-18.

<sup>262</sup> *Id.* at 116.

<sup>263</sup> See, e.g., ETTIN, *supra* note 19; KANE, *supra* note 11; MCGUIRE, *supra* note 11; Patten, *supra* note 22.

<sup>264</sup> See *supra* notes 64-72 and accompanying text.

<sup>265</sup> See *supra* note 68 and accompanying text.

<sup>266</sup> See Jaworski, *Aesthetic, Communicative and Political Silences*, *supra* note 11, at 23.

In its rhythmic function, intervening silences provide open space around the speech and thereby draw attention to it.<sup>267</sup> In this way, they can pace a theme in a narrative.<sup>268</sup> This insight is important to legal storytelling because pacing the presentation of the facts of a case can often highlight a party's pattern of conduct. Often, the narrative theme of a case will develop from recurring types of conversations, conflicts, or other conduct, for example, failure of a company to respond to complaints of race discrimination; a series of misrepresentations in a consumer fraud action; or repeated disregard of the building code in a faulty construction action.<sup>269</sup> Short intentional silences before and after the description of each of the occurrences can call the listener's attention to the existence of the pattern. Without this punctuation, the pattern of conduct might become lost in a jumble of facts, and the theme will be undermined.

Melodically, intervening silences can set a mood for the story. By slowing speech at an appropriate moment in the narrative, for example, they can increase the dramatic effect of the narrative, and by speeding it up again, they can release the tension.<sup>270</sup> When telling a story in a products liability case, for instance, the plaintiff's lawyer can use gradual silences in her build up to the product's malfunctioning to paint a vivid picture of the events. Or in the context of a particular narrative, appropriate silences can generate a sense of ambiguity, reflecting the bewilderment felt by a particular party.<sup>271</sup> Finally, they can create a sense of loneliness and isolation.<sup>272</sup> In a domestic violence case, for example, well-placed silences in the recounting of the narrative of the victim's daily life can paint a picture of her bleak emotional state.

Used in legal storytelling, these silences can help to create a mood for narrating the facts. Often lawyers adopt a somber, professional tone for any presentation of facts in their cases. For

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<sup>267</sup> See *supra* note 68 and accompanying text; cf. ETTIN, *supra* note 19, at 90 (In reference to written narrative, author observes, "That which is unsaid, the silence of space around the text, should make an environment commanding attention for significant pronouncements.").

<sup>268</sup> See DAUENHAUER, *supra* note 12, at 5.

<sup>269</sup> See KRIEGER ET AL., *supra* note 30, at 143.

<sup>270</sup> KANE, *supra* note 11, at 24.

<sup>271</sup> Jaworski, *Aesthetic, Communicative and Political Silences*, *supra* note 11, at 25.

<sup>272</sup> Cf. JAWORSKI, THE POWER OF SILENCE, *supra* note 11, at 149 (describing how "silence" in Edward Hopper's paintings, such as *Nighthawks*, tell stories "about the loneliness, isolation, and depression of Americans at a certain time in their history").

some audiences, however, especially juries and even some adversaries and judges, a narrative with an overall tone (e.g., tragic, humorous, dramatic) can tell a more persuasive story.<sup>273</sup> Certainly, the word choice, theme, and images chosen can help to create that tone. But unless silences are used to provide the words with a melody, the impact can be greatly diminished. Presented in a stereotypical lawyerly style, even the most persuasive language will not have the same effect as when it is surrounded by appropriate melodic silence.

## 2. *Fore and After Silences in Legal Narrative*

While intervening silences punctuate particular parts of a discourse, fore and after silences operate as a frame for the entire presentation. As described in Part II, fore silences provide open space before the discourse in which the listener is given an opportunity to imagine the utterances to follow. After silences give the listener an interlude after the discourse to savor the preceding utterances.<sup>274</sup>

In their eagerness to present their cases (and often to hear the sound of their own voices), lawyers frequently ignore the significance of fore and after silences, immediately launch into their discourses, and allow little opportunity for listeners to process their words when they are finished. In a negotiation, for example, some lawyers provide little open space before or after the arguments in support of a position, leaving the other side no chance to digest fully the content of their arguments. Obviously, in some contexts, such as routine court calls, short phone negotiations, or other presentations made under significant time pressures, fore and after silences have little relevance. But in those situations when the lawyer wants her audience to focus their attention carefully on her presentation, such as in an opening statement or closing argument, these silences can be very effective.

Fore silences, for example, can create suspense for the listener in anticipation of the narrative to follow. Before a closing argument in a trial, for instance, a short silence can draw the decision-maker's attention to the lawyer's words and spark its curiosity about the way she will attempt to weave together the facts. Giving the decision-maker the silence to imagine the coming argument actually can energize the presentation as long as the lawyer

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<sup>273</sup> KRIEGER ET AL., *supra* note 30, at 147.

