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SILENCING CULTURE AND CULTURING SILENCE: A COMPARATIVE EXPERIENCE OF CENTRIFUGAL FORCES IN THE ETHNIC STUDIES CURRICULUM

Steven W. Bender*

INTRODUCTION

Using the metaphor of silencing, Professor Margaret Montoya documents the irrelevance of race, gender, and socio-historical perspectives both in legal education and, more broadly, in legal discourse.[1] Although others have invoked this metaphor,[2] Professor Montoya's charting of the physical, rather than merely metaphorical, space of silence moves beyond this legal literature in several respects. Viewing silence not just as dead space, Professor Montoya enlivens and colors silence and other nonverbal aspects of communication as positive cultural traits. She demonstrates how silence can be used as a pedagogical tool (a centrifugal force) in the classroom and in client interviews to bring out the voices of women and of men of color.[3] Moreover, Professor Montoya documents how silence and nonverbal communication, rich with cultural meaning, are misread to the legal detriment of the (non)speaker and others dependent on cross-cultural understanding.[4] My own experiences in the classroom, an Ethnic Studies

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1. *See* Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847 *passim* (2000), 33 U. MICH. J.L. REFORM 263 *passim* (2000).

2. *See, e.g.*, Keith Aoki, *Introduction: Language Is a Virus*, 53 U. MIAMI L. REV. 961, 968 (1999); Margaret (H.R.) Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 UCLA ASIAN PAC. AM. L.J. 4, 11 (1995); Yvonne A. Tamayo, *Literal Silencing/Silenciando la Lengua*, 53 U. MIAMI L. REV. 995, 995–1001 (1999).

3. *See* Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 884–89, 33 U. MICH. J.L. REFORM at 300–05.

4. *See id.* at 5 MICH. J. RACE & L. at 873–79, 33 U. MICH. J.L. REFORM at 289–95; *see, e.g.*, Hernandez v. New York, 500 U.S. 352, 372 (1991) (upholding rejection of Latino/a jurors in Latino defendant's trial for attempted murder where the prosecutor exercised peremptory challenges based on his culturally limited interpretation of Latino/a demeanor).

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classroom filled with students intent on the study and progressive practice of law, validate many of Professor Montoya's experiences and observations.

In Part I, I discuss my own experiences with respect to silence and race in an Ethnic Studies classroom. In Part II, I address the challenges my undergraduate students face in their journey to become progressive lawyers. In Part III, I examine some of the doctrinal pitfalls encountered by new lawyers aspiring to use the law as a mechanism for achieving social justice. Finally, I conclude by discussing the apparent irrelevance of Latino/a perspectives in legal education.

I. SILENCE AND RACE FROM AN ETHNIC STUDIES PERSPECTIVE

Professor Montoya posits that failure to acknowledge racial issues in the law school classroom, and in traditional legal discourse produces a centripetal force that maintains white privilege.[5] In contrast, a few years ago I designed an undergraduate course, Chicanos/as and the Law, in the Ethnic Studies curriculum which uses race as the means of introducing students to legal education.[6] I was moved in part by a concern that the sole undergraduate offering by our law school, Perspectives on the Law, was not situated to attract or to intrigue undergraduates of color.[7] Particularly, I had in mind Chicano/a students in the Movimiento Estudiantil Chicano de Aztlan (MEChA) organization for which I served as a faculty advisor. I believed that a course focused on race, especially on issues outside the Black-White paradigm of race discourse, would

5. *See* Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 879–905, 33 U. MICH. J.L. REFORM at 295–321.

6. I have offered the course in 1995, 1996, 1997, 1999 and 2000. Latinos/as comprised the majority of the students in at least the first two offerings. Progressive white students, particularly women, have displaced Latinos/as as the dominant group that enrolled in the class in the last two course offerings. Typically there are a few Asian American and African American students as well.

7. In 1993, the University of Oregon's course description for "Perspectives on the Law" described five thematic segments: (1) law as a grievance-remedial instrument, (2) law as a penal-corrective instrument, (3) law as an administrative-regulatory instrument, (4) law as an instrument for organizing conferral of public benefits, and (5) law as an instrument for facilitating private arrangements. The course was team-taught by five law faculty members including one woman but no faculty of color.

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serve as a catalyst to interest these students in the study and practice of law.[8]

Since I began teaching Chicanos/as and the Law in 1995, I have used language discrimination as the decentralizing theme (in Professor Montoya's phrasing, as a centrifugal force) for the class. I survey the field of American law using three dimensions of language law and policy that serve to silence the Spanish-speaker's culture: Official English and English-only laws[9] that govern public speech, English-ability laws and policies,[10] and private language vigilantism.[11] Language law enables me to introduce areas of first-year legal curriculum as diverse as torts,[12] criminal law,[13] property,[14] civil procedure,[15] constitutional law,[16]

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8. My colleague, Keith Aoki, had taught a similar class in 1994 focusing on Asian Americans, "Asian Americans in U.S. Law & Culture," which he described in his article, Keith Aoki, *Critical Legal Studies, Asian Americans in U.S. Law & Culture, Neil Gotanda, and Me*, 4 ASIAN L.J. 19 (1997).

