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## Conscious Identity Performance

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# Conscious Identity Performance

LESLIE P. CULVER\*

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\* © 2018 Leslie P. Culver. Professor of Legal Writing and Director of A.I.M. for Law, California Western School of Law; Visiting Professor of Lawyering Skills, University of California, Irvine School of Law. First, I thank God for directing my steps. Second, my husband Carl, for his unending support in providing the space to work and encouragement to excel. Third, to Devon Carbado (UCLA) for his comments that pushed this important contribution further. Fourth, Dr. Mark P. Orbe (Western Michigan), whose groundbreaking work in co-cultural communication, and for his comments on earlier drafts. Fifth, my colleagues at California Western whose comments, and research support were invaluable in earlier stages: William Aceves, Hannah Brenner, Scott Ehrlich, India Thusi, and Linda Weathers—my research guru. Sixth, to my Lutie Lytle sisters whose insightful comments on this work were transformative, particularly Stacy Hawkins (Rutgers), Osamudia James (Miami), and Angela Onwuachi-Willig (UC Berkeley). Next, to my wonderful legal writing colleagues who helped provide shape and affirmation when this article was just an idea, Terrill Pollman (UNLV), Alyssa Dragnich (ASU), Linda Berger (UNLV), and Teri McMurtry-Chubb (Mercer). Finally, my sincere gratitude to my research assistants Shandi Korte and Liza Ahmed for their faithful dedication.

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## I. INTRODUCTION

*I hear [the Soul of White Folk,—this modern Prometheus's] mighty cry reverberating through the world, "I am white!" Well and good, O Prometheus, divine thief! Is not the world wide enough for two colors, for many little shinings of the sun? Why, then, devour your own vitals if I answer even as proudly, "I am black!"*

—W.E.B. Du Bois<sup>1</sup>

I offer the story of Jason and Keith,<sup>2</sup> two of my former students, both black males. Jason was outgoing and outwardly perceived as a gregarious individual usually surrounded by his law school peers, most of whom were white.<sup>3</sup> Keith, on the other hand, appeared more reserved in the law school setting and I frequently observed him sitting with a little distance between himself and his predominately white classmates. In the year that both of these young men were in my class I do not recall observing them interacting with each other. Keith was a member of the Black Law Student Association (BLSA) and a regular visitor during my office hours to talk about both academic and nonacademic items—as relevant disclosure, I am a black female. Jason, to my knowledge, was not an active member of BLSA and, as I recall, attended my office hours only during mandatory writing conferences or group presentations. Presume that both of these young men will graduate law school with comparable academic credentials, similar work

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1. W.E.B. DU BOIS, DARKWATER: VOICES FROM WITHIN THE VEIL 66 (1920).

2. These names have been changed to preserve anonymity.

3. I recognize his peer choice may also reflect the predominantly white racial make-up of his law school class.

experience, and laudable extracurricular activities, and thereafter apply to the same predominantly white law firm. Affording individual freedom to how these young men choose to wear or give meaning to their race, one might wonder what inferences will be drawn when asked whether Jason or Keith is more likely to have a successful legal career at that law firm.

People in the legal profession from traditionally marginalized groups—termed “outsiders”—sometimes feel pressure to perform strategies to communicate their identity in a predominantly white, heterosexual, male profession. Building upon outsider strategies to combat prejudice or assimilate, which legal scholarship describes in terms such as *covering* and *passing*, the diversity crisis in the legal profession signals the need for a deeper understanding of identity communication and strategies. The existence of such strategies raises important questions, such as whether attorneys from marginalized groups should be intentional or passive in performing their identity. This question assumes attorneys are consciously choosing such strategies, as opposed to responding subconsciously to their circumstances. Ultimately, the discussion of identity strategies already prevalent in legal scholarship provides a valuable starting point for the communication scholars’ co-cultural theory to offer further insight into communication strategies that may move the needle in this critical space.

This Article centers on the application of the co-cultural theory, which largely discusses the communication styles of nondominant groups within a dominant culture. In summary, the co-cultural theory views, from the standpoint of the marginalized person, how nondominant cultures communicate and negotiate their identity within dominant structures.<sup>4</sup> The co-cultural theory is a blend of the *muted group theory* and *standpoint theory*. First, the muted group theory, from the field of anthropology, suggests that where there is a power difference between two groups in a society, one group is rendered mute.<sup>5</sup> For example, men are the dominant group in many societal hierarchies, so when men and women are present in the same space, it is likely that men talk more and not only for themselves, but potentially for

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4. MARK P. ORBE, CONSTRUCTING CO-CULTURAL THEORY: AN EXPLICATION OF CULTURE, POWER, AND COMMUNICATION 32 (Margaret Seawell et al. eds., 1998); Mark P. Orbe, *Laying the Foundation for Co-Cultural Communication Theory: An Inductive Approach to Studying “Non-Dominant” Communication Strategies and the Factors that Influence Them*, 47 COMM. STUD. 157, 160 (1996) [hereinafter *Laying the Foundation*]; Marsha Houston Stanback & W. Barnett Pearce, *Talking to “The Man”*: Some Communication Strategies Used by Members of “Subordinate” Social Groups, 67 Q.J. SPEECH 21, 23 (1981).

5. See ORBE, *supra* note 4, at 4; Edwin Ardener, *Belief and the Problem of Women*, in PERCEIVING WOMEN 1, 2 (Shirley Ardener ed., 1975).

women too.<sup>6</sup> Second, the standpoint theory, originating from feminist scholars, analyzes the lived experiences of marginalized people from their individual vantage point.<sup>7</sup> Equally important to this theory is to remain both conscious of, and sensitive to, the standpoints “among” various groups—for example, women, people of color, and LGBTQ+—as well as “within specific groups”—for example, African Americans.<sup>8</sup>

By unifying these two theories, communication scholars created a valuable framework in the co-cultural theory. Specifically, the theory studies the communication practices of marginalized groups, who are normally without a significant voice in the dominant white culture—muted group theory—and does so from their viewpoint—standpoint theory. One of the hallmark features of the co-cultural theory is its reliance on a German-developed human science research process known as “phenomenology.”<sup>9</sup> This methodology focuses on the conscious experiences of how a person relates to the world, and with such focus, it moves away from traditional empirical research and toward inclusion of the subject group members’ perspective, as they are best positioned as the expert on their own life and life experiences.<sup>10</sup> Another highly regarded feature is the communication orientation paradigm that communication scholar Dr. Mark Orbe developed after his significant studies on the intergroup communicative practices of African-American men.<sup>11</sup> This notable orientation identifies twenty-six communication practices that describe how nondominant cultures communicate with the dominant culture.<sup>12</sup> Now, which communication practice is employed turns on several factors, two preeminent being the “preferred outcome” the nondominant group member desires with the dominant culture, as well as which “communication approach” the nondominant group member chooses to utilize.<sup>13</sup>

Orbe’s “communication orientation” paradigm, with its micro-level narratives, provides insight into how better to understand the basic identity performance strategies legal scholars rely upon.<sup>14</sup> This Article explores

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6. See Ardener, *supra* note 5.

7. See ORBE, *supra* note 4, at 30.

8. *Id.* at 28 (emphasis added).

9. *Id.* at 36; Orbe, *supra* note 4, at 159.

10. ORBE, *supra* note 4, at 36; Orbe, *supra* note 4, at 159.

11. ORBE, *supra* note 4, at 48 (discussing his 1992 graduate paper, *African American Graduate Students, Their Majority Host Institution, and Ethnic Prejudice: A Bright Side?*, for which he interviewed nine African American male graduate students and later thirty-five African American men in 1993 as part of his dissertation, resulting in his 1994 work, “Remember, It’s Always Whites’ Ball”: *Descriptions of African American Male Communication*); Orbe, *supra* note 4, at 159.

12. ORBE, *supra* note 4, at 55.

13. *Id.* at 15.

14. *Id.* at 129.

what it might 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.

This exploration of identity strategies begins, in Part II, with a discussion of the forerunners in legal scholarship whose work touches on identity performance strategies of outsider attorneys. Part III provides relevant background on the co-cultural theory, and most importantly, the communicative practices, outcomes and approaches of traditionally marginalized group members within a dominant society. Finally, Part IV demonstrates the depth of identity strategies outsiders gain through the co-cultural communication practices by applying the theory on attorney narratives. The overarching claim of this Article is that conscious identity performance is an indispensable step toward empowerment for outsiders in the legal profession, who might otherwise internalize the insiders' stereotypes to their detriment.

At the outset, I offer a few clarifications. The terms *diverse*, *marginalized*, *nondominant/dominant*, *outsider/insider*, and *co-cultural* are used at different points. While the terms collectively point to members of society traditionally seen as underrepresented, including women, racial and ethnic minorities, LGBTQ+, and people with disabilities, the terms connote a different meaning in context. The term *diverse*, more readily known in the legal community, is used primarily when discussing the legal profession. The term *marginalized* is used to describe the societal and emotional positioning of these diverse groups, who may often be discriminated against and be a source of discomfort for those unfamiliar with the respective cultural identity. Similarly, the terms *nondominant* and *dominant* are used when discussing the power differential between marginalized groups in society—for example, white and black people. Finally, the use of certain terms is maintained in context with a particular theory or attributing scholar. For example, the terms *outsider* and *insider* are used when discussing identity strategies in legal scholarship, and the term *co-cultural*, when examining the co-cultural theory.

## II. IDENTITY PERFORMANCE STRATEGIES IN LEGAL SCHOLARSHIP

Several legal scholars have examined how marginalized attorneys negotiate their identity through various strategies in predominantly white work settings. In *Working Identity*, Devon Carbado and Mitu Gulati highlight the multiple ways in which nonwhites constantly make choices—or are perceived to make choices—about how to present their differences.<sup>15</sup> In addition, Kenji Yoshino’s work, *Covering*, examines similar terrain, focusing particular attention on the tension between retaining an identity stigma—for example, being gay—without participating in activities stereotypically associated with that stigma—for example, gay activism.<sup>16</sup> He frames this tension in terms of “assimilation bias.”<sup>17</sup> Below, I elaborate on these works and illustrate how the communication framework builds on each of them.

In *Working Identity*, Carbado and Gulati discuss the strategies that people use when negotiating and performing their identity in the workplace, particularly in the face of positive and negative stereotypes.<sup>18</sup> Falling along a continuum, Carbado and Gulati discuss “passing” and “comforting” as basic strategies used to combat prejudice, with the strategy choice turning on “[t]he individual and institutional context.”<sup>19</sup> “Passing” is described as “the phenomenon of fooling insiders into believing that an outsider is one of them.”<sup>20</sup> The term *passing* can arguably be traced back to the 1929 novel of the same name, by Nella Larsen, and described in more detail in the 1981 work of Marsha Houston Stanback and W. Barnett Pearce.<sup>21</sup> This strategy may occur, for example, where a “light-skinned, straight-haired” African-American is perceived as white;<sup>22</sup> a gay person is perceived as a heterosexual; or Jew as a gentile.<sup>23</sup> Because only a small subset can pass 100% of the time, an outsider may try “*partial passing* . . . where the outsider’s

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15. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1272 (2000).

16. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772, 779 (2002).

17. *Id.*

18. Carbado & Gulati, *supra* note 15, at 1270.

19. *Id.* at 1300–01. For discussion on how these strategy categories are similar to Orbe’s influential factors, situational context and field of experience, see *infra* notes 104, 132–135 and accompanying text.

20. Carbado & Gulati, *supra* note 15, at 1300.

21. See NELLA LARSEN, *QUICKSAND AND PASSING* 150, 157–61 (Deborah E. McDowell ed. 1986) (detailing a scene in Harlem in the 1920’s where character Irene Redfield, a light-skinned black woman, questions whether another woman, Clare Kendry, “suspect[s] that she was a Negro,” as she had always been taken “for an Italian, a Spaniard, a Mexican or a gipsy[.]” and then discussing how Clare, also a light-skinned black woman, gets on with the “hazardous business of ‘passing.’”); see generally Stanback & Pearce, *supra* note 4.

22. *Id.* at 25 (citing HAROLD GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* 116–85 (1967))

23. Carbado & Gulati, *supra* note 15, at 1300.

status is known, but he or she can take actions to modify the social meaning of or stereotypical assumptions about that status.”<sup>24</sup> Second, “comforting” is when an outsider performs certain acts to “make insiders comfortable with their outsider status.”<sup>25</sup> In this strategy the outsider’s status is clear, but how the outsider will “work her identity to make the insider feel at ease” is the question.<sup>26</sup> These two strategies often work in concert. That is, the more an outsider engages in passing—100% or partial—the more comfort insiders derive from this implicit racial subordination.<sup>27</sup>

As a vivid example of both passing and comforting, Carbado and Gulati provide the scenario of an Asian-American scientist, who is subject to a racial perception that Asian-Americans, while “exceptional” in the scientific field, “are not deemed trustworthy” and are “conflicted about their loyalty to the United States.”<sup>28</sup> In this scenario, a pending promotion will require both success in scientific knowledge as it relates to weapons research and the ability to work well in teams.<sup>29</sup> The authors ask, “[w]hat kinds of strategies might the . . . Asian-Americans take in order to comfort (appear less foreign and more ‘American’ to) their seniors?”<sup>30</sup> The authors suggest *comfort* strategies including emphasizing an American college education, playing stereotypical American sports such as football or baseball, associating only with mainstream Americans, altering Asian sounding names to sound white, or even “mak[ing] fun of stereotypical Asian accents.”<sup>31</sup> In so doing, these *comforting* strategies are chosen to make white superiors feel at ease and simultaneously are intended to make Asian-American outsiders seem like “‘one of the guys,’ despite [their] outsider status”—that is, *partial passing*.<sup>32</sup>

Kenji Yoshino’s work also demonstrates the use of identity strategies in legal scholarship. In *Covering*, Yoshino confronts an “antidiscrimination schism” between racial minorities and women on the one hand, and gays on the other.<sup>33</sup> His work explores the view that in antidiscrimination law, groups such as gays, who are perceptively able to assimilate into mainstream

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24. *Id.* at 1301 (emphasis added).

25. *Id.*

26. *Id.* at 1301–02.

27. *See id.* at 1301 n.111.

28. *Id.* at 1302.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1302–03 (footnote omitted).

33. Yoshino, *supra* note 16, at 772, 779, 875–89.



society, are perceived as less worthy of societal concern and legal protection.<sup>34</sup> In challenging this notion that assimilation is somehow “the cure to many social ills,” he argues that sexual minorities find a common cause with racial minorities and women by offering “a new perspective on the relationship between assimilation and discrimination.”<sup>35</sup> Readily acknowledging that gays can assimilate in more ways than women or racial minorities, who are limited by their “‘immutable’ and ‘visible characteristics,’” he frankly challenges antidiscrimination jurisprudence that embodies an assimilationist bias against gays by distinguishing among three forms of assimilation: *conversion*, *passing*, and *covering*.<sup>36</sup> His work defines conversion to mean “the underlying identity is altered,” and it occurs, for example, “when a lesbian changes her orientation to become straight.”<sup>37</sup> “Passing means the underlying identity is not altered, but hidden” and it occurs, for example, “when a lesbian presents herself to the world as straight.”<sup>38</sup> Finally, “[c]overing means the underlying identity is neither altered nor hidden, but is downplayed [and] occurs when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation.”<sup>39</sup>

As an extensive cultural example of covering, which he maintains is an often-subtle form of discrimination worthy of protection, Yoshino sets forth the story of Lawrence Mungin.<sup>40</sup> Mungin, an African-American Navy veteran and Harvard College and Law School graduate, sued his former law firm employer for race discrimination in 1994.<sup>41</sup> Mungin worked most of his life “to be one of the ‘good blacks’ [and] assimilate[d]” into white culture, but after a series of career setbacks, he resigned to the fact that these roadblocks were due to his race.<sup>42</sup> Mungin’s narrative sets out many ways in which he sought to cover his race, beginning in his early childhood. For example, even though his black mother was not ashamed of being black, she told her children, “You are a human being first, . . . an American second, a black

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34. *Id.* at 771, 779.

35. *Id.* at 771–72.

36. *Id.* at 771, 779.

37. *Id.* at 772.

38. *Id.*

39. *Id.*

40. *Id.* at 879 (citing PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999)).

41. *See id.* *See generally* Mungin v. Katten Muchin & Zavis, 116 F.3d 1549 (D.C. Cir. 1997); Randall L. Kennedy, *Playing by the Rules: A Snapshot of Race Relations at Century’s End*, HARV. MAG., <https://harvardmagazine.com/1999/01/browser.html> [<https://perma.cc/D5FV-B565>].

42. Yoshino, *supra* note 16, at 879 (citing PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999)).

third,” thereby emphasizing covering.<sup>43</sup> Her children were punished if they spoke improper English, she discouraged racial activist politics, and she advised her children that the “existing system would treat them fairly if they played by its rules.”<sup>44</sup> On this motherly advice, in middle school Mungin skipped lunch to avoid being seen in the black lunch line, and in high school he participated in the debate team, student government, and became “the school’s first African-American senior class president.”<sup>45</sup>

After high school, Mungin continued to ignore his racial identity. He attended Harvard University based off a non-racially orientated college tour, laughed at “racially laden comments,” and avoided black affinity campus groups or spaces.<sup>46</sup> During his time at Harvard Law School, he continued his racial avoidance and essentially disassociated himself from all black groups<sup>47</sup> as well as criticized his black peers for concerning themselves over issues such as the lack of tenured minority professors.<sup>48</sup> Mungin covered his blackness well by remaining silent concerning racial incidents he did encounter, with such omissions intended to increase “the comfort level of whites around” him.<sup>49</sup> As Mungin moved into his prestigious law firm, Katten Muchin & Zavis, his covering continued, “extend[ing] to his dress, his speech, his dissociation from other African Americans, and his silence in the face of perceived racial slights,” and he further underscored his

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43. *Id.* at 880; PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* 24 (1999).

44. Yoshino, *supra* note 16, at 881; *see also* BARRETT, *supra* note 43, at 24; KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 128–30 (2006); Richard D. Kahlenberg, *The Practice*, N.Y. TIMES ON WEB (Jan. 3, 1999), <http://www.nytimes.com/books/99/01/03/reviews/990103.03kahlent.html> [<https://perma.cc/6FQP-ZHHZ>].

45. Yoshino, *supra* note 16, at 881 (citing BARRETT, *supra* note 43, at 29–31).

46. *Id.* (citing BARRETT, *supra* note 43, at 64–66); Kennedy, *supra* note 41 (“He did not participate in black student organizations, did not sit at the black table in dining halls, did not seek out black roommates, and did not commit himself to changing society on behalf of black interests. He thought that it made little sense to come to Harvard, the apex of the white power elite, only to retreat into a black social cocoon.”).

47. Yoshino, *supra* note 16, at 881–82 (citing BARRETT, *supra* note 43, at 75) (noting Mungin refused to join the Black Law Student Association and had a white roommate, who was Paul Barrett); Kahlenberg, *supra* note 44.

48. BARRETT, *supra* note 43, at 76; Kennedy, *supra* note 41 (“While many of [his black colleagues] worked on remembering where they came from, he worked on trying to escape the clinging grip of his roots. He saw race consciousness not as a vehicle for liberation, but as an old, unattractive cage. He sought his salvation not in challenging established protocols, but in carefully respecting them. He embraced passionately his mother’s oft-stated axiom—‘Play by the rules and the system will treat you right.’”).

49. Yoshino, *supra* note 16, at 882.

Harvard education in part because he knew this pedigree was a “reassuring signal to whites.”<sup>50</sup> Mungin’s story goes on, and he was ultimately successful in his lawsuit against his law firm.<sup>51</sup>

Carbado and Gulati’s story of Asian-American junior scientists and Yoshino’s recount of Mungin’s story pointedly demonstrates, as Yoshino comments, “how pervasively and deeply such covering [and other strategic identity] demands affect the individuals on whom they are made.”<sup>52</sup> These stories also raise critical questions: Do outsiders, almost as if by some normative matter, rightly reject their cultural identity for professional success? Is there a cost in doing so? Moreover, is there any cost or effect upon insiders as contributors to the outsiders’ burden?<sup>53</sup> In the end, Mungin felt the sting of his choice to assimilate and dissociate himself from his culture.<sup>54</sup> Despite his conscious investment in the “‘racial-comfort strategy’ of covering,” Mungin ultimately failed in his attempt to “show that [he] was like white people,” that he was “one of the *good* blacks.”<sup>55</sup>

Notably, the impact of *comfort* and *passing* as identity strategies on insiders, as Carbado and Gulati intuitively suggest, is that the insider employer escapes confronting assumptions and stereotypes about the outsider.<sup>56</sup> For

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50. *Id.* at 882–83 (citing BARRETT, *supra* note 43, at 41); *see also* Kennedy, *supra* note 41 (noting Mungin joined the law firm in Washington, D.C. in 1992).

51. *See* Kahlenberg, *supra* note 44 (“Mungin believed that he was seen as ‘a racial token’ rather than as ‘a real lawyer,’ but white appeals court judges nullified the jury verdict, finding it not ‘reasonable.’ One of Mungin’s own lawyers told Barrett it was ‘questionable’ whether Mungin’s mistreatment was related to race.”); Kennedy, *supra* note 41 (“A jury consisting of a white person and five blacks agreed and awarded him an astounding \$2-million judgment—\$1 million in compensatory damages, and \$1 million in punitive damages—one of the largest awards of this type on record. . . . But [interestingly while the white judge upheld the jury’s verdict,] a divided panel of the United States Court of Appeals nullified Mungin’s victory, [with one judge maintaining the jury verdict was erroneous, but still upholding the finding of racial discrimination, while] two conservative Republican white judges . . . decided that no reasonable juror could have concluded on the basis of evidence presented at trial that [the firm] racially discriminated against Mungin in terms of pay, work environment, or promotion.”).

