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(Un)Covering Identity in Civil Rights and Poverty Law

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ESSAY

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INTRODUCTION

The effective delivery of scarce legal goods to disadvantaged clients requires more than the provision of equal access, case-by-case representation, and zealous advocacy. Scarcity requires that effective legal change be measured not by the outcomes of individual cases, but rather by the progress of social change: specifically, by the degree to which individual clients are able to collaborate in local and national alliances to enlarge civil rights and to alleviate poverty.[1] This Essay argues that, by incorporating the theory of "covering"[2] into their work, legal practitioners in civil rights and poor people's movements can facilitate such collective action. This Essay also makes the general claim that forming links between theory and practice should be a principal goal of clinical and nonclinical legal education.

Historically, legal services and civil rights lawyers have sought to broaden their impact by engineering class-wide institutional reform and litigating test cases. Such litigation fails, however, without political support. It fails when courts reject needed remedies. It fails when

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[1] On scarcity in public interest and poverty law practice, see generally Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978); Troy E. Elder, *Poor Clients, Informed Consent, and the Ethics of Rejection*, 20 GEO. J. LEGAL ETHICS 989 (2007); and Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999).

[2] *See generally* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

legislatures rebuff funding mandates or supersede court decrees. It fails when administrative agencies refuse to compel regulatory compliance. And it fails when street-level enforcement ebbs. Poor communities are contemporary witnesses to these recurrent failures.

The shortage of legal services and the limits of litigation in poor communities underscore the importance of grassroots interest-group organization and mobilization in support of equal opportunity and economic justice. Although poor and dispossessed clients routinely suffer in isolation, they in fact share larger group interests linked by common experiences of class, gender, race, and sexuality. In historically marginalized neighborhoods, like immigrant communities of color in Miami or New York City, individuals and groups can develop hypermarginalized identities, for example, as gay HIV-positive Haitians in Miami's Little Haiti and other immigrant communities of color experience daily. Both marginalization and hypermarginalization inflict cultural and social stigmas. Stigma inhibits individual self-elaboration and group integration in the cultural and social spheres of civic life.[3]

The presence of hypermarginalized individuals and groups in marginalized communities of color raises hard questions for clinical law teachers. These questions address the form of clinical pedagogy and the substance of the skills that clinics seek to impart.[4] Today, standing in clinical and nonclinical classrooms, how should we teach law students to represent hypermarginalized individuals and groups trapped in marginalized communities? What should we teach students about marginalized or hypermarginalized client difference and identity? What skills should we instill? What ethical guidelines or values should we prescribe? When should we counsel clients to "cover" marginalized or hypermarginalized differences and identities and when

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[3] By self-elaboration, I mean the public expression of personhood. Personhood implies authenticity, moral agency, and rational volition. By integration, I mean full participation in civic culture and society. Participation entails open engagement in the political process and the economic marketplace free from bias and discrimination.

With respect to a lawyer's role in fostering these values, neither legal education nor the lawyering process offers an exacting, client-tailored test to gauge the fullness of personhood, the scope of personal freedom, or the degree of individual authenticity. At best, each supplies a range of interpretive methods and techniques to help verify a lawyer's intuition and instinct. This checking function is crucial to the legitimacy and utility of lawyers representing clients in cross-cultural contexts.

[4] For twenty years, I have studied, designed, and supervised law school clinics. During these two decades, I have served in both clinical and nonclinical academic appointments. The clinical/nonclinical distinction, despite its false dichotomies and pernicious consequences, persists throughout the legal academy. Paradoxically, progressive law school faculties, including critical legal studies, critical race, and feminist scholars, too often hew to this distinction, thus reproducing indefensible status hierarchies inimical to professed ideals of equality in their own institutions and in the profession.

should we counsel clients to "uncover"? What are the social costs and benefits of covering and uncovering to clients and communities?

Questions of clinical pedagogy and lawyering skills provoke both normative and methodological debate within the legal academy. The debate surrounds the place of professional skills and values instruction in the curriculum. Externally, the American Bar Association and the Carnegie Foundation for the Advancement of Teaching have enriched this debate by generating recommendations to enhance professional development.[5] Internally, the Association of American Law Schools and the Clinical Legal Education Association have contributed to this continuing debate by establishing best-practice standards for experiential learning and institutional effectiveness.[6] Yet the traditional law school curriculum has made little progress toward the integration of skills and values in theory and practice, especially in sorting out normative and empirical accounts of marginalized and hypermarginalized client difference and identity in the lawyering process. Far more integrative, the conventional clinical curriculum has moved increasingly toward addressing the effects of stigmatizing, difference-based client identity.[7]

A primary purpose of this Essay is to revisit the ongoing curricular debate over lawyering skills and professional values instruction in the hope of crafting a broader, more empathetic and community-minded set of norms and skills that can be useful for clinical education and for legal education generally. The thesis is straightforward: in preparing law students for careers as civil rights and poverty lawyers, clinical and nonclinical faculty should teach students not only how stigmatizing differences marginalize clients, but also how such differences mold individual and group identity by imbuing that identity with meaning and value. Equally important, faculty should teach students how and when to counsel marginalized and hypermarginalized clients to un-

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[5] *See* THE MACCRATE REPORT (Joan S. Howland & William H. Lindberg eds., 1994); TASK FORCE ON LAW SCH. & THE PROFESSION, AM. BAR ASS'N, LEGAL AND PROFESSIONAL DEVELOPMENT (1992). *See generally* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS (2007) (documenting intensive field work at a cross-section of sixteen law schools during the 1999–2000 academic year).

[6] For useful practice-based curricular surveys and recommendations, see ASS'N OF AM. LAW SCH. EQUAL JUSTICE PROJECT, PURSUING EQUAL JUSTICE: LAW SCHOOLS AND THE PROVISION OF LEGAL SERVICES (2002); and ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007).

[7] In clinical education, early undifferentiated accounts of client identity have gradually given way to difference-based accounts. *Compare* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS (1991), *with* Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 346 (1997) (reprimanding client-centered clinical models for failing to address the effects of race, class, and gender on lawyer-client interaction). Surprisingly, generalized accounts continue to dominate the teaching of trial advocacy.

cover their difference-based identities in order to serve larger group and societal interests.

Counseling uncovering serves two purposes. First, it affords clients a potentially beneficial opportunity to engage in authentic self-elaboration, to obtain equal treatment, and to exercise the liberty of full participation in cultural and social environments. Second, it gives clients a useful chance to collaborate in grassroots, interest group mobilization in support of economic justice. Purposefully fashioning these transformative opportunities alters the content of legal education, the goals of the lawyering process, and the professional roles of civil rights and poverty lawyers. In formal terms, counseling uncovering treats client difference as a meaning-making factor central to the construction of individual, group, and community identity, and views the elaboration of identity as a moral value independent of client goals and objectives.[8] In instrumental or strategic terms, counseling uncovering links difference-based client identity to related group and community interests, and posits collaborative forms of interest group organization and mobilization as a moral value likewise independent of client goals and objectives. Thus, counseling uncovering presents new ways to evaluate legal education, the lawyering process, and civil rights and poverty law.

Part I of this Essay explores the concepts of covering and uncovering, and assesses the costs and benefits of covering and uncovering hypermarginalized client identity. Part II examines the practices of covering and uncovering in civil rights and poverty law through contemporary case studies of direct service counseling, law reform litigation, and community lawyering. Part III considers the ramifications of covering and uncovering practices for alternative education, training, and curricular initiatives.

I. COVERING AND UNCOVERING IDENTITY

Many practitioners in the fields of civil rights and poverty law cover client difference-based identity as part of a strategy of crafting stories of deprivation and entitlement. These stories glean legal substance from constitutional, statutory, and common law claims of mistreatment. They gain cultural and social resonance from narratives of class, gender, race, and sexual difference. Civil rights and poverty law practitioners consciously and unconsciously construct stories out of narratives of legal entitlement and sociocultural difference. Their sto-

[8] Difference-based identity encompasses more than language and interviewing skills. *See* Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007) (exploring the role of language difference in poverty law and community lawyering).

ries give meaning to, and take meaning from, individual and group identity.

Much of my prior work is about law stories, the stories lawyers tell clients, courts, and each other.[9] Current critical theories of race and ethnicity help discern the difference-based meaning of marginalized and hypermarginalized identity in stories and, by extension, in law, culture, and society.[10] Acts of covering inscribe the meaning of difference-based identity in legal, cultural, and social narratives. Such acts produce significant normative and practical implications.

A. Defining Covering and Uncovering

Clinical teachers by now are well-versed in covering. Every day they observe law students and faculty colleagues attempting to mute or silence a disfavored or stigmatized trait, for example, by preparing alternative "gay" and "straight" workplace résumés, presenting "neutral" rather than "ideological" classroom perspectives, and suppressing "activist" or "outsider" forms of scholarship.[11] Having learned their lessons well, clinical law students similarly help mute and sometimes silence a disfavored or stigmatized trait of a client's identity at hearings, trials, and neighborhood caucuses. They do so instrumentally as a means to safeguard client interests and goals. Advancing these interests and goals by covering cultural and social differences both benefits and potentially harms clients. This section defines covering and assesses the personal as well as collective costs of covering for individuals, groups, and social movements.

1. "Covering" Defined. — The most useful sociolegal definition of covering comes from the work of Professor Kenji Yoshino. Professor Yoshino's writing addresses civil rights, status, and stereotype in law and culture. Borrowing from the sociologist Erving Goffman, he uses the term "covering" to explain how individuals mute their own stigmatized identities, even when those identities are known and visible. He describes multiple axes along which individuals cover, exploring con-

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[9] *See generally, e.g.*, Anthony V. Alfieri, Gideon *in White*/Gideon *in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459 (2005); Anthony V. Alfieri, Essay, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Anthony V. Alfieri, *Welfare Stories*, *in* LAW STORIES 31 (Gary Bellow & Martha Minow eds., 1996).

[10] *See generally, e.g.*, Anthony V. Alfieri, *Color/Identity/Justice: Chicano Trials*, 53 DUKE L.J. 1569 (2004) (book review); Anthony V. Alfieri, *Teaching the Law of Race*, 89 CAL. L. REV. 1605 (2001) (book review).

