

## TRANSFORMATIVE SILENCE AND PROTEST

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### ABSTRACT

*Social movement protests have become common place in the last several years. Images come easily to mind of protestors marching down streets holding signs and chanting. Just as easily, images come to mind of counter-protestors yelling back, and law enforcement engaging protestors, often trying to control them with notable force. This Article recognizes that protestors often engage with speech, silence and the law in very pragmatic, but important ways. How does a locality handle permitting for protests? Are there noise restrictions to know about? How likely will it be that law enforcement will be present and making arrests? If there are arrests, who will post bail? While those practical choices are important, focusing on those choices often means that protest gets framed as being about speech rights—who gets to speak and how, and who gets to control speech and how. That framing obscures that protest is as much about silence as it is about speech.*

*That is true because protest is a deeply relational activity and choices about speech always involve choices about silence—or silencing. Similarly, the law is deeply relational as it sets up ways to order how people can, or cannot, engage and interact with each other. This Article posits that more carefully investigating the relationality involved in protest work unearths a new and powerful dynamic—transformative silence. The Article considers how transformative silence can upend the typical zero-sum qualities of protest, and can increase the possibility that protest can lead to social change.*

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## INTRODUCTION

Ferguson, Missouri (Michael Brown), August 2014. The Women's March, Washington, D.C. and worldwide, January 2017.<sup>1</sup> March for Our Lives, Marjorie Stoneman Douglas High School students, Washington, D.C., March 2018.<sup>2</sup> Minneapolis-St. Paul, Minnesota (George Floyd), May 2020.<sup>3</sup> That list reflects just a few of the myriad of protests that have occurred over the last several years. We have been in a period of time of increased protest for social change. The calls for social change commonly include calls for changing the law and the legal system.<sup>4</sup> This Article considers whether current conceptions of protest might actually constrain its potential to catalyze social change.

The starting list of protests above easily prompts related images and ideas of what it means to protest. Protest means speaking out, and it often means demanding changes in the law or legal system. Protest often is experienced as, and portrayed as, adversarial and zero sum. For example, protestors and counter-protestors argue about their respective first amendment rights in ways that suggest if one side has the right to a certain degree, the other side necessarily loses its right to that same degree.<sup>5</sup> This Article considers what it would mean to have a more capacious experience and understanding of protest.

In the first three sections, the Article puts several strands of thought related to protest into conversation with each other. It considers the role of speech *and* silence in protest, unearthing the ways in which protestors use both to assert their power and to be understood. It further considers how protestors' actions are never one-sided. Those actions always and necessarily reflect a web of

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<sup>1</sup> See *Annual Report 2017*, WOMEN'S MARCH (2017), [https://static1.squarespace.com/static/5c3feb79fcf7fdce5a3c790b/t/5c422af80e2e725f8f0ea8f8/1547840252450/2017%2BWM%2BAnnual%2BReport\\_LoRes.pdf](https://static1.squarespace.com/static/5c3feb79fcf7fdce5a3c790b/t/5c422af80e2e725f8f0ea8f8/1547840252450/2017%2BWM%2BAnnual%2BReport_LoRes.pdf).

<sup>2</sup> See *Mission & Story*, MARCH FOR OUR LIVES (2021), <https://marchforourlives.com/mission-story/>.

<sup>3</sup> Derek Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES, (Mar. 28, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html>.

<sup>4</sup> See, e.g., *A Peace Plan for a Safer America*, MARCH FOR OUR LIVES (2021), <https://marchforourlives.com/peace-plan/>.

<sup>5</sup> See, e.g., Nancy Thomas, *Educating for Democracy in Undemocratic Contexts: Avoiding the Zero-Sum Game of Campus Free Speech Versus Inclusion*, 7 E JOURNAL OF PUB. AFFS. 81 (2018), [http://www.ejournalofpublicaffairs.org/wp-content/uploads/2018/04/EJOPA\\_7.1\\_199-Nancy-Thomas.pdf](http://www.ejournalofpublicaffairs.org/wp-content/uploads/2018/04/EJOPA_7.1_199-Nancy-Thomas.pdf) (discussing zero-sum framing of free speech rights in higher education settings).

relationships with others, both within and outside of the social movement. Protest also reflects a relational dynamic that not only is about people, but also is about the law and the surrounding legal system.

The Article then inquires about what opportunities might be missed when we understand protest as a zero-sum contest between those who hold power and those experiencing subordination. In Section IV, it makes a novel move and looks to the use and experience of silence in faith traditions. In many faith traditions, silence is used for revelation and transformation. It is intentionally cultivated as a way of listening for the unexpected. Practices of silence then cultivate and support efforts to transform a new path forward. Those practices of silence also help build resilience, equanimity and empathy. The Article discusses how protest work might be more effective if it had more opportunities for the kind of open, silent listening that can be found in faith traditions.

In the final section, the Article pulls all of the above strands together and considers the role of the law and legal systems. It concludes that protest can be most effective when it acknowledges that transformative social change often requires transforming relationships before transforming the law.

## I. SETTING THE STAGE.

The last handful of years have been remarkable in terms of social mobilization, with a notable increase in social protests across the country and across issues.<sup>6</sup> With plenty of media coverage, it is easy to watch protests happen and unfold. And, for many, this recent period of increased protest activity has been an introduction into actual protest work, learning and experiencing what it means to step out publicly in support of social change.<sup>7</sup>

Both the experience of engaging in social protest, as well as watching it, create expectations about what protest is, and what it looks like. I would suggest that some expectations start to predominate. Those expectations can be dichotomous—protestors are agitated and angry, or, protestors are calm and stoic; protestors

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<sup>66</sup> See Ronald Brownstein, *The Rage Unifying Boomers and Gen Z*, THE ATLANTIC (June 18, 2020), <https://www.theatlantic.com/politics/archive/2020/06/todays-protest-movements-are-as-big-as-the-1960s/613207/>.

<sup>7</sup> See, e.g., Scott Medintz, *Preparing to Protest: A Beginner's Guide*, CONSUMER REPORTS (June 11, 2020), <https://www.consumerreports.org/human-civil-rights/preparing-to-protest-a-beginners-guide/>.

are loud and vocal, or, protestors are quiet and silent. By definition, those of us protesting intend our actions to mean something, to be saying something about our disagreement with the status quo. Those of us observing protestors also understand that protest is intended to send us a message.

In some basic way, whether protesting or observing protest, we understand there to be a relationship between the two groups. But, because of the dominant expectations about what protest looks like, I also would suggest that we have fairly narrow ideas about the kinds of relationships that exist between protestors and their audiences. For both protestors and audiences, each has a “good” kind or a “bad” kind. For example, for protestors, a bad audience is one that misunderstands, or cannot understand, the injustice that the protestors are calling out. A bad audience unjustly demands that the protestors be quiet, or heckles and bullies quiet protestors. In contrast, for audiences, a bad protestor needlessly disrespects civility and disrupts the necessary daily activities of others. (For each, there are more extreme descriptions as well.) Nonetheless, whether we are protesting or observing, we seldom press ourselves to describe or understand our relationship to the other side with much nuance. It is enough to stay with the notion that we are trying to do something to them or they are trying to do something to us.

In the above examples, the experience of protestors and audiences being in relationship to each other often gets expressed by communications. We observe relationality by observing who is saying what, or what kinds of conclusions each side draws about the other because of the words that are said. Relationality, though, can be expressed and experienced in other ways and through other mechanisms. Importantly for this Article, the law gets used as a mechanism of relationality. It constructs and constrains relationships.

A dominant view of the law, played out across a myriad of doctrinal areas, says that the law has a core role of ordering the way in which people relate and engage with each other, and that it is supposed to do so in neutral ways. The assertion is that the “rule of law” applies equally to all who are within the web of relationships in our society.<sup>8</sup> More particularly for protest, the law orders how it happens. Because of the law’s supposedly neutral approach, the

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<sup>8</sup> See generally Tara Smith, *Neutrality Isn’t Neutral: On the Value-Neutrality of the Rule of Law*, 4 WASH. U. JURIS. REV. 49 (2011) (discussing the idea of neutrality in the Rule of Law and its applications).

expectation is that the law orders relationships in ways that both provide space and support for protest as well as constrain and restrain protest.<sup>9</sup> The law is expected to inform both protestors and audiences about what actions are acceptable and what actions are not. The law is not supposed to pick substantive sides between protestors and audiences, but is supposed to order their relationality based on assertedly neutral principles.<sup>10</sup>

I would suggest that many, if not most of us, understand that there are deep and genuine disagreements and fractures about the idea of law's neutrality. As the fields of Critical Legal Theory<sup>11</sup> and Critical Race Theory<sup>12</sup>, among others, have made abundantly clear, there are sharp and incisive critiques about whether law can ever be neutral. Thus, there is deep skepticism that the law addresses *all* protestors in equitable and just ways, as well as whether the people who are enforcing or deploying the law do so against all in equitable and just ways.<sup>13</sup>

Those disagreements, however, do not negate the fact that the law is relational. The law presumes that there is a relationship between protestor and audiences, and the law attempts to order those relationships. For my purposes, it is crucial to foreground that relationality is present regardless of whether the law is neutral, or can ever be neutral. I suggest that either way, what becomes more important to social change is a thorough-going understanding of the web of relationships involved, followed by a

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<sup>9</sup> See, e.g., Know Your Rights: Protestor Rights, ACLU (2021), <https://www.aclu.org/know-your-rights/protesters-rights/> (discussing the kinds of actions protected and prohibited under first amendment jurisprudence).