<sup>274</sup> See *supra* notes 76-84 and accompanying text.



meets those expectations in the eventual argument.<sup>275</sup> Likewise, silences after the argument can give a decision-maker the opportunity to reflect fully on the story presented. When readers finish a good book, they often sit back and take a few minutes to savor its impact. Similarly, after silence in a legal setting can allow the listener to assess the inferences the attorney seeks to draw from the evidence, evaluate on the cohesiveness of the story, and determine its meaning to him.

### 3. *Omissions in Legal Narratives*

Another function of silence examined in Part II and relevant to the crafting of persuasive legal narrative is the encouragement of reflection by the listener. This type of silence, presenting an argument but omitting the conclusion, induces listeners to make their own inferences and to come to their own decisions.<sup>276</sup> Some marketing research studies have suggested that communicators can actually be more effective when they do not state the conclusion to their arguments than when they explicitly make it. When the conclusion is omitted, listeners perceive the communicator as dispassionate and feel less of a threat to their own freedom to make a decision.<sup>277</sup> But, as the study of closed versus open-ended advertisement showed, these silences may only be effective when the arguments establish an adequate foundation for listeners to draw a conclusion and motivate them to reach a decision.<sup>278</sup>

In the context of narrative theory, the issue of conclusion omission can be significant. When speakers or writers present their stories, the omission of conclusions, and sometimes even crucial facts, can allow their audiences to use their own imagination and fill in the gaps. Given this opportunity, the audience may become deeply involved in the story, make its own inferences, and find its own meaning.<sup>279</sup> As one critic has observed, "it is only through inevitable omissions that a story will gain its

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<sup>275</sup> See *supra* notes 77-80 and accompanying text.

<sup>276</sup> See *supra* notes 98-105 and accompanying text.

<sup>277</sup> See Darwyn E. Linder & Stephen Worchel, *Opinion Change as a Result of Effortfully Drawing a Counterattitudinal Conclusion*, 6 J. EXPERIMENTAL PSYCHOL. 432, 433-34 (1970) ("A persuasive communication, then, may be viewed as a threat to a person's freedom to hold his own opinion or to take any position save that espoused in the message."); Sawyer, *supra* note 11.

<sup>278</sup> See *supra* notes 102, 105 and accompanying text.

<sup>279</sup> See generally ETTIN, *supra* note 19, at 80-81 (quoting Marianne Moore in regard to poetry, "Omissions are not accidents"); Scott, *supra* note 130.

dynamism. [These omissions give us the opportunity] to bring into play our own faculty for establishing connections—for filling in the gaps left by the text itself.”<sup>280</sup> The danger, of course, is that the omissions will be so large that the audience is left confused and abandons any attempt to discover meaning. Accordingly, for these silences to be effective in storytelling, the narrative must set forth enough information to capture the audience’s imagination without squelching it.

In regard to legal narrative, a lawyer’s use of these silences in storytelling will depend on the role the lawyer wants the audience to play in conclusion-drawing. The choice of audience role hinges, in large part, on the lawyer’s assessment of the strength of the “facts” which will be presented. A lawyer will usually want to cast the audience in a passive role when she wants it to rely solely on the “facts.” Especially when the uncontested facts strongly support the client’s case, the lawyer might want to present her case as a simple, unambiguous tale. In many criminal cases, for example, prosecutors will want the jury to focus solely on the evidence presented and discourage jurors from taking any active role in story construction. Under this approach:

[t]he facts are something that happened . . . years ago. The jury’s job is to discern those facts by observing their fossils in the evidence. . . . Resolving the issue of the defendant’s intent [for example] is simply a matter of perceiving a reality which certain facts inherently possess and which their fossilized remains in the evidence therefore ‘prove.’ Reality does not need to be created. It is already out there, in events.<sup>281</sup>

If, however, the lawyer wants to take advantage of ambiguities in the facts of a case, she might want to leave the audience with enough silence so it can use its own imagination and play an active role in the construction of the story. In other words, instead of focusing on the reality of the “facts” presented, her story might want to use gaps in chronology to demonstrate alternative meanings to the events.<sup>282</sup> Indeed, in a criminal trial, the defense lawyer might actually want to cast the jury as a character—the

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<sup>280</sup> Wolfgang Iser, *The Reading Process: A Phenomenological Approach*, 3 *NEW LITERARY HIST.* 279, 284-85 (1971).

<sup>281</sup> Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 *N.Y.L. SCH. L. REV.* 55, 102 (1992). This study of the closing argument of a prosecutor found repeated references to the phrases, “in fact” and “the fact that.” *Id.* at 102 n.126.