52. Yoshino, *supra* note 16, at 880.

53. This notion of rejecting with a cost is aptly considered in Orbe’s communication practice of perceived costs and rewards, discussed *infra* notes 104, 132 and accompanying text.

54. Yoshino, *supra* note 16, at 884 (quoting BARRETT, *supra* note 43, at 6).

55. *Id.* at 884 (footnote omitted). Expressing the cost of covering, Mungin remarked: I was going to have to be more publicly honest about the lie that I was living. It wasn’t that I was around people who were open minded, who thought blacks are terrific. It’s that I was bending over backward all the time to avoid making white people uncomfortable. Like my neighbors in Alexandria: Now I’m just tired of making them feel comfortable, I don’t even talk to them. If they say hello, I’ll say hello, but I don’t even bother anymore making them feel comfortable late at night. It’s too much work.

*Id.* at 885 (quoting BARRETT, *supra* note 43, at 163).

56. Carbado & Gulati, *supra* note 15, at 1303.

example, when an insider states, “We don’t really think of you as . . . Asian-American,” the insider is deceitfully granted liberation from their own stereotyping by engaging in “outsider exceptionalism.”<sup>57</sup> In other words, simply because the insider believes the outsider is an exception to the stereotype, subjective freedom from being a racist sets in.<sup>58</sup>

Carbado and Gulati’s work alongside Yoshino’s work are presented to show not only the existing discourse of identity strategies in legal scholarship, but also to demonstrate a fundamental gap in *outsider* empowerment—and subsequently *insider* reform. That is, the urgency for outsiders to have more tools to intentionally or consciously choose how *they* perform their identity in the dominant culture.

Intuitively, Carbado and Gulati raise this question of intentionality as they discuss outsider employees that would signal concern: (1) the outsider who intends to use an identity strategy—that is, partially pass; (2) the outsider who is aware her conduct could be perceived as employing a particular identity strategy, but does not necessarily intend that perception as the outcome; and (3) the outsider who is simply clueless as to how his conduct may be interpreted.<sup>59</sup> Central to this Article’s thesis, an appropriate query arises: What might it look like for these outsiders to have an expanse of identity communication strategies in order to be mindful of both their communication approach and intended outcome? This Article suggests the tools to engage in this mindfulness or “intentionality,” per Carbado and Gulati’s recommended vocabulary,<sup>60</sup> are inadequate within the current legal scholarship and yet arguably necessary so outsiders do not have their work performance subject to the whim of the insiders’ interpretations of intentional or unintentional identity strategies. To this point, Carbado and Gulati almost foreshadow the room and need for outsider empowerment over their own identity performance, stating, “[e]ven without any intentionality on the employees’ part, [an outsider’s] professional standing within an institution can be enhanced or diminished depending on whether and to what extent their workplace conduct can be interpreted [by insiders] as partial passing.”<sup>61</sup>

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57. *Id.* (emphasis omitted).

58. *Id.*

59. *Id.* at 1303–04.

60. *Id.* at 1303.

61. *Id.* at 1304.

### III. TALKING TO THE MAN: FOUNDATIONS OF CO-CULTURAL THEORY EXTENDING FROM MUTED GROUP, STANDPOINT, AND SUBORDINATE COMMUNICATION THEORIES

The interdisciplinary theoretical framework in this Article is responsive to what I believe are the identity strategy gaps in the current legal scholarship, as identified in Part II. Specifically, marginalized attorneys would benefit from a deeper understanding of identity based on the equally formative work by feminist and communication scholars known as the co-cultural theory. The level of detail described in the communication practices, almost a micro-level catalogue of descriptive choices, empowers the outsider to govern their professional choices. The following Section briefly provides relevant background on the co-cultural theory, discussing first its anthropological roots in the muted group theory—examining women’s subdued speech in the presence of men; second, its incorporation of the standpoint theory—deriving its name from focusing on life from the standpoint of the outsider; and finally, the broadening of co-cultural theory based on general communication strategies for subordinate social groups.

#### A. *Muted Group Origins: From Cameroon to the United States*

*We are, for practical purposes, in a male world. The study of women is on a level little higher than the study of ducks and fowls they commonly own—a mere bird-watching indeed. . . . It is the very inarticulateness of women that is the technical part of the problem they present.*

—Edwin Ardener<sup>62</sup>

Muted groups exist in any society that includes asymmetrical power relationships.<sup>63</sup> The muted group theory originated with England’s Shirley and Edwin Ardener in 1968<sup>64</sup> and was then adopted as a theoretical framework in the United States by feminist communication theorists, Cheris Kramarae in 1981,<sup>65</sup> and later by Mark P. Orbe in 1994.<sup>66</sup> The extension of the muted group from England to the United States proved worthwhile, as muted group became one of the formative components of the co-cultural theory.

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62. Ardener, *supra* note 5, at 1–2.

63. See ORBE, *supra* note 4, at 4.

64. See generally *Obituary*, ANTHROPOLOGY TODAY, Dec. 1987, at 21.

65. See generally CHERIS KRAMARAE, WOMEN AND MEN SPEAKING: FRAMEWORKS FOR ANALYSIS (1981).

66. See generally Orbe, *supra* note 4.

In 1968, Edwin Ardener, an English social anthropologist, had a revolutionary discovery that led to the muted group theory.<sup>67</sup> During his study of female puberty rites of the Bakweri women living in Cameroon, Ardener found that the interpretation and symbolism of these female rites were articulated by the *male* voice.<sup>68</sup> In his findings, he noted that social anthropology had purported to “‘crack the code’ of [various] societies, without any direct reference to the female group.”<sup>69</sup> To be clear, Ardener was not suggesting the problem was the “position of women,” rather it was the problem women presented to anthropologists.<sup>70</sup> Most notably, men in the group were bridging the communication gap for women, and the ethnographer’s models of an entire society were derived from having conversed only with men, though the men purported to have included women.<sup>71</sup> The problem with a society’s code being male dominated was more than an “injustice to women” in two respects: first, women’s models were not deemed “acceptable at first sight to men or to ethnographers,” and second, women’s metalanguage for describing their model of society was insufficient in the male structure.<sup>72</sup> Ardener’s perceived inability for women to communicate in the male-dominated society insightfully segues into feminist theorist contention, that is, women are arguably unlikely to be heard entirely or even just distinctly unless they adopt the male voice or idiom that established the asymmetrical hierarchy to begin with.

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67. See *Obituary*, *supra* note 64, at 23 (noting Ardener’s “1968 Documentary and Linguistic Evidence for the Rise of the Trading Policies between Rio del Rey and Cameroon 1500–1650,” which led to the development of the muted group theory).

68. Ardener, *supra* note 5, at 1.

69. *Id.*

70. *Id.* at 1–2. Technically, where any linguistic difficulties were present between the ethnographer and the studied group, not surprisingly, the men of the group, more so than women, were willing to bridge that communication gap. *Id.* at 2. In other words, the men were speaking for the entire group, thus, the interpreters, and ethnographers were “more likely to be found among men than among women.” *Id.*

71. *Id.* at 1–3. As to the analytical quandary, Ardener poetically revealed a disturbing problem, that is,

if the models of a society made by most ethnographers tend to be models derived from the male portion of that society, how does the symbolic weight of that other mass of persons—half or more of a normal human population, as we have accepted—express itself? . . . The fact is that no one could come back from an ethnographic study of “the X,” having talked only *to* women, and *about* men, without professional comment and some self-doubt. *The reverse can and does happen constantly.*

*Id.* at 3 (emphasis added).

72. *Id.*

In 1981, Cheris Kramarae was arguably the first to extend Ardener's muted group theory to the field of communication.<sup>73</sup> One of her greatest contributions was her view that unless women used a male idiom to speak, they were largely muted because their language was "developed largely out of male perception of reality."<sup>74</sup>

In this space of potential female silence, Kramarae's work demonstrates women's creativity in brokering their identity and voice in a male-dominated world. For example, because men determine the acceptable values and models of the world, "women have had to learn the language structure of the dominant group, [and] men have seldom had to discern or have wanted to discern the women's model of the world."<sup>75</sup> In addition, females have found ways to "express themselves outside the systems used by males," not surprisingly, because *his* language—written or spoken—is acceptable by other males, far more acceptable than any forms or modes women produce.<sup>76</sup> It follows then, as Kramarae's work found, that men's language simply did "not fit the expressive needs of women."<sup>77</sup> And so, in this male-dominated society, her work foreshadows a sentiment of this Article, when she asks, "[w]hat happens if women define the nature of their interactions?"<sup>78</sup> Ultimately, the overlay of the muted group theory and Kramarae's gender and language research is remarkable in that the *muted* group's theoretical

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73. KRAMARAE, *supra* note 65, at xvi–xvii.

74. *Id.* at 2. The three frameworks, outside of the muted group theory that Kramarae analyzed, include the work of Jacques Lacan, a French psychoanalyst, modified by Cora Kaplan, which is labeled *reconstructed psychoanalysis*. *Id.* at xvi–xvii. Like the muted group theory, reconstructed psychoanalysis is concerned with "general organization of culture and thought, and the relation of language structure to both women's and men's self-conceptions and to their articulation of their experience." *Id.* The other two frameworks—"speech styles," which includes the work of Howard Giles, social psychologist, and "strategy model," which includes the work of several American and British anthropologists—both stress "the uses of language in social life—the how and why men and women speak the way they do." *Id.* at xvii, 2, 4. Also noteworthy is Nancy Henley's work in 1977 and Judith Hall's work in 1977, which suggests women are restricted to a language structure primarily designed by men, and thus are often largely reduced to nonverbal expression. *Id.* at 17–18. Kramarae posits that,

Henley's material on the way nonverbal expression can be used to establish and maintain power differentials indicates both sexes understand basically the same communication system. But they may not have equal access to all parts of the system. The muted group theory suggests that we need to look at the possibly different ways women and men use verbal and nonverbal methods of communication.

*Id.* at 18.

75. *Id.* at 9 (referencing work, in addition to her own, by George Gerbner and Nancy Signorielli).

76. *Id.* at 12, 14.

77. *Id.* at 25.

78. *Id.* at 30 (emphasis added).

tenets, paradoxically, gave *voice*, vocabulary, and vision to an important but under regarded population.