<sup>10</sup> For example, a core principle of first amendment jurisprudence is that the government must be neutral when regulating the context of speech, but may regulate the time, place or manner of speech. See Barbara J. Van Arsdale et al., *Time, Place, and Manner Regulations as Not Violating First Amendment, Generally*, 16A AM. JUR. 2D. CONST. L. §534 (2021).

<sup>11</sup> For an early, exemplary article representing Critical Legal Studies, see Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

<sup>12</sup> For an early and seminal article on Critical Race Theory, see, Kimberle William Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331 (1988).

<sup>13</sup> After the insurrection at the national capitol on January 6, 2021, commentators noted how lax law enforcement's response was to white supremacists as compared to responses at Black Lives Matter protests. See Kellie Carter Jackson, *The Inaction of Capitol Police Was by Design*, THE ATLANTIC (Jan. 8, 2020), <https://www.theatlantic.com/culture/archive/2021/01/inaction-capitol-police-was-design/617590/>.

clear-eyed assessment of the practical utility of law as an instrument of social change.

Consider that at the very same time that the law is ordering relationships, protestors and audiences make a range of choices about relational behaviors—both in the face of the law and despite the law. Notice that if you are a lawyer, almost without bidding, ideas like “first amendment,” or “symbolic speech,” have come into your mind. If you are experienced setting up protests, almost without bidding, ideas like “permits to march,” or “bail funds,” have come to your mind. I think that reflects two particular features about how we think about protest. First, that we most commonly think protest is about speaking—a protestor speaks up and speaks out. It is an individual endeavor, although it gets performed by a collective of individuals. Second, protest requires someone to attend to a range of very practical, logistical matters—how do you get a permit to march, where can signs be hung, is there a local lawyers group that can provide legal monitors?

Both of those features of protest are important, and because they come readily to mind, they often dominate how we think, plan and act about protest. As a result, I think some important and interesting dynamics about protest get obscured. First, protest can be as much about silence as it is speech. Obviously, protestors may decide that silence, not speech, is the better way to illustrate the message they hope to send. But, silence in protest also is one way to illuminate the profound relationality that exists in the endeavor. Silence can create space for us to observe and see. If I am concentrating on what *I* am chanting or how *I* need to speak next, I am focused mostly on my own actions, and my own experiences are most present in my mind. I surely sense and experience those around me, and their chanting or speech may bolster and motivate my own. Our collective action of protesting together also likely helps me feel my own relationship to others in the group. I feel like I belong to something bigger than just me. Nonetheless, my reference frame is centered on me.

I want to investigate whether exploring a more expansive character of silence in protest might reveal a greater level of nuance. I think my investigation reveals that there is a more generative form of silence available in protest and to protestors. It is a silence that sees the possibility of a relationality in protest that forges connection out of disagreement and strives for transformation. I think that more capacious understanding of relationality in protest

helps protestors discern how (or even if) to engage the law. I will investigate all of those ideas in more detail below.

## II. LAW, RELATIONALITY AND SILENCE.

Before more thoroughly investigating how silence looks and operates as a form of protest, it will be helpful to more generally observe some of the existing dynamics in the ways that law deals with silence. More specifically, it will be helpful to consider how the law reflects the fact that silence is never really only about an individual's choice, but about choices within a web of relationships.

For example, think about the idea of rights and the way rights, generally, are imbued with relationships—either the relationship between governments and individuals or relationships between individuals. There is a rights holder who is entitled to exercise her rights against others, or a government that is supposed to grant and honor rights that are exercised by the people who are in relationship with the government (as citizens, as members within its borders etc.)<sup>14</sup> The contours of the right are created by the web of relationships involved. Then, some rights deal directly with who in the web of relationships can control speech or silence.

Consider my 5<sup>th</sup> amendment right not to be compelled to be a witness against myself. That right has import because it relates to my compelled testimony to others. I doubt that we think about the right as having anything to do with some kind of compelled confession that I make to myself that is not recorded or shared with others in any way. While the right is about protecting a particular individual, the right protects that individual as she is in relationship to others. It protects her silence not because the individual cares about being silent to herself, but because she cares about being silent in the face of other people surrounding her who are interested in having her speak.

Similarly, the ability to subpoena me as a witness and to compel my speech matters because the person subpoenaing me believes I have something useful to say about another, or about myself as it relates to another. I am being subpoenaed not because someone wants to hear me speak about whatever I choose or about

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<sup>14</sup> Traditionally, legal scholars have distinguished between “negative” and “positive” rights, with the first associated with the right to be free from government interference and the second with the right to demand government action. See Frank B. Cross, *The Error of Positive Rights*, 48 U.C.L.A. L. REV. 857, 863 (2001). Regardless, relationality exists whether a right is framed as positive or negative.

my own internal musings. I am being subpoenaed because I am part of a web of relationships that has given rise to a conflict. The subpoena is a mechanism to compel my speech about that web of relationality.

The kind of relationality that the law often pays the most attention to is relationships in opposition to each other. In many ways, when the law deals with silence, it presumes that the context involves one person or group opposing another person or group. As noted above, even when the issue is framed affirmatively—a person has the affirmative right to speak or be silent—the law is stepping in because some other person or group wants to compel the opposite outcome. To give yet another example, think about victim impact statements in criminal cases. A stated goal of those statements is to affirmatively provide a way for victims in criminal cases to speak to the court about how they have been affected, so that victims can feel heard in proceedings that otherwise are focused on issues about the defendant and the defendant's guilt or innocence.<sup>15</sup> But, that affirmative right is in opposition to the defendant and the defendant's rights to have a judicial process that is fair and not unduly influenced by external factors.<sup>16</sup>

Even in settings that we might think are about mutuality and about positive benefits—like employment relationships—when the law deals with silence, the law often presumes that there will be antagonism. Think about non-disclosure agreements.<sup>17</sup> They exist because of distrust. An employer distrusts that employees will keep sensitive business information confidential and so the employer uses the law to ensure that employees are silenced in certain ways.<sup>18</sup>

Again, the goal of my examples is to illustrate two points. First, that most of our experiences related to silence are not internal and solitary, but come about because we are in relationship to another or to some set of other people. Second, that when the law

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<sup>15</sup> See Erin Sheley, *Reverberations of the Victim's "Voice": Victim Impact Statements and the Cultural Project of Punishment*, 87 IND. L.J. 1247 (2012).

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., MICHAEL D. SCOTT, SCOTT ON INFORMATION TECHNOLOGY LAW § 6.25 (West 2021) (noting the "danger" that an employee will take trade secrets when the employee leaves the job).

<sup>18</sup> See also Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable*, 25 WM. MITCHELL L. REV. 627 (1999) (arguing that employers should be able to force employees to keep some business information confidential, like trade secrets, but should not be able to silence employees disclosing information about public health and safety).



is asked to deal with silence, it presumes that the relationships at hand are antagonistic in some way. I want to turn now to consider how silence and relationality are present and experienced in social protest.

### III. SILENCE, RELATIONALITY AND PROTEST.

There are two primary ways that silence and protest are experienced. Silence is a tool to shut down expression at the same time that it is a tool of expression. It is a tool designed to control resistance at the same time that it is a tool of resistance. For example, those who wish to control protestors often do so in ways that are designed to silence the protest. Protestors are cordoned off in designated spaces that potentially limit the range of people who hear or see the protest.<sup>19</sup> Protestors are arrested and, in that way, silenced. Often, the controls are justified on public safety grounds, which then can offer up opportunities for protestors to harness silence. Protestors who stand silently in place call out the ruse of “public safety,” and their silence becomes resistance. It also becomes a tool of expression. Protestors use silence as a way of affirmatively expressing the ways in which those in control are falsely portraying protestors as destructive and menacing.<sup>20</sup>

I think what gets revealed by noticing the contradictory and oppositional experiences of silence in protest is the deep relationality of the endeavor. Each side claims the power of silence because of, and in response to, the other side. Those who have power exercise that power against others. Silence becomes a tool for control only if there is someone to control. Further, control includes both compelling silence and compelling speech. In return, silence as resistance exists only because there is someone to resist against. Control in resistance means both refusing to be silent and refusing to speak.

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<sup>19</sup> See *Free Speech Under Fire: The ACLU Challenge to “Protest Zones,”* ACLU (2021), <https://www.aclu.org/fact-sheet/free-speech-under-fire-aclu-challenge-protest-zones> (describing a range of protest zones used during the George W. Bush Administration in 2002-03).

