

“Talk Less”¹: Eloquent Silence in the Rhetoric of Lawyering

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Of Oscar Wilde’s fictional aristocrat Lord Henry Wotton it was observed: “He knew the precise . . . moment when to say nothing.”² Twenty-first-century lawyers would be wise to sharpen such skill.

Spoken arguments benefit greatly from silence, as do written arguments, but to a far lesser degree. Because they speak and write for a living, lawyers need to understand the history, theory, and use of silence as a critical component in their rhetorical repertoire. Lawyers, like all participants in society, stand as both agents and targets of persuasion.³ In speaking, the decision to pause before a word or midsentence, to create a chunk of words, or to be entirely silent creates rhetorical impact. To a lesser extent, the decision to forgo filing a reply brief or sending a responding letter/e-mail/text can have rhetorical effect, particularly in the case of text messages. Understanding how and why silence is eloquent not only gives us the skill to be persuasive when we use silence, but also makes us aware of the tactic when silence is used against us.

I. Introduction

Silence, as in not publishing a concurrence, serves to strengthen the majority decision. Silence, as in ceasing a speech for thirteen seconds while thousands sit and wait, demonstrates “full control over the moment and the

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1. *Aaron Burr, Sir, Hamilton*, GENIUS, <https://genius.com/Lin-manuel-miranda-aaron-burr-sir-lyrics> [<https://perma.cc/XQ3S-8Z9G>] (advice of Aaron Burr to Alexander Hamilton—both lawyers—in the lyrics of the Broadway production of *HAMILTON* (2015)).
2. OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* 14 (Dover Thrift ed. 1993).
3. Peter Reilly, *Resistance Is Not Futile: Harnessing the Power of Counter-Offensive Tactics in Legal Persuasion*, 64 *HASTINGS L. J.* 1171, 1177 (2013).

craft.”⁴ Silence, such as not responding in a negotiation to an invitation to do so, can be a “probe, to stimulate individuals to provide more information.”⁵

In June 2015, Justice Ginsburg found herself in the *Obergefell v. Hodges*⁶ majority, but she did not agree, necessarily, with Justice Kennedy’s reasoning in the Court’s finding a constitutional right to same-sex marriage. Justices Kagan, Sotomayor, and Breyer signed on with Justice Kennedy’s majority opinion as well. None wrote a concurrence, yet surely each had much to say. By contrast, the four dissenters felt compelled to publish a combined twenty-three pages in the *Supreme Court Reporter* voicing various views.⁷

A month later, at Duke University, Justice Ginsburg explained the purpose and power of her silence in *Obergefell*.⁸ Justice Ginsburg “keeps a book of Justice Louis Brandeis’ unreleased dissents in her chambers to remind herself of the virtue of restraint.”⁹ Her concurring opinion, had she written one, undoubtedly would have contained a fuller discussion of the Equal Protection rationale for legalizing marriage equality, but Justice Ginsburg understood that the four dissents were “bound to spread confusion.”¹⁰ In deciding to not offer a concurrence, Justice Ginsburg made a rhetorical choice. At Duke University, she explained her thinking:

Perhaps because in this case it was more powerful to have the same, single opinion That kind of discipline is to say, “I’m not the queen and if the majority is close enough to what I think . . . then I don’t have to have it exactly as I would have written it.” . . . On the whole, we think of our consumers—other judges, lawyers, the public. The law that the Supreme Court establishes is the law that they must live by, so all things considered, it’s better to have it clearer than confusing.¹¹

Since its founding in the early nineteenth century by free black man Denmark Vesey¹² the Emanuel A.M.E. Church has shown as a beacon of freedom and

4. Peter Manseau, *Obama’s Graceful Pause in Charleston*, THE ATLANTIC (June 30, 2015, <http://www.theatlantic.com/politics/archive/2015/06/obamas-graceful-pause-in-charleston/397223/>) [<https://perma.cc/NT9F-4YPQ>].

5. Debra Lyn Bassett, *Silencing Our Elders*, 15 NEV. L. J. 519, 529 (2015).

6. 135 S. Ct. 2584 (2015).

7. *Id.* at 2611–34.

8. Samantha Lachman & Ashley Alman, *Ruth Bader Ginsburg Reflects on a Polarizing Term One Month Out*, HUFFPOST: POLITICS (July 29, 2015, 11:21 PM), http://www.huffingtonpost.com/entry/ruth-bader-ginsburg-tk_us_55b97c68e4bob8499b18536b [<https://perma.cc/S4VN-MSMU>].

9. *Id.*

10. *Id.*

11. *Id.*

12. Shevaun E. Watson, *Frying Silence: The Case of Denmark Vesey and the History of African American Rhetoric*, in SILENCE AND LISTENING AS RHETORICAL ARTS 75 (Cheryl Glenn & Krista Ratcliffe eds., 2011) [hereinafter GLENN & RATCLIFFE].

hope for African-Americans. On June 17, 2015, Dylann Roof entered that church hoping to start a race war and assassinated nine parishioners and Rev. Clementa Pinckney.¹³ Nine days later, President Barack Obama delivered Clementa Pinckney's eulogy. Considered one of the President's great speeches,¹⁴ the eulogy is known not as much for its words as for its silence.¹⁵ Nearing the end, the President stopped—he stopped. For a full thirteen seconds silence reigned, and then, slowly, the President began to sing *Amazing Grace*. Peter Manseau wrote of “Obama’s graceful pause in Charleston”¹⁶ and, quoting Evans Crawford’s book on African-American preachers’ sermons,¹⁷ observed that Obama’s pause was “not a ‘dead silence’ but a ‘live silence.’ . . . It is a silence that organizes time that invites us to think of time not as something passed but as something plotted.”¹⁸

Don Corleone, in 1920s New York, provides another example of the power of such “live silence.” Professor Thomas Hills, of University of Warwick, explains how a scene from *The Godfather* demonstrates that silence is golden:

In this scene, the young Vito Corleone is approached by a landlord who offended Vito by refusing to allow an evicted woman to return to her apartment with her son and dog. The landlord has since learned that Vito is a powerful man, not someone whose request he should have refused. In this scene, the landlord says [he] has changed his mind. He wants to hear he is forgiven and all is well. Instead, he is met by complete silence while the Godfather (Vito) thinks it over. Uncomfortable in the silence, the landlord rushes ahead to sweeten his offer—not only will he accept the tenant back, along with her son and dog, but he will also keep the rent the same instead of raising it. This is met by another uncomfortable silence. Again, the landlord interprets the silence as a refusal of his offer so he talks again, lowering the rent and showing his fear and desperation.¹⁹

13. Polly Mosendz, *Dylann Roof Confesses: Says He Wanted to Start ‘Race War,’* NEWSWEEK (June 19, 2015, 9:38 AM) <http://www.newsweek.com/dylann-roof-confesses-church-shooting-says-he-wanted-start-race-war-344797> [<https://perma.cc/D4R4-EA49>].
14. Allyson Hobbs, *Barack Obama’s Second Inaugural in Charleston*, THE NEW YORKER: NEWS DESK (June 29, 2015), <http://www.newyorker.com/news/news-desk/barack-obamas-second-inaugural-in-charleston> [<https://perma.cc/TX85-C9QE>] (comparing the speech to Abraham Lincoln’s Second Inaugural Speech); Gregory Korte, *First Take: Eulogy Was Obama at His Best*, USA TODAY: NEWS (June 29, 2015, 7:05 PM), <http://www.usatoday.com/story/news/politics/2015/06/26/obama-pinckney-eulogy-analysis/29352765/> [<https://perma.cc/UD7B-RHM5>].
15. President Obama is considered one of the great presidential speechmakers. See Richard Greene, *Obama Is America’s Third Greatest Presidential Orator in Modern Era*, HUFFPOST (May 25, 2011), http://www.huffingtonpost.com/richard-greene/obama-is-americas-3rd-gre_b_813868.html [<https://perma.cc/588J-K79W>].
16. Manseau, *supra* note 4.
17. EVANS E. CRAWFORD WITH THOMAS H. TROEGER, *THE HUM: CALL AND RESPONSE IN AFRICAN AMERICAN PREACHING* (1995).
18. Manseau, *supra* note 4.
19. Thomas Hills, *Silence Is Golden*, PROPAGANDA FOR CHANGE (Mar. 17, 2014), <http://>

Effective silence, as Justice Ginsberg, President Obama and The Don demonstrate, can be more persuasive than the speech that surrounds it. Che Guevara said it best when he observed that “[s]ilence is argument carried out by other means.”²⁰ Those “means” are the thoughts that silence stimulates in the minds of each audience member.

Absence powerfully persuades. In this way, silence uses the listener as a tool of the orator instead of just as a passive audience member. Courts note this power and call it “deafening silence.”²¹ Silence is powerful because it penetrates the listener’s mind by giving meaning to what was already heard; conversely, silence can act as a ramp up to what is about to be heard. Silence, thus, allows the listener to finish a thought, or prepare to receive a thought. Either way, the listener becomes participant.

DePaul’s Professor Julie A. Bokser provides an excellent discussion of the classic origins of this idea of activating a listener’s mind by means of deploying silence. In examining the New World rhetoric of listening, she contrasts the classical approach of Socrates and Cicero that sees silence as something that the speaker does to an audience with Aristotle’s enthymeme, which hinges on a participatory dynamic between speaker and audience that makes the silent premise so powerful.²² An enthymeme is a syllogism that leaves a premise unspoken.²³ A modern example of just how powerful an enthymeme can be comes from the 1988 vice presidential debate when Senator Lloyd Bentsen listened, along with 46.9 million TV viewers,²⁴ to Dan Quayle compare himself to President Kennedy. When Senator Quayle finished, Senator Bentsen paused, and then said:

Senator, I served with Jack Kennedy.
I knew Jack Kennedy.
Jack Kennedy was my friend.

persuasion-and-influence.blogspot.com/2014/03/silence-is-golden.html [https://perma.cc/UQB2-ZPWH].

20. *As quoted in* EARL ERNEST GUILÉ, *SECRETS TO A RICHER LIFE* 225 (2005).
21. *See* United States v. Gray, 177 F.3d 86, 90 (1st Cir. 1999); Kaplan v. Super. Ct. of Orange Cty., 491 P.2d 1, 6 (Cal.1971).
22. Julie A. Bokser, *Sor Juana’s Divine Narcissus: A New World Rhetoric of Listening*, 40 RHETORIC SOC’Y Q. 224, 227 (2010).
23. The classic deductive syllogism is “All humans are mortal” (major premise); “Socrates is human” (minor premise): therefore, “Socrates is mortal.” See William of Ockham, SUMMA LOGICAE, III 1,3;36rb (1326) (believed to be the first use of this classic syllogism), http://www.logicmuseum.com/wiki/Authors/Ockham/Summa_Logicae/Book_III-1/Chapter_3 Just stating “Socrates is mortal” is an enthymeme because the first two premises are silent. *See* William L. Benoit, *The Most Important Passage in Aristotle’s Rhetoric*, 12 RHETORIC SOC’Y Q. 2, 4 (1982) (arguing that Aristotle’s discussion of enthymeme in *Rhetoric* is the work’s “most significant passage”).
24. *See* A.J. Katz, *Vice Presidential TV Debate Ratings by the Numbers*, ADWEEK: POL. | RATINGS (Oct. 4, 2016, 10:19 AM), <http://www.adweek.com/tvnews/vice-presidential-tv-debate-ratings-by-the-numbers/306445> [https://perma.cc/48TE-FB4L].