<sup>282</sup> *Id.* at 104.

hero—in the story who will reject the prosecutor's total reliance on the established facts in the case. After showing the uncertainties in the facts of the case, the storyteller can address her listeners,

[so] what I'm really asking you to do is to do what I think will probably be one of the hardest things that you have ever been required to do in public, which is to stand up and at some point [to] look over at the defendant and while looking at him vote not guilty of charges brought against him.<sup>283</sup>

#### 4. *Deep Silences in Legal Narrative*

"The cry one holds back is the most powerful of all."

Rabbi Menachem Mendle of Kotzk<sup>284</sup>

The final form of silence that is pertinent to crafting persuasive legal narrative is deep silence. As described previously, these silences are expressions of deep emotions. They arise in response to unexpected events or in situations where the parties share close intimacy or are separated by hatred or anger.<sup>285</sup> Because of the intense emotions involved, the speaker forsakes the word.

In presenting facts about highly emotional events or relationships, a lawyer needs to be aware of the possible use of these silences. When the victim in a domestic violence case testifies, for example, words may be inadequate to describe the pain she suffered or humiliation she endured. In preparing her for trial, her lawyer may not want to advise her to articulate all of her feelings. In terms of the impact on the audience, an expression of deep silence, a minute or two pregnant with the wordless, may actually communicate the message more effectively than words. Likewise, in a closing argument in such a case, her lawyer's rhetorical flourishes may not be as persuasive as a description of her client's experience punctuated with deep silence. Obviously, such techniques can be misused or abused. But a lawyer needs to be aware that not all emotions can be expressed in words, and one option for describing them is deep silence. Indeed, silences, as well as words, can be material for lawyerly histrionics.

<sup>283</sup> Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 74 (1994).

<sup>284</sup> WOLPE, *supra* note 75, at 186.

<sup>285</sup> See *supra* notes 123-42 and accompanying text.

## CONCLUSION

The legal profession is infatuated with the verbal. In relationships with clients, lawyers want detailed information and often become frustrated with evasive and ambiguous answers. In negotiations, they frequently strive to overwhelm the other side with words: arguments, threats, and posturing. When a tentative agreement has been reached, they spend, at least in the opinion of laypersons, inordinate amounts of time, parsing each and every term, and attempting to forge a deal that will take into account every possible eventuality. In formal hearings and trials, lawyers pride themselves on the precision and incisiveness of their arguments and examinations, ridiculing a witness' uncertainty and hesitation and often trying to take control of the courtroom with the power of their voices.

Much of legal education supports this culture.<sup>286</sup> Many law professors demand the quick, precise answer, take advantage of student pauses and hesitations to make their point, and often appear to reward the glib response. At the end of the semester, mastery of a subject is evaluated solely on a three-hour examination in which rapid recall and recitation of the course material is the value.

Lawyers' infatuation with the verbal, however, ignores the fact that not all communication is informational. The details, demand for precision, search for the right words, the focus of most of a lawyer's craft, can ignore the interpersonal and contextual components of language. Lost in all the verbiage is an understanding of the communicative power of silence. As this Article has shown, silence plays a variety of functions in human communication both to facilitate the sending of verbal messages (pauses and hesitations; intervening silences) and to send their own messages (assent; promotion of reflection and discussion; deep silences; and marking of social distance). Disregard of these functions can often lead to unreflective discourse and misunderstanding. Lawyers can have all the words right but can miss the mark when they do not have an appreciation of the function of the spaces

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<sup>286</sup> This phenomenon is not limited to legal education. See Adam Jaworski & Itesh Sachdev, *Teachers' Beliefs About Students' Talk and Silence: Constructing Academic Success and Failure Through Metapragmatic Comments*, in METALANGUAGE: SOCIAL AND PRAGMATIC PERSPECTIVES (Adam Jaworski et al. eds., forthcoming 2001) (manuscript on file with author) (in reviewing teacher references for students, researchers found that talk was viewed positively and silence, negatively).

between words. Especially in cross-cultural contexts, the failure to understand how someone from a less verbal culture uses silence can result in serious misunderstandings.

This Article has demonstrated that effective lawyering requires knowledge not only of the grammar of language, but also the rules of silence. Obviously, much of a lawyer's practice needs to focus on verbal precision and the crafting of words into a persuasive and coherent message. But without a grasp of the forms and functions of silence, lawyers cannot communicate effectively with their clients, their adversaries, or decision-makers. Both as speakers and listeners, the messages sent can be lost or misunderstood in all the lawyerly noise. As strange as it may initially sound, a lawyer can at times be most effective when she does not speak.