<sup>20</sup> See, e.g., *Taking a Knee: The Rights of Students to Peaceful Protest,* ACLU WASH. (2021), <https://www.aclu-wa.org/pages/taking-knee-rights-students-peaceful-protest> (noting that students have a right to silent protest and that teachers and administrators should embrace such protest and “turn it into an opportunity for learning and dialogue”).

Further, the relationality of silence in protest reveals a deep irony—a person choosing to be silent controls only her choice. How she is “heard” or understood is a separate choice exercised by the other side. For example, when I choose to be silent as a way of expressing my disagreement with those in power, I create a range of choices for the other side—they can ignore me, they can speak out and repeat their own position, and they can speak out and create a narrative about what my silence means. I then have a range of choices about how I respond. I can maintain my silence. I can rebut what the other side has said. I can ignore the other side, and change my tactics of protest. Similarly, if I am the person in power, and I try to shut down, or silence, the speech of another, I create a range of opportunities for the other—to respond in words, to respond in actions, to be silent yet act, or to be silent entirely. Similarly, if I am in power and I try to compel speech of another, I also create the same range of opportunities for the other.

Further, the idea of relationality in silence also reflects the fact of subordination, as critical scholars have made clear.<sup>21</sup> When we foreground the fact that subordination inherently is about relationships, we can see how silence can play different roles as a mechanism for protesting subordination. For example, one possible way to protest is to refuse to “behave” as those in power expect, and to speak out and act up. In other words, to refuse to be silent. As bell hooks has described it, for people experiencing oppression, speaking out “is an act of resistance, a political gesture that challenges the politics of domination that would render us nameless and voiceless. As such, it is a courageous act; as such it represents a threat.”<sup>22</sup> Refusing to be silent is a relational response. It happens because there are those in power and those who are not.

Similarly, another point of refusing to be silent is to create resistance stories that reclaim an authentic voice.<sup>23</sup> Protestors tell their own stories instead of having a story created and told by those in power in service of their power. Resistant speech is both a

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<sup>21</sup> See Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy, and Discourse*, 5 MICH. J. RACE & L. 847 (2000).

<sup>22</sup> BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 8 (2015) (hereinafter “TALKING BACK”).

<sup>23</sup> See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Margaret E. Montoya, *Mascaras. Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN’S L.J. 185 (1994).

response to power and an affirmative act of power. Resistance stories say—“I reject your telling me to be quiet. I reject the stories you create about me. I will speak up and I will tell my story in my own words.”

In many ways, we expect protest not to be silent. In other words, we expect protestors to refuse to be silent because we most often expect that those in power intend to control through silencing. Again, bell hooks:

Moving from silence into speech is for the oppressed, the colonized, the exploited, and those who stand and struggle side by side, a gesture of defiance that heals, that makes new life, and new growth possible. It is that act of speech, of “talking back” that is no mere gesture of empty words, that is the expression of moving from object to subject, that is the liberated voice.<sup>24</sup>

We also expect protest to be vocal because part of the goal of protest is to call others into the social movement. Hearing someone else speak to my problem helps me see that I am not alone and may motivate me to join in the protest.

Interestingly, the need and impetus to speak in one’s own voice resists not only against adversaries in control, but also resists against well-intentioned, but unaware progressive voices within the dominant culture. As Gayatri Spivak has put it: “The ventriloquism of the speaking subaltern is the left intellectual’s stock-in-trade.”<sup>25</sup> For those experiencing subordination, silencing can happen both directly—“Don’t speak,”—and indirectly—“I’ll speak for you.” bell hooks captures that ventriloquism eloquently:

No need to hear your voice when I can talk about you better than you can speak about yourself. No need to hear your voice. Only tell me about your pain. I want to know your story. An then I will tell it back to you in a new way. Tell it back to you in such a way that it has become mine, my own. Re-writing you I write myself anew. I am still author, authority. I am still

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<sup>24</sup> HOOKS, *supra* note 22, at 9.

<sup>25</sup> GAYATRI CHAKRAVORTY SPIVAK, *CAN THE SUBALTERN SPEAK?: REFLECTIONS ON THE HISTORY OF AN IDEA* 27 (Rosalind C. Morris, ed. 2010).

colonizer, the speaking subject and you are now at the center of my talk.<sup>26</sup>

Refusing to be silent helps reveal some of the complicated relational dynamics because protestors can affirmatively call out their adversaries as well as “call in”<sup>27</sup> their intended supporters.

Of course, protestors also can refuse to “behave” by affirmatively demonstrating in silence. In other words, another way to exercise power against those in power is to refuse to speak in words and to resist by action in silence. Consider the iconic moment at the 1968 summer Olympics in Mexico City when Tommy Smith and John Carlos raised their fists on the medals podium in support of the Olympic Project for Human Rights.<sup>28</sup> Or, the more current protests of athletes, like Colin Kaepernick, kneeling during the national anthem.<sup>29</sup> Or, the 1917 NAACP Silent March in New York City to protest the indiscriminate killing of Blacks in East St. Louis.<sup>30</sup> Or, GLSEN’s annual Day of Silence where LGBTQ students and their allies vow to be silent for a day to protest against acts of discrimination and harassment.<sup>31</sup>

Those acts of silence are intended to have meaning just as much as an act of speaking. In fact, the silent protester typically intends her silence to carry the very same rejection of subordination as the protestor who chooses to speak. With silence, the protestor says to those in power: “Even if you think you can silence my words,

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<sup>26</sup> Bell Hooks, *Marginality as Site of Resistance*, *OUT THERE: MARGINALIZATION AND CONTEMPORARY CULTURES* 343 (R. Ferguson, et al. eds. 1990).

<sup>27</sup> Recently, activists have used the phrase “call in” in contrast to “call out” as a way of signaling a commitment to genuinely conversing about a difficult topic in order to find shared understanding and to build connections. The phrase has been credited to Loretta Ross. See Jessica Bennett, *What If Instead of Calling People Out, We Called Them In?*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/19/style/loretta-ross-smith-college-cancel-culture.html>; Loretta Ross, *I’m A Black Feminist. I Think Call-Out Culture is Toxic*, N.Y. TIMES (Aug. 17, 2019), <https://www.nytimes.com/2019/08/17/opinion/sunday/cancel-culture-call-out.html>.

<sup>28</sup> See generally TOMMIE SMITH, *SILENT GESTURE: THE AUTOBIOGRAPHY OF TOMMIE SMITH* (2007).

<sup>29</sup> See KTVU FOX 2 San Francisco, *Colin Kaepernick Explains Why He Won’t Stand During National Anthem*, YOUTUBE (Aug. 29, 2016), <https://www.youtube.com/watch?v=ka0446tibig>.

<sup>30</sup> See Odette Harper, *Account of Silent Protest Parade in New York Against East St. Louis Riot*, N.Y. PUB. LIBR. (June 6, 1939), <https://digitalcollections.nypl.org/items/ead02d30-6c5e-0133-444a-00505686d14e>.

<sup>31</sup> See *Day of Silence*, GLSEN (Apr. 23, 2021), <https://www.glsen.org/day-of-silence>.

you cannot actually silence me. I control what my silence means, not you.” The force of silence comes from the refusal to participate according to the rules.

To protest in silence is, in part, to upset and resist the ability of those in power to use their power. To protest in silence precludes those in power from sanctioning the protestor for her vocal speech as inappropriate, or disruptive or threatening. To be sure, silent protest does not take away all ability for those in power to sanction. It does, however, change some of the ways in which the protestor and the powerful play out their relationality. With silent protest, the protestor takes away the opportunity for those in power to directly punish the protestor for speaking up, or take the protestor’s actual words out of context or to distort those words. Further, to protest in silence sends a message to those in power that the protestor’s speech cannot be compelled. The protestor is choosing to hold back her speech, and can neither be forced to speak nor forced to be silent. The protestor uses her silence to upset the expected ways in which power is distributed and used between the protestor and those in control.

Of course, protesting in silence does not mean that those in power cannot retaliate or punish a protestor. Those in power can and will. What silence does is to potentially limit the range and mechanisms available to those in power. For example, reports of the 1917 Silent March noted the “dignified” nature of the march.<sup>32</sup> Silent protestors took away the ability for those in power to justify punishments, from arrests to social opprobrium, based on claims that the protestors were unruly or acting in ways that jeopardized the safety of the surrounding citizenry.