[1.3-second pause]

Senator, you are no Jack Kennedy.²⁵

The silent premise here, making the last sentence an enthymeme, is that “Jack Kennedy was a great man.” Stating that premise expressly would have taken away from the impact of the statement, and the powerful persuasive moment would have never been. Rather, by electing to leave the key premise silent, Senator Bentsen united with the audience in a powerful rhetorical barb²⁶ that not only stung Quayle and stuck, but stands as a hallmark of political lore²⁷ and as a part of our popular culture.²⁸

Silence is a lawyer’s tool, one too often unappreciated or outright ignored. To start down the remedial road, this article keys on a lawyer’s effective use of spoken silence and, to a lesser extent, documentary silence in legal discourse. The author demonstrates, in Section II, why silence is rhetorical. Section III explores how silence works—cognitively—to persuade. In Section IV, the author highlights how lawyers can, and should, talk less in conversations and court, and consider more deliberately when to, and not to, respond to a brief, letter, e-mail, or text. In Section V, the article concludes with an observation, rather than recommendation, on when to stay silent.

II: The Scholarship and History of Silence as Argument

Virtually ignored by academics for decades,²⁹ silence was viewed as something that bounded sounds (or to a small degree text), and thus served as a stage upon which words played out the communication act. Many in academia now recognize silence as not merely a stage, but also as a powerful

25. *October 5, 1988 Debate Transcripts: The Bentsen-Quayle Vice Presidential Debate*, COMMISSION ON PRESIDENTIAL DEBATES, <http://www.debates.org/index.php?page=october-5-1988-debate-transcripts> [https://perma.cc/66JS-BXM6] (last visited June 16, 2017).
26. See Lloyd F. Bitzer, *Aristotle’s Enthymeme Revisited*, 40 Q. J. SPEECH 399, 408 (1959) (“[E]nthymemes occur only when speaker and audience jointly produce them. Because they are jointly produced, enthymemes intimately unite speaker and audience and provide the strongest possible proofs.”).
27. The line has been called “the most famous put-down in political history.” *A Brief History of Memorable Moments*, USA TODAY, Oct. 5, 2016, at 2A. See also Steven E. Clayman, *Defining Moments, Presidential Debates, and the Dynamics of Quotability*, 45 J. COMM. 118, 118 (1995) (using the Quayle/Bentsen debate exchange as the case study in powerful debate moments).
28. In the movie *George of the Jungle*, for example, the final scene includes the following exchange: Ursula’s mother: “Arthur, I wish you would do something about all these monkeys. I feel like Jane Goodall.” Ape: “Madam, I knew Jane Goodall and you are no Jane Goodall.” *George of the Jungle (1997) Quotes*, IMDB, <http://www.imdb.com/title/tt0119190/quotes> [https://perma.cc/H9LW-C6UL] (last visited June 16, 2017).
29. Bassett, *supra* note 5, at 522; PERSPECTIVES ON SILENCE xi (Deborah Tannen & Muriel Saville-Troike eds., 1985).

player in the communication act.³⁰ One of the earliest scholars to make this point was linguistics professor William J. Samarin, who 50 years ago wrote: “Silence can have meaning. Like the zero in mathematics, it is an absence with a function.”³¹ Just as architects know that both negative space and material elements are essential in building design,³² and photographers know that light and absence of light are equally necessary in composition,³³ speakers know that both silence and speech are essential in creating rhetorical effects.³⁴

This realization manifested itself in the scholarship of silence, the trajectory of which from the early 1970s to the 2010s is laid out in *The Functions of Silence*.³⁵

Communication theory, linguistics, anthropology, and other disciplines now all recognize silence as “an active meaningful means of communication demonstrated to have different functions.”³⁶ Paradoxically, it is now understood that silence is crucial to speech. “Silence can shape sequences of speech, carry meaning and organize the social relationships between speakers.”³⁷ Silence, as a means of communication, has been variously categorized, but most simply breaks down into three groups. First, silence can be simple *silence*, in other words, as stillness—sleep, meditation, or the pause necessary for turn-taking in conversation.³⁸ Second, silence can be *silencing*—a verb that means censorship or

30. See generally Shelby P. Bell, *What Does Silence Signify? Investigating the Rhetoric of Silence in Berghuis v. Thompkins*, 78 W. J. COMM. 175, 176–79 (2014) (excellent discussion of the history of the study of silence as a rhetorical choice); three important books that deal with silence as a communicative act are COLUM KENNY, *THE POWER OF SILENCE: SILENT COMMUNICATION IN DAILY LIFE* (2011); ADAM JAWORSKI, *THE POWER OF SILENCE: SOCIAL AND PRAGMATIC PERSPECTIVES* (1993); PERSPECTIVES ON SILENCE, *supra* note 29.
31. William J. Samarin, *Language of Silence*, 12 PRAC. ANTHROPOLOGY 115, 115 (1965).
32. RUDOLF ARNHEIM, *TO THE RESCUE OF ART: TWENTY-SIX ESSAYS* 92 (1992).
33. Ron Bigelow, *The Importance of Shadows* (shadows “are an entity as alive as the light”) http://ronbigelow.com/articles/shadows/importance_of_shadows.htm (last visited on July 29, 2017).
34. Stefan H. Krieger, *A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process*, 80 OR. L. REV. 199, 217 n.73 (2001); MAX VAN MANEN, *RESEARCHING LIVED EXPERIENCE: HUMAN SCIENCE FOR AN ACTION SENSITIVE PEDAGOGY* 112 (1990).
35. Michal Ephratt, *The Functions of Silence*, 40 J. PRAGMATICS 1909 (2008).
36. Biok Behnam & Nastaran Nostratzadegan, *A Discourse Study of Rhetorical Silence in Persian and English Literature*, 3 INT’L J. ACAD. RES. IN PROGRESSIVE EDUC. & DEV. 161 (2014). The actual “functions of silence” have been variously categorized. Recently, Professor Bassett broke down the five such functions of silence: “(1) linkage (meaning to bond people or to separate them), (2) affecting (meaning to heal or to wound), (3) revelation (meaning to make something known or to hide something), (4) judgmental (meaning to assent or dissent), and (5) activating (meaning thoughtfulness or mental inactivity.”); Bassett, *supra* note 5, at 523.
37. Ulrich Schmitz, *Eloquent Silence*, UNIVERSITAT DUISBURG-ESSEN: DUEPUBLICO 3.4(0) (1999), <http://duepublico.uni-duisburg-essen.de/servlets/DerivateServlet/Derivate-30/silence.htm> [<https://perma.cc/Y5NV-SB48>].
38. Thomas J. Bruneau, *Silence, Silences, and Silencing*, in 2 ENCYCLOPEDIA OF COMMUNICATION THEORY 880, 880–84 (Stephen W. Littlejohn & Karen A. Foss eds., 2009).

mutism.³⁹ These first two types of nonspeech are both silence for a nonrhetorical purpose. While these two noncommunicative silences are important, they are not the focus of this article. Rather, this article focuses on the third kind: *silences*—or what the Greeks called *evyloti slopi*—“Eloquent Silence.”⁴⁰ This is the type of silence in which the nonspeaker intends to be communicative by her silence, or, for our purposes, to make an argument.⁴¹

While lawyers’ use of Eloquent Silence as a rhetorical device needs exploration, in the area of political nonspeech, scholars have already undertaken such study. For example, looking at President Nixon’s and President Carter’s use of silence, Purdue University Professor Barry Brummett pointed out that silence has utility as rhetoric when “talk is expected.”⁴² Appending the term “strategic” as an adjective to silence instead of “eloquent,” Brummett argues that silence is strategic when that silence (a) violates expectations; (b) draws public attribution of fairly predictable meanings; and (c) seems intentional and directed at an audience.⁴³ This article will use the term “eloquent silence” rather than “strategic silence,” but the two are interchangeable.

As testament to its classical origins, the phrase “Eloquent Silence” can be traced to “the Roman poet Ovid, who wrote in his *Artis Amatoriae* (*The Art of Love*): ‘Often there is eloquence in a silent look.’”⁴⁴ Eloquent Silence finds reference in legal opinions, as well. For example, in *Edmonds v. Compagnie Generale Transatlantique*,⁴⁵ Justice White, speaking for the majority construing the Longshoremen’s and Harbor Workers’ Compensation Act,⁴⁶ turned to the absence of anything in the legislative history that supported the appeals court’s interpretation, writing:

The legislative history strongly counsels against the Court of Appeals’ interpretation of the statute, which modifies the longshoreman’s pre-existing rights against the negligent vessel. The reports and debates leading up to the 1972 Amendments contain not a word of this concept. This silence is

39. *Id.*

40. Kofi Agyekum, *The Communicative Role of Silence in Akan*, 12 PRAGMATICS 31, 32 (2002); see also Ephratt, *supra* note 35, at 1909; Behnam & Nostratzadegan, *supra* note 36, at 162.

41. Other descriptions for this type of communicative “silences” include “individually determined/interactive” silence. See PERSPECTIVES ON SILENCE *supra* note 29, at 16, or “communicative silences”; Thomas J. Bruneau, *Communicative Silences: Forms and Functions*, 23 J. COMM. 17-46 (1973).

42. Barry Brummett, *Towards a Theory of Silence as a Political Strategy*, 66 Q. J. SPEECH 289, 290 (1980).

43. *Id.* at 289.

44. Michael G. Walsh, *Lawyerly Clichés and Their Origins (A-G)*, EXPERIENCE (Am. Bar Ass’n Senior Lawyers Div., Chicago, Ill.), Spring 2006, at 23, 25. Walsh notes that in addition to Ovid, “[m]any authors have echoed this sentiment, including Thomas Carlyle, who wrote in 1840 in *On Heroes and Hero-Worship*, ‘Silence is more eloquent than words.’” *Id.*

45. 443 U.S. 256, 266-67 (1979).

