

## PROFESSIONAL (I)RESPONSIBILITY AND THE UNEXAMINED ROLE OF CONSCIOUS IDENTITY PERFORMANCE

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### ABSTRACT

*Traditionally marginalized law students often lack coping strategies to navigate their identity in predominantly white law schools. While the existing legal scholarship discusses identity performance strategies—such as assimilation, covering, and passing—that “outsiders” (e.g., women, people of color, LGBTQ) use to communicate with “insiders” (white, heterosexual males), this conversation seems most dynamic outside the law school classroom. This Article has two aims: first, to address the need to teach conscious identity performance in law school, as a vital component of professional responsibility and ethics curricula; and second, to deepen teaching tools by incorporating existing identity categories with co-cultural theory. This theory, emanating from feminist and communication scholars, describes how non-dominant cultures communicate in a dominant society. Most significant to law students from marginalized communities, is this theory’s micro-level catalog of communication practices that actually facilitate conscious identity performance. These practices include, for example, determining the preferred outcome of the communication with the dominant culture (e.g. assimilation, accommodation, or separation), as well as choosing the communication approach or style (e.g. nonassertive, assertive or aggressive). The value of such consciousness awakens students to be empowered over their own academic journey and legal careers, and not internalize the insiders’ stereotypes to their detriment; as well as provides students with the professional and cultural competence to represent clients within marginalized communities.*

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\* Professor at California Western School of Law. I am grateful for the lifetime work of Dr. Mark Orbe whose work on intercultural communication, and particularly his transformative curriculum on cultural competency, greatly informed the pedagogical framework for this work. Dumela!

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## INTRODUCTION

*Traditionally, in american society, it is the members of oppressed, objectified groups who are expected to stretch out and bridge the gap between the actualities of our lives and the consciousness of our oppressor. For in order to survive, those of us for whom oppression is as American as apple pie have always had to be watchers, to become familiar with the language and manners of the oppressor, even sometimes adopting them for some illusion of protection. Whenever the need for some pretense of communication arises, those who profit from our oppression call upon us to share our knowledge with them. In other words, it is the responsibility of the oppressed to teach the oppressors their mistakes.*

-Audre Lorde<sup>1</sup>

Centuries ago the stage was set for white America, and by white America, to play the leading role in this country's historical narrative.<sup>2</sup> With no more heroic roles to cast, it was the women, poor, people of color and later non-heterosexuals, who inevitably became foes in what would become (and remains) discriminatory and inexcusable chapters in

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<sup>1</sup> Audre Lorde, "Age, Race, Class and Sex: Women Redefining Difference," in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 114 (Crossing Press, 1984), <http://www.socialism.com/drupal-6.8/sites/all/pdf/class/Lorde-Age%20Race%20Class%20and%20Sex.pdf>. See also Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 *FORDHAM LAW REVIEW* 2081, 2082 (2005) ("As white people, we too often view racial issues as belonging to people of color. We tend to do that in one of two ways. Some whites believe that race generally does not matter except in the rare case of an intentional racist. Other whites view whites generally as racists and look to people of color to tell them how to understand issues of race.").

<sup>2</sup> See Leslie P. Culver, *White Doors, Black Footsteps: Leveraging "White Privilege" to Benefit Law Students of Color*, 21 *J. OF GENDER, RACE & JUSTICE* 37, 46 (2018) ("A brief review of history bears relevance in painting a vivid picture of the white backdrop of the United States legal system. The opening scene features white men creating the founding doctrines that govern our country, while simultaneously enslaving people of color, who were not recipients of these *liberating* documents. Beginning in the middle colonies in the eighteenth century, it was white American males who determined "that no society, no free society at least, can exist without a legal profession."); MICHAEL ERIC DYSON, *TEARS WE CANNOT STOP: A SERMON TO WHITE AMERICA* 45 (2017) ("Whiteness forged togetherness among groups in reverse, breaking down or, at least to a degree, breaking up ethnicity, and then building up an identity that was cut off from the old tongue and connected to the new land. So groups that were often at each other's throats [e.g., Italians, Irish, Polish and Jews] learned to team up in the new world around whiteness.\*\*\*Old tribe for new tribe; old language for new language; old country for new one.").

America’s history.<sup>3</sup> As Michael Eric Dyson aptly articulates in his recent work, *Tears We Cannot Stop: A Sermon to White America*,<sup>4</sup> American history and whiteness are synonymous. He writes,

Whiteness long ago, at least in America, shed its ethnic skin and struck a universal pose. Whiteness never had to announce its whiteness, never had to promote or celebrate its unique features. If whites are history, and history is white, then so are culture, and society, and law, and government, and politics; so are logic and thinking and reflection and truth and circumstances and the world and reality and morality and all that means anything at all.

[In short,] [h]istory is a friend to white America . . . .<sup>5</sup>

While the kinship between history and white America may try to ignore black and brown skin, non-whites do exist—and they are not the problem of American society, but a reflection of her entrenched flaws.<sup>6</sup> “The implication is that only certain Americans can define what it means to be American—and the rest must simply ‘fit in.’”<sup>7</sup>

This rigid purview of American as whiteness is reciprocated in the legal profession where “lawyer” also equates to “whiteness,” and more specifically, white males. Thus, people of color, women, and LGBTQ often stand outside the norm, a phenomenon that is evidenced by the decades-long discourse about the diversity crisis.<sup>8</sup> The troubling reality of the

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<sup>3</sup> For example, Cornel West, a profound writer on race in America, remarks that, “Black people in the United States differ from all other modern people owing to the unprecedented levels of unregulated and unrestrained violence directed at them. No other people have been taught to systematically to hate themselves – psychic violence—reinforced by the powers of state and civic coercion—physical violence—for the primary purpose of controlling their minds and exploiting their labor for nearly four hundred years.”

CORNEL WEST, *RACE MATTERS* vii (2001).

<sup>4</sup> MICHAEL ERIC DYSON, *TEARS WE CANNOT STOP: A SERMON TO WHITE AMERICA* (2017).

<sup>5</sup> MICHAEL ERIC DYSON, *TEARS WE CANNOT STOP: A SERMON TO WHITE AMERICA* 65 (2017).

<sup>6</sup> See CORNEL WEST, *RACE MATTERS* 3 (2001) (discussing that the problem of race in America is not one of black people being a problem, but “with the flaws of American society—flaws rooted in historic inequalities and longstanding cultural stereotypes.”).

<sup>7</sup> CORNEL WEST, *RACE MATTERS* 3 (2001).

<sup>8</sup> See, e.g., ABA COMM’N ON WOMEN IN THE PROFESSION, *VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS* (2006),

preference for white lawyers by law firms and related organizations is that the preference severely diminishes the need for traditionally marginalized attorneys and simultaneously makes employers shortsighted as to the value of diversity. With such a narrow, and undesirable lens, through which non-white male attorneys are both viewed and inducted into the profession, the need for strategic tools to retain one's identity is not a luxury, but becomes a matter of survival. Sadly, this survival skill is not readily taught in law schools.

As a woman of color, and eager new associate at a large law firm, I was woefully unprepared not for the practice of law, but for its debilitating whiteness. In earlier work, I reflected on my own experience:

*I graduated law school with a 3.8 in my final semester. I was on the Executive Board of my school's law journal, published, served as a Research Fellow, a Teacher's Assistant, received the highest grade in my Legal Writing class, ranked second in my Trial Advocacy class, clerked for the then-Chief of the Missouri Supreme Court, and followed that with a clerkship with the second most senior judge in the same court. I had even applied for and accepted an FBI interview but ultimately delayed that opportunity because I began working for one of the top five litigation firms in the city.*

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*Now, I would love to tell you that my day burst with phone calls and the constant chime of incoming emails inviting me to join the legal teams on important cases. In fact, I had visions of being engaged in*

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<https://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility.authcheckdam.pdf> [hereinafter **VISIBLE INVISIBILITY**] (discussing a national study on the intersection of race and gender and its impact on women of color in law firms); ABA COMM'N ON WOMEN IN THE PROFESSION, FROM VISIBLE INVISIBILITY TO VISIBLY SUCCESSFUL: SUCCESS STRATEGIES FOR LAW FIRMS AND WOMEN OF COLOR IN LAW FIRMS (2008), [https://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility\\_vs.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility_vs.authcheckdam.pdf) [hereinafter **SUCCESS STRATEGIES**] (follow-up report to **VISIBLE INVISIBILITY**); NAT'L ASS'N FOR LAW PLACEMENT, 2016 REPORT ON DIVERSITY IN U.S. LAW FIRMS 3 (2017), <http://www.nalp.org/uploads/Membership/2016NALPReportonDiversityinUSLawFirms.pdf> (noting that “[w]omen and Black/African-Americans made small gains in representation at major U.S. law firms in 2016 compared with 2015 . . . [but that] the overall percentage of women associates has decreased more often than not since 2009, and the percentage of Black/African-American associates has declined every year since 2009, except for the small increase in 2016”).

*impressive dialogue on whether punitive damages were appropriate in this case, or pacing the room in a “Law & Order”-type fashion musing on how to argue that our client, a doctor, acted in a reasonably prudent way when he examined the victim days before her unfortunate death. My calendar should have been filled with coffees and lunches with partners to discuss my supportive role in their upcoming cases.*

*Sadly, this was not the case. The above law firm pictured is white. I am black. And during my time at the law firm, I was one of two, maybe three, black female attorneys. My visibility, let alone impact, was dismal at best.*

*My scenario went more like this: I arrived to work at some ungodly hour of the morning to show my team spirit. I smiled at every white face I passed between the parking garage and the ride up to the sixth floor wondering if they knew my name. I did stop to talk to the Latino worker at the deli stand, who shared cooking secrets with me weekly, and to one of my dear friends, a black sorority sister, who was a paralegal at the law firm. Upon checking my email, I usually had some work from Catherine<sup>9</sup> (white female partner) and Gary (white male partner), or a pro bono case from Ruth (white female partner and former judge). And that was about it. I would work dutifully on my assignments, trying to stretch out a half-day project to an entire day because I needed to hit my billable hours. Catherine did great at assigning me new cases, and I was one of Gary’s go-to junior associates, but after a while, their efforts and my own were simply not enough to sustain me or provide any sense of career growth. White colleagues, and more so white males, that began the same year as me were getting most of the work. My reviews went as follows: “Leslie, we love your team spirit (I smile), but we would like to see you get more work under your belt (I smile and nod, but sad emoji on the inside).” My response (completely in my head of course): “Firm, I would love to have some new work; I have emailed every person I can think to ask. I have personally knocked on doors to make myself known, and since I cannot play fantasy football or go on golf outings with the male partners, and seem unable to get many of the white female partners to give me much of the time of day, I’m open to suggestions.”*

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<sup>9</sup> Names have been changed to protect privacy.

*That was my review from year one to year four. \*\*\* Glass ceiling hit. It was only year four. I quit.*<sup>10</sup>

I often replay this season of my life and wonder if the ending would have been different had I learned about whiteness, white privilege, unconscious and implicit bias, racial anxiety, and the like before I ever set foot inside the prestigious walls of my law firm. Instead, I started my first day excited and ready to make a difference, to be an integral part of the law firm culture, and genuinely join the ranks of this elite profession with all the rights, privileges and credible presumptions that came with it. In hindsight, I knew I was black and, dialectically, I did not think of myself as *not* white. In other words, based on my upbringing in a predominantly white community, and a fairly effortless ability to interact with white people, I simply was not mindful that I was *not* white. I honestly believed that my opportunities and any perceptions about me would be on par with my white peers. After all, I had done the same rigorous work to arrive here. But upon reflection, what really started that first day was the journey of a black female who would have to work twice as hard, to get half the work, and daily have to step into a white world for them to engage with me. Where was the professional training for this emotional journey and identity negotiation in law school?

Traditional professional responsibility courses in law school generally focus on national and local rules governing the conduct of lawyers toward the bench, other attorneys, and clients; legal ethics; and the client-attorney relationship, among other things. And while this content has a necessary place in training future lawyers, for lawyers of color and others in marginalized groups, there exists invisible barriers to professional growth that fall outside the scope of an attorneys conduct before the court. To this point, legal scholarship underscores the reality that law students in outsider groups, in addition to learning the skills of lawyering, will also have the burden of negotiating and performing their identity in a predominantly white male legal profession.<sup>11</sup> The American legal profession seems to ache

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<sup>10</sup> Leslie P. Culver, *White Doors, Black Footsteps: Leveraging ‘White Privilege’ to Benefit Law Students of Color*, 21 J. GENDER, RACE & JUSTICE 37, 38-40 (2017) (“With respect to this particular narrative, I recognize that there could be three distinct experiences at play here: those of new associates regardless of race or gender, those of female associates, and those of associates of color. However, I did not observe the white male associates who were part of my entering class struggle to obtain work from senior associates and partners; in fact, quite the opposite. So, I would suggest the likelihood of race or gender *or both* as the triggers, a problem known as “intersectionality.”).

<sup>11</sup> Add authority

for a banner of objectiveness and neutrality, under the fanciful prose of colorblind justice. And within this poetic credo the stanza of professional responsibility is arguably situated, cozied with universal norms of a lawyer's identity, values and beliefs. But, as Professor David Wilkins iterates, it is false to believe that,

the current norms of professional responsibility were developed outside of the context of any particular identity, [rather they] reflect the particular biographies, beliefs, and expectations of the narrow and relatively homogeneous group who created the modern American legal profession; a group from which blacks (as well as many others) were scrupulously excluded.<sup>12</sup>

The exclusion of non-white males in contributing to the homogenous code of professional responsibility pressures such individuals to both learn the code, and simultaneously appreciate, favorably or not, the myriad of ways that their own identity deviates from the code. Traditional professional responsibility courses focus on a lawyer's responsibility toward a client, and may even touch upon dealing with clients of different races,<sup>13</sup> but they do little to provide law students with guidance about the

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<sup>12</sup> David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached out Lawyering*, 5 INT'L J. LEGAL PROF. 141, 142, 143 (1998) (rejecting Sanford Levinson's notion of bleached out professionalism in that "[t]he model promises that everyone who encounters a lawyer will receive the same uniform professional product. This uniformity, in turn, appears to safeguard the producers of legal services. By insisting that contingent features such as race or gender are irrelevant to a lawyer's professional role, the model promises to insulate practitioners from the prejudices and negative stereotypes that unfortunately all too often attach to these ascriptive forms of identity. Consequently, a lawyer who happens to be black need not labor under the weight of being a 'black lawyer' To the contrary, whatever she may be in her private life, professionally she is simply 'a lawyer', entitled to all of the perquisites and privileges that this status purports to confer on all members of the Bar.")

<sup>13</sup> For examples of earlier work concerning race-consciousness in lawyering, see Margaret Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 768 (1997) ("[R]epresenting race' is a fundamental and inescapable part of minority attorneys' professional identity and political function as marginalized actors in the mainstream legal system, quite apart from and transcendent of the particulars of individual client representation."); David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached out Lawyering*, 5 INT'L J. LEGAL PROF. 141, 163 (1998) (discussing the need for race-conscious professionalism to enable black attorneys to balance viewing their identities as important in their professional roles, with upholding the norms of the legal profession); Anthony V. Alfieri, *(ER)Race-ing an Ethic of Justice*, 51 STAN. L. REV. 935, 935-36 (1999) (contemplating, as part of work focused on the rhetoric of race in prosecuting and defending race cases, the "practicalities of institutionalizing a race-conscious, community

manner in which the law student should perform or negotiate his or her identity vis-a-vis the client (or colleague), an arguably “non-legal” area of the law. Therefore, these lawyers, at best (if they have an understanding of identity performance), must somehow unilaterally anticipate and prepare for the numerous scenarios they may have to negotiate. At worst, and what I perceive most likely, they will be blindsided by the silent expectation of conforming to the dominant culture and checking their identities at the door.<sup>14</sup>

In this Article, I discuss two faces of professional responsibility, the first being Professional Responsibility as a traditional law school course, and the second being a professional responsibility as a matter of law schools developing agency and autonomy in law students. The significance of this endeavor lies almost entirely in the presumption of competence and integrity that accompany the lawyering profession, that is, for white males.<sup>15</sup> And while for women, lawyers of color, and others from marginalized groups, there may be some protection from the stigma of moral and intellectual inferiority based solely on the lawyer status, these individuals will spend much of their career mindful that some (clients and

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ethic of representation.”); Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 229-30, 231 (2002) (“For lawyers-as for other professionals-achieving multicultural competence is no longer optional. It is increasingly a business as well as a professional and moral imperative. In this new millennium, multicultural competence is an essential component of good legal practice. . . . Any differences that exist between the lawyer and her client may exacerbate the power imbalance inherent in the relationship. These differences threaten to create barriers to effective communication and may impair the attorney/client relationship. But no aspect of diversity creates challenges as intractable as that of race. Race in America is the most salient, the most toxic of all areas of difference.”); Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM LAW REVIEW 2081, 2082 (2005) (arguing that “for white lawyers, as well as lawyers of color, increased ‘competence [in] dealing with racial matters’ and ‘speak[ing] openly, frankly, and professionally about relations’ is necessary both to competent client representation and equal justice under law.”).

<sup>14</sup> David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached out Lawyering*, 5 INT’L J. LEGAL PROF. 141, 153 (1998) (commenting that personal identities cannot be checked at the door “by simply becoming lawyers.”).