9. "Official English" laws are those designating English as the official state language, whereas "English-only" laws move beyond such symbolism in expressly prohibiting government speech in languages other than English. Several state laws fall somewhere in between, such as by purporting to preserve and protect the English language and by creating a private enforcement mechanism. *See, e.g.*, CAL. CONST. art. III, § 6 (2000).

10. By "English-ability," I mean to describe laws and policies that withhold benefits or privileges from, or otherwise impose sanctions on, non-English-speaking persons. An example is a state requirement of proficiency in English as a condition to issuing a driver's license. In a future article, I will identify this trend in legislation, case law, and private action toward requiring English ability as far more punitive than Official English law.

11. *See generally* Steven W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145 (1997) (identifying the causal link between state Official-English laws and private attacks on non-government speech).

12. *See* Ramirez v. Plough, Inc., 863 P.2d 167, 178 (Cal. 1993) (holding drug manufacturer had no duty in tort to warn in Spanish of product risks).

13. See discussion of the trial of Santiago Ventura Morales *infra* notes 30–42 and accompanying text.

14. *See* Howard Mintz, *English-only Policy for Tenants Upheld*, SAN JOSE MERCURY NEWS, Dec. 10, 1998, *available in* LEXIS, News Library, San Jose Mercury News File (reporting that a California jury had concluded a landlord's English language policy did not violate federal housing discrimination law).

15. Among other introductions to the process of litigation, my students examine a legal complaint filed in 1990 in an Oregon circuit court against a tavern that enforced its English-only rule against three Latina patrons. *See* Portillo v. Howdy Pardner, Inc., No. 16-90-08274 (Or. Cir. Ct. Lane County filed Sept. 19, 1990).

16. *See* Guerrero v. Carleson, 512 P.2d 833, 839 (Cal. 1973) (stating that due process does not compel state agency to provide notice in Spanish to non-English-speaking recipients of reduction or termination of welfare benefits); *see also* Flores v. State, 904 S.W.2d 129, 131 (Tex. Crim. App. 1995) (holding equal protection not denied to defendant sentenced to prison for want of a Spanish language alcohol diversion program comparable to programs available for English-speaking defendants).

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and contracts.[17] Study of language law also previews more advanced legal curriculum, such as First Amendment,[18] labor law and employment discrimination,[19] environmental law,[20] criminal procedure,[21] and family law.[22] Of course, language law is also an appropriate means of introducing students to race-apparent courses of legal study such as immigration law and civil rights. My point is that traditional courses of study in legal education—where race is often silenced—can be effectively introduced and taught through race-apparent themes such as language discrimination.

Language law also serves to illustrate the structure and process of the American legal system. Using the litigation that nullified Arizona's English-only constitutional provision allows me to expose students to the core constitutional concept of supremacy, to the structure of the judicial system and rights to appeal, and to the process in some states of adopting laws by citizen initiative.[23] In examining the legal challenges to oppression of Latinos/as by means of language law and policy[24] in governmental and private settings

17. *See, e.g.*, Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027 (1996) (examining unfairness in contracts between merchants and non-English-speaking consumers).

18. *See* Ruiz v. Hull, 957 P.2d 984, 1000 (Ariz. 1998) (holding Arizona's English-only constitutional amendment infringed on multiple First Amendment interests of the public, public employees, and elected officials).

19. *See* Garcia v. Spun Steak Co., 998 F.2d 1480, 1490 (9th Cir. 1993) (holding the employer did not violate civil rights of bilingual employees in requiring them to speak only English on the job).

20. *See* Luke W. Cole, *The Struggle of Kettleman City: Lessons for the Movement*, 5 MD. J. CONTEMP. LEGAL ISSUES 67, 74–75 (1993–94) (describing examples in struggle to prevent siting of toxic waste incinerator that link language discrimination to environmental racism).

21. *See* United States *ex rel.* Negron v. New York, 434 F.2d 386, 389–90 (2d Cir. 1970) (holding constitutional right to confront adverse witnesses compels appointment of interpreter in criminal trial at state expense).

22. *See* Sam H. Verhovek, *Mother Scolded by Judge for Speaking in Spanish*, N.Y. TIMES, Aug. 30, 1995, at A12 (reporting that Texas judge had instructed a bilingual mother in a child custody proceeding that she was abusing her five-year-old daughter by speaking to her only in Spanish).