Paradoxically, though, silent protest may more readily trigger the problem of the “ventriloquism” of others filling in the meaning of silence on behalf of the protestor. Obviously, those in power can try and take advantage of silence to fill in with their own message, and we expect to see that dynamic happen. For example, when professional football player Colin Kaepernick began kneeling during the national anthem before games, those in power were quick to insist that his silence was an act of disrespect. After a game early in Kaepernick’s protest, Senator Ted Cruz tweeted: “To all the athletes who have made millions in America’s freedom: stop

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<sup>32</sup> ALESSANDRA LORINI, *RITUALS OF RACE: AMERICAN PUBLIC CULTURE AND THE SEARCH FOR RACIAL DEMOCRACY* 244 (1999) (quoting from press reports at the time of the march).

insulting our flag, our nation, our heroes.”<sup>33</sup> Of course, Kaepernick also spoke out about what he intended his kneeling to mean, but the challenge of silent protest is that it provides space for those in power to co-opt meaning through their own words.<sup>34</sup>

The ventriloquism that is more challenging and possibly less expected is that of presumed allies of the silent protestor. Again, as critical scholars have persuasively illuminated, well-intentioned narrators who fill in stories for the silent protestor may not see how their stories maintain and preserve the status quo, and thereby denigrate the silent protestor.<sup>35</sup> The well-intended, but misguided, privilege holders see the story they wish to see without confirming whether their story is the one that the protestor intended. For example, the privilege holder may see the protestor as a victim and beaten down whereas the protestor may see herself as strong and resilient. There is the further risk that the misguided privilege holder does not even see the structural inequities of the setting and, blind to those inequities, builds out a narrative that the protest really is within members of the subordinated group. Spivak has described that kind of dynamic when talking about colonial responses to the Hindu tradition of sati as follows: “White men are saving brown women from brown men.”<sup>36</sup>

We have seen that same kind of negligent beneficence called out more generally in several areas. Consider the context of domestic violence advocacy where there is a narrative that a woman experiencing abuse is silent only because she is afraid or is captured by learned helplessness. Feminist critics have challenged that story of silence as disempowering, noting that silence also can be a choice about exercising power in the face of complicated choices about economics and relationality (i.e., if the abuser also is the primary income earner, speaking up and putting the abuser in jail means the household’s income could drop precipitously).<sup>37</sup>

Or, consider the context of human rights where the contours of the rights typically are crafted by those in power on behalf of

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<sup>33</sup> Betsy Klein, *Cruz Condemns Athletes’ Anthem Protests*, CNN (Sept. 12, 2016), <https://www.cnn.com/2016/09/12/politics/ted-cruz-athletes-national-anthem-tweets/index.html>.

<sup>34</sup> KTVU FOX 2 San Francisco, *supra* note 29.

<sup>35</sup> See, e.g., HOOKS, *supra* note 22; SPIVAK, *supra* note 25.

<sup>36</sup> SPIVAK, *supra* note 25.

<sup>37</sup> See Tamara Kuennen, “No-Drop “Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims, 16 U.C.L.A. WOMEN’S L.J. 39, 41 (2007).

those who are not. As Ratna Kapur has thoroughly detailed, contemporary human rights “are mechanisms tied to a specific and normative script of freedom.”<sup>38</sup> That normative script is crafted by those in power and imposed upon those experiencing subordination. As Kapur explains: “Rights are not bulwarks of defence against state power, but are a crucial aspect of power’s aperture and governmentality—in other words, rights can *themselves* be tactics and vehicles of governance and domination . . . .”<sup>39</sup> Those in power beneficently grant rights to the “other” so long as the other acts in specifically defined and constrained ways.<sup>40</sup> Thus, as hooks describes it, the other is permitted only to “talk a talk that . . . [is] in itself a silence.”<sup>41</sup>

As noted earlier, one response to misguided ventriloquism is to break silence. In other words, to meet misguided control in just the same way as one meets hostile control, and to speak up and be heard in one’s own voice. Another response is to maintain silence as a way of refusing to become engaged in, or captured by, any narrative created by someone other than the person experiencing subordination. Kapur writes about the “recalcitrant who refuses to comply”—refusing to speak and act in ways that acquiesce either to hostile control or to beneficent control.<sup>42</sup>

As we think about the relational dynamics that are present in all of the examples above, it is a dynamic that is antagonistic. Those in power intend to compel silence or intend to control speech. Those experiencing subordination intend their silence to defy and resist control. Generally, neither side of the relationship intends to speak *with* each other. They are responding *at* each other.

We see that antagonistic dynamic reflected in the law as well. For example, when a racist group like the Ku Klux Klan wishes to march in public, the group frames the inquiry as about protecting its legal right to free speech. From a jurisprudential perspective, protecting a full range of speech, including despicable speech, is justified on the grounds that it best enables robust public discourse about ideas. Thus, unpopular and offensive speech is

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<sup>38</sup> RATNA KAPUR, GENDER, ALTERITY AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL 36 (2018) (hereinafter “FREEDOM IN A FISHBOWL”).

<sup>39</sup> *Id.* at 35.

<sup>40</sup> *Id.* at 27-28.

<sup>41</sup> HOOKS, *supra* note 22, at 7.

<sup>42</sup> KAPUR, *supra* note 38, at 213.

tolerated because it is supposed to help people participate in their democracy.<sup>43</sup>

But, from a lay person's perspective (and likely the KKK's perspective) the KKK's interest is not actually in speaking for the purpose of beginning a discussion. Instead, it intends its speech as a display of antagonism and control against another. While the jurisprudential justification for fulsome speech may be a less antagonistic idea of the marketplace of ideas<sup>44</sup>, the lived experience of people engaged in, and buffeted by, fulsome speech is consistently antagonistic.

#### IV. SILENCE AND RELATIONALITY IN FAITH TRADITIONS.

What would it mean, and what would happen, if the antagonistic relationality above were to be replaced by a radical, mutual relationality? Further, could silent protest be a transformative practice that creates the possibility for mutually beneficial social change while at the same time maintaining the capacity to call out social injustice? In order to investigate those questions, I want to turn to a very different setting in which silence has been important—religious, contemplative traditions.

In many faith traditions, silence plays an important role as a setting that fosters deep discernment into the core beliefs of the tradition. In Abrahamic traditions, there is the idea of “listening for God,” where moving into silence allows a listener to remove herself from the distractions of everyday life and truly hear the divine voice.<sup>45</sup> The writer, Jane Brox, illustrates this possibility using the example of monastics chanting Psalms: “While chanting the psalms, one half of the monastic community faces the other half in the oratory. Half sing the first part of the verse of a psalm, and all is silent for a moment before the other half of the community completes it. . . . The brief silence in the middle of the line allows sound to reverberate; allows the community to listen, to anticipate,

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<sup>43</sup> That Liberal justification for tolerating despicable speech has been roundly criticized, both normatively and empirically.

<sup>44</sup> See *Abrams v. United States*, 250 U.S. 616 (1919) (Supreme Court case generally recognized as propounding the marketplace of ideas).

<sup>45</sup> For example, in the Christian Bible's Book of Luke, there are references to Jesus going to solitary or lonely places to pray—to listen for God. See *Luke* 4:42; see also *Luke* 5:16; see also HOWARD LESNICK, LISTENING FOR GOD: RELIGION AND MORAL DISCERNMENT 74-112 (1998) (considering the idea of listening for god across Abrahamic traditions and understanding the action as one of discernment, not obedience).



to wait. It is a pause for the beauty of the music, for the spirit, for the breath, for the mind.”<sup>46</sup>

Silence is not so much a response *to* something, but a state of readiness *for* something. In a faith tradition where one listens for God, silence signals an effort to move one’s focus from the vagaries and challenges of the everyday world to become open to the divine. Sister Mary Margaret Funk, in describing the Catholic practice of *lectio divina*, a contemplative practice using scriptures, talks about moving from the conscious reading of scripture into a “deeper silence” of contemplation that can be experienced as a “resting in God.”<sup>47</sup>

Similarly, Islamic spiritual practices can include silent contemplation as part of daily observances. For example, in the Sufi tradition, the concept of *muraqabah* relates to a person’s efforts to be in full knowledge of Allah.<sup>48</sup> By including silence in one’s prayers or acts of worship, a person can better prepare herself to be present for the wisdom of Allah. As one scholar has described it, the contemplative practices are a way of “polish[ing]” one’s heart so that a person can be most present to Allah.<sup>49</sup>

Silence has a prominent role in Buddhism as well. Buddhism has the concept of Noble Silence.<sup>50</sup> Buddhism is not theistic—meaning the religion is not based on the idea of a creator god (or gods).<sup>51</sup> Thus, unlike the Abrahamic traditions where silence is an important mechanism by which to hear God, silence plays a different role in Buddhism. For Buddhists, there are a set of practices, referred to as the Eightfold Path, that are designed to help Buddhists cultivate a state of mind, of physical being, and of action, that bring insight about the ever-changing nature of all

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<sup>46</sup> JANE BROX, *SILENCE: A SOCIAL HISTORY OF ONE OF THE LEAST UNDERSTOOD ELEMENTS OF OUR LIVES* 67-68 (2019).

<sup>47</sup> MARY MARGARET FUNK, *THE GETHESMANI ENCOUNTER: A DIALOGUE ON THE SPIRITUAL LIFE BY BUDDHIST AND CHRISTIAN MONASTICS* 63 (D. Mitchell & J. Wiseman eds., 1999).

<sup>48</sup> See Justin Parrott, *How to Be a Mindful Muslim: An Exercise in Islamic Meditation*, YAQEN INST. FOR ISLAMIC RSCH. (2017), [https://nyuscholars.nyu.edu/ws/portalfiles/portal/42476045/How\\_to\\_be\\_a\\_mindful\\_Muslim.pdf](https://nyuscholars.nyu.edu/ws/portalfiles/portal/42476045/How_to_be_a_mindful_Muslim.pdf).