<sup>15</sup> See David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached out Lawyering*, 5 INT’L J. LEGAL PROF. 141, 142, 145 (1998) (“For black lawyers, however, this is more than simply a quest for professional privilege. The presumption of competence and integrity that has traditionally accompanied professional status offers blacks the promise of at least some protection from the otherwise pervasive myths of intellectual and moral inferiority with which African-Americans must routinely cope.”)

colleagues) will not perceive them as “‘real’ lawyers.”<sup>16</sup> Needless to say, for all the traditional markers of success I gained from my own law school education, I was unprepared for the emotional and psychological toll of not being afforded the same presumed credibility of white lawyers.

This Article responds to a gap in law school curricula, that is, teaching identity performance strategies as a necessary component of Professional Responsibility. Specifically, I argue that it is irresponsible to graduate law students from marginalized groups without foresight of the potential challenges, socially, emotionally, and professionally, that they may face. To do so renders them twice marginalized — first, as a byproduct of socially constructed inferiority, and second, through undisclosed knowledge.

While this Article is written for law professors and law students, it is useful to a broader academic audience. In many respects, much of my earlier work, deepening identity performance strategies discussed in legal scholarship through co-cultural theory, laid the foundation for this conversation, this moment, this space. The goal is to “construct[ a] pedagogical space”<sup>17</sup> where law students from marginalized groups are first, intentionally and productively enlightened to biases and stereotypes that will confront them, and second, empowered with both strategic and culturally competent tools to consciously perform their identities in the manner they so choose.<sup>18</sup>

The need for conscious identity performance as an arm of professional responsibility begins with discussing how non-white males, as a normative

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<sup>16</sup> David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached out Lawyering*, 5 INT’L J. LEGAL PROF. 141, 145, 147 (1998) (discussing how the black lawyer threatens the social goal of a “presumption of competence and integrity” and, as to women, noting that “[e]ven those who are not convinced that the content of professional norms are gendered will be hard pressed to deny that the traditional lawyer’s career path was created to fit a male biography.”).

<sup>17</sup> Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 391 (1996).

<sup>18</sup> Power exists in choosing how to perform one’s identity, regardless of whether that choice goes with or against one’s own member group. That said, there should also be a conscious mindfulness if one chooses to conform to the dominant culture. This caution is visually detailed in the work of Harrison & Montoya’s discussion of the “Malinche Paradox” whether they “problematize the roles of Outsiders who seek to deploy the discursive tools and tactics of the dominant culture, only to produce unexpected and, at times, unwanted outcomes.” Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 393 (1996).

matter, must regularly perform identity strategies within the legal profession. The second section exposes how traditional professional responsibility curricula does little to warn against a false sense of inclusion into the dominant culture for traditionally marginalized group members. Finally, the third section demonstrates how conscious identity performance, informed by the borderlands metaphor and co-cultural theory's communication practices, is central to a professional and cultural development of professional identity.

#### I. BACKGROUND: IDENTITY PERFORMANCE AS A SOCIAL NORM FOR NON-WHITE MALES

*The experience of law students and lawyers of color is quite different. As a minority group in the legal profession, they have 'no choice except to learn about white culture if they are to survive.'*

Russell G. Pearce<sup>19</sup>

To be a young lawyer who is white, male, heterosexual, Christian, middle-class, and able-bodied is to walk into a law firm presumed competent to handle whatever tasks lay before you.<sup>20</sup> Without even uttering

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<sup>19</sup> Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 *FORDHAM LAW REVIEW* 2081, 2088 (2005) (quoting Clayton P. Alderfer, *A White Man's Perspective on the Unconscious Processes Within Black-White Relations in the United States*, in *HUMAN DIVERSITY: PERSPECTIVES ON PEOPLE IN CONTEXT* 201, 217 (Edison J. Trickett et al. eds., 1994)).

<sup>20</sup> This description of the American norm or dominant species is not uncommon. See Audre Lorde, "Age, Race, Class and Sex: Women Redefining Difference," in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 114 (Crossing Press, 1984), <http://www.socialism.com/drupal-6.8/sites/all/pdf/class/Lorde-Age%20Race%20Class%20and%20Sex.pdf> ("Somewhere, on the edge of consciousness, there is what I call a *mythical* norm, which each one of us within our hearts knows 'that is not me.' In America, this norm is usually defined as white, thin, male, young, heterosexual, Christian, and financially secure. It is with this mythical norm that the trappings of power reside within this society."); Laura Morgan Roberts & Daryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 *DUKE J. GENDER L. & POL'Y* 369, 374 (2007) ("Most often, the corporate culture of United States organizations is infused with the values and preferences of white, heterosexual, Protestant, and educated males. People who belong to these dominant identity groups are more likely to possess."). Professor

a word, he will appear to have the characteristics to further the firm's value and effortlessly attain a natural affinity among the other white attorneys.<sup>21</sup> He will immediately begin receiving assignments from dotting white male partners and senior associates, also presumed competent, eager to groom the next generation of sameness. He will not have to worry about receiving enough work to meet his billable hours. He is set. This claim is not based on presumption or insensitivity toward white people. The legal research firmly demonstrates that not only are white males overrepresented in the legal profession,<sup>22</sup> but the magnitude of that statistic is compounded by

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Russell G. Pearce describes an intergroup theory exercise he conducted in his first year class at the University of Pennsylvania Law School in 1991.

The students' task is to work in identity groups to create a picture describing their identity group's experience as law students. To facilitate the formation of identity groups, the exercise starts by dividing the students into four race- and gender-based groups: women of color, men of color, white women, and white men. The basis for this division is the hypothesis that for most students, their race and gender are the most salient identities. . . . When the identity groups complete their pictures, they post them on the wall and describe them. The class discussion begins with the role of identity group differences in the law school experience and moves to the role of these differences in the legal system and their implications for the rule of law. . . . My picture will also identify how some students- usually but not always white- will reject identifying themselves on the basis of race and how some students- usually but not always students of color- will indicate that race is a significant part of their experience as law students. Students of color, but never yet a white student, will describe the experience, while working during the summer, of having lawyers mistake them for secretaries or messengers.

*Russell G. Pearce, White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 *FORDHAM LAW REVIEW* 2081, 2087 (2005) (“As a member of the dominant group in the legal profession, the white lawyer is the norm.”); MARK P. ORBE, *CONSTRUCTING CO-CULTURAL THEORY: AN EXPLICATION OF CULTURE, POWER, AND COMMUNICATION* 2 (1998) (commenting that “European-American heterosexual middle- or upper-class males has acquired dominant group status in the major societal institutions.”).

<sup>21</sup> Margaret Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 *MICH. L. REV.* 766, 768 (1997) (commenting that minority lawyers are numerically significant enough to “undermine claims of white racial exclusivity in the profession, yet far too low to facilitate the comforting sense of belonging or even anonymity that attaches quite naturally to white lawyers.”); Laura Morgan Roberts & Daryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 *DUKE J. GENDER L. & POL’Y* 369, 374 (2007) (discussing how white males are more likely to be assumed to fit the organization’s culture in its broader discussion, and admonishing of, cultural profiling).

<sup>22</sup> AM. BAR ASS’N, *LAWYER DEMOGRAPHICS: YEAR 2016* (2016), <https://properpr.files.wordpress.com/2016/11/lawyer-demographics-tables-2016->

interdisciplinary research reporting that people have a natural preference toward members of their ingroup.<sup>23</sup> In other words, the white male partner is, consciously or subconsciously, going to gravitate toward the young white male junior associate; and this young associate is going to reap the benefits of that mentorship in ways that will have an exponential impact on his future legal career.<sup>24</sup>

So, what to say to the young lawyer whose identity deviates one degree, or more, from that of the young lawyer above? Billable hours are not the only thing you will have to worry about. The legal scholarship is rich with

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authcheckdam.pdf (according to the American Bar Association, white people make up eighty-eight percent of the legal profession, and sixty-four percent of lawyers are male versus thirty-six percent female).

<sup>23</sup> CHERYL STAATS ET AL., *STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 12 (2016)*, <http://kirwaninstitute.osu.edu/wp-content/uploads/2016/07/implicit-bias-2016.pdf> (quoting Ohio Attorney General Mike DeWine); White male preference over minorities or women for employment is common. In a study of professors at 259 universities, researchers found that professors were more responsive to emails concerning future mentorship from white males than from female or minority students, though the only differences between the emails had been the students' gender and race. STAATS ET AL., *supra* note 82, at 38–39 (citing Milkman et al., *What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway into Organizations*, 100 J. APPLIED PSYCHOL. 1678 (2015)); Stacy Blake-Beard et al., *Unfinished Business: The Impact of Race on Understanding Mentoring Relationships* 6 (Harvard Bus. Sch., Working Paper No. 06-060, 2006), <http://www.hbs.edu/faculty/Publication%20Files/06-060.pdf>; David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached out Lawyering*, 5 INT'L J. LEGAL PROF. 141, 153, 154 (1998) (“Empirical and anecdotal research confirms that individuals cannot easily separate themselves from contingent features of their identities. For example, in his pioneering work on careers and developmental relationships inside corporations, David Thomas reports that race and gender significantly influence conduct and perceptions within organizations. This influence takes many forms. Chief among them is the preference that senior mentors have for proteges who remind them of themselves. White men, as Thomas's work repeatedly demonstrates, feel more comfortable in working relationships with other white men. My own research suggests that white partners in law firms are no different.”) (internal citations omitted). *See also* earlier work, Leslie P. Culver, *White Doors, Black Footsteps: Leveraging “White Privilege” to Benefit Law Students of Color*, 21 J. GENDER, RACE & JUSTICE 37, 69-89 (2017) (discussing the need to confront whiteness among white law professors, to both recognize implicit bias and create mentoring relationships with students of color to be instrumental in advancing students' legal professions).

<sup>24</sup> Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 824 (2003) (“Even if individual whites do not seek the advantage of race privilege, because race is a social construction, they are more likely than people of color to be perceived by other whites as good prospective employees and neighbors, or to be perceived by banks and insurers as good credit risks.”).

voices that affirm the reality and burden of identity performance strategies among diverse attorneys to navigate predominantly white spaces.<sup>25</sup> To be clear, most white and non-white lawyers perform their identities in a way to “increase or decrease the salience” of a particular social identity, in efforts to demonstrate that they possess the “firm’s desired character traits.”<sup>26</sup> To

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<sup>25</sup> The term “identity performance” is credited to Devon Carbado and Mitu Gulati. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (offering a general discussion of identity performance theory broadly and narrowly in the context of workplace discrimination); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 781 (2002) (add parenthetical); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1200-02 (2004) (add parenthetical); Gowri Ramachandran, *Intersectionality As “Catch 22”: Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 299 (2006) (using “intersectional” (i.e. more than one identity, such as race and gender) to discuss harmful demands that role-playing has on one’s identity); Margaret Russell, *Beyond “Sellouts” and “Race Cards”: Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 769 (1997) (“Attorneys of color often find their everyday professional and personal encounters peppered with reminders of their minority status in the legal system.”); Laura Morgan Roberts & Daryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL’Y 369, 378 (2007) (discussing identity performance as a response to “cultural profiling” where “one is more likely to be the target of cultural profiling if her cultural displays increase the salience of a social identity group that has been stereotyped as deviant and/or incompetent.”); Katherine E. Leung, Note, *Racial Identity Performance and Employment Discrimination Law*, 24 VA. J. SOC. POL’Y & L. 57, 59 (2017) (“I routinely perform my own racial identity by wearing red on Lunar New Year, and attending Chinese cultural events. But as a woman with a mixed racial background, raised in a predominantly white suburban neighborhood, I also have the privilege of passing and years of practice code switching, displaying elements of the white side of my identity performance in professional settings where whiteness is the established cultural norm. Although I grew up feeling that I was never Asian enough, my whiteness has made me less vulnerable to racial identity performance discrimination. But such a contextual shift is not always seamless, nor should it be a necessary element of professional success.”). For non-legal scholarship on identity performance in the legal profession, see Todd A. Collins, et. al, *Intersecting Disadvantages: Race, Gender, and Age Discrimination Among Attorney’s*, [REDACTED] SOC. SCIENCE QUARTERLY [REDACTED] (2017) (“[A]ttorneys who are “outsiders” in terms of their race and gender may face bias and skepticism from other members of the legal system when they try to participate on equal terms with white men.”).

<sup>26</sup> Laura Morgan Roberts & Daryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL’Y 369, 378, 382 (2007) (“Disclosure decisions extend beyond signaling group membership; people also strategically disclose the degree to which they identify with a social identity group to which they obviously belong. For example, discussing participation in certain cultural or religious activities informs both co-workers and supervisors of the employee’s degree of identification with a social-identity group. In other words, when people disclose their feelings about group membership and involvement in social-identity group activities, they communicate how important those

do so intentionally and strategically is what I call conscious identity performance.<sup>27</sup> And for non-white lawyers, particularly those susceptible to stereotypes that demean their competence and character, the investment in identity performance is arguably a matter of emotional and professional survival.<sup>28</sup> And, to be sure, the identity conversations will challenge their intellect, competence, professional assertiveness, effectiveness in establishing and retaining client relationships, work ethic and dedication, and discretion and professionalism in speech, to name a few. That is, it will not be a question of *if* an attorney from a diverse background will have to discuss (or have discussed about them) their identity/ies, but rather *when* and *how often* these conversations will take place.

For example, non-white males enter law school with the perception or stigma that they are less intelligent or qualified than their white counterparts—that they were admitted based on their race rather than on

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identities are to their self-concept and daily living. Beyond disclosing group affiliation and involvement, people attempt to shape how others view them in light of social-identity group membership in many ways, including: educating others about the inaccuracies of group stereotypes; holding oneself up as a positive exemplar who does not embody the stereotypes of one's group; playing into group stereotypes in order to accrue social benefits; or avoiding discussions of difference altogether.\*\*\*Public affiliations are also a means of identity performance; workers may strategically socialize with dominant-group members, while avoiding socializing with members of marginalized groups (e.g., not speaking to janitors or security guards, even if they belong to the same racial group; not participating in identity caucus workgroups or diversity taskforces; intentionally joining majority-group colleagues for golfing or after-work drinking), because they wish to avoid the stigmatization of being associated with lower-status workers or being accused of antisocial behavior.”).

<sup>27</sup> See Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. \_\_\_\_ (forthcoming 2018) (relying on interdisciplinary tools to broaden those available in legal scholarship to enable attorneys and law students from traditional marginalized groups to perform their identities in an empowering way that limits or avoids altogether internalizing insider stereotypes to their detriment).

<sup>28</sup> Laura Morgan Roberts & Daryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL'Y 369, 378, 381, 385(2007) (noting that “[a]s a consequence, members of negatively-stereotyped groups take great care in managing their self-presentation and cultural displays to ensure that they communicate competence, character, and commitment. . . . When historically-disadvantaged and marginalized group members perform culturally-deviant identity expressions or criticize the dominant structure, these singular acts may signal to the firm that the employee has not internalized the values that the firm has defined as important. Thus, the work of identity performance is cumulative--future identity displays are interpreted in light of previous acts and identity-group expectations. Individuals who work in organizations where cultural profiling is prevalent remain vigilant in ensuring that their behavior over time is consistent with the image of competence and commitment that they have attempted to create.”).

merit.<sup>29</sup> This stigma contravenes, as Cornel West has said of black America, “[t]he quest for black identity [that] involves self-respect and self-regard . . . .”<sup>30</sup> It make sense then, that if non-white males had discouraging experiences inside their institution of elite learning, they may not have developed strong interracial relationships with their white peers or white professors.<sup>31</sup> Particularly for black males, if they enter law firms without an acclimation toward social interactions with the dominant culture, relevant legal scholarship suggests that they relinquish potential social and work opportunities, thereby reinforcing their isolation.<sup>32</sup>

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<sup>29</sup> This perception applies to all law students of color. See Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1198 (2010); Clyde L. Otis III, *Wringing the Clouds Dry: The Minority Attorney's Guide to Rainmaking*, 149 N.J. LAW. MAG., Nov./Dec. 1992, at 32, 33; see [Boysen et al., supra note 144, at 220](#) (noting that “[e]xperiences of subtle bias are common among racial and ethnic minority students”); Sean Darling-Hammond & Kristen Holmquist, *Creating Wise Classrooms to Empower Diverse Law Students: Lessons in Pedagogy from Transformative Law Professors*, 25 BERKELEY LA RAZA L.J. 1, 4 (2015) (discussing the increasing portion of law students of color “who face the mutually exacerbating triple-threat of the solo status that accompanies being a member of an underrepresented group, the stereotype threat that accompanies being a member of a stereotyped group, and the challenges that attend lacking a background in the law before beginning law school” and thus “face unique challenges [with] law schools too often ignor[ing] their legitimate pedagogical needs”).

<sup>30</sup> CORNEL WEST, RACE MATTERS 65 (2001) (speaking to elimination of black poverty being predicated upon the “affirmation of black humanity, especially among black people themselves. . . .”).

<sup>31</sup> For discussion of the value of interracial relationships between law students of color and white professors, see Leslie P. Culver, *White Doors, Black Footsteps: Leveraging “White Privilege” to Benefit Law Students of Color*, 21 J. GENDER, RACE & JUSTICE 37, 74-85 (2017).