### B. Standpoint Theory and Subordinate Social Groups

In addition to the muted group theory, Orbe's co-cultural communication work relied upon the *standpoint theory*<sup>79</sup> and general communication strategies proposed across all subordinate group members.<sup>80</sup>

Briefly, standpoint theory is a feminist theoretical framework that explores marginalized viewpoints from both *within* and *outside* male dominated institutions.<sup>81</sup> Its most notable feature is its starting point. That is, this theory makes a conscious attempt to start by capturing the lived experiences of marginalized group members while remaining sensitive to the various standpoints within any one co-cultural group.<sup>82</sup> In other words, this theory explores the communication strategies of those without societal power

79. See ORBE, *supra* note 4, at 1, 27; see also Russell Powell, *Theology in Public Reason and Legal Discourse: A Case for the Preferential Option for the Poor*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 327, 382 (2009); NANCY C. M. HARTSOCK, MONEY, SEX, AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM 12 (Nicole Benevento et al. eds., 1983); SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE?, at vii, x (1991). Although the work of Hartsock and Harding is beyond the scope of this Article, both authors used standpoint theory as an epistemological lens for transforming unjust societies that have largely ignored women and to philosophically challenge any arguments that suggest some social situations are better than others. Powell, *supra*, at 383 (quoting Sandra Harding, *Rethinking Standpoint Epistemology: What is "Strong Objectivity"?*, in FEMINIST EPISTEMOLOGIES 49, 61 (Linda Alcoff & Elizabeth Potter eds., 1993); see also Dorothy E. Smith, *Women's Perspective as a Radical Critique of Sociology*, in THE FEMINIST STANDPOINT THEORY READER: INTELLECTUAL & POLITICAL CONTROVERSIES 21, 25–26 (Sandra Harding ed., 2004).

80. See Stanback & Pearce, *supra* note 4, at 23.

81. ORBE, *supra* note 4, at 4. In 1972, Dorothy E. Smith, a feminist scholar, was the earliest standpoint theorist to remark that women are "outside and subservient to" a male dominated structure, one that men both live and work in, unlike women. Smith, *supra* note 79, at 26. With a sociological focus, Smith noted that the methods and theories foundational to sociology were built in a "male social universe (even when women have participated in its doing)," thus it was difficult for sociologists to transpose the "actualities of what people say and do" into governing conceptions when what was relevant was viewed "from the top"—that is, from the male perspective. *Id.* at 22–23. In many ways similar to Kramarae's work, Smith explored how the women's point of view, as both *within* and *outside* male dominated institutions, might change how society views social relations. Powell, *supra* note 79; see also ORBE, *supra* note 4, at 27.

82. ORBE, *supra* note 4, at 25, 28 (noting standpoint theory rejects traditional research methodology that generalizes scientific findings).



from *their own* lived experiences—from *their* individual vantage point.<sup>83</sup> It is this outsider-within perspective that fortifies its critical inclusion within the co-cultural theory.<sup>84</sup> Specifically, because marginalized group members live and function on the outside of dominant societal structures, they can view not only their own position, but are best positioned to see a more complete picture of the existing dominant structure, a view largely unattainable by privileged dominant group members.<sup>85</sup> As Orbe comments,

To survive and succeed in society, those persons marginalized by dominant structures must be attentive to the perspective of the dominant group and their own. In other words, a “double vision” is established that advocates an awareness of and sensitivity to both the dominant worldview and their own perspective. Because of the privileged stance, those persons positioned in the center of societal structures do not develop a similar double vision but focus solely on the dominant worldview of society. The result of this, as compared to the standpoint of marginalized groups members, is a partial view of reality.<sup>86</sup>

In some respects, in the same way the dominant group has only a partial view of reality due to its *inside* positioning, it could be suggested that nondominant groups similarly have an incomplete or biased picture of reality based on their *outside* positioning. But the converse is more likely, namely that at some point nondominant group members will “gain access . . . into dominant structures,” even if temporary, and thus be able to experience behaviors and thought processes from a unique yet distant vantage point that most dominant group members will not have.<sup>87</sup> For example, take the previously mentioned light-skinned, African-American woman with straight, black hair who passes as white<sup>88</sup>: as long as white people believe she fits into their dominant structure and they treat her accordingly, she has gained access into the dominant group and thus obtained both *inside* and *outside* positioning—otherwise known as double vision.

Finally, later work proposed four general communication strategies across all subordinate group members, to which many legal scholars could attribute their identity strategy lexicon.<sup>89</sup> These strategies are used by nondominant—

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83. *Id.* at 30. For example, scholars should be mindful of the standpoints among co-cultural groups—women, people of color, LGBTQ—as well as within specific groups—African Americans.

84. *See id.* at 29 (“Since life perspectives emerge from one’s daily life experiences, knowledge from the standpoint of marginalized group members cannot be fully grasped by those persons privileged by a dominant group positioning.”).

85. *Id.*

86. *Id.* (citation omitted).

87. *Id.* at 29–30.

88. *See supra* text accompanying note 22.

89. *See Stanback & Pearce, supra* note 4, at 21–22 (“There are particularly stringent demands on the performances by members of ‘inferior’ groups when they communicate with persons from the dominant group. Somehow they must work within the constraints

or “lower-stateded”<sup>90</sup>—group members to negotiate the expectations of the dominant culture, and include: “*tomming*,” *passing*, “[*s*]hucking,” and “*dissembling*.”<sup>91</sup> Of these four, the strategy most recognized within legal scholarship is *passing*, as discussed earlier.<sup>92</sup> According to Stanback and

imposed by their own intentions and concepts of self and the ‘agreed-upon’ script lines about how such communication should go.”)

90. *Id.* at 23–24 (discussing perspectives that “lower-stateded” persons assume based on how they perceive the relationship between themselves and the dominate culture, of which the “co-cultural” perspective is the most relevant, where it accepts the hierarchical or status differences between these groups, “but strives to develop a culture which includes selected aspects of both”). The other two perspectives are “monocultural,” which denies any unequal status, thus the person “treats the two groups as if they were the same” and “other-cultural,” which “accepts the differences between the groups and is willing to maintain it.” *Id.* at 23.

91. ORBE, *supra* note 4, at 32–33; Stanback & Pearce, *supra* note 4, at 23 (noting these strategies are all performed from the perspective of the lower-stateded person and presume the dominant person has a specific expectation about how the communication between the two groups should proceed).

92. *See supra* pp. 582–84, 586–87. The other three strategies include: (1) *Tomming*: drawn from the main character in Harriet Becher Stowe’s *Uncle Tom’s Cabin*. ORBE, *supra* note 4, at 32. “Tomming occurs when a member of a subordinate group accepts the way s/he is perceived and expected to act as valid, and communicates with members of the dominant group exactly as they expect him/her to do.” Stanback & Pearce, *supra* note 4, at 24. Each instance of tomming serves to further separate the dominant from the nondominant group, as the latter group sadly reflects a self-concept that has internalized a negative but pervasive stereotype rooted in the dominant social structure. *Id.* In this regard, tomming reinforces the division of the two groups by participating in a process that exemplifies this divergent social hierarchy. *Id.* (2) *Shucking*: “a term used by American Blacks to identify a form of communication in which they behaviorally conform to racial stereotypes while cognitively rejecting the meaning associated with those behaviors and stereotypes.” *Id.* at 25. Similar to tomming, in that it conforms to the behavioral expectations of the dominant culture, shucking nonetheless involves a different cognitive experience by the nondominant group member. *Id.* at 25–26. Specifically, where those who engage in tomming do so consistently, implying a sense of internalization, those who engage in shucking do so “only when they must,” with a conscious realization that the performance of a particularly stereotype, often disliked, is necessary “to accomplish particular goals.” *Id.* (3) *Dissembling*: this “occurs when a person of a lower-stateded group conforms to the behavioral expectations but disregards the meaning associated with those behaviors by the higher stateded group.” *Id.* at 26. Like tomming and shucking, a dissembler engages in the expected behavior. *Id.* But unlike tomming, dissembling does not accept those stereotypes as true, rather simply pretends that he or she does, and unlike shucking, the negative values of particular stereotype are irrelevant to the dissembler. *Id.* Why would a person do this? The researchers suggest that because dissemblers essentially disassociate themselves from any meaning that may be ascribed to a behavior, the dissembler is affirmatively choosing to perform them simply “defines them as a stratagem to accomplish particular purposes, not as an involuntary participation in a degrading act.” *Id.* at 26–27. In putting these strategies together, sans the passing strategy, take for example a woman who receives help from a man to put gas into her car or lift a heavy box. If she were *tomming*, she would accept and have internalized

Pearce, “[p]assing occurs when a member of a subordinate group acts as if s/he were actually a member of the dominant group.”<sup>93</sup> Interestingly, this strategy has a subtle form of deception: the person *passing* is walking in a role they know to be fraudulent, yet the passer has, to varying degrees, intimate knowledge of the communicative role of the dominant group to be successful in this pseudo-dominant capacity.<sup>94</sup>

The distinctive combination of the muted group theory, standpoint theory, and particularly the subordinate communication strategies provides the foundation for Orbe’s co-cultural communication orientations and strategies.

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the stereotype that woman are weaker and less capable than men, and thus accept the help. If she were *shucking*, she would cognitively detest the stereotype that woman are weaker and less capable than men, but would still accept the help because she desires neither to put the gas in her car nor to lift a heavy box. Finally, if she were *dissembling* she would again allow the man to help her pump gas into her car or lift the heavy box, but she would not put any value in his perceived stereotype of her; rather, she would voluntarily play the proverbial damsel-in-distress because she just rided herself of having to engage in the mundane tasks. Neither her self-perception nor worldview are altered. Life goes on as she planned.

93. Stanback & Pearce, *supra* note 4, at 25. For example, as has been previously mentioned, when a light-skinned African-American person or a light skinned Mexican, with straight hair, passes as a white person, they choose to navigate their identity in the dominant structure, thus avoiding—without denying their legitimacy—any mannerisms, values or behaviors largely representative of their nondominant group. *See id.*; *see also supra* text accompanying note 22.

