

Diversity, Hierarchy, and Fit in Legal Careers: Insights from Fifteen Years of Qualitative Interviews

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ABSTRACT

This article focuses on change and continuity in how the legal profession provides opportunity for women and minorities. It begins by discussing a provocative photograph of “diverse” “elite lawyers” on the golf course as a symbol of the requirement to “fit” in the work settings of the legal profession. It is the first article based on three waves of qualitative interviews of an “After the J.D.” longitudinal study of lawyers’ careers. These interviews took place over a fifteen-year period. There were a total of 219 interviews, and the vast majority of them were conducted by the authors of this article. Twenty of the individuals were interviewed twice and twenty-seven were interviewed three times. Our qualitative interviews are unique in allowing us to see changing attitudes and situations over the course of more than ten years. This article uses that unique resource to examine the evolving role of race, gender, and ethnicity in lawyers’ careers. The article addresses theoretical perspectives on advantage and disadvantage, contrasting our “capital assets” approach with a variety of other legal and sociological approaches. It then presents the qualitative interviews beginning with the elite track of large law firms, which we term “On-Broadway” to connote the most established and high prestige route. The article next studies similar issues in medium-size firms and variations of Big Law careers—of counsel and in-house in particular—concluding with examples of how people build “Off-Broadway” careers that draw upon diversity and find ways to capitalize on it. The concluding part draws the qualitative interviews together in a general conclusion, demonstrating how the capital asset approach is enacted in the interviews through the concept of “fit.” Fit is a way for embedded histories and power relationships to make it more difficult for minorities, women, and people who do not possess the cultural capital represented by golf, for example, to succeed in particular settings—including the corporate law firm.

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INTRODUCTION

This article draws inspiration in part from a photograph that we found online on the topic of elite lawyers. The article is about “fit” in the legal profession, and we wondered if we could find a visual of what “elite lawyers” looked like. The photograph, which we found by searching “elite lawyers,” is available in the SSRN version of this article.¹ It immediately captured for us what we have seen in our interviews. It depicts a “diverse” “elite lawyers club.” It includes four males—two of whom are white, one of whom appears to be Asian, and another who appears to be black—dressed the same and posing on the golf course. It is a perfect illustration of the fact that, at the elite level, the “fit” required of minorities entails much more than doing quality legal work. Golf is in part a symbol of what is required and a factor that comes into play in real careers. An African-American woman who attended large law firm receptions while in law school made this point quite clearly.

1. Bryant Garth & Joyce Sterling, *Diversity, Hierarchy, and Fit in Legal Careers: Insights from Fifteen Years of Qualitative Interviews 2* (Univ. of Denver Sturm Coll. of Law Legal Research Paper Series, Working Paper 17–35, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046851 [<https://perma.cc/8SX4-MK3B>]. The photo was from South Africa, but it nicely illustrates the situation in the United States.

As part of the “After the J.D.” qualitative interview project, we asked her why she elected to go into a government career. She talked of her experience at receptions designed, at least in part, to recruit diverse lawyers into corporate firms.

I went to a couple of law firm Christmas parties and just really felt out of place and weird. Really out of place, and I knew right then this is not, I can't do this. This is not for me, this is not the environment . . . there wasn't any passion in it, there. The topics that they covered, and the topics they addressed just really didn't appeal to me. The personalities of the people . . . I met at that Christmas party . . . I couldn't get along with. I just thought . . . they're so fake, they're so phony . . . why are you sitting here talking to me about golf? I already told you I don't know how to golf. I've never played golf . . . why do I have to pretend to be interested in it?²

The legal profession is relatively open in the United States. It remains a path of upward mobility for individuals who do not have the characteristics of the traditional legal elite—including women and minorities. But outsiders are brought into the profession, and especially the elite careers, through a process that, like the law itself, changes very slowly. The process also tends to enhance the legitimacy of law and the hierarchies associated with law and the legal profession. The references to golf and its enduring presence in law firm culture both symbolize and illustrate this process.

This article will focus on the limited openness and the processes of professional continuity and change. It is the first article based on three waves of qualitative interviews for an “After the J.D.” longitudinal study of lawyer careers.³ These interviews took place over a fifteen-year period. There was a total of 219 interviews, and the vast majority of them were conducted personally by the authors of this article. Twenty of the individuals were interviewed twice, and twenty-seven were interviewed three times. Our qualitative interviews are unique in allowing us to see changing attitudes and situations over the course of more than ten years. This article uses this unique resource to examine the evolving role of race, gender, and ethnicity in lawyering careers.

This article proceeds in four parts. The remaining part of this introduction elaborates on our sociological research perspective, which focuses on the “capital assets” that determine access to lawyer careers, and the qualitative interviews that we will use to examine the role of race, gender, and ethnicity in legal careers. Part I looks at a variety of theoretical perspectives that scholars bring to these questions, contrasting each with our sociological “capital assets” approach. We discuss human capital theory from economics, implicit bias from psychology,

2. Interview notes on file with authors. All interview quotes are left as is.

3. See generally RONIT DINOVIETZ ET AL., AFTER THE J.D.: FIRST RESULTS OF A NATIONAL STUDY OF LAWYER CAREERS (2004) [hereinafter AFTER THE J.D. I]; RONIT DINOVIETZ ET AL., AFTER THE JD II: SECOND RESULTS OF A NATIONAL STUDY OF LAWYER CAREERS (2009) [hereinafter AFTER THE J.D. II]; GABRIELE PLICKERT ET AL. AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS (2014) [hereinafter AFTER THE J.D. III]. We refer to these collectively as the “After the J.D. Reports.”

recent sociological perspectives, critical race theory from law, and what might be called an emerging “identity capital” approach from law.

Part II presents the qualitative interviews beginning with the elite track of large law firms, which we characterize as beginning “On-Broadway” with the advantages that come from possession of the most highly valued credentials in the legal profession. We follow with a discussion of similar issues in medium size firms and variations of Big Law careers—of counsel and in-house careers in particular. We next turn to “regional theater” variations of the On-Broadway careers. Finally, we discuss what we call Off-Broadway approaches that—much more than the elite Broadway paths—value diversity, build new careers, and potentially open up and expand Broadway opportunities.⁴ The final part draws the qualitative interviews together in a general conclusion, demonstrating how the capital asset approach is enacted in the interviews through the concept of “fit.” Fit is a way for embedded histories and power relationships to make it more difficult for minorities, women, and people who do not possess the cultural capital represented by golf, for example, to succeed in particular settings—including the corporate law firm.

The qualitative interviews from the “After the J.D.” study provide a means to see both a snapshot and a moving picture of the legal field in the United States in terms of gender, race, and ethnicity. Drawing on the sociology of Pierre Bourdieu, we see the legal field as a semi-autonomous space of struggle according to certain rules of the game that can also be contested.⁵ Actors within the field adopt “strategies” oriented toward success in the field. Strategies are not necessarily chosen instrumentally or self-consciously. Actors internalize the rules of the game, such that it seems natural, and they try to build up the capital that is valued in the field or find ways to get the capital that they possess to be valued within the field. Lauren Rivera’s recent sociological study of hiring practices at investment banks, management consultants, and elite law firms found that law firms, discussed below, illustrate some features of this process.⁶ Evaluators, she found, tended to look for “qualities that are similar to their own.”⁷ Those who received high grades would emphasize grades and those who did not do well would discount the value of grades.⁸ Those who graduated at the top of the class at a less

4. The focus of the present paper contrasts the “On-Broadway” vs. “Off-Broadway” distinction. It is one of the simplest distinctions to characterize the hierarchy of legal careers, particularly at the beginning of the twentieth century. We do not want to suggest that this is the only way to characterize legal careers. We use it as a starting point with the intention to emphasize in this article the relatively staid, slow moving elite careers exemplified above all by large corporate law firms versus a relative openness for innovative paths by those who follow other paths. In future writings, the present authors will elaborate on innovative legal careers that we identify as “Off-Broadway” and are less associated with gender, race, and ethnicity.

5. See PIERRE BOURDIEU & LOIC WAQUANT, *AN INVITATION TO REFLEXIVE SOCIOLOGY* (1992).

6. See Lauren A. Rivera, *Hiring as Cultural Matching: The Case of Elite Professional Service Firms*, 77(6) AM. SOC. REV. 999, 1003 (2012).

7. *Id.* at 1013.

8. *Id.*

prestigious law school similarly argued against a reliance on graduates of elite schools.⁹ The prevailing standards, more generally, reflected what the dominant members of the organization valued. The picture of elite lawyers discussed above suggests, for example, that males from a social class where golf is part of the upbringing, likely with wives at home, and comfortable with others from the same milieu, possess key ingredients of “what it takes” to join the legal elite.

We therefore examine our interviews for evidence of which “capital assets” possessed by individuals are valued or discounted in building lawyer careers. We examine what is valued not only in the most prestigious careers, but also in the less prestigious careers. We focus this first article on race, gender, and ethnicity. In future work, we will use the interview data to examine the relationship of other forms of capital assets to lawyer careers.

Qualitative interviews are essential to understand the structure of fields and the prevailing rules of the game.¹⁰ They reveal the strategies over time of those who do and do not possess the capital that is highly valued in the field. They show how people make careers through entrepreneurial strategies utilizing what they do possess. In contrast to quantitative data, which provide statistics on the characteristics and credentials of those who are in law firms or solo practices, the qualitative interviews illustrate both the human cost of devaluing certain individuals in particular settings, especially those recognized as the legal elite, and the active agency of those who find ways to excel even though they may not fit into traditional elite legal practices. The qualitative interviews thus provide a detailed picture that is invisible in tables of quantitative data.

This article uses the ideas of “On-Broadway” and “Off-Broadway” to show the strategies and also to illustrate continuity and change in the legal profession, its hierarchies, and what it takes to succeed. The elite path through top-ranked law schools, judicial clerkships, brand-name corporate law firms, high profile public interest law firms, Assistant United States attorneys, and Fortune 500 in-house corporate counsel, as we shall show, can be seen as comprising the On-Broadway tracks to professional success and recognition. This track, as described in the introduction, strongly favors white males raised in relative privilege with wives who manage their household affairs and attend to their children.¹¹

9. *Id.*

10. See Rivera, *supra* note 6, at 1013 (“[Q]ualitative interviews are essential to understand the structure and the prevailing rules of the game.”).

11. It is well understood and reflected in the After the J.D. Reports that students of the most elite law schools on the average come from higher socio-economic statuses, that lower-ranked law schools have students that are further down in socio-economic status, and that students of elite schools have advantages in getting into the large law firms and staying to make partner. After the J.D. Reports, *supra* note 3. Women and minorities, in addition, disproportionately drop out of the corporate elite positions. See AFTER THE J.D. III, *supra* note 3. With respect to partners and stay-at-home spouses, most of the information is qualitative. A typical example of this qualitative information is the remark of a diversity consultant, Sharon Jones, CEO of Jones Diversity, who was quoted recently for the proposition that “most partners at large law firms are married and most have a spouse who doesn’t work and stays at home. [In her words,] ‘It’s very rare to meet someone at that level who

Of course, not all white males with elite credentials succeed in that world, and some individuals without the success-favoring profile will make it to the most prestigious positions. But the point is that there are countless almost imperceptible ways that the capital value structure affects success directly—credentials and ability to work long hours, for example. A supervisor’s conscious and unconscious behavior can have negative impacts in the workplace, such as unequal access in gaining mentors and getting clients, presuming an ability to attract and retain clients, a willingness to forgive mistakes, getting to know people well and identifying with their situation, deciding to whom to give work and with whom to travel, and listening to what an individual has to contribute to a team. The list can go on.

The Off-Broadway track accounts for the myriad paths other than the elite ones through which lawyers can make their careers. A feature of the United States legal profession arising from its colonial origins is the presence of a larger group of non-elite individuals who use their entrepreneurial talents and whatever capital they have to invent careers that provide career satisfaction despite lacking the prestige of the On-Broadway lawyers.¹²

The distinction between On-Broadway and Off-Broadway maps to the famous “two-hemispheres” thesis of Heinz and Laumann, which divided Chicago lawyers into those who served organizations, mainly corporations, and those who served individuals.¹³ In the early 1970s, they found, the “upper” hemisphere included WASP (White Anglo-Saxon Protestant) males with stay-at-home wives and degrees from elite law schools, while the “lower” hemisphere included Catholics and Jews and the relatively few minorities and women in the profession. Our account here will discuss this divide. It is important to recognize that discussion of On- and Off-Broadway and of elite and non-elite hemispheres is not to give normative value to one career over another. Rather, the divide is a real feature of the legal profession in the United States that needs to be understood.

We will also show that there is a relationship between the two sides that is a vital feature of the United States legal field. To continue with the metaphor of theater, Off-Broadway is the place where innovations in the theater typically begin before becoming the mainstream On-Broadway. If we treat the path through large law firms as essentially starting On-Broadway, we miss the fact that during the first two-thirds of the 1900’s, for example, litigation was an Off-Broadway

has a working spouse.” Aebra Coe, *3 Ways Law Firms Sabotage Their Own Diversity Efforts*, LAW360 (Oct. 19, 2017), <https://www.law360.com/articles/975223/3-ways-law-firms-sabotage-their-own-diversity-efforts> [<https://perma.cc/L6T6-B8GV>]. The perceptions of the interviewees discussed below confirm this notion as well.

12. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 473 (3d ed. 2005) (describing night law schools where working-class students attended law school); *id.* at 484 (describing the increasing proportions of sons of shopkeepers and small business men who went to law school after 1870).

13. JOHN HEINZ & EDWARD LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 319–88 (Russell Sage ed., 1982).

strategy. However, the growth of corporate litigation in the 1980s led to litigation being adopted as an On-Broadway tactic embraced by Big Law.¹⁴ For the purposes of our focus on diversity, the Off-Broadway settings, at least until recently, would also have been the likely first place to take the “risk” that minorities can be given starring parts or portrayed in non-stereotypical fashion. Innovations that make it to Broadway, however, expand the model of success rather than transform it. They sustain as well as change the longstanding characteristics that define Broadway theater and the economic and social world that supports it.

Finally, as we shall see, there is another dimension to the On-Broadway/Off-Broadway distinction. It is not just large law firm versus other careers. It is also New York and other sites of elite practice versus regional markets, which we can analogize to regional theater—again a source of innovation that may lead to adaptations and innovations On-Broadway—and on Wall Street.