<sup>32</sup> Kevin Woodson, *Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms*, 83 FORDHAM L. REV. 2557, 2573–75 (2015) (“Developing this type of acclimation will not be easy going for law firm associates, as the acculturation that helps some workers develop and sustain positive interracial relationships often reflects the embodied learning of many years of prior life experiences. Many of those associates who reach these law firms without such background exposure will find that it is too late for them to make up for lost time.”); David B. Wilkins, TWO PATHS TO THE MOUNTAINTOP? THE ROLE OF LEGAL EDUCATION IN SHAPING THE VALUES OF BLACK CORPORATE LAWYERS, 45 STAN. L. REV. 1981, 1983 (1993) (“And, while the doors to the inner sanctums of the corporate bar continue to creak open slowly and fitfully, a large percentage of black students attending the nation’s elite law schools will, like their white counterparts, spend at least some of their careers in large corporate law firms or the legal departments of Fortune 500 corporations.”). See also David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached out Lawyering*, 5 INT’L J. LEGAL PROF. 141, 157 (1998) (noting that black people are often asked to prove their academic achievements and are held to a higher standard than their white counterparts in hiring and evaluation processes in law firms, and also that “[a]t present, black lawyers

Second, white women, though they share some of the power and privilege of being white, their patriarchal handicap persists. Legal scholarship continues to underscore gender disparities in opportunities for the advancement of women in legal education, practice and the judiciary.<sup>33</sup> And recent legal scholarship looks beyond the overt gender inequity in many law firms and organizations,<sup>34</sup> to more subtle biases that are not actionable under traditional anti-discrimination laws.<sup>35</sup> Known as gender sidelining, this phenomenon describes the ways in which women are “upstaged or otherwise marginalized” in ways not reached by traditional anti-discrimination laws.”<sup>36</sup> While Title VII provides some relief from gender discrimination, it does not provide protection from the subtle biases

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have a very low chance of being hired at an elite law firm, and if hired, face substantial barriers to becoming partners. As a result, black lawyers have inadequate incentives to invest in succeeding in these environments.”) (internal citation omitted); Margaret Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 772 (1997) (“The Black attorney generally is not accorded the respect, autonomy, or even anonymity enjoyed by her white colleagues, and she is therefore doubly disadvantaged by the imposition of careerist pigeonholes and expectations.”)

<sup>33</sup> See Deborah L. Rhode, *The Unfinished Agenda: Women and the Legal Profession*, 8-9, ABA (2001), <http://womenlaw.stanford.edu/pdf/aba.unfinished.agenda.pdf> (noting that men are two to three times more likely to become partners in law firms than women, and noting that although there have been some increases in female judges, law faculty, and law students, women are still significantly underrepresented in positions of power and prestige); Audre Lorde, “Age, Race, Class and Sex: Women Redefining Difference,” in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 118-19 (Crossing Press, 1984), <http://www.socialism.com/drupal-6.8/sites/all/pdf/class/Lorde-Age%20Race%20Class%20and%20Sex.pdf> (noting that “white women face the pitfall of being seduced into joining the oppressor [white men] under the pretense of sharing power[, which yields a] wider range of pretended choices and rewards for identifying with patriarchal power and its tools.”).

<sup>34</sup> Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1041 (2011).

<sup>35</sup> Jessica Fink, *Gender Sidelining and the Problem of Unactionable Discrimination*, 29 STAN. L. & POL’Y \_\_\_\_\_ \*5-6, 8-9 (2018) (discussing the limits to Title VII of the Civil Rights Act of 1964 to adequately protect against or provide redress for gender discrimination, and further that the reach of Title VII may be appropriately restricted to not endorse society’s inequity toward women in the workplace; that is, courts do not permit bruised egos and lack of general civility as sufficient evidence to support an adverse action).

<sup>36</sup> Jessica Fink, *Gender Sidelining and the Problem of Unactionable Discrimination*, 29 STAN. L. & POL’Y \_\_\_\_\_ \*5-6, 8-9 (2018) (discussing the limits to Title VII of the Civil Rights Act of 1964 to adequately protect against or provide redress for gender discrimination, and further that the reach of Title VII may be appropriately restricted to not endorse society’s inequity toward women in the workplace; that is, courts do not permit bruised egos and lack of general civility as sufficient evidence to support an adverse action).

such as “a lack of access to certain opportunities, the diversion of credit for an idea, [and] a nagging sense of being held to a higher standard than their male peers.”<sup>37</sup> And further still, as if overt/actionable and subtle/unactionable gender discrimination is not enough to weigh on one’s soul, earlier work extends the theory of gender sidelining to self sidelining by women, where I suggest that the combination of internal and external gendered forces may consciously or unconsciously make women discipline themselves to downplay or prevent their *own* achievements and opportunities to advance.<sup>38</sup>

Third, for those persons within the LGBTQ community, they face challenges in wearing their identity, even in “gay-friendly”<sup>39</sup> workplaces. For example, if they choose to be out in their workplace, they will have to balance that decision with a constant readiness to confront homophobia, which can lead to a loss of valuable work relationships.<sup>40</sup> Recent Canadian

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<sup>37</sup> Jessica Fink, *Gender Sidelining and the Problem of Unactionable Discrimination*, 29 STAN. L. & POL’Y \_\_\_\_\_ \*8-9 (2018) (quoting TRISTIN GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW 101-02 (Cambridge Univ. Press 2017)).

<sup>38</sup> See Leslie P. Culver, *The Rise of Self Sidelining*, 39 WOMEN’S RTS. L. REP. \_\_\_\_\_ (forthcoming 2018) (“despite objective evidence of success, the high achieving woman internally feels like an intellectual fraud (i.e. impostor phenomenon), but when her ideas and contributions are discounted by men (i.e. gender sidelining), these negative experiences externally validate, albeit erroneously so, the belief she is an intellectual phony and she begins to believe that perhaps she does not belong. As such, she intentionally shies away or walks away from opportunities for professional advancement based on falsely endorsed feelings of inadequacy, thus falling prey to self sidelining.”).

<sup>39</sup> Sara J. Baker & Kristen Lucas, *Is it safe to bring myself to work? Understanding LGBTQ experiences of workplace dignity*, 34 CANADIAN J. OF ADMIN. SCI. 133, \_\_\_\_\_ (2017).

<sup>40</sup> For research regarding the experience of LGBT lawyers, see *20th Anniversary Reprint of the 1995 Hcoba Report: Legal Employers’ Barriers to Advancement and to Economic Equality Based Upon Sexual Orientation*, 41 WM. MITCHELL L. REV. 243, 256 (2015) (“For those interviewees who have chosen to be out in law firms, the relief that comes with being out is balanced by a need to be on one’s guard. Most of those persons who are out report expending energy to confront homophobia and to cope with varying degrees of fear that harm will befall them. Some interviewees reported that upon coming out at work, formerly positive relationships deteriorated. Out interviewees also reported that they encountered undue suspicion of their work, including concerns about leadership abilities and mistrust of their substantive skills.”). See also James G. Leipold, *Stand and Be Recognized: The Emergence of A Visible LGBT Lawyer Demographic*, 42 SW. L. REV. 777, 791–92 (2013) (recounting his own law school experience in the early nineties, particularly whether to reveal his sexual orientation on his resume); Tonette S. Rocco & Suzanne J. Gallagher, *Straight privilege and moral/izing: Issues in career development*, 2006 NEW DIRECTIONS FOR ADULT & CONTINUING EDUC. 29, \_\_\_\_\_ (2006) (“deconstructing heterosexual privilege in the workplace and offering suggestions for ‘queering the

scholarship examined “dignity threats” that undermine their safety and security when they owned their gendered/sexual identities in their workplace, and related protection strategies used to deflect those threats.<sup>41</sup> Such strategies included: “avoiding harm by seeking safe spaces, deflecting harm with sexual identity management, offsetting identity devaluations by emphasizing instrumental value, and creating safe spaces for authenticity and dignity.”<sup>42</sup> The depth of these strategies is beyond the scope of this Article, but the central concern is that any person would have to proactively and intentionally engage in strategic efforts to reclaim their dignity.

Fourth, white males with lower socio-economic status may feel removed from privilege, and thus reject traditional notions of essentialism with the dominant culture. For some, they may feel less aligned with their high-status brethren, and identify more with minority groups.<sup>43</sup> Even as a black woman, I can appreciate a desire of vindication from any stigma or perception you do not feel you own. That is, from an external perspective, all white males should be basking in the privileges their whiteness grants. But if a poor background has limited opportunities for some white men to validly own such privileges (even despite transient residence), then in their reality they live on the fringes. Even still, the fringes are better than the ghetto. As Michael Dyson provokes white America, despite not having a clear “passport to riches” for whites who live in this marginal space, there

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workplace’ with an emphasis on career development”); Jaigris Hodson et al., *Between the corporation and the closet: Ethically researching LGBTQ+ identities in the workplace*, 37 EQUALITY, DIVERSITY & INCLUSION: AN INT’L J. 283, [REDACTED] (2018) (noting ethical concerns in researching LGBTQ individuals in the workplace due to a tension between someone coming out or being outed for purposes of research, and more relevantly commenting that such individual have varying degrees of outness between their professional and private lives).

<sup>41</sup> Sara J. Baker & Kristen Lucas, *Is it safe to bring myself to work? Understanding LGBTQ experiences of workplace dignity*, 34 CANADIAN J. OF ADMIN. SCI. 133, [REDACTED] (2017) (reporting on interview with thirty-six LGBTQ employees noting safety and security threats to dignity included “social harm, autonomy violations, career harm, and physical harm.”).

<sup>42</sup> Sara J. Baker & Kristen Lucas, *Is it safe to bring myself to work? Understanding LGBTQ experiences of workplace dignity*, 34 CANADIAN J. OF ADMIN. SCI. 133, [REDACTED] (2017).

<sup>43</sup> See generally Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1504 (2010) (reviewing Title VII interracial solidarity claims to reveal the burden of colorblind rules, as a racially discriminatory cover by high-status whites, actually victimizes low-status or marginal whites, and arguing that marginal whites may be “potential allies in antidiscrimination struggles.”); Orbe & Rizamante (discussing dominant group theory, and commenting that some dominant group members may “[o]bject[] to criticisms by others that generalize majority group members into one large homogenous group”).  
[determine if Orbe’s point here is one of lower status or different values]

exist the “psychological and social advantage in not being thought of black; poor whites seem to say, “At least there’s a n[----] beneath me. And that’s the way for poor whites to be of value to richer whites . . . .”<sup>44</sup>

For those lawyers with physical and mental disabilities who apply for a job, “too often the first question concerns what he or she can’t do, rather than what they can.”<sup>45</sup> Not only is their presence in law firms less visible than non-white males and women, but the stigma attached to disabilities leads to an unintended marginalization.<sup>46</sup> Misconceptions and old attitudes lead many to view those with disabilities as delicate or damaged, a discriminating viewpoint that furthers isolation and discouragement.<sup>47</sup> For

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<sup>44</sup> MICHAEL ERIC DYSON, *TEARS WE CANNOT STOP: A SERMON TO WHITE AMERICA* 66 (2017). For a discussion of unequal standing even among whites, see Camille Gear Rich, *Marginal Whiteness*, 98 CAL. L. REV. 1497, 1524 (2010). Rich defined her phrase “technologies of whiteness” as:

the regional, cultural, and context-specific practices whites use to actively construct the category of whiteness in a workplace (or other institutional locations). These practices include differentiating among whites and subordinating lower-status whites’ interests to conserve scarce resources for a smaller, select group of whites when necessary. These social practices typically make use of understandings of whiteness circulated in national political debates or local politics but can be idiosyncratic in some ways based on understandings generated by the workers in a given employment context.

<sup>45</sup> Terry Carter, *The biggest hurdle for lawyers with disabilities: preconceptions*, ABA J. (June 2015), [http://www.abajournal.com/magazine/article/the\\_biggest\\_hurdle\\_for\\_lawyers\\_with\\_disabilities\\_preconceptions](http://www.abajournal.com/magazine/article/the_biggest_hurdle_for_lawyers_with_disabilities_preconceptions) (last visited May 12, 2018).

<sup>46</sup> See **ABA STATS**; Terry Carter, *The biggest hurdle for lawyers with disabilities: preconceptions*, ABA J. (June 2015), [http://www.abajournal.com/magazine/article/the\\_biggest\\_hurdle\\_for\\_lawyers\\_with\\_disabilities\\_preconceptions](http://www.abajournal.com/magazine/article/the_biggest_hurdle_for_lawyers_with_disabilities_preconceptions) (“In an ABA membership survey in 2013, 8 percent of the lawyers answered in the affirmative when asked whether they have disabilities. A 2012 survey by the Washington State Bar Association found that 21 percent of its members said so. The National Association for Law Placement found that just one-third of 1 percent of law firm partners reported having disabilities in its 2014 survey, which was slightly higher than a few years earlier. Associates with disabilities composed just 0.28 percent, also slightly higher than before. The figures were based on data from 740 law offices and firms (including some reporting zero disabilities) encompassing 73,081 lawyers.”) (last visited May 12, 2018).

<sup>47</sup> See Terry Carter, *The biggest hurdle for lawyers with disabilities: preconceptions*, ABA J. (June 2015), [http://www.abajournal.com/magazine/article/the\\_biggest\\_hurdle\\_for\\_lawyers\\_with\\_disabilities\\_preconceptions](http://www.abajournal.com/magazine/article/the_biggest_hurdle_for_lawyers_with_disabilities_preconceptions) (“Though [Stuart Pixley, a senior attorney at Microsoft Corp. who has cerebral palsy and uses an electric wheelchair and hearing aids] succeeded in law practice, Pixley felt isolated and discouraged in the firms. ‘I don’t remember seeing

example, one attorney recalls being offered a school bus to and from firm functions where independent transportation was limited, and another attorney with hearing impairment was asked “at a large gathering by a partner . . . how well the hearing aids helped him.”<sup>48</sup> This particular attorney responded that at times he asks for information to be repeated, but added, “[b]ut then [some in the firm] became afraid that if I let folks know I have a hearing impairment and asked them to repeat themselves too many times, that they might literally fear being double-billed.”<sup>49</sup> While technology has made it easier for some attorneys with disabilities “to perform ordinary tasks in legal work[,]” the fear of (or perhaps willful ignorance to explore) the unknown, coupled with the infrequent presence of this diverse group in large law firms, renders “[m]any lawyers with disabilities . . . channeled toward government work, advocacy organizations or solo and small- firm employment, often with disability-related practices.”<sup>50</sup>

Finally, with Christianity as the predominant religion<sup>51</sup> in the United

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anyone who looked like me.’ Pixley adds that Microsoft is so systematically intensive about building ‘an understanding of disabilities through cultural competence’ rather than through gestures of political correctness, that ‘I have an idyllic world here.’”)

<sup>48</sup> See Terry Carter, *The biggest hurdle for lawyers with disabilities: preconceptions*, ABA J. (June 2015),

[http://www.abajournal.com/magazine/article/the\\_biggest\\_hurdle\\_for\\_lawyers\\_with\\_disabilities\\_preconceptions](http://www.abajournal.com/magazine/article/the_biggest_hurdle_for_lawyers_with_disabilities_preconceptions) (last visited May 12, 2018).

<sup>49</sup> See Terry Carter, *The biggest hurdle for lawyers with disabilities: preconceptions*, ABA J. (June 2015),

[http://www.abajournal.com/magazine/article/the\\_biggest\\_hurdle\\_for\\_lawyers\\_with\\_disabilities\\_preconceptions](http://www.abajournal.com/magazine/article/the_biggest_hurdle_for_lawyers_with_disabilities_preconceptions) (last visited May 12, 2018).

<sup>50</sup> See Terry Carter, *The biggest hurdle for lawyers with disabilities: preconceptions*, ABA J. (June 2015),

[http://www.abajournal.com/magazine/article/the\\_biggest\\_hurdle\\_for\\_lawyers\\_with\\_disabilities\\_preconceptions](http://www.abajournal.com/magazine/article/the_biggest_hurdle_for_lawyers_with_disabilities_preconceptions) (last visited May 12, 2018) (“The dearth of individuals with disabilities in the legal profession prompted the ABA Commission on Disability Rights in 2009 to proffer a pledge for committing to support disability rights. It is titled Disability Diversity in the Legal Profession: A Pledge for Change (PDF). It is a commitment to help ensure that lawyers with disabilities are given a fair chance at work in the profession, and to better reflect the diversity of communities, clients and customers. The more than 175 signatories thus far include law firms, law schools, corporations, organized bar groups and others.”) (referencing

[https://www.americanbar.org/content/dam/aba/administrative/mental\\_physical\\_disability/pledge\\_for\\_change.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/pledge_for_change.authcheckdam.pdf)).