94. Stanback & Pearce, *supra* note 4, at 25.

## IV. A RICHER PERSPECTIVE: UNDERSTANDING CO-CULTURAL THEORY

The co-cultural theory<sup>95</sup> is the study of interactions between dominant and nondominant cultures.<sup>96</sup> While this definition is simplistic in nature, one person can live at the intersection of both a dominant—for example, male or heterosexual—and nondominant—for example, African-American or lesbian—group.<sup>97</sup> This intersectionality, as critical race theorists would

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95. I take care to maintain the use of the term *co-cultural* when discussing Orbe's co-cultural theory—or co-cultural theorizing as he later describes it—based on the belief that the United States is a country made up of different cultures that co-exist with each other, but do not necessarily stand in co-equal positioning. See ORBE, *supra* note 4, at 2; Mark P. Orbe & Tabatha L. Roberts, *Co-Cultural Theorizing: Foundations, Applications, and Extensions*, 23 HOW. J. COMM. 293, 294, 302 (2012). Co-cultural also acknowledges how real power differences are not inherent or natural but can be socio-politically created. See generally Mark P. Orbe, *The Rhetoric of Race, Culture, and Identity: Rachel Dolezal as Co-cultural Group Member*, 6 J. CONTEMP. RHETORIC 23 (2016) [hereinafter *Rhetoric of Race*] (analyzing rhetoric of Rachel Dolezal, a biologically white woman who embraces a black cultural identity, thus claiming a cultural outsider identity that prompted various co-cultural communication orientations and practices geared toward specific preferred outcomes, namely accommodation and ultimately total assimilation). Orbe comments that previous terms as used by other researchers, such as subordinate, inferior, minority, subcultural, nondominant, or muted, are not reflective of modern communication scholar's adoption of co-cultural, which represent "a conscious attempt to avoid the problematic nature of existing terms that frame marginalized group members as secondary in importance and submissive to the powers of dominant society." ORBE, *supra* note 4, at 30. That said, even in the use of the term co-cultural that supposes no single culture is inherently superior to another, Orbe readily acknowledges that over time, one co-culture group, that of the "European-American heterosexual middle- or upper-class males[,] has acquired dominant group status in the major societal institutions." *Id.* at 2. I wrestle with the use of this term in the legal context because *co* appropriately and ambitiously signals equal positioning of sorts, or at least the ideal of that positioning. As Orbe recognizes, however, the European white heterosexual able-bodied male is the dominant co-cultural group. *Id.* More pointedly, because the European heterosexual white male so dominates in the legal profession, will the term *co-cultural* readily resonate with the legal community? In accordance with that query, perhaps there is room for the co-cultural theory to add a plus factor to the intersectionality work of Kimberle Crenshaw, which aptly parsed out race from gender, for example, in antidiscrimination law. See generally 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, 139. For a discussion of how the power difference between nondominant and dominant groups adds an additional burden to identity performance, see *infra* note 180 and accompanying text.

96. ORBE, *supra* note 4, at 50.

97. *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." Orbe, *Rhetoric of Race*, *supra* note 95, at 28 (commenting that research on white students in an

term it, or “multileveled co-cultural group position[ing],” as Orbe describes it, demonstrates the complexity that can result from “co-cultural oppression”—oppression between co-cultural group members.<sup>98</sup> To some extent, we are all privileged in some aspects and disadvantaged in others.<sup>99</sup>

With this complex, multi-level positioning in mind, co-cultural communication research explores the “common patterns of communication across . . . different marginalized groups” by creating a theoretical framework to promote understanding as to how marginalized group members, those seemingly without societal power, communicate within dominant structures.<sup>100</sup> To be clear, while Orbe is not credited with coining the term “co-cultural,”<sup>101</sup> he maintains its use to affirm the modern movement of communication scholars away from seemingly negative terms previously assigned to marginalized group members.<sup>102</sup> He is rightly credited, however, with creating twenty-six communication strategies and orientations that co-researchers use when interacting with the dominant culture, which are influenced by preferred communication outcomes and approaches.<sup>103</sup>

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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.”)

98. ORBE, *supra* note 4, at 51 (discussing research confirming “the existence of co-cultural oppression” as in the 1982 work of Hull, Scott, and Smith—which drew attention to sexism and racism facing African-American women—and Luna’s 1989 work on gay racism).

99. *Id.* (discussing work by Collins from 1990 regarding “penalty and privilege”).

100. *Id.* at 4 (emphasis omitted). Born from his early work exploring the communicative practices and experiences of African-American graduate students, Orbe questioned whether other underrepresented groups—people of color, LGBT, women, those from lower socioeconomic status—similarly communicated with an inter-group cultural system, and if these groups created “communication strategies and coping mechanisms to function in an oppressive society. *Id.* at 48 (discussing his 1992 graduate paper, *African American Graduate Students, Their Majority Host Institution, and Ethnic Prejudice: A Bright Side?*, for which he interviewed nine African-American male graduate students, and later thirty-five African-American men in 1993 as part of his dissertation, resulting in his 1994 work “Remember, It’s Always Whites’ Ball”: *Descriptions of African American Male Communication*).

101. For example, Stanback and Pearce used this term in their work in 1981, as noted in the previous section, to describe a “perspective [that] accepts the difference between the groups but strives to develop a culture which includes selected aspects of both.” Stanback & Pearce, *supra* note 4, at 23.

102. Regarding the use of “co-cultural” in the legal profession, see *supra* note 95.

103. ORBE, *supra* note 4, at 55. Central to understanding the communication strategies of co-cultural groups is capturing the personal experiences of its members, which is achieved through the phenomenological process. *See id.* at 35–36. Developed by German scholars, phenomenology, the study of life world, is a popular communication research methodology focusing on “the conscious experience of a person relating to the lived world that she or he inhabits.” *Id.* at 36 (citations omitted); Orbe, *Laying the Foundation*, *supra* note 4, at 159. The method reflects a general movement in the communication field away from traditional empirical research and toward inclusion of the subject group members as “co-researchers” who are naturally viewed as the expert on their own life and life experiences.

Without undermining the sophistication of the co-cultural theory, its tenets can be simplified in the following regard: from the oral narratives of nondominant, co-cultural members—or outsiders—numerous *communication themes or practices* developed that described how they communicated in a dominant society. The intriguing query is when certain practices are used. Simply put, the answer turns on six interrelated factors: *preferred outcome, field of experience, abilities, situational context, perceived costs and rewards, and communication approach*.<sup>104</sup> The two most prominent are the *preferred outcome* for an interaction with the dominant culture and the *communication approach* that nondominant person relies on.<sup>105</sup> In view of this multistep conscious consideration for identity performance, the value of this framework to the marginalized within the legal profession is almost palpable.<sup>106</sup>

For a visual illustration, Orbe's communication orientation chart demonstrates how the *communication practices*—text within the box—might be organized in relation to the two most influential factors, *preferred outcome*—along the horizontal axis: separation, accommodation, assimilation—and the *communication approach*—along the vertical axis: nonassertive, assertive, aggressive.<sup>107</sup>

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ORBE, *supra* note 4, at 13 (noting the term “co-researchers” is intentionally used by communication scholars to recognize “the interactive role these persons play in shaping research outcomes”); *see also* Orbe, *Laying the Foundation*, *supra* note 4, at 160. This phenomenological approach, that is, human science research, purports to give a “voice to the voiceless,” thus making it both a logical and critical research method for co-cultural theorizing as the latter relies on gaining insight into the dominant society from the standpoint of the nondominant group member. Orbe, *Laying the Foundation*, *supra* note 4, at 160. Relevant is phenomenology's reliance on the conscious experiences of co-researchers who self-assign meaning to their experiences—that is, *capta*—rather than hypothetical situations where the interviewers assign meaning, usually via a pre-set agenda—that is, *data*. *Id.*

104. ORBE, *supra* note 4, at 89–106.

105. *Id.* at 89, 104.

106. The term “identity performance” is credited to Devon Carbado and Mitu Gulati. Carbado & Gulati, *supra* note 15, at 1262 (offering a general discussion of identity performance theory broadly and narrowly in the context of workplace discrimination).

107. ORBE, *supra* note 4, at 110 fig.5.2.

	SEPARATION	ACCOMMODATION	ASSIMILATION
NONASSERTIVE	Avoiding  Maintaining Interpersonal Barriers	Increasing Visibility  Dispelling Stereotypes	Emphasizing Commonalities  Developing Positive Face  Censoring Self  Averting Controversy
ASSERTIVE	Communicating Self  Intragroup Networking  Exemplifying Strengths  Embracing Stereotypes	Communicating Self  Intragroup Networking  Utilizing Liaisons  Educating Others	Extensive Preparation  Overcompensating  Manipulating Stereotypes  Bargaining
AGGRESSIVE	Attacking  Sabotaging Others	Confronting  Gaining Advantage	Dissociating  Mirroring  Strategic Distancing  Ridiculing Self

#### A. Communication Practices

The co-cultural communication practices provide an expansive lexicon that enhances the current identity strategies already common within legal scholarship. In this regard, the intricate detail of the co-cultural communication practices, of which Orbe identified twenty-six at the start,<sup>108</sup> arose from oral narratives and simply cannot be underscored enough.

Beginning with those communication practices that foster a *preferred outcome of assimilation*,<sup>109</sup> they 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

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108. Orbe, *Rhetoric of Race*, *supra* note 95, at 27 (commenting that over the past twenty years, scholars have identified additional co-cultural practices).

109. Starting from the top right of the chart above and moving down.

group members; (3) *censoring self*—remaining silent when comments from dominant group members are inappropriate, indirectly insulting, or highly offensive; (4) *averting controversy*—veering 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; (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>110</sup>

Next, those communication practices that foster a *preferred outcome of accommodation*<sup>111</sup> 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;<sup>112</sup> (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 group 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-

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110. ORBE, *supra* note 4, at 16–18 tbl.1.1.

111. Starting from the middle column of the chart *supra* p. 598 and moving downward.

112. This is used by those with strong self-concepts.



cultural oppression as a means to provoke dominant group reactions and gain advantage.<sup>113</sup>

And finally, those communication practices that may result in a *preferred outcome of separation*<sup>114</sup> 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.<sup>115</sup> Also included in this group are the communication practices of *communicating self* and *intragroup networking*, explained in the *accommodation* section above.<sup>116</sup>

### B. Factors that Influence a Communication Practice

Next, the six interrelated factors that influence which communication practice a person may choose are: *preferred outcome*, *field of experience*, *abilities*, *situational context*, *perceived costs and rewards*, and *communication approach*.<sup>117</sup>

One of the fundamental factors is the *preferred outcome* of interacting with the dominant culture; this factor exists along the horizontal axis of the chart, and includes separation, accommodation, and assimilation.<sup>118</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>119</sup> This strategy is probably the most well-known among legal

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113. ORBE, *supra* note 4, at 16–18 tbl.1.1.1.

114. Starting from the top left of the chart *supra* p. 598 and moving downward.

115. ORBE, *supra* note 4, at 16–18 tbl.1.1.1.

116. *Id.*

117. *Id.* at 89–106.

118. *See id.* at 89.

119. *Id.* 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.

scholars, as specifically mentioned in Yoshino's work, *Covering*.<sup>120</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>121</sup> The essence of accommodation is really to work with other cultures, and any attempt to mute nondominant voices is resisted.<sup>122</sup> For example, *confronting* and *gaining advantage*, both involve aggressive or assertive methods to assert one's cultural presence in order to provoke dominant group reactions and gain advantage.<sup>123</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 to make insiders feel uncomfortable.<sup>124</sup> Lastly, the third outcome is *separation*, which "rejects the notion of forming a common bond with dominant group members and other co-cultural groups."<sup>125</sup> This outcome seeks instead to maintain identities separate and largely outside the dominant culture.<sup>126</sup>

The second fundamental factor, *communication approach*, exists along the vertical axis of the chart,<sup>127</sup> and includes nonassertive, assertive, and aggressive approaches.<sup>128</sup> *Nonassertive* behavior puts the needs of others

120. Yoshino, *supra* note 16, at 884.

121. ORBE, *supra* note 4, at 91.

122. *Id.* 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.