I. THEORETICAL PERSPECTIVES

The questions of inequality and access in the legal profession are central to several competing scholarly approaches. The theoretical approach chosen to address these questions determines to a great extent what scholars look at, what explanations they offer to explain lingering inequality, and what potential remedies they entertain. Our approach, as noted above, focuses on the relatively open analysis of “capital assets,” and we believe this approach is especially useful for understanding inequality in the legal profession, the evolving role of diversity concerns, and both the change and continuity that we find today. Our approach is also flexible and looks toward how values and assets can change over time. We contrast our approach in this section with economic perspectives on human capital, the social psychological theory of implicit bias as an account of lingering inequality, recent sociological perspectives, critical race theory, and recent work on the idea of “identity capital.” These theories provide a framework to set up the discussion based on the qualitative interviews. The conclusion then returns to the theories to suggest how the capital assets approach fits with our findings.

A. SOCIOLOGICAL VERSUS ECONOMIC PERSPECTIVES

The “human capital theory” associated with economists holds that the smartest person with the best training and skills is the person who is valued most highly.¹⁵ The “mismatch theory” associated with Richard Sander is one controversial example of this approach.¹⁶ Sander argues that success in the legal profession

14. YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE DEVELOPMENT OF A TRANSNATIONAL LEGAL FIELD* (1996).

15. The Nobel Prize-winning economist Gary Becker pioneered the concept of human capital theory. *See, e.g.*, Gary Becker, *Human Capital*, *THE CONCISE ENCYCLOPEDIA OF ECONOMICS* (2008), <http://www.econlib.org/library/Enc/HumanCapital.html> [<https://perma.cc/AD3J-WZYB>]; GARY S. BECKER, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION* (3d ed. 1993).

16. *See* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *STAN. L.*

depends mainly on the ability of individuals as measured by performance on law school examinations.¹⁷ He argues that those who obtain high grades will be more successful on bar exams and in the legal profession.¹⁸ Sander uses the theory to argue against affirmative action efforts to promote women and minorities.¹⁹ The problem with affirmative action, he contends, is that its beneficiaries achieve less success in schools where they do not match academically or in firms where they do not match in their analytical skills.²⁰ Sander's work has generated a substantial debate by scholars arguing against his position.²¹ Its assumptions and conclusions differ greatly from what we find from our capital assets perspective.

Sociological perspectives are very different. The human capital defined by economists is perhaps not irrelevant, but it is not all, or even most, of the sociological story. Put bluntly, a more sociologically-oriented "mismatch theory" would explain that minority lawyers do not fit into the picture of the elite lawyers at the golf club, and why that is the case.²² It asks what capital is valued within a socially constructed legal field. There is no objective ability or lack of ability that determines who achieves success.

A recent article by Kevin Woodson uses the human capital perspective in the large law firm context to explain the often-negative experiences of African-American lawyers.²³ His study of African-American lawyers entering large law firms finds evidence of "human capital discrimination."²⁴ Woodson uses the term to focus in on what kinds of assignments associates get and how that work builds—or does not build—the expertise and competence of associates. Woodson argues that not getting high quality assignments or not being supervised by a key senior partner, for example, add up over time and result in African-American lawyers not being prepared for promotion up the ladder of success in Big Law.²⁵ Woodson argues that human capital discrimination ends up derailing these

Rev. 367 (2004).

17. *See id.* at 459–68.

18. *Id.* (seeking to show that earnings correlate above all with law school grades).

19. *Id.* at 468–78 (“[T]he elimination of racial preferences would put blacks into schools where they were perfectly competitive with all other students—and that would lead to dramatically higher performance in law school and on the bar.”).

20. *See id.* at 478–79.

21. *See, e.g.,* David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1855–98 (2005); W.C. Kidder & Richard Lempert, *The Mismatch Myth in U.S. Higher Education: A Synthesis of the Empirical Evidence at the Law School and Undergraduate Levels*, in AFFIRMATIVE ACTION AND RACIAL EQUITY: CONSIDERING THE EVIDENCE IN FISHER TO FORGE THE PATH AHEAD 1, 105–29 (U.M. Jayakumar and L.M. Garces eds., 2015).

22. *See infra* Section I.C.

23. *See* Kevin Woodson, *Human Capital Discrimination, Law Firm Inequality, and the Limits of Title VII*, 38 CARDOZO L. REV. 183 (2016).

24. *See id.* at 194–207.

25. *Id.* at 204 (“The racial disparities described by these interviewees do not occur in a vacuum. Human capital discrimination often stems from disparities in the relationships (social capital) that junior associates have with senior colleagues.”).

minority associates' careers.²⁶ As detailed below, these examples of what he calls "capital discrimination" are consistent with our qualitative interviews. Our theoretical perspective, however, sees this discrimination as part of a more fluid picture framed around the question of what forms of capital are valued in different settings. The match—or lack of match—is experienced in terms of "fit." Those who are not given the key assignments and do not stay within the large law firms are in effect penalized for not sharing the historical characteristics rewarded in large law firms. It is not only a matter of race. It is also about a cultural fit as suggested by our reference to the golfers.

We draw on Bourdieu's categories of capital to provide a sociological framework to take into account the socially constructed values that a field rewards.²⁷ There is first what we can call purely symbolic capital. Symbolic capital is valued because it is valued.²⁸ The process is circular but nevertheless very real. Elite law degrees from this perspective are valued not because those who hold the degrees are necessarily better lawyers, but because lawyers and clients are persuaded that preferences should be given to those with elite degrees. For example, lawyers recognize the symbolic value of a corporate law firm that has more lawyers with elite degrees, and indeed, such a firm would historically trumpet that fact. Similarly, clients and other law firms would give value to those degrees as indicators of professional quality, whether there was evidence to support that assumption or not.²⁹ The experience of working in corporate law firms (even if only document review), we contend, is also valued mainly as a form of symbolic capital. The same may be true of judicial clerkships.³⁰

There are skills and experiences (and networks) from these positions that may help lawyers succeed better in later positions, but that is not as clear as the symbolic value and credibility that comes from the large law firm position. The value is clear in settings where boutique law firms or public interest law firms promote their firm as made up of lawyers with experience at leading corporate law firms.³¹ In addition to these kinds of symbolic capital, we can point to the value of social capital—essentially one's ability to call on a network of relationships. Social

26. *Id.* at 207 ("[A]ssociates come to realize that their failure to develop sufficient human capital has limited their career prospects within the firm and beyond.").

27. BOURDIEU & WAQUANT, *supra* note 5.

28. *Id.* at 4, 119.

29. Interestingly, in the subfield of the plaintiff's bar, the hierarchies can be reversed. An elite law degree is devalued because it is treated as a sign that the lawyer will not identify well with jurors of ordinary people—again, whether it is true or not. And, that those with elite degrees will not be as hungry and hard working. See Sara Parikh & Bryant Garth, *Philip Corboy and the Construction of the Plaintiffs' Personal Injury Bar*, 30(2) *LAW & SOC. INQUIRY* 269, 294 (2005).

30. See Ronit Dinovitzer & Bryant G. Garth, *The New Place of Corporate Law Firms in the Structuring of Elite Legal Careers* (forthcoming) (on file with authors).

31. One typical example is a law firm in Orange County, Carothers DiSante & Freudenberger LLP, which states on its website that "CDF was founded in 1994 in Orange County by several labor and employment attorneys practicing at leading AmLaw 100 firms." *About CDF*, CAROTHERS DISANTE & FREUDENBERGER LLP, <http://www.cdflaborlaw.com/about-cdf/overview> [https://perma.cc/WK9C-C3KH] (last visited Feb. 8, 2018).

capital includes family capital, which, for example, can be called upon to gain access to law schools, clerkships, and positions in law firms. Legacy admits are one form of return to family capital. Another is judicial clerkships that may go to graduates whose family members are friends of the judges. There is also valued cultural capital, which the photograph suggests includes ability to fit in at an elite country club. Bourdieu describes cultural capital as “external wealth converted into an integral part of the person . . . [and] cannot be transmitted instantaneously (unlike money, property rights . . .)”³² At a recent panel of lawyers at the University of California, Irvine School of Law, for example, one young lawyer of Mexican-American descent told the class that she did not like wine or golf but attended wine tastings and golf tournaments as part of building her and her firm’s practice.³³ She, in that way, paid respect to the hierarchy of cultural capital—its association with “embodied wealth”—reflected in elite law practice.

The sociological question is why the United States legal field values certain forms of capital and not others. The answer requires an examination of the history of the legal profession and the tracing of the impact of that history in legal careers today. Corporate law firms on Wall Street at the turn of the twentieth century gained recognition as the new elite of the profession—building their legitimacy through public service in politics and philanthropy, forming an alliance with the elite law schools newly converted to the case method, and both representing large corporations and helping to regulate them.³⁴ They also found a place in the elite social circle, especially in New York City.³⁵ Since at least the early part of the twentieth century, therefore, the top of the United States legal profession has been the corporate partner.

This history of the corporate bar makes understandable the kinds of capital that historically have been valued in the legal profession. The corporate lawyers had WASP pedigrees, elite cultural capital, Ivy League degrees, and (as with professional careers generally) a supportive stay-at-home wife.³⁶ Those historical characteristics of the corporate law firm remain embedded in the structure of power of the corporate firms and the legal profession.³⁷ White Protestant males with wives at home, elite degrees, and the cultural capital of elite gentlemen are most

32. Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 47, 48 (J.G. Richardson ed. 1986), <https://pdfs.semanticscholar.org/ca18/e562d34a1981662e33c5170669f221178393.pdf> [<https://perma.cc/X7XQ-PZPK>].

33. Remarks at the Legal Profession Course at the University of California-Irvine School of Law (Spring 2016).

34. See Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1870–1910*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 52–53, 55, 65 (Gerard W. Gawalt ed., 1984).

35. See SVEN BECKERT, THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE AMERICAN BOURGEOISIE, 1850–1896 253–54 (2001).

36. See ERWIN O. SMIGEL, THE WALL STREET LAWYER, THE PROFESSIONAL ORGANIZATION MAN? 311–340 (1964); LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 30–31 (2002).

37. Dinovitzer & Garth, *supra* note 30.

naturally felt to “fit” in large law firms, and individuals without those characteristics must persuade the insiders that they too belong. Innovations that manage to succeed within these firms take place within the historical structure of the corporate law firms.

It is worth reiterating that what is valued is not inevitable either within the large law firms or within the legal field more generally. Those who represent large corporations could be depreciated, as they historically have been in France, for example, as too close to business rather than professional values.³⁸ Particular skills, such as virtuosity in oral advocacy, might be ascendant in relation to the transactional skills most identified with corporate lawyers. But, as we shall see, the career stories confirm the enduring hierarchy of values that puts corporate law firms at the top, and they confirm the particular forms of symbolic, social, and cultural capital that the firms have valued traditionally and reproduced for more than a century.

The high prestige of corporate law defines the most highly valued capital assets within the legal field. The comparison of On-Broadway and Off-Broadway strategies shows how law careers depend in part on who possesses the assets valued by corporate law—especially elite law degrees and high grades. Again, our study does not give particular normative value to any of these assets or careers. It simply recognizes their place in the hierarchies of the legal profession as currently constituted.

B. IMPLICIT BIAS VERSUS CAPITAL ASSETS THEORY

The capital assets theory, which comes from sociology, has elements in common with the “implicit bias” theory from social psychology adopted specifically from “cognitive structure” theory.³⁹ This approach, better known in law as “implicit bias,” has been adopted by a number of critical legal theory scholars for application in the courts.⁴⁰ As stated by Jerry Kang, one of the leading proponents of implicit bias theory in the courts,

Through law and culture, society provides us (the perceivers) with a set of racial categories into which we map an individual human being (the target) according to prevailing rules of racial mapping. Once a person is assigned to a racial category, implicit and explicit racial meanings associated with that category are triggered. These activated racial meanings then influence our interpersonal interaction.⁴¹

Kang discusses the unconscious psychological processes that lead individuals to associate minorities in particular, but also women, with negative attributes that

38. John Leubsdorf, *On the History of French Legal Ethics*, 8 U. CHI. L. SCH. ROUNDTABLE 341, 344–48 (2001) (on the distance between French *avocats* and business).

39. See generally SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (2d ed. 1991).

40. Jerry Kang is a prolific scholar in the area of implicit bias applied to law. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); see also Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANNUAL REV. SOC. SCI. 427 (2007).

41. Kang, *supra* note 40, at 1499.

make it more difficult for them to succeed professionally and in other ways.⁴² Within corporate law firms, for example, implicit biases may affect how assignments are given out, how associates are evaluated, and who gets bonuses. The negative stereotypes that are part of this process tend to come from the mass media and other social processes that, Kang suggests, “infect” brains with negativity.⁴³ They act like computer viruses that take over and dominate the brain’s unconscious attitudes. Kang focuses on education and reforms in the media as ways to combat implicit bias and remove the obstacles to advancement associated with such biases.⁴⁴ The idea is to find tools that switch off the unconsciousness bias or keep the infection of relentlessly biased media stories at bay.

Our capital assets approach similarly provides a strong place for unconscious processes and background assumptions. Law firm partners may unconsciously think that minorities and women are not very good at bringing clients to the firm, for example, or that they somehow do not fit within a firm’s “culture,” or even that their work is not as good as someone else’s. Consistent with both literatures discussed above, partners may expect individuals to behave according to stereotypes that make them not suited for partner. They are then punished either for living up to the stereotypes or for behaving counter to the stereotypes. These approaches can in part be assimilated to a framework that focuses on capital assets, the value that the holders of power assign—consciously or unconsciously—to the traits associated with those competing to get ahead in particular legal settings or the legal field more generally.

The capital assets approach, however, also pays particular attention to power and its role in the social construction of the rules of the game that favor dominant social groups. Law firms grew up to serve large corporations, and their partners sought to blend into the world of economic power in New York City and elsewhere. The law firms marketed lawyers who were white males comfortable with the business elite, with wives at home to free up work time and also help maintain a presence in the social world; and the firms worked to persuade clients that the best lawyers required the credentials of the elite law schools with which the firms had very close ties.

The market in which they operated assumed that women and minorities did not fit in positions of power. In effect, both overt and implicit bias prevented women from rising to positions of power. Over time as people outside of the narrow social world gained more opportunity and power, partly because of a tempering of overt prejudice, capital assets theory suggests that the law firms will still be shaped in part by the institutional memory—embodied in those with a history in the firms—of what a successful corporate lawyer partner looks and acts like. Change will be slow, and it will often be exemplified by minorities entering the

42. *See id.* at 1559–62.

43. *See id.* at 1571–72.