<sup>51</sup> See generally Frank Newport, *2017 Update on Americans and Religion*, GALLUP (Dec. 22, 2017), <http://news.gallup.com/poll/224642/2017-update-americans-religion.aspx> (“About three-quarters of Americans identify with a Christian faith”);

<http://www.pewforum.org/religious-landscape-study/> (reporting that Christian religious group, including Evangelical Protestant, Mainline Protestant, Historically Black Protestant, Catholic, Mormon, Orthodox Christian, Jehovah’s Witnesses and Other

States, non-Christians may experience tension in the practice of or acceptance into the legal profession. In the practice of law, arguably a competing god of professional ethics aims to supersede any one person's conscious or religion as a guide to practicing law.<sup>52</sup> For example, Sanford Levinson conceived the term “bleaching out” to describe what it might look like for lawyers to ignore certain aspects of their identity (e.g., “race, gender, religion, or ethnic background”) – making these aspects “irrelevant to defining one's capacities as a lawyer.”<sup>53</sup> His work focused on Jewish lawyers and the tension that arises, for example, when “observant Jews” “refrain[] entirely from the practice of law on certain days because of overriding duties derived from the Jewish religious calendar,” or Jews who practice law entirely within Jewish institutions or bring duties from Jewish law into their non-Jewish setting.<sup>54</sup> Similar tensions arise for non-Christians in legal employment as demonstrated by Professor Sahar Aziz's work on Muslim attorneys.<sup>55</sup> She comments on the tension between being a cultural Muslim (or good Muslim) who may change their ethnic-sounding name or allow others to believe they are Christian in efforts to be white, and a practicing Muslim (or bad Muslim) who displays their religious practices or seeks religious accommodations.<sup>56</sup>

To be clear, the above accounts were detailing the plight of the professional identity of those attorneys whose identity is *one* degree

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Christian, comprised 70.6% of the religious groups in the United States) (last visited May 12, 2018).

<sup>52</sup> See Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578 (1992) (remarking on Monroe Freedman's view of legal profession, where Freedman states, “that the wisest course is to make each lawyer's conscience [or the teachings of one's religious tradition] his ultimate guide. It should be recognized, however, that this view is wholly inconsistent with the notion of professional ethics, which, by definition, supersedes personal ethics.”) (quoting Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1482 n.26 (1966) (emphasis added)).

<sup>53</sup> See Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578-79 (1992).

<sup>54</sup> See Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1584 (1992).

<sup>55</sup> Professor Aziz's work focuses on Muslim women of color, and the detriment that comes from her intersectional identities based on race, gender and ethnicity. Sahar F. Aziz, *Coercing Assimilation: The Case of Muslim Women of Color*, 18(2) J. GENDER RACE & JUST. 389, 24(2) TRANSNAT'L L. & CONTEMP. PROBS. 341 (2015).

<sup>56</sup> Sahar F. Aziz, *Coercing Assimilation: The Case of Muslim Women of Color*, 18(2) J. GENDER RACE & JUST. 389, 24(2) TRANSNAT'L L. & CONTEMP. PROBS. 341, 393-94 (2015).

removed from the norm: white, male, heterosexual, Christian, upper class, and able-bodied. But for the attorney whose identity is intersectional, existing across multiple planes, e.g., women of color, gay white man, lesbian white or black female, Muslim women of color, Latina/o with disabilities, their narratives often document an internal journey to discover their identity and voice, along with an external struggle to fight against the standards the dominant culture has defined as normal.<sup>57</sup> In the words of

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<sup>57</sup> This idea of multiple identities is commonly referred to as intersectionality, a theory originating from Professor Kimberle Crenshaw's chronicled work which discusses the problem of essentialism (or sameness) in how women of color were treated under antidiscrimination laws, namely that the experience of white women and black men did not equal the experiences of black women. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149-50 (1989). See also Audre Lorde, "Age, Race, Class and Sex: Women Redefining Difference," in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 116 (Crossing Press, 1984), <http://www.socialism.com/drupal-6.8/sites/all/pdf/class/Lorde-Age%20Race%20Class%20and%20Sex.pdf> ("By and large within the women's movement today, white women focus upon their oppression as women and ignore differences of race, sexual preference, class, and age. There is a pretense to a homogeneity of experience covered by the word *sisterhood* that does not in fact exist."); Sahar F. Aziz, *Coercing Assimilation: The Case of Muslim Women of Color*, 18(2) J. GENDER RACE & JUST. 389, 24(2) TRANSNAT'L L. & CONTEMP. PROBS. 341 (2015) ("Who are we to judge how a Muslim woman chooses to perform her multiple identities? So what if she chooses to wear short skirts and sleeveless shirts, uncovers her hair, hides her associations with Muslims, supports American militarism in the Middle East, or uses an English nickname? Even though we may be uncomfortable making these judgments about Muslim women's identity performances, the reality is that employers do so every day; employers act on their judgments of employees' identity performance through distribution of resources and access to opportunities in the workplace based on subjective, majoritarian values and cultural norms. As a result, minority employees who fail or refuse to accommodate those values and norms, often guised under the rubric of "professionalism," "civility," or "collegiality," may be overlooked for promotion, given lower quality work assignments, denied access to clients, set on a marginalized career track, or terminated."). For an example of social science research documenting via empirical data that unique experience of women of color lawyers, see Todd A. Collins, et. al, *Intersecting Disadvantages: Race, Gender, \* and Age Discrimination Among Attorney's*, \_\_\_ SOC. SCIENCE QUARTERLY 13 (2017) ("While it may be unsurprising that women will perceive more gender bias and racial minorities will perceive more racial bias by professional peers, our findings about minority women's perceptions tell an important story that is often overlooked in the literature. Specifically, minority female attorneys, being part of two outgroups, occupy a distinctive place in a profession traditionally dominated by white males. Our results show that the women of color group is the only one that reports higher levels of unfair treatment based on race, gender, and age.")

For additional work arising out of intersectionality and how some subordinate identities are treated as conflicting forces, e.g. homosexuality and race, see Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the*

Audre Lorde, “[a]s a forty-nine-year-old Black lesbian feminist socialist mother of two, including one boy, and a member of an interracial couple, I usually find myself a part of some group defined as other, deviant, inferior, or just plain wrong.”<sup>58</sup> Needless to say, as Lorde notes, “[t]here is a constant drain of energy,”<sup>59</sup> and I would add that the end goal is to somehow keep one’s soul intact.

The central aim of the above discussion is not to recount the overt or subtle discriminations, biases, or stereotypes facing certain lawyers, but rather to draw two insights. First, that the bulk of legal scholarship surrounding attorneys from traditionally marginalized backgrounds rarely describes stories of building a successful legal practice, but rather rings with well-articulated pleas for awareness and awakening among the dominant culture toward these outgroups, as well as with voices of resistance, affirmation and solidarity among outsiders. And second, a clear absence of white males needing such scholarship to professionally succeed or emotionally survive.

It must be emphasized that heterosexual white males will *never* have to navigate their identity as a habitual practice because they simply do not stand outside the dominant societal structure of which they actually define.<sup>60</sup> And while the white, heterosexual, Christian, middle-class, and able-bodied male has largely defined both the role and identity of the American lawyer, it cannot be the expectation that women, people of color, and those from other marginalized groups should bend their identities within a dominant frame, or relinquish them altogether to be counted in the cast of lawyers. In the era of strained racial tensions such a request weakens

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*Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 288 (2001) (noting that a gay and lesbian civil rights organization endorsement of a Republican vocal against certain minority groups, demonstrated a “vision of gay and lesbian equality required gay men of color and lesbians of all races to silence central parts of their identities and political commitments in order to embrace a narrowly defined gay and lesbian ‘equality.’ White, upper-class male constituents of . . . did not have to make such complicated choices.”).

<sup>58</sup> Audre Lorde, “*Age, Race, Class and Sex: Women Redefining Difference*,” in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 114 (Crossing Press, 1984), <http://www.socialism.com/drupal-6.8/sites/all/pdf/class/Lorde-Age%20Race%20Class%20and%20Sex.pdf>

<sup>59</sup> Audre Lorde, “*Age, Race, Class and Sex: Women Redefining Difference*,” in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 115 (Crossing Press, 1984), <http://www.socialism.com/drupal-6.8/sites/all/pdf/class/Lorde-Age%20Race%20Class%20and%20Sex.pdf>

<sup>60</sup> *See discussion of dominant social structure and positioning supra notes 74-76 and accompanying text.*

America; it does not make her great. Borrowing from David Wilkins sentiment concerning the need for black lawyers to “reject bleached out professionalism,” I argue that to break stereotypes, to create inclusivity, lawyers must be seen for their gender, race, and other diverse identities. “If they are not, their success will be dismissed as exceptional or idiosyncratic, and will not benefit other[s similarly situated].”<sup>61</sup> In addition, creativity of thought and influence is diminished. To this point, Laura Roberts and Daryl Roberts comment in their work on cultural profiling, that

[c]orporations intentionally hire and retain workers from various cultural backgrounds to enhance innovation and increase the bottom-line, largely because society has sent a message to corporations that diversity is a necessary goal. Yet, corporations that adopt a color-blind philosophy and encourage employees to suppress cultural differences suffer increased conflict and decreased innovation, compared to corporations that value and leverage diversity to enhance organizational processes and outcomes

Ultimately, I would stretch Wilkins’ noble plea one step further to suggest the need for anti-essentialism, that is for the black lawyer to be seen *as black*, or the female lawyer to be seen *as a woman*, is vital to visibly validate their professional identities as “real” lawyers in a white profession. In the next section I argue that the failure of traditional Professional Responsibility courses to teach the reality of and strategies for identity performance can subject law students from marginalized groups to overwhelming feelings of isolation and doubt. Seeking to be simply great lawyers, some students will spend much of their career trying to maintain their diverse identity or, and perhaps worse still, naively believe that they are immune from the need for such distinctiveness.

## II. THE FALSE INCLUSION [OR CONSCIOUSNESS] IN PROFESSIONAL RESPONSIBILITY/ IDENTITY LAWYERING COURSES

*[I]t is always a . . . mistake . . . [for the outsider to join with the] more empowered group, even for strategic reasons.*

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<sup>61</sup> David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached out Lawyering*, 5 INT’L J. LEGAL PROF. 141, 157, 159 (1998) (discussing the need for black corporate lawyers to be seen as black to break stereotypes and advance the race-conscious strategies of renowned civil rights lawyers such as Thurgood Marshall and Charles Hamilton Houston).

*[T]he price of strategic essentialism is not only that you get away from your agenda and your heart-of-hearts goals. You'll develop what Antonio Gramsci calls false consciousness. You'll forget who you are and what your original goals and commitments were. Goals, personal identities, and loyalties are socially constructed. If we work and struggle with people—no matter how well-intentioned—whose perspectives, cultures and agenda are different from ours, we will eventually change.*

Melissa Harrison & Margaret E. Montoya<sup>62</sup>

The critique of traditional professional responsibility/professional identity law school curricula is based on two observations: First, what I believe are the identity strategy gaps in the current legal scholarship, which are relevant to professional identity of law students.<sup>63</sup> Second, and more relevant to this Article, the almost clandestine social and cultural norms of a bleached out profession that create invisible barriers to career satisfaction and advancement for lawyers from traditionally marginalized groups. How does one prepare for an enemy they do not know exists? And one whose weapon is an internal evaluation based on damning and socially constructed inferiority. And perhaps more strategically, borrowing from Cornel West as he ponders the question of black identity, “[h]ow does one affirm oneself without reenacting negative black stereotypes or overacting to white supremacist ideals?”<sup>64</sup>

At times I find it exhausting, admittedly, still to be talking about the marginalization of certain groups in the twenty-first century. Will progress ever truly come, and if so, what it will look like? In 1963 the Reverend Martin Luther King had a vision of progress when he dreamed that his “four little children [would] one day live in a nation where they [would] not be

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<sup>62</sup> Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 406 (1996) (citing Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 652-53 (1993)).

<sup>63</sup> For an in-depth discussion on the relevance of the co-cultural theory (largely drawn from feminist communication scholars) to the legal profession and its members who are strained to rely upon performing identity strategies in predominantly white spaces, see Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. \_\_\_\_ (forthcoming 2018).

<sup>64</sup> CORNEL WEST, RACE MATTERS 65 (2001).

judged by the color of their skin but by the content of their character.”<sup>65</sup> Yet over five decades later, amidst enlightened studies on cultural competency, gendered awareness, and reports on every manner of bias, are we any closer to Dr. King’s dream being fulfilled – for any disadvantaged group member? How many parents of young black boys live in daily fear for their son’s very lives? How many parents of children who also exist outside the space of white privilege worry about the quality of their children’s future? What do the daily conversations at the dinner table look like for the parents of a white child as compared to the latino/a or black child?

But even in the ideological pursuit of an integrated society, where advancement can seem looming at best, there exists the remembrance that “race is not just something that [fell] from the sky; it is . . . a fabricated idea[;]” a socially constructed strategy to permit only white people to naturalize as United States citizens.<sup>66</sup> In this respect, as Michael Dyson articulates, “[b]ut that doesn’t mean that race doesn’t have material consequences and empirical weight. It simply means that if we constructed it, we can get about the business of deconstructing it.”<sup>67</sup> **TRANSITION**

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<sup>65</sup> Rev. Martin Luther King, Jr., *I Have a Dream*, ARCHIVES.GOV (1963), <https://www.archives.gov/files/press/exhibits/dream-speech.pdf>.

<sup>66</sup> MICHAEL ERIC DYSON, *TEARS WE CANNOT STOP: A SERMON TO WHITE AMERICA* 67 (2017); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 2-7, 19–20 (2006) (maintaining that the category “white” was judicially constructed in racial prerequisite cases [post-Civil War trials where the courts adopted social conceptions of race to determine whether certain racial and ethnic groups were or could be “white”] in a two-step process, where first courts constructed the boundaries of whiteness by determining who was not white and then denigrated those so described as not white, assigning them inferior and negative characteristics); Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 902 (2002) (citing LÓPEZ, *supra* note 3, at 43–44) (“The racial prerequisite cases were another set of racial determination trials that occurred to ascertain whether aliens could become citizens of the United States. From 1790 until 1870, only whites were permitted to naturalize. For much of the period from 1870 to 1952 (the year when racial bars on naturalization were abolished), only whites and blacks were eligible for citizenship.”); Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 *MINN. L. REV.* 1637, 1638–39 (1999) (discussing the deeply embedded message of critical race theory that “[r]ace is only skin deep because it is always a social construction (but a very important social construction) and the work of critical race theory is to go beyond the socially constructed boundaries and is exactly about understanding race’s importance but scientific insignificance”).

<sup>67</sup> MICHAEL ERIC DYSON, *TEARS WE CANNOT STOP: A SERMON TO WHITE AMERICA* 67 (2017).

### A. *The Limits of Lawyer Neutrality in Lawyer Identities*

The model of professional responsibility traditionally taught in law schools arguably presumes that the canons of good lawyering ring with an air of neutrality or bleached out professionalism, thus diminishing, or outright rejecting, the significance of gender, race and other diverse identity markers.<sup>68</sup> Yet, as Russell Pearce remarks, “the assumption of lawyer neutrality so central to lawyer professionalism is not only wrong descriptively, but . . . it also undermines the very goals it seeks to promote.”<sup>69</sup>

For decades, prominent legal scholars have argued against lawyer neutrality as a professional norm, finding distinctive personal identities cannot simply be checked at the door of the law firm when the lawyer identity arrives.<sup>70</sup> The personal identities impact how others view the lawyers competency, thus ultimately affect their ability to be an effective lawyer. In other words, that racial identity and lawyering identity are linked, and cannot be separated in the name of neutrality – a false loftiness that presumes and further perpetuates whiteness as the norm. To this point, there is legal scholarship that implements approaches to culturally competent (or

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<sup>68</sup> This notion of neutrality is often traced to Sanford Levinson’s concept of “bleached out” lawyering. See Levinson, *infra* note 54. See also Russell G. Pearce, *White Lawyering*, 73 *FORDHAM L. REV.* 2081, 2083, 2089 (2005) (commenting on white lawyer’s view of themselves as the “neutral norm or baseline” for lawyering is “consistent with, and reinforces, the prevailing professional norm that lawyers should ‘bleach out’ their racial, as well as their other personal, identities[,] . . . [and] [u]nder this view, all lawyers should be –and in most instances are- fungible. Not only should race play no role in how a lawyer approaches her work, but with few exceptions it will play no role.”); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 *MD. L. REV.* 1502, 1535 (1998) (“Recall that the central claim of bleached out professionalism is that all contingent features of a given lawyer’s identity should be irrelevant to how she performs her professional role. This implies, of course, that it is possible for people to ‘check’ other aspects of their identities at the door by simply becoming lawyers. By virtue of their professional training and socialization, lawyers are assumed to be able to choose to become people who view themselves only as lawyers, free from any remnants of other aspects of their identity that might influence how they perform their professional duties.”).

<sup>69</sup> Russell G. Pearce, *White Lawyering*, 73 *FORDHAM L. REV.* 2081, 2083 (2005) (discussing research of Robin Ely and David Thomas that suggests “that in a diverse society and legal profession an integration-and-learning perspective that openly acknowledges and manages racial identity would far better promote excellent client representation and equal justice under law than the currently dominant commitment to color blindness.”).

<sup>70</sup> See Wilkins, *supra* note 68.

race-conscious) lawyering.

For example, David Wilkins' work, which focuses primarily on black lawyers, is well regarded in offering a model of practice that integrates racial identities with the professional responsibility of lawyering. Specifically, Wilkins' view of race-conscious professionalism includes his somewhat controversial "obligation thesis," which he describes as "the obligations black lawyers owe to the black community [that] may, in certain circumstances, take precedence over particular professional norms, just as the extent to which a black lawyer can be called upon to honor race-based commitments is subject to the call of the lawyer's personal commitments and aspirations."<sup>71</sup> The obligation thesis has been criticized for suggesting that "blacks owe special moral obligations to something called 'the black community[.]' which "runs afoul of the general moral injunction to treat all persons as presumptive moral equals."<sup>72</sup> In defending his thesis, however, Wilkins argues that the black attorney's mindfulness of his or her race is "morally justified" where consumer protections fail to prevent any disparate treatment of one group over another.<sup>73</sup> Most notably for blacks, various models<sup>74</sup> of lawyering fail to account for their complex racial identity, which Wilkins describes as "constitut[ing] . . . [a] powerful social force."<sup>75</sup>

Borrowing from the intergroup theory, Russell Pearce offers an Integration-and-Learning model in client representation, where he posits that

As lawyers increase their 'competence [in] dealing with racial matters,' they should consider how their identity group, as well as

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<sup>71</sup> David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1550 (1998).