123. *Id.* at 79–81.

124. Carbado & Gulati, *supra* note 15, at 1306.

125. ORBE, *supra* note 4, 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.*

126. *Id.*

127. *See supra* p. 598.

128. ORBE, *supra* note 4, at 104.

before one's own in a nonconfrontational way; this may be inherent in being soft-spoken or strategic.<sup>129</sup> *Assertive* behavior takes into account both self-needs and the needs of others in an attempt to promote everyone's rights.<sup>130</sup> And *Aggressive* behavior would be that "perceived as hurtfully expressive, self-promoting, and assuming control over the choices of others."<sup>131</sup>

Briefly, but relevant, the other four factors include (3) *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";<sup>132</sup> (4) *abilities*—"the person's relative ability to enact different practices . . . may vary greatly depending on specific personal characteristics and situational circumstances";<sup>133</sup> (5) *situational context*—the person's situation, for example, 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;<sup>134</sup> and (6) *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."<sup>135</sup> The heightened insight these factors provide are illuminated when analyzed within attorney narratives.

#### V. CO-CULTURAL THEORY AS A FRAMEWORK FOR CONSCIOUS IDENTITY PERFORMANCE

As a normative matter, the discussion of identity strategy in the legal profession affects all attorneys. It may noticeably target traditionally underrepresented attorneys as the struggle for promotion opportunities for these groups continues, but it also tacitly exposes the negative stereotyping

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129. *Id.* (commenting that a soft-spoken example may be a "first-generation Asian American wom[a]n," 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.").

130. *Id.* at 105.

131. *Id.* (emphasis omitted).

132. Mark Orbe, *From the Standpoint(s) of Traditionally Muted Groups: Explicating A Co-Cultural Communication Theoretical Model*, COMM. THEORY, Feb. 1998, at 1, 11 [hereinafter *Traditionally Muted Groups*].

133. *Id.*

134. *Id.* at 12; ORBE, *supra* note 4, at 98–99 (noting 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.").

135. Orbe, *Traditionally Muted Groups*, *supra* note 132, at 12.

and other biases within the dominant culture, many of which escape legal exposure under traditional antidiscrimination law.<sup>136</sup>

To my knowledge, this Article is the first to extend the co-cultural theory to legal scholarship and does so as a complementary identity strategy framework. Specifically, the discussion thus far has demonstrated where basic identity strategies have appeared in legal scholarship to provide a base for the co-cultural theory to find common ground.

At the outset, there are potential limitations in suggesting identity strategies. First, the outsider's identity performance may be subconscious, as Carbado and Gulati observed in *Working Identity*, foreclosing then the ability to operate with conscious consideration.<sup>137</sup> Second, even if outsiders were conscious of their strategic choices, do they really want to—and should they have to—work that hard purely to communicate with an insider? Recall Lawrence Mungin, who eventually found himself in this space when his near lifetime of racial covering efforts still did not permit him entrance into the white-only club.<sup>138</sup> The focus of this Article, however, is introducing, through an interdisciplinary lens, depth to the existing identity strategies in legal scholarship. This enhancement is useful even if we have not yet resolved future problems.<sup>139</sup>

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136. Carbado & Gulati, *supra* note 15, at 1293 (noting identity negotiations are problematic in antidiscrimination law in three senses: “First, identity negotiations involve costs that are not captured by current antidiscrimination regimes (the ‘capture problem’). Second, to the extent that a person engages in certain strategic identity negotiations, she undermines her ability subsequently to bring a discrimination claim (the ‘evidentiary problem’). Third, antidiscrimination law reflects the problematic presumption that an employer who hires several outsiders, and fails to promote some is not motivated by discriminatory reasons (the ‘doctrinal problem’).”).

137. *Id.* at 1277–78 (“In modeling identity performance as a function of conscious strategic choices, we do not mean to suggest that all identity-related decisions are a product of conscious strategizing. Just as a significant amount of the stereotyping that occurs tends to operate at a subconscious or unconscious level, we expect that a significant portion of the outsider responses to these stereotypes also operates at the subconscious or unconscious level. The conscious-behavior model is a simplifying mechanism to understand what is undoubtedly a more complex phenomenon.”) (footnote omitted).

138. *See supra* pp. 584–86.

139. Future work will discuss the need to teach conscious identity performance in the law school curriculum, as an arm of professional responsibility and ethics curricula. Specifically, the need to broaden existing identity categories through the incorporation of co-cultural theory, thus deepening teaching tools for professors. As a result, I suggest that diverse law students, in particular, are empowered to consciously navigate their academic journey and legal careers, and not internalize the insiders' stereotypes to their detriment. Further, students are provided with the lexicon and social intelligence for representing clients within marginalized communities.

With this background, the following section applies the co-cultural theory to the narrative experiences of diverse attorneys, by first suggesting co-cultural communication practice(s) their experiences might demonstrate, and thereafter articulating the availability of a conscious strategic choice for negotiating their identity. This section also demonstrates the insight one gains from viewing the communication practices from the marginalized perspective. The application is both broadening and empowering.

A. *To Be Gay or Not to Be Gay, That Is the Question: James Leipold*

James Leipold, Executive Director of the National Association of Law Placement (NALP), recounts his own law school experience in the early nineties, particularly regarding whether to reveal his sexual orientation on his resume.<sup>140</sup> He writes,

At the time I experimented by circulating two different resumes, one on which I was out, noting my leadership role in the LGBT student organization at my law school, and one on which I was not out. In my experience with virtually one hundred percent consistency I would get interviews with law firms when I left my LGBT status off my resume and would not be invited for a law firm interview when I included the LGBT reference. . . . I eventually summered at an Am Law 100 firm where I had not been out in the screening and interviewing process, but during my summer work, and against the advice of the one gay lawyer at the firm I had been able to identify, I did come out. At the end of the summer I did not receive an offer for post-graduate employment, and no explanation was ever offered other than an inference that it would not have been a good fit.<sup>141</sup>

Now, the current legal scholarship may end Leipold's story here. More expressly, it might toss Leipold into a pool of statistics, followed by a lengthy report, more legal scholarship espousing frustration at the possible homophobic behavior, and likely culminate in a re-actively drafted law firm diversity statement that touts both inclusiveness and progressiveness.<sup>142</sup>

Yet, the co-cultural theory's outside-within perspective heightens our insight to understand Mr. Leipold's experiences through his own words;

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140. James G. Leipold, *Stand and Be Recognized: The Emergence of a Visible LGBT Lawyer Demographic*, 42 SW. L. REV. 777, 791–92 (2013).

141. *Id.*

142. For additional research regarding the experience of LGBT lawyers, see Thomas H. Garrett III et al., *20th Anniversary Reprint of the 1995 HCBA 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.”).

namely by analyzing the relationship between Leipold's *communication practices* and the related *influential factors*.<sup>143</sup>

To start, when Mr. Leipold removed any reference to his LGBT status he perhaps employed the communication practices of *dissociating*—making a concerted effort to elude any connection with behaviors typically associated with one's co-cultural group; or *mirroring*—adopting dominant group codes in an attempt to make one's co-cultural identity completely invisible or at least less visible.<sup>144</sup> A co-cultural group member who is influenced by the *preferred outcome of assimilation* into the dominant culture could use both of these communication practices. While it is unclear whether he was cognizant of a preferred outcome, when Leipold intentionally hid his LGBT status, he obtained temporary access and assimilated into the “good ol’ heterosexual boys club.” He was able to experience the privileged life, and if his conscious goal was to keep the job, then his chosen communication practice—for example, disassociation was effective.

However, when he later chose to make his sexual identity known, risking a future job offer, he possibly employed the communication practices of *increasing visibility*, *dispelling stereotypes*, or *communicating self*.<sup>145</sup> This aspect of Leipold's narrative arguably demonstrates two interrelated factors influencing his communication practice(s). First, focusing on the influential factor of *preferred outcome*, the above communication practices are commonly used by co-cultural group members who choose to *accommodate* the dominant culture, while simultaneously maintaining their cultural identity. Second, and equally insightfully, is the influential factor of *perceived costs and rewards*.<sup>146</sup> Specifically, Leipold's decision to reveal his sexual identity required him to weigh the perceived *cost* of not being offered a job in comparison to the *cost* of being closeted. Regardless of the influential factors—preferred outcome or perceived costs and rewards, or both—paramount is the notion that the communication practice and strategy was his conscious choice; thus, even the loss of a job is equally as empowering as assimilating to keep the job.

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143. For a discussion of outsider-within perspective, see *supra* note 84–85 and accompanying text.

144. ORBE, *supra* note 4, at 16–18 tbl.1.1.1.

145. *Id.*

146. For a discussion of influential factors affecting chosen communication practices, see *supra* Section IV.

This theoretical framework reveals a powerful double vision.<sup>147</sup> Unlike a partial view of reality that limits the dominant group, as they are standing in the center of societal structures, Leipold, a nondominant group member has “an awareness of and sensitivity to both the dominant worldview and [his] own perspective”<sup>148</sup>—a valuable positioning for understanding communication structures. Under the co-cultural theory, in the latter scenario when he did not receive a job offer, Leipold still engaged in a conscious, albeit unfair, choice resulting in his return to the nondominant group and his fall from privilege. In this case, no job offer or meaningful explanation exposes negative stereotypes or bias from the dominant culture.<sup>149</sup>

It must be emphasized that heterosexual white males will *never* have to negotiate their identity in this manner because they simply do not stand outside the dominant societal structure of which they actually define.<sup>150</sup> In this way, their view of reality can only be partial.

Herein lies the value of a theory whose significance, indeed its very existence, is constructed through voices from the margins. By understanding the reasoning behind a chosen communication practice, both sides gain insight. First, nondominant groups can be more intentional with their communication and identity strategies in view of their preferred outcome or interaction with the dominant culture. Second, the dominant group gains valuable insight into the very real and exhausting process nondominant attorneys go through daily in negotiating their identity within a dominant society.

#### *B. It Does Matter if You're Black or White: Black Law Firm Associates*

As additional examples, Kevin Woodson's work on homophily-based behavior<sup>151</sup> vividly reveals opportunities to demonstrate co-cultural communicative practices. While Woodson's work does not indicate the use of the phenomenological method communication scholars use,<sup>152</sup> his extensive interviews with seventy-five black law firm associates certainly

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147. See *supra* notes 86–87 and accompanying text.