44. *See id.* at 1567–84.

workplace, but being indistinguishable from the white lawyers, similar to the golfers referred to at the beginning of this article. They may differ in ethnicity or skin color, but otherwise the setting of the golf course suggests that they share the same backgrounds and cultural capital. Such change is not only about switching off the implicit bias against minorities. It is about individual minority lawyers showing that they possess the assets implicitly or explicitly assumed necessary for partnership even though they do not, for example, possess the historically dominant skin color or gender. Put in a different context, the white male with certain credentials may be assumed to be acceptable to a client and to possess the requisite stature to become partner and a leader in the firm, but the minority or woman may have to affirmatively overcome the assumption that she does not naturally have what it takes. The act of agency to show the possession of what it takes is not well-captured in the implicit bias literature with its focus on psychology rather than organizational and social context and evolving power relationships.

C. APPROACHES FROM SOCIOLOGY COMPLEMENTARY TO A CAPITAL ASSETS APPROACH

Recent work in sociology is consistent with key features of the capital assets approach. The first is the theme of the role of ideology in support of power. Implicit bias focuses on psychological processes, while more sociological approaches focus on power differences, hierarchy, and the socially constructed ideologies that serve power and hierarchy. For example, according to work by Cecilia Ridgeway and Shelley Correll, referred to as status expectations theory,⁴⁵ beliefs about the relative qualities of men and women emerge from hierarchical assumptions that accord men greater status than women. This set of beliefs about the relative qualities of men and women then plays out in the background of professional careers, affecting how women are evaluated and even how they evaluate themselves within career settings.⁴⁶ And even though women and minorities in particular circumstances challenge or reject the hegemonic belief system, and many actors in society also no longer accept the hegemonic assumptions, the enduring pervasiveness of the background beliefs makes change difficult and relatively slow. From our perspective, those background beliefs play an enduring

45. See Cecilia L. Ridgeway & Shelley J. Correll, *Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations*, 18 GENDER AND SOC'Y 510, 513–21 (2004). There is a more recent version of this argument. See CECILIA RIDGEWAY, FRAMED BY GENDER: HOW GENDER INEQUALITY PERSISTS IN THE MODERN WORLD 65–66 (2011).

46. “As gender beliefs write gender hierarchy into the interpersonal relations through which people create new social forms, the people in effect rewrite gender hierarchy into the new social practices that develop to define the new occupation or industry. In this way, gender beliefs and social relational contexts conserve gender hierarchy in the structure of society and cultural beliefs themselves despite ongoing economic and technological change.” Ridgeway & Correll, *supra* note 45, at 523.

role in shaping what is and is not valued in individuals seeking to make lawyer careers.

The ideology that comes from power relationships is embodied in the assumed characteristics of the “ideal worker” for a particular position.⁴⁷ Recent work by Swethaa Ballakrishnen on gender in India highlights the ways that gendered assumptions become traits that are valued in particular organizations.⁴⁸ The ideal worker is a particular mix of capital assets that typically assign default low values to women and minorities.⁴⁹ Law firms are conscious of diversity initiatives to recruit women and minorities to join their firms. However, when it comes to the partnership decision, firms suddenly refer back to questions of “fit.”

Certainly race, gender, and ethnicity play a role in determining the value of the assets an individual possesses, but we also need to look deeper than the categories themselves. There are related assumptions about the characteristics suitable for particular positions that relate to but are not the same as race, gender, and ethnicity. Recent empirical work by Lauren Rivera draws on qualitative interviews to highlight the ways that professional service firms, including law firms, look for “fit” in hiring decisions.⁵⁰ According to Rivera, similarity is an important driver of both attraction and evaluation that mediates issues of race, gender, and social class.⁵¹

The fit between individual and organization is therefore shaped by cultural traits. For example, similarities in leisure pursuits, life experiences, self-presentation, and other “lifestyle markers” are better for predicting inclusion or exclusion than simply race or gender.⁵² Rivera suggests that we have to focus on cultural aspects along with human capital, social capital, and discrimination.⁵³ From our perspective, her work supports a broad focus on the various forms of capital assets—including cultural capital—that shape how individuals are perceived in relation to the organizations that may employ them. The “ideal worker” in this sense is not specifically the white male whose commitment to work is supported by a wife at home, who has elite degrees, and who is comfortable at the country club. But that mix of capital assets defines what the organization tends to value. Ballakrishnen, similarly, notes that the relatively equal treatment of women at Indian law firms relates in part to the fact that they are all English speaking,

47. See Swethaa S. Ballakrishnen, ‘*She Gets the Job Done*’: *Entrenched Gender Meanings and New Returns to Essentialism in India’s Elite Professional Firms*, 4 J. PROF. & ORG. 324 (2017) (and sources cited therein).

48. *Id.*

49. For more in-depth discussion of “ideal workers” and how this is used as a roadblock for women’s progress, see John Hagan & Fiona M. Kay, *The Masculine Mystique: Living Large from Law School to Later Life*, 25 CANADIAN REV. SOC. 2, 195–226 (2010); PAMELA STONE, *OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* (2007); JOAN WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* (2010).

50. Rivera, *supra* note 6. See also LAUREN RIVERA, *PEDIGREE: HOW ELITE STUDENTS GET ELITE JOBS* (2016).

51. Rivera, *supra* note 6, at 1001.

52. *Id.*

53. See *id.* at 1002.

cosmopolitan, urban, and from “forward castes.”⁵⁴ They blend well in many ways that help make gender less important.

Rivera also does not focus on how the values may change, however slowly, in relation to changes in power relationships within the organization and in the organization’s clientele. But part of the organizational fit depends on how those in the organization believe individuals will be valued by potential clients.⁵⁵ Studies show that it matters, for example, whether the client is led by women.⁵⁶ Ballakrishnen’s Indian study similarly notes that Indian law firms value women more than other sectors of the profession, notably the advocates, do, in part because multinational businesses have different expectations of their firms than do Indian clients.⁵⁷ Leaders of multinational businesses expect to see women in power positions. The changing world of clients affect what assets are valued within the profession.

D. THE INSIGHTS OF CRITICAL RACE THEORY

Critical race theorists have much to say about the agency involved in “adapting” to the traits that are valued within a particular organization. While lawyers may come from diverse backgrounds, they need to be able to assimilate into their law firms. Assimilation includes being comfortable socializing with clients. Carbado and Gulati draw on the notion of cultural capital to show the problem for minorities of having to demonstrate the possession of traits that seem to qualify for partnership in a large law firm. In one of their early articles, they write that, while “all the employees in our hypothetical law firm have an incentive to demonstrate that they have the potential to become partners, the burden of proof, and thus the precise nature of the incentive, varies across identities.”⁵⁸ They go on to note that,

performing well—to the extent that ‘well’ is defined as success in an insider environment, such as an elite law firm—is difficult. Performing one’s outsider status in a way that satisfies insiders requires care. As with acting, the ability to negotiate different institutional cultures takes skill. The individual must acquire that skill or cultural capital. That easy ways to acquire or learn that skill exist is by no means clear.⁵⁹

Among many examples from the work of Carbado and Gulati, their examination of a “fifth Black woman” not making partner is especially salient.⁶⁰ They note the difficulty of using discrimination law to analyze a situation where four

54. See Ballakrishnen, *supra* note 47.

55. See, e.g., Damon J. Phillips, *Organizational Genealogies and the Persistence of Gender Inequality: The Case of Silicon Valley Law Firms*, 50(3) ADMIN. SCI. Q. 440 (2005).

56. *Id.*

57. See Ballakrishnen, *supra* note 47.

58. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1269 (2000).

59. *Id.* at 1300.

60. See Devon W. Carbado & Mitu Gulati, *The Intersectional Fifth Black Woman*, 10 DU BOIS REV.: SOC. SCI. RES. ON RACE 527 (2013). See also DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN “POST-RACIAL” AMERICA (2013).

black women make partner and one, Mary, does not, when the differences between Mary and the four are obvious but not obviously relevant within the law:

Dress. While Mary wears her hair in dreadlocks, the other black women relax their hair. On Casual Fridays, Mary sometimes wears West African influenced attire. The other black women typically wear khaki trousers or blue jeans with white cotton blouses.

Institutional Identity. Mary was the driving force behind two controversial committees: the committee for the Recruitment and Retention of Women and Minorities and the committee on Staff/Attorney Relations. She has been critical of the firm's hiring and work allocation practices. Finally, she has repeatedly raised concerns about the number of hours the firm allocates to pro bono work. None of the other four black women have ever participated on identity-related or employee relations-related committees. Nor have any of them commented on either the racial/gender demographics of the firm or the number of hours the firm allocates for pro bono work.

Social Identity. Mary rarely attends the firm's happy hours. Typically, the other four black women do. Unlike Mary, the four black women each have hosted at least one firm event at their home. All four of them play tennis, and two of them play golf. Mary plays neither. Finally, while all four black women are members of the country club to which many of the partners belong, Mary is not.

Educational Affiliations. Two of the other four black women graduated from Harvard Law School, one graduated from Yale, and the other graduated from Stanford. Mary attended a large local state law school at the bottom of the second tier of schools.

Marital Status. All four of the other black women are married. Two are married to white men and each of them is married to a professional. Mary is a single mother.⁶¹

Carbado and Gulati's work seeks to raise awareness among policymakers of the extra burden placed on minorities to conform to a taken-for-granted world associated with corporate law firms. They make clear that certain traits and forms of behavior demonstrate to those who control the firm such things as loyalty to the firm (perhaps not making waves about demographics and pro bono); potential business development ability (includes comfort interacting with clients on the golf course, tennis court, or country club), academic pedigree (elite law school credentials), and perhaps even ability to work well and fit with clients (more relaxed hair versus dreadlocks perhaps, more standard business attire). They raise the issues associated with both implicit assumptions of the leaders of a firm and

61. See Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. OF CONTEMP. ISSUES 701, 717–18 (2001).

the felt need of many outsiders—minorities especially—to demonstrate affinity with what is valued in the law firm.

This work is also reminiscent of the work of David Wilkins on “bleached out” lawyering, which also raises the question of how to navigate identity in the corporate law firm setting.⁶² Wilkins in later work provides at least one example of how minority identity is valued today by large law firms. Wilkins notes that black corporate lawyers are disproportionately specialized in the defense of employment discrimination actions.⁶³ This positive side of racial diversity has been picked up in more recent literature, discussed below.

One of the points not emphasized in the critical race literature, however, is the constantly evolving values of different forms of capital exemplified by the “value of diversity.” The examples given in the article on the fifth black woman explain very well the place of golf, for example, but they do not discuss the relationship to the evolving social context within the legal profession generally and within the law firm as an organization situated in a changing social context.

E. AMBIGUITIES OF POSITIVE RACIAL AND IDENTITY CAPITAL

One key issue in the evolving social context is how the commitment to diversity in the legal profession relates to the traditional hierarchy of valued capital assets. Two professors at the University of Denver Sturm College of Law, Nancy Leong and Eli Wald, have recently produced interesting work on this issue.⁶⁴ They build on the insight that diversity interacts with this corporate law firm “scale of value” in a complex way reminiscent of the photograph we discussed at the beginning of this article. Diversity is valued by the power structure of large law firms, corporations, and governments. It affects the rankings of the law firms, decisions by clients about whether to retain a law firm or not, and entry level and lateral hiring. Yet the achievements of corporate law firms are still quite limited in terms of diversity.

Leong and Wald both worry that the value of diversity is partly symbolic in a dangerous sense. While valued in hiring, bids for business, and diversity scorecards, the value is not often converted into minority and female partners with power. Leong has a name for it—“racial capitalism” which she has recently expanded to “identity capitalism.”⁶⁵ Her thesis is that,

[Within a system of identity capitalism,] [i]ndividuals and institutions . . . derive social or economic value from identity categories such as race, gender,

62. See David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached Out Lawyering*, 5 INT’L J. OF THE LEGAL PROF. 141 (1998).

63. David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1595 (2004).

64. See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013); Eli Wald, *BigLaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509 (2015).

65. Nancy Leong, *Identity Entrepreneurs*, 104 CAL. L. REV. 1333 (2016).

sexual orientation, and class. Again, in theory, a member of any identity group might engage in identity capitalism, as might a group dominated by any identity. In practice, however, identity capitalism—as a system—occurs when individual members of in-groups or in-group-dominated institutions derive social and economic value from out-group identities. Like racial capitalism, identity capitalism maintains and reinforces existing distributions of power and resources.⁶⁶

One of Leong's concerns is that minorities "sell themselves" by acting according to the stereotypes that the mainstream organizations expect, and will therefore "buy."⁶⁷ An Asian might be hired, for example, on the stereotypical assumption that he or she will be quiet and hardworking. But that strategy has limits since the identity is not really supported by the firm. That same stereotype suggests that Asians will not attract and retain clients through social interactions such as golf, and they therefore are not encouraged, or are even discouraged, from interactions with clients. As a result, those who rely on identity capital will not be given real opportunities to convert it into what they need for success at the firm.⁶⁸ Almost by definition they will not fit. Wald echoes this concern and calls for firms to facilitate that conversion from identity capital into what it takes for success at the firm.⁶⁹ In this way he hopes the firms will change the odds for partnership and the achievement of positions of strength in the firm. Leong and Wald aspire to a situation where minorities and women can be truer to their identities and where law firms will take the value of identity capital and work to convert it into professional success.

From our perspective, this critique and recipe for success needs to be supplemented by a more sociological approach. First, the criticism of racial or identity capitalism takes as given the value of the capital of identity. It is worth noting that it took a huge effort over a long period of time to build that value. If we go back even to the 1970s, as documented by Heinz and Laumann, the values celebrated at law firms showed the firms' propensity for homogeneity. The lawyers found in these firms sent their children to the same schools, and the lawyers and their families attended the same churches and social clubs. In fact, when their wives engaged in volunteer work, it was done with wives of other lawyers from

66. *Id.* at 1337.

67. *Id.* at 1367.

68. According to Wald, *supra* note 64, at 2514,

Part V demonstrates how BigLaw can (1) explicitly recognize the roles social, cultural, and identity capital play in its retention and promotion apparatuses and (2) revise its policies and procedures to ensure that all of its lawyers have equal opportunities to develop the requisite capital and compete on equal and fair terms for positions of power and influence. Moreover, exactly because the capital model describes the underrepresentation of diverse lawyers at BigLaw as an endogenous outcome within the control of BigLaw and its lawyers, it is, while far from rosy, a cautiously optimistic model that offers hope for greater representation of diverse lawyers in positions of power and influence.