23. *See* ARIZ. CONST. art. XXVIII, *invalidated by* Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995), *cert. denied sub nom.*, Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) (finding plaintiff's resignation from state employment rendered case moot); *see also* Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998). Enacted in 1988 by initiative, § 3(2) of Arizona's constitutional provision prohibiting non-English languages in government speech provided for exceptions that included those necessary to protect the rights of criminal defendants (e.g., Negron), provide bilingual education to the extent required under federal law, and comply with other federal laws. *See, e.g.*, Voting Rights Act, 42 U.S.C. § 1973aa-1a (1994).

24. My emphasis in teaching language law and policy is on the silencing of Spanish and the consequent oppression of Latinos/as. Our study, however, necessarily exposes the potential for oppression of other subordinated groups by means of language policy. For example, my students study accent discrimination in the workplace, an offshoot of English-

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such as workplaces and the consumer marketplace, I am able to highlight the diverse sources of American law from statutory[25] to administrative[26] to constitutional[27] and common law.[28]

Our classroom study of language, cultural, and race discrimination in the criminal justice system, as illustrated by the wrongful murder conviction of Santiago Ventura Morales in 1986, brings out many of the dimensions of silence and silencing that Professor Montoya documents. As an eighteen-year-old Mixtec immigrant from Oaxaca, Mexico, Santiago[29] was found guilty of stabbing a fellow migrant worker in the strawberry fields outside Portland,

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only policies, that often targets Asian-Americans. *See* Fragente v. City & County of Honolulu, 888 F.2d 591, 594 (9th Cir. 1989) (holding that Filipino man was not discriminated against when denied position because of his "heavy accent"); *see generally* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law and a Jurisdiction for the Last Construction*, 100 YALE L.J. 1329 (1991). In California, particularly, the English-only movement is aimed at both Spanish speakers and Asian immigrants. *See* Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 1425 (1998) (discussing language tensions in Monterey Park in the 1980s); *see generally* Grace A. Pasigan, *Sign Language: Colonialism and the Battle Over Text*, 17 LOY. L.A. ENT. L.J. 625 (1997) (examining English-only efforts on the East Coast directed at Asian Americans).

Language politics implicate other subordinated groups. For a discussion of the "Ebonics" controversy surrounding the recognition of Black-English in public education, see Richard Lee Colvin, *No "Ebonics" in New Oakland School Plan*, L.A. TIMES, May 6, 1997, at A1, as well as the impact of English-only law and policy on the indigenous languages of Native cultures, see Larry Campbell, *Dispatch Alaska: More Native Villages Reject English-only Rule*, ANCHORAGE DAILY NEWS, Jan. 24, 1999, at B7. *See generally* Allison M. Dussias, *Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901, 991 (1999) (discussing history of English-only policy and current struggles against such policy).

25. The federal Civil Rights Acts, 42 U.S.C. §§ 1981, 1982 (1994), have been invoked in litigation seeking redress from enforcement of English-only policies by restaurants and taverns against Spanish-speaking patrons. *See* Bender, *supra* note 11, at 170–72. Similarly, the federal Fair Housing Act, 42 U.S.C. § 3601 (1994), has been used to target similar policies by residential landlords. *See* Mintz, *supra* note 14.

26. For example, Equal Employment Opportunity Commission Guidelines create a presumption that employer English-only rules constitute national origin discrimination under Title VII. *See* EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.7(a) (2000), *rejected in* Garcia v. Spun Steak Co., 998 F.2d 1480, 1489 (9th Cir. 1993) (refusing to presume that an English-only policy has a disparate impact on employees).

27. *See generally* Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998); Guerrero v. Carleson, 512 P.2d 833 (Cal. 1973); Flores v. State, 904 S.W.2d 129 (Tex. Crim. App. 1995). The federal constitutional doctrines of due process, equal protection, and free speech are employed routinely in challenges to government policies that target non-English-speaking persons.

28. *See* Ramirez v. Plough, Inc., 863 P.2d 167, 178 (Cal. 1993) (applying negligence law to conclude there was no duty to warn non-English-speaking consumers in Spanish of product dangers); Bender, *supra* note 17, at 1095–1103 (arguing that certain language policies of merchants in the consumer marketplace are subject to attack using common law doctrines such as fraud and unconscionability).

29. I use Santiago's first name as a short-form reference in subsequent text so as not to elide his paternal or maternal surname in the discussion of his culture.