<sup>72</sup> David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1556 (1998).

<sup>73</sup> See David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1558 (1998).

<sup>74</sup> David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1535 (1998) (commenting that neither "bleached out professionalism, representing race theory, or personal morality lawyering-sufficiently accounts for this complexity.").

<sup>75</sup> David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1532-33 (1998) ("It literally colors the way that we are perceived by the world at the same time that it shapes our self-perceptions. As a result, blacks are inextricably bound together, both in the sense that the actions of individual blacks impact the opportunities of other blacks, and in the manner in which the opportunities available to all blacks are tied to the fate of the black community as a whole.")

the identity groups of others with whom they are working, influences their relationships with colleagues, clients, adversaries, and court personnel. Lawyers should then, with their colleagues and clients, make explicit that issues of race are open for discussion and ‘speak openly, frankly, and professionally about relations.’<sup>76</sup>

The goal of Pearce’s model is to increase respect and civility among lawyer and client, as well as create a space that invites open and genuine dialogue for discussing legal strategies and other collaborations.<sup>77</sup>

The need for open dialogue about tough issues, such as race, is illuminated in the renowned story of Dujon Johnson<sup>78</sup> who was represented by Clark Cunningham, a clinical professor at University of Michigan law school.<sup>79</sup> Briefly, the clinical version of the story narrates Cunningham’s court-appointed representation of Johnson in a misdemeanor case that Cunningham initially characterized as “an improper *Terry*-stop that had escalated into a pretext arrest.”<sup>80</sup> As the story progresses, Johnson

<sup>76</sup> Russell G. Pearce, *White Lawyering*, 73 FORDHAM L. REV. 2081, 2095 (2005).

<sup>77</sup> See Russell G. Pearce, *White Lawyering*, 73 FORDHAM L. REV. 2081, 2095-96 (2005).

<sup>78</sup> In an earlier draft, I wrote this sentence as being the “renowned story of Clark Cunningham,” as so many other scholars have done –centering this critical introspective moment around Cunningham. But, I was reminded, by Mr. Johnson’s own words as set out in Cunningham’s article, that this is his story, not Cunningham’s. How subtle and insidiously we can replicate patriarchy. In correspondence between Johnson and Cunningham regarding the article draft, Cunningham had asked Johnson if wanted his name to be changed in the article or if he wanted to be identified. Johnson responded that “not only did I have his permission to use his real name, he *insisted* that I do so. He said:

If my name is not used I would be a non-person again. [During the case] I was talked over; I was talked through. [In the version of the Article sent to him] I still don't exist. I *want* to be identified. This anonymity has to end somewhere; I was anonymous in the courtroom.

Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1383–84 (1992).

<sup>79</sup> Russell G. Pearce, *White Lawyering*, 73 FORDHAM L. REV. 2081, 2091-93 (2005).

<sup>80</sup> Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1309 (1992) (“In *Terry v. Ohio*, [392 U.S. 1 (1968)] the Supreme Court extended the Fourth Amendment’s prohibition of ‘unreasonable searches and seizures’ to include the common police practice known as ‘stop-and-frisk,’ an interference with liberty short of a full arrest in which a police officer approaches a person she suspects of criminal activity for a brief interrogation. In order to protect the officer’s safety during this brief encounter with a possible criminal, the officer is allowed to ‘seize’ the suspect long enough to conduct a ‘pat-down’ search for weapons *if* the officer has particularized reasons for believing that the suspect is presently armed and dangerous. The Court emphasized that such a stop-

maintains his innocence, --that he came to a complete stop (based in large part on the problems with his clutch),<sup>81</sup> and that prior to being frisked, the officers failed to inform him why he was being stopped.<sup>82</sup> The scholarly story of Johnson, however, is more profound. The failure to have positional awareness in lawyering,<sup>83</sup> as well as the “difficult problem of understanding and interpreting the client’s story when the client does not share the lawyer’s communication system.”<sup>84</sup> In short, Johnson’s story is less about the constitutionality of a stop-and-frisk, and more about the loss of voice and identity for those less privileged in society, a privilege lawyers should actually be protecting not dismantling. As a demonstration of this realization, Cunningham opens his article with these words:

This is a true story. It is the story of how the law punished a man for speaking about his legal rights; of how, after punishing him, it silenced him; of how, when he did speak, he was not heard. This pervasive and awful oppression was subtle and, in a real way, largely unintentional. I know because I was one of his oppressors. I was his lawyer.<sup>85</sup>

After Cunningham spends significant time walking through the technical and procedural aspects of Johnson’s case, he aptly and transparently speaks to the soul of Johnson’s story. Most salient is that Cunningham, a white lawyer, did not insert race into Johnson’s story, but translated it to the court simply in terms of what Cunningham believed was legally relevant for a “Fourth Amendment theory [that] seemed race neutral.”<sup>86</sup> Upon reflection,

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and-frisk, a procedure now named the ‘Terry-stop’ after the *Terry* case, requires more than an ‘unparticularized suspicion or ‘hunch’.”).

<sup>81</sup> Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1369 (1992) (“The problem with the clutch was important to Johnson because it made him certain that he had come to a full stop at the intersection. Because the clutch was “acting up,” he needed to stop and turn off the engine in order to shift gears. Thus, when Trooper Kiser approached him at the gas station, Johnson apparently felt sure that the trooper could not have thought, even mistakenly, that he had run the flashing red light. Given that certainty, what was the most likely explanation in Johnson’s mind for the stop?”).

<sup>82</sup> See Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1311 (1992).

<sup>83</sup> Russell G. Pearce, *White Lawyering*, 73 FORDHAM L. REV. 2081, 2091-93 (2005).

<sup>84</sup> Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 430 (1996).

<sup>85</sup> Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1299 (1992).

<sup>86</sup> Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1370-71 (1992)

(commenting that while he believed the incident was motivated by Johnsons’ race, “as a

he resigns to his biased thinking, stating that

By eliminating race from our translation of what happened, we not only excluded a possible alternative explanation for the troopers' actions, we also probably distorted Johnson's motivations. Our story of what happened portrayed Johnson as a person with a lawyer's concern for the technicalities of the law, asking the police to justify their investigative actions in terms of the Fourth Amendment. . . . But by framing out Johnson's possible larger concern, we may have presented a very distorted and ultimately rather unsympathetic picture of our client. . . . [O]ur translation[] of Johnson's story erased his racial identity.<sup>87</sup>

The work of Cunningham, Pearce, Wilkins, and even Levinson –whose bleached out professionalism sparked an academic debate that continues decades later –sufficiently demonstrates an awareness of the pivotal role identity, be it race, gender, spiritual, etc., plays in lawyering. But aside from Pearce's acknowledgement of the identity exercise he engages his first year law students in (beginning in 1991), and Cunningham's article that used Johnson's case to frame his theory of translation of language as a metaphor for lawyering,<sup>88</sup> the legal scholarship is virtually silent on how this important conversation is being translated in law schools for students. That is, when the student of color, or from another underrepresented group, is figuratively in Johnson's position –as a participant in the legal profession –will they too feel unable to advocate for themselves on the basis of their identity? I presume the student attorneys in Johnson's case were white,<sup>89</sup>

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*lawyer* I did not talk about “the case” that way, and therefore I ceased to *think* in terms of racial issues as our various translations shaped and limited our shifting understanding of what was legally relevant.”). It is also interesting that the white judge in Johnson's case inserted his own racial stereotype by routinely referring to the case as “an attitude ticket.” *Id.* at 1328.

<sup>87</sup> Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1375-76 (1992) (“Johnson might have failed to entrust us with his belief that what happened that night was a ‘racial incident,’ because he anticipated the same skepticism from us that his assertion received from the troopers and Judge Collins. When a white person hears a black person use a word like ‘racist,’ the response is often a strong defensive reaction that implicitly says to the black person, ‘prove it!’ And the standards of proof are those white people are comfortable with: evidence of conscious racial animus, intent to harm and degrade.”).

<sup>88</sup> Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1331 (1992).

<sup>89</sup> Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1381 (1992) (commenting

but the false notion that their whiteness somehow exempts them from needing to understand their own identity performance, and that of other diverse groups, was magnified by the white judge’s praise of the students’ legal talent, who called this “fifty dollar attitude ticket” a “great experience” for the students.<sup>90</sup> But from Johnson’s vantage point, these “law school” students saw and treated him differently and often like a child.<sup>91</sup> I make no judgment on the students’ personal reflection or takeaway, but it is not clear from the article if the *greater* experience—a shaping of character and lawyering identity—while observed by Cunningham, was equally and intentionally transferred to them.

This Article acknowledges that some law school courses teach identity considerations surrounding class, race, gender, etc. when discussing effective lawyering toward clients.<sup>92</sup> Cunningham’s own translation as a

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on the invisibility of Johnson’s experience as a “racial incident” to “me, the student attorneys, and the white judge . . .”).

<sup>90</sup> Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1329 (1992).

<sup>91</sup> See Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1329-30 (1992) (stating in response to the students reminding him of the importance of attending court dates, “Why must I qualify myself, reveal my soul to you, convince you that I wasn’t there for good reasons?”).

<sup>92</sup> See e.g., Anthony V. Alfieri, (*UN*)*Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 808 (2008) (discussing how to teach “law students to represent hypermarginalized individuals and groups trapped in marginalized communities? What should we teach students about marginalized or hypermarginalized client difference and identity? What skills should we instill? What ethical guidelines or values should we prescribe? When should we counsel clients to “cover” marginalized or hypermarginalized differences and identities and when \* should we counsel clients to “uncover”? What are the social costs and benefits of covering and uncovering to clients and communities?”); Bill Ong Hinga, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1807-08 (1993) (discussing identity issues in lawyering courses, such as Legal Strategies for Social Change course, which “explores the roles lawyers have played and should play in trying to bring about social change to benefit disadvantaged or subordinated groups,” and Subordination course that examines the role “knowledge of social and political subordination” plays for activist lawyers); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 373-74 (2002) (discussing the need for interviewing and counseling instruction in law schools could benefit from cross-culture in non-legal disciplines as a means to “increase access and substantive justice to [ ] client.”); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, [REDACTED] CUNY ACADEMIC WORKS 33, 35 (2001) (exploring clinical teachers’ use of identity and bias instruction to explore “the role culture plays in lawyering.”); Patience Crowder, *Designing a Transactional Law Clinic for Life-long Learning*, 19 LEWIS & CLARK L. REV. 413, 414, 425-26 (focusing on law

metaphor for lawyering is one such example. And I intentionally leave the work of identity performance as it relates to the relationship between the lawyer and his or her client to Cunningham, Pearce, Wilkins and others. But as Cunningham's article draws to a close, the dialogue between him and Johnson underscores the need for law schools to prepare its students, particularly those from marginalized groups, to enter a profession where *their* identities may be their most salient feature. As Johnson reflects on the post case debrief between himself, Cunningham and the student attorneys, he remarks

[A]s white educated men (or as two law students), the three of you would never have to worry about finding employment or about providing for your families. This society is geared toward and protected by white men. No matter what the outcome of my case, no one's life would be changed.... The very fact that I was involved in the legal proceedings, as I saw it, was a presumption of guilt (I have the two requirements: I was a person of color, and I didn't know my place.) This then was a fight of survival for whatever control I had left. How can I not have control of my life and still have goals, dreams, and ambitions?<sup>93</sup>

When reading those words, I myself was struck by his reality that the center stage of whiteness, or perhaps the refusal for the dominant players to acknowledge blackness, left him with no control over his own life. And that vulnerability stole his future.

Johnson's statement should not be limited to a *defendant's* viewpoint, with no broader application. Johnson is a black male who interacted with white attorneys, a white judge in a white socially-constructed legal system. The black male attorney, for example, even with all of his degrees, will be subjected to the same biases and stereotypes. The question is whether he will be prepared to handle these biases when they are, and they will, coming from members within the legal profession who should be his equal. This conversation is absent from legal scholarship, and is the gap this Article

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clinics as a platform for professional development of attorneys, and including "marginalized/undercapitalized communities" as some of the communities students work with).

<sup>93</sup> Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1385 (1992).

seeks to fill. I would venture to say that law students from marginalized groups are aware of dominant groups and their positioning outside of that space. But there is an urgency to teach law students to navigating their own identity performance, among their colleagues, to maintain control over their professional growth and career advancement. Their degrees will not immunize them from presumption of incompetence. To this point, the following section examines how the content of Professional Responsibility courses implicitly perpetuates bleached out professionalism, offering little to no cultural competency training for diverse law students in identity performance.

### ***B. Professional Responsibility Curriculum***

**SECTION FORTHCOMING, MAYBE. DO I NEED THIS???**

### III. TEACHING CONSCIOUS IDENTITY PERFORMANCE AS A MODE OF PROFESSIONAL RESPONSIBILITY

*My fullest concentration of energy is available to me only when I integrate all the parts of who I am, openly, allowing power from particular sources of my living to flow back and forth freely through all my different selves, without the restrictions of externally imposed definition. Only then can I bring myself and my energies as a whole to the service of those struggles which I embrace as part of my living.*

Audre Lorde<sup>94</sup>

*It is only when we can honestly declare that a Muslim woman of color has the same agency and choice as a member of the majority group in performing her multiple identities in ways that she finds authentic and non-oppressive, without being penalized in the workplace, that we can celebrate progress in civil rights. Until then, we have much work to do.*

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<sup>94</sup> 120-21

Sahar F. Aziz<sup>95</sup>

For many graduating law students who are members of marginalized groups, their post-graduate professional picture will likely look very different than their white counterparts, whether or not they realize it. “Whiteness and masculinity remain depicted as normative, universal, and invisible, while other social identities are viewed as deviant and unnatural. This universal depiction of ‘professionalism’ places a burden on marginalized groups to prove their ability to fit into the dominant culture, and ultimately serves to reproduce the existing hierarchy.”<sup>96</sup> And with fewer access to mentors and lawyers in influential positions, these unsuspecting law students are disadvantaged in learning the secret code of the organizational culture and balancing that with an authentic identity.<sup>97</sup> In this way, the need to bring consciousness to identity performance becomes essential as an impediment to “psychological and career sacrifices.”<sup>98</sup>

In thinking about conscious identity performance, I am inspired by the metaphorical discussion of borderlands, a concept Harrison & Montoya<sup>99</sup>

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<sup>95</sup> Sahar F. Aziz, *Coercing Assimilation: The Case of Muslim Women of Color*, 18(2) J. GENDER RACE & JUST. 389, 24(2) TRANSNAT’L L. & CONTEMP. PROBS. 341 (2015).

<sup>96</sup> Laura Morgan Roberts & Daryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL’Y 369, 403 (2007).

<sup>97</sup> See Laura Morgan Roberts & Daryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL’Y 369, 401 (2007).

<sup>98</sup> Laura Morgan Roberts & Daryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL’Y 369, 403 (2007).

<sup>99</sup> Harrison & Montoya borrowed the borderland theories from “Gloria Anzaldua, Peter McLaren, D. Emily Hicks, and others” in conjunction with their own theoretical backdrops of essentialism and anti-essentialism. Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 Colum. J. Gender & L. 387, 392 (1996) (“A borderland can refer to the actual physical border between two geographic entities. However, we refer to psychic borderlands defined by Gloria Anzaldúa as ‘physically present wherever two or more cultures edge each other, where people of different races occupy the same territory, where under, lower, middle and upper classes touch, where the space between two individuals shrinks with intimacy.’ D. Emily Hicks defines ‘border writing’ as that which ‘emphasizes the differences in reference codes between two or more cultures and

relied upon to magnify the identity conversation over two decades ago. And, from a pedagogical viewpoint, I am equally inspired by Orbe's work on intercultural communication informed by co-cultural theory,<sup>100</sup> as it is useful to situate my concept of conscious identity performance within in order to push the boundaries of how law schools teach professional responsibility.<sup>101</sup>

### *A. Identity in the Borderlands*

What is alluring about the borderlands is the freedom it offers to imagine a space where your racial or gendered identity simply for classification sake, is far less important than, as Dr. King remarked decades ago, the "content of [your] character." Of the borderlands, Harrison & Montoya remark that:

For some students it may represent a place to invent and construct new identities, or to re/member lost ones. For other students the borderlands is a way station, a periphery where the norms of the dominant culture can be learned and practiced, but also a place that can be left behind in order to return to one's home community. Students' awareness of the borderlands as a liminal space can assist them not only in the exploration of their own identities but also in their legal representation of clients.

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Border identities inspire our imagination and lure us with the potentiality of 'a plural self, one that thrives on ambiguity and multiplicity, on affirmation of differences, not on polarized and

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depicts, therefore, a kind of realism that approaches the experience of border crossers, those who live in a bilingual, bicultural, biconceptual reality.' Peter McLaren defines 'border identities' as "created out of empathy for others by means of a passionate connection through difference. Such a connection is furthered by a narrative imagination which enables critical linkages to be made between our own stories and the stories of cultural others.' He theorizes that '[b]order identities are identities in which readers and narrators are both one and the Other in the sense that the border crosser is both 'self and 'other.'").