69. *Id.* at 2550–54.

the firm. The missing theoretical point is that the forms of capital valued within the law and within the large law firm at the top of the hierarchy are contestable. They are not static. This suggests that there might be further change. But it suggests also that neither further change nor the value of diversity capital is inevitable.

Second, neither scholar confronts the enduring and embedded hierarchy and power structure in the law and in the large law firm. They use the sociology of fields and the terminology of social capital to some extent but underestimate how diversity and the process they describe interacts with *power and hierarchy* and the capital that power and hierarchy represent and embody. To the extent that individuals change themselves to better gain access or even replicate all the other characteristics of the organization in order to gain access (elite schools, clerkships, grades), they are deferring to the historical hierarchy. It is a strategy that makes sense to aspiring lawyers given the world that they see and to some extent internalize. But they are also reinforcing existing structures of power even as they seek to find a space within it for their capital to get recognized.

In other words, it is fine as an ideal to say that the large firms should give real value to diversity, converting it to prestige and to partnership. It is also worthwhile to exhort the ideal that it should not be necessary to make people try to look and behave like corporate elites. But the qualities for success (including stay-at-home spouses) are measured within a set of racial and gendered categories by definition subordinate to the hierarchies embedded in the law and the law firm. David Wilkins noted, as mentioned above, that a story of “success” in litigation departments was African-American lawyers defending employment discrimination lawsuits.⁷⁰ The value of diversity is converted into a niche that finds particular value in the law firm world.⁷¹

70. According to Wilkins,

[th]e plurality of the black corporate lawyers I interviewed specialized in ‘labor and employment law,’ which in large-law-firm speak is a euphemism for defending discrimination cases. When the large number of black corporate lawyers who specialize in litigation (where the heavy concentration of minorities in urban jury pools is increasingly significant) and municipal bond practice (where black city officials are often the ones dispensing the work) are added to this number, it is evident that a substantial percentage of black lawyers are engaged in practice areas in which their race might be perceived as a valuable credential.

Wilkins, *supra* note 63, at 1595.

71. The importance of minorities in employment litigation is reiterated in a recent article on the increasing value of diversity, which uses the example of Littler Mendelson P.C., a major employment law firm. See Miriam Rozen, *As Clients Get Tougher on Diversity, Some Firms See a Selling Point*, THE AM LAW DAILY (Aug. 1, 2017), <http://www.americanlawyer.com/id=1202794457489/As-Clients-Get-Tougher-on-Diversity-Some-Firms-See-a-Selling-Point?slreturn=20170707110653> [<https://perma.cc/FUG2-ZTFQ>].

In 2016, seven clients asked for the labor and employment firm’s overall demographic data and for specific diversity information about the lawyers assigned to work on their matters, Bender said. This year, those requests have skyrocketed. So far in 2017, Bender said 24 clients—more than three times the number last year—have asked to see diversity data for the firm or for specific attorney teams, or both . . . Kent Zimmermann, a law firm consultant at The Zeughauser Group, noted that labor and employment firms may have structural reasons to show greater diversity. ‘They can

II. QUALITATIVE INTERVIEWS

A. INTRODUCTION

We have undertaken 219 interviews through the three waves of the “After the J.D.” Project. We focus here largely on the issues raised by the studies of diversity in relation to hierarchy and the valued forms of capital. We will go through a selection of qualitative interviews that illustrate what we find in the literature. We especially draw on the narratives with respect to these issues that can be seen in multiple interviews, since we interviewed twenty-seven individuals three times and interviewed twenty individuals two times. What capital is in fact valued and who possesses it? How does this inequality play out in careers? Our approach is to see how the interviewees make sense of the social and professional worlds that they come to inhabit. We look at where they perceive they fit—where they believe what they have to offer is valued. Many interviewees also articulate what it is like to feel like misfits. Their choices to leave can be presented as lack of fit or better fit elsewhere, but the results are the same.

We use the interviews to reveal how the processes play out, not to show what percentage of minorities and women experience the negative valuation. The statistics on who stays and who leaves speak for themselves.⁷² Our reports of negative experiences of our minority and women lawyers at large law firms are not balanced here by stories of success in large firm settings by other women and minorities. Of course, there are such success stories even if not in our qualitative sample.⁷³ Furthermore, our interviews show that even those who are deemed unsuccessful in Big Law typically take control and find other ways to prosper and excel.

It is also instructive to use the interviews to see how many of the lawyers try to find some form of capital they have or can get, that can provide a niche for them at the highest levels—or simply a niche within the profession. We see this both within the large firm settings and other On-Broadway strategies. We also see how individuals pushed outside of the traditional elite track, or had no opportunity to join, develop alternative strategies. We begin with the strategies that we characterize as On-Broadway, where lawyers seek to show they have what it takes to succeed on an elite track. We then turn to the strategies employed by those who either lack access to the elite track or for other reasons opt out or fail to gain a place in that privileged sector.

In section B, we begin with men who are a natural fit for On-Broadway. These individuals possess the right degrees and their social capital enables these men to

have a leg up if they have a diverse team. If that team is representing a company accused of gender bias, often it makes a better impression to have a diverse team,’ Zimmermann said.

Id.

72. See AFTER THE J.D. III, *supra* note 3, at 67.

73. *Id.* at 63 (showing there are, for example, female equity partners in large law firms within the AJD quantitative sample).

succeed On-Broadway. Having the “right-fit” makes upward mobility a natural and almost organic process. On-Broadway stories also include lawyers who have moved through multiple elite firms, where each time they move they are able to ratchet up their status within the law firm hierarchy. This section also discusses lawyers of color with the right credentials to be hired On-Broadway after law school. However, their stories take a different twist as we discover their credentials become devalued and these lawyers realize their On-Broadway trajectories have been cut short. In section C, we discuss lawyers who begin their careers entering into medium size firms, and in particular women find that judgmental views of appearance can become roadblocks. Section D offers a preliminary summary of the findings for the emblematic On-Broadway careers in large law firms. Section E focuses on the variations of the corporate law firm strategy emblematic of On-Broadway careers, in particular of counsel and in-house, and how they have evolved in part to accommodate women who do not want to commit to the hours—and assumption of a spouse-at-home—required of corporate partners. Section F provides a Regional Theater approach that involves staying with corporate law and becoming partner, but in a regional context where the hour demands are not the same. Finally, we discuss a variety of careers that involve the development of capital assets that are not especially valued—or not yet—in the large law firm setting.

B. VARIATIONS OF FITTING WITHIN ON-BROADWAY TRAJECTORIES

1. NATURAL SUCCESS IN A LARGE LAW FIRM

Our first example is very straightforward. It concerns a lawyer we interviewed three times. He illustrates that the On-Broadway option fits well with someone who has the right stuff to be welcomed and promoted. We begin with the first interview when he had been working for six years in his firm.

I was a Harvard undergrad and then University of Chicago law school . . . I did two one-year clerkships before coming to the firm [federal district and federal appellate]. I applied to the Justice Department to the Honours Program and was very interested in that because I wanted to go somewhere I thought I would get a lot of opportunities to do things as a young lawyer and so I had the offer from there and thought that I was likely to do that but one of my co-clerks had been an associate at Big Firm ABC and I knew of it from having been in the city before and he sold me on the idea that the firm was actually like that too and he really enjoyed it and was thinking about coming back so I thought I would interview and see what I thought. And ultimately I made the decision, so I came through, liked everyone I met, seemed like the work was very interesting. . . .

I never really thought that I would be the big firm lawyer for a long time. I think coming in from the outside I sort of expected that going to a big, known firm, that it would be insurmountable hours and I would burn out relatively

quickly and I came in thinking ‘I’ll just see how it goes, it will be a good experience while I’m here and if I decide it’s time to leave, I hopefully won’t have closed any doors and will be able to go,’ and nothing has driven me away. I mean I’ve had a good experience and so . . . I wouldn’t have told you coming in that this is something I was looking for but I’ve been happy while I’ve been here

He discussed mentoring in the following terms:

[T]he (formal system) here isn’t as useful as the informal process I found mostly by the people I’ve ended up working with. I’ve developed relationships with them and talked to them about other things I should be trying to do or what they’ve heard that’s out there in the firm that I should try or people to work with or avoid working with so that too has been a pretty informal process for me

I think I have had people look out for me in terms of getting the breadth of experience . . . The best part of the job I think though is the people I work with

While I’m sure no one would look down their nose at you if you were out there trying to gather business, it’s not something that is stressed

Who knows maybe I will decide if I make partner that it’s—again, I never really thought this is the be all or end all—I wouldn’t be surprised if I made it and I decide in a couple of years that I’ve had enough of doing this and want to try something else. But there’s nothing at the moment that makes me feel that I definitely need to leave or I have missed something obviously that I should be doing.⁷⁴

Here is an example of someone recruited to the firm because his friend correctly perceived that he would be a good fit. He quickly found mentors and sponsors, and he confirmed that that the best part of the job was the people at the firm.

Not surprisingly, when we visited with this respondent in 2009 for Wave 2, he had been promoted to an equity partner. His firm was one that at the time had only one kind of partner and largely promoted from within instead of hiring laterals. Despite his On-Broadway success, he remained modest about his aspirations. He suggested that he had not aspired to be a big firm lawyer. He just seemed to fit there.

So . . . if it’s possible, I guess I feel more included than before but that’s not meant to be dismissive about the way I felt before . . . it certainly was not my dream all along to be a partner at a big law firm but the fact was I enjoyed what I was doing and sort of kept checking in every couple of years and realizing things seemed to be going well and they hadn’t driven me out like I thought they might which I know really is a back-handed compliment.

74. Interview transcripts are on file with the authors.

In 2014, we had our third interview with the respondent. He is still enjoying success at the firm as a partner. We asked what it took to become a partner.

Partners? Who have a broad range of skills and who fit the culture. But that's all easy to say and . . . harder to identify But that is it. I mean, you're looking for . . . the next generation of people we think are stars.

We also asked about his wife and family. They have two children. He referred to the fact that during the Wave 3 interview, his wife was staying at home with their two children. We should note that the respondent's wife is a lawyer whom he met when he joined the firm. She was an associate there as well. Once they got married, she left the firm and moved to a governmental position.

[She] didn't go back [to work] after our second (child) and is trying to decide what she's gonna do next And it's driving her crazy. She wants to be back at work, yes She was never the, she will tell you, the stay-at-home mom . . . but more likely kind of NGO, non-profit types To see if she could find something in an area that [involves] . . . advocacy groups for . . . victims of domestic violence. Or children's issues or the like.

A few points merit highlighting about this elite career trajectory: the level of comfort at the firm and sense of comradery, the way the firm helped him through mentoring to partnership, the lack of importance of individual rainmaking at that stage, the assimilation to firm values of who merits partnership, and the seemingly natural progression of his wife—never the “stay-at-home mom”—from the very same firm to out of the workforce and considering non-profit alternatives. The point is not that every white male with elite credentials has this experience, but the example shows how natural, in retrospect, this process appears. All the parts fit within the traditional law firm hierarchy.

2. ANOTHER EASY PARTNERSHIP TRACK

The second example is a man trained as an engineer and a professor prior to deciding to go to law school. He attended a top law school and friends recommended that he use his engineering credentials and relocate to Silicon Valley to practice. He did that. He did not choose to specialize in intellectual property (IP) and instead became a tax lawyer. He figured he could advise IP corporations by demonstrating his technical understanding of their problems and then help these corporations to solve their tax issues. In his words,

I became heavily involved in discussing with taxpayer engineers the underlying facts and the products and the intellectual property so I got a chance to really dig into the client's businesses which clients love and that to me is one of the . . . most important things about any good lawyer which is understanding the client's business

Describing his career path,

R: I stayed at LARGE FIRM A from 1999 until 2002 when the partners I worked with left. So 98% of my billings walked out the door so they invited me to go with them and at that time, April 2002, I went to LARGE FIRM B and I stayed there until October 2011 when I came to LARGE FIRM C I made income partner at B and then I was promoted to equity partner at B.

Q: And what does it take to make partner?

R: So I had good hours, good client contacts. You have to be, you have to have a certain I don't want to say *je ne sais quoi* but it's a partner potential. You have to be seen as somebody who's likely to be able to bring business into a law firm. Is this somebody you . . . [and] other partners . . . we would put in front of clients or potential clients?

Q: And then what prompted you to come here?

R: I thought that FIRM C would be a better platform for me to build my practice. It's a larger law firm than B slightly I knew the partners in my field office I practiced with them at FIRM A [as well as another in the current firm . . .] They were slightly ahead of me and they had left FIRM A and came here a few years previously and they met with me over a period of years and they kept telling me how great it was. So first of all, I knew them and that's a big factor in any job. The unknown, the largest unknown is probably not what you're doing but who you're doing it with or who you're doing it for.

To complete the story, he has two children and a wife at home. The career spans three firms but is still very similar to the first example. It presents a straight story of contacts made at the first firm, naturally following a partner who leaves to a second firm, and then gaining partnership there and at the third firm. In addition to being a white male with a wife at home, this lawyer finds a tech fit that is especially valued in the Silicon Valley. As is often the case for those who sail to partnership, it is difficult to articulate the "*je ne sais quoi*"⁷⁵ that leads them naturally to partnership. But the connection to the perceived market is also made explicit—"is this somebody we would put in front of clients or potential clients?"

3. NEXT EXAMPLE OF MOVING SMOOTHLY TO THE ELITE TRACK

Another white male shows the process working after the recession. The lawyer noted that, "I only stuck around [at Firm A] because I was on the partnership track there at ELITE FIRM A." But then his plans got derailed.

Q: So what happened when the economic crash hit?

R: So basically . . . I was a lawyer IN X FIELD and what happened was the economic crisis hit . . . the (West Coast) groups that we worked with [and the firm] pretty much fired everybody Our clients completely just shut down There's no way you're going to make partner when all your clients are

75. The French phrase "*je ne sais quoi*" refers to a quality that cannot be described easily.

closed. And . . . as an associate . . . who did a lot of work with some great existing firm clients that was all great and had the credit crunch not happened I would have made partner there. I guess the vote would have happened at the end of 2009 and . . . I would have made partner at the beginning of 2010 which is when they make partners . . . I had actually had a promise from the former head of the firm . . . and I'd gone through internal processes, and he [said] . . . "next year is going to be your year," . . . they actually put me up the prior year but then everything . . . went completely sideways and when they . . . had the meeting with me where they said, "hey guess what, you're not going to make partner next year" . . . They promoted me to counsel instead . . . At the time I'd actually known of a position that was available at FIRM B . . . It's not in the same sort of league as . . . FIRM A but its maybe . . . a tier down, it's still a fine firm. And the group at FIRM B (West Coast) was . . . headed by a former FIRM A (West Coast) partner . . . His . . . number two [who] is another partner there was actually the woman who . . . trained me as a junior associate at FIRM A and I had worked for her the first two years of my career. So I knew them really well. I had known that they needed somebody for that position and . . . through a headhunter I reached out to them and I looked at a lot of options but . . . that was an opportunity for me to lateral to a firm . . . with a guarantee that I would make partner.