[11] On the suppression of "activist" or "outsider" scholarship in the legal academy, see Richard Delgado, Commentary, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984); and Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992).

crete illustrations from the contexts of race, gender, sexuality, religion, and disability.[12]

To Professor Yoshino, everyone covers. To cover is to mute or repress a disfavored or stigmatized identity trait.[13] Covering constitutes a form of assimilation and conformity. Assimilation, Professor Yoshino laments, veils the repression resulting from white supremacy, patriarchy, and homophobia.[14] He points to the tolerance of such repression under civil rights laws calibrated to protect only immutable and innate traits, such as skin color or gender.[15] Unfettered by the law, the demand for covering deforms the behavioral aspects of personhood, undermining individual self-elaboration and encouraging conformity at the grave cost of sacrificing authenticity and civil rights.[16]

For Professor Yoshino, covering signals a cultural and social suppression of traits and behaviors associated with difference. It is a public performance of scripted acts and dialects simultaneously self-deforming and repressive. And it is a performance that masks an injury of discrimination unaddressed by civil rights laws. Professor Yoshino argues that the psychic cost of covering and the continuing vulnerability of historically stigmatized individuals to the assimilationist demands of racial and sex-based covering pose hurdles to the equality claims and liberty aspirations of all outsider groups. To overcome those hurdles, he urges traditional civil rights groups and increasingly rebellious outsider groups to assert a universal demand for equality tied to public self-elaboration and societal integration.[17]

The commitment to self-elaboration and equality marshals opposition to both covering and "reverse-covering" demands. Reverse-covering directs individuals to conform their behavior to group stereotypes. For Professor Yoshino, neither covering nor reverse-covering demands fulfill the equal protection norms purportedly guaranteed by the Civil Rights Act of 1964 and the Constitution.[18] Weakened by the judicial tendency to protect status rather than behavior, these norms afford little constitutional or statutory protection against the demands of covering. Professor Yoshino observes that the normative reform of

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[12] According to Professor Yoshino's definition, passing "pertains to the visibility of a particular trait, while covering pertains to its obtrusiveness." YOSHINO, *supra* note 2, at 18 (emphases omitted) (quoting ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 102 (1963)). See generally GOFFMAN, *supra*, at 102–04, for a discussion of the concept of covering. In his book, Professor Yoshino describes his own struggle to "elaborate" an identity both as a gay man and as an Asian American.

[13] YOSHINO, *supra* note 2, at ix.

[14] *See id.* at 106–07.

[15] *See id.* at 23–24.

[16] *See id.* at ix–xii.

[17] *See id.* at 21–27.

[18] *See id.* at 191–92.

civil rights laws to protect individuals will not reach the demands of covering that occur daily in intimate spaces inaccessible to legal intervention or that are otherwise located outside of the law. Such demands move the civil rights struggle beyond the law and into culture and society.[19]

Professor Yoshino's analysis of the limits of law should prod civil rights and poverty lawyers into cultural and social action. The languages of both law and culture back the struggle against conformity spearheaded by the gay rights movement, a struggle that is echoed in the call for diversity sounded by the growing immigrant rights movements of ethnic and racial minorities.[20] Moreover, gays and racial minorities share a commonality stemming from the context of covering and reverse-covering demands. Both gays and racial minorities inhabit settings beset by competing majority/minority community demands. Typically, a majority community ("straights" or whites) imposes a covering demand to assimilate by muting difference, while a minority community (gays or racial minorities) imposes a reverse-covering demand to conform by acquiescing in group stereotype.[21]

Professor Yoshino deplores acquiescence to the demands of majority/minority covering and reverse-covering in law and society. He attributes the loss of individual authenticity and group equality to the historical acquiescence of outsider communities to such demands. An acquiescence-based explanation, however, may unfairly diminish the role of individual psychology and resistance in navigating covering and reverse-covering demands. Studies in modern trait theory, for example, suggest that individuals may harbor common personality traits adaptive to generalized, cross-situational covering and reverse-covering behavior.[22] Similarly, studies of resistance in diverse sociolegal contexts indicate that acquiescence to covering and reverse-covering demands may obscure discreet forms of opposition and resistance.[23] For these reasons, clinical and practice-based accounts of ac-

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[19] *See id.* at 133–39 (discussing discrimination based on hairstyle, language, and surnames); *id.* at 191–93 (arguing for a new legal paradigm and describing the areas in which law's solutions and remedies fail).

[20] *See, e.g.*, JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 148–84 (2005).

[21] *See* YOSHINO, *supra* note 2, at 111–41 (describing how both majority and minority races impose expectations of covering); *id.* at 146–47 (describing how expectations of covering and reverse-covering are imposed on women).

[22] For a useful exposition of trait theory, see LAWRENCE A. PERVIN, THE SCIENCE OF PERSONALITY 37–68 (2d ed. 2003) (tracing the history of trait theory); and Thomas J. Reed, *The Character Evidence Defense: Acquittal Based on Good Character*, 45 CLEV. ST. L. REV. 345, 364–71 (1997).

[23] For early investigations of client resistance in poverty law settings, see Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991); and Lucie

quiescence to covering and reverse-covering deserve closer scrutiny for evidence of adaptive and expressive behavior as well as contested cultural and social meaning.

2. Uncovering Defined. — Professor Yoshino's work suggests the existence of two types of uncovering applicable to the lawyering process: individual uncovering and group uncovering. Both types should rely on client self-motivation rather than external pressure imposed by lawyers. Reliance on external pressure, such as lawyer coercion or "outing,"[24] damages the integrity of self-elaboration as an authentic assertion of personhood. Client-initiated and lawyer-counseled forms of uncovering renounce stigma and its constraining cultural, economic, and political consequences.

Individual uncovering reveals the marginalized or hypermarginalized elements of a client's identity. These elements roughly correlate with the stigmatizing traits of class, gender, race, and sexuality. Group uncovering, by comparison, exposes the internally stigmatized identity of a subgroup within a larger marginalized community. Internal stigma of this sort may attach to battered women, drug users, ex-offenders, or perceived sexual deviants (lesbian, gay, bisexual, or transgender individuals). Group-specific uncovering repudiates the stigma of sub-group marginalization and its restrictions.

Professor Yoshino explains that uncovering, like covering, may proceed along four different axes: appearance, affiliation, activism, and association.[25] Uncovering appearance reveals the individual's physical manifestation of identity. Uncovering affiliation discloses an individual's cultural identifications. Uncovering activism displays an individual's political commitments. Uncovering association divulges an individual's choice of community.[26]

In civil rights and poverty law practice, as in clinics, lawyers counseling uncovering must advise clients and client groups why, how, and when to act upon one or more of the four different axes Professor Yoshino maps. In addition to advising about the rationale, mechanics, and timing of uncovering, lawyers must counsel clients and client groups about how much to uncover through individual self-elaboration and group collaboration. For example, gay movement lawyers must advise "normal" gay groups on how much they should collaborate with

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E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

[24] Counseling uncovering to promote client self-elaboration or group coalition building should be distinguished from outing. In contrast to uncovering, outing involves the forced, public disclosure or exposure of individual identity without consultation or consent. On the ethics and tactics of outing, see LARRY GROSS, CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING 163–73 (1993).

[25] YOSHINO, *supra* note 2, at 79.

[26] *Id.*

"queer" or transgender gay groups. In the same way, civil rights lawyers must advise traditional civil rights groups like the NAACP on the extent to which they should collaborate with immigrant rights groups. Counseling of this kind should be client-centered, group-sensitive, and community context–specific. To that end, counseling a client's uncovering should turn on a concurrent assessment of the risk of impairing a client's moral integrity and material well-being, together with the risk of impeding a client's cultural and social integration. This dual risk-assessment should be linked to community-wide consultation and outreach whenever possible.

B. Identifying Costs of Covering and Benefits of Uncovering

The application of Professor Yoshino's covering and uncovering framework to civil rights and poverty law practice and to clinical education requires concrete analysis of the costs and benefits to affected clients and client groups. This section considers the costs of covering and the benefits of uncovering. The analysis extends to both individual and collective cost-benefit calculations.

1. *Individual Costs/Benefits.* — The costs of covering include the curbing of authentic self-elaboration, the decline of socioeconomic and political equality, and the diminution of cultural and social liberty. These individual and collective costs derive from the essentializing tendencies and identity-making practices of forced assimilation and conformity.

All outsider groups cover.[27] Coerced covering survives because courts have limited the principle of accommodation in favor of assimilation. The pull of assimilation strains the moral imperative of personal authenticity. In his book on covering, Professor Yoshino elucidates his own gay identity by pointing to different moments of covering and flaunting. When not compelled by unjustified coercion and not contaminated by bias, those moments denote the individual freedom to fashion identity in authentic terms.[28]

For Professor Yoshino, the individual freedom to elaborate an authentic identity for the self should stand as a bulwark against coerced assimilation. This autonomy-giving freedom, and its promise of universal equality, impels resistance to covering and reverse-covering demands. Resistance is crucial to safeguarding individual personhood and to banishing symbolic group inferiority. Indeed, resistance animates the project of self-elaboration. As envisioned by Professor Yoshino, the norms of universality and authenticity steer disparate identity groups toward the common goals of self-elaboration and

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[27] *Id.* at ix.

[28] *Id.* at 92–93.

integration through reason-forcing conversation.[29] The struggle of difference-based identity groups (for example, the gay rights and immigrant rights movements) to resist identity-denying assimilation points to the shared costs of covering and the benefits of collective acts of uncovering.

For difference-based identity groups, the benefits of uncovering are bound up in socioeconomic and political emancipation, a concept that stands central to Professor Richard Ford's work on the politics of race. Emancipation allows individuals to express a public sense of self, to experience equality of economic opportunity, and to realize the liberty of cultural and societal participation. To Professor Ford, identity politics can impede individual emancipation; he treats social identities as both the generative force and the manifestation of underlying differences.[30] This account casts individuals as agents in a field of social power shaped by racial difference.[31] Identity status, signaled by membership in a social group, confers an important aspect of the self. According to Professor Ford, status can occupy a position endowed with, or evacuated of, social power. Group identities that take shape as the effect of "externally imposed social discourses," such as racism and homophobia, deform aspects of the autonomous self.[32]

2. Collective Costs/Benefits. — The collective costs of covering extend to group fragmentation, economic inequality, political disenfranchisement, and cultural and social bias. The costs incurred in the gay struggle against assimilation, for example, reveal how social movements grapple with covert and overt demands for covering that are expressed in conversion and passing. On Professor Yoshino's reading, the struggle of the gay rights movement began with the decades-long campaign to defeat the demand for conversion and to refute the psychoanalytic claim of therapeutic intervention. Radicalized by the Stonewall Riots of 1969, the campaign knitted together disparate strands of activism to challenge medically sanctioned conversion therapy.[33]

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[29] *See id.* at 194–96. To Professor Yoshino, the coerced conformity of subordination signals the limits of civil rights law. Realizing these limits, he urges civil rights activists to move outside the law into reason-forcing conversations with state actors in the public sphere and with dominant groups in the private sphere to debate the imposition of assimilation burdens on protected groups. Reason-forcing conversations, he explains, should occur informally and intimately. Certain reasons, pointing to "white supremacy, patriarchy, homophobia, religious intolerance, and animus toward the disabled," *id.* at 195, should be deemed illegitimate grounds for covering demands. Reasoned conversations reveal an aspirational vision of civil rights law encouraging human flourishing free of the limitations of bias. *Id.* at 194–96.

[30] *See* RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 28 (2005).

[31] *See id.* at 59.

[32] *Id.* at 28, 59–67 (assailing multiculturalism, identity politics, and the politics of recognition).