<sup>100</sup> ORBE, CONSTRUCTING CO-CULTURAL THEORY, *supra* note \_\_, at 4.

<sup>101</sup> The notion of relying on interdisciplinary theories to better inform how lawyers move beyond bleached out professionalism, and become more culturally responsive is not a new concept. See Russell G. Pearce, *White Lawyering*, 73 *FORDHAM L. REV.* 2081, 2081-82 (2005) (relying on intergroup theory in exploring being a white person in the legal profession and "how recognition of whiteness as racial identity requires a dramatic rethinking of professional norms."); [ADD MORE]

polarizing notions of identity, culture, race, or gender.”<sup>102</sup>

Lest the suggestion be to abandon our own identities in some mythical borderlands, the richer perspective is to recognize that even where one intentionally seeks to insert their identity into a space, the borderlands creates an openness that decrees no hierarchy, patriarchy, or any other air of superiority. Rather, a paradigm shift is required to view a borderland, on a theoretical level, as an edge or “space between two individuals [that] shrinks with intimacy” as opposed to a pragmatic view of this space intending to mark territory,<sup>103</sup> in effect peeing on each other instinctively.

Harrison & Montoya speak of a border consciousness in way that I believe illuminates conscious identity performance. In earlier work I frame the essence of consciousness in this way, “what might it look like if an outsider had more tools by which to make a *conscious* choice on identity performance, absent any normative judgment on that choice, particularly as it affects their legal career?”<sup>104</sup> Using the narratives of Keith and Jason,<sup>105</sup> two black men in one of my first year courses, I consider whether knowledge about the depth of identity performance strategies the co-cultural theory offers would make either of these young men, during law school, construct strategic choices in view of entering a predominately white male profession.

For example, Keith, who is relatively reserved around white people, [would he] choose a more *assertive approach* if he deems a better relationship with white people is relevant for his professional growth. Even still, in this conscious space, what if Keith is also mindful that his *field of experience* reveals limited skills in developing such relationships? He may recognize his need for a mentor of either his own race, who has strong relationships with the dominant culture, or a white mentor, who is willing to assist him in genuinely and professionally navigating the dominate terrain.<sup>106</sup>

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<sup>102</sup> Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 392 (1996).

<sup>103</sup> See Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 398 (1996).

<sup>104</sup> Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. \_\_\_\_ (forthcoming 2018).

<sup>105</sup> Names changed to protect anonymity.

<sup>106</sup> Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. \_\_\_\_ (forthcoming 2018). For a discussion on white people using their white privilege to

And what about Jason [who was not frequently seen engaging with his white peers]? What if he . . . consciously weigh[s] the *perceived costs and rewards* in communicating with white people significantly more than communicating with his in-group peers (which is perhaps reflective of his upbringing). If he seeks legal employment in a predominantly white setting, he may have acquired the cultural capital to be successful at developing relationships in that setting. For both Keith and Jason, the consciousness of their own identity choice creates an empowered voice regardless of the ultimate professional decision.<sup>107</sup>

And whether Keith or Jason’s respective decisions bring them closer to or further away from the dominant culture, the empowerment rests not on being coded as white, but on the conscious choice of deciding.<sup>108</sup>

Returning to the camaraderie between border consciousness and conscious identity performance, both a struggle and a resolve emerge. As to the struggle, Harrison & Montoya suggest that living with a border consciousness can feel “extremely disruptive and insecure”<sup>109</sup> and in many respects the journey toward conscious identity performance may feel the same. The journey of discovering how we want to perform our identity can be uncomfortable. There is exertion in learning and exploring one’s history and culture from a social and legal perspective, and an honesty and

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benefit law students of color, see Author’s earlier work, *White Doors, Black Footsteps: Leveraging White Privilege to Benefit Law Students of Color*, 21 J. GENDER, RACE & JUSTICE \_\_\_\_ (forthcoming 2018).

<sup>107</sup> Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. \_\_\_\_ (forthcoming 2018).

<sup>108</sup> For a conversation regarding the freedom to perform one’s identity as they see fit, see Laura Morgan Roberts & Daryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL’Y 369, 383, 395-96 (2007) (commenting that “we believe that individuals should have the freedom to perform aspects of their identity however they choose, as long as the performance does not interfere with business practices or interfere with the rights or human dignity of other employees. We also acknowledge that, even though certain identity performances trigger multiple symbolic meanings for those who enact them, these meanings may be entirely separate from an observer’s interpretation of such acts.... For example, a black woman who straightens her hair, marries a white man, and attends an Ivy League institution is no less black than a black woman who wears cornrows, is outspoken about the firm’s diversity policies, and chooses not to socialize with her white colleagues after work.”).

<sup>109</sup> Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 399 (1996).

assurance that must accompany embracing or neglecting some or all of that culture; asking and facing hard questions of ourselves and our ingroup members; a willingness and vulnerability to acknowledge one’s own biases, stereotypes and other ugliness against members inside and outside our group.

As to the resolve, when the laborious work is done or at least less gut wrenching than at the start, there emerges a self-discovery of core values and a credible voice. The journey toward voice, at least for me, was filled with immense doubt and insecurity, but the ensuing resolve was exhilarating. This resolve, Harrison & Montoya describe as the “[e]dges[–]boundaries, borderlands, margins[–]places where a plethora of postmodernist and feminist writers and writers of color engaged with comparative cultural studies remember[ed], reconstruct[ed] and construct[ed] anew the imaginative power of cultures and identities.”<sup>110</sup> In engaging in conscious identity performance, we can and should push ourselves to the edges to find where our boundary lines are drawn; we should intentionally dig into those intersectional and multidimensional margins to understand how our own background, upbringing, and life experiences have shaped us perhaps distinct from our perceived member group.<sup>111</sup> This exploration, like the borderlands, requires that we

<sup>110</sup> Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 399 (1996) (citing Sarah Williams, *Abjection and Anthropological Praxis*, 66 ANTHROPOLOGICAL Q. 67, 74 (1993)).

<sup>111</sup> See generally Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 402 (1996) (discussing work of Angela Harris and Katharine Bartlett, among others, cautioning against essentialism in borderland exploration, noting “Angela Harris’ work suggests a move beyond essentialism toward ‘multiple consciousness,’ which is defined as ‘the recognition of a self that is multiplicitous, not unitary; the recognition that differences are always relational rather than inherent; and the recognition that wholeness and commonality are acts of will and creativity, rather than passive discovery[;]’” and “[f]or Bartlett, truth is determined by one’s position in particular involvements and relationships. She states, ‘[t]hese relationships, not some essential or innate characteristics of the individual, define the individual’s perspective and provide the location for meaning, identity, and political commitment.’”) (quoting Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 608 (1990); Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880 (1990)). See also Mari Matsuda, *When the First Quail Calls: . Multiple Consciousness as* , *UNIVERSITY OF MICHIGAN* 7-9 (1989) (explaining multiple consciousness as ‘bifurcated thinking, . . . [a] shifting back and forth between her consciousness as a Third World person and the white consciousness required for survival in elite educational institutions[;]’ ‘a deliberate

“remember, reconstruct and construct anew”<sup>112</sup> a formidable identity to both honor and evolve our soul. Most certainly, this identity journey is an ongoing process, that, like the borderlands, “beckon[s] to risk takers, meaning awakers, and vision makers.”<sup>113</sup> And for this journey, the need to have useful tools to negotiate one’s identity as well as understand others becomes essential. As the next section discusses, co-cultural theory, an interdisciplinary framework, is particularly useful to deepen the strategic identity and communication tools in legal scholarship.

### *B. Co-Cultural Theory as Framework for Conscious Identity Performance*

The co-cultural theory is the study of interactions between dominant and non-dominant cultures.<sup>114</sup> While this definition is simplistic in nature, one person can live at the intersection of both a dominant (e.g., male or female) and non-dominant (e.g., African-American or lesbian) group.<sup>115</sup> My earlier work provides more historical background as to the origins of co-cultural theory,<sup>116</sup> however, the following is a summary of this formative theory.

From the oral narratives of non-dominant co-cultural members (or outsiders), numerous *communication themes or practices* developed that described how they communicated in a dominant society. The intriguing question is when are certain practices utilized? Simply put, the answer turns on six interrelated [and influential] factors: *preferred outcome, field of experience, abilities, situational context,*

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choice to see the world from the standpoint of the oppressed.’ ‘That world is accessible to all of us.’”).

<sup>112</sup> Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 399 (1996) (citing Sarah Williams, *Abjection and Anthropological Praxis*, 66 ANTHROPOLOGICAL Q. 67, 74 (1993)).

<sup>113</sup> Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 441 (1996).

<sup>114</sup> ORBE, CONSTRUCTING CO-CULTURAL THEORY, *supra* note [redacted], at 50.

<sup>115</sup> *Id.* at 51. Interestingly, later work by Orbe and related scholars posit that the co-cultural theory can apply “both to traditionally marginalized group members as well as majority group members whose localized context places them in the minority.” Mark P. Orbe, *The Rhetoric of Race, Culture, and Identity: Rachel Dolezal as Co-Cultural Group Member*, 6 J. CONTEMP. RHETORIC 23, 28 (2016) (commenting that research on white students in an interracial class with an African American professor and heterosexual students attending a lesbian festival are examples of how “dominant group communication mirrors that of co-cultural group communication when they perceive themselves as minorities.”).

<sup>116</sup> Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. \_\_\_\_ (2018).

*perceived costs and rewards*, and *communication approach*.<sup>117</sup> The two most prominent [factors] are the *preferred outcome* for an interaction with the dominant culture, and the *communication approach* that non-dominant person relies on.<sup>118</sup> In view of this multi-step conscious consideration for identity performance,<sup>119</sup> the value of this framework to the marginalized within the legal profession is almost palpable.<sup>120</sup>

Before turning to the communication practices, it is useful to understand that they are situated inside two of the most influential factors,<sup>121</sup> first, an outsider’s decision as to their *preferred outcome* with an insider, and second, the outsider’s *communication approach*.

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<sup>117</sup> *Id.* at 89-106. The other factors include field of experience, abilities, situational context, perceived costs and rewards. While not one of the most influential factors, I believe the *Situational context* factor also bears relevance as it posits that one communication practice is not necessarily ideal for all situations, yet another complexity co-culture group members must always consider. *Id.* at 98-99. As one African-American young man stated, “I’m going to be black no matter what situation I’m in . . . but the ways in which that blackness is communicated depends on the specific situation.” *Id.* at 99.

<sup>118</sup> *Id.* at 89, 104.

<sup>119</sup> The term “identity performance” is credited to Devon Carbado and Mitu Gulati. See Carbado & Gulati, *supra* note [redacted], at 1259 (offering a general discussion of identity performance theory broadly and narrowly in the context of workplace discrimination).

<sup>120</sup> For a visual illustration to demonstrate how the *communication practice* might be organized in relation to the two most influential factors, *preferred outcome* and the *communication approach*, see MARK P. ORBE, *CONSTRUCTING CO-CULTURAL THEORY* 110 (1998) (figure 5.2).

<sup>121</sup> The other four factors include *field of experience* (“[t]he influence of one’s past experiences is an important consideration in the constant, cyclical process of contemplating, choosing, and evaluating co-cultural communicative practices.”); *abilities* (the person’s relative ability to enact different practices may vary depending on “specific personal characteristics and situational circumstances”); *situational context* (the person’s situation, e.g., work, home, school, public or social places, and the existence of others (dominant or co-cultural) in the setting, are all important considerations and may change the person’s communication practice) and *perceived costs and rewards* (“[d]epending on the situational context and preferred outcome, co-cultural group members will evaluate the pros and cons of specific communicative practices differently; often this reflective process is governed by a person’s field of experience.”). Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. \_\_\_\_ (2018) (citing Mark Orbe, *From The Standpoint(s) of Traditionally Muted Groups: Explicating A Co-cultural Communication Theoretical Model*, 8(1) COMM. THEORY 1, 11 (1998)).

1. Two Influential Factors in Determining a Communication Practice

The *preferred outcome* for interaction between outsiders and insiders includes separation, accommodation and assimilation.<sup>122</sup>

When a person *Assimilates* they may “attempt[] to eliminate culture differences, and the loss of any distinctive characteristics, to fit in with the dominant society.”<sup>123</sup> This strategy is probably the most well-known among legal scholars, as specifically mentioned in Yoshino’s work, *Covering*.<sup>124</sup> In *Accommodating*, the co-cultural member does not “live by dominant social rules,” rather they “insist that dominant structures ‘reinvent or, in the least, change the rules’ so that they incorporate the life experiences of each co-cultural group.”<sup>125</sup> The essence of accommodation is really to work with other cultures, and any attempt to mute non-dominant voices is resisted.<sup>126</sup> For example, [the communication practices of] *Confronting* and *Gaining advantage*, both involve aggressive or assertive methods to assert one’s cultural presence in order to

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<sup>122</sup> *Id.* at 89.

<sup>123</sup> ORBE, CONSTRUCTING CO-CULTURAL THEORY, *supra* note 5, at 89. One African-American woman whose job requires her to perform a lot of business over the phone commented:

[T]hey think that they are talking to a white lady on the phone. . . . I didn’t say anything, so I know that they think that I am white when they talk to me on the phone. They talk about me coming down [to Florida] and getting a super tan and all this kind of stuff. That’s fine with me as long as it doesn’t affect my job performance.

*Id.* at 89-90.

<sup>124</sup> Yoshino, *supra* note 13, at 884.

<sup>125</sup> ORBE, CONSTRUCTING CO-CULTURAL THEORY, *supra* note 5, at 91.

<sup>126</sup> *Id.* at 91. One co-cultural group member who had grown up in a housing project, on and off welfare, commented on modest satisfaction gained in sharing their past with the dominant culture:

Everyone is generally pretty good about it . . . and very supportive and encouraging. But every now and then, I’ll make certain comments that catch them off guard. Like once... when we were discussing childhood memories, everyone was talking about these “golden moments,” so I said, “the best thing that ever happened to us was when my father deserted us so that we could get more food stamps.” I love to see their pitiful reactions!

*Id.* at 81.

provoke dominant group reactions and gain advantage.<sup>127</sup> As a point of comparison, some of the communication practices within this accommodation approach may bear some resemblance to the “discomfort strategy” discussed in legal scholarship, where an outsider chooses to emphasize their outsider status so as to make insiders feel uncomfortable.<sup>128</sup> Lastly, the third outcome is *Separation*, which “rejects the notion of forming a common bond with the dominant group members and other co-cultural groups.”<sup>129</sup> This outcome seeks instead to maintain identities separate and largely outside the dominant culture.<sup>130</sup>

The *communication approach* includes nonassertive, assertive and aggressive approaches.<sup>131</sup>

*Nonassertive* behavior puts the needs of others before their own, in a non-confrontational way; this may be inherent in being soft-spoken or strategic.<sup>132</sup> *Assertive* behavior takes into account both self-needs and the needs of others in an attempt to promote everyone’s rights.<sup>133</sup> And *Aggressive* behavior would be those that are perceived as “hurtfully expressive, self-promoting, and assum[es] control over the choices of others.”<sup>134</sup>

## 2. Orbe’s Communication Practices

The value of Orbe’s co-cultural communication practices is the extent

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<sup>127</sup> *Id.* at 55-85.

<sup>128</sup> Carbado & Gulati, *supra* note 12, at 1306.

<sup>129</sup> ORBE, CONSTRUCTING CO-CULTURAL THEORY, *supra* note 5, at 92. An African-American man remarked that it is futile to change or work within the dominant structure,

If you look at the plight of African Americans and other people of color in regards to the beginning of time in this country, an institutional legacy of racism has been ingrained and perpetuated through the years. It has been here so long that you or I are not going to change it.

*Id.* at 92.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 104.

<sup>132</sup> *Id.* (commenting that a soft-spoken example may be a first-generation Asian American woman, while strategic may be the Fortune 500 female employee who knows her male co-workers “won’t listen to women who come off as too confident.”).

<sup>133</sup> *Id.* at 105.

<sup>134</sup> ORBE, CONSTRUCTING CO-CULTURAL THEORY, *supra* note 5, at 105.

to which they enhance the identity strategies already common within legal scholarship. Orbe initially identified twenty-six communication practices<sup>135</sup> derived from oral narratives. A brief description of each practice follows, organized by the preferred outcome they foster.

The communication practices that foster a *preferred outcome* of *Assimilation* include:

- (1) *Emphasizing commonalities* - Focusing on human similarities while downplaying or ignoring co-cultural differences;
- (2) *Developing positive face* - Assuming a gracious communicator stance where one is more considerate, polite, and attentive to dominant group members;
- (3) *Censoring self* - Remaining silent when comments from dominant group members are inappropriate, indirectly insulting, or highly offensive;
- (4) *Averting controversy* - Averting communication away from controversial or potentially dangerous subject areas;
- (5) *Extensive preparation* - Engaging in an extensive amount of detailed (mental, concrete) groundwork prior to interactions with dominant group members;
- (6) *Overcompensating* - Conscious attempts consistently enacted in response to a pervasive fear of discrimination (to become a superstar);
- (7) *Manipulating stereotypes* - Conforming to commonly accepted beliefs about group members as a strategy to exploit them for personal gain;
- (8) *Bargaining* - Striking a covert or overt arrangement with dominant group members where both parties agree to ignore co-cultural differences;
- (9) *Dissociating* - Making a concerted effort to elude any connection with behaviors typically associated with one's co-cultural group;
- (10) *Mirroring* - Adopting dominant group codes in an attempt to make one's co-cultural identity less (or totally not) visible;
- (11) *Strategic distancing* - Avoiding any association with other co-cultural group members in attempt to be perceived as a distinct individual; and
- (12) *Ridiculing self* - Invoking or participating in discourse, either passively or actively, that is demeaning to co-cultural group members.<sup>136</sup>

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<sup>135</sup> Orbe, *supra* note 97, at 27 (commenting that over the past 20 years, scholars have identified additional co-cultural practices) (citing Gina Castle Bell, Mark Hopson, Melinda R. Weathers, and Katy A. Ross, *From 'Laying the Foundations' to Building the House: Extending Orbe's (1998) Co-Cultural Theory to Include 'Rationalization' as a Formal Strategy*, 66(1) COMM. STUDIES 1 (2014)).