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Oregon.[30] Santiago was singled out quickly as the murder suspect when he stuttered and would not look a police officer in the eye during questioning.[31] Rather than serving as a guilt reflex, as presumed by the white police officer, Santiago's inability to convey an Americanized demeanor of innocence reflected his cultural upbringing in which young Mixtecs do not look their elders in the eye.[32] At trial, his defense was marred by the assumption that Santiago and the migrant witnesses understood Spanish.[33] In fact, their primary language was Mixtec, and Santiago and the witnesses had trouble understanding the Spanish interpreter provided by the state.[34] One juror viewed this judicial circus of witness misunderstandings and confused testimony as part of a criminal enterprise in which "[t]hey all acted kind of guilty."[35] Indeed, one of the jurors remarked later that "[w]e don't need so many of 'em [Mexican mi-

30. *See* Peter Carlin, *What Becomes of the Resurrected?*, L.A. TIMES, Mar. 8, 1992, (Magazine), at 20.

31. *See id.*; *see also A Trial of Errors* (KGW-TV Portland news documentary, Sept. 5, 1990) (reporting remarks of investigating police officer Tim Skipper that "[i]f they hesitate to look you in the eye . . . or they stutter when they speak to you [they are guilty].").

32. *See* Paul J. DeMuniz, *Introduction* to IMMIGRANTS IN COURT 3, 5 (Joanne I. Moore ed., 1999). The prosecutor in *Hernandez* explained his peremptory challenges against the Latino/a jurors as based in part on their lack of eye contact in responding to whether they could ignore deviations between the interpreter's translation and the testimony. *See* Hernandez v. New York, 500 U.S. 352, 357 n.1 (1991). *Cf.* Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 874, 33 U. MICH. J.L. REFORM at 290 ("Indeed, I think the prosecutor did not know enough about nonverbal communication, particularly cross-cultural communication, to understand that silence, pauses, and hesitations are encoded with meaning in relation to the words and the language being spoken."); Juan F. Perea, Hernandez v. New York*: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 60 (1992) (suggesting that in the cultural context, looking away from the prosecutor may have been an expression of respect for him or of discomfort in the unfamiliar proceedings); *see generally* Richard W. Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. NEW ENG. L. REV. 193, 226 (1997) (giving examples of cultural explanations for failing to express remorse verbally and non-verbally).

33. *See* DeMuniz, *supra* note 32, at 3–5.

34. *See* Carlin, *supra* note 30, at 20 (reporting that the investigating officer dismissed the distinction between languages because Spanish and indigenous languages "go hand-in-hand in Mexican country down there"); Barnes C. Ellis, *Ventura Murder Case Dropped*, OREGONIAN, Apr. 12, 1991, at A2, A18 (noting contention of anthropologist that Santiago understood only enough Spanish to buy vegetables in the marketplace); *see also* Sandra Sanchez, *Misdiagnosed Patient Freed After 2 Years*, USA TODAY, June 17, 1992, at 3A (describing release from Oregon mental hospital of Mexican migrant worker wrongly diagnosed two years previously as a paranoid schizophrenic for speaking in tongues when doctors assumed he spoke Spanish and patient in fact spoke the indigenous dialect of Trique).

Prompted by the experience in Santiago's case, Oregon ultimately passed legislation requiring interpreters to be tested and certified. *See Oregon Mandates Testing for Court Interpreters*, OREGONIAN, Dec. 26, 1995, at B4.

35. Carlin, *supra* note 30, at 20.

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grant workers] running around here."[36] Further, Santiago's public defender decided unilaterally that Santiago could not testify in his own defense,[37] leading at least one juror to assume incorrectly that "he had a long criminal history."[38] When the guilty verdict was announced, Santiago broke his involuntary silence and began howling in what his public defender described as "horrible sorrow."[39] Capturing the jurors' reaction to hearing his voice for the first time, Santiago said later "[t]hey realized I was a human then."[40] When several jurors concluded shortly thereafter that they had succumbed to group dynamics and made the wrong decision, they began a five-year struggle along with local activists that culminated in a successful petition for post-conviction relief that freed Santiago.[41]

II. DECULTURING FORCES IN LEGAL EDUCATION

I tell my students that after his release from prison, Santiago declared his interest in becoming a lawyer to fight injustice.[42] No doubt, many of them have the same noble intention. Professor Montoya soundly indicts the deculturing forces in legal education that shift these students away from a commitment to progressive lawyering for social change to the pursuit of a career with

36. *Id.* As best as I can determine, the Santiago jury was all-white. Of course, under the outcome in *Hernandez v. New York*, 500 U.S. 352 (1991), the prosecutor could have validly used her peremptory challenges to exclude bilingual Latinos from this jury if she had perceived they would be unable to ignore the testimony of the witnesses in Spanish.

37. *See A Trial of Errors*, *supra* note 31 ("My attorney never told me that I had the right to testify.").

38. *Id.* (quoting juror Patty Lee).