[33] YOSHINO, *supra* note 2, at 39. For historical background, see WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 17–148 (1999).

Conversion-commanded assimilation destroys identity. Resisting assimilation and the destruction of identity, Professor Yoshino insists, involves coming out. The early gay rights movement "came out" in the Stonewall Riots, inaugurating a new militancy. Gay rights militancy during this late-twentieth-century era, however, failed to quell the demand for passing.[34] Assimilationist passing concedes homosexuality in silence instead of engaging in self-identifying conduct or speech. Reinforced by gay silence, the passing norm survived until the political turmoil of the AIDS public health crisis. Professor Yoshino views the AIDS crisis as a galvanizing moment for the gay community; it roused gay individuals to come out in order to combat the private and public consequences of the health epidemic.[35]

Professor Yoshino posits self-identifying gay performance and speech as transformative. The transformative logic of cultivating and protecting the authentic self shifts the debate within the gay rights movement away from conversion and passing, and toward covering.[36] For Professor Yoshino, the debate over self-elaboration and covering divides the gay community, partitioning "normals" and "queers," who respectively form assimilationist and liberationist camps.[37] Normals disdain queers for flaunting sexual difference. Queers disparage normals for their sexual conformity. Professor Yoshino depicts the gay schism between "normalcy" and queerness in fragments of experience along the different axes of covering.

Uncovering connects marginalized individuals and groups with legal and political strategies fashioned to counter the isolation of historically subordinated communities. Imposed by a stigma of inferior caste or class status, that isolation undercuts participation in politics, markets, culture, and society. Uncovering affords stigmatized social groups an opportunity to confront entrenched status hierarchies and to engage in transformative acts of self-elaboration, political and economic participation, and cross-racial dialogue about the dangers of social stigma and caste status.[38]

C. Identifying Costs of Uncovering and Benefits of Covering

The costs of uncovering for hypermarginalized individuals and the marginalized groups that encompass them go beyond the risks of jeopardizing personal survival or safety to include the risk of internal and external repression. To Professor Ford, the public performance of difference, and the discourse that accompanies it, creates a stereotyping

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[34] YOSHINO, *supra* note 2, at 68.

[35] *See id.* at 66–68.

[36] *See id.* at 76–77.

[37] *Id.* at 77.

[38] *See id.* at 194–96.

social discipline of ingrained habits, practices, and traits that leads to cultural discrimination by both insider and outsider groups.[39] Insider groups discriminate by forcing group members to accept historical stereotypes. Outsider groups discriminate by punishing those historical stereotypes. Professor Ford locates this dual discrimination in popular accounts of distinctive cultural differences and rights. He views these accounts as repressive.[40]

Under Professor Ford's "repressive hypothesis," uncovering may dilute civil rights enforcement by infusing rights claims with difference-based, rather than status-based, cultural content. The "tactical exaggeration of group cultural difference" fostered in litigation and political mobilization strategies increases the risk of rights dilution.[41] Additionally, difference-based cultural claims threaten to divert attention away from the social institutions and underlying status hierarchies of racism.[42] In this way, uncovering may force group members into conforming social roles while obscuring the pervasive social bias and discrimination that attaches to those roles.[43]

Uncovering may also jeopardize the formation of groups and subgroups struggling to organize against cultural and social stigma. Within the gay community, for example, uncovering hypermarginalized subgroups such as transgender immigrants may not only inflame "normal"/"queer" tensions between conforming and flaunting gays but also hamper the mainstream acceptance of the gay rights movement. This form of uncovering poses strategic risks for marginalized groups that add to the acknowledged risks of endangering client survival and safety, reinforcing stereotypes, and rekindling discrimination. These risks heighten the complexity of the lawyering process in counseling uncovering.

D. How and Why To Counsel Uncovering

Civil rights and poverty lawyers are wary of uncovering. Laboring hard to ensure the survival and to protect the safety of clients, they distrust normative commands that further burden their work by attending to abstract notions of individual client authenticity or group solidarity. Their skepticism emanates from concrete, temporal, professional concerns. Concretely, client survival and safety present compelling needs, not abstractions. Professionally, attending to those needs

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[39] *See* FORD, *supra* note 30, at 36–42.

[40] *See id.* at 37.

[41] *Id.* at 17.

[42] *Id.* at 31.

[43] *See id.* at 36–41; *see also* Angela Onwuachi-Willig, Essay, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1907–27 (2007).

through advising uncovering requires sociopsychological and political skills that lie outside the general competence of lawyers.

On this reasoning, when professional considerations recommend muting the disfavored identity traits of a client in order to protect his or her best interests, civil rights and poverty lawyers instinctively — and not unreasonably — cover. Law school clinics follow the same logic of covering in teaching direct service representation, law reform, and community advocacy. That instrumental logic, however, potentially harms clients in situations when authentic self-elaboration and group coalition building are not only possible, but also beneficial. This section considers uncovering as a form of sociolegal counseling appropriate for lawyers' discretion.

Counseling uncovering when representing marginalized and hypermarginalized clients raises troubling questions of lawyers' discretion. Codified in ethics rules and predicated on independent professional judgment and candor, discretion in uncovering permits a lawyer to weigh legal and nonlegal considerations, including relevant moral, economic, social, and political factors, in counseling a client.[44] In civil rights and poverty law practice, counseling discretion occurs in situations of unequal lawyer-client bargaining power. Covering exacerbates lawyer-client relational inequality, interfering with communication and thwarting mutual understanding. Ineffective communication and misunderstanding cast doubt on the competence and legitimacy of lawyer-counseled uncovering.

Neither civil rights and poverty lawyers nor clinical teachers and students seem well-suited to engage in counseling uncovering. Most of them lack rudimentary instruction in this sort of counseling. Moreover, because they are situated within an advocacy process that is prone to inequality and paternalism, most lack an appropriate opportunity to perform such counseling. Further, the exigent demands of direct service, law reform, and community lawyering seem incompatible with the more deliberative, cross-disciplinary process of counseling uncovering.

Granted, to a limited extent, ethics rules recognize lawyers' competence to make professional judgments about a client's decisionmaking capacity.[45] The rules also permit lawyers to take reasonably necessary protective action by consulting with or seeking the appointment of professionals from other relevant disciplines.[46] Yet this narrow compe-

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[44] *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007) (authorizing lawyers to refer to nonlegal considerations when rendering advice).

[45] *See id.* R. 1.14 (providing some discretion for lawyers to make judgments for clients with limited decisionmaking capacities).

[46] *Id.*

tence does not mean that lawyers are equipped to counsel the authentic self-elaboration of individual or group identity.

Still, viewed against the broader backdrop of activist lawyering traditions, tensions over the competence and legitimacy of lawyers' discretion in counseling stigmatized clients to uncover their individual or group identity seem less daunting. Those well-known, role-defining tensions in part underlie the history of civil rights and poverty law as well as the rise of cause lawyering.[47] They also track long-recognized strains in lawyers' divergent ethical duties to client interests and social goals.[48]

Despite controversy over when lawyers should counsel uncovering, the effort to develop an alternative means of advising stigmatized clients survives. Such counseling concedes a client's freedom to decline uncovering. It also better serves the social responsibilities of lawyers by working to abolish status hierarchies within marginalized groups and society. Abolition of these repressive forms of assimilation opens identity-based difference to social dialogue.

Meaningful social dialogue among marginalized and hypermarginalized client groups inevitably will incite conflicts over the ordering of self-elaboration and group solidarity preferences. These conflicts may involve litigation tactics, campaign strategy, resource allocation, or other issues. At times, self-elaboration and group solidarity goals may function at cross purposes. Consider, for example, the public self-elaboration of a hypermarginalized group like gay, HIV-positive Haitians in the historically marginalized community of Miami's Little Haiti. Their public display of authenticity, however appropriate, may undercut legislative efforts by immigrant rights groups to liberalize Haitian immigration policy. In this context, the social costs of uncovering may outweigh its benefits. This dynamic, context-dependent calibration suggests that the decision to cover or uncover may turn on social cost as much as individual psychology, normative conviction, or political computation. Insofar as the decision to cover or uncover implicates multiple variables, informational client counseling that accurately assesses the social costs of uncovering becomes vital to the lawyering process. In the same way, transformational counseling that evaluates the socially optimal balance of external goods (justice, liberty, and equality) for marginalized and hypermarginalized groups be-

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[47] For studies of cause lawyering, see CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., 2006); and STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004).

[48] *See* Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 766–67 (1995); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1221–62 (1982).

comes indispensable. The next Part illustrates opportunities for both types of counseling — covering and uncovering — in the context of direct service, law reform, and community lawyering.

II. CASE STUDIES OF COVERING AND UNCOVERING

The fields of civil rights and poverty law provide widespread opportunities for lawyers to counsel hypermarginalized individuals and groups to cover or uncover their stigmatized identities. These opportunities arise out of the identity-making practices pervading each field and influencing each facet of the lawyering process. In direct service, identity-making practices affect client interviewing and counseling. In law reform, they impact client decisionmaking about the strategy and objectives of litigation. In community lawyering, they impinge on the roles of clients and the relationships among client groups in mounting local economic development and neighborhood improvement initiatives. To understand covering and uncovering opportunities generated by the provision of legal services, this Part assembles three case studies gleaned from the law school clinics at the University of Miami's Center for Ethics and Public Service and from the Lesbian Gay Bisexual Transgender Project at the ACLU. The Essay will turn first to the university's Community Health Rights Education Clinic to provide a current account of direct service lawyering.

A. Direct Service Lawyering: Community Health Rights

Identity-making practices often shape direct service lawyering by constructing client difference as a mark of inferiority.[49] This mark defines the client as dependent, helpless, or even deviant. Differences of class, gender, and race all serve as identity markers and potential stereotypes. The more marginalizing differences a client presents, the more likely a lawyer will be to construct his or her identity in terms of stereotypes.

Lawyer construction of client difference starts at the initial interview. Construing a client as stereotypically inferior during the interviewing process inhibits the lawyer's understanding of a client's motivation in seeking legal assistance. It also interferes with active listening and reciprocal dialogue, narrows the scope of the lawyer's information gathering, and allows the lawyer to fill in informational gaps with stereotypical explanations.

Client difference infects the counseling process as well. Effective client counseling requires eliciting information, clarifying objectives,

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[49] Direct service lawyering entails the limited case-by-case representation of individual clients for exigent, problem-solving purposes. *See* Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 683–87 (1988).

identifying alternatives, and evaluating consequences. If the lawyer assigns the client a passive role in that process, the client may not volunteer information or assert the full extent of particular objectives. Likewise, if the lawyer perceives the client to be incompetent, the client may not come forward to help identify alternative courses of action or evaluate nonlegal consequences. Disabling or marginalizing identity excludes clients from meaningful participation in counseling and increases the risk of paternalistic lawyer intervention in client decisionmaking.