<sup>136</sup> Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. \_\_\_\_ (2018) (citing ORBE, CONSTRUCTING CO-CULTURAL THEORY 55-85).

Next, those communication practices that foster a *preferred outcome* of *Accommodation* include:

(13) *Increasing visibility* - Covertly, yet strategically, maintaining a co-cultural presence within dominant structures; (14) *Dispelling stereotypes* - Myths of generalized group characteristics and behaviors are countered through the process of just being one's self; (15) *Communicating self* - Interacting with dominant group members in an authentic, open, and genuine way (used by those with strong self-concepts); (16) *Intragroup networking* - Identifying and working with other co-cultural group members who share common philosophies, convictions, and goals; (17) *Utilizing liaisons* - Identifying specific dominant groups members who can be trusted for support, guidance, and assistance; (18) *Educating others* - Taking the role of teacher in co-cultural interactions; enlightening dominant group members of co-cultural norms, values, etc.; (19) *Confronting* - Using the necessary aggressive methods, including ones that seemingly violate the rights of others, to assert one's voice; (20) *Gaining advantage* - Inserting references to co-cultural oppression as a means to provoke dominant group reactions and gain advantage.<sup>137</sup>

And finally, those communication practices that may result in a *preferred outcome* of *Separation* include:

(21) *Avoiding* - Maintaining a distance from dominant group members by refraining from activities or locations where interaction is likely; (22) *Maintaining interpersonal barriers* - Imposing, through the use of verbal and nonverbal cues, a psychological distance from dominant group members; (23) *Exemplifying strengths* - Promoting the recognition of co-cultural group strengths, past accomplishments, and contributions to society; (24) *Embracing stereotypes* - Applying a negotiated reading to dominant group perceptions and merging them into a positive co-cultural self-concept; (25) *Attacking* - Inflicting psychological pain through personal attacks on dominant group members' self-concept; and (26) *Sabotaging others* - Undermining the ability of dominant group members to take full advantage of their privilege inherent in dominant structures. Also included in this group are the communication practices of "communicating self" and

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<sup>137</sup> Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. \_\_\_\_ (2018) (citing ORBE, CONSTRUCTING CO-CULTURAL THEORY 55-85).

“intragroup networking,” explained in the *Accommodation* section above.<sup>138</sup>

### C. Teaching Identity Performance

*If we do not address issues of diversity, we are – in essence - preparing others for a world that no longer exists.*

Dr. Mark Orbe<sup>139</sup>

In the summer of 2018 I had the wonderful opportunity to attend an innovative diversity training at Ohio University, conducted by Dr. Mark P. Orbe.<sup>140</sup> Orbe is the creator of twenty-six communication practices that stem from the co-cultural theory.<sup>141</sup> Admittedly, I attended both to meet Dr. Orbe, whose expansion of the co-cultural theory was the framework for my own scholarship, as well as to push my research and scholarship further. But after four days, and thirty-hours of intensive training on intercultural communication, cultural identity, diversity theorizing and a myriad of discussions, reflections and processing, I found it impossible to exit that training without being transformed in some meaningful way. The curriculum was thoughtfully and intentionally designed to permit complete strangers –who represented the gamut of races, ethnicities, nationalities, religions, sexual orientations –to seamlessly drift from casual diversity awareness icebreakers, toward cultural identity pyramids processing groups, and into vulnerable spaces of honesty, regret and hope.

<sup>138</sup> Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. \_\_\_\_ (2018) (citing ORBE, CONSTRUCTING CO-CULTURAL THEORY 55-85).

<sup>139</sup> Dr. Mark Orbe, SIDE Summer Institute for Diversity Education, Ohio University Office for Diversity and Inclusion, *Introduction to Diversity Education 4* (2018) (training materials for SIDE 2018 conference) (on file with author). *See also Russell G. Pearce, White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM LAW REVIEW 2081, 2093 (2005)(offering a mode of constructing a professional identity using an “Integration-and-Learning Approach” versus a color-blind model, which “acknowledges the influence of identity group affiliations on lawyers’ work.”).

<sup>140</sup> George E. Mauzy Jr., *Summer Institute for Diversity Education continues to expand its reach in ninth year*, OHIO.EDU (May 30, 2018), [https://www.ohio.edu/compass/stories/17-18/05/side-recap-2018.cfm?utm\\_source=Athens+Campus+Staff+-+Spring+Semester+2018&utm\\_campaign=ca4494bdac-EMAIL\\_CAMPAIGN\\_2018\\_May+31\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_b31ab3ca2b-ca4494bdac-42112949](https://www.ohio.edu/compass/stories/17-18/05/side-recap-2018.cfm?utm_source=Athens+Campus+Staff+-+Spring+Semester+2018&utm_campaign=ca4494bdac-EMAIL_CAMPAIGN_2018_May+31_COPY_01&utm_medium=email&utm_term=0_b31ab3ca2b-ca4494bdac-42112949)

<sup>141</sup> ORBE, CONSTRUCTING CO-CULTURAL THEORY 55-85

I was enlightened and honestly blown away to see this transformation happening not only in me, but in others, right before my eyes. This experience of actually witnessing enlightenment and self-awareness brought to mind the identity work of Melissa Harrison and Margaret Montoya's, where Harrison introspectively questioned:

How do white, Anglo women attempt to step out of that emotionally secure space where we believe that everyone is just like us? First of all, is it possible? While it may not be possible to become the Other or even to understand the Other, we can attempt to know the lives of Others; we can acquire knowledge that helps us to see multiplicity.

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Bathing in my own sea of introspectiveness, I left this training questioning how any of us attempt to step out of the space we occupy – whether that space be one of privilege or inferiority? Is there entitlement in being the Other? That is, have Others (or the media's characterization of Others) somehow ostracized these identities to the point that no one can ever understand their lives, least of all the privileged white person? As a black woman, I carry these oscillating feelings of minority superiority and minority inferiority.<sup>143</sup> In this era of racial tensions, where black and white races are often in the limelight, coupled with the #metoo movement that seeks to empower women, I am a super minority, that is, I bear two infamous identities that garner constant media attention. But, I am also fully aware that these two identities equally render me twice marginalized – an inferiority that I am constantly reminded of – implicitly or explicitly – in my professional and personal life. Echoing Harrison's candid thoughts, I ask in return, how do black women, or Others, step out of a space of justified

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<sup>142</sup> Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 407 (1996). See also Russell G. Pearce, *White Lawyering*, 73 FORDHAM L. REV. 2081, 2083 (2005) (relying on intergroup theory to suggest that “whether they view themselves as color-blind or racist, white lawyers understandably have a tendency to treat whiteness as a neutral norm or baseline, and not a racial identity, and tend to view racial issues as belonging primarily to people of color, whether lawyers or clients. This approach is consistent with, and reinforces, the prevailing professional norm that lawyers should ‘bleach out’ their racial, as well as their other personal, identities.”).

<sup>143</sup> This sentiment could best be described as “double consciousness” as articulated by W.E.B. Dubois. See Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 659 (1993) (“It holds that persons of color see the world in two ways at the same time. The Black person, for example, sees himself as normal and abnormal at the same time—as others see him, and also as he sees himself. It's a familiar feeling we all know.”).

animosity where we are tired of playing the white person's game, in their institutions, and by their rules often unknown to us? Is it possible, or even worth the effort? While it may not be possible for the white person to intimately understand a day in our life, and the exhaustion of code-switching and identity performance, could we set race aside and find other salient and non-salient identity characteristics that could unite us in a common space?<sup>144</sup> Can we, *will we*, allow white people a genuine glimpse into our lives, allowing them to “acquire knowledge that helps [them] to see multiplicity?”<sup>145</sup>

These questions continue to illuminate the beauty and necessity of the borderlands, upon which Harrison & Montoya lean. The borderlands, this murky and often uncomfortable space, by definition, resists a single perspective dominating in order to promote better lawyering.<sup>146</sup> Rather, students are encouraged to “resist essentialism by being constantly aware of different cultures, classes, genders, races, and sexual orientations inhabiting the same space. The borderlands exhort students to be constantly aware of difference. . . . It enables students and lawyers to make ‘critical linkages’ between their ‘stories and the stories of cultural others.’”<sup>147</sup> In other words, the borderlands invite and operate on finding common ground in a culturally diverse society.<sup>148</sup> This commonality is the essential goal of Orbe's

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<sup>144</sup> I attribute this notion of salient and non-salient identities to the work of Dr. Mark Orbe, who has developed a Cultural Identity Pyramid that “increase[s] awareness of how various cultural markers contribute to one's identity and how the saliency of these cultural markers varies from person to person.” SIDE training materials, *Culturally[sic] Identity Pyramid Facilitation Process*, supra note [redacted] (on file with author).

<sup>145</sup> Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 407 (1996).

<sup>146</sup> See Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 412 (1996).

<sup>147</sup> See Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. Cultural competence must include knowledge, skills and motivation GENDER & L. 387, 412 (1996) (cautioning that “[t]he work of Angela Harris, Kimberle Crenshaw, Maria Lugones, and Elizabeth Spelman exhorts us to be constantly aware of difference and not to expropriate the stories of others in order to make those ‘critical linkages[,]’ [and further offering] the borderlands as a trope for understanding the process of rendering oneself vulnerable but open to opposing perspectives, new voices, and different worlds.”).

<sup>148</sup> Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 440 (1996) (“We have utilized the notion of the border to propose new ways of thinking about and teaching about a culturally diverse society where law students

intercultural training. We journey toward the differences, lightly but deliberately, when we start from a place of finding common ground, and in this way we stand a better chance of resisting essentialism.

Relying on both the co-cultural theory and the metaphor of the borderlands as frameworks, I designed a lawyering course titled *Identity, Power & Professional Responsibility* to broadly examine how traditionally marginalized group members use coping strategies to navigate their identities in predominantly white professions.<sup>149</sup>

### 1. *The Seminar: Identity, Power & Professional Responsibility*

This seminar relies on both legal and feminist communication scholarship to engage students in critical and interdisciplinary perspectives of identity performance strategies. Students are also exposed to in-depth communication practices that can actually facilitate conscious identity performance before their legal careers even begin. The lofty goal of this course is to empower law students in their academic journey and legal careers, and provide them with tangible professional and cultural competence skills to navigate their own identities, and to help them better understand the complexities of representing clients within marginalized communities. The professional responsibility arm is the very existence of

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must be adept at interacting with a wide range of clients, peers, and present and future colleagues.”).

<sup>149</sup> This course was first taught at the University of California-Irvine School of Law in the Spring of 2019. While the focus of this Article is on identity performance for law students from marginalized groups, I recognize the need to engage white law students in this conversation, as to how they can manage their privilege responsibly. For scholarship on the issue of responsible white privilege, see Robert J. Razzante & Mark P. Orbe, *Two Sides of the Same Coin: Conceptualizing Dominant Group Theory in the Context of Co-Cultural Theory*, COMM. THEORY (2018) (using dominant group theory to “challenge[] the essentialist assumption that all dominant group members work to reinforce their privileged societal position[,]” noting that through dominant group theory a dominant group member can learn how to resist oppressive structures.”). See also Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 *FORDHAM LAW REVIEW* 2081, 2095, 2096 (2005) (discussing a case study conducted by Ely and Thomas involving 275 retail branches of a bank where an integration-and-learning approach effectively promoted a positive racial environment, and commenting that

If the white lawyers had applied this approach in the case study described above, they would have acted quite differently. First, they would have asked themselves whether their white identity influenced how they perceived and were perceived by their African-American client, the white police officer, and the white judge. Second, from the beginning of the relationship and continuing throughout, they would have invited their client to engage with them openly on issues of race.).

the course itself, as I believe the professional responsibility lies within the law school to adequately prepare its students for an unconscious (but sometimes blatant) enemy of “other” bias.

At the time of designing the course, I identified the following as learning outcomes:<sup>150</sup>

1. Discuss what role the law and society has played in defining whiteness as the dominant culture in the legal profession.
2. Demonstrate a broad understanding of the historical development of identity performance theories emanating from legal and interdisciplinary scholarship.
3. Obtain proficient understanding and awareness of insider/outsider positioning, and create a safe environment to explore differences.
4. Discuss, in depth, several identity performance strategies.
5. Identify major critiques and counter-critiques of identity performance theories/strategies.
6. Engage in diverse perspective as a mode of teaching and learning
7. Communicate effectively, both orally and written, well-organized, and well-supported critical analysis of legal issues in identity performance.
8. Provide professional and critical feedback to peers in their writing and shared ideas.

The fourteen-week seminar course<sup>151</sup> uses three pedagogical tools: critical readings, interactive workshops, and paper presentations. First, students have required and additional readings to provide a substantive foundation of the relevant identity performance scholarship in order to engage in critical perspectives of. The readings and discussion centered around the social construction of whiteness in the legal profession, both the legal and interdisciplinary roots (and themes) of identity performance, critical perspectives on essentialism, contemporary issues in identity performance, and finally critical perspectives on responsible white privilege. Second, the course includes interactive workshops<sup>152</sup> that would allow students to better explore the substantive material they were reading.

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<sup>150</sup> See ABA Standard 301(b) (stating that “[l]earning outcomes for individual courses must be published in the course syllabi.”

[https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2015\\_learning\\_outcomes\\_guidance.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_learning_outcomes_guidance.authcheckdam.pdf)

<sup>151</sup> The course was taught once a week for three-hours.

<sup>152</sup> The interactive workshops would follow two, or perhaps three, weeks of substantive reading/discussion sessions.

The material for the workshops were based largely on Orbe's intensive diversity training workshop<sup>153</sup> and included sessions on creating diverse communities, awareness of insider/outsider positioning, exploration of identity differences, and identity strategy tools. Finally, the course was designed to fulfill an upper-level writing requirement for students – either scholarly or rigorous writing. Various deadlines for the paper were embedded into the syllabus, including pre-emption/thesis checks, outline, rough draft and of course the final submission. In addition, students were given instruction on how to write scholarly papers, as opposed to more instrumental writing from their first year. In the latter half of the course four sessions were allotted for students to present their works in progress to the class, and receive peer and professor feedback.<sup>154</sup>

2. *The Goal: Being changed by diverse perspectives and strategic identity performance tools*

The need for law school instruction on these issues is essential. As I have stated earlier in this article, the reality is that attorneys of marginalized groups perform their identity in numerous ways to succeed in the legal profession. But this phenomenon of identity performance has largely been confined to the scholarly world, and frankly delivered at times on such a theoretical platform that I wonder if a law student, even if they did come across it, would see the relevance for themselves.

It is my sincere hope that this course is transformative for all law students. From a pedagogical standpoint, and really a culmination of the learning outcomes, readings and workshops, I have two larger goals for this course. Borrowing from Orbe's diversity training, the first is for students to recognize that “engaging diverse perspective is a central building block to ‘higher’ forms of teaching and learning;”<sup>155</sup> and the second, to provide students tools for identity negotiation.

In some ways, I worry that the term “diversity” is beginning to gain a poor reputation. That the trainings and workshops that bear its name are

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<sup>153</sup> See information regarding the workshop, *supra* note 139, and accompanying text.

<sup>154</sup> Depending upon enrollment, I anticipated five presentations per class, with each presentation (including speaker and peer feedback) totaling thirty minutes.

<sup>155</sup> Dr. Mark Orbe, SIDE Summer Institute for Diversity Education, Ohio University Office for Diversity and Inclusion, *Introduction to Diversity Education 4* (2018) (training materials for SIDE 2018 conference) (on file with author).

becoming a reactive measure based on a recent incident,<sup>156</sup> or a proactive strategy to obtain more business.<sup>157</sup> But I was moved by Orbe’s description of diversity education, that even with its dialectical tensions,<sup>158</sup> it is an opportunity to move toward a higher echelon of learning – beyond what any casebook could ever teach. Harrison & Montoya also offer a rich insight into the beauty of diversity, one that we miss if we minimize “diversity” down to a business tool. They comment that

the richest meaning of diversity and the most persuasive justification for diversifying the profession along racial and ethnic lines [are ] the collective life experiences that grow out of “race” and skin color (or language or gender or sexual orientation or physical and mental dis/abilities); [they] are the wellspring for more nuanced legal analyses, discourses and skills.<sup>159</sup>

When diversity operates as a mode of learning, we can better train students for internal and external change. From an internal perspective, change is simply a part of human existence, and from an external perspective, as Orbe cautions, “different people have different levels of

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<sup>156</sup> For example, the April 2018 racial incident in a Philadelphia Starbucks franchise sparked a nationwide closure of 8,000 Starbucks stores for a half-day racial bias diversity training. See e.g., Jennifer Calfas, *Starbucks Is Closing All Its U.S. Stores for Diversity Training Day. Experts Say That’s Not Enough*, TIME.COM (May 28, 2018), <http://time.com/5287082/corporate-diversity-training-starbucks-results/> (commenting that corporations, such as Starbucks, “often employ knee-jerk reactions and swift changes to appease an enraged public when controversy arises.”).