39. *Id.*

40. *Id.* Without meaning to detract from the gravity of Santiago's experience and emotion upon being sentenced to life in prison, I wonder whether, when law students of color speak out in the classroom after a long silence, their white professors and classmates are similarly moved to realize their competency. *Cf.* Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994) (describing personal experience of breaking silence to question the socio-economic and cultural backdrop of a manslaughter case involving a Latina defendant).

41. *See* Carlin, *supra* note 30, at 20 (noting the ruling in Santiago's favor was based on the denial of his constitutional right to testify and on the failure of his defense counsel to call any expert witnesses in his defense); *see also* DeMuniz, *supra* note 32, at 5 (revealing that a private reinvestigation of the case established convincingly that another migrant laborer had committed the murder). Having learned English while imprisoned, Santiago obtained a college degree in social work and now works for the California Rural Legal Assistance Foundation.

42. *See* Spencer Heinz, *Morales Enrolls in College, Takes Look at Career in Law*, OREGONIAN, Jan. 21, 1992, at C8.

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conservative law firms in partnership with corporate America. Professor Montoya's focus on the silencing of race and gender in the law school classroom as the culprit for this "pernicious" change leads me to question whether my own focus on race and culture makes the false promise to my students of the relevance of race in legal education.[43] Surely the undergraduate Ethnic Studies major, immersed in a curriculum rich with socio-historical perspectives,[44] will be confused, intimidated, and ultimately silenced by the apparent irrelevance of this background in legal discourse. By contrast, I imagine those law students steeped in the language of economics and business in their undergraduate careers may find a more tradeable currency in the law classroom.[45]

Of equal concern, I wonder whether Professor Montoya's focus on the deculturing of the classroom is too narrow. Race is silenced long before and well after the hegemony of the law school classroom. I worry about my Latino/a students' performance on the standardized law admissions test. Will the dismantling of affirma-

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43. In the same vein, my presence in the undergraduate classroom as a law professor of color may give the deceptive impression that Latino/a law professors are plentiful in number. Not only am I the only Latino/a law professor at my school, but it is also likely that, given my German father's surname, few of my law students are aware that I identify myself as Latino. Generally, I find that my teaching areas of Real Estate Planning, Secured Land Transactions, Commercial Law, and Corporations are oriented toward the dominant culture and provide students with no clues as to my cultural identity. Thus far, I have had no opportunity to teach Chicanos/as and the Law in the law school curriculum. The irrelevance and eliding of race in the law school classroom, as documented by Professor Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 891–904, 33 U. MICH. J.L. REFORM at 307–20, helps mask my own identity as a Latino law professor from my law students.

44. *See generally* Kevin R. Johnson & George A. Martínez, *Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship*, 53 U. MIAMI L. REV. 1143 (1999) (examining the roots of Chicana/o Studies and its links to LatCrit theory). As part of our discussion of English-only laws, my students read amicus briefs filed with the Supreme Court in the *Yniguez* litigation, see discussion *supra* note 23, by the State of New Mexico, describing the history of government acceptance of Spanish there, and by the Hawaii Civil Rights Commission, detailing the role of early English language law and policy in the denigration of Hawaiian culture. Later, when we address ill-conceived laws aimed at immigrants, particularly those from Mexico, my students read about the history of the abuse of Mexican migrant laborers. *See generally* Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, *in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 190 (Juan F. Perea ed., 1997).

45. *See* Elizabeth M. Iglesias, *Foreword: Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575, 655–56 (1999) (describing the professional and academic reward system for fluency in law and economics in contrast to critical frameworks of outsider jurisprudence such as LatCrit); Jean Stefancic, *Needles in the Haystack: Finding New Legal Movements in Casebooks*, 73 CHI-KENT L. REV. 755, 762 (1998) (stating that anecdotal evidence suggests that more law students today have backgrounds in economic theory than a grounding in ethnic or race studies).

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tive action,[46] part of the broader effort to silence race in legal and higher education, enhance the role of this often culturally inappropriate device?[47] How culturally appropriate are American law schools where student rankings and self-worth are derived from a twice annual "sit and spill" examination?[48] Are bar examinations that regulate entry into the profession in an even more rigorous session of endurance and speed any better suited to the culture of students of color? Moreover, assuming that students survive this deculturing gauntlet with their public interest commitment intact, will spiraling debt loads steer them away from often underpaid opportunities in progressive lawyering?[49] Surely, the journey from

46. *See, e.g.*, Proposition 209, *enacted as* CAL. CONST. art I, § 31; Hopwood v. Texas, 78 F.3d 932, 955 (5th Cir. 1996) (holding University of Texas School of Law may not use race as a factor in admissions).