46. 33 U.S.C. §§ 901-50 (1976 & Supp. 5 1982).

most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely.⁴⁷

Some fifty years before *Edmonds*, the Louisiana Supreme Court wrote of Eloquent Silence in a land-use case in which the defendant claimed the right to a plot in an open area of the cemetery.⁴⁸ The plaintiff sought an injunction, arguing that there was an “implied plan” that no graves were allowed in this open space. The relevant documents were silent on the point, and it was to this absence of a writing that the court turned to hold for the plaintiff. The court stated:

Silence is sometimes as eloquent as words; the thousand spaces destined to tombs in this cemetery each has its number; these numbers, like so many tongues, tell us that these spaces are destined to tombs; while the blank of this semicircle, like an eloquent silence, tells us that here no tomb is to be placed.⁴⁹

Beyond these judicial references, on a more macro level, Eloquent Silence functions as a major communicative event,⁵⁰ such as during a moment of silence,⁵¹ or at a funeral.⁵² While the study of silence as a rhetorical tool exists generally,⁵³ the scholarship does not examine silence as a lawyer’s tool. An in-depth study of lawyers’ use and appreciation of Eloquent Silence as part of

47. 443 U.S. at 266-67. For other references to “eloquent silence” see, e.g., Kez U. Gabriel, *The Idealist Discourse of Legal Professionalism in Maryland: Delineating the Omissions and Eloquent Silences as a Progressive Critique*, 41 U. BALT. L.F. 120 (2011).
48. *Shean v. Carra*, 82 So. 399 (1919).
49. *Id.* at 400. See also *United States v. Curescu*, 674 F.3d 735, 740 (7th Cir. 2012) (“What Curescu didn’t say in any of the recorded conversations illustrates that silence like obliquity can be eloquent.”); *Barclays Bank Int’l Ltd. v. Franchise Tax Bd.*, 829 P.2d 279, 300 (Cal. 1992) (Congress’s repeated refusal to intervene “is a governmental silence that is eloquent.”).
50. JAWORSKI, *supra* note 30. For example, silence as a communicative tool has also been studied for how it enhances power relationships. This can take the form of the so-called Spiral of Silence in which individuals afraid of social isolation refrain from expressing dissenting opinions. See, e.g., J. David Kenamer, *Self-Serving Biases in Perceiving the Opinions of Others: Implications for the Spiral of Silence*, 17 COMM. RES. 393 (1990). Silence has also been studied in interpersonal relationships such as “giving someone the silent treatment.” See generally KIPLING D. WILLIAMS, *OSTRACISM: THE POWER OF SILENCE I* (2001).
51. Moments of silence possess a place in our popular culture, from sporting events to the start of the school day for some students. See *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001) (upholding Virginia’s moment-of-silence law). See generally Eric J. Segall, *Silence Is Golden: Moments of Silence, Legislative Prayers, and the Establishment Clause*, 108 NW. U. L. REV. ONLINE 229 (2014), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1022&context=nulr_online; David L. Eng, *The Value of Silence*, 54 THEATER J. 85 (2002) (discussing how the language of loss is often silence).
52. See, e.g., Ruth Langer, *Jewish Funerals: A Ritual Description*, PROC. N. AM. ACAD. LITURGY ANN. MEETING 108 (2001).
53. See, e.g., GLENN & RATCLIFFE, *supra* note 12; Robert L. Scott, *Rhetoric and Silence*, 36 W. SPEECH 146 (1972); Behnam & Nostratzadegan, *supra* note 36.

their rhetorical repertoire is important, because rhetorical tools comprise the contents of every lawyer's toolbox.

In legal writing, trial advocacy, and other areas of legal scholarship, Eloquent Silence needs to be studied, and its rhetorical impact appreciated. While the legal significance of silence in contract law, agency, freedom of speech, criminal justice, and other areas has been explored in depth,⁵⁴ the only treatment of Eloquent Silence as a tool are Professor Krieger's article⁵⁵ published fifteen years ago, urging "lawyers to become more conscious of their own use of words and silence in their communication and to become more reflective about others' silence,"⁵⁶ and, more recently, Professor Bassett's article discussing how the "discomfort with silence" that exists in the practice of law "has particular ramifications for lawyer effectiveness in negotiating, interviewing, and counseling."⁵⁷ While Professor Krieger's and Professor Bassett's articles explore the topic and discuss the legal significance of silence, the appropriate use of silence in various settings, or how silence need not be "filled" because doing so gets in the way of representing the client, these articles contain little on *how silence can be deliberately deployed to persuade*. And it is how Eloquent Silence serves as such an aid to argument on which this article focuses.

Before turning to that discussion directly, an understanding of the means by which the mind processes Eloquent Silence is helpful.

III. How Eloquent Silence Persuades—Cognitively

While Aristotle devoted an entire volume to how one person, or a group, attempts to convince another of its beliefs, intentions or desires,⁵⁸ it was not until the second half of the twentieth century that scientists began to explore how the brain systematically processes persuasion. By the 1990s, scientists had articulated the dual process theory of persuasion, grounded in earlier scientific work distinguishing a "cue" from "learning."⁵⁹ This theory postulates that persuasion follows two paths as it is processed in the brains of target audience members: the central route and various peripheral routes.⁶⁰ The central route

54. See, e.g., Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1 (1995); Anne Graffam Walker, *The Two Faces of Silence: The Effect of Witness Hesitancy on Lawyers' Impressions*, in PERSPECTIVES ON SILENCE, *supra* note 29, at 55; Comment, *When Silence Gives Consent*, 29 YALE L. J. 441 (1920).

55. Krieger, *supra* note 34.

56. *Id.* at 205-06.

57. Bassett, *supra* note 5, at 529.

58. See Emily B. Falk et al., *The Neural Correlates of Persuasion: A Common Network Across Cultures and Media*, 22 J. COGNITIVE NEUROSCIENCE 2447, 2447 (2009).

59. Richard E. Petty & Pablo Briñol, *Persuasion: From Single to Multiple to Metacognitive Processes*, 3 PERSP. ON PSYCHOL. SCI. 137 (2008).

60. See generally Richard E. Petty, *Creating Strong Attitudes: Two Routes to Persuasion*, in NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH AND HUMAN SERVS., RESEARCH MONOGRAPH 155, REVIEWING THE BEHAVIORAL SCIENCE KNOWLEDGE BASE ON TECHNOLOGY TRANSFER 209

is generally considered to be careful thought, while via the peripheral routes persuasion operates primarily from subjective aspects of the listener, including positive and negative cues. A full discussion of the neuroscience of persuasion⁶¹ is beyond the scope of this article. Nevertheless, a brief overview of two of the peripheral routes—think time and awkward silence—helps explain how the absence of sound persuades a listener.

A. Think Time

One way to conceptualize the dual process model of persuasion is explored by Nobel Prize-winning economist David Kahneman in *Thinking, Fast and Slow*.⁶² Thinking fast, so-called “System 1,” is intuitive and requires little mental energy or time. See snake–flee. But System 1 thinking is prone to mistakes—cognitive biases.⁶³ Kahneman’s book offers a famous example of how System 1 leads one astray:

A bat and a ball cost \$1.10. The bat costs one dollar more than the ball. How much does the ball cost?⁶⁴

The answer—if you took your time—is five cents, yet most people employ System 1 and answer ten cents, wrongly.⁶⁵

Now, what is the product of 238 and 96? Here, System 1 does not work at all. A quick, intuitive response is lacking. For System 2, slow, methodical, logical cognitive work is required.⁶⁶ System 1 does not require silence; see a snake in a crowded concert and you will still run. But try to multiply 238 and 96 in a mosh pit at the Metro. You can’t. System 2 demands silence to work. As Professors Murdock and Sullivan put it, “System 1 operates on

(Thomas E. Backer, Susan L. David & Gerald Saucy eds., 1995), <https://archives.drugabuse.gov/pdf/monographs/155.pdf> [<https://perma.cc/66MH-MQNC>].

61. I. Stephanie Vezich, Emily B. Falk & Matthew D. Lieberman, *Persuasion Neuroscience: New Potential to Test Dual-Process Theories*, in *SOCIAL NEUROSCIENCE: BIOLOGICAL APPROACHES TO SOCIAL PSYCHOLOGY* 34 (Eddie Harmon-Jones & Michael Inzlicht eds., 2016).
62. DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011). See also Charles W. Murdock & Barry Sullivan, Essay, *What Kahneman Means for Lawyers: Some Reflections on Thinking, Fast and Slow*, 44 *LOY. U. CHI. L.J.* 1377 (2013) (discussing Kahneman’s thesis as applied to lawyers); Brian K. Johnson, *Lawyers Talking, Fast and Slow*, *ARIZ. ATT’Y*, Jan. 2013, at 36 (same).
63. See generally DEAN BUONOMANO, BRAIN BUGS, HOW THE BRAIN’S FLAWS SHAPE OUR LIVES (2011); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCI.* 1124 (1974); see also Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 *PSYCHOL. REV.* 293 (1983); JONATHAN BARON, THINKING AND DECIDING (4th ed. 2008); DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008).
64. KAHNEMAN, *supra* note 62, at 44.
65. $Bat + ball = \$1.10$; $bat - ball = \$1.00$. Adding the two equations together, the result is: $2 bats = \$2.10$; therefore, the bat equals \$1.05 and the ball equals \$0.05. *Id.* at 44–45. See Murdock & Sullivan, *supra* note 62, at 1379–80.
66. KAHNEMAN, *supra* note 62, at 31–34.

the basis of limited evidence and limited effort—what Professor Kahneman describes as WYSIATI, or “what you see is all there is.”⁶⁷ On the other hand, System 2 is capable of digging deeper and bringing more information to the consciousness. System 2 thinking results in better decisions, but it also takes more effort; it is much easier to jump to a conclusion than to reason one out.⁶⁸ So, does intentionally creating silence foster System 2 thinking, increasing the quality of the thinking of the listener? Yes. Effective persuasion requires silence. Research in classroom think time—traditionally called “wait time”—provides evidence of the persuasive power of silence.

Professor Mary Budd Rowe, a middle school science teacher turned Stanford professor, published a landmark paper in 1974 summarizing years of research on how wait time affected the development of language and logic in children.⁶⁹ During most of the twentieth century, wait time periods—silence that follows the teacher’s question and the student’s answer—rarely topped 1.5 seconds. Rowe discovered that longer periods of silence between a teacher’s question and a student’s answer yielded a host of positive results. A three-second wait time of silence, for example, increased length and correctness of responses, reduced “I don’t know” responses, and increased the number of students who volunteered answers.⁷⁰ This concept, later rebranded by scholars as “think time,” includes as many as eight types of classroom “silence”—all of which recognize the benefit of disturbance-free silence so that both student and teacher can process relevant information and act accordingly.⁷¹ Simply put, “both students and teachers benefit from the intentional and consistent” use of silences.⁷²

Neuroscience shows why. As one neuroscientist notes, the “main difficulty the brain experiences when thinking is confusion. In order to undertake neural encoding processes, people need opportunities for reflection in order for the brain to transfer learning and construct meaning.”⁷³ Silence slows things down

67. *Id.* at 85–88.

68. See Murdock & Sullivan, *supra* note 62, at 1394–95.

69. Mary Budd Rowe, *Pausing Phenomena: Influence on the Quality of Instruction*, 3 J. PSYCHOLINGUISTIC RES. 203, 221–22 (1974); Mary Budd Rowe, *Relation of Wait-Time and Rewards to the Development of Language, Logic, and Fate Control: Part II-Rewards*, 11 J. RES. IN SCI. TEACHING 291, 291 (1974). See also Mary Budd Rowe, *Wait Time: Slowing Down May Be a Way of Speeding Up*, AM. EDUCATOR, Spring 1987, at 38; Bassett, *supra* note 5, at 525.

70. See Robert J. Stahl, *Using “Think-Time” and “Wait-Time” Skillfully in the Classroom*, ERIC CLEARINGHOUSE FOR SOC. STUD./SOC. SCI. EDUC. (ED370885 1994) (summarizing scholarship), <http://files.eric.ed.gov/fulltext/ED370885.pdf> [<https://perma.cc/LMV6-NRS8>].