He then moved to a top tier firm as an equity partner: "I was actually very, very happy being there, what changed was . . . I'd worked with FIRM C on some deals." FIRM C invited him to join that firm. He too has two children and a wife at home. Here, the road to equity partnership was altered by the recession, but his contacts saw that he had the right stuff for partnership and stayed with him.

4. A FEMALE MINORITY DEVALUATION IN AN ELITE FIRM

The fourth example is an Asian-American woman from a top fifteen school whom we interviewed three times. The timespan of the interview corresponds to a reduction in the value to the firm of her diversity as an Asian woman. That depreciation accelerated when the recession hit. From her perspective during the Wave 1 interview, she was relatively happy in a new office of an elite law firm: "So you get the exposure to the big clients but you still get a nice family sort of feel. You can . . . know the name of everybody in the office."

Q: And did you have a bunch of offers that you were deciding between?

A: I had twenty-one callbacks. And I picked my top three firms.

Q: And what about a longer-term goal?

A: Longer-term goal? That's, that's hard to tell. Just take it day by day.

Q: Yea, and do you feel like you're . . . on track? That you're getting the trial experience that you hoped you would?

A: I am, but it takes, takes initiative and it takes a certain amount of ballsiness to go out and spend that much time on pro bono. I think a lot of people may be

afraid to not be doing the income generating work, but I've heard nothing but good things and praise.

The experience was going well from her perspective, even though she was perhaps an outlier on pro bono, in which she invested heavily. Her choice of terms, interestingly, appears to be a way of blending into the masculine litigation culture of the firm—as suggested below.

At year nine, when we interviewed her for Wave 2, she was an income partner at the same firm. We asked about her ability to bring in clients: “I have tried to bring in about six clients over the last two years. Unfortunately, the matters were too small to justify our rates and so I had to give them to people who have left the firm and gone to smaller firms.”

Q: How would you describe your picture of the practice of law now, your place in this organization?

R: Obviously, I know how to run cases now . . . I'm fine in court. I do plenty of pro bono cases . . . but to do the type of case that FIRM A does, I need to step to the next level and be handling my clients and making the key strategic calls myself. And I can't do that with my own clients because they're too small.

Q: Now, do you feel your life here would've been different if you were a white male?

R: Absolutely, yes. It's not an overt discrimination. In no way do I feel that because I'm Asian I've been discriminated against. There is a little bit paternalistic attitude towards women. You can either be relegated to the role of being sort of a submissive, little worker bee or, if you're more assertive, and I'm definitely more on the assertive side, I feel that sometimes I scare the guys a bit. You can be in a meeting and . . . they're comfortable swearing and dropping the F-bomb here and there and so am I quite frankly, but because . . . there are ladies present, sometimes they'll hold themselves back . . . If we're in a meeting and it's appropriate and I drop the F-bomb . . . then, I think it scares them a little or when I'm aggressive about my witnesses when my witnesses are not doing what I want them to do, and I'm expressing extreme displeasure and I say so in a meeting, it'll scare them as well so you feel like you can't win.

Socially, also because politics is important and establishing relationships is important, it's difficult to be a woman here . . . You'll be doing work together, sitting in the conference room and they'll [say] well . . . I couldn't have my wife do the same things that you do . . . There's only one person who can wear the pants in the family and that's got to be me. I've got to be the breadwinner and . . . work long hours. I couldn't handle it if my wife was doing that. Or even small social things like a share partner will say to a non-share partner, “hey, you know, we should get together. Why don't you have your wife call my wife?”

When we found her for the Wave 3 interview after she was practicing for twelve years, she had left the firm and was looking back at what happened. She described a case that she was involved in as a non-equity partner before she left.

I got into the case late, six months after taking over for somebody else. Who got kicked out because of a conflict he had with one of the clients. It was kind of abrasive. So I took over. There were several other equity partners on the case and they gave me terrible work. They had me do the document review and document productions.

In the past, on other cases, I'd been told I had to be a team player and do that kind of thing. And then that came back to bite me in my reviews when they said you didn't do enough substantive work You were only doing document productions. So this time, when they said I'd be on document productions, I said that's fine, I'm a team player. However, I'd also like to have substantive work I need to be able to handle a witness or . . . work up some substantive legal part of the case.

That . . . wasn't met very positively. But they did throw me a bone and they gave me a witness who they thought was not very integral to the case. But I established a very good rapport with him and built up that portion of the case. And it eventually ended up with me having ten witnesses because I'd built up the whole contracts and insurance portion of the case.

The integral role she played in the case did not do anything for her position there: "And right after that, they said thank you very much and we anticipate that we won't need your services." The recession hit and she was basically given a nice severance package along with statements that she was not skilled enough as a lawyer. She characterized her service in retrospect as follows:

There's so much backstabbing and maneuvering and hitching your wagon to the right star You're supposed to be on the same team. That's how I see it But this was more like being on the reality show *Survivor* where you just have to watch for people stabbing your back and your real enemy is not the opposition, but the people in their own team.

It is clear from the interview that the game of *Survivor* she described was not one with equal contestants. In the macho man's world of litigation, she did not find a comfortable and valued space. Her diversity and talent were very highly valued as she entered the firm and moved to non-equity partner. But by the time of a recession, she was not one they wished to save and keep in the fold. It is telling that she tried to get ahead by bringing in clients, while the male partners described previously were promoted on the basis of firm clients, which is indicative of those promoted to equity partners generally.⁷⁶

76. See Dinovitzer & Garth, *supra* note 30.

Gender was certainly a key in this story, but we can also note more generally that the quantitative data from “After the J.D.” project showed that Asian lawyers in corporate law firms, who were well-represented and a “success story” at Wave 2, nine years into their careers, left in disproportionately high numbers when the recession hit or firms had to decide who would be equity partner.⁷⁷

5. THE EXPERIENCE OF AN ASIAN MALE IN AN ELITE LAW FIRM

We briefly provide a few lines from the one interview we had with a male Asian-American lawyer with a strong IP background. He stayed in one firm until recently and is still not an equity partner. He has moved from non-equity partner to a counsel position at another Big Firm.

Looking back . . . I had sort of a misconception of how work and clients were generated . . . I . . . figured if you did good work, over time, . . . you would have your own clients . . . Everyone is . . . scrambling to network and connect with clients, potential clients, old colleagues that are now our clients, or companies, I guess . . . it’s a lot of legwork that I never saw because [I] never had to do [it] . . .

But, shortly after starting and working and doing well, you . . . have the expectation you would’ve made equity . . . In twelve years, and that hasn’t come true, so I’m, I’ve fallen short of that expectation.

Yeah, . . . I think without that, [the] partner I worked with whose office is no longer . . . a producer of work, it mainly receives work from other offices, and the dynamic importance of this office has been minimized.

I think *where I would like to see myself in five years* is doing the same work, same legal work, but having my own clients . . .

So . . . self-sufficient . . . because I love the work, I just don’t like the uncertainty or the lack of clarity. Or worrying, like, “Oh, what if, you know, that partner doesn’t want to give you work anymore?”

The quotes do not evince a well-mentored and comfortable career toward equity partnership. The service role has been the best he can attain. This lawyer would have liked to be equity partner and still hopes that the kind of practice he covets will come to him.

6. ARAB-AMERICAN IN AN ELITE FIRM

An Arab-American lawyer in an elite law firm shows both the welcome and the subsequent discomfort in a large law firm. In our first interview, we asked about relations with associates:

I think there’s a clique or a group of friends in my class that do hang out a lot together. I don’t hang out with them as much, I’m married, have a baby. I’m a

77. See AFTER THE J.D. III, *supra* note 3, at 72, 88–89.

religious guy, so I don't play poker and I don't drink. So that limits my social ability a bit. But we do get together sometimes.

We asked if his ties to the Middle East might conceivably help his career at a large firm. He recognizes the possibility and that it could help him, but does not see it at his current firm:

I don't think it would help me at FIRM A in terms of business and all. I think that clients sometimes get a kick out of it, we joke about it sometimes. They appreciate it. Jokes between, for instance, me and the associate who's Jewish, the client might say 'come on guys you're working on this agreement, why don't you figure out the Palestinian struggle.' We'll get those types of jokes. But . . . I don't think that in the long-term that my background will directly help me bring clients into A, not A.

After 9/11, furthermore, he was perceived somewhat differently. He noted that individuals asked him to explain:

And with senior partners and when you choose your words carefully and you don't go into it in detail you . . . don't get personal because it is a very emotional time. You have a senior associate or partner who comes to you and says, 'why are they doing these suicide bombings.' And they want to understand. In a way, I can explain it in a little bit better way than they're getting in the media. But do you want to even start talking about the plight of Palestinians when somebody's very emotional.

But he was still relatively enthusiastic about the law firm. After describing some potential options, he stated:

Anyway, those are examples of types of things that I might do later. I also see myself sticking it out at . . . Firm A and being involved in the Chicago community. I would love to maybe someday be asked into the Chicago Council of Foreign Affairs or Chicago Economic Club or any of these other . . . general institutions of the city that make Chicago so great.

The prospects of that kind of partner trajectory were gone by the time of the second interview. By year nine and our second interview, he had left the firm, partly because he could not see a way in the large law firm that he could build a practice that linked him to the Arab-American community: "My sense of separation from community work and activism was growing because I simply had no time." He also became increasingly uncomfortable within his practice group.

Also simultaneously I was learning that the . . . practice, led by a very obnoxious hard-headed seemingly an asshole And the more I was working in the group, the more I had to interact with him, the less buffer I had with either senior associates or junior partners, and that experience was like a hazing

He switched firms to a medium size firm where he also did not quite fit in, ultimately lost his confidence, and suffered from clinical depression before leaving and investing in politics. We discuss the much brighter picture of his current career below.

7. AFRICAN-AMERICAN—TWICE PASSED OVER FOR PARTNERSHIP

An African-American man who sought partnership at a large corporate firm was twice turned down, perhaps in part because of the recession but also partly because, he was told, he lacked the “business person type of personality.” Our first interview was before he was considered for promotion, but his second interview occurred after being turned down for partnership, and he was trying to figure out his next move. During his Wave 3 interview, we discovered that he had moved into the federal government as a lawyer who appeared in court regularly to represent his agency. He found this new position to be fulfilling. Reflecting back on his experience, he noted:

I wasn't in a silo so I was . . . bouncing around the outside and I would pick up [others] who were not in a silo and those people were very nice to me, gave me great advice, but they can't help me maneuver so I was on the outside bouncing around those silos and they were bouncing with me and paralleled. There were a few people that [gave] the best advice they could.

I think that it was already hard, that combined that with a lack of any mentors The trick is that it is always somebody else is taking care of what would be necessary for that to happen [move to partnership].

Well, you know, this is not completely unrelated to race and background and things like that. It's part of what world you grow up in . . . it's . . . the comfort level in networking, . . . in an all-white, mostly all-white world Seems like . . . but I'm not sure it's race.

Q. It might be a more class thing?

Right, I've been asked if I could be a fourth for some golfing and I've never . . . I've never even been on a green.

Of course, there are many lawyers in large firms who are told they are not fit to be partner. But the inability to get in the right “silo” and become embraced suggests that he did not overcome the assumption that what he possessed was not quite right for partnership—at least in a recession. This story appears to fit precisely Woodson's description of “capital discrimination.”⁷⁸ Indeed, cultural assets might have helped him give the impression that he belonged within the right silo—playing golf, for example. Golf or some more cultural capital might have proved that he did indeed possess a “business-type” personality. He lacked the essential capital assets necessary to meld into the firm and become adopted by senior mentors who could have ushered him toward partnership. In discussing his

78. See Woodson, *supra* note 23, at 185.

exit from the firm, he mentioned both race and social class as factors that probably made him a misfit from the point of view of partners at the firm.

C. SIMILAR PROCESSES AT MEDIUM-SIZE FIRMS

1. WOMAN AT A SMALLER FIRM: A STRANGE QUESTION OF FIT

One woman's experience at a relatively large regional law firm shows how superficial the requisite capital for success can be.

We had a partner who suddenly left and I stepped in and saved a big chunk of business. I took over an entire portfolio and then we had another person leave and I did the same thing for another group. And so I really was at that partner level and . . . I thought I deserved the recognition

She did not get the votes for partnership.

The following few days it was a revolving door in my office, partners coming in saying, . . . literally telling me "We messed up. Give us another chance." Wow okay so. And then I had the discussion that kind of sealed the fate. There was one partner in particular who had been working on an investigation due to discrimination and I was not the one who put forward the claim but I was a witness. During the course of that he [asked] . . . has this partner or that partner told me point blank to never expect to be made partner—'*not pretty enough*'—and now combine that with, now only a year later not making partner. By one vote and then this partner coming into my office and saying "It wasn't because of that. There's something else going on."

One partner was too candid, and others denied his observation, but the point is that looks especially for women can determine whether one is perceived as right for partnership.⁷⁹

2. WRITING THE PARENTAL LEAVE POLICY AND LEAVING THE FIRM

A graduate of a Midwestern state law school worked in litigation for a regional firm in the Midwest. Her husband, who graduated from the same law school, worked in an elite law firm during the period described below. She knew that she wanted to have children and to have the possibility of working part-time without losing the partnership track.

This is what happens when you've been somewhere for fourteen years. Things get in the mix. I was really vocal as an associate about having reduced hours. [A partner and I] had many hours of conversations about this, . . . he ended up forming a committee of partners that included the . . . one of the two non-equity women partners at the time and the one equity female partner we have, two other men, and me. We basically drafted an hours arrangement that,

79. See generally DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* (2010).

ultimately, I was not happy with, but it was better than nothing, I suppose. Honestly, the biggest kicker . . . and I say this, because I knew, when the policy got formed, that it was gonna be an issue. Part of the policy is (a) it's a two-year situation, where you could reduce down to eighty percent. Out of 2,000 hours, it's still 1,600 hours. It's a full-time job. So, you could do that for two years, and that was basically it Because, basically, [for] partnership considerations. I am a seventh-year associate . . . or, six-year associate, it's 2006, . . . I have my son . . . in October of 2006, and partnership there is nine years I had a really bad, horrible postpartum with my older one, anxiety, and I took an extra month, so I did three months paid, and then I told them, "Listen, I need one more month to get my head around this" I went back at four months, but I said, "I'm not coming back full-time." And they [said] . . . "Okay, you can do eighty percent per the policy," and [my response was], "I'm not doing eighty percent."