148. ORBE, *supra* note 4, at 29.

149. Recall the earlier notion that a discussion of identity strategy is broadly relevant. See *supra* note 136.

150. For a discussion of dominant social structure and positioning, see *supra* notes 84–86 and accompanying text.

151. See Kevin Woodson, *Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms*, 83 *FORDHAM L. REV.* 2557, 2560–61 (2015) (arguing that homophily-based behavior deprives many black attorneys of equal access to critical relationship capital in predominantly white firms, thereby reinforcing racial inequality).

152. For an in-depth discussion of the phenomenological process, see *supra* note 103 and accompanying text.

details the power of relationship capital between black and white attorneys.<sup>153</sup> A few narratives were selected where the interviewees described their experience in their own words, to demonstrate further the application of Orbe's co-cultural theory communicative practices.<sup>154</sup>

### 1. *The Racially Isolated Attorney: Avoiding and Separation*

One interviewee who had attended a predominantly white university had no close social relationships with her white classmates.<sup>155</sup> She described her time as an undergraduate at an elite public university:

If you looked at my photo albums from school, you would have thought that I went to Howard or Hampton or Spelman because all my friends were black. And we just had the community . . . All your friends were black, you were going to the black mixers, the Kappa parties . . . you were in the black organizations . . . My college experience—it was [a Historically Black College and University] experience, essentially.<sup>156</sup>

The possible communication practice exhibited here might be *avoiding*—maintaining a distance from dominant group members; refraining from activities or locations where interaction is likely. This identity performance was perhaps not seemingly detrimental during college, but theoretically her actions suggest a preferred outcome of *separation* from white people. This separation or racial isolation will naturally decrease her social comfort with white people, arguably making successful career navigation at a predominantly white law firm very difficult and exhausting.

### 2. *The Networking Attorney: Increasing Visibility, Utilizing Liaisons, and Accommodation*

Another interviewee, in discussing the power of relationship capital, commented that junior attorneys who have the strongest relationships and rapport with senior colleagues tend to receive greater access to “work

153. See Woodson, *supra* note 151, at 2560 n.22 (describing the interviews as conducted as part of Woodson's “dissertation research, which consisted of interviews of a larger sample of black workers who held professional or managerial positions in large corporate firms and a smaller comparison sample of white workers”).

154. Given that I did not personally conduct these interviews, I recognize the excerpts may not capture the full intent of each interviewee.

155. See *id.* at 2564.

156. *Id.* (footnotes omitted).



assignments and other opportunities.”<sup>157</sup> Specifically the interviewee explained:

Though law firms have formal ways to distribute assignments, the way that you’re really going to get the assignment that you want to get is to know senior associates, to know partners . . . by being someone that they want to have a conversation with, being somebody that they wouldn’t mind talking to outside of the office.<sup>158</sup>

In this situation, the possible communication practices could be *increasing visibility*—covertly, yet strategically, maintaining a co-cultural presence within dominant structures—and *utilizing liaisons*—identifying specific dominant groups members who can be trusted for support, guidance, and assistance.<sup>159</sup> Both of these communication practices suggest a preferred outcome of *accommodation* toward the dominant culture. I proffer these two suggestions because from this excerpt the associate seems to recognize the value of networking with the dominant group, and his or her tone seems comfortable with the idea of trying to be “someone that [white people] want to have a conversation with”<sup>160</sup> but not at the risk of sacrificing their own cultural identity.

### 3. *The Anti-Party Attorney: Avoiding, Increasing Visibility, and More*

A third interviewee “explained how social and cultural differences rendered informal firm-related social events and gatherings problematic for some of his black colleagues.”<sup>161</sup> If black associates are not acclimated to social interactions with the dominant culture, they relinquish potential social and work opportunities, “thereby reinforcing their isolation.”<sup>162</sup> The interviewee remarked:

There’s another layer of complication, stress, and almost like another layer of the job that you have to go through if you’re not comfortable. So for example, if you don’t like to go out and drink beer. . . . There’s small annoyances. If you go to a firm event you know there’s gonna be shi[\*]\*ly music. That’s just the way it is. You almost ignore it but why should you? Why is it that there are only certain genres . . . what it meant to go out and have a good time was very monolithic. I’m sure there are certain people who have a very difficult time adapting to that or have no desire to adapt and don’t think it’s worth the price.<sup>163</sup>

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157. *Id.* at 2566.

158. *Id.* at 2567.

159. *See* ORBE, *supra* note 4, at 16–18 tbl.1.1.

160. Woodson, *supra* note 151, at 2567.

161. *Id.* at 2568.

162. *Id.*

163. *Id.*

Here, there are a number of possible communication practices available depending upon the preferred—or even unintended—outcome. First, if this black associate chooses not to interact socially by *avoiding* or *maintaining interpersonal barriers*—imposing, through the use of verbal and nonverbal cues, a psychological distance from dominant group members), his communication practices suggest a preferred outcome of *separation*.<sup>164</sup> But, even in spite of the social entertainment differences, if he consciously chooses to attend the various work events he may intentionally be *increasing visibility*, *dispelling stereotypes* (myths of generalized group characteristics and behaviors are countered through the process of just being one’s self), *communicating self*, (interacting with dominant group members in an authentic, open, and genuine manner; used by those with strong self-concepts) or *educating others* (taking the role of teacher in co-cultural interactions; enlightening dominant group members of co-cultural norms, values, etc.).<sup>165</sup> Similar to the previous interviewee, any of these communication practices suggest a preferred outcome of *accommodation* toward the dominant culture.

#### 4. *The Unplugged and Cosmopolitan Attorneys: Extensive Preparation, Increasing Visibility, and More*

Finally, several interviewees confessed that their inability to develop rapport with colleagues was a handicap, as compared to others, who admitted their “cosmopolitan background better enabled [them] to build rapport with” their colleagues.<sup>166</sup> Those who struggled in developing rapport with colleagues, as compared to their peers who were comfortable talking to white people, described their difficulties stating:

There’s just nothing that goes on that feels race related; I just don’t feel plugged in . . . that would be the only thing that I could say would be race but then it’s not racism, it’s just that I’m different and I have no idea how to fit in here. I have no idea how to be the person that you want to drink with.<sup>167</sup>

Whereas we were doing the same in law school, and I even had an easier time getting a job . . . she excelled and just did really, really well at her firm . . . I always attribute the difference to being that she knows how to get along better with those sort of people who are decision makers . . . and it had huge differences in

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164. See ORBE, *supra* note 4, at 16–18 tbl.1.1.

165. See *id.*

166. Woodson, *supra* note 151, at 2569.

167. *Id.* at 2569–70.

how she was perceived and how work went for her . . . that's something that comes a little easier for her, she'll go out to drink with a partner from her law firm . . .<sup>168</sup>

For these interviewees who appeared to have difficulty culturally acclimating to their law firms, they may have found themselves falling into *extensive preparation*—engaging in an extensive amount of detailed (mental, concrete) groundwork prior to interactions with dominant group members—or *overcompensating*—conscious attempts—consistently enacted in response to a pervasive fear of discrimination to become a superstar.<sup>169</sup> First, I offer these two communication practice suggestions because trying to acclimate to the dominant culture for diverse associates can become an exhaustive mental process where diverse attorneys assesses each action or inaction for its potential interpretation by white attorneys, and the implications or consequences for diverse attorneys. Second, reading between the lines of the narratives, two influential factors surface: (1) the *preferred outcome* as a desire to *assimilate*—based on the statements of wondering how to fit in, and recognizing the value of getting along well with others—and (2) the importance of *field of experience*—namely, the significance of background experience in developing relationships with white people.<sup>170</sup>

Conversely, other interviewees were a bit more cosmopolitan, believing their background experiences in developing relationships with white people afforded them the comfort and acculturation necessary to develop relationship capital in their firms.<sup>171</sup> One explained:

From the day you walk in the door, it's based on who you know, who you can create relationships with, so it's a very tricky place to navigate . . . For me, to be clear, this wasn't really a problem because I've pretty much been operating in these environments . . . for most of my life. . . . it didn't feel any different than anywhere else I've ever been.<sup>172</sup>

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168. *Id.* at 2569–70; see also Anastasia M. Boles, *The Culturally Proficient Law Professor: Beginning the Journey*, 48 N.M. L. REV. 145, 148 (2018) (identifying and “examining steps individual law faculty members can take to begin the journey of delivering culturally proficient instruction to law students and engaging in culturally proficient student interactions”); Leslie P. Culver, *White Doors, Black Footsteps: Leveraging “White Privilege” to Benefit Law Students of Color*, 21 J. GENDER, RACE & JUST. 37, 69–70 (2017) (discussing the need for the development of relationships between white professors and law student of color becomes imperative in preparing these students for the futures in a cosmopolitan and culturally competent world).

169. See ORBE, *supra* note 4, at 16–18 tbl.1.1.

170. *Id.* For a discussion of influential factors affecting chosen communication practices see *supra* Section IV.B.

171. See Woodson, *supra* note 151, at 2574. The recognition of background experience in developing relationships with white people as important demonstrates that field of experience is an important factor a person considers in determining their communication practice with the dominant culture. See *supra* Section IV.B.

172. See Woodson, *supra* note 151, at 2574.

Another interviewee noted, “I’ve just been in a lot of different social environments, and I have a lot of different types of friends so for me fitting in is not something that’s that difficult . . . but I think for other black attorneys it is a lot more difficult.”<sup>173</sup> And the final cosmopolitan example is an interviewee who held close interracial friendships throughout her life.<sup>174</sup> She commented on her ability to form a bond with one of the most powerful partners at the firm, an older white man, “who eventually became a valuable sponsor who greatly enhanced her experience at her firm.”<sup>175</sup> The interviewee stated:

I knew he liked art . . . so I sat down with him at a big dinner . . . sort of a black tie event, and I said, “I really want to tell you about this exhibit that I saw recently when I was in New York.” And all the other partners are looking around . . . and finally someone said, “I thought you were talking about a *trial* exhibit” and he says, “Oh no—she knows where my heart is really at; she’s talking about an exhibit at the Metropolitan Museum of Art.”<sup>176</sup>

These cosmopolitan associates, primarily because of their close relationships with white people, may have been employing one or more of the following communication practices: *increasing visibility* (covertly, yet strategically, maintaining a co-cultural presence within dominant structures); *dispelling stereotypes* (myths of generalized group characteristics and behaviors are countered through the process of just being one’s self); *communicating self* (interacting with dominant group members in an authentic, open, and genuine manner; used by those with strong self-concepts); *intragroup networking* (identifying and working with other co-cultural group members who share common philosophies, convictions, and goals); *utilizing liaisons* (identifying specific dominant groups members who can be trusted for support, guidance, and assistance); or *educating others* (taking the role of teacher in co-cultural interactions; enlightening dominant group members of co-cultural norms, values, etc.).<sup>177</sup> The above list is communication practices common to a preferred outcome of *accommodation*. To be sure, while *accommodation* or *assimilation* could support the black associates’ engagement with their white colleagues, based on professed comfort, length of interethnic communications, and even similar artistic taste, there is little indication that they had to

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173. *Id.*

174. *Id.* at 2574–75.