71. *Id.*

72. Jackie Acree Walsh & Beth Dankert Sattes, *A New Rhythm for Responding*, EDUC. LEADERSHIP, Sept. 2015, at 46, 47.

73. Dan White, *A Pedagogical Decalogue: Discerning the Practical Implications of Brain-based Learning Research on Pedagogical Practice in Catholic Schools*, in HOW THE BRAIN LEARNS: WHAT LESSONS ARE THERE FOR TEACHING? 68, 69–70 (2013), <http://research.acer.edu.au/cgi/viewcontent.cgi?a>

(triggering System 2), allowing more effective learning to take place. Silence makes “learning personal, purposeful, meaningful and relevant.”⁷⁴ Think time allows the listener to make connections and detect patterns. As targets for persuasion, lawyers, judges, and clients are just like students—and wait time allows for personal, purposeful, meaningful and relevant learning.⁷⁵ Silence is wait time’s solitary ingredient.

B. Awkward Silence

Silence in a conversation “can result in discomfort and awkwardness.”⁷⁶ And thus, quiet can be, ironically, disquieting. This phenomenon comes about as a result of an implied social contract of interaction that characterizes conversation such that participants shoulder a responsibility to keep that conversation going. Silence abdicates that responsibility.⁷⁷ Think about those restaurant table talks where suddenly no one responds. Your heart skips a beat, and from your core rises up an urge to fill that void.⁷⁸ In that void, a persuasive opportunity hides.

Those who succumb to the urge to fill that void by speaking miss that opportunity. By speaking up, they give others the opportunity to listen. Speaking in an uncomfortable moment shortcuts customary speaker filters. Things may be said that otherwise would have gone unsaid. Here, listening becomes a gold mine for those who choose not to speak. Don Corleone, discussed above, used this situational silence to great effect as the uncomfortable landlord kept bidding against himself.

Effective litigators know how to use awkward silence to their client’s advantage. For example, L.A. attorney William H. Ginsburg noted that in depositions “a technique sometimes used by plaintiffs’ lawyers to attempt to prod a witness to volunteer information is the ‘pregnant pause.’ The deposing counsel asks a question, the witness responds, and then counsel simply stares at the witness in silence, waiting for some further response.” Because “[p]eriods of silence are uncomfortable to the average person engaged in

rticle=1163&context=research_conference [https://perma.cc/WQ28-48FD] (citing Barbara K. Given, *Theaters of the Mind*, EDUC. LEADERSHIP, Nov. 2000, at 72).

74. *Id.* at 70, citing Renate Nummela Caine & Geoffrey Caine, *Reinventing Schools Through Brain-Based Learning*, EDUC. LEADERSHIP, Apr. 1995, at 43; Robin Fogarty, *The Intelligence-Friendly Classroom—It Just Makes Sense*, 79 PHI DELTA KAPPAN 655 (1998).

75. See BRIAN K. JOHNSON & MARSHA HUNTER, *THE ARTICULATE ADVOCATE: PERSUASIVE SKILLS FOR LAWYERS IN TRIALS, APPEALS, ARBITRATIONS, AND MOTIONS* 70 (2d ed. 2016)(discussing what the authors call echo memory).

76. Bassett, *supra* note 5, at 525. See also Namkje Koudenburg, Tom Postmes & Ernestine H. Gordijn, *Disrupting the Flow: How Brief Silences in Group Conversations Affect Social Needs*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 512 (2011).

77. Helen M. Newman, *The Sounds of Silence in Communicative Encounters*, 30 COMM. Q. 142, 148 (1982).

78. Bassett, *supra* note 5, at 525.

conversation,” many deponents fill up the void and in doing so volunteer valuable information.⁷⁹ As in business negotiation and management, staying silent when questioning a witness in a deposition can be especially powerful.⁸⁰

Not only does silence cause anxiety, but neurological research reveals how silence can also surprisingly stimulate the brain.⁸¹ While the onset of sound prompts special neurons in the auditory cortex to light up, those same brain cells stop reacting to continued sounds in a relatively constant manner.⁸² The same thing happens with silence: While the auditory cortex lights up with silence that follows sound, continued silence shuts down those neurons.⁸³ The brain is attuned not to sound or silence, but rather to the contrast in between. In sum, whether succeeding or preceding sound, silence stimulates the mind.

IV. A Few Examples of Eloquent Silence Deployed Effectively by Lawyers, and Others

At its core, lawyering is about the facts—gathering them, arranging them, and arguing them. As one scholar notes, “the practice of law can be fairly characterized as both a function of intellect and a quest for information gathered for a purpose,” and argumentation, “in law, is seen primarily as a vehicle for transmission of that information.”⁸⁴ And while silence is communication, many lawyers are unable to tolerate it, “[f]earing that the silence indicates a loss of momentum or control, [so] they will keep talking, filling in, embellishing . . . *writing aloud*.”⁸⁵ Such fear is folly.

Eloquent Silence can, and should, be used by lawyers in court and in meetings. It can also be applied to writings, by delaying a response when one is expected, or not responding at all. “Live silence” (to borrow Evan Crawford’s phrase describing the sermon delivery style of African-American preachers)⁸⁶ is an important skill for lawyers to appreciate and master, because it is in conversation that silence achieves its greatest rhetorical impact. But

79. William H. Ginsburg, *Preparing for Depositions*, FOR DEFENSE, Nov. 1990, at 27, 28.

80. Peter Bregman, *If You Want People to Listen, Stop Talking*, HARV. BUS. REV. (May 25, 2015), <https://hbr.org/2015/05/if-you-want-people-to-listen-stop-talking>. See also Dennis Kurzon, *When Silence May Mean Power*, 18 J. PRAGMATICS 92 (1992).

81. Alexandra K. Moore & Michael Wehr, *Parvalbumin-Expressing Inhibitory Interneurons in Auditory Cortex Are Well-Tuned for Frequency*, 33 J. NEUROSCIENCE 13713 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3755717/pdf/zns13713.pdf> [<https://perma.cc/4QEK-X9M2>]. See also Daniel A. Gross, *This Is Your Brain on Silence: Contrary to Popular Belief, Peace and Quiet Is All About the Noise in Your Head*, NAUTILUS (Aug. 21, 2014), nautil.us/issue/16/nothingness/this-is-your-brain-on-silence [<https://perma.cc/YY7X-FFXK>].

82. Gross, *supra* note 81.

83. *Id.*

84. Walker, *supra* note 54, at ch. 5.

85. Joshua Karton, *On Paper vs. in Person: From Writer to Actor, Communication Techniques for Persuasive Advocacy*, TRIAL LAW. C. 4 (2002), <https://www.triallawyerscollege.org/media/1075/1793y.pdf> [<https://perma.cc/3QDL-JBH9>] (emphasis in original).

86. CRAWFORD WITH TROEGER, *supra* note 17 and accompanying text.

written silence in limited circumstances can have impact as well. Therefore, this article includes a short discussion of the advisability of not responding (or delaying a response) when a written response is expected.

A. Live Silence in Court

Eloquent Silence to a judge or to a jury, or in a meeting, generally takes one of three forms:

- A single pause before a word or phrase (pregnant pause), or after a phrase or word (dramatic pause);
- A pair of pauses, one each side of a phrase, creating a “chunk”⁸⁷; and
- Saying nothing.

Each is addressed in turn, with examples and suggestions to provide some basic guidelines as to the effective deployment of these silences as a rhetorical strategy.

1. The Pause, Before or After a Word or Phrase, as Eloquent Silence

Pauses occur in two distinct places in a conversation. A pause can be “in turn” or “between turns” in a conversation.⁸⁸ This article focuses on lawyers’ use of silence to persuade, and so there is no need to discuss between-turn pauses. These pauses switch the conversation from one speaker to the other—a handoff. By contrast, an in-turn pause comes during a speaker’s turn, and this pause can be “filled”—with an “um” or “ah,” or with silence.⁸⁹ The former is not a persuasive technique. Eloquent Silence is the in-turn pause of no sound that lasts long enough to be a pause, but not so long as to be a stop that becomes a between-turn pause—a handoff to the other speaker.⁹⁰

87. See generally Stuart T. Klapp, *Motor Response Programming During Simple and Choice Reaction Time: The Role of Practice*, 21 J. EXPERIMENTAL PSYCHOL. HUM. PERCEPTION & PERFORMANCE 1015, 1017 (1995).

88. See Walker, *supra* note 54, at 61-62.

89. These are called “hesitation disfluencies.” Martin Corley & Oliver W. Stewart, *Hesitation Disfluencies in Spontaneous Speech: The Meaning of um*, 2 LANGUAGE & LINGUISTIC COMPASS 589, 589 (2008).

90. How long an in-turn pause should last to operate as Eloquent Silence depends on what scholars call “a vast constellation of linguistic phenomena.” Walker, *supra* note 54, at 71. Conversational implicatures are “social, cognitively complex meanings that discourse participants create jointly in interaction.” Christopher Potts, *Conversational Implicature: Interacting with Grammar* (Sept. 30, 2013) (unpublished manuscript), <http://web.stanford.edu/~cgpotts/manuscripts/potts-interacting2013.pdf> [<https://perma.cc/G54G-HEMC>]. See Walker, *supra* note 54, at 73. See also Janet Ainsworth, *Silence, Speech, and the Paradox of the Right to Remain Silent in American Police Interrogation*, in 15 LAW AND LANGUAGE: CURRENT LEGAL ISSUES 371, 374 (Michael Freeman & Fiona Smith eds., 2013). These factors include the social setting (see generally CHERYL GLENN, UNSPOKEN: A RHETORIC OF SILENCE (2004)); the culture (see Ikuko Nakane, *Silence*, in THE HANDBOOK OF INTERCULTURAL DISCOURSE AND COMMUNICATION 158 (Christina Bratt Paulston, Scott F. Kiesling & Elizabeth S. Rangel eds., 2013)); and the past interactions between the speaker and listener (see generally Renée Gendron, *The Meanings of Silence During Conflict*, 2 J. CONFLICTOLOGY 1 (2011)). This mosaic of interpersonal interaction is called conversational implicature. Ainsworth, *supra* at 375. See also H.P. Grice, *Logic and*

Speaking to the deployment of in-turn silence in the legal arena, in a chapter titled “Master the use of the pause,” Justice Scalia and Bryan A. Garner state that “[p]erhaps the rhetorical device most undervalued and indeed ignored by lawyers is the pause.”⁹¹ The authors continue: “A strategic pause after an appropriate lead-in can add emphasis to whatever phrase or sentence immediately follows.”⁹² This is the pregnant pause, so-called because it looks forward, as does an expectant mother. This pause *precedes* the important word or phrase and thus invests in the listener—causing him to “pay attention.” Mark Twain spoke to the power of the pregnant pause: “The right word may be effective, but no word was ever as effective as a rightly timed pause.”⁹³ Equally as powerful is the “dramatic pause,” which comes after the important word or phrase.⁹⁴ It is this type of pause that allows the just-stated meaningful word or phrase to resonate in the listener’s mind⁹⁵ and in what is sometimes called “echo memory.”⁹⁶

More than just emphasis from a pause, pregnant or dramatic, well-placed silence affects understanding of the word or words that the silence surrounds. Emory University theology Professor Fred Craddock notes in his book *Preaching*⁹⁷ that a word can take on profound meaning simply because of the silence that surrounds it. He writes:

How one understands a word as an event in the world of sound depends to a great extent upon whether that word is experienced against a backdrop of silence or in a room of many words. We have all experienced sound that breaks the silence [H]ow noisy are our attempts to create silence But a break in the noise is not the silence that we are considering. . . . is a primal reality.⁹⁸

Conversation, in 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41, 43-58 (Peter Cole & Jerry L. Morgan eds., 1975) (conversational implicatures are “social, cognitively complex meanings that discourse participants create jointly in interaction.”).

91. ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 146 (2008).
92. *Id.*
93. *Quoted in* KARLYN KOHRS CAMPBELL, SUSAN SCHULTZ HUXMAN & THOMAS A. BURKHOLDER, *THE RHETORICAL ACT: THINKING, SPEAKING, AND WRITING CRITICALLY* 69 (5th ed. 2015).
94. These two types of intervening silence are “fore and after silence.” *See* Krieger, *supra* note 34, at 217-18. While many authorities do not distinguish “fore and after,” otherwise termed the pregnant and dramatic pause, in this article the author has chosen to do so since the effects of the two are different. The pregnant pause builds anticipation, while the dramatic pause allows time for the idea to sink in. *Id.*
95. RUSS M. HERMAN, *COURTROOM PERSUASION: WINNING WITH ART, DRAMA AND SCIENCE* § 5:26, at 237 (1997) (“A dramatic pause, silence can drive home a point.”).
96. JOHNSON & HUNTER, *supra* note 75, at 71-73.
97. FRED B. CRADDOCK, *PREACHING* (1985).
98. *Id.* at 52-53, *quoted in* CRAWFORD WITH TROEGER, *supra* note 17, at 26.

It is *primal* because Eloquent Silence has a cognitive ring—it calls us to attention, sets the “climate for participation,”⁹⁹ and also allows time to think.

One of the twentieth century’s most iconic phrases demonstrates the rhetorical power of the properly placed pregnant pause. With a nation mired in the depth of the Great Depression, FDR’s first inaugural address aimed to inspire hope, and FDR said to a nation listening on the radio that “the only thing we have to fear is [3.5-second pause] fear itself.”¹⁰⁰ FDR understood the power of that pause, and in the speech he “captured the hearts of a nation.”¹⁰¹ By breaking the sentence into two phrases, divided at the “is” and followed by a pause, FDR invited the nation of listeners to participate in the moment, and let their imaginations work.¹⁰²

Turning from statecraft to courtroomcraft, *AmericanRhetoric.com*¹⁰³ considers fictional lawyer Jake Tyler Brigance’s closing argument in the 1996 movie adaption of John Grisham’s *A Time to Kill*¹⁰⁴ to be a great closing argument.¹⁰⁵ The effectiveness of the closing is a function of not what the lawyer says, but his compelling use of silence between words, and sentences. The movie clip¹⁰⁶ shows the extensive and effective use of both pregnant and dramatic pauses. The story centers on a black man tried for the murder of two white men who raped and tortured his young daughter, Tonya. Race is the prevalent theme in the movie: Can a black man receive a fair trial for the murder of white men? In the closing argument, Brigance tells the story of the raped and tortured Tonya. Below is the transcript, with the notations at the three most important pauses, although the entire presentation should be watched to hear the effective use of pregnant and dramatic pauses by attorney Brigance, played by Matthew McConaughey.

99. CRAWFORD WITH TROEGER, *supra* note 17, 25–35.

100. *American History: The Greatest Speeches (1933–2008)*, YOUTUBE, https://www.youtube.com/watch?v=6EuAZsz_z_U.

101. GREG GOODALE, SONIC PERSUASION: READING SOUND IN THE RECORDED AGE I (2011).

102. In some ways, this use of a pause by FDR to invite the listener into the moment, to be a participant, is how a rhetorical question functions as a persuasive tool. See generally Richard E. Petty, John T. Cacioppo & Martin Heesacher, *Effects of Rhetorical Questions on Persuasion: An Cognitive Response Analysis*, 40 J. PERSONALITY & SOC. PSYCHOL. 432 (1981).

103. AM. RHETORIC, <http://www.americanrhetoric.com/>, is a website created and curated by Associate Professor of Communications Michael E. Eidenmuller, University of Texas at Tyler.

104. JOHN GRISHAM, *A TIME TO KILL* (1989).

105. See “*A Time to Kill*” (1996): *Jake Tyler Brigance’s Closing Argument*, AM. RHETORIC, <http://www.americanrhetoric.com/MovieSpeeches/specialengagements/moviespeechatimetokill.html> (last visited June 19, 2017) [hereinafter *Brigance’s Closing Argument*]. See also Tim Dirks, *Best Film Speeches and Monologues 1996*, AMC FILMSITE, <http://www.filmsite.org/bestspeeches57.html>.

106. *A Time to Kill Closing Argument*, YOUTUBE (Sept. 5, 2016), <https://www.youtube.com/watch?v=He1PDqzCAgg>.

Brigance tells the story to the jury as follows:

Now I wanna tell you a story. I'm gonna ask y'all to close your eyes while I tell you this story. I want you to listen to me. I want you to listen to yourselves.

This is a story about a little girl walking home from the grocery store one sunny afternoon. I want you to picture this little girl. Suddenly a truck races up. Two men jump out and grab her.

They drag her into a nearby field and they tie her up, and they rip her clothes from her body. Now they climb on, first one then the other, raping her, shattering everything innocent and pure—vicious thrusts—in a fog of drunken breath and sweat.

And when they're done, after they've [sic] killed her tiny womb, murdered any chance for her to bear children, to have life beyond her own, they decide to use her for target practice. So they start throwing full beer cans at her. They throw 'em so hard that it tears the flesh all the way to her bones—and they urinate on her.

Now comes the hanging. They have a rope; they tie a noose. Imagine the noose pulling tight around her neck and a sudden blinding jerk. She's pulled into the air and her feet and legs go kicking and they don't find the ground. The hanging branch isn't strong enough. It snaps and she falls back to the earth. So they pick her up, throw her in the back of the truck, and drive out to Foggy Creek Bridge and pitch her over the edge. And she drops some 30 feet down to the creek bottom below.

Can you see her? Her raped, beaten, broken body, soaked in their urine, soaked in their semen, soaked in her blood—left to die.

Can you see her? [4-second dramatic pause] I want you to picture that little girl. [8-second pregnant pause]

Now imagine she's white. [20-second dramatic pause]

The defense rests, Your Honor.¹⁰⁷

Twenty-eight seconds surround the key four words in the sentence—not only the key sentence of the closing argument, but the climax of the entire story. The strategic use of the pregnant pause and the dramatic pause not only invites but forces the audience to participate in the moment, and to see the racism that infects culture. The use of those pauses forces each juror to confront the reality that he or she would acquit if it were a black man who was murdered by the white father of a raped and tortured white girl. Seeing Tonya as white caused the jurors see her as their own daughter. They vote to acquit.

Turning from fiction to fact, Johnnie Cochran's closing argument in the O.J. Simpson trial also provides proof of the persuasive power of properly placed pauses. The final fifty minutes of Cochran's four-part closing argument demonstrates the power of pregnant and dramatic pauses.¹⁰⁸ On the last day,

107. *Brigance's Closing Argument*, *supra* note 105.

108. See *Closing Arguments of O.J. Simpson Murder Trial (Part 4)*, YOUTUBE (Aug. 23, 2013), www.youtube.com/watch?v=...

building toward the conclusion, Cochran recites the key passage from James Russell Lowell’s 1844 poem *The Present Crisis*:

Truth forever on the scaffold, Wrong forever on the throne,—
Yet that scaffold sways the future, and, behind the dim unknown,
Standeth God within the shadow, keeping watch above his own.¹⁰⁹

To better appreciate the power of the pause, below are reprinted Cochran’s final few paragraphs, with notations showing both pregnant pauses (P) and dramatic pauses (D):

[49:16]¹¹⁰ That is what happened in this case [D] and so the truth is now out.
[Speeds up] It is now up to you. We’re going to pass this baton to you soon.
You will do the right thing. You have made a commitment for justice. You’ll
do the right thing.

I will someday go on to other cases, no doubt [D] as will Miss Clark [D] and
Mr. Darden. Judge Ito [D] will try another case someday, [P] I hope [D], but
this is O.J. Simpson’s [P] one day in court.

By your decision [long D] you control his very life [P] in your hands. [Speeds
up] Treat it carefully. Treat it fairly. Be fair.

Don’t be part of this continuing coverup. Do the right thing, remembering
that [D] if it doesn’t fit, [P] you must acquit [D], that if these messengers
have lied to you, [P] you can’t trust their message, [P] that this has been [P]
a search for truth. [long D]

That no matter [P] how bad it looks [long D], if truth is out there on a scaffold
[D] and wrong is in here on the throne [D], remember that scaffold always
[speeds up] sways the future and beyond the dim unknown standeth the same
God for all people keeping watch above his own.

He watches all of us and he will watch you in your decision.

Thank you for your attention. [P]

God bless you. [50:40]¹¹¹

[youtube.com/watch?v=0KNnU2NnfS4](https://www.youtube.com/watch?v=0KNnU2NnfS4) [hereinafter *O.J. Closing*].

109. James Russell Lowell, *The Present Crisis*, available in THE POEMS OF JAMES RUSSELL LOWELL 199 (2004) and also reprinted in 3 ENGLISH POETRY: FROM TENNYSON TO WHITMAN 1370, 1371 (Harvard Classics) (1938). Cochran’s use of this poem was also a rhetorical tactic. The poem provided inspiration for the leaders of the National Association for the Advancement of Colored People (NAACP), and in 1910 they agreed that the name of their magazine should be *The Crisis*. *The Crisis*, WIKIPEDIA (Apr. 24, 2017), https://en.wikipedia.org/wiki/The_Crisis [<https://perma.cc/VY9U-DEJG>].

110. *O.J. Closing*, *supra* note 108.

111. Both closing arguments, from *A Time to Kill* and the O.J. Simpson trial are discussed in the context of the power of storytelling in jury arguments in Leonard M. Baynes, *A Time to Kill, the O.J. Simpson Trials, and Storytelling to Juries*, 17 LOY. L.A. ENT. L.J. 549 (1997).