"I'm not gonna come back at eighty percent. I wanna do sixty percent," so I could be home two days a week. I said, "But I wanna stay on partnership track," and the garbage that they gave me at the time was that there were two other girls behind me who also had just announced they were pregnant. I was the first person to ever use the policy, the policy that I knew was gonna do this to me, and they said, "You go sixty percent, then you stall in partnership." You basically are in limbo land. And I [said], "I don't care I can't do it physically, mentally. Right now, I can't, so I need to go sixty percent." So, I went back sixty percent Reviews are in December, and I was working mostly still with . . . a very demanding guy. I love him dearly, but it's rolling with the old boys with him. And the other female partner, as well. I will never forget her saying, "Any less, you need to choose. Either you're a mother, or you're a lawyer. What's your priority?" I was a very vocal associate, and I [said], "How can you say that?" But neither of them felt that they should do any favors for the young women [their response], "Well, we did it." And the reason I bring all of this up is because the first review that I had . . . I started back in February at sixty percent.

So, in December of 2007, I had my review. I had not had a secretary since coming back from maternity leave My cases lived in my office Now, granted, the clients . . . thrilled. They loved me. No one ever had a complaint. The work was not an issue. My files were a mess, and they lit out at me in my review. The thing is, I knew what it was . . . both of them were highly cognizant of the fact that I had time that I wasn't spending at work, because I was at sixty percent. It was very clear, cuz they both would say things like, "You need to spend more time on your filing."

I had already billed 250 [hours] in excess of my requirement under the sixty percent, and they still weren't happy enough. I was miserable, and my husband, he was still at [an elite firm], our son . . . we weren't putting him to bed till 9:00 at night, cuz we were seeing him for one hour. I was working five days a week, pumping at work. They wouldn't put a lock on my door, cuz it was gonna cost money. That's what happens when you're the first one. Stupidly,

fourteen years later, I'm still there. So, in February of 2008, then, I had come off the review, I was furious, I was stressed beyond control, I was miserable.

I said, "I can't do this anymore" . . . [A partner] knew what was going on, and he totally defended me at the review . . . "You guys are selling her short" . . . I said [to him], "What would you think if I pitched to go contract and work only with you on whatever you want, but these particular clients? You have my home phone number, anyway, so what do you think?" He [said] . . . "I am totally onboard with that" . . . he pitched it for me. I wrote up the proposal, he pitched it. They were very, very unhappy. They, being the rest of the firm, because they wanted me . . . they really had hoped that I would come back onboard and go towards partnership. [My response], "What is that? That's a name. What is it to be a partner in a firm and be miserable and hate your life and have your kids prefer the nanny?" . . . I knew that . . . was kinda the death [knell] . . . for my career, as far as advancing. But, honestly, best move I ever made.

It is notable that she was encouraged to go for partnership. She matched with the qualities that they valued as a litigator. But they believed that a partner must be full-time and demonstrate a full commitment to the firm. They did not seek to help her work to be partner part-time on her terms. The historical path was placed in her way. Interestingly, when her husband lost his position in the large law firm in the recession, he was unemployed for a substantial enough time that they seriously contemplated her returning to full-time with him becoming the primary caretaker of the children. He landed an in-house position, however, and the division of labor continued. The firm had made it clear that she needed to make a particular time commitment—which probably required a stay at home spouse—to be valued enough to be made partner.

D. GETTING TO A LEAD ROLE ON BROADWAY: A PRELIMINARY CONCLUSION

These qualitative interviews, especially those that portray the process over multiple years, illustrate how people fit in or not. In our sociological terms, it shows what tends to be valued through an internalized value system that is not inconsistent with what people believe is a prominent and good faith commitment to diversity. Entry into the elite of the profession, notably within the best-known corporate law firms, depends on a special chemistry—a mix of capital that works to make one into partnership material. In this section, we have identified a number of matters that affect career progression—religiosity, comfort with golf, appearance for women, having a spouse at home, and gaining acceptance in the right law firm "silo." The same factors influence whether an associate acquires mentors and sponsors who will say what the associate needs to do and then ensure that it gets done.⁸⁰ Diversity is valued but the path-dependent structures of value

80. The difference that powerful and supportive mentors—who the interviews show are not distributed equally—can make is shown in the stories contained in *THE DIFFERENCE "DIFFERENCE" MAKES: WOMEN AND LEADERSHIP* (Deborah L. Rhode, ed., 2003).

and comfort all tilt toward the traditional hierarchy and those who mimic its characteristics most effectively. It is not a matter of adopting a “bleached out identity” or flipping a switch that will convince those in power to convert traditional outsider identities into rewards.

Yet, as noted above, the profession is not static, and part of the process of change is the opening of new pathways and career patterns, and marketing to new kinds of clients. We term these alternate career patterns as “Off-Broadway” and “regional theater.” But we first show how there are variations on the Big Law, Broadway trajectory.

E. VARIATIONS ON THE BIG LAW—ON-BROADWAY—TRAJECTORY

1. OF COUNSEL

An Asian woman who graduated from a top thirty law school after a select private college secured a position in one of the top D.C. law firms in a regulatory practice. She was married to a government lawyer and at the time of the first interview was working part time after having a child. When asked about her view of partnership, she said,

Well . . . when I was on leave I . . . thought about this a lot and I figured . . . I have to come back and at least try for partnership. While I’m back here. They actually have a fifth-year training coming up and that tells you, ok this is what you need to start doing . . . if you’re going to be on partnership track Everybody flies out to this year it’s in San Francisco, and a bunch of presentations . . . about billing or business development

At the time of the second interview, she had returned from maternity leave from her second child. Her perception was that she had slowed:

It has been eight years; most firms have an eight year track I’ve been held back a year . . . well, they say due to the structure of my department . . . but also cuz . . . I’ve taken leave and I’ve been reduced schedule since I’ve been back since my first So I’m . . . on a slower track generally.

At the time of her third interview, she was Of Counsel, billing 1,900 hours per year⁸¹ at a minimum, but basically content with her position. As she had stated at the time of the second interview:

I try to do a good job here but you know I’m not gonna take more time away from my family to try to aim for . . . [partnership] . . . I’ve . . . come to that realization a few years ago and I’m fine with [it]. . . . I’ve always had a realistic view . . . of what my career would be here. . . . So . . . my expectations have always been fairly low

81. In order for an attorney to be able to bill 1,900 hours per year, she must work significantly more non-billable hours, since it is very difficult to be able to bill every hour you work.

She still has a relatively high salary and a place in an elite law firm. The firm values her capital of experience and credentials, but now her career is one of relatively low expectations—designed for people who are not seen as rainmakers or possessing the right stuff for partnership—including the ability to commit even more time than the 1,900 hours she now works. She has found a well-paid position akin to a governmental agency position, but it is outside the reward structure available to equity partners.

2. IN-HOUSE

One can see moves in-house as a variation of this strategy. The General Counsel position is often as prestigious as the partnership position in a large law firm, and certainly the in-house position is widely sought after, but for many, if not most, it can be seen as moving to a more flexible and less highly compensated position in Big Law. The capital of the elite law firm is exchanged often for a position that pays somewhat less and typically requires fewer hours—and no billable hours.

One Asian-American woman from a top fifteen law school began at an elite California law firm where she worked very hard.

One piece of advice that one of my mentors gave me is . . . if you want to be a good attorney . . . give up your first five years . . . I didn't really understand it at the time or appreciate it, but I understand it now and see why, because you really do learn a lot . . . the more hours you work, the more cases you're on . . . [it] further[s] your knowledge. So, yeah, I did work a lot.

So I was there for five years and then I wanted to go in-house cuz I knew I liked . . . I wanted to be in this environment, an in-house environment . . . But all I had was litigation experience, so when I was interviewing I didn't have counseling experience. So I decided to join a law firm . . .

She was subsequently in a position to go in-house and succeeded in getting a position in Silicon Valley. At the time of the interview, in 2014, she had two children and was expecting another. She stated simply: "And that's why in-house life appealed to me as well. I couldn't imagine myself at a large law firm with children." Further, "[t]hat's the thing when I was in a law firm I couldn't envision myself being partner because I looked at every woman there and either the husband didn't work or they had a nanny and they never saw their kids . . ." She also noted that, "I took a huge pay cut to come here." She also explained how she got her job through networking and has continued to network:

Maybe because of my sociology major I just am generally interested in meeting people and getting to know people. So it's not necessarily a chore for me or hardship whereas some people . . . roll their eyes and don't want to do things like I don't want to go to this activity or not. I actually like it. [A] lot of those

activities or networking activities are places where you don't really see, you only see certain people at these things You're not close enough to go out to lunch with them or email them, but at these things you see them and I like talking to people

I just think it's a good thing when people help each other and it kind of comes back and I've seen it work myself, so I'm happy to do that. So I generally still do, I go to . . . Asian American Bar Association events just after work, especially if they have happy hours, especially if they're close by I feel like there's no excuse not to really go and stop by for an hour or whatnot.

She described her schedule as follows:

I . . . see what meetings I have in the morning and I saw 9:30 . . . that means I have to get to work by 9:30, but if I don't have a 9:30 . . . there isn't as much pressure to get here by then, but I try to maintain basically a 9:00 to 5:30 schedule and sometimes I start later . . . it's very fluid

Her husband had a similar in-house legal position and they lived nearby, so the situation worked well for them. Interestingly, even if in many respects an Off-Broadway strategy, she made clear that she expected to advance in the position.

My plan is come back from maternity leave, see how it's going, get back in to things at that point, see if I get promoted in a year or so. But if I get back [and] feel that it's not happening . . . I'd probably be open to looking. And it's not that I'm not open to looking all the time, I keep my eyes open, but it would have to be an opportunity

These examples show ways of finding careers outside of the traditional elite of the corporate partnership track. We can also note that there is a way that these paths also reinforce and legitimize traditional hierarchies. The highly sought after in-house position validates elite credentials as the legitimate path to the top in-house positions. They also validate experience in large corporate law firms as the place to start a fast-track career. But the commitment to time is not as essential in many of the corporate counsel offices. The in-house positions also require particular skills, such as counseling as well as litigation, that go beyond the symbolic capital of large law firm experience. Finally, there is no need to be presented as a rainmaker or business-type personality.

3. IN-HOUSE AS VALUING WHAT IS NOT RECOGNIZED IN A LAW FIRM

The woman who was "not pretty enough" found a job through a headhunter with a global bank working as an in-house lawyer. The key, she said, was that since she never had a close mentor in her law firm, she had worked in many different areas and learned how to handle them through hard work. The in-house bank position valued her general skill set:

Yeah a lot of it was focused on the fact that I have experience in a lot of areas . . . my position right now is I am focused on the default . . . I handle all of our offensive litigation strategy and just general dealing with any regulation laws and all that fall into . . . mortgage foreclosures . . . Lawsuits where we have to sue our clients on mortgages, promissory notes, whatever and I handle that for the consumer world and the commercial world. My deals could be as small as 10,000 [and] that can go up to 50[,000] . . . they liked the fact that I have a lot of litigation experience not just in foreclosures . . . but I had all the other litigation experience. I had breach of fiduciary duty, breach of contract . . . I'm on the litigation team here so not only could I take care of my area . . . I can help with discovery strategy; I can help overall litigation strategy for the bank

She was clearly thriving at the bank and looking to advance within the bank hierarchy. The “pretty-enough” bias tied to what law firms historically assumed was necessary for (at least female) partners charged with finding and maintaining clients did not matter in the bank.

F. FROM BROADWAY TO SUCCESS IN REGIONAL THEATER

We begin with a woman who went from an elite law school to a prestigious West Coast law firm. She loved the litigation practice that she joined and thrived on the long hours. She was supported and encouraged by the law firm.

I worked on a lot of different very complex pieces of litigation, and big firms get a bad rap for not being . . . supportive environments. I thought it was a great place to work. I worked with really good mentors, who were really kind, and I got a lot of great standup and good experience. But I worked all the time. I mean, *all* the time.

Then, in her words,

I got pregnant with our first child, and . . . I just felt like I couldn't go on there, to be honest. I'm a very risk averse person . . . this is the most, sort of, irresponsible thing I have ever done, cuz I was pregnant, and I had these trials lined up in front of me, and I knew that I could ask for help, but I . . . thought it would impact my professional career . . . the people that I had seen go off-track . . . I . . . didn't see them thriving there. And the way you really thrived in that environment was to work like everybody else did. So I quit suddenly . . . I gave them two months' notice, and I finished my work, but I, basically, was pregnant, I didn't take my maternity leave, I left all the benefits behind me.

I quit in March of 2004, I had my daughter in June, and I didn't work for a year. And I . . . thought at the time that I would get a job with the government or maybe go do . . . work for legal aid or . . . something else . . . but at the same time, my husband and I started talking about moving. We are both from the Midwest. We decided to come to [a regional market near where they came

from]. I knew it would be an easy way to get into the legal market for me, that I would be very marketable with firms here.

Knowing she could pick a firm given her experience in an elite law firm, she

had really specific criteria having worked and left a law firm environment I wanted to be at a place that I thought promoted women, had more flexibility, had a lower billable hour target I mean, I interviewed with a bunch of firms, but I was really only seriously considering a couple

Her elite large city experience gave her ready credibility in a more regional market—our analogy to regional theater—and she knew the pace would be different outside of the city where she had worked. She indeed became very successful at the firm, helping even to change practices that disadvantaged those who took maternity leaves. She became head of litigation and followed a schedule that worked with her three kids and a husband whose job was less flexible but more predictable, allowing him to drive the children to school and to prepare dinners.

During the school year, I usually get to work about 8:30 or 9:00, and I work till 5:00, and I go home, and have dinner with my kids, and do whatever I'm gonna do with them for the evening I usually get back online about 9:00 . . . between 9:00 and 10:00, and I usually work for about two hours. I try not to work weekends, unless I'm really busy. I'm really busy right now. So that's sorta how I do it. I love summer, cuz we have a nanny all summer, so I get to come to work earlier, and then I don't have to work so much at night. In the summer, I come in at 7:00, and then I leave at 4:30, and I usually can get my work done and not have to be online at night.