1. Community Health Rights in Context. — At the Community Health Rights Education Clinic (CHRE), opportunities to counsel uncovering frequently arise in the representation of gay, HIV-positive members of the Haitian community for purposes of estate and permanency planning. One recent HIV-positive Haitian client, a widower, sought out CHRE's assistance at the clinic's South Florida AIDS Network public hospital site. The fifty-three-year-old client was the father of three children ranging in ages from twelve to twenty-three. He relied on Supplemental Security Income disability benefits for subsistence. Bilingual in Creole and English, he emigrated from Haiti to the United States in 1971. Referred to CHRE's medical-legal site, he requested help from clinic students in planning for the long-term care of his children.[50]

During interviews with CHRE students and faculty, the client explained that he was "out" to the local gay community but closeted to his family, friends, and neighbors. Seriously ill, he directed the students to draft planning documents in cooperation with his family without informing the family of his sexual identity or the AIDS-related cause of his illness. The students complied with the client's directions and did not disclose his sexual identity or the etiology of his illness.

Client directions of this sort come regularly from CHRE's HIV-positive clients in Miami's Little Haiti. It is not uncommon to learn that the sexual identity and health status of such immigrant clients remain unknown to their families and communities. The literature of the Haitian Diaspora documents complex intersections of gender, sexuality, and culture in Haiti and the Caribbean more generally.[51] These intersections lead to changing cultural and social constructions

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[50] Interview with JoNel Newman, Associate Clinical Professor and Director, CHRE Clinic, Univ. of Miami Sch. of Law, in Miami, Fla. (Dec. 22, 2006). CHRE evolved out of the cross-disciplinary, medical-legal model of community advocacy developed by Professors Gary Bellow and Jeanne Charn at Harvard Law School's WilmerHale Legal Services Center. For a preliminary sketch of medical-legal advocacy, see Gary Bellow & Jeanne Charn, *Paths Not Yet Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 GEO. L.J. 1633, 1649 n.54, 1659–63 (1995) (describing the Medical-Legal Services Project).

[51] For studies of the intersection of gender and sexuality in Caribbean culture, see THE CULTURE OF GENDER AND SEXUALITY IN THE CARIBBEAN (Linden Lewis ed., 2003).

of male sexual orientation. Indeed, data accumulated from the AIDS pandemic in Haiti reveal significant male histories of risk-taking bisexual behavior.[52]

In preparing clinical students to represent Haitians or other immigrant groups, should we teach them to counsel their clients to uncover important constructions of their own identity? CHRE's answer is to encourage covering. Loyal to client interests in survival and safety, and respectful of client autonomy, CHRE teaches students to refrain from paternalistic intervention in counseling. Instead, it urges students to treat clients as independent moral agents capable of making rational decisions — in this case the decision to cover. In HIV/AIDS legal clinics, that decision protects clients from unwanted disclosures that might leave them vulnerable to family antagonism, loss of employment, community hostility, or even hate crimes.

A more complete answer, however, requires the acknowledgement that acceding to client covering requests involves identity-making practices that harm as well as protect clients. Covering effaces an intrinsic part of a client's self-identity, here sexuality, denying a client space for personal self-elaboration. The failure to support self-elaboration in direct service representation abandons a potentially useful instrument for enhancing voluntary association and political activism.

2. Lessons of Community Health Rights. — CHRE's lessons in covering illustrate how HIV/AIDS clients of color hide or mute their own stigmatized identities, even when those identities are known and at times visible. An analysis of individual covering strategies provides clinical students with a corrective lens to spot covering as a form of coerced assimilation. That lens enables CHRE students to better recognize the muted traits and behaviors associated with difference in the Haitian gay community. CHRE's HIV/AIDS clients experience the psychic costs of difference-based covering firsthand. Historically stigmatized, these clients are continually vulnerable to racial discrimination and cultural stereotypes.

Today, CHRE clients continue to cover. In fact, they direct clinical faculty and students to cover on their behalf in both the private sphere of family life and the public sphere of legal representation. At CHRE, clients cover to prevent racial and cultural discrimination while submitting to coerced assimilation and status hierarchy. Their strategic covering obscures the distinctive racial culture of gay Haitian clients and forsakes the liberal ideal of self-actualization. In this way, CHRE indirectly accepts illegitimate social hierarchies.

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[52] *See* PAUL FARMER, AIDS AND ACCUSATION: HAITI AND THE GEOGRAPHY OF BLAME 134–35 (updated ed. 2006); *see also* ARTHUR M. FOURNIER WITH DANIEL HERLIHY, THE ZOMBIE CURSE: A DOCTOR'S 25-YEAR JOURNEY INTO THE HEART OF THE AIDS EPIDEMIC IN HAITI 28, 44–45 (2006) (describing Haitian homosexual males with AIDS).

CHRE's covering strategies arise out of racial and cultural differences in immigrant communities of color. Those differences give rise to a form of race consciousness predicated on discriminatory animus. Progress in transforming racial animus hinges on uncovering strategies that are linked to legal rights advocacy, political organization, economic development, and cultural evolution. However, for CHRE's gay Haitian clients, uncovering strategies threaten to restrict the liberty of group members already forced to assimilate by putting them at public risk. Although forced assimilation effectively produces and punishes group difference, it also protects groups from difference-motivated violence.

For the gay clients of Little Haiti served by CHRE, the labeling of group difference occurs in social institutions like immigration and disability offices or public hospital clinics. The labels signify status differences based on sexual orientation, immigration, and health. Status-based markers endow group identity with an objective character and culture. The objectification of group identity reinforces the hard facts of stereotype.

CHRE's clinical students and faculty can change these facts by counseling uncovering. Applied to CHRE, uncovering alters the content of medical-legal collaborations by providing interdisciplinary, community-based advocacy and care to underserved, multicultural communities. Alteration requires clinics to develop a curricular model for instruction in medical-legal uncovering protocols, to establish a practice model for the delivery of medical-legal care to populations likely to engage in uncovering, and to provide health care rights education, self-help advocacy training, and legal representation to underserved populations susceptible to uncovering. Each of these activities necessitates intensive client interviewing and investigation in consultation with medical-legal faculty, as well as in-depth counseling to help clients, their families, and their communities weigh the costs and benefits of uncovering.

Of necessity, uncovering implicates the attorney-client privilege as well as ethics rules governing confidentiality and work product protections.[53] In addition, counseling uncovering implicates both power dynamics and ethical judgments.[54] Gauged by conventional measures, the judgment to abide by a client's directions to draft permanency planning documents in cooperation with his family without informing the family of his sexual identity or the AIDS-related cause of his illness

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[53] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007).

[54] For a discussion of power relations between lawyers and clients, see Susan D. Carle, *Power as a Factor in Lawyers' Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 137–48 (2006).

properly fulfills the standard conception of a lawyer's obligation under prevailing ethics rules.[55]

Under the standard conception of advocacy, the norms of zealous representation of the client's interests and moral nonaccountability in the adversarial process guide lawyers' decisionmaking.[56] Adversarial norms emphasize individual client interests and outcomes obtained in isolation from third party, group, or community considerations. CHRE's HIV-positive immigrant clients often give directions unmindful of such third party considerations. CHRE students regularly find out that the sexual identity and health status of their clients remain hidden from their families and communities, yet they still consistently yield to their clients' expressed desire to cover. In doing so, clinic students abandon countervailing traditions of lawyer independence and moral activism.[57] Sparsely supported by ethics rules,[58] these traditions encourage greater community-centered and socially minded reflection in determining whether to counsel covering or uncovering identity.

To counsel uncovering would challenge clinical students to discern the repressive impact of group stereotype and stigma. When deployed in counseling, negotiation, or litigation, discriminatory stereotypes taint lawyer accounts of client cultural differences, practices, and rights. The accounts render an inaccurate description of clients and their encompassing social groups. Further, they compel minority groups to accept historical stereotypes. At CHRE, the covering account of closeted gay members of the Haitian community reinforces the discrimination and status hierarchy that marginalize gay immigrant clients of color in Miami.

For CHRE and other clinics representing hypermarginalized clients within historically marginalized communities, uncovering strategies should connect the eradication of caste or status hierarchies with the accommodation of claims of cultural difference. Accommodation entails greater attention to the commonality of cultural discrimination and the shared solidarity of cultural identity in forging political alliances. These remedial alliances supplement group participation in the democratic process. An uncovering strategy motivated by the intolerance of caste status allows for experimentation, flexibility, and innovation in representing hypermarginalized groups under the constraints of

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[55] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.").

[56] *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY, at xx, 7 (1988).

[57] *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083, 1113–19 (1988) (discussing theories of how lawyers should respond to conflicting legal and moral concerns in representation, and arguing that lawyers should consider "whether assisting the client would further justice").

[58] *See* MODEL RULES OF PROF'L CONDUCT R. 2.1.

civil rights and poverty law. For CHRE, that alternative strategy may work to counter the isolation of gay Haitian clients while honoring their claims of cultural pluralism and group identity.

On a daily basis, CHRE students hear client narratives of group difference and witness client performances of group culture. Counting such narratives and performances as the effects of repressive social institutions in no way diminishes their narrative authenticity or performative value. In covering during the permanency planning process, CHRE's Haitian clients voice that authenticity, albeit incompletely. Similarly, the acknowledgement that the social production of group difference consigns individuals to preordained social roles — to the detriment of minority group members — in no way lessens the historical utility or indispensability of those roles for the collective defense and welfare of the group itself. Here, CHRE's Haitian clients fulfill their coerced subordinate role for the collective benefit of family and group.

No doubt, incomplete or partial narrative authenticity in role performance offers some emancipation from the social practices that reinforce the subordination of ascribed social status. But full emancipation requires social justice tied to the political enfranchisement and economic integration of subordinated groups into the governing structures of society. Political inclusion and economic integration rest on uncovering racial discrimination embodied in policies that exhibit (or could be reasonably inferred to exhibit) bias, either through racist proxies or associated types of status-based social animus.

The pervasive racial bias and status-based social animus impinging on CHRE's representation of Haitian clients curtail the range of programmatic social justice interventions available to buttress uncovering strategies. Interventions calculated to enforce civil rights laws or to vindicate statutory entitlements to subsistence benefits may be unable to protect specific types of activity, such as publicly coming out. That failure leaves the particular narratives of group culture unratified and unprotected. Absent uncovering strategies, such group narratives may be silenced. The same risks intrude upon covering and uncovering strategies in law reform lawyering.

B. Law Reform Lawyering: The ACLU's LGBT Project

Identity-making practices affect law reform lawyering in several ways.[59] The practices may infuse stereotypical imagery and language into pleadings, motions, and memoranda, and portray clients as power-

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[59] Law reform lawyering involves class-wide or group representation in test case litigation to attack structural policies and practices for purposes of institutional change. *See* Alfieri, *supra* note 49, at 688–90.

less victims of discrimination or depict people of different sexualities as disabled. Building on this stereotypical rendering, lawyers may draw an almost natural inference of client incompetence regarding joint consultation on litigation tactics and goals. Further extending that enfeebling inference, lawyers may physically exclude their clients from litigation forums such as hearings or trials.