These examples of courtroom closing arguments, as with President Obama's eulogy in Charleston, demonstrate how pauses occupy a "beacon position" in speech.¹¹² Like a lighthouse, they signal "pay attention," and because of, or in addition to, that signaling function, pauses increase comprehension of the words that the pause precedes or follows.¹¹³

The *pregnant pause* should be a regular element of a lawyer's speeches to judge, jury, or witness. Lawyers need to capture the listener's attention, and hold it, for what comes next in an argument—the main point. Both closing arguments—from *A Time to Kill*, and the O.J. Simpson trial—offer textbook examples of how in "silence the drama of suspense is born."¹¹⁴

The power of the pause is ubiquitous. Actors and comedians, for example, know the power of the pause. George Burns noted that a pause gives the audience the time necessary to "hear, digest, interpret (and) understand."¹¹⁵ By inserting a pause in a spoken argument before the main point, the lawyer is much like an actor or comic, drawing the audience in. Henny Youngman's classic one-liner "Take my wife [*pregnant pause*]-please"¹¹⁶ works only because the pregnant pause draws the audience in for the punch line.¹¹⁷ Another example is Gene Wilder, who displayed exceptional talent in this application of the pregnant pause. Just recall this exchange in *Blazing Saddles* when the new black sheriff in town meets the whisker-faced Waco Kid coming out of a drunk stupor:

Sheriff (Cleavon Little): What's your name?

Kid (Wilder): Well, my name is Jim. But most people call me [4-second pause] Jim.¹¹⁸

112. Brigitte Zellner, *Pauses and the Temporal Structure of Speech*, in FUNDAMENTALS OF SPEECH SYNTHESIS AND SPEECH RECOGNITION 41, 47 (Eric Keller ed., 1994).
113. Martin Corley & Robert J. Hartsuiker, *Why Um Helps Auditory Word Recognition: The Temporal Delay Hypothesis*, 6 PLoS ONE e19792 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3097182/pdf/pone.0019792.pdf> [<https://perma.cc/RP89-V23W>].
114. See Karton, *supra* note 85, at 4.
115. *Interview with George Burns*, TV GUIDE, June 11, 1954, cited in John Pratt, *Mind the Gap—An Examination of the Pause in Modern Theatre; Shadows—A Play* (Major Creative Work); Bank Accounts—A Collage of Monologues (Minor Creative Work) 56 (Jan. 2012) (unpublished Ph.D. dissertation, Edith Cowan University), <http://ro.ecu.edu.au/theses/459>.
116. MEL HELITZER WITH MARK SHATZ, COMEDY WRITING SECRETS: THE BEST-SELLING BOOK ON HOW TO THINK FUNNY, WRITE FUNNY, ACT FUNNY, AND GET PAID FOR IT 55 (2d ed. 2005).
117. See generally Salvatore Attardo & Lucy Pickering, *Timing in the Performance of Jokes*, 24 INT'L J. HUMOR RES. 233 (2011), http://faculty.tamuc.edu/lpickering/Pdfs/Publish_11.pdf; Sanford Pinsker, *Comedy and Cultural Timing: The Lessons of Robert Benchley and Woody Allen*, 42 GA. REV. 822, 822 (1988) ("As any stand-up comic will tell you, the secrets of comedy are timing, timing, and timing.").
118. Kwame Opam, *Gene Wilder's Comedic Timing Was Beyond Compare*, VERGE (Aug. 31, 2016, 10:57 AM), <http://www.theverge.com/2016/8/31/12726430/gene-wilder-comedic-timing-pause-performance> [<https://perma.cc/U8T4-2ZTS>]. Comicalike timing is an admired character trait in a lawyer. See Jeffrey Toobin, *The Showman: How U.S. Attorney Preet Bharara Struck Fear into*

Just as in a movie audience member’s mind, in jurors’ minds a pregnant pause creates suspense, interest and attention as they are pulled in. As trial lawyer Kevin C. Kennedy puts it:

[S]ilence before a vital spoken thought can invoke suspense and thus command the undivided attention of an audience. Jurors who pay close attention to what you are saying will more likely comprehend what you want to communicate. Do not be afraid to pause and think before you speak. Not only will you provide the jurors with more cogent thoughts and arguments, but they will infer from the silence that what you are about to say is important and worthy of consideration.¹¹⁹

In her *Ten-Step Guide to Closing Argument*, Cathy R. Kelly, director of training for the Missouri State Public Defender System, is even more emphatic about the power of the pregnant pause as a tool to persuade a jury.¹²⁰ She advocates the use of silence:

- *At the beginning* of closing argument “to build tension in the courtroom and to gather the attention of” the audience;
- *During your argument* as a “nonverbal parenthesis to set apart and emphasize a powerful point or to let an argument float in the air for a bit before moving on to the next one”;
- *At the end*, letting the lawyer’s last words soak in before she “simply, softly say[s] thank-you.”

Not just before a jury, but before a judge a pregnant pause can be effective.¹²¹ By creating a space for the listener’s mind to anticipate what will be said, a short silence before an important point makes the point more important.

The *dramatic pause*, while also part of the lawyer’s spoken rhetorical repertoire, should be deployed less frequently than the pregnant pause. A dramatic pause comes after what is important, and in this way provides time for the listener to reflect on what was said. Justice Ginsberg counsels that “[a]t argument, gems will be missed if counsel forgets to speak clearly, slowly, with a full voice, and to maintain good eye contact with the judges.”¹²² The dramatic pause allows the judge or jury to realize the existence of that gem, and relish it. But there is risk in pausing at the end of a point: The listener can interpret that stop as complete conclusion, which it is not. Moreover, pauses, if too long, can cause

Wall Street and Albany, THE NEW YORKER, May 9, 2016, at 36 (noting the comic timing of the former U.S. Attorney for the Southern District of New York).

119. Kevin C. Kennedy, *Closing Argument: Through the Eyes of a Trial Advocate*, 30 AM. J. TRIAL ADVOC. 593, 598 (2007).

120. Cathy R. Kelly, *A Ten-Step Guide to Closing Argument*, N.C. INDIGENT DEF. SERVS. (June 28, 2006), <http://www.ncids.org/Defender%20Training/2012DefenderTrialSchool/ClosingArgument.pdf> [<https://perma.cc/R9AS-GYT4>].

121. SCALIA & GARNER, *supra* note 91, at 146.

122. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 569 (1999).

listeners discomfort.¹²³ Such an ineffective dramatic pause becomes an empty pause that leaves listeners wondering about the cause of the delay. Not only does a too-long dramatic pause not function as a rhetorical tool, but such prolonged silence after a point is made can cause the entire argument to lose steam. In sum, pregnant pauses plenty; dramatic pauses fewer.

Before turning to the placement of pauses on each side of a phrase to create a chunk, one more singular pause must be addressed. A pause can become so long as to be a stop that is not interpreted as a “handoff,” and that type of stop can be Eloquent Silence. Such a permanent in-turn pause is called “aposiopesis,” from the Greek phrase *aposiōpaein*, meaning “to become totally silent.”¹²⁴ Such stoppage in midsentence can show respect for the audience, or trigger surprise or other emotion, or just serve as a transition.¹²⁵ This rhetorical device finds use in the first century B.C., when Virgil deployed it to depict Neptune’s exasperation with the wind gods in *The Aeneid*: “How dare ye, ye winds, to mingle the heavens and the earth and raise such a tumult without my leave? You I will—but first I must quiet the waves.”¹²⁶ Used sparingly, aposiopesis is an effective rhetorical tool, like the live news report from Herbert Morrison describing the Hindenburg disaster, when he stopped speaking completely as the airship burst into flames.¹²⁷ Perhaps the most profound example of all, aposiopesis is employed by the Lord in Genesis: “And the LORD God said, ‘Behold, the man is become as one of us, to know good and evil. And now lest he put forth his hand, and take also of the tree of life and eat, and eat and live forever.’”¹²⁸ God can take liberty with how often to use aposiopesis, but a

123. See Ulla Gjeset Schjølberg, *The Art Behind The Perfect Pause, Research shows that a half second can do the trick*, ScienceNordic, September 25, 2015 (a long pause “can feel like eternity”) <http://sciencenordic.com/art-behind-perfect-pause>.
124. *Aposiopesis*, LITERARY TERMS, <https://literaryterms.net/aposiopesis/> [<https://perma.cc/DD5Z-DGYM>] (last visited Feb. 28, 2016); see generally SILVIA MONTIGLIO, SILENCE IN THE LAND OF LOGOS 132 (2000).
125. *Aposiopesis*, *supra* note 124.
126. Quoted in *Aposiopesis* (Gr. “a becoming silent”), THE PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS 134 (Roland Green et al. eds., 4th ed. 2012).
127. The full text is: “It burst into flames! Get this Charley! Get this Charley! It’s fire and it’s crashing! It’s crashing terrible! Oh, my! Get out of the way, please! It’s burning, bursting into flames and is falling on the mooring mast, and all the folks agree that this is terrible. This is the worst of the worst catastrophes in the world! Oh . . . ! Oh, the humanity, and all the passengers screaming around here. I told you . . . I can’t even talk to people . . .” *Aposiopesis*, AM. RHETORIC, <http://www.americanrhetoric.com/figures/aposiopesis.htm> [<https://perma.cc/gKW8-5GRF>] (last visited June 22, 2017).
128. *Genesis* 3:22 (King James). The Bible contains many other examples attesting to the import of the sentence-stopping pause. See *Figures of Speech—Aposiopesis (Sudden Silence)*, TRUTH OR TRADITION, <http://www.truthortradition.com/articles/figures-of-speech-aposiopesis-sudden-silence> [<https://perma.cc/H4BX-P4Y2>] (last visited June 22, 2017).

lawyer’s resort to aposiopesis should be infrequent, for only then does it have impact.¹²⁹

2. Silence Before and After Key Phrases—Chunking as Eloquent Silence

The human mind is complex. Its information-processing and storage architecture require pauses within listened-to speech both to process information and to act as a cue for what is important. This brain architecture involves sensory input, filtering, and storage. Generally, between sensory systems that gather and select among thousands of environmental stimuli and long-term memory (LTM), which stores knowledge, is short-term memory (STM).¹³⁰ STM constitutes our “now,” and it is “where we live.”¹³¹ “Now” is short, STM finite. Therefore, listened-to speech in the “now” is processed effectively over some “chunk of signal” that fits within that limited memory store. This process is called “chunking,” because it breaks listening into chunks of words.¹³² Think phone number—it’s never recited as ten digits in a row, but rather recited as area code (chunk) + prefix (chunk) + final four numbers (chunk).¹³³ Try and remember 5-5-5-9-4-5-4-2-4-4 vs. (555) 945-4244.¹³⁴

This architecture of the human brain of the listener requires the speaker to chunk speech to be persuasive, because unprocessed information can never persuade. This chunking is accomplished by proper placement of pause within a spoken phrase or sentence. It’s not hard. You have been taught to be a chunker since Day 1 of kindergarten. The *Pledge of Allegiance* stands as a poster child for the persuasive effect of chunking.¹³⁵ Just say it:

“I pledge allegiance [pause] to the Flag [pause] of the United States of America, [pause] and to the Republic [pause] for which it stands, [pause] one Nation [pause] under God [pause], indivisible, [pause] with liberty [pause] and justice for all.”¹³⁶

129. See RONALD WAICUKAUSKI, PAUL MARK SANDLER & JOANNE EPPS, *THE 12 SECRETS OF PERSUASIVE ARGUMENT* 177-78 (2009) (“Because it is unexpected, a speaker’s suddenly stopping as if unable to continue can be an effective way to make a point.”).