The regional story was therefore a remarkable success. At the same time, however, she cautioned that she was not certain of the future.

Everyday I'm on the verge of quitting my job, to be honest So I think . . . frankly, my home life, it seems like it should get easier as your kids get older, but it gets harder, and we've . . . hit that moment in my life I've got kids in a lot of activities and just kids who [are] . . . developing into people, and they've got stuff going on, and somebody's gotta pay attention. And we've sorta been struggling with what to do about that.

As of this writing, she has become of counsel to the firm and taken on the position of public interest counsel.

These variations on the Big Law career—of counsel in a large law firm, in-house, and regional—take advantage of a different mix of capital valued in these settings. There is less focus on the all-out time commitment and the assumption of the right personal skills for a high-powered partnership. We could point to these career stories as presaging changes that will take place in the large corporate law firms. But we could also say that they are providing outlets that make it

so the large corporate law firms can change very slowly, especially with respect to gender. In a way, they protect the “cultures” of the corporate law firms while allowing those who do not fit to find a good position outside.

G. OFF-BROADWAY STRATEGIES RESHAPING THE LANDSCAPE FOR DIVERSITY IN THE PROFESSION

1. RETURN TO THE ARAB-AMERICAN WHO DID NOT FIT AT A LARGE LAW FIRM

An Arab-American individual we noted above left his prestigious law firm and then moved into politics and smaller firms before taking a new direction. He noted at the time of his second interview that he was starting his own law firm in health care.

A huge chunk of Muslim Americans are in the healthcare sphere. Either they're physicians or they're entrepreneurs within the healthcare field. Many of them are also very entrepreneurial . . . They want to start something new, etc., and they don't wanna pay \$600. Growing up in [that community], you have an appreciation . . . I can build off my own natural clients. Yes, they're not heads of banks. They're running individual [practices and groups], but it's enough to make a living, so that's what I'm doing.

He was successful, and his firm grew. He managed to make what he possessed—a set of contacts within the medical community among Arab-Americans—valuable. Indeed, this new addition to his own portfolio of marketable capital assets made him attractive to law firms as a partner. As of 2017, he had joined a prominent regional firm as a partner, focusing on corporate law and the health care industry.

2. ANOTHER STRATEGY EMPLOYING ISLAMIC CULTURAL CAPITAL

Another Islamic-oriented strategy came from a male who obtained his undergraduate degree from a state university and attended a local California law school. He obtained his first job by cold-calling a number of law firms and using a strong letter of recommendation he had from work he did in the technology sphere. He was a biology major. He passed the bar on his second attempt. He had just taken and passed the patent bar at the time of the meeting. His father was an engineer born in India.

For his first position prior to passing the bar:

I just wanted to get something, so I called, and he was an Indian guy, I'm Indian too, . . . and said, look I do IP you know, and I think he started, he was starting to get a lot of IP issues at that time. And that was during the economic boom going on, in ninety-nine . . . And he was getting a lot of startup Indian entrepreneur type clients, he needed somebody to do the trademark copyright licensing issues . . . And I needed a job [be]cause I was going to get married.

He left when the IP work abated, and he again got the next position by contacting someone directly. This time it was someone he met at an IP seminar:

And he sat at my table, and I dropped him an email saying it was a pleasure to meet him, and then three months later I dropped him an email saying I'm looking for work. And at that time they just got a big patent case, and their patent attorney left to go back to Sacramento.

He handled the case and continued doing patent work in this medium-size firm, but the work was intermittent, and he was not sure it could sustain him ultimately for partnership. He believed he was treated very well at the firm, but he was looking for new work at the time of the first interview: "Well I'd just like to be at a place where . . . I can have a constant work flow of patent litigation. That's my number one concern. And my number two would be I'd like to get paid more."

He elaborated:

Either I [have] to go to a firm, you know where I can have more work and start building my clients from there. Or I have to start bringing in clients here. And the reason is because . . . you don't want to be an attorney without your own clients, that's just the worst thing in the world to be. And I think I can start tapping into, see what I've done to obtain my clients in the past, is I tapped into, some in the Indian community It's a little bit difficult to tap in the Indian community because I'm Muslim.

So what I do is, through the Muslim community, people hire me. For example, like the non-profit, I've done some work for a non-profit, and I'm actually on their board of directors now. And then we've done some litigation for that non-profit cause somebody's publishing stuff in New York saying that we're, they're funding terrorists, terrorism in India, or something like that. Put a stop to that. And, and then I get trademark people call me up . . . I go to a lot of the social events, Indian I go to the mosque and stuff, go to all their events. And . . . try to go to the Indian events They're not really interchangeable.

He commented, not surprisingly, that he loved networking and marketing.

In 2009, shortly after his Wave 2 interview, he reported that he had left the firm when he was still an associate: "I worked there for two years exactly, and I got a considerable amount of patent experience there doing prosecution work, patent prosecution, and a lot of heavy trademark prosecution, and patent litigation."

Through his network, he learned of an opening at a large law firm in a technology intense place, and he applied and got the job. He was thriving for a time:

[T]hey were billing the hell out of this client. I think it was like thirty . . . twenty or thirty attorneys working on it And this went on . . . they were suing [major companies] and they were suing everybody Unfortunately I came in at the tail end of it, [less than a year later] . . . they pulled the plug on us I think they were just running out of money, because the . . . funds were drying up . . . so a bunch of us didn't have much work to do. And I kind of eked it out for another six or seven months. And so then there was really not

much work for the whole group So then they just pared down our group, and I was part of the group that . . . got pared down.

He did not want to work for another large law firm, but he was very pleased that he had the experience:

I've always wanted to work for a big firm you know that was my . . . that's what I've always wanted to do, because it just sounds so cool, right? And it just sounds really cool, because you go into a room and you're [asked] like hey what firm did you used to work for? Everybody's announcing and I really wanted to work for somewhere where people immediately recognize you. So once I got into [the well-known corporate firm] I just felt like it was like the Holy Grail. Like I did what I wanted to do I just felt complete

He contemplated starting up his own practice because of his connections and also perhaps because he now had the capital of experience at a large law firm:

But ever since I was at [the first law firm], I've been really plugged in, to the community; meaning the Indo-Pakistani entrepreneurial community. And I've always been doing stuff on the side, like setting up non-profits and stuff it wasn't like . . . I didn't know anybody I did know quite a few people. Yeah, I think it's fair to say a big chunk of the community knows me It's fair to say a big chunk of the practicing Muslim population knows me.

He started talking in 2008 with a senior lawyer in the Muslim community who specialized in bankruptcy and was contemplating retirement. It was the same lawyer as the one with whom he first worked. "Then I started toying with the idea, look I can move in here. Because he was kind of basically . . . he's a general practitioner, but his emphasis is bankruptcy work. So . . . he's booming, like it's just unbelievable." But at the time (of the Wave 3 interview), "he was . . . literally shutting down."

He also talked to his father:

So then I met him and . . . I talked to my dad, [and he said] well you know you've got a platform, and he's very well respected in the community, the Muslim community and also the Indian community a lot of people know him because he's . . . one of the most senior attorneys out there He's . . . my dad's age almost.

They joined up and the younger lawyer modernized the office and continued with aggressive rainmaking in the Indian and Pakistani communities in the tech area. It began to build slowly. He noted at the time of the Wave 2 interview:

You know for a while I was contemplating doing . . . a security job or something I've never told anybody that I was thinking maybe I should be a security guard or something at night I was just really, really stressed out But I didn't let anybody know that I was stressed out

Once this individual committed to forming a firm with the senior lawyer who was approaching retirement, he had to confront some of the typical anxieties of lawyers who find themselves having to run a business, not just practice law. We probed more about how long it took to get comfortable running his own business. He indicated it

took me about six, seven months to really kind of get over [that hump]. And . . . now I'm not as worried. There's a little . . . voice . . . that say's how . . . what about next month? But it's not like it was. Before it was like a yell or a roar . . . so it's not too bad now, I can deal with it, and I'm feeling better . . .

[I]t's happening, I guess . . . I did a lot of research . . . I read tons of books on law office strategy and management and stuff; and I think everybody says it takes about four years to be established . . . that's my benchmark . . . I figured in the first year, if I can . . . make . . . anywhere between \$36,000 and \$48,000 my first year, which I think isn't too unreasonable.

[I]t's almost weird . . . I'm . . . becoming more of a general practitioner, but I think you have to initially before you can focus again . . . especially if it's a community-based practice . . . that's not the intention, but for right now it is. I think a big chunk of our clients are community people, either Indo-Pak or Muslim. Meaning they could be any denomination . . .

[I]n five years I think I would like to have had at least four or five attorneys, here by then . . . maybe start having some associates and . . . really hopefully try to build it up. That's where I'd like to be in five years . . . [Reflecting back on] when I first met you I . . . all of the things that I wanted to do I've done so far.

At that point, his wife worked full time and they had two children as well.

At the time of the Wave 3 interview, he had a remarkable story to tell, including just returning from a one-month long Mediterranean cruise. He recognized that his partner thrived in part because he would do whatever it took to serve an Indian or Muslim entrepreneur:

I re-learned how to set up companies, set up LLCs but then my clients started having more and more needs . . . I want to do a merger, I want to . . . acquire this, I want to do a first round of finance whatever so I got introduced to this other attorney who was twenty years out of Harvard with an MBA who just did corporate work who needed work.

He hired several people on a contractual basis who had the same profile: people with fifteen to twenty years of experience from large law firms. He noted that,

at these big firms at some point you have to bring in money or else they don't justify it and they just replace you . . . these guys work for . . . big firms and then after twenty years they weren't making much money . . . they kind of . . . get pushed . . . I never really inquired but they kind of you know get marginalized or whatever but their work is first-class . . . they're smart . . .

I've created . . . I call it the high-tech group which is employment, immigration, corporate, and IP . . . employment I have a contract attorney, for immigration I have a specialist, for intellectual property I've got another patent attorney. I have a relationship with this patent attorney or contract attorney out in New York that I reached out when I first passed the patent bar and so he's been doing it twenty/thirty years . . . He's Pakistani, he's Muslim too.

During the interview, he also noted his continuing involvement with non-profits and issues within the Muslim community, including issues such as how Mosques respond to requests that they spy. As of this writing, the law firm has nine lawyers listed as part of the law firm's "team." As with respect to the other Muslim-American, he could draw on his identity—which was not highly valued at the corporate law firm—and use it to build an innovative legal practice—making a virtue out of necessity. The use of identity also brings clients into the legal system with lawyers with whom they can relate. The process of absorption is even more evident in the case of the lawyer who builds a practice with Syrian-American physicians and then becomes part of a larger law firm as partner.

H. OFF-BROADWAY STRATEGIES THROUGH MEXICAN-AMERICAN IDENTITY

1. A THRIVING IMMIGRATION AND COMMUNITY PRACTICE

Identity was also crucial for a Mexican-American attorney who went into the field of immigration law after graduating from a fourth-tier law school (after a state university). His wife was also a lawyer whom he met in law school. His parents moved from Mexico, after which his father found a way to make a living as a photographer and his mother became a seamstress. He had three different jobs in rapid succession after his graduation. He quit all three of them quickly because of unethical practices that drove him away. He quickly found that the field of immigration law was filled with unscrupulous lawyers (and non-lawyers as well). At the time of the first interview, he was with a small immigration law firm, where he stayed as an associate until late in 2006. By 2006, he also had four children. While at the firm, "now that I'm here we've taken over more of the Hispanic cases and he's just there, they're open to everything, my suggestions have been gold to them, they've been great." He also did considerable networking: "I volunteer all the time. I've done volunteer work for [the local non-profit TV station] . . . getting call-in phone calls; at the schools here . . . I'll go out and give free advice."

When interviewed for Wave 2, he had a successful solo practice combining criminal law and immigration. "I started off with a \$5,000 loan from my mother and I paid her off the very first month The first two months of business, I made more money than I had the previous year working for [the previous law firm]." He reported in 2009 that he made four times as much as he had, and he worked many fewer hours. He also was even more involved in the community:

One of the things that I've done is since I left, a couple weeks after I left, I was appointed to the school board And since then, I've been elected into office. So, for the last two years, I've been the president of the school board I also sit on a couple of different boards. I sit on the board for the YMCA here And I sit on the board for the Hispanic Bar Association for the first three and a half years, four years now.

Interestingly, he noted also that, "You know, and that's one thing I have developed is a golf game because I've been invited through different organizations to do stuff like that."

Five years later, the office had expanded from three to nine employees, including his father as a marketer, his brother as a paralegal, and his mother as a notary public. His wife remained a prosecutor. He also said he had two openings at his firm. One of his employees was waiting for bar results and then would join him as a lawyer. As of this writing, there is one associate and one of counsel to the firm. He noted also that ninety percent of his work was with Spanish speaking clients. He said that his business had grown every single year, and he described how he encouraged employees to finish college and even attend law school.

2. FROM CORPORATE LAW TO SPANISH LANGUAGE IN-HOUSE

Another of our respondents was able to use her Spanish language ability as the key to make a move from corporate law to in-house. The daughter of Mexican immigrants whose father was a carpenter, she attended a top public university and an elite law school. She began in corporate practice with a leading national law firm. Describing her corporate law stint, she noted that even though she stayed three years, it was an "old boys kind of club, so, [she] didn't quite . . . fit in there." She did not have mentors to back her. She noted that

one partner in particular, a non-equity partner, I felt like she was very caring and we still keep in touch to this day. Very caring, very, very, great to work with, but she didn't have, not the mentor in the sense that, "I'm going to look out for you and I'm going to make sure that you make it too."

Her background meant also that she did not have the cultural capital of those brought up in more well-to-do households.

She left and joined another prominent law firm but became disenchanted.

I think at that point, I just really was frustrated . . . with practice in a big law firm, by that point and wasn't what I really wanted anymore In a way, it was lack of fit too. I know . . . I did have a very good mentor at [the second firm], but, he wasn't in general corporate practice. He was not in my practice group. He was in the Corporate Finance, like Latin American Corporate Finance And he, was very honest, and . . . told me what he thought it took to become a partner . . . but I saw what it took from his side and . . . he worked all the time.

Through a headhunting firm, she found a position in-house with a Spanish language media company. She has now been there eleven years and is the Deputy General Counsel. She speaks Spanish at work with this company and expressed satisfaction both with her position and with her chances to advance further as a General Counsel.