All of these conscious and unconscious practices operate to gain tactical advantage with the trier of fact, an adversary, or the media. They also function to accommodate burdens of proof imposed by statute and doctrine. Equally important, they furnish rallying points of injury and injustice for the organization and mobilization of communities. In bracing clinical students to mount law reform campaigns, should we teach them to counsel their clients to cover or uncover group identity?

1. The ACLU's LGBT Project in Context. — Like CHRE, the ACLU's Lesbian Gay Bisexual Transgender (LGBT) Project's answer is to cover. In 2001, LGBT Project lawyers filed a lawsuit in New York state courts on behalf of the Hispanic AIDS Forum (HAF) seeking compensatory and punitive damages for sex, gender, and disability discrimination.[60] The only Latino-run HIV/AIDS organization in New York City, HAF provides treatment education, risk-reduction counseling, and prevention services to the Latino population in an effort to reduce HIV/AIDS transmission among individuals and couples, and in order to secure wellness and support services as well as empowerment opportunities for Latinos affected by HIV/AIDS.[61]

In 1991, HAF leased office space in the Jackson Heights neighborhood of Queens, a neighborhood with "the highest incidence of HIV/AIDS among Latinos in [the borough] and one of the highest concentrations of transgender Latinas and Latinos in the United States."[62] HAF's Jackson Heights office expanded in 1995 and shared common areas, including public hallway bathrooms, with other tenants.[63] In 2000, during lease renewal negotiations, HAF learned of tenant complaints about "men who think they're women . . . using the women's

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60 *See* Second Amended Complaint at 12, Hispanic AIDS Forum v. Estate of Bruno, 759 N.Y.S.2d 291 (Sup. Ct. 2003) (No. 01/112428). The complaint contends that "HAF's transgendered clients have or are perceived to have a medically diagnosable condition known as Gender Identity Disorder." *Id.* at 5. The complaint alleges violations of the New York Human Rights Law and the New York City Administrative Code. *Id.* at 9–12.

61 *Id.* at 2.

62 *Id.* at 3–4.

63 *Id.* at 4. The complaint alleges that during initial lease negotiations, the building landlord objected to the listing of HAF's full name — Hispanic AIDS Forum — on the ground floor directory "because [the landlord] did not want the word 'AIDS' in the directory." *Id.* at 4. Reportedly, "HAF agreed to this condition and listed its full name only on its office doors." *Id.*

bathroom."[64] Complaining that HAF's clients "use the wrong restrooms," the landlord's property manager advised HAF that no lease renewal would be forthcoming unless HAF agreed to bar its transgender clients from using the public bathrooms in the building.[65] When negotiations between the landlord and HAF collapsed in 2001, HAF received an eviction notice and subsequently vacated the building.[66]

The LGBT Project engaged in a difficult covering posture in the HAF litigation that was compelled in part by the practical requirements of pleading sex, gender, and disability discrimination claims under New York statutes and regulations, and in part by the ACLU's law reform mission to attack prejudice and discrimination against transgender people affected by HIV/AIDS. Doubtless HAF and its Latino clients endorsed this mission and the purpose of the litigation, though the voices of these clients are absent from the litigation record.[67] In fact, the only voices present are the voices of tenants complaining of "those men that look like women using the bathroom" and the voices of the landlord's agents seeking to rid the building "of all these Queens."[68]

The strategic rationale for the inclusion and amplification of the defendant's prejudicial remarks is evident. But that inclusion in no way warrants the exclusion of client voices, here represented by HAF and its transgender constituents. Although pleadings and memoranda describe HAF's institutional history and service mission, none makes mention of the equality and self-elaboration struggles of Latino transgender people in Jackson Heights, Queens. Again, the strategic rationale for this exclusion is clear-cut, namely "don't flaunt" in public forums like state courts where outsiders are vulnerable to engendering cultural disapproval among judges or juries or where outsider rights of self-elaboration are judged irrelevant. Here, irrelevance applies to both doctrine and identity. Doctrinally insignificant and differentially silenced, the HAF clients' interest in self-elaboration was rendered strategically inconsequential.[69] Under this paradoxical logic, outsider clients like transgender Latinos must cover their identity in law when asserting their right to stand uncovered in society.

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[64] *Id.* at 6 (internal quotation marks omitted).

[65] *Id.* at 7.

[66] *Id.* at 7–8.

[67] For example, the second amended complaint contains descriptions of conversations that included HAF's executive director, lawyer, and administrative assistant, but none with any HAF clients. *See id.* at 5–7.

[68] *Id.* at 5, 7 (internal quotation marks omitted).

[69] On identity construction in legal representation, see generally Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 115, 120 (David Kairys ed., 3d ed. 1998).

More distressing than the Project's overreliance on covering strategies in pleadings and motion practice is its deployment of stereotypical imagery and language to portray all transgender people as mentally disordered.[70] Once more, the strategic rationale here is evident: the claim of medical disability invokes the protection of New York disability law and seeks to solicit the sympathy of the court. And yet, this claim covers, not by muting difference, but by converting difference into disability.[71] Covering of this kind distorts client appearance and affiliation. Moreover, it severs clients from useful sources of community association and activism in the LGBT rights movement.

2. Lessons of the ACLU's LGBT Project. — The work of the ACLU's LGBT Project in defending the constitutional and civil rights of individuals and groups in cases involving discrimination based on sexual orientation, gender identity, and health status demonstrates the risks of covering and disability conversion in law reform litigation, especially for LGBT groups. The LGBT Project's lawsuit attacked bias against members of New York City's transgender Latino population. That bias addressed the appearance of HAF's transgender clients. Rather than seek to uncover the stories of HAF's transgender clients, the LGBT Project covered HAF's clients' individual and group constituent identity narratives, erasing their appearances, muting their affiliations, denying their associations, and silencing their activist voices.

Both the LGBT Project's memorandum of law and an amicus brief filed by a transgender health organization describe transgender people as mentally disordered and medically disabled.[72] This description tilts toward disability from the weight of doctrine and the sway of ideology. Even the coherent identity politics of the LGBT Project is displaced by the doctrinal force of transgender disability presumptions. The repeated medical, psychotherapeutic references to HAF's transgender clients as mentally impaired diminishes the ameliorative purposes of the litigation. Nowhere do these descriptions make any reference to

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[70] *See* Memorandum of Law in Opposition to Defendants' Motion To Dismiss the Complaint at 18, *Hispanic AIDS Forum*, 759 N.Y.S.2d 291 (No. 01/112428) (arguing that "[t]ransgender people have a diagnosable condition . . . recognized as a mental disorder").

[71] *But see* Jennifer L. Levi & Bennett H. Klein, *Pursing Protection for Transgender People Through Disability Laws*, *in* TRANSGENDER RIGHTS 74, 74–92 (Paisley Currah et al. eds., 2006) (arguing for a legal strategy based on using disability laws while working to eliminate stigmas against disabled and transgender people). *See generally* NAN D. HUNTER ET AL., THE RIGHTS OF LESBIANS, GAY MEN, BISEXUALS, AND TRANSGENDER PEOPLE 174–75 (4th ed. 2004) (discussing applicability of federal and state disability laws to transgender people).

[72] *See* Memorandum of Law in Opposition to Defendants' Motion To Dismiss the Complaint, *supra* note 70, at 18; *see also* Joint Brief for Amici Curiae Harry Benjamin International Gender Dysphoria Ass'n et al. in Support of Plaintiff-Respondent at 1–13, Hispanic AIDS Forum v. Estate of Bruno, 792 N.Y.S.2d 43 (App. Div. 2005) (No. 3820), 2005 N.Y. App. Div. Briefs LEXIS 18.

the empowering affiliations or associations of transgender people.[73] Moreover, nowhere do they mention any sense of larger LGBT cultural commitments or group values. Inured to covering and conversion in the confines of litigation, the LGBT Project lawyers took a pragmatic, rights-based approach to difference and group identity consciousness, employing civil rights laws as useful, albeit ultimately constraining, vehicles for social justice.

Nonetheless, the HAF litigation and the LGBT Project provided rich opportunities for experimenting in uncovering and cultural pluralism. When successful, such experiments sort and reassemble old and new cultural forms, generating alternative models of cultural pluralism and, equally important, multiple sources of social identity. This process propagates new hybrid forms of distinctive group cultures, enhancing the freedom of individuals to renegotiate the content of their historically ascribed identities to promote social integration or to vindicate antidiscrimination goals. At the same time, such freewheeling negotiation may disrupt local cultural continuity and traditions, diluting social solidarity.

Litigation strategies tied to uncovering stigmatized identities may overturn status hierarchies and discredit stereotypes. Unlike assimilation-induced covering, these strategies neither mute traits nor restrain behaviors associated with difference. To the contrary, these strategies exploit the expressive value of status performance, invoking the protection of civil rights laws without harming identity. Because the traditional civil rights paradigm typically omits the identity costs of damaged authenticity and stifled emancipation, the psychic cost of caste status and stereotypes to marginalized groups goes largely unmentioned in the HAF litigation.

In a noteworthy sense, the muted civil rights discourse expressed in the HAF litigation works to accommodate the dominant conventions of gay rights litigation. Typically, Professor Yoshino explains, pro-gay litigation battling forced assimilation or conformity in the forms of conversion, passing, and covering avoids the presentation of flagrant homosexual appearance or conduct. Indeed, pro-gay litigation generally portrays "straight-acting" men in positions "identical to straights in all ways except orientation."[74] Despite these portrayals, federal trial and appellate courts seem more inclined to tolerate demands to cover than demands to convert or pass. Put simply, courts fail to protect gays who decline to cover.[75] By covering identity in the HAF litiga-

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[73] On the disempowering constructions of disability advocacy, see Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 828–46 (1992).

[74] YOSHINO, *supra* note 2, at 80.

[75] *See id.* at 93–107 (referring to "case after case in which courts predicate an entitlement on whether a gay or lesbian individual covered," *id.* at 101).

tion, the LGBT Project sought to accommodate the traditional paradigm of civil rights advocacy in order to safeguard the equality rights of transgender Latinos. However well intentioned, this accommodationist effort achieved only limited results.[76]

Both the HAF litigation and the larger LGBT Project illustrate potential strategies for uncovering identity in the lawyering process. In the context of the gay rights movement, these strategies form part of the struggle to resist the assimilation demands of conversion, passing, and covering. The gay critique of assimilation, and the concomitant struggle to resist coerced covering, defies the systematic demand to assimilate to mainstream norms. Defiance stems from the unfair burdens of assimilation, burdens blunting the equality claims and self-actualizing aspirations of all marginalized and hypermarginalized groups. Connecting a universal demand for equality to the authentic expression of identity in the litigation process binds traditional civil rights groups and outsider groups to a new civil rights paradigm asserting joint group-based equality rights and universal liberty rights.