130. Kevin M. Clermont, *Procedure’s Magical Number Three: Psychological Bases for Standards of Decision*, 72 *CORNELL L. REV.* 1115, 1137 (1987).

131. *Id.*

132. Simon Farrell, *Temporal Clustering and Sequencing in Short-Term Memory and Episodic Memory*, 119 *PSYCHOL. REV.* 223, 229 (2012).

133. George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 *PSYCHOL. REV.* 81, 90 (1956) (Miller’s famous paper argues that 7 +/- 2 is a magic number for short-term memory).

134. DONALD B. EGOLF, *HUMAN COMMUNICATION AND THE BRAIN* 75 (2012).

135. Chunking is a unifying information-processing mechanism first proposed by psychologist Adriaan de Groot in the 1940s. See Fernand Gobet et al., *Chunking Mechanisms in Human Learning*, 5 *TRENDS IN COGNITIVE SCI.* 236, 236 (2001) (discussing history of research on chunking).

136. 4 U.S. Code §4 (2012 & Supp. 2 2015) (pauses inserted by author).

Chunking is the second type of pause (actually a pair of pauses) that lawyers can deploy as a rhetorical tool in speaking to a judge, jury, or any listener. The placement of the pauses within a string of spoken words creates groups of words that are intended to be interpreted together. Chunking also varies cadence; Justice Scalia and Mr. Garner counsel lawyers that the rat-a-tat-tat of “machine-gun presentations, even when perfectly understood, are ineffective.”¹³⁷ The lawyer must employ varied silence within and between sentences to effectively chunk the speech. What is the magic chunk of words for a lawyer to employ to be persuasive? It depends: A wealth of scientific research establishes that the number of words to a chunk is, like a phone number, seven, plus or minus two.¹³⁸

The timing and pacing of speech divided by pauses into chunks enhance persuasion. Nowhere is this effect of chunking more clear than in a preacher’s sermon. Discussing the persuasive power of “call and response” in African-American preaching, Howard University theologian Evans Crawford, citing to Bruce Salmon’s book, delineates a useful list of “dos” when it comes to pacing and timing speech (i.e., chunking) to engage the audience. Engagement is a necessary predicate to persuasion. Crawford’s list of pacing and timing “dos” applies with equal force to the lawyer, for in many ways the lawyer “preaches” her argument to judge or jury:

- Pause before any change of idea or significant word.
- Emphasize meaningful words.
- Take imaginative passages slowly; take rapidly parts narrating action.
- Change pace as the climax nears.
- Employ conversation at a speed that is appropriate for the character speaking.
- Note that the pause and the dropped voice can be more effective than the shout.¹³⁹

For a lawyer, like any speaker, this kind of chunking of phrases within a speech creates rhythm and flow, which replaces monotonous droning. While this enhances a speaker’s persuasive impact by making the speech more pleasing, the real rhetorical impact of chunking has everything to do with STM. Breaking apart the phrases and sentences allows listeners time to cognitively digest the chunks of argument. The human mind simply cannot digest long strings of words. Just as reading a run-on sentence can detract from the effectiveness of a writing,¹⁴⁰ so too can lack of chunking in speech render the persuasive phrase impotent.

137. SCALIA & GARNER, *supra* note 91, at 142-43.

138. MILLER, *supra* note 133. See also NELSON COWAN, WORKING MEMORY CAPACITY 75-104 (2005); DAVID A. SOUSA, HOW BRAIN SCIENCE CAN MAKE YOU A BETTER LAWYER 88-89 (2009).

139. CRAWFORD WITH TROEGER, *supra* note 17, at 34, citing BRUCE C. SALMON, STORYTELLING IN PREACHING: A GUIDE TO THEORY AND PRACTICE 56 (1985).

140. See Eugene Volokh & J. Alexander Tanford, *How to Write Good Legal Stuff*, HOME PAGE FOR

Not only does chunking allow for better processing in STM, but the placement of the pauses that bracket the chunk substantively matters. Cleave the words at one point and the meaning changes. There is a difference between “Let’s eat, Grandma” and “Let’s eat Grandma.” The *Pledge of Allegiance* offers another example of the significance of chunk placement. Make the phrase one chunk, “one nation under God, indivisible,” and it has a different meaning than “one nation [pause] under God, indivisible [pause].” How to chunk the Pledge is the subject of debate, because what is chunked changes the meaning.¹⁴¹ Pause placement can create meaning. As one scholar concluded, “[w]hether these chunks are phrases, sentences, or paragraphs, their meaning becomes unambiguously clear through intermittent moments of silence.”¹⁴²

Lawyers need to stay aware of the power of the pauses bracketing a key phrase, both in terms of emphasizing import and creating meaning. Lawyers must remember to intentionally insert silence before and after completion of key blocks of spoken information—chunk it.

3. Saying Nothing as Eloquent Silence

Why does a pause become a void, and lose rhetorical effect? This is an important distinction to make, because merely trailing off and not completing a sentence, as with aposiopesis, but saying nothing at all comes at a steep cost. Saying nothing in court can be interpreted by judge or jury as contemptuous or, at best, just discourteous. But can a pause that becomes a nonresponse be persuasive? Yes. When? Context is key. An old rule in trial practice dictates when silence is essential: If you are winning, stop talking.¹⁴³ Professor Krieger notes that a more direct statement of this principle is from “the late Judge Hubert L. Will of the U.S. District Court for the Northern District of Illinois [who] would often warn attorneys in such situations, ‘When you’re winning, shut up! If you keep on talking, I just might change my position.’”¹⁴⁴ Beyond that discrete situation, for a lawyer in court, not talking or ceasing talking before the lawyer is done with what he intends to argue is not Eloquent Silence.

JAMES ALEXANDER TANFORD 2 (2009), <http://law.indiana.edu/instruction/tanford/web/reference/how2writegood.pdf> [<https://perma.cc/AF4N-HZ8P>].

141. Sheldon H. Nahmod, *The Pledge as Sacred Ritual*, 13 WM. & MARY BILL RTS. J. 797, 805-06 (2005). Two states have even taken official action on this issue: Utah (S. Con. Res. 1, Concurrent Resolution Recognizing the 60th Anniversary of the Inclusion of Under God in the Pledge of Allegiance, 2014 Gen. Sess. (Utah 2014), 2014 Utah Laws 2359-60 and New York (S.J. Res. 3339, Commemorating the 60th Anniversary of the addition of the Words “Under God” to the United States Pledge of Allegiance).

142. JOHNSON & HUNTER, *supra* note 75, at 118.

143. J. Scott Bovitz, *Things They Didn’t Teach You in Moot Court*, AM. BANKR. INST. J., Apr. 2014, at 62, 108.

144. Krieger, *supra* note 34, at 200 n.2. See also Karen Thalacker, *The New Lawyer’s Handbook: 101 Things They Don’t Teach You in Law School* 214-15 (2009) (“I felt like every time the [criminal] defense attorney made an argument, that I needed to respond to it. Finally, the judge said, ‘Ms. Thalacker, you are winning. I don’t think you should say anything else.’”)

B. Live Silence in Meetings with Adversaries or Allies

Meetings can be with adversaries (negotiations) or with allies (inner-office conference). In either type of meeting of lawyers, or lawyers and clients, the same three types of silence discussed above with live silence in court operate. As speaker, you can employ in-turn pauses, chunk, or say nothing. And while the same analysis discussed above applies, there is a key difference between court dialogue and meeting dialogue. A meeting is a discussion among equals, not an argument with a decision-maker (judge or jury), where there exists a power differential between actors in constrained roles.¹⁴⁵

A lawyer's silence in meetings with adversaries makes that lawyer a more effective negotiator, because a lawyer can't talk and listen simultaneously. No one can. And in addition to knowing what the other side is saying, listening is key to effective negotiation with an opponent for three less obvious but related reasons: discovering lies, keeping secrets, and flattery.

It is axiomatic that effective negotiation "involves a certain amount of dissimulation"—a transparent negotiator is not a good negotiator.¹⁴⁶ Unless you are sociopath, lying isn't easy. Nontruth-telling causes stress, and stress can manifest itself in physical gestures, mannerisms, or more often outright statements.¹⁴⁷ So staying silent allows an attorney to discover the "tell" or "leak" in the other side's statements. As Barry Goldman points out, "I can't offer you any more" and "I don't think I can offer you any more" are different. Assuming the goal is to lower the settlement costs, an effective lawyer states the former, not the latter. Nonverbal leaks, like change in voice pitch, also indicate deceit.¹⁴⁸ It is harder to notice these tells or leaks in others when you are talking.

Staying silent reduces the chances of the speaker revealing his own tell or leak. By keeping his mouth shut, the speaker is less likely to say something he should not. Obviously, negotiation requires a negotiator to speak, but every time one speaks, one increases the chances of a leak that could reveal a secret

145. Excellent books explore the science and strategy of effective negotiation, including when to not respond for strategic reasons. See generally BARRY GOLDMAN, *THE SCIENCE OF SETTLEMENT: IDEAS FOR NEGOTIATORS* (2008); ANDREA KUPFER SCHNEIDER & CHRISTOPHER HONEYMAN, *THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* (2006). This article only touches on the topic of nonresponse as a negotiating ploy, and only to the extent that silence, a rhetorical pause in speaking, can be used to make arguments in negotiation more effective. This article does not, for example, explore international negotiations, which present a special type of meeting in which culture differences in the application of silence play an important role. See, e.g., John L. Graham & N. Mark Lam, *The Chinese Negotiation*, HARV. BUS. REV., Oct. 2003, at 82, 90 ("In defending price positions, the Chinese use patience and silence as formidable weapons against American impatience and volubility.").

146. GOLDMAN, *supra* note 145, at 64.

147. *Id.*

148. *Id.* at 64-65; see also Lynn A. Streeter et al., *Pitch Changes During Attempted Deception*, 35 J. PERSONALITY & SOC. PSYCHOL. 345, 348-49 (1977).

to the other side. When in doubt, a lawyer should listen in silence, and let the other side leak away.

Another element of silence in negotiation is the fostering of an air of flattery, and the potency that flattery can have in reducing the other side’s reluctance to a proposal. Being observed by the other side silently listening shows the silent listener’s interest. Having an interested audience is an ego boost for the speaker. The speaker’s positive emotions in turn make the silent listener more likable and the speaker less likely to be hostile. Both result in a better bargaining position for the one who chooses to listen at a given moment of a meeting and eschew speaking. Active listening, not passive hearing, is summarized in the simple statement “When I listen, people talk.”¹⁴⁹ Social psychologists call the use of flattery an “ingratiation technique,”¹⁵⁰ but regardless of what’s it’s called, as Mae West famously said—and correctly—“flattery will get you everywhere.”¹⁵¹ So don’t talk, listen.

Silence can be eloquent not only in negotiations with the “other side” but in a meeting of allies as well. As demonstrated by Justice Ginsberg’s decision to keep her quill covered and not write a concurrence in *Obergefell*, a key difference exists between “signing on” and “adding on.” In deciding to sign on and not add on, she followed Justice Brandeis’s lead—acknowledging that by adding to a point with which you agree can dull it.¹⁵² In other words, while all pulling in the same direction, whether as a trial team or as a slew of transactional attorneys working for client on one side of a deal, lawyers are often tasked with encouraging their colleagues to take a certain course. General takeaway: Keep your mouth shut if your teammate is doing a good enough job.