47. *See generally* Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121 (1993) (arguing that, despite recent efforts to make the Law School Admission Test (LSAT) more inclusive of diverse groups, the test perpetuates bias and disadvantages minority and women applicants to law schools).

48. Dean Rennard Strickland contributed to this Article the following account of the cultural inadequacy of most law school examinations from a Cherokee perspective:

> The story is one that happened to me while I was working on the infamous Girl Scout Murder case in which a Cherokee had been charged with the murder. After the accused James Leroy Hart had been found not guilty, the state decided to charge the religious leader of the Keetoowah traditional Cherokee religious group with harboring a fugitive for having granted him sanctuary (which is a little bit like benefit of clergy in Anglo-Saxon jurisprudence). One of the young Indian men who was working with us was absolutely brilliant and seemed to know and understand every legal doctrine any of us would mention. I finally told him that I thought he ought to go to law school. He reported that he had and that he had flunked out. This didn't make sense to me because his analysis and knowledge were simply superb. It finally came to me that he was a very traditional Cherokee who had been raised in a family with strong tribal values. In such a society, the wise and good citizen does not make rapid decisions but reviews and re-reviews all issues. It is not thought "wise" or "smart" or "fair" to answer complex questions quickly. The good man and good woman gives the question the time it is worth. In law school (and on much of the bar), we too often test how quickly one can answer a question. We ask our Native students (like all other students) to list the thirty-seven crimes in a fact situation in a fifteen minute question. The method of testing runs exactly counter to what is taught in most traditional American Indian cultures. This creates a very difficult situation in which even those students who survive are not showing on the tests what they have learned or how they can apply the knowledge.

E-mail from Dean Rennard Strickland, Dean and Philip H. Knight Professor, University of Oregon School of Law, to Steven W. Bender, Associate Professor of Law, University of Oregon School of Law (May 1, 2000) (on file with author).

49. *See* Michael A. Olivas, *Paying for a Law Degree: Trends in Student Borrowing and the Ability to Repay Debt*, 49 J. LEGAL EDUC. 333 (1999) (documenting a dramatic increase in the cost of legal education).

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an Ethnic Studies education to what Gerald López describes as a rebellious lawyer[50] is a perilous one.

III. DOCTRINAL PITFALLS TO PROGRESSIVE LAWYERING

What awaits the now-graduated progressive lawyer who aspires to use law as a means of achieving and ensuring social justice? She will find a legal wasteland marked by the increasing conservatism of judges in construing statutes and reigning in common law theories;[51] the chilling of civil rights actions through "tort reform" measures that reciprocate attorney fee recoveries, eliminate or restrict punitive damage recoveries, and limit class actions;[52] and the dismantling of statutory guarantees originating in the Civil Rights era in what is now called the post-Civil Rights era.[53]

On reflection, my undergraduate students ought to see some of this spirit-breaking writing on the wall. Many, if not most, of the language cases they study foretell the doctrinal pitfalls of progressive lawyering for civil rights on behalf of Latinos and Latinas. They learn the difficulty in bridging the judicial and definitional divide between language discrimination and unlawful discrimination on the basis of race or national origin.[54] They observe how easily a defendant can elude liability for purposeful discrimination under civil rights laws by asserting some pretextual business purpose—for example, that a tavern's English-only policy keeps the

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50. *See* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 38 (1992).

51. *See, e.g.*, Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1170–71 (1995) (identifying in recent contract law decisions a "judicial tilt away from underdogs, back toward the privileged beneficiaries of classical contract law.").

52. *Cf.* Troy L. Cady, Note, *Disadvantaging the Disadvantaged: The Discriminatory Effects of Punitive Damage Caps*, 25 HOFSTRA L. REV. 1005, 1038–39 (1997) (suggesting the disproportionate impact of tort reform on the economically disadvantaged).

53. *See* Garcia v. Spun Steak Co., 998 F.2d 1480, 1490 (9th Cir. 1993) (rejecting EEOC Guidelines designed to facilitate challenges under Title VII to employer English-only rules).

54. *See* Flores v. State, 904 S.W.2d 129, 130–31 (Tex. Crim. App. 1995) (rejecting contention that language discrimination amounts to discrimination based on race or national origin and affirming denial of probation to defendant because of his inability to speak English); *see generally* Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994) (calling for explicit statutory protection against discrimination on the basis of ethnic traits).