The joinder of group-based equality rights and universal liberty rights in opposition to covering challenges civil rights laws' toleration of white supremacy, patriarchy, and homophobia. That challenge arises out of outsider norms and narratives of authenticity and emancipation. When silenced by the demands of conversion, passing, and covering, these narratives minimize the public expression of self- and group identity. The gay rights movement gives renewed voice to those narratives, disparaging the conditioning of gay equality and inclusion on forced assimilation to straight norms. Targeting the behavioral expressions of identity, assimilation demands occur daily in the intimate spaces seen in the HAF litigation, spaces often inaccessible to law and lawyer intervention.

Given the inaccessibility of the legal system for those fighting the demands of covering, the primary means of resisting covered assimilation has been cultural action. Cultural action in advocacy involves a broader mindfulness of, and a conversation about, demands for conversion, passing, and covering. Although changing, those demands are often premised on the metaphor of difference (especially homosexuality) as illness. This metaphor finds expression in the HAF litigation through the rhetoric of mental illness and the landlord's demand for assimilation and identity transformation. Conversion-commanded as-

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[76] *See Hispanic AIDS Forum*, 792 N.Y.S.2d at 47 (dismissing the complaint on the merits); *see also* Hispanic AIDS Forum v. Estate of Bruno, 839 N.Y.S.2d 691 (Sup. Ct. 2007) (denying motion to dismiss with respect to sex/gender discrimination claims in HAF's amended complaint). The case has since settled for $90,000. WebCivil Supreme, eCourts, N.Y. State Unified Court System, http://iapps.courts.state.ny.us/webcivil/FCASSearch?param=I (search for Index Number 112428/2001; then follow "Index Number" hyperlink; then click "Show All Appearances" button).

similation destroys identity. Transformative in its effect, the self-identifying gay performance of uncovering stands essential to the authentic self.

To the extent that the liberal logic of gay self-elaboration divides "normals" and "queers," it greatly influences the way in which lawyers deal with uncovering in litigation. Litigation-based uncovering seeks to fulfill the minimum degree of assimilation necessary for legal change and, at the same time, steer reason-forcing conversation toward common goals of universal liberty and group-based equality. The HAF litigation unfortunately shows that public reason-forcing conversations may fail to remedy coerced assimilation in law and society. Whether informal or intimate reason-forcing conversations will fare any better in expelling white supremacy, patriarchy, and homophobia from other marginalized groups depends on the pragmatic decisions of civil rights and poverty lawyers and outsider group members reached in the context of community. This Essay turns next to the task of confronting repressed or shunned group identity in community lawyering.

C. Community Lawyering: Economic Development

Identity-making practices permeate community lawyering in classrooms, courtrooms, and neighborhoods. Community lawyering entails the representation of community-based organizations and groups for purposes of empowerment, capacity-building, and political mobilization.[77] In clinical classrooms, talk of "poor people" may conjure up images of helpless tenants, frail homeowners, and incompetent small business owners. This reliance on traditional notions of "marginalized groups" oftentimes obscures the existence of hypermarginalized subgroups such as battered women, drug users, ex-offenders, and transgender people. That omission, coupled with images of powerlessness, stifles the creativity and imagination of clinical students.

By comparison, collaborations with "poor people" in courtrooms often erase marginalized community groups and their members from the courtroom itself. Again and again, those groups and their members are absent from or underrepresented at public meetings, administrative hearings, and court proceedings. That collective absence teaches clinical students to exclude marginalized groups from meaningful participation in the lawyering process. Hypermarginalized subgroups suffer that exclusion most profoundly.

1. Community Economic Development in Context. — In neighborhoods, community economic outreach to "poor people" frequently limits its partnerships to established private entities, nonprofit groups, and

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[77] On community lawyering, see, for example, Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994) (book review).

churches. This artificial limitation prevents clinical students from discovering hypermarginalized subgroups and discourages them from forging new community alliances and joint ventures. At the University of Miami School of Law's Community Economic Development and Design Clinic (CEDAD), law students wrestle with identity-making practices in courtrooms and neighborhood meeting rooms. In priming students to reach out to community-based organizations to aid economic development initiatives or social service projects, should we teach them to counsel their clients to cover or uncover the identities and needs of hypermarginalized subgroups encompassed within their own marginalized communities?

Again, like CHRE and the LGBT Project, CEDAD's answer in the impoverished Village West neighborhood of Miami is to cover. Historically called the Black Grove, the Village West neighborhood consists largely of Bahamian and African-American descendants of segregated pioneer laborers.[78] Stymied by crime, deteriorating housing, economic disinvestment, and inadequate social services, Village West leaders and residents assembled in 2001 to create a coalition of residents, stakeholder organizations, and community partners. This coalition works to promote affordable housing, preserve the cultural character and historic structures of the neighborhood, build mixed-income housing, and foster economic development.[79]

In assisting the coalition, CEDAD students gradually learned that the needs of certain subgroups had been left unaddressed by community leaders and coalition partners preoccupied by crime, housing, and capital reinvestment. Presented with the opportunity to counsel uncovering, CEDAD has abstained from direct intervention in community deliberations, despite an urgent need. To a degree, this abstention benefits the integrity of Village West as a community by treating the coalition and its constituent groups as autonomous institutional agents capable of reaching rational decisions. This deferential posture runs sharply counter to the regnant lawyer tendency in civil rights and poverty law to intrude upon and exert control over client-community decisionmaking.[80]

However, the costs of deference are acute. Once again, the subgroups of Village West in greatest need of assistance (battered women, drug users, ex-offenders, and transgender people) fall neglected. This

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[78] *See* Arva Moore Parks, *History of West Coconut Grove*, *in* REIMAGINING WEST COCONUT GROVE 20, 20–23 (Samina Quraeshi ed., 2005).

[79] *See* REIMAGINING WEST COCONUT GROVE, *supra* note 78, at 90–186 (describing various intervention efforts in West Coconut Grove).

[80] On the limits of regnant lawyer models in civil rights and poverty law, see GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 11–82 (1992).

neglect is the source of great dissonance in CEDAD, especially among students alert to the unattended needs of hypermarginalized subgroups. Their needs are not only urgent but also highly discrete. Each of the subgroups requires a different set of advocacy skills and services. Battered women, for example, require protection and family support services. Drug users require medical assistance and rehabilitation. Ex-offenders require job training and reintegration. And transgender people, like other marginalized groups, may require tailored health and social services.

CEDAD's non-intervention has allowed continued covering by the coalition, which addresses none of these needs. Covering concedes the potential dangers these subgroups pose to the coalition in terms of their hypermarginalizing appearance and cultural affiliation. At the same time, covering relinquishes the chance to integrate new forms of subgroup association and activism into the coalition.

2. Lessons of Community Economic Development. — The normative and practical consequences of CEDAD's silence and inaction for identity-based lawyering are severe. Normatively, silence about identity further marginalizes already subordinated groups, blocking self-elaboration and intensifying inequality. Practically, silence ignores, and hence exacerbates, these groups' distinct needs for protective, rehabilitative, and reintegrative services.

CEDAD's silence cannot serve the best interests of the Village West neighborhood. Silence will not fill CEDAD's tenant and homeowner outreach seminars, or its storefront small business enterprise workshops, with battered women or drug users. Similarly, silence will not help deliver economic development education and empowerment training to ex-offenders or gay men.[81] To address these interests, CEDAD students must speak to the identities and needs of these groups with coalition leaders and constituent groups. One such group is a faith-based network, where the subject of gay and transgender group rights may prove anathema to theological doctrine.[82] Likewise, CEDAD stu-

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[81] For theories about such empowerment programs, see Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527 (2006); Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009 (2000); Zanita E. Fenton, *Silence Compounded — The Conjunction of Race and Gender Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 271 (2003); and Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997).

[82] *See* KEITH BOYKIN, BEYOND THE DOWN LOW: SEX, LIES, AND DENIAL IN BLACK AMERICA 255–68 (2005); J.L. KING WITH KAREN HUNTER, ON THE DOWN LOW: A JOURNEY INTO THE LIVES OF "STRAIGHT" BLACK MEN WHO SLEEP WITH MEN 77–84 (2004); Beverly A. Greene, *Heterosexism and Internalized Racism Among African Americans: The Connections and Considerations for African American Lesbians and Bisexual Women: A Clinical Psychological Perspective*, 54 RUTGERS L. REV. 931, 947–49 (2002).

dents must counsel the coalition and its affiliated nonprofit organizations about uncovering and the necessary recasting of community services and development initiatives to meet the neglected needs of hypermarginalized groups encompassed within the historically segregated borders of Village West.

Breaking the silence of Village West requires a politics of race and a racial discourse sympathetic to traditional civil rights claims and alert to the stereotyping social discipline of difference-based identity claims. A politics of race directs the strategic use of racial discourse in advocacy and organizing. Racial discourse encompasses colorblind, color-coded, and color-conscious forms of expression. Unlike multicultural accounts of distinctive cultural differences, here the politics of race and racial discourse eschew the social performance of historical minority stereotypes, choosing instead to remedy historic discrimination and status hierarchy. Meager in its cosmopolitan cultural commitments and group values, this remedy of breaking community silence approaches difference and group-identity consciousness pragmatically, operating as a modest instrument of social justice.

The risk of stereotyping battered women, drug users, ex-offenders, and gay men through racial difference discourse adds to the onus of stigmatized identities. Lessening that onus by muting traits associated with difference aggravates the effect of coerced assimilation, and the consequent harm to personhood. Discrimination frustrates efforts to assimilate under cover not only because of the psychic cost of covering, but also because of the socioeconomic vulnerability of those historically stigmatized groups.

Elaborating and amplifying the subordinated voices of hypermarginalized subgroups within their own deeply marginalized communities gives limited rise to an uncovered, group-based identity politics more inclusive than either mainstream or marginal communities like Village West. Without this struggle for group inclusion and self-expression, highly vulnerable groups will be denied the opportunity for human flourishing and equality.

Uncovering hypermarginalized subgroups, however, may come at a cost. Difference discourse influences policies regulating the treatment of subgroups and shapes legal-political strategies at work in communities like Village West. Those strategies, which are inextricably bound to the caste- and status-based subordination of hypermarginalized subgroups, often betray liberal ideals of equality, freedom of choice, and self-actualization. Uncovering such subordinating practices through robust group identification threatens to inflame intraracial and interracial divisions suppressed in Village West and elsewhere. Uncovering may also distract minority group attention from the more pressing and intractable social maladies of wealth and income disparity afflicting Village West and similarly impoverished communities in Miami.

The liberty of the silent hypermarginalized groups of Village West depends in part on exposing the divisions within their own communities that reflect disparities of wealth, income, health, and education. The contemporary interdependence of race and cultural difference in subordinating low-income communities of color resists a clear historical explanation. In communities like Village West and Little Haiti, culture-bound racial status lies buried by infirmities now difficult to trace and to redress without uncovering. For now, the best promise of redress may come from the community-based uncovering efforts of law school clinics undertaken with civil rights and poverty lawyers in collaboration with marginalized and hypermarginalized groups.