The same concepts of deploying dramatic pauses and pregnant pauses and intentionally chunking that apply to court or to negotiations with the other side apply to a speaker’s approach to meetings with allies. But the context, born of familiarity, is materially different. Working with the same people means that they can become accustomed to a given attorney’s use of silence, whether by means of pauses or chunking or both. Since the rhetorical effect of silence is the product of cognitive contrast in the listener’s mind caused by his

149. GOLDMAN, *supra* note 145, at 65–66; *see also* John L. Barkai, *How to Develop the Skill of Active Listening*, PRAC. LAW., June 1984, at 73.

150. C. de Haan et al., Who’s the Best? Effectiveness of Ingratiation Techniques in Speeches for Different Target Groups (Jan. 2006) (unpublished manuscript), https://www.researchgate.net/publication/314096301_Who%27s_the_best_Effectiveness_of_ingratiation_techniques_in_speeches_for_different_target_groups (noting that advocating flattery as a means to influence dates back to Cicero and Quintilian).

151. *See, e.g.*, James D. Westphal & Ithai Stern, *Flattery Will Get You Everywhere (Especially If You Are a Male Caucasian): How Ingratiation, Boardroom Behavior, and Demographic Minority Status Affect Additional Board Appointments at U.S. Companies*, 50 ACAD. MGMT. J. 267 (2007) (showing effectiveness of flattery in business management).

152. *See* Nancy Maveety, *Concurrence and the Study of Judicial Behavior in American Political Science*, 8 JURIDICA INT’L 173, 176 (2003) (explaining the view that in the American judicial system “[t]he filing of a concurring opinion . . . was generally understood as weakened attitudinal agreement with the opinion of the court”).

expectation vs. what plays out, using the same tool all the time with the same audience minimizes its potency.

For example, as a junior partner I would attend firm meetings, and a wise old lawyer would sit silently as others pressed this point or that. When the “wise one” did speak, I would listen with intent. The others sounded like Charlie Brown cartoon adults. As years rolled slowly on, and I attended more and more meetings, the “wise one’s” rhetorical silence slid from impressive to irrelevant. Everyone then sounded like Charlie Brown adults. To combat this normalizing of what worked only because it is out of the ordinary when conversing with those with whom you always converse, remember: It is contrast with the expected, not just silence, that serves as the cue to the audience to lean in and listen carefully.

C. Nonwriting When a Writing Is Expected as Eloquent Silence

Not responding in writing in a situation that typically calls for a written response can serve as Eloquent Silence. But because written exchanges differ from conversations in material ways, the opportunities to effectively use Eloquent Silence in written exchange are scarce. First, the rhetorical impact of not saying something when the listener expects works because the *in the moment* expectation of the listener is disrupted and his mind cued.¹⁵³ By contrast, most back-and-forth written communication (texting excepted) lacks immediacy. The temporal distinction means that the nonwritten response lacks impact because the silence may be interpreted by the intended recipient as mere delay, or even as a belief that the recipient misplaced (or deleted) the response that never was. Either way, the nonwritten response does not function as Eloquent Silence. Other than text messages, and to a small degree e-mails, a nonresponse to a writing lacks persuasive power as an intended rhetorical tactic.

Take, for example, forgoing filing a reply brief. An exchange of briefs in litigation is not a place to employ silence for rhetorical effect. The general rule is always to file a reply brief unless it is clear that it will make no difference.¹⁵⁴ And while judges routinely criticize the effectiveness of replies,¹⁵⁵ as too long or repetitive,¹⁵⁶ as Judge Richard A. Posner makes clear, “do not forgo the opportunity to file a reply brief. The appellee is bound to make some halfway decent points in rebuttal of your appeal. Don’t let him or her have the last word.”¹⁵⁷

153. See *supra* Section III.

154. Thomas D. Hird, *No Reply?* CERTWORTHY, Summer 2005, at 40 [https://perma.cc/9LLP-37GK].

155. Jason Vail, *The Pitfalls of Replies*, 2 J. APP. PRAC. & PROCESS 213 (2000).

156. See Gerald Lebovits, *Or Forever Hold Your Peace: Reply Briefs*, N.Y. ST. B.J., June 2010, at 64, 58 (2010).

157. Richard A. Posner, *Effective Appellate Brief Writing*, APP. PRAC. J. (Am. Bar Ass’n Appellate Practice Comm.), Spring 2010, at 1, 16.

Demand letters are another place Eloquent Silence is not achieved by not responding. Demand letters are a specific genre of business correspondence designed to elicit a response.¹⁵⁸ Not responding to a demand letter has no rhetorical effect. Rather, not responding leads the sender to conclude that the letter was not received, or that the letter was received and not read.

Text messages and e-mails represent the only writings in which one might consider employing Eloquent Silence, either by delaying or not responding.¹⁵⁹ While rhetorical concepts apply to e-mails and text messages (called computer-mediated communications (CMC)),¹⁶⁰ and silence is an element of rhetoric, CMC is an “asynchronous medium that involves the exchange of character-based messages,”¹⁶¹ contrasting with the synchronous medium of spoken conversation. With CMC, the built-in delay caused by the nature of the medium necessarily diminishes any rhetorical effect of silence. But not entirely. Texting, particular among digital natives,¹⁶² is fast becoming synchronous. Just ask a teen if she “talked with so-and-so” today. The affirmative response will mean that the teen and the asked-about friend texted.¹⁶³ Since texting is akin to conversation, the idea of not responding “in turn” can become Eloquent Silence, because delay can be unexpected by the one waiting for the prompt response.¹⁶⁴

Turning from the general population’s use of CMC to the world lawyers inhabit, e-mail is now the primary means of legal communication.¹⁶⁵ Text

158. See generally Bret Rappaport, *A Shot Across the Bow: How to Write an Effective Demand Letter*, 5 J. ASS’N LEGAL WRITING DIRECTORS 32 (2008).
159. Cf. Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC 1 (2015) (discussing the meaning of e-communication).
160. Persuasive Design (PD) concerns the use of computing technology for persuasive purposes—including reliance on such classic concepts as ethos, pathos, and logos. Per F. V. Hasle & Anne-Kathrine Kjaer Christensen, *Persuasive Design*, in HANDBOOK OF RESEARCH ON COMPUTER MEDIATED COMMUNICATION 283–96 (Sigrid Kelsey ed., 2008). See, e.g., Jimmie Manning, *Construction of Values in Online and Offline Dating Discourses: Comparing Presentational and Articulated Rhetorics of Relationship Seeking*, 19 J. COMPUTER-MEDIATED COMM. 309 (2014).
161. Yuuki Kato & Shogo Kato, *Reply Speed to Mobile Text Messages Among Japanese College Students: When a Quick Reply Is Preferred and a Late Reply Is Acceptable*, 44 COMPUTERS IN HUM. BEHAV. 209, 209 (2015).
162. Those for whom computers have always been part of their learning and lives. See Marc Prensky, *Digital Natives, Digital Immigrants Part 1*, ON THE HORIZON, Sept./Oct. 2001, at 1, 1 (coining the term).
163. Larry Alton, *Texts Or Email? Here’s How Millennials Prefer To Communicate*, FORBES, MAY 11, 2017 (noting preference for texting over telephone calls) <https://www.forbes.com/sites/larryalton/2017/05/11/how-do-millennials-prefer-to-communicate/#5f8067bo6d6f> [https://perma.cc/E6P2-G2HK].
164. See generally Alina Tugend, *The Anxiety of the Unanswered E-Mail*, N.Y. TIMES, Apr. 20, 2013, at B5; Kato & Kato, *supra* note 161, at 210.
165. See Margolis, *supra* note 159, at 11.

messages are also quickly becoming part of the practice of law.¹⁶⁶ This trend of increased reliance on CMC will continue to grow¹⁶⁷ as digital natives enter the market as legal consumers and lawyers, and analog natives retire or die or just give in to the new reality.

That reality is here. Lawyers are already, for example, advised by their bar association to be aware of the rhetorical effect of certain elements of texting, such as the use of ALL CAPS = yelling.¹⁶⁸ In determining the rhetorical effect of silence, through nonresponse or delayed response in a CMC context, the focus is on “response-time expectation.” Because the rhetorical effect, or cue, of silence comes from its deployment when not expected, lawyers need to think about how quickly, if at all, to respond to an e-mail or a text. As CMC use expands, delay-time expectations, like all Internet customs, will continue to evolve and eventually become settled.¹⁶⁹ As texting expands, and to some degree starts replacing telephone calls as texting does for millennials,¹⁷⁰ the need for lawyers to know and understand the application Eloquent Silence by not texting back, or by delaying the response, will become more significant.

V. CONCLUSION

Leonardo da Vinci metaphorically made the point this article does:

Oysters open completely when the moon is full; and when the crab sees one, it throws a piece of stone or seaweed into it and the oyster cannot close again so that it serves the crab for meat. Such is the fate of him who opens his mouth too much and thereby puts himself at the mercy of the listener.¹⁷¹

Just because you can speak, write or text does not mean you must [*very long pregnant pause*], or even should.

166. See generally *The Florida Bar Best Practices for Electronic Communication*, CHILDERS LAW, <http://www.smartbizlaw.com/E-communication-PDF-ADA.pdf> [https://perma.cc/FY45-7T2D] [hereinafter *Best Practices*]. See also Dean R. Dietrich, *Handling Clients' Text Messages*, WIS. LAW., Apr. 2016, at 4 (discussing the ethical obligation to retain client text messages).
167. Carolyn Elefant, *Maybe the Time Has Come for Lawyers to Have a Conversation About Texting or Snapchatting with Clients*, MY SHINGLE (Sept. 8, 2015), <http://myshingle.com/2015/09/articles/client-relations/maybe-the-time-has-come-for-lawyers-to-have-a-conversation-about-texting-or-snapchatting-with-clients/> [https://perma.cc/BBW9-JZZ2].
168. See *Best Practices*, *supra* note 166, at 4 (“Never use texting lingo or shorthand. Spell out all words to eliminate confusion. Never use ALL CAPS; it can be read as the equivalent of yelling. Check your spelling; the auto correct will often change words that you intend to use into words that you did not intend to use.”).
169. For example, texting mimics face-to-face conversation, and ending a text message with a period is interpreted as less sincere than ending with no punctuation. Danielle N. Gunraj et al., *Texting Insincerely: The Role of the Period in Text Messaging*, 55 COMPUTERS & HUM. BEHAV. 1067 (2016).
170. See Neil Howe, *Why Millennials Are Texting More and Talking Less*, FORBES: ARTS & LETTERS (July 15, 2015, 11:00 AM), <https://www.forbes.com/sites/neilhowe/2015/07/15/why-millennials-are-texting-more-and-talking-less/#66aaf059752> [https://perma.cc/A4P9-LZPH].
171. Quoted in ROBERT GREEN, *THE 48 LAWS OF POWER* 33 (2000).