<sup>49</sup> *Id.* at 13.

<sup>50</sup> See BROTHER PHAP HAI & SISTER TUE NGHIEM, *ONE BUDDHA IS NOT ENOUGH* 14 (2010) (hereinafter “ONE BUDDHA”).

<sup>51</sup> See HUSTON SMITH & PHILIP NOVAK, *BUDDHISM: A CONCISE INTRODUCTION* 53-54 (2003) (hereinafter “BUDDHISM”).

things as well as the deep interconnectedness of all things.<sup>52</sup> Silence is a critical tool that is used in those efforts. Most notably, among the range of meditation practices used by Buddhists, silent meditations, including lengthy silent retreats, are seen as extremely important.<sup>53</sup> To find Noble Silence means to have cultivated unity between body, mind and action.<sup>54</sup>

Like the Abrahamic traditions, silence in Buddhism is intended to reveal important knowledge. While Buddhists are not listening for revelations from God, they are listening in order to understand the fundamental nature of all things. Like prayer, sitting in silence is a technique that Buddhists use to help them become aware of the chatter in their heads, to quiet that “habit energy,” and allow the mind to become open to, and listen in silence for, more profound knowledge.<sup>55</sup> The teachings of Buddha are designed to help any person create the conditions and practices that lead to the profound wisdom that the Buddha also discovered and experienced.<sup>56</sup>

In contemplative traditions, silence is generative. It is a mechanism a person can use to concentrate so that she can focus on, and be receptive to, deep and sacred wisdom. It is a mindset in which a person cultivates an open awareness that allows a person to have insights revealed. The Catholic theologian, Thomas Merton, described the generative possibilities of silent contemplation as such:

[It] must provide an area, a space of liberty, of silence, in which possibilities are allowed to surface and new choices—beyond routine choice—become manifest. It should create a new experience of time, not as stopgap stillness, but a “temps vierge”—not a blank to be filled or an untouched space to be conquered and violated, but a space which can enjoy its own

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<sup>52</sup> *Id.* at 38-49.

<sup>53</sup> *See, e.g., id.* at 172-183 (describing a particular form of meditation, vipassana, and how its beginnings in Southeast Asian has transformed to the U.S.).

<sup>54</sup> HAI & NGHIEM, *supra* note 50, at 14.

<sup>55</sup> *See* THICH NHAT HANH, *ESSENTIAL WRITINGS* 33-34 (2001) (Buddhists often use the image of a monkey swinging from branch to branch to capture the idea of habit energy and its lack of focus).

<sup>56</sup> SMITH & NOVAK, *supra* note 51, at 29-30.

potentialities and hopes—and its own presence to itself.<sup>57</sup>

Similarly, contemplative practices do not see silence as a mechanism by which to wall off the rest of the world. Two Buddhist monastics have described the “gift” of Noble Silence as “being who we are and allowing the other person to be who they are. We offer each other space. At the same time, the communication is very deep. Noble silence is not about cutting ourselves off, but about communicating deeply with each other.”<sup>58</sup> Thomas Merton echoed that seeming contradiction when he said: “[T]he only justification for a life of deliberate solitude is the conviction that it will help you to love not only God but also other men.” In other words, a person can use silence as a way of investigating and improving her interior life, and one result of that solitary engagement is to become more fully aware of the fact of the interconnectedness of all people.

In most faith traditions, the revelation that follows from understanding human connectedness is love for all and compassion for all. As religious scholar, Karen Armstrong, has noted, the major faith traditions across the world “share an ideal of sympathy, respect, and universal concern.”<sup>59</sup> Further, the traditions also share an overall commitment that faith practices, whether listening for God or prayer or meditation, are designed to “methodically cultivate[] an entirely different mindset” that allows practitioners to “experience an enhancement of their humanity.”<sup>60</sup>

Interestingly, just as critical scholars have illuminated the double-edged nature of silence in protest, there are religious scholars who have noted a double-edged nature to silence as a spiritual practice. Religious scholars Carla Sherrell and Judith Simmer-Brown have described how Buddhist contemplative practices can become infused with white privilege, particularly in the West.<sup>61</sup> White practitioners insist that they hold special knowledge about what counts as the correct contemplative practice

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<sup>57</sup> THOMAS MERTON, *THE ASIAN JOURNAL OF THOMAS MERTON* 117 (1968).

<sup>58</sup> HAI & NGHIEM, *supra* note 50, at 14.

<sup>59</sup> KAREN ARMSTRONG, *THE GREAT TRANSFORMATION: THE BEGINNING OF OUR RELIGIOUS TRADITIONS* 466 (2006).

<sup>60</sup> *Id.* at 467.

<sup>61</sup> Carla Sherrell & Judith Simmer-Brown, *Spiritual Bypassing in the Contemporary Mindfulness Movement*, 1 *INITIATIVE FOR CONTEMPLATIVE EQUITY & ACTION* J. 76 (2017), [http://www.contemplativemind.org/files/ICEA\\_vol1\\_2017.pdf](http://www.contemplativemind.org/files/ICEA_vol1_2017.pdf) (hereinafter “Spiritual Bypassing”).

and insist that others conform to certain ways of stillness and silence.<sup>62</sup> The practice becomes about controlling others and not about spiritual inquiry and insight.<sup>63</sup>

At its worst, the result is overt subordination. Western Buddhist communities have been replete with scandals of white male spiritual leaders sexually assaulting women students.<sup>64</sup> Predominantly white sanghas (the term for a Buddhist practice community) have been places where practitioners of color regularly experience racial microaggressions that are couched as instructions on the “proper” way to be a Buddhist.<sup>65</sup> The generative, transformative, and spiritual practice of silence is lost—both for the person being controlled and for the person who inappropriately is insisting on silence as control.

The spiritual practice of silence also can have a problematic benign form, which Sherrell and Simmer-Brown call “structural spiritual bypassing.”<sup>66</sup> Like the misguided ventriloquism described earlier, spiritual bypassing creates “environments of white privilege [that] demand that practitioners manifest stillness and conformity, [and as a result,] the wisdom-body of the oppressed practitioner feels the violence.”<sup>67</sup> Think of a privileged white practitioner who presents spiritual teachings about love of neighbor or the connectedness of all living beings as paths to peace and contentment without also acknowledging how structural and systemic subordination makes those spiritual teachings different for, and more fraught for, people of color. When the spiritual teachings are to be considered through silent contemplation, like prayer or meditation, the implied instruction can be that it is the fault of the person experiencing subordination if she cannot be still or quiet.<sup>68</sup> She is not working hard enough.<sup>69</sup> Like misguided ventriloquism, spiritual bypassing uses silence to confine and define whose experiences are valid.

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<sup>62</sup> *Id.* at 82-83.

<sup>63</sup> *Id.*

<sup>64</sup> See generally SANDY BOUCHER, TURNING THE WHEEL: AMERICAN WOMEN CREATING THE NEW BUDDHISM (1988) (weaving throughout Buddhist women’s stories of subordination and abuse at the hands of male teachers).

<sup>65</sup> REV. ANGEL KYODO WILLIAMS ET AL., RADICAL DHARMA: TALKING RACE, LOVE, AND LIBERATION 18-21 (2016).

<sup>66</sup> Sherrell & Simmer-Brown, *supra* note 61, at 77.

<sup>67</sup> *Id.* at 86.

<sup>68</sup> *Id.* at 82-84.

<sup>69</sup> *Id.*

Critical religious scholars also have noted other ways in which power silences voices by controlling narratives. For example, Professor David Shneer has described interpretive traditions of the Hebrew Bible that have controlled certain voices, like those of women or of LGBTQ persons.<sup>70</sup> Those who have felt marginalized have found it important to break that silence by retelling and interpreting biblical texts in their own voices. Professor Gwynn Kessler describes “queering” the portion of the Torah known as *Parashat Vayera* (Genesis 18:1-22:24), which includes God announcing plans to destroy Sodom and Gomorrah.<sup>71</sup> Professor Kessler retells *Parashat Vayera* from the point of view of Lot’s unnamed wife as a way of refocusing on the full text and its multiple storylines so that the particular storyline about Sodom is put in place and not given undue weight.<sup>72</sup>

At its best, I think the use of silence in faith traditions reveals an underlying and deep commitment to viewing the world through a lens of radical relationality and mutuality. While certain traditions can at times label that relationality as “love,” as in “love of neighbor,”<sup>73</sup> I think the more accurate way of understanding the relationality is that connections exist between humanity regardless of harmony or discord. The word “love” stands in for efforts to see others with empathy and humility, and to dismantle inflated or false notions of heightened self-worth.

Faith traditions have developed contemplative practices in which silence helps one listen in an activated and affirmative way—listening for revelation, listening to learn how to be a better human in the world, and listening beyond one’s self. To use a Buddhist frame, the practice of silence is what allows a person to hear beyond the constant, habituated chatter in her own mind. By turning the focus from that habituated chatter, she instead hears the actual rich and complicated tapestry of true sounds in the world—the joy of laughter, the cries of loss, the words of care, or the spit of anger and hate.