III. UNCOVERING AS AN ALTERNATIVE PRACTICE VISION

The covering practices embedded in the traditions of civil rights and poverty law call for alternative education, training, and curricular initiatives in clinical education and legal education more generally. Teaching the next generation of civil rights and poverty lawyers to uncover hypermarginalized identities requires analytic frameworks appropriate to a multiplicity of racial groups and subordinate cultures, many entrenched in caste status. Critical theory provides the first rough outlines of these frameworks.

A. Alternative Theoretical Frameworks

Critical theory helps law students to address difference-based client and community identity. By situating identity in law, culture, and society, critical theory supplies a range of insights and interventions to law students striving to meet individual, group, and community needs.[83] For critical theorists, client or group identity is neither natural nor necessary. Rather, it is constructed by advocacy, adjudication, and regulation. Participants in this sociolegal construction include lawyers, judges, and legal agents (administrators, caseworkers, and law enforcement officers). Four theoretical frameworks elucidate the role of these institutional actors and contest the influence of their practices in shaping client and community identity: cultural studies, critical outsider jurisprudence, democratic theory, and pragmatism.

1. Cultural Studies. — Cultural studies scholars view law as a cultural and social practice. Both clinical and nonclinical students should view lawyering as an interpretive practice applicable to oral, written, and symbolic texts rooted in culture, politics, and society. The practice

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[83] *See* Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1808 (1993); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1733–35 (1993).

is partisan — not simply because it advances the interests of particular parties, but also because it constructs and communicates the social reality inhabited by those parties from a particular stance. That stance is simultaneously descriptive and prescriptive. Lawyers construct the social reality of difference-based client identity in interviewing and counseling as well as at trial and on appeal. Nothing about those interpretive acts of lawyering is neutral. All are subject to cultural and racial bias. And all demand reflection and suspicion.

2. *Critical Outsider Jurisprudence.* — Outsider jurisprudence — critical race theory, feminist theory, and queer theory — treats identity as multifaceted and unstable. For outsider scholars, identity is neither uniform nor static; rather it is a shifting aggregation of multiple categories (race, gender, and sexuality) that occupies different forms at different times across different contexts. Clinical and nonclinical students should acknowledge the multiple dimensions and changing qualities of difference-based client identities. And they should also accept the incompleteness and partiality of their own understandings in making identity-based factual and legal claims.

3. *Democratic Theory.* — Democratic legal theory emphasizes the norms of participation and process. Clinical and nonclinical students should urge client participation in the lawyering process and make room within that process to accommodate difference-based identities. Participation educates clients in rights discourse, which creates opportunities for individual empowerment and collective mobilization in legal, political, and cultural forums. Participation also educates clients in lawyering skills, encouraging lay advocates to expand the representation of underserved groups and communities without lawyers' intervention.

4. *Pragmatism.* — Pragmatism teaches that legal reasoning is contextual, multivariable, and open-ended. Contextual reasoning draws from situational variables (for example, HIV/AIDS status, transgender bias, domestic violence) as well as from wider social considerations (family interests, institutional strategies, and neighborhood priorities). Clinical and nonclinical students should ground their advocacy practices in collaborative contexts that permit clients to integrate both specific variables and broader considerations into their decisionmaking process about the means and ends of representation. Students should also realize that difference-based client identities may direct highly contingent, provisional outcomes that must be revisited as roles, relationships, and goals change. In this way, critical theory encourages reconsideration of covering and uncovering tactics in counseling.

B. Alternative Teaching Methods

Crafting alternative educational methods to teach the next generation of civil rights and poverty lawyers to uncover difference-based

identities involves experimentation with new forms of cross-cultural collaboration. Cross-cultural training in lawyering is necessary because of the failure of client-centered clinical pedagogy to address lawyer-client cultural differences, an omission that impairs the representation of clients of color and clients in low-income communities.[84]

1. Cross-Cultural Training. — Effective cross-cultural training prepares lawyers to reach out to clients across the boundaries of cultural and racial difference. Leading clinical scholars link cross-cultural effectiveness in advocacy to the identification of segregating differences, exploration of multiple explanations for client behavior, and elimination of lawyer bias and stereotype from client interviewing and counseling. Together, these key habits establish an initial benchmark for lawyer cross-cultural and cross-racial competence in counseling uncovering.[85] But framing cross-cultural training purely in terms of the acquisition of certain habits of thinking, speaking, and doing understates the deep-seated dimensions of difference-based identity.[86] These dimensions challenge the pretense of colorblind neutrality in counseling and the presupposition of cross-cultural competence as a neutral technique of case planning and management.

2. Challenging Neutrality. — Cross-cultural competence in counseling uncovering requires the abandonment of neutrality. To counsel uncovering demands familiarity with the stereotype and stigma of difference and identity. The stereotype and stigma of racial or sexual difference remake the cognitive, emotional, and behavioral content of advocacy, transforming civil rights and poverty lawyers into instruments of client self-elaboration and group solidarity. This instrumental purpose complements efforts by lawyers to be reflective and avoid resorting to stereotypes in the disorienting encounter with client and group difference.

The failure to train civil rights and poverty lawyers in practices of cross-cultural and difference-based identity analysis perpetuates stigma-induced marginalization in law and society. Neither nonjudgmental lawyer inquiry nor an appreciation of cultural difference will by itself halt marginalization. Only a reassessment of client and community identity and their cultural manifestations will revise lawyer

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[84] *See* Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131, 131 & n.1 (2006).

[85] *See* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 64–67 (2001); Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, *in* RACE, CULTURE, PSYCHOLOGY & LAW 47 (Kimberly Holt Barrett & William H. George eds., 2005); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373 (2002).

[86] *See* Piomelli, *supra* note 84, at 162–65 (explaining that "cross-cultural competence necessarily entails cognitive, emotional, and behavioral dimensions, each of which is most effectively developed and enhanced through repeated practice and use").

perception and interpretation of difference, facilitate interaction across differences, and transform advocacy.[87] Reassessment starts with lawyer introspection, cultural self-awareness, and cross-cultural skills, particularly competence in overcoming prevalent stereotypes of class, race, and sexuality.

3. Client Collaboration. — Openly confronting stereotypes in collaboration with clients permits a frank discussion of normative objections, empirical associations, and remedial measures. Confrontation of this sort reveals the extent to which stereotypes impute marginalizing traits or behaviors (for example, dependency, helplessness, and passivity) to people of color, particularly those with low income. It also erodes stereotypes by questioning the dominance of lawyers' "expert" opinions in technical and strategic decisions affecting client goals and objectives. Collaboration eases this confrontation.

Uncovering identity in civil rights and poverty law practice also involves discretionary counseling decisions about the goals and tactics of class-wide and group representation in impact and test case litigation. Like decisions involving the delivery of direct services, these discretionary judgments ensnare lawyers in conflicts sparked by competing client objectives, third party interests, and institutional commitments.[88] Regulated by ethics rules governing both group and entity representation,[89] the conflicts defy easy resolution, even under client-centered counseling approaches.[90]

Collaboration transforms the lawyer-client relationship by enlarging the scope of client participation in the lawyering process with respect to problem solving and strategic decisionmaking.[91] Community-based collaboration in particular expands the substantive goals of representation beyond individual, case-specific interests to issue-focused, neighborhood-wide interests in legal advocacy and political organiz-

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[87] *See, e.g.*, Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1266–81 (2002).

[88] On the ethics of group representation, see generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

[89] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7 (2007) (regulating conflicts of interest involving current clients); *id.* R. 1.13 (same for organizations as clients).

[90] On client-centered and rebellious lawyering models of group representation, see Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992); Janine Sisak, *If the Shoe Doesn't Fit . . . Reformulating Rebellious Lawyering to Encompass Community Group Representation*, 25 FORDHAM URB. L.J. 873 (1998).

[91] *See, e.g.*, Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000); Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541 (2006); Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395.

ing.[92] Collaboration also facilitates the organization and mobilization of client groups in legal-political advocacy.[93]

C. *Alternative Curricular Initiatives*

Preparing the next generation of civil rights and poverty lawyers to uncover identity-based differences in legal advocacy and political organizing requires greater theory/practice integration within the law school curriculum. Curricular integration should start in the multiple disciplines of jurisprudence, lawyering skills, and ethics. Law schools should weave both classical liberal jurisprudence and critical outsider jurisprudence into lawyering skills and professional values instruction. Instruction in liberal jurisprudence lays the foundation for discussion of authentic self-elaboration, equality of opportunity, and individual liberty. Critical jurisprudence enhances this discussion by locating barriers erected by caste status, class subordination, and the identity-based stigmas of race, gender, and sexuality.

1. Curricular Integration. — An integrated curriculum relevant to skills and values instruction should include the culture, history, and sociology of the legal profession, especially as embodied in current writings on cause lawyering, civic professionalism, and public service. Recent interdisciplinary movements — like the one in psychology and therapeutic jurisprudence illuminating the cognitive, affective, and behavioral elements of legal understanding and decisionmaking — also warrant incorporation.[94] Each of these fields furnishes an opportunity for law schools to engage in university-wide, cross-disciplinary collaboration.[95]

Beyond the integration of normative and empirical disciplines, the law school curriculum should focus on the values and techniques of

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92 *See* Gerald P. López, Keynote Address, *Living and Lawyering Rebelliously*, 73 FORDHAM L. REV. 2041, 2049 (2005); Gerald P. López, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59 (2004).

93 *See* Lucie White, *"Democracy" in Development Practice: Essays on a Fugitive Theme*, 64 TENN. L. REV. 1073 (1997); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699.

94 *See generally* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION (Marjorie A. Silver ed., 2007). For helpful overviews of therapeutic jurisprudence, see THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990); and ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1991).

95 In one example of this cross-disciplinary collaboration, a CHRE clinical faculty team taught a cross-disciplinary graduate course entitled "Law, Medicine, and Nursing: Advocacy, Policy, and Ethics" during the 2004–2005 academic year in partnership with faculty and students from the Schools of Law, Medicine, and Nursing. *See* Troy Elder, *Steel, Hector & Davis Community Health Rights Education Successes*, 3 CENTER FOR ETHICS & PUB. SERVICE NEWS (Univ. of Miami Sch. of Law, Miami, Fla.), Spring 2004, at 3–4, *available at* http://www.law.miami.edu/ceps/images/spring_2004.pdf (reporting on a grant for the interdisciplinary course).

ethical decisionmaking and moral lawyering.[96] Professor Neal Katyal emphasizes "the need for law schools to start a moral conversation and to encourage students to practice law in an 'ethical' manner."[97] Repeating themes articulated by earlier commentators,[98] Professor Katyal anticipates that moral conversation will build an ethical groundwork for legal education and lawyering.