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peace in the bar,[55] or that a landlord's policy to reject non-English speaking applicants is meant to ensure effective communication as to the condition of the premises.[56] They are exposed to the tendency of courts to defer to the legislature on issues of language policy, and learn, of course, that where the legislature has failed to create positive language rights, the claim to establish such rights under the common law is doomed.[57] In studying the Supreme Court's refusal to invalidate a prosecutor's use of peremptory challenges to exclude bilingual Latinos/as from the jury,[58] students see the shortcomings of the doctrine of equal protection to guard against cultural ignorance. In the balancing of detriment and benefit under the doctrines of due process and equal protection, they see undue weight given to protecting government from the cost of providing Spanish services on the mistaken assumption that extending rights to Spanish-speakers requires recognition of every other language.[59] Finally, despite its use in striking down Arizona's

55. *See* Bender, *supra* note 11, at 171–72 (describing the successful defense of a Washington tavern owner whose English-only policy was upheld against a challenge under state civil rights law because the factfinder concluded the owner was acting to ensure safety of person and property).

56. *See* Mintz, *supra* note 14 (suggesting the basis for a jury's conclusion that the landlord's policy did not violate federal housing discrimination law).

57. *See* Ramirez v. Plough, Inc., 863 P.2d 167, 178 (Cal. 1993) (refusing to impose tort duty on aspirin manufacturer to disclose dangers in Spanish because court believed legislature is the appropriate institution to require such disclosures); Commonwealth v. Olivo, 337 N.E.2d 904, 910 n.6 (Mass. 1975) (arguing that it was improper for court to require translation of notice to vacate public housing without legislative mandate); Alfonso v. Board of Review, 444 A.2d 1075, 1077 (N.J. 1982) (leaving the decision of whether to require translation of unemployment appeal rights to legislature that can better assess the changing needs and demands of the non-English-speaking population and the government agency).

58. *See* Hernandez v. New York, 500 U.S. 352, 369 (1991).

59. *See, e.g.*, Frontera v. Sindell, 522 F.2d 1215, 1219 (6th Cir. 1975) (stating that to require Civil Service exams in Spanish would entitle other groups to exams in their language to the detriment of city taxpayers); Guerrero v. Carleson, 512 P.2d 833, 837–38 (Cal. 1973) (rejecting constitutional challenge to English-only notice in part because of concern that requiring Spanish translation would compel accommodation in other languages); Flores v. State, 904 S.W.2d 129, 131 (Tex. Crim. App. 1995) (finding no violation of equal protection where defendant was denied probation because of lack of adequate Spanish language alcohol diversion program and stating that a different outcome would require cash-strapped governments to establish treatment programs in many languages); *see also* Bender, *supra* note 17, at 1061–62 (questioning the assumption that requiring government to accommodate Spanish language necessarily compels accommodation in every language, particularly given the enormous gap between the number of Spanish-speakers in America and speakers of other non-English languages). My point is that in gauging the detriment of denying language rights, a court should determine the extent of the population affected by an adverse decision. Particularly with regard to the provision of government translations in Spanish (e.g., when conducting examinations for licensed occupations), courts might well conclude that it is reasonable to accommodate only certain languages other than English. In contrast,

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English-only law,[60] my students observe the limited reach of the constitutional guarantee of free speech.[61]

Language law is not unique in its reflection of the deteriorating conditions for progressive lawyering. Surely other thematic rights-based approaches to introduce the study of law, such as those based on gender, class, sexual orientation, immigrant rights, or racial discrimination, would foretell similar obstacles to social justice. These pitfalls expose a separate concern from what Professor Montoya has identified as the curricular avoidance of race in the law school classroom. Law students are rarely schooled in praxis—the means of linking legal strategies to community-based political and social movements for change.[62] By contrast, my undergraduate students learn about the role that these movements play in the struggle for social justice, a role strong enough that the community-based effort on occasion wholly displaces any legal (lawsuit-based) response.[63] In the context of language policy, we study the role of community activism in the withdrawal of plans to site a toxic waste incinerator near Kettleman City, California.[64] Previously, a judge had thrown out the project's environmental impact report because it had not been translated into Spanish for the benefit of the local Spanish-speaking residents.[65] However, had it not been for community resistance measures that undoubtedly influenced the decision to abandon the project, its proponent could

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when a liberty interest is at stake as in *Flores*, the detriment is so substantial that every language should be accommodated in lieu of imprisonment.

60. *See* Ruiz v. Hull, 957 P.2d 984, 1002 (Ariz. 1998) (holding Arizona's constitutional amendment infringes free speech interests of the public, public officials, and elected officials).

61. *See* California Teachers Ass'n. v. Davis, 64 F. Supp. 2d 945, 953–54 (C.D. Cal. 1999) (upholding California's bilingual education initiative against challenge by public school teachers in part because of the state's ability to regulate teachers' speech in the classroom).

62 *See generally* Francisco Valdes, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self Empowerment*, 2 HARV. LATINO L. REV. 1 (1997) (describing the importance of praxis to LatCrit scholars).