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<sup>70</sup> DAVID SHNEER, TORAH QUEERIES: WEEKLY COMMENTARIES ON THE HEBREW BIBLE 29-33 (Gregg Drinkwater et al. eds.) (2009) (hereinafter “TORAH QUEERIES”).

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

<sup>72</sup> *Id.* at 29 (“For queer theory, a central point is not to find one static, inherent meaning in a text but to view a text from multiple angles . . .”).

<sup>73</sup> See, e.g., Deborah J. Cantrell, *What’s Love Got to Do With It?: Contemporary Lessons on Lawyerly Advocacy From the Preacher Martin Luther King, Jr.*, 22 ST. THOMAS L. REV. 296-340 (2010) (explaining concept of “love of neighbor” across multiple faith traditions).

When I actively listen to the fullest tapestry, I cannot pick and choose what I want to hear or to pay attention to. In that fashion, I am pressed to expand my perspective. Instead of thinking only about myself without regard to others or only thinking about others in relation to my own self-interest, I begin to see a wider tapestry of connections. I also see that the connections carry a myriad of valences—positive, negative, oppressive, supportive, generative, aggressive and the like. Again using a Buddhist frame, silence teaches me that I will have no choice about experiencing radical relationality. I will have choices about how to skillfully navigate that relationality so that I may live a flourishing life. At their core, other faith traditions offer similar teachings about radical relationality and follow with guidance on the best practices to a flourishing life.

## V. RADICAL RELATIONALITY AND PROTEST.

I want to now focus on connecting the strands laid out above. The first strand is that protest is inherently relational and necessarily means that everyone in the web of relationships has some kind of choice. The next is that both silence and voice are important to protestors and both are methods of resistance. A third strand is that faith traditions' silent contemplative practices may offer new ways for protestors to engage their work, including the important work of cultivating empathy—not only with clear adversaries, but also within and across social movements. Throughout, I want to come back to my starting inquiry about law, silence and protest, and to consider whether and how law matters.

### A. Protest Always is Relational, and Practical Protest Choices Reflect Relationality.

Bringing the relationality of protest to the fore makes even more clear that a protestor's choice about how to protest *always* reflects an assessment of the possible choices of others in the web of relationships. The protestor considers who in the web will choose to support the protestor? Who in the web will choose to oppose? Will those choices change if the protestor's way of protesting is by speaking or by using silence? Does that matter, and to whom? And, considering the answers to any of those questions, are there still

other reasons more internal to the protestor that make speech or silence the preferred choice?

For the protestor, some of those choices may involve the law. For example, are a locality's procedures for public marches satisfactory under the first amendment? Do protestors expect or intend to get arrested and what legal consequences might follow? The protest itself might be about changing the law.

Further, as protestors consider "the law," they also have to consider relevant relationships, particularly relationships that involve who implements the law. For example, who is the city manager in charge of issuing permits and what has the person's decisionmaking looked like in the past? What is the reputation of local law enforcement? Is part of the point of the protest to be provocative, and, if so, what do the protestors know about the people they intend to provoke and the likely responses? Or, regardless of the protestors' intent, are those who oppose them intent on provoking unrest no matter what actions the protestors take? For protestors, understanding the law requires assessing the web of relationships involved as well as understanding the actual laws and legal doctrines that may be in play.

When protestors assess the relational dynamics about the law, that helps them make strategic choices about speech or silence. For example, knowing that the law will protect not only the speech of protestors, but also speech of counter protestors, protestors might choose to silently cordon off counter voices—both as a way of limiting the scope of the counter protestors and also as a way of exercising power (i.e., "We will not justify your counter speech with our own speech. We will respond only in silence.") In contrast, knowing that the law has aided in silencing protestors may mean protestors decide to take advantage of the symbolism of breaking silence. GLSEN's Day of Silence is an example of such a choice where LGBTQ community members maintain silence for a full day to demonstrate the ways society, including through law, has enforced silence about LGBTQ issues. Protestors symbolically break that silence at the end of the day, reclaiming speech in ways that are intended to be more inclusive.

## **B. Silence and Speech Both Matter.**

As the above examples demonstrate, both silence and speech are important choices for protestors as they think about audiences external to their own social movement. While we may most readily

think that protest is about actual speech and voice, understanding the relational dynamism that is present between protestors and audiences reminds us that silence can be a forceful way to resist. As I described earlier in Section III, protestors can refuse to speak their stories as a way of refusing to give those in power any spoken content to manipulate. And, protestors can perform silence as a way of demonstrating how those in power attempt to keep them quiet and attempt to eliminate their stories

As I also noted earlier, social movement actors also have to learn how to deal with the kinds of negligent beneficence that I have described. It is critical because a social movement can face challenges and impediments not only from external adversaries, but also from unreflective actions within the movement. I think it is critical that movement participants attend to, and reflect about, who within the movement already has more voice or more access to systems of power and who does not. In other words, who in the movement already has privilege within the power system and in what ways might those movement actors alter their choices.

This kind of dynamic has been called out before. Feminist women of color called out their silencing by white women during the second wave of the feminist movement in the 1960's to 1970's.<sup>74</sup> Members of the LGBTQ community other than white men called out their lack of recognition in initial HIV/AIDS activism work in the late 1970's and 1980's.<sup>75</sup> And, as the 1917 riots in East St. Louis demonstrate, the labor movement has examples of ostracizing workers of color and privileging white workers.<sup>76</sup>

As the above examples make clear, there are important choices to be made about voice and silence within a movement itself. For example, current conversations about anti-racism have explicitly called on white protestors to choose silence and listening<sup>77</sup>

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<sup>74</sup> See, e.g., COMBAHEE RIVER COLLECTIVE, THE COMBAHEE RIVER COLLECTIVE STATEMENT (1977).

<sup>75</sup> See, e.g., BENITA ROTH, THE LIFE AND DEATH OF ACT UP/LA: ANTI-AIDS ACTIVISM IN LOS ANGELES FROM THE 1980S TO THE 2000S 70 (Cambridge Univ. Press 2017) (discussing activist women's demands for a women's coalition within ACT UP/LA to respond to concerns about sexism in the organization).

<sup>76</sup> See Allison Keyes, *The East St. Louis Race Riot Left Dozens Dead, Devastating a Community on the Rise*, SMITHSONIAN MAG. (June 30, 2017), <https://www.smithsonianmag.com/smithsonian-institution/east-st-louis-race-riot-left-dozens-dead-devastating-community-on-the-rise-180963885/>.

<sup>77</sup> *Black Protest Leaders to White Allies: "It's Our Turn to Lead Our Own Fight,"* NPR (Sept. 22, 2020), <https://www.npr.org/2020/09/22/913094440/black-protest-leaders-to-white-allies-it-s-our-turn-to-lead-our-own-fight>.



as a way of acknowledging that structural racism ensures that white voices have been heard over voices of color and as a way of demonstrating a commitment to protecting space for people of color to, in bell hooks' words, "talk back . . . [as an] expression of moving from object to subject," and, thus to a "liberated voice."<sup>78</sup>

Thus, self-reflective movement members consider not only how their choice to speak or be silent will impact those they are protesting against, but also how their choice supports or disempowers others within their own movement. For example, in one protest moment, activists may have assessed that the chances of being arrested are high, especially for those protestors out in front. If the collateral consequences of arrest are higher for some movement actors than others, those who have lower consequences might choose to be loud in front in order to protect others for whom collateral consequences are harder. Or those at lower risk might form a silent barricade around their colleagues at higher risk in the hope of creating space for those at-risk colleagues to speak out more safely.

One point of my inquiries above is to highlight how protestors have expansive and nuanced choices—both about their actions in relation to others outside the movement, and about actions inside of the movement. But seeing the fullest range of choices can be challenging when one is under pressure or so focused on a particular goal or outcome that one's perspective is narrowed. For protestors to have the capacity to see their fullest range of choices, they must be able to create good conditions for their own steady self-reflection. This is the point at which I think it is helpful to return to faith traditions' practices related to silence.

### **C. The Possibility of Transformative Silence in Protest.**

As I described in Section IV, one of the core roles of silence in many faith traditions is to create the setting for sacred knowledge or wisdom to be revealed. To "listen for God" typically is profoundly different than listening to a friend's conversation. When I listen to a friend's conversation, I likely am listening for a story or for some interesting facts and considering what kind of response my friend needs. I genuinely may be listening, in the sense that I am attentive and focused on what I am hearing. I also may be trying to be empathetic and to put myself in my friend's shoes. My listening,

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<sup>78</sup> HOOKS, *supra* note 22, at 9.

though, likely is framed by what my friend chooses to tell me and what my own intent is as a conversation partner. Have I decided that my friend needs her story validated? Have I decided that my friend needs some useful factual information that I can share? I likely am not listening for wisdom.