This groundwork gains strength from the curricular initiatives recently proposed by the Carnegie Foundation. In its 2007 report, *Educating Lawyers: Preparation for the Profession of Law*, the Carnegie Foundation emphasized the importance of professional identity in challenging law schools to "link[] the interests of legal educators with the needs of practitioners and the public the profession is pledged to serve" in order to promote a vision of "civic professionalism."[99] This linkage requires equipping students with "strong skill in serving clients and a solid ethical grounding."[100] Integration of skills training and ethics education into the standard law school curriculum requires venturing outside the case-dialogue method, and outside the classroom altogether, to address matters of social need, justice, and moral compassion — matters traditionally ignored in the first-year curriculum and too often neglected in the upper-level curriculum as well.[101]

The move outside the classroom and into the community through the curricular integration of skills and ethics instruction addresses two fundamental limitations of legal education: the "lack of attention" accorded to practice, and the "inadequate concern with professional responsibility."[102] The Carnegie report found that law schools paid "only casual attention to teaching students how to use legal thinking in the complexity of actual law practice," provided little "effective support for developing ethical and social skills," and devoted meager "attention to

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[96] *See* Neal Kumar Katyal, *The Supreme Court, 2005 Term—Comment:* Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 119–22 (2006); *see also* Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000) (identifying community lawyers' need for nontraditional ethical guidance); Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1320–33 (2006) (discussing lawyers' ethical obligations and the reasons lawyers often fall short in meeting them).

[97] Katyal, *supra* note 96, at 120 (quoting Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 66–67 (1992)).

[98] *See* MILNER S. BALL, CALLED BY STORIES: BIBLICAL SAGAS AND THEIR CHALLENGE FOR LAW (2000); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994).

[99] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: SUMMARY 4 (2007), *available at* http://www.carnegiefoundation.org/files/elibrary/EducatingLawyers_summary.pdf.

[100] *Id.*

[101] *See id.* at 5–7.

[102] *Id.* at 6.

the social and cultural contexts of legal institutions and the varied forms of legal practice."[103]

Evidence of the widespread neglect of practice, ethical values, and social skills as applied in institutional and relational contexts gives a compelling reason for law schools "to elevate the twin concepts of the practice of law as a public service calling and the development of the capacity for reflective moral judgment to the same level as legal knowledge and traditional legal skills."[104] The Carnegie Foundation's endorsement of public service practice and reflective moral judgment calls for a "dynamic curriculum that moves [students] back and forth between understanding and enactment, experience and analysis."[105] Urging efforts to bridge the gap between formal knowledge and experiential knowledge, the report stresses the need "to combine the elements of legal professionalism — conceptual knowledge, skill and moral discernment — into the capacity for judgment guided by a sense of professional responsibility."[106]

To the Carnegie Foundation, the fusion of professionalism and judgment occurs most effectively in the latter two years of law school. At this stage, students may employ learned doctrine and analysis in the lawyering process and competently assume responsibility for clients and clinical colleagues. Also at this stage, students may meaningfully explore their professional identities.[107] Curricular synthesis of this kind affords third-year students in particular a "capstone" opportunity "to develop specialized knowledge" and "engage in advanced clinical training."[108] Both endeavors encourage "serious, comprehensive reflection" on the law school educational experience and alternative career paths toward professional growth.[109]

2. Faculty Cross-Disciplinary Collaboration. — The springboard for curricular integration is pedagogical collaboration among faculty that teach doctrinal and practical courses of study in professional skills and values.[110] Collaboration might entail discussion of student ethical-social development, faculty-community outreach programs, or teaching in lawyering courses and clinics. Broad faculty clinical participation

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103 *Id.*

104 *Id.* at 7 (quoting SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, TEACHING AND LEARNING PROFESSIONALISM 15 (1996)).

105 *Id.* at 8.

106 *Id.*

107 *See id.* at 8–9; *see also* Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2093–99 (2005) (illustrating techniques to encourage professional exploration of identity); David B. Wilkins, Essay, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502 (1998) (discussing the relevance of race to a lawyer's professional identity).

108 SULLIVAN ET AL., *supra* note 99, at 9.

109 *Id.*

110 *See* SULLIVAN ET AL., *supra* note 5, at 7–13.

expands the curricular reach of instruction in ethical judgment and cross-cultural collaboration, which are essential skills in addressing the status of excluded and silenced subgroups within marginalized communities.[111] The substantive commitments that underlie uncovering strategies help expunge stereotypical images of segregated minority group cultures in legal and social discourse. Those commitments aid in abating the repressive conformity of minority culture as well, opening up opportunities to develop dialogue and to build commonalities across racial boundaries in law, culture, and society.

3. New Clinical Paradigms. — Integrating client self-elaboration and group legal-political collaboration into the canons of civil rights and poverty law advocacy and legal education requires new clinical paradigms. To be effective pedagogically and practically, these paradigms must emphasize the habits, values, and skills of community-based, interdisciplinary work.[112] Community work of this kind encourages client leadership and partnership. It also urges the interdisciplinary study of socioeconomic, environmental, and health disparities. Perhaps most important, it enlarges the scope of lawyer ethical judgment, professional responsibility, and professionalism beyond a narrow conventional vision of advocacy. Although no law school fully integrates the norms of community lawyering and the insights of critical outsider jurisprudence into the curricular structure of its clinical and nonclinical programs, the contours of such programs are visible in the innovative curricular designs of law schools at New York University,[113] the City University of New York,[114] and Yale.[115] Additional curricular innovations include recently augmented clinical and interdisciplinary programs at Stanford Law School[116] and Harvard Law

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111 On legal-political organizing strategies and tensions, see Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001); Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195 (2002); and Joseph Erasto Jaramillo, Comment, *The Community-Building Project: Racial Justice Through Class Solidarity Within Communities of Color*, 9 LA RAZA L.J. 195 (1996).

112 *See* Colloquium, *Race, Economic Justice, and Community Lawyering in the New Century*, 95 CAL. L. REV. 1821 (2007).

113 SULLIVAN ET AL., *supra* note 5, at 38–43 (noting NYU's linking of doctrinal, lawyering, and clinical courses as a connecting point for faculty discussion and theoretical work).

114 *Id.* at 34–38 (citing CUNY's close integration of doctrinal and lawyering curricula, including a first-year program featuring linked lawyering seminars and doctrinal courses taught by the same instructor).

115 *Id.* at 120 (noting that Yale reduced the number of required courses for first year students and encourages students to take clinicals beginning in their second semester).

116 *See* Theresa Johnston, *Transforming Legal Education: Preparing Lawyers for Today's World Practice*, STAN. LAW., Fall 2006, at 14, 18 (discussing expansion of clinical and interdisciplinary programs).

School.[117] The best of these wide-ranging and still-evolving programs demonstrate the capacity of law schools to renew the meaning of legal education and the spirit of the lawyering process in public service.

CONCLUSION

Enriching the mission of clinical education and legal education more generally is central to uncovering the marginalizing infirmities of class, race, and sexuality in impoverished communities. As part of the ongoing debate over identity in law, culture, and lawyering, uncovering challenges the silencing conventions of the lawyering process and the legal profession in the fields of civil rights and poverty law. Jurisprudential movements in critical and interdisciplinary theory illuminate the injury of silence. Uncovering urges clients to engage in reason-forcing dialogue to counteract that injury.

The implications of silenced identity emerge in clinical classrooms through dubious cultural theories of client incompetence and infiltrate clinical practices via stereotypes of client inferiority. Lawyers occupy a formative role in shaping client, group, and community identities. Professional discourses and practice traditions cast such roles as natural or necessary features of the adversary system. The exercise of those roles and the applied logic of legal advocacy and political organizing determines how, when, and why to counsel clients to cover or uncover the silence of individual, group, and community identity.

Law school clinics representing the poor and the disenfranchised deal with covering daily. At the University of Miami School of Law, CHRE students representing HIV/AIDS patients in public benefits and immigration cases routinely discover that the HIV history, health status, and sexual orientation of their clients are veiled from their clients' own families and communities. In litigating and negotiating on behalf of those clients, the students accede to their clients' requests to cover their gay identity. Furthermore, CEDAD students representing low income neighborhood groups in combating urban blight and economic displacement regularly learn that the needs of certain groups — battered women, drug users, ex-offenders, and gay men — lay neglected, relegated to the margins of community building. In counseling neighborhood associations, faith-based institutions, and nonprofit organizations about appropriate community services and economic de-

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[117] Harvard Law School recently instituted a First-Year Lawyering Program, revitalized the Program on the Legal Profession, and instituted a new pro bono requirement. *See* The Harvard Law School Strategic Plan: A Thumbnail Sketch (Oct. 16, 2006), http://www.law.harvard.edu/news/strategic/thumbnail.php; *see also* Elaine McArdle, *Bridge-Building for the Future: A First-of-Its-Kind Research Center Readies Lawyers for a Changing Profession,* HARV. L. BULL., Fall 2006, at 12, 14.

velopment initiatives, the students decline to uncover those group identities and needs.

In both CHRE and CEDAD, the practices of clinical students and faculty are not unlike the identity-making practices of racialized narratives and race-coded representation employed by prosecutors and defenders in cases of racially motivated violence. In the criminal justice system, the law and the lawyering process condone identity-conscious covering and reverse-covering strategies that are potentially harmful to clients, third parties, and communities. To alleviate the stigma of covering, the next generation of civil rights and poverty lawyers must reconceptualize difference-based identity in legal advocacy and political organizing in terms of caste status and culture. Moreover, they must reconfigure identity-based law school curricula long tolerant of client covering and reverse-covering demands.

Curricular revision should start with the affirmation of the modern traditions of liberal legalism, traditions vital to the constitutional and statutory protection of minority groups injured by ascribed caste or status hierarchies. Revision should also acknowledge the postmodern contingencies of racial and cultural identity posited by critical theory, particularly the often rebellious and unstable quality of identity. Taken together, liberal legalism, postmodern contingency, and the commitment to antisubordination bridge critical theory and clinical practice, offering up a more inclusive identity-affirming vision of civil rights and poverty law. That vision must contemplate policymaking opportunities in interdisciplinary, community-based collaborations spanning public and private initiatives at local, state, national, and international levels.[118]

Identity theory furnishes transformative insights for civil rights and poverty lawyers as well as clinical teachers laboring to appreciate difference-based identity norms and narratives in representing historically stigmatized groups. Studying the practice and texts of law in action allows teachers, students, and practitioners of civil rights and poverty law to reconceive the politics of difference in American law, thereby altering strategies of covering and uncovering identity in the lawyering process. Building on the efforts of earlier generations of civil rights and poverty lawyers, the next generation must reunite the law, culture, and politics of difference-based identity in advocacy and organizing, once again facilitating individual self-actualization in collective emancipation.

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118 *See generally* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001); THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE (Austin Sarat & Stuart Scheingold eds., 2005); Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. (forthcoming Feb. 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=944552.

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