<sup>157</sup> See e.g., *Why You Need to Ramp Up Your Diversity & Inclusion Program Today*, GLASSDOOR.COM (June 22, 2017) <https://www.glassdoor.com/employers/blog/why-you-need-to-ramp-up-your-diversity-inclusion-program-today/> (“There’s no better time to be starting or amping up your diversity and inclusion program. These programs are more than just a current trend: research shows that a diverse workforce is good for business and company culture. When you hire for diversity and manage for inclusion, you’re making a critical step toward becoming a recruiting and employer branding powerhouse.”).

<sup>158</sup> Dr. Mark Orbe, SIDE Summer Institute for Diversity Education, Ohio University Office for Diversity and Inclusion, *Introduction to Diversity Education 4* (2018) (training materials for SIDE 2018 conference) (on file with author) (including dialectical tensions as an underlying assumption when engaging in diversity education, that is, we are complex beings that often exists in spaces of tensions of wanting both/and, i.e. we want to feel special, and we want to be normal; we want to be in relationship, but we need time apart).

<sup>159</sup> See Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 420 (1996).

readiness for change.”<sup>160</sup> In that respect, an initial and critical step in this seminar is to build community, to avoid displaying the myriad of ways that people are different, which will likely make everyone resistant to change (and blinded by their own need for it). One of the first interactive workshops allows students to interact with each other, share cultural knowledge, and also plants seeds for self-awareness. The self-awareness comes, in part, through assumptions of cultural knowledge based on ingroup status within that culture. For example, should a person of faith be assumed to know the answer to certain religious questions? Should a black person know the history of Juneteenth? Should it be assumed that only persons of color, or persons from non-privileged groups, have experienced being stereotyped?<sup>161</sup>

After engaging students in diversity through community building, self-awareness of our own stereotypes and biases creates space to have truthful dialogue about the origins of whiteness as the normative standard in the legal profession, and the need for outsider groups to have to rely upon strategies to perform their identities. Simply put, law students who belong to traditionally marginalized groups will not avoid performing their identity in a predominantly white profession. The larger question is whether they will realize when they are engaging in a particular strategy, or will they subconsciously acquiesce to its control. This tension between subconscious and conscious identity performance raises the need for students to have tools of identity performance, my second pedagogical goal for this seminar.

In this seminar, students would engage in an in-depth examination of Orbe’s communication practices stemming from the co-cultural theory,<sup>162</sup> which envelop those strategies already discussed in legal scholarship. Providing students with identity performance tools consciously awakens

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<sup>160</sup> Dr. Mark Orbe, SIDE Summer Institute for Diversity Education, Ohio University Office for Diversity and Inclusion, *Introduction to Diversity Education 4* (2018) (training materials for SIDE 2018 conference) (on file with author).

<sup>161</sup> When I engaged in this exercise during the 2018 SIDE training, I found myself having numerous points of “self-awareness.” One particular moment, I recall, is when I learned that one of the participants, a middle-aged, white, male identified himself as having experienced being stereotyped. One can only imagine how far back my eyes rolled (in my mind of course). As I waited for his response I thought, “this is going to be rich.” And then he indicated his occupation – a police officer. Next thought in my mind, “Yep. He knows about stereotyping.” A middle-aged, white, male (and as I later learned, a Christian), the quintessential image of the dominant culture, was attending a diversity training. Self-awareness, check.

<sup>162</sup> For discussion of Orbe’s communication practices, see *supra* note      and accompanying text.

them to be empowered over their own academic journey and legal careers, and not internalize the insiders' stereotypes to their detriment.

For example, recall earlier I briefly introduced two black male law students, Keith and Jason, one observed more often with the white community and the other observed more by himself, and upon recollection, a member of a black law student affinity group.<sup>163</sup> I questioned what the experiences of each would be like in a predominantly white law firm if their law school interactions remained status quo until their graduation. In this particular instance, I proffer that if Keith and Jason are first made aware that black male attorneys have struggled with their race in white law firms,<sup>164</sup> and are then invited to consider whether aspects of their personality change when they are in dominant spaces, and if so, in what way and under what circumstances. This introspection brings conscious awareness to what may have likely been unconscious identity performance. Finally, relying largely on interdisciplinary tools –which are more expansive than those present in legal scholarship –Keith and Jason can explore how *they* want to bring their culture into that space, whether that be assimilation (trying to fit in with the white culture), accommodation (finding similarities with the white culture, while maintaining important aspects of the black culture), or separation (rejecting the white culture for the black culture). And, as also mentioned earlier, the empowerment is not in whether Keith or Jason's performance decision brings them closer to being coded as white, but rather the empowerment is in deciding the outcome.<sup>165</sup>

#### IV. CONCLUSION

The words of Audre Lorde that began this article ring loudly in my head as I end. Most pointedly that “*in order to survive*, those of us for whom oppression is as American as apple pie have always had to be watchers, to

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<sup>163</sup> See *supra* note 105 and accompanying text.

<sup>164</sup> See *e.g.*, Kevin Woodson, *Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms*, 83 *FORDHAM L. REV.* 2557, 2559-60 (2015) (calling attention to “[c]ultural homophily, the tendency of people to develop rapport and relationships with others on the basis of shared interests and experiences” as an “unacknowledged source of racial disadvantage” as having a “profoundly and often determinatively disadvantage[d]” effect on black attorneys, and “[d]rawing evidence from interviews of seventy-five black attorneys who have worked as associates at large law firms throughout the country, [he] argues that homophily-based behavior deprives many black attorneys of equal access to critical relationship capital in predominantly white firms, thereby reinforcing racial inequality.”).

<sup>165</sup> See *supra* note 108.

become familiar with the language and manners of the oppressor, even sometimes adopting them for some illusion of protection.”<sup>166</sup> Sadly, having a juris doctorate which signals induction into one of the world’s most prestigious professions, a profession that fights for the rights of others, does not always protect its own from being oppressed. Those of us who have our juris doctorates know this. Law students may not.

The passion for this scholarly journey began with introspection into my own law school and law firm experiences. There were some highs, primarily the friends I made along the way, but largely I remember the lows—the scars of racial anxiety, implicit bias, the isolation, the struggle to succeed without mentorship, and my confidence as a good attorney, a “real lawyer,” being shaken to the core, so much so that I quit a six-figure associate position. Keeping my soul intact was more valuable. In many respects my reflections now beg the question of if I knew then what I know now, if I had the tools then that I have now, would my external path have been different. For me, that answer is no.<sup>167</sup> But, I strongly believe the internal angst would have been reduced if I was more aware of my own identity and how I wanted to perform it in a white space. The notion that I could and should keep moving, that my value as a black female attorney was not defined by the white male partner’s racial anxiety, was never taught. In addition to my instruction in contracts, criminal law and the like, that was the critical instruction I did not receive. This gap left me helpless. This article pays it forward, to fill that gap for those law students from marginalized groups that are coming after me.

The need to teach identity performances strategies in law school has a dual effect on the legal profession. On the one hand, and really the impetus of this article, it provides law students from marginalized groups with tools to negotiate their identity. And while I believe there is empowerment in conscious identity performance, let me be clear, it is exhausting and a

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<sup>166</sup> Audre Lorde, “Age, Race, Class and Sex: Women Redefining Difference,” in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 114 (Crossing Press, 1984), <http://www.socialism.com/drupal-6.8/sites/all/pdf/class/Lorde-Age%20Race%20Class%20and%20Sex.pdf>. See also Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 *FORDHAM LAW REVIEW* 2081, 2082 (2005) (“As white people, we too often view racial issues as belonging to people of color. We tend to do that in one of two ways. Some whites believe that race generally does not matter except in the rare case of an intentional racist. Other whites view whites generally as racists and look to people of color to tell them how to understand issues of race.”).

<sup>167</sup> I actually think not because I believe in a Creator who does not make mistakes, and has always directed my steps.

burden. That being said, on the other hand, I believe there is an important discourse that identity performance illuminates, which targets the dominant group. Essentialism. Essentialism is the idea that there exist a monolithic experience for all members of the same group, and it perpetuates both ingroup and outgroup stereotypes, adding yet another barrier to genuinely engaging in diverse perspectives.<sup>168</sup>

Let's return to Keith and Jason to illustrate this point. Essentialism would say that Keith and Jason, both being black males, would have the same "black" experience, and thus wear their black identity the same. If this is the viewpoint of the white attorneys at the white law firm, that all black people are the same, then Keith and Jason's experiences will turn on whomever is more successful at "acting white," –in other words, who assimilates the best. This outcome is damaging to both sides. Keith and Jason have their very identities, and arguably their careers, unfairly subject to the whims of white privilege. And the white attorneys remain stagnant in an abyss of prejudice. The inability of Keith and Jason to control how they want to perform their identity, I argue, is strongly correlated to the white attorney's incapability to see Keith and Jason as individuals. This narrow viewpoint aborts the higher level of teaching and learning that engaging in diverse perspectives brings.

But if Keith and Jason develop personal identity tools they are better positioned to fend off subconscious or strategic essentialism. The way in essentialism combats dominant oppression is best illustrated through the

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<sup>168</sup> A prominent voice on essentialism is Angela Harris and her work, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588-89 (1990), where she discusses the monolithic experience:

The notion that there is a monolithic "women's experience" that can be described independent of other facets of experience like race, class, and sexual orientation is one I refer to in this essay as "gender essentialism." A corollary to gender essentialism is "racial essentialism"—the belief that there is a monolithic "Black Experience," or "Chicano Experience." The source of gender and racial essentialism (and all other essentialisms, for the list of categories could be infinitely multiplied) is the second voice, the voice that claims to speak for all. The result of essentialism is to reduce the lives of people who experience multiple forms of oppression to addition problems: "racism + sexism ÷ straight black women's experience," or "racism + sexism + homophobia ÷ black lesbian experience." Thus, in an essentialist world, black women's experience will always be forcibly fragmented before being subjected to analysis, as those who are "only interested in race" and those who are "only interested in gender" take their separate slices of our lives.

provocative narrative of Richard Delgado and his fictional protégé in *Rodrigo's Chronicles*.<sup>169</sup>

Delgado, a prominent critical race theorist, vividly portrays race in America through the life of Rodrigo – an African-American and Italian-trained lawyer who is mentored by a learned American professor schooled in the ways of critical race theory.<sup>170</sup> In *Rodrigo's Sixth Chronicle*, Rodrigo and the professor discuss the “perils of making a common cause” with the dominant group.<sup>171</sup> This reflection comes about when Rodrigo walks in on a Law Women’s Caucus meeting during a heated debate between white and black women.<sup>172</sup> The women were discussing essentialism, and, perhaps to Rodrigo’s reputational demise, he interjected his thoughts that solidarity, or interest-convergence, was needed between both groups as a sense of preservation against a larger and more powerful force - men.<sup>173</sup> Rodrigo regarded this relational essentialism as requiring

Black women [to join] join white women, but not because both groups have the very same experience, perspective, needs, and agendas. They don't. Rather, it's because they stand on the same footing with respect to patriarchy. In this respect, they are essentially the same, that is, oppressed and in need of relief.<sup>174</sup>

But upon reflection (and largely in response to his girlfriend –a Law Women’s Caucus member –shunning him), Rodrigo seemed more willing to recognize the slippery slope of essentialism, and, as the professor offered,

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<sup>169</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993). See also Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 421 (1996) (discussing the “‘La Ma/inche Paradox’ -the impulse to collaborate with the dominant culture, to use in Audre Lorde’s words ‘the Master’s tools,’ to learn the oppressor’s languages out of a desire, at once, to rescue one’s community, to save oneself, to subvert the colonizer. Translation practices, legal and cultural, can be a form of resistance, but they are fraught with pitfalls.”).

<sup>170</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 639 (1993).

<sup>171</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 647 (1993).

<sup>172</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 648 (1993).

<sup>173</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 648 (1993).

<sup>174</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 649 (1993).

its “desire to simplify others.”<sup>175</sup>

At this moment in the essay, Rodrigo offers three reasons why, as a prelude to the above quote, “an outsider cannot play along, as it were, with the relatively more empowered group that wants to essentialize it.... [That] it is always a big mistake to take the perspective of the larger, more empowered group, even for strategic reasons.”<sup>176</sup> The first reason is strategic, that it is better to “march along more slowly in your own direction” than to join in some semblance of solidarity with a more powerful group whose ultimate goals are not our own, because “we [outsiders] will eventually change.”<sup>177</sup>

[T]he price of strategic essentialism is not only that you get away from your agenda and your heart-of-hearts goals. You'll develop [a] false consciousness. You'll forget who you are and what your original goals and commitments were. Goals, personal identities, and loyalties are socially constructed. If we work and struggle with people—no matter how well-intentioned—whose perspectives, culture, and agenda are different from ours, we will eventually change.<sup>178</sup>

The second reason turns on social altruism.<sup>179</sup> That is, as Rodrigo suggests, social gains in civil rights are successful only if they “coincide with white self-interests[, but] [i]n eras in which white self-interest and Black justice are not aligned, nothing happens.”<sup>180</sup> There is, as in the first reason, a false sense of hope that coalitions with the dominant group will

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<sup>175</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 650, 651 (1993) (using the example of a Black woman, who is neither a Black male or a white woman, Rodrigo acknowledges that she “has to choose, and neither choice is comfortable. Neither category is hers.”).

<sup>176</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 650, 652 (1993).

<sup>177</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 652-53 (1993).

<sup>178</sup> Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 406 (1996) (citing Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 653 (1993) (attributing term “false consciousness” to Antonia Gramsci, and discussing the first reason why strategic essentialism is dangerous for the outsider)).

<sup>179</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 654 (1993).

<sup>180</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 654 (1993).

advance an outsiders “special needs” when the dominant group “[does] not have [the outsider’s] interest at heart.”<sup>181</sup> And worse than an outsiders needs being forgotten, “[y]ou’ll forget who you are.”<sup>182</sup> Finally, the third reason, is that rights that are gained from a collective effort are eventually narrowed to limit, or exclude altogether, their applicability within a marginalized group.<sup>183</sup>

While Delgado’s championing for anti-essentialism has received some skepticism,<sup>184</sup> I offer it here because it seamlessly foreshadows the theories underlying co-cultural theory, namely that the outsider perspective permits a double-vision that is beneficial to society as a whole.<sup>185</sup> The outsider is a “possessor of multiple consciousness [and] learns to see everything through two or more lenses at once . . . giv[ing] [her] a better grasp of reality.”<sup>186</sup> She avoids being nearsighted or blind to systemic defects within the dominant culture, and this vantage point actually provides her with a valuable platform to stand on.<sup>187</sup> Based on this positioning, Delgado “urg[es] [ ] outsiders [ ] to hang onto their peculiar form of social insight, maintain it pristine and separate[,]” which benefits the larger group.<sup>188</sup> Specifically, “[t]hey get careful outside criticism. They get a certain degree of protection from complacency by reason of the need to vie for the support of potential allies in outside groups. They get constant reminders that our perspective is not the only one.”<sup>189</sup>

<sup>181</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 655 (1993).

<sup>182</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 655 (1993).

<sup>183</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 655-56 (1993) (commenting on women’s collective victory in the right to an abortion, ultimately marginalized poor women who could not afford an abortion, and women of color – particularly Black women – whose “sexuality came under fire” as being sexually “irresponsible, and [using] abortion as a means of birth control [and thus] an abuse of a right.”).

<sup>184</sup> Add authority?

<sup>185</sup> On the discussion of double vision in non-dominant cultures, see Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. \_\_ (forthcoming 2018) (citing MARK P. ORBE, *CONSTRUCTING CO-CULTURAL THEORY: AN EXPLICATION OF CULTURE, POWER, AND COMMUNICATION* 29 (1998)).

<sup>186</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 660 (1993).

<sup>187</sup> See Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 660-61 (1993).

<sup>188</sup> See Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 660-61 (1993).

<sup>189</sup> See Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 664 (1993) (“I know it sounds

It is within this positional awareness that I situate the communication practices of co-cultural theory for outsiders, and subsequently advocate for its instruction in law schools. As it stands, the limited identity strategies offered in the current legal scholarship seem to assume that assimilation is an outsider's best or perhaps only choice within a dominant culture, offering performance options along the assimilation spectrum (e.g. covering, passing, conversion, comforting). But those choices deny an outsider's positioning as being something pristine and socially valuable. Teaching Orbe's co-cultural theory communication practices, however, give substantive wings to Delgado's desire to empower outsiders, and specifically our law students, as agents of social change.

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paradoxical, Professor. But bear with me [Rodrigo] for a minute. Merging with the larger group causes you to forfeit a kind of sightedness. So it's bad for you. But it's also bad for the larger group because dissenters who agree to remain in the larger movements eventually become coopted and alienated from their own position, with the result that the larger group loses an important source of criticism, a kind of early warning signal from which they could learn something. Systemic evils, like racism and sexism, are never visible within the culture, because those evils are woven into the paradigm-into the system of meanings by which we construct and understand reality. Speech is paradigm-dependent. And, if racism-or any other evil-is embedded in that paradigm, one can't speak out against it without being heard as incoherent. That's why racism and sexism are harder to correct than scientific error.”).