175. *Id.*

176. *Id.* at 2575.

177. See ORBE, *supra* note 4, at 16–18 tbl.1.1.

disappear culturally for those relationships to develop, as would more likely be the case in *assimilation*.

The existence of such detailed micro-level communication strategies, while empowering, simultaneously demonstrate how exhausting and consuming it is to be an outsider living and working in a world whose norms are established and dictated by whiteness. In some respects, the discomfort and uncertainty of our culture for traditionally marginalized and underrepresented groups, has seemingly generated a lifelong examination of identity performance, where questions beget questions. However, to not have discussions, to avoid the need for the intellectual journey, is perhaps the greater transgression.

### C. *Performing One's Identity*

The previous section demonstrates the depth of awareness the co-cultural communication strategies bring to identity performance. The reaction to this strategy expansion, however, is really bittersweet. On the one hand, perhaps there is freedom or empowerment for the attorney in the nondominant group as they now have additional tools to navigate the dominant white, heterosexual, male profession. For example, if a Muslim woman in a predominantly white law firm wants to fit into the dominant culture, but also seeks to maintain her own culture, she may choose to *accommodate*, thus consciously bring her culture to work each day, aware of positive or negative reactions. This may include wearing her hijab,<sup>178</sup> letting her co-workers know she is observing Ramadan—for example, attending the work lunches even though she is fasting, allowing others to *see* her culture. In this way, she may be nonassertively *increasing visibility, dispelling stereotypes, or communicating self*,<sup>179</sup> in view of the dominant group.

On the other hand, there is arguably a huge burden on the nondominant group member—less in the selection of the identity strategy and subsequent performance, but more in the very fact that a strategy has to exist at all. Sadly, it is not clear whether the dominant culture is aware of the burden of making this conscious identity choice. For example, the Muslim attorney, in publicly displaying her culture in the workplace, must daily weigh the

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178. Hijab is an Arabic word that has its origins in the word “hajaba,” which means “to prevent from seeing.” In Islamic culture, hijab concerns conceptions of “modesty, privacy, and morality.” While hijab refers to the headscarf worn by Muslim women, the word also implicates broader notions of a Muslim woman’s religious beliefs and practices. Thus, hijab can be more readily understood as both an item of clothing and a way of life for Muslim women.

Kelly A. Harrison, *Hiding Under the Veil of “Dress Policy”: Muslim Women, Hijab, and Employment Discrimination in the United States*, 17 *GEO. J. GENDER & L.* 831, 836 (2016) (footnotes omitted).

179. See ORBE, *supra* note 4, at 16–18 tbl.1.1.

*perceived costs and rewards* of doing so in fear of discrimination.<sup>180</sup> She may rehearse how she will respond to cultural questions and public glances, in effect preparing herself for an emotional and psychological cloud that may frame much of her interactions with others throughout the day. In short, on top of simply trying to do her work as an attorney, she will always be reminded, explicitly or implicitly, not just that she is not white, but that she is an “other.”

In addition to “greater depth of identity” strategies based on more traditional markers of diversity that co-cultural theory offers, I recognize some critiques of conscious identity performance, particularly that of adding a “cost of choosing” burden to already marginalized groups. One such cost is rooted in the reality that an asymmetrical power relationship exists between nondominant and dominant cultures.<sup>181</sup> Thus, looking again at the Muslim woman, she is reminded not only of her ethnicity and gender, but also of how her lack of positional power can aggravate, and in some cases compete against, a conscious performance of her multidimensional identities. So, if she chooses to *accommodate* the dominant culture by displaying her own culture, perhaps an empowering choice, she now must weigh the cost of whether that same performance actually reinforces her inferior power position to the white male norm in that work setting. Another cost, perhaps more solemn, is the burden that one nondominant group member’s identity performance can have on other members of that same group. For example,

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180. The scholarship discussing growing religious discrimination for Muslims in the workplace is increasing as this ethnic group has been under close scrutiny since 9/11. See Harrison, *supra* note 178, at 832 (discussing issues of religious discrimination and protection in the workplace for Muslims, including the 2015 United States Supreme Court case *EEOC v. Abercrombie & Fitch Stores, Inc.* where the Justices considered whether retailer Abercrombie & Fitch violated Title VII when it rejected a qualified female applicant under its grooming policy “because she wore a Muslim headscarf, known as a hijab, in accordance with her adherence to Islam”); see also Zehra Naqvi, *What’s It Like Being Muslim in America?*, HUFFINGTON POST (Nov. 16, 2015, 9:30 AM), [https://www.huffingtonpost.com/zehra-naqvi/what-its-like-being-muslim-in-america\\_b\\_8569378.html](https://www.huffingtonpost.com/zehra-naqvi/what-its-like-being-muslim-in-america_b_8569378.html) [<https://perma.cc/WXU6-9KXX>] (“Being Muslim in America means no one is informing non-Muslim Americans about the actual basis of the ideology that underlies ISIS—Saudi-exported hate-mongering, supremacist Wahhabism—or explaining that as long as we, as a nation, are more in love with oil than troubled by the true cost of that oil and what kind of ideology may be imported alongside that oil, we will all be at risk for more attacks, the reputation of the majority of Muslims around the world who don’t buy into ISIS’ distorted views of Islam will continue to be maligned and our kids will pay the price for all of our ignorance, having to stand up to misdirected bias and hate over and over again.”).

181. For a discussion on muted groups and asymmetrical relationships, see *supra* Section III.A.

a black male's choice to assimilate into a predominantly white environment has consequences for other minorities in that same environment who choose to perform their identity differently—that is, not assimilate. To this cost, Teri McMurtry-Chubb, a prominent scholar on how systems of oppression are replicated in the legal profession, raises a grave concern: “[w]here there are multiple minorities, those who choose to ignore issues of discrimination and to assimilate are used to punish and exclude those who speak up and choose not to assimilate.”<sup>182</sup> I would call this an interconnected cost that is almost a hallmark of nondominant groups—that is, the actions of one black person are presumed normative for all Black people. Given this interconnected cost, how free is that black male to consciously choose his identity performance strategy? If that choice furthers white supremacy and patriarchy, is it even a choice at all? There are no easy answers. But all of these perspectives become relevant considerations when thinking about one's possible identity strategies and the desired outcome or response from the dominant culture. For all the empowerment that conscious identity performance can bring, particularly in light of the generous strategic expansion the co-cultural theory offers, it is disheartening to still be reminded of the burden that marginalized groups bear.

Despite any critiques, I believe the benefits to conscious identity performance outweigh the harms of potential unconscious assimilation or uncertainty of one's identity. Equally important, the benefits of conscious identity performance do not rest on the shoulders of marginalized groups alone. While beyond the scope of this Article, the dominant group bears its own accountability to become educated on systems of oppression, so that this burden to educate is not continually upon the nondominant group.<sup>183</sup> As Audre Lorde once wrote, “[w]henver 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.”<sup>184</sup>

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182. Text message from Teri McMurtry-Chubb, Professor of Law, Mercer University School of Law (Aug. 18, 2018, 10:11 PST).

183. See e.g., 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 (forthcoming 2018) (introducing dominant group theory, which, of relevance, discusses dominant group members using white privilege to benefit nondominant group members).

184. Audre Lorde, *Age, Race, Class, and Sex: Women Redefining Difference*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 114 (1984). See Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 *FORDHAM L. REV.* 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.”) (footnote omitted);

Specifically, the dominant group can no longer rest on diversity trainings to teach them how to talk to their own colleagues who simply bear a diverse identity. Diversity trainings need to be replaced with inter-cultural communication and inclusivity discussions that *begin* with coming to terms with the privileges associated with whiteness and undue white privilege and *continue* with a commission to share the nondominant culture's burden of identity performance through cultural competency, integration, and acceptance. To be sure, the conversation should never end.

## VI. CONCLUSION

Let us return to the story of Jason and Keith, the two young, black, male law students. Recall that Keith was generally more reserved with more distance between himself and his white classmates, while Jason was fairly outgoing and usually surrounded by his white law school peers. If both choose to begin their careers within a predominantly white law firm, what can a co-cultural consciousness mean to both men? How could it facilitate successful careers for both men, even if each man defines success differently?

For example, Keith, who is relatively reserved around white people, once knowledgeable about the depth of identity performance the co-cultural theory offers, may 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 dominant terrain.<sup>185</sup>

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WOC Faculty, *A Collective Response to Racism in Academia*, MEDIUM.COM (May 8, 2018), <https://medium.com/@wocfaculty/a-collective-response-to-racism-in-academia-35dc725415c1> [<https://perma.cc/EMM4-N6LY>] (publishing a response by women of color faculty in academia who, in response to Chronicle in Higher Education's (*CHE*) survey asking about experiences with racism in the academy, commented that this information already exists, and encouraging *CHE* to engage with the decades of scholarship to gain insight and further noting that "[t]his request made by *CHE* is more than a microaggression: it is an insult to our presence in the academy as it invalidates our collective experiences we grapple with daily. Others remain immune while weaponizing their whiteness against BIPOC (Black, Indigenous, and People of Color) even as they demand BIPOC perform the thankless labor of teaching a white academic audience about racism").

185. For a discussion on white people using their white privilege to benefit law students of color, see Culver, *supra* note 168.



And what about Jason? What if he, like Mungin,<sup>186</sup> had consciously weighed 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. In this way, what the co-cultural theory provides is an almost tactical and proactive mindfulness of their own box of tools—for example, background experience or comfort, desired career goal, natural abilities to build relationships, the costs and risks to any chosen action—to consciously navigate their career ascent.

Notable legal scholars have set a foundation of performance identity strategies for traditionally marginalized groups in the legal profession. To their credit, our profession has greatly benefited from almost two decades of discussion as we press the law to both recognize and accommodate these essential voices from the margins.

But there is still more work to be done. Reaching into other disciplines broadens our depth of understanding of these identity issues. Specifically, the co-cultural theory and Orbe's communication practices not only capture the lived experiences of outsiders but also thematically categorize their experiences from their perspective. This framework is a valuable contribution to the current legal scholarship in that the co-cultural theory would allow traditionally marginalized group members to consciously, and proactively, be equipped with indispensable tools of empowerment to perform their own identity. A relevant question is whether the conversation regarding identity performance is more dynamic among scholars, and minimized, or absent altogether, in the law school classroom where many diverse law students lack coping strategies to navigate their identity in predominantly white, heterosexual law schools, and eventually in a predominantly white, male, heterosexual profession.

In a future article that considers this question, I suggest that there is a need to teach conscious identity performance, premised on co-cultural theory, as a vital component of professional responsibility. 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 lexicon and social intelligence for representing clients within marginalized communities.

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186. See *supra* pp. 584–86.