3. TRANSITION TO A “MINORITY-OWNED FIRM”

Another Mexican-American lawyer who came from a modest background stayed in private practice but learned to use his identity as well. He graduated from an elite law school and began at an elite law firm. He described the elite firm practice as follows:

It's great people at [the firm]. It's great people, really smart people, committed people, but I was there . . . for almost three years, and I did three depositions, and two of them were expert depositions, and the rest of the time was just writing demurrers or doing those document reviews, that kind of stuff, which is what younger lawyers do, anyway. But, again, you have to remember where I started from, the first person from my family to graduate from college, the first person from my family to be a lawyer.

It was a shock going into [the elite law school], and then it was an even bigger shock ending up at [the law firm]. And I had good mentors, but the people who were my mentors, one left a little less than a year after I started there, and then the other mentor that I had left about 18 months after I started . . . so that . . . left me in a little bit of a lurch.

When he started, he thought about becoming partner, “When I started, yes, but you kind of see the writing on the wall, quite honestly. After a couple of years, especially when the people who I was working with left, you have to find somebody to be a mentor.” Evidently no one stepped up to provide mentoring, and his previous mentors did not recruit him to their new firms. Further, the lack of cultural capital fit that he mentioned at the outset contributed to a lack of fit.

He moved to a small litigation-focused firm and stayed for ten years, becoming partner during that time. He then decided to form a firm with a friend, taking several key clients, including a governmental entity, from the prior practice. The firm emphasizes its diversity and has been very successful, with eight attorneys now. As with respect to many boutiques, the website of the firm trumpets the names of the elite law firms that most of the lawyers worked for earlier in their careers. He could market the firm's diversity and the experience of lawyers in elite corporate law firms.

4. SUMMARY OF IDENTITY AND LINGUISTIC AFFINITY FIRMS

Identity and language play key roles in these Off-Broadway career paths. Individuals turn a lack of fit—related to social class, identity, or even non-elite law school credentials—within the traditional corporate law firms into very

successful careers that build space for new consumers of legal services and for diverse attorneys who generally have trouble talking to corporate law firms. In this way, the practice is renovated with new blood adopting and reinforcing the traditional rules of the game. As noted, the boutique firm reinforces the status of the notable elite law firms. The in-house position keeps the Spanish-language business within the world of the traditional law firms. And the small-firm Spanish language criminal and immigration practice replicates the statesperson-like status of the classic corporate lawyer active in the community and even willing to invest in golf. New approaches based on identity bring new groups into the legal system with lawyers they can identify with, and they also to some extent reinforce the hierarchies by building on their experience with elite firms, mimicking key aspects of them and even feeding work to them.

CONCLUSION: RACE, ETHNICITY, AND GENDER AND THE VALUES OF CAPITAL ASSETS: PROCESSES OF CONTINUITY AND CHANGE

The capital assets approach insists that there is both continuity and change in the values of particular forms of capital within the legal field, and that is what the qualitative interviews show. The valued forms of capital at any time shape opportunities and achievements. The interviews show clearly that being smart and working hard are not by themselves tickets to success. History and the powers that shaped history are embedded in the forms of capital valued in the profession. The forms and values of capital recognized within the elite of the legal field in particular continue to be linked to the ascendancy of the corporate law firm in the late nineteenth century. From the turn of the twentieth century until at least the 1960s, law firms refined an organizational structure that rewarded elite law degrees, to some extent high grades, WASP identities, and men with stay-at-home wives. Golf and country clubs fit this world perfectly. This world was not autonomous from the structure of the social world outside of law. The big corporate businesses at the top of the economy shaped and reinforced the capital values of the large law firms. Clients did not care about diversity. They cared about meeting their lawyers for golf at the clubs. There were certainly implicit biases rooted in these naturalized power structures, and it was difficult to challenge it in the name of diversity until the civil rights and gender equality movements asserted the need to give value to those excluded from the traditional corporate law firm.

The values have changed, as we see in the interviews. There is now a value assigned to diversity, following on the law firms earlier opening to non-WASPs and some individuals who came from outside the elite law schools. The valued capital assets changed in part because of the activities of individuals seeking to gain value for what they possess—linguistic skills, connections to a particular community, embracing a minority identity—or seeking to challenge seemingly entrenched values such as the commitment to full-time availability to the extent

that one needs some version of a wife at home. Individuals also seek to gain success by altering their own trajectories and behavior toward what they perceive to be valued within the field. The picture of the golfers and a number of our interviews attest to the continuing pull of the country club and golf as means of gaining recognition and stature in the legal field in the United States. There are other enduring forms of capital. Gaining a position, even if temporarily, in a large corporate law firm is an example of obtaining a valuable symbolic capital asset that can be used to gain credibility in other legal positions—for example, in-house counsel, boutique law firm, and regional law firm.

The values of assets are not always specified clearly, but that does not mean they do not play a major role in shaping careers. Our interviews show that much of the work is done through perceptions on both sides of “fit” in a particular legal setting. Our first example from the qualitative interviews of a “natural success” was a Caucasian male, graduate of both Harvard undergrad and Chicago Law. He ended up at Big Law by following a friend’s recommendation to interview with this large firm and he was hired. His story reveals that he was perceived as a natural fit who made friends easily at the firm. Similarly, his wife chose to exit the work force to care for their two children. His “fit” meant that the family chose to, or had to adapt their lives to, the work demands of the firm if they were to receive the rewards of that practice, leading his wife to disinvest in her own legal career.

The work of “fitting” is evident in numerous interviews. From the perception of those who succeed, it becomes internalized. Our equity partners defined the qualities needed for partnership. One noted the need for lawyers “to have a broad range of skills and who fit the culture. But that’s all easy to say and is . . . harder to identify.” Fitting the culture and what it sees as the characteristics of star quality favors those who most resemble the existing stars. Another noted that there is a certain “*je ne sais quoi*” of a “potential partner,” but it would be “somebody you would, the other partners would ask because I would ask, is this somebody we would put in front of clients or potential clients?” There may be some change here, but it is easy to see how there is a natural comfort with lawyers who act and resemble what clients have long expected corporate lawyers to be.

Fit goes beyond getting a job. Clearly, going to a top-tier law school opens the door to Big Law, but it does not guarantee the mentorship and socialization necessary to guaranty promotion to the partnership. Similarly, the value of a lawyer’s minority status may assure job offers from Big Law at the beginning of their careers and guarantee receipt of the large compensation packages of Big Law. But the traditional hierarchies re-emerge as these lawyers get closer to the partnership decision, eliminating the vast majority of them from promotion to the first level of partnership and definitely making it a very low probability of achieving Equity Partner status.

The top-law-school-educated African-American at a large law firm who failed to make partner noted his inability to fit into the right “silo” at the firm. Even more telling, he noted that he was told that he did not have a “business person type of personality.” He also said this about fit,

You know, I don’t want to overdo the, you know, is it the firm’s fault, you know, but those are parts of things where . . . it’s . . . the comfort level in net-working, . . . in an all-white, mostly all-white world is a little bit different.

He could not find a way to make himself fit into an organizational context where for a number of reasons he did not belong—above all, his race and social background—but also his cultural capital, or lack of the appropriate cultural capital—*e.g.*, not playing golf.

A case of making a very strong effort to adapt is the Asian-American woman who graduated from a top tier law school. As we noted, she moved to non-equity partner, worked extremely hard, brought some success in a major arbitration, and then was abruptly given a severance package and told she had to move on. The challenge of fit is quite clear. She was a litigator in a firm known for a macho litigation culture. She was not afraid to use some profanity in her conversations with other litigators, but that and other macho behavior did not make her fit: “You can either be relegated to the role of being sort of a submissive, little worker bee or, if you’re more assertive, and I’m definitely more on the assertive side, I feel that sometimes I scare the guys a bit.” She sought to fit into the partnership model also by bringing in cases and building her own book of business, but that strategy did not work:

I have tried to bring in about six clients over the last two years. Unfortunately, the matters were too small to justify our rates and so I had to give them to people who have left the firm and gone to smaller firms . . . I need to step to the next level and be handling my clients and making the key strategic calls myself. And I can’t do that with my own clients because they’re too small.

Those with the more “natural” fit, as noted, organically gained clients through the law firm and their friends there.

Two of the Mexican-Americans from working class backgrounds reveal the mundane ways that fit pushes out those whose mix of assets is not precisely the same as those who represent power in large law firms. The Mexican-American woman with elite credentials seemed to have some early desire to succeed in the large law firm world, but she moved several times. Also, she did not have a support system that promoted her talents to the partners. At some point, “I just really was frustrated just with practice in a big law firm, by that point and it . . . wasn’t . . . what I really wanted anymore In a way, it was lack of fit too.” Similarly, the Mexican-American male in the boutique firm was not invited to follow exiting partners of the elite large firm on their way to a new firm (similar to stories we heard from WASP males), nor was he invited by remaining partners

to be sponsored by one of those remaining partners. The contrast with the white male repeatedly given opportunities by his mentors who stayed or left the firm reflects the valued forms of capital—even if hidden in the idea or feeling of fit.

Fit from those who do not resemble the dominant partner profile can also be fragile. The Arab-American who loved working at a large law firm found that his fit changed after 9/11. The perceptions of the senior partners—mainly white males and overwhelmingly not of Arab descent—may be idiosyncratic. The woman who heard that she was “not pretty enough” exemplifies that the requirements to fit may still be overtly racist or sexist.

With respect to gender in particular, according to our interviews, there is the issue of fitting into the demands for a full-time commitment to the job. The woman who helped write the part-time policy and then pushed to succeed within the terms of the policy ran into a wall at her firm. The embedded value of a full-time commitment to the firm got in the way of her advancement, and she moved off the track of potential partnership or even advancement within the firm. In a different but analogous way, this pressure contributes to the not unusual fate of the women who abandon partnership aspirations in favor of the more flexible hours of an of counsel position.

These issues of fit suggest enduring values of the traditionally valued assets in large corporate law firm practice. The easy assets to see are graduation from a top law school and high grades. Other valued assets are more subjective and not necessarily stated as such, but they are evident from our qualitative interviews. The world no doubt has changed, as evident above all in the entry level hiring in favor of diversity, but “fit” (or “ideal worker norms”)⁸² provides a way to entrench white males and the full-time commitment requiring a spouse at home. The mutual feeling of fit may also disproportionately drive out those with more working-class backgrounds. This somewhat static picture, however, is only part of the conclusion we draw from the qualitative interviews. The changes are not merely symbolic, and individuals are continuing the work to gain value for a different but complementary set of capital assets associated with gender and diversity. The story David Wilkins provides of African-American lawyers finding a niche for employment discrimination defense is a potential example of the same process.

The ascendancy of the in-house counsel position is a major example. The two examples we discussed show that the “*je ne sais quoi*” of “partner potential” is less valued than the human capital of experience and competence touching several skill sets—litigation, advice, and compliance, for example. The Asian woman we profiled in the Silicon Valley who positioned herself for a move in-house to a more flexible and less demanding work schedule, worked specifically Asian networks to find a position, and trusts in those same networks to help her if she fails to advance at the rate she expects. She found a place and is helping

82. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 64–142 (2000).

expand it where what she represents is valued and places no limits on her career potential.

These variations on Big Law careers are our On-Broadway careers. They are often looked at separately as the careers that define relatively elite professional success. But the legal field is a field that evolves in part through individuals seeking to gain value for what they represent in the field. That evolving process helps to replenish the field and its existing hierarchies, such as the corporate law firm. Our focus in this article is on diversity and inclusion of women and minorities, but the process is much more general. The assimilation of litigation and bankruptcy as major practices in large corporate law firms—linked to changes in the corporate world—brought an openness both to new expertise and a generation of individuals who did not have access to corporate law careers. After they were assimilated into the firms, however, the firms went back to their focus on hiring especially from elite law schools, even if they were now more open to Catholics and Jews, for example. The “Jewish law firms” that existed in major cities gained credibility in part by adopting the hiring and promotion standards of traditional Wall Street and then evolved into major mainstream corporate law firms themselves.⁸³

The Off-Broadway strategies of those who never had opportunities at the major corporate law firms or who did not fit—lacked the valued assets—are therefore part of an evolving story. The woman who tried “regional theater” when she realized that she was not willing to work the hours necessary to make it On-Broadway, chose a more open and flexible firm and then transformed it to make it more open and more flexible, most likely having a spillover impact among the law firms in the city where she practiced. The Arab-American whose fit was undermined by 9/11 ultimately drew on his family capital, his contacts in the Arab-American world, and his experience in an elite firm, to start a practice that then was absorbed within a regional corporate law firm. Another Arab-American also drew on family, religion, connections, and experience in an elite firm to build a very successful practice involving Indian engineers—a practice that brings a group into law and the legal profession. He brought Big Law to his clients from his experience and contract lawyers out of Big Law that he employed, again expanding the field and making a place for him and the assets that he possesses. The two Mexican-American refugees from Big Law found niches open to their identities—a boutique firm emphasizing diversity and a Spanish language media outlet.

Each case draws on the value of their elite corporate law experience and law school credentials, but each also opens up space for individuals like themselves who did not fit Big Law. But each is well versed and well-connected in Big Law, and they will bring their clients in appropriate cases to the expertise and even the

83. See Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 *STAN. L. REV.* 1803, 1839 (2008).

law firms associated with Big Law. Finally, the successful fourth tier law graduate who has participated in the increase in status and importance of immigration law is helping to bring an increasingly important clientele—immigrants into the United States—within the law and the legal system.

The capital assets approach is consistent with our qualitative interviews. It is not inconsistent with much of what is studied as implicit bias, since the assets valued are often not even consciously valued. They are hidden in the notion of “fit.”⁸⁴ We feel it is important, nevertheless, to try to make the underlying and embedded values explicit, because they certainly continue to be important—WASP identities and stay-at-home wives, for example. Critical race theory strongly emphasizes the embedded forms of capital assets that are not as obvious as race or gender as such—dress, playing golf, and comfort socializing with existing firm members. Capital assets theory also emphasizes that values can and do change over time, even if slowly—as evident from the “diverse” golfers in the photograph. We are indeed at the point where it at least makes sense to refer to the value of diversity, but the interviews show a very slowly moving process of building that value. That value is, as the Off-Broadway stories show, more likely to gain recognition outside of the large law firm setting. The stories of how value is allocated and affects, in particular women and minorities, are in many cases quite poignant, illustrating how far we have to go; but we also see the many ways that individuals use their experiences and identities to find other paths to professional reward.

84. See Rivera, *supra* note 6, at 1017.