In contrast, when I listen in the ways called for by my faith tradition, I do so because I think that it can help me gain wisdom and revelation. I do not know at the outset what knowledge, if any, will be revealed to me. I know I have to settle the mundane chatter in my head so that my mind is open and exploring, and attending to revelation no matter what direction it comes from. I am listening not because I have a conversation partner, like I do with my friend. Instead, I am listening in a more open-ended way because I believe that my own knowledge of the world is limited and that silent contemplation creates a potent setting in which I might receive wisdom. That idea of listening to hear something beyond words is captured well by the Zen koan, “Speak to me of the unspeakable, and not with words.”<sup>79</sup>

Through contemplative silence, we are reminded that our own views and knowledge always are partial, and that there always remains something more that can be revealed to us. As the social activist and Buddhist master Thich Nhat Hanh has noted: “Do not think the knowledge you presently possess is changeless, absolute truth.”<sup>80</sup> The effects of listening in silence that faith traditions describe have a different valence than we often experience when we listen to more prosaic, daily conversations. Instead of listening for more instrumental reasons, we are listening for transformation. For protest, both reasons for listening are important and relevant to choices about silence and speaking.

As I described above, protestors always have a range of instrumental choices to make about silence and speech. Those choices are important, not only to successfully getting out the message of the protest, but also to the physical safety and wellbeing of protest participants. Because instrumental choices are salient, and genuinely important, it is easy to notice and give time to them. As a consequence, an advocate’s time and energy can be gobbled up on those kinds of choices.

The challenge is that the instrumental choices need to be in service of the desired transformative change. Without time to

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<sup>79</sup> THICH NHAT HANH, *LIVING BUDDHA, LIVING CHRIST* xviii (1995).

<sup>80</sup> *Id.* at 2.

reflect on, and remind oneself about the larger goals of transformative change, an advocate's instrumental choices may become unmoored from those goals and at risk for becoming choices made out of habit and not intent. For example, if a protestor thinks mainly about the instrumental choice of how to get media coverage, and believes that the media are more like to cover loud protests, that may lead the protestor to miss ways of protesting that could bring in supporters who engage differently—like those folks who are more likely to come up to a protest table set up for smaller size conversations and who actively avoid more crowded events. Or, those groups that have relied on gathering citizen signatures on petitions because of the instrumental choice of being able to engage in that kind of protest without many logistical hurdles may miss the emotional and motivational power of settings that provide supporters with a way to gather and speak out as a group.

Looking at faith traditions' ways of deep listening helps remind us to infuse our protest choices with the possibility of transformation. Protest work is arduous. It is not always clear that the social change that protestors are seeking can be achieved. Systemic injustice feels intractable. As social movement advocates widely experience, it takes effort to stay with the work, and burning out and dropping out are real consequences.

A benefit of bringing transformative silence into protest work is that it enables us to build resilience for the contradictions inherent in social movement protest. Derrick Bell has described that kind of contradiction as “both/and” in his writing related to systemic racism.<sup>81</sup> As he has noted, there is the pragmatic recognition that racism is systemic and possibly immutable, and the idealism based on the dream of a truly equal society. A protestor must be able to hold *both* the pragmatic and the ideal together without reconciliation, *and* yet still move into action.<sup>82</sup>

In many ways, that contradictory space can be found in the revelatory silent space of faith traditions. For example, Buddhists speak about the interdependence and interbeing of everything. Thich Nhat Hanh puts it simply—there is no rose without the garbage.<sup>83</sup> That simple phrase is not meant to simplify. Human relations are dynamic and complicated. The phrase is meant to crisply illustrate the unending and unbroken web of relationships

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<sup>81</sup> DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 248 (1992).

<sup>82</sup> *Id.*

<sup>83</sup> THICH NHAT HANH, *supra* note 55, at 56-58.

in which we all necessarily do our work and, for movement activists, undertake our efforts at social change. For Buddhists, to fully sit with the “both/and” of interdependence builds equanimity, avoids complacency and acceptance of the status quo, as well as avoids despair. That equanimity then builds stamina for the effort needed to change society.

Further, as I noted above, across most faith traditions, one feature of revelatory silence is that it triggers empathy and compassion. Remember Thomas Merton’s conviction that his life of solitude was justified only because it helped him love his fellow humans? To stay with social movement work is to believe *in* social change. I would suggest that to believe in social change also requires a critical next step, which is to believe that *people* can change.

That follow-on step is hard because the lived experience of protestors is that the people who show up in opposition can behave in ways that are mean-spirited and hateful. To meet hate with empathy can feel unjust, and may even put a protestor at risk. Thus, it makes sense that protestors take a moment of silence to ready themselves—not to find empathy with those who oppose them, but to gather courage and pull their wits about them before meeting the opposition. Protestors need courage and wits—to meet hostile law enforcement who will shoot pepper spray or rubber bullets at them, to meet hostile counter-protestors who will spit on them and yell epithets, and to meet media who may be looking to portray them unsympathetically. In the face of those lived experiences, it takes effort to believe that people can change.

That may be especially true if a social movement activist is caught up by the logistical and practical pieces of protest. Those important choices crowd out space for other kinds of reflections. Activists can end up fully occupied by logistics unless they have cultivated intentional practices that create the room for—the intentional silence for—more.

Transformative silence provides activists with a practice that fosters a steadiness to call out injustice and to insist on change in ways that improve society for all. Transformative silence also fosters the ability to meet hostility of others with that same steadiness instead of with hatred and a wish for denigrating payback. History gives us profound examples: Vietnamese Buddhist monks walking in silence through their war-ravaged

country to protest the violence of the Vietnam War<sup>84</sup>; civil rights activists linking arms and marching across the Edmund Pettus Bridge in Selma;<sup>85</sup> the National Farm Workers Association strike and grape boycott;<sup>86</sup> or the Standing Rock Sioux Tribe's protest of the Dakota Access pipeline.<sup>87</sup>

Much of the law related to the prosaic work of protest, like getting a permit to march or figuring out on what public spaces signs can be hung, does not require a protestor to cultivate empathy. But I think protest work to transformatively change the law must have empathy to succeed. Further, I would suggest that the kind of empathy that is required can be different depending on how the protestor comes to movement work.

If we come to protest work carrying at least some privilege in society, we have to check carefully that what we have learned to call "empathy" is not infused with the negligent beneficence I discussed earlier. If our protest choice is to speak out, it is carefully cultivated empathy that will help us learn how to overtly acknowledge our own privilege, and to speak out in ways that genuinely support and uplift those in the movement for whom privilege has been withheld. It also is carefully cultivated empathy that will help us learn when our silence is what the protest requires because it is more important for other voices to be heard. I think the empathy that moves us into silence can also be inward-looking. It can help those of us with privilege see our own deep historical connections to subordination and understand how, even though committed to movement work, we still benefit from systems that disempower our movement colleagues.

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<sup>84</sup> See THICH NHAT HANH, *supra* note 79, at 1-13 (referencing the Sister Annabel Laity, *Introduction: If You Want Peace, You Can Have Peace* article).

<sup>85</sup> See MARTIN LUTHER KING, JR., *THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR.* 270-289 (Clayborne Carson ed. 1998) (describing the Selma to Montgomery march and the police brutality on the Edmund Pettus Bridge).

<sup>86</sup> See Dick Meister, *'La Huelga' Becomes 'La Causa'; 'There's no Turning Back Now,' Says Cesar Chavez Leader of the Grape Strikers 'La Huelga' Goes On*, N.Y. TIMES (Nov. 17, 1968), <https://www.nytimes.com/1968/11/17/archives/la-huelga-becomes-la-causa-theres-no-turning-back-now-says-cesar.html> (outlining the history of the Delano grape boycott organized by the National Farmworkers Association).

<sup>87</sup> See Lauren Donovan, *Sioux Spirit Camp to Protest Dakota Access Pipeline*, BISMARCK TRIB. (Mar. 29, 2016), [https://bismarcktribune.com/news/state-and-regional/sioux-spirit-camp-to-protest-dakota-access-pipeline/article\\_4773fba1-f3bb-599d-96a4-7d1ddf30690e.html](https://bismarcktribune.com/news/state-and-regional/sioux-spirit-camp-to-protest-dakota-access-pipeline/article_4773fba1-f3bb-599d-96a4-7d1ddf30690e.html).

I would offer that for those social movement actors who come to the work having experienced subordination more than privilege, it takes empathy to trust in the possibility of actual solidarity with activists with privilege. That empathy will need to be hard-edged. In other words, those who have experienced subordination rightly may condition their trust on allies showing proactive behaviors. As queer Black feminist writer and activist, Mia McKenzie, has described, being in solidarity with those experiencing subordination is not “an identity It’s a practice. It’s an active thing that must be done over and over again, in the largest and smallest ways, every day.”<sup>88</sup>

And, for all activists, it takes empathy to genuinely hear narratives of others within and across social movements, to be both settled and unsettled by those narratives at the very same time, and to find equanimity about hearing the cacophony across the stories. Protest and social change seldom are neat and tidy. There is friction within movement members. There are different priorities that conflict between movements. Empathy helps build resilience for the work. At its best, it also helps movement actors resist the urge to avoid differences between people who all believe they are on the same side, and instead to find a way to make those differences generative and not destructive.