63. *See* Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 47 (1995) (observing that litigation alone has not been very successful historically in promoting social change for Latinos); Kevin R. Johnson, *Lawyering for Social Change: What's A Lawyer To Do?*, 5 MICH. J. RACE & L. 201, 205 (1999).

64. *See* Jim Wasserman, *Little Town Notches Win Over Big Money*, FRESNO BEE, Sept. 9, 1993, at B1 *available at* LEXIS, News Library, Fresno Bee File.

65. *See Judge Overturns Approval of Commercial Waste Incinerator*, L.A. TIMES, Jan. 1, 1992, at A24 (noting that 40% of the local residents spoke only Spanish).

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have simply translated the report as the court had ordered and pushed forward with the approval process.[66]

We also study a recent example of activism against hate speech—a close ally of language discrimination.[67] In 1998, while a federal court in California was still wrestling with constitutional challenges to the anti-immigrant Proposition 187 adopted four years earlier, the co-sponsor of that initiative erected a billboard in the California desert announcing to travelers "Welcome To California, The Illegal Immigration State. Don't Let This Happen To Your State."[68] Within a few weeks, a Latino activist threatened at first to burn and later to repaint the billboard to erase its message of hate directed at immigrants and Latinos/as. Rather than face a confrontation, the billboard owner returned the vinyl sign to the anti-immigrant group not two months after its unveiling.[69] As

66. *See* Cole, *supra* note 20, at 77–79 (addressing the relationship between legal intervention and the larger political movement for environmental justice).

67. *See* Bender, *supra* note 11, for discussion of private language vigilantism; *cf.* Elizabeth Weise, *Goal! Soccer Fans Force AOL To Accept Spanish*, ARIZ. REPUBLIC, July 26, 1996, at E1 (detailing how a mass e-mail protest led to an internet company's reversal of an English-only rule for its soccer chatroom).

68. *See California Billboard Fans Illegal Immigrant Dispute*, HOUST. CHRON., May 6, 1998, at 16A (reporting remarks of California Coalition for Immigration Reform spokesperson that the billboard serves as a warning about "the devastation that has occurred in California because of illegal immigration and bilingual education."). California has a long history of overt hostility, violence, and threats toward immigrants who are perceived as non-white. *See generally* TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994). For examples of this hostility towards Chinese laborers and Japanese agriculturalists in the late 19th and early 20th Centuries, see Keith Aoki, *"Foreign-Ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1, 23–33 (1996); Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998).

69. *See* Peter H. King, *With Gusto, But No Inferno, Obledo Brought Down "Racist" Billboard*, FRESNO BEE, June 24, 1998, at B1, *available at* LEXIS, News Library, Fresno Bee File. Apparently the activist, Mario Obledo, had researched vandalism and trespassing laws and had anticipated his arrest. *See id.* In a subsequent article, I will discuss whether property-based doctrines protecting against entry should give way to allow self-help to remove physical monuments of hate speech.

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Professor Montoya suggests, hate speech too often prompts silence rather than individual or community activism.[70] As viewed against Montoya's indictment of the silencing of race, it is ironic that proponents of the billboard assailed the activist's tactics as intimidation that "squelched" needed public discourse on race.[71]

CONCLUSION

Validating Professor Montoya's observations on the irrelevance of race and socio-historical perspectives in legal education, no administrator has ever suggested that I offer my Chicanos/as and the Law course to law students. Recently, Professor Frank Valdes at the University of Miami School of Law conducted an e-mail survey that confirmed only a handful of U.S. law schools include meaningful coverage of Latino/a issues in their curricula.[72] As Professor Valdes concluded, this means that most law students, whether Latino/a or not, graduate "without EVER having studied about, thought about, or discussed legal issues that are especially germane to the fastest growing social group in the country!"[73]

Today, Latinos/as and their intersection with law and social policy are relevant only at the margins and fringes of legal education. The LatCrit enterprise, well represented in this Symposium, is devoted to challenging the ongoing silencing of race and to urging that the legal profession, legal education, and society recognize the salience of race and of Latinos/as, their culture, and their history, in our collective future.

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70 *See* Montoya, *supra* note 1, at 5 MICH. J. RACE & L. at 906, 33 U. MICH. J.L. REFORM at 322. ("[H]ate speech . . . can only be countered by being responded to. Silence in the face of hate speech makes us all complicit.").

71. *See* Dan Schnur, *Liberals Don't Seem Ready for a Real Conversation on Race*, SAN JOSE MERCURY NEWS, July 12, 1998, at 5F.

72. *See* e-mail from Frank Valdes, Professor of Law, University of Miami School of Law, to Steven W. Bender, Associate Professor of Law, University of Oregon School of Law (Mar. 29, 2000) (on file with author).

73. *Id.*

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