Finally, there is yet a different kind of empathy to cultivate towards those who oppose the change pressed by the social movement. If the change demands that others lay down their exclusive claim to power and privilege and learn how to share it, I think it fair and just that protestors want to ensure that there is no way for their message to be misunderstood. Thus, being empathetic cannot be conflated with being an apologist. Being empathetic cannot mean asking permission of the opposition. It cannot mean having to say, “I’m sorry, but can you please stop treating me unjustly and inequitably?”

The kind of steadfast empathy that is needed harkens back to transformative silence. It is empathy that listens for the possibility of connection. The seed of connection might be very small. As I stand across from a counter protestor shouting demeaning things at me, our only connection might be that we both are living human beings at the same time. That brief moment of connection may help remind me to stay intentional about the relationality of that

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<sup>88</sup> Mia McKenzie, *No More “Allies,”* BLACK GIRL DANGEROUS (Sept. 30, 2013), <http://www.blackgirldangerous.com/2013/09/no-more-allies/>.

encounter. I can disagree with, critique, or condemn, the ideas of the counter protestor. I do not have to dehumanize or denigrate the counter protestor. I also can call on my privileged social movement colleagues to step up when they need to use their privilege to meet the same privilege in the counter protestor.

#### **D. Closing the Circle—Protest to Change the Law.**

And what does all this relational empathy have to do with changing the law? Very simply, it helps movement actors see when and where social change might happen through reconstructing the law and when and where social change must first reconstruct relationships before the law can change. As I noted in Section II, it is obvious to all of us that the law already orders relationships. The law regularly presumes that relationships are antagonistic, and law's role is to orchestrate how the conflict is to be resolved. As the examples I gave in Section II illustrate, the resolution often is zero sum. I either am compelled to testify or I am permitted to be silent. I am permitted to participate in a criminal proceeding or I am not. My civil rights protect me against conduct by another or they do not.

Of course, any particular context or factual scenario may present more nuance than my either/or statements suggest. But the presumption of adversarialness increases the chances that a dispute is framed in zero sum terms. Thus, when movement actors strategize about change and the law, the default possibility is to presume an adversarial relationship and to think that social change will follow if the law changes who has the initial power of action or choice.

For example, think about the range of laws in employment settings that dictate whether the employer or the employee has control over information. When we assume an adversarial relationship, we frame the questions in ways like the following. Should the employer have the power to demand that an employee disclose certain health information? Or should an employee have the power to choose what health information to share?<sup>89</sup> Can an employer structure their job responsibilities in ways that are inattentive to an employee's responsibilities outside the work

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<sup>89</sup> See, e.g., Nancy Hatch Woodward, *Understanding GINA: The Newest Nondiscrimination and Privacy Statute*, 27 CORPORATE COUNSEL QUARTERLY ART. 4 (2011) (discussing federal law about employee privacy rights related to genetic information).

setting? Or can employees insist that an employer accommodate outside responsibilities?<sup>90</sup>

I have drawn my examples from questions already addressed by current law to illustrate how easy and comfortable it is for us to generate zero sum questions when we think about creating legal solutions. Of course, a substantial reason it is easy and comfortable is because the relationship at issue often *is* adversarial—or it at least reflects a power imbalance. The law may or may not have originally created the power imbalance, but the law surely has played a notable role in maintaining the power imbalance.

For example, the law of corporations has developed to prioritize shareholder interests over the interests of other stakeholders in the corporation, including employees. Even if the employer wants to be in a non-adversarial relationship with employees, corporate law may impede that. An oft-cited example of that dynamic is the well-known ice cream company, Ben and Jerry's. When it was looking for potential buyers for the company, it looked to limit potential buyers to other socially responsible businesses. But Unilever presented the highest offer and the Ben and Jerry's board felt that corporate law's requirement to maximize shareholder profits constrained it to accept the offer even if Unilever was not the kind of socially responsible buyer that Ben and Jerry's wanted.<sup>91</sup>

As commentators have noted, Ben and Jerry's was incorporated in Vermont. Vermont already had a statute that permitted a corporate board to consider constituencies other than shareholders when deciding whether or not to accept a buy-out. So, state law had created a possibility for corporate decisionmakers to recognize and protect positive relationships with employees. But the historical accretion of corporate law's privileging of shareholder interests trumped, and the Ben and Jerry's board was unwilling to risk turning down Unilever's offer.<sup>92</sup>

I think the Ben and Jerry's example illuminates how changing any particular law may not actually change the power imbalance because a bigger system with a longer history maintains

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<sup>90</sup> See, e.g., Barbara Berish Brown & Nancy E. Shallow, *Some FMLA Basics*, 42 PRACT. LAW. 6 (1996) (discussing parameters of when and employee may take unpaid leave for family-related responsibilities).

<sup>91</sup> See JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES 164-65 (2002).

<sup>92</sup> *Id.*



the status quo. I think it is even easier to imagine how more profound structural and systemic change always will require movement actors to reconstruct relationships before changing the law. As Critical Legal and Critical Race scholars have amply demonstrated, the “law” has been developed by those in power and implemented through a system designed to maintain the existing power structure.<sup>93</sup> That structure reflects and protects histories of subordination—of indigenous peoples, of Black people, of peoples of color, of women, and of poor people. As a result, changing the law, even when the change appears to be powerful, may not lead to the desired profound, systemic, societal changes. There remain too many ways in which those in power can find ways to under-implement, under-enforce or under-utilize the positive potential of the law. There also remain too many ways in which those in power can over-implement, over-enforce or over-utilize the negative consequences of the law to maintain their power.

Contemporary history gives us notable examples of social movement work that changed the law, but the legal gain did not lead to the full, desired, societal change. School segregation still exists, despite *Brown v. Board of Education*.<sup>94</sup> Unequal pay between men and women in the same jobs still exists despite the Equal Pay Act of 1963,<sup>95</sup> and subsequent legislative efforts to enhance that Act. Corporate C-suites and boardrooms remain predominantly white and male despite a range of state and federal anti-discrimination laws.<sup>96</sup>

Considering the limits of the successes noted above, both social movement activists and scholars have called out the core need to build relationships in order to bring about truly transformative change. As scholar Charles Lawrence has noted in speaking about activists in the Black Lives Matter movement, activists “must expose the lies in the law’s narrative and speak directly to the people—talking back, resisting power, telling the rest of us that we have always been the authors of our own freedom. They must know that Black Lives Matter is about saving all of our lives. . . .”<sup>97</sup>

As I noted earlier, transformative silence can be a way for protestors to reflect in a deeper way on a range of pragmatic protest

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<sup>93</sup> See supra notes 11-12 and accompanying text.

<sup>94</sup> 347 U.S. 483 (1954).

<sup>95</sup> 29 U.S.C. § 206.

<sup>96</sup> See, e.g., Title VII is the primary federal law. 42 U.S.C. § 2000e (1964).

<sup>97</sup> Charles R. Lawrence, *The Fire This Time; Black Lives Matter, Abolitionist Pedagogy and The Law*, 65 J. LEGAL ED. 381, 404 (2015).

choices. For example, who speaks on behalf of a movement is not the default of who already is comfortable doing so, but a result of reflective choices about the range of voices within the movement and a consideration of the range of ways different voices serve different movement goals. The choice of silence or speech is not based on existing habits or patterns. Instead, the choices demonstrate broader commitments about how movement actors hope their own behaviors reflect more just and equitable relationships amongst themselves as well as model the way forward to just and equitable relationships across society. And those just and equitable relationships start to create the broader and deeper web of relationships needed to create systemic change.

From the examples and discussion above, I have tried to illuminate some existing habits of thought we have about several inter-related ideas, including: how we often think protest is about speech, not silence; how we often think about protest choices from only the perspective of the protestor, and see those choices in zero sum ways; and how we often see the law as changing relationships instead of relationships as leading change. While those existing habits of thought reflect true facts on the ground, they also unhelpfully prune a more complicated, and more interesting, story. The more complicated story recognizes several features. First, it recognizes that protest speech and silence ineluctably travel together. Further, speech and silence involve choices made by both protestors and audiences and those choices cannot be fully controlled by either side. Next, while the law often is set up in ways that encourage protestors (and audiences) to see their choices as zero sum and adversarial, deeper listening and reflection reveals that the relationality between protestors and audiences always and inevitably is dynamic and changeable. That dynamism presents the potential for transformative change.

## VI. CONCLUSION.

We currently are in a time of social foment, where seeing and hearing about protest is common. For those of us who wish for structural changes in our society, marching and chanting in the streets can be an important way to claim space to speak out about our visions of a more just and equitable society. This Article fully acknowledges the critical role of speaking out for social change,

while also reminding us of the equally critical, and potentially transformative, role of silence. It further reminds us that protest, whether through speech or silence, holds its greatest potential when protestors recognize the deep relationality of their actions. The potential for transformative change lies as much in building (and rebuilding) relationships as it does in changing the law.