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BIGLAW IDENTITY CAPITAL: PINK AND BLUE, BLACK AND WHITE

*Eli Wald**

INTRODUCTION

A Caucasian male attorney joins a large law firm as a first year associate. In addition to his regular heavy workload, he is often invited to attend various firmwide events and functions, but his occasional absences are accepted and presumed to be the result of his work ethic and long billable hours. Over time, he receives a steady flow of assignments, a reasonable mix of paperwork and more challenging, quality assignments. He meets and develops an informal mentoring relationship with a few of the firm's partners, including one or two of its powerful partners. At times he experiences pressure to meet the firm's expectations, yet he is always treated with respect by partners and associates who assume that he is competent and loyal to the firm and its clients. Nothing in his formal and informal evaluations suggests any concerns, and he believes he is having a solid experience. During his fourth year at the firm, an entity client for which he has been working for a year approaches him about joining its in-house legal department. He is flattered but decides to stay with the firm. Following his ninth year he is elected to the partnership.

A Latina attorney joins a large law firm as a first year associate and is soon asked to join the firm's diversity committee. In addition to her regular heavy workload, she is often invited to attend various firmwide events and functions, where she is photographed and later featured prominently on the firm's website and print publications. She is also actively involved with the firm's recruitment efforts, especially its efforts to recruit minority candidates. Over time, she receives a steady flow of assignments, a reasonable mix of paperwork and more challenging, quality assignments. She meets and develops an informal mentoring relationship with a few of the firm's partners, including one or two of its minority partners. At times

* Charles W. Delaney Jr. Professor of Law, University of Denver Sturm College of Law. I thank for their comments Arthur Best, Devon Carbado, Richard Collier, Ronit Dinovitzer, Michele Goodwin, Bruce Green, Stacy Hawkins, Justin Hansford, Savita Kumra, Jonathan Lamptey, Nancy Leong, Russ Pearce, Deborah Rhode, Hilary Sommerlad, Joyce Sterling, David Wilkins, Kevin Woodson, and the participants at *The Challenge of Equity and Inclusion in the Legal Profession: An International and Comparative Perspective* Colloquium held at Fordham University School of Law. I also thank Diane Burkhardt, Faculty Services Liaison at the Westminster Law Library at the University of Denver Sturm College of Law, for outstanding research assistance. For an overview of the colloquium, see Deborah L. Rhode, *Foreword: Diversity in the Legal Profession: A Comparative Perspective*, 83 FORDHAM L. REV. 2241 (2015).

she experiences implicit pressure to work her personal and professional identity to meet the firm's cultural expectations,[1] and sometimes she feels she is being treated disrespectfully by partners and associates who seem to imply that she may have been hired and retained in part because of her racial and gender identity; yet overall she is content at the firm. Nothing in her formal and informal evaluations suggests any concerns, and she believes she is having a solid experience. During her fourth year at the firm, an entity client for which she has been working for a year approaches her about joining its in-house legal department. She is flattered and, mindful of the fact that the firm has but a few minority partners, accepts the job offer. The firm and the associate part ways on amicable terms.

In some ways, the experiences described above are similar and typical for associates at large law firms. Working long hours while at the firm is common; so is the expectation that associates serve on committees and regularly attend firm functions.[2] Even as BigLaw[3] increasingly moves away from hiring large entry-level classes of associates,[4] still most

1. Workplace actors, explain Devon Carbado and Mitu Gulati, "work their identity" when they "adopt strategies to signal that they are hard working, collegial, team oriented, and trust worthy." Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1263 (2000). Identity work is necessary because firms value not only effort and merit but also qualities such as collegiality, collaboration, and commitment, which are hard to observe. *Id*.

2. Paul D. Cravath is credited with being among the first to mold and implement the basic organizational features of the modern large law firm. *See* WAYNE K. HOBSON, THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY, 1890–1930, at 196–200 (1986); *see also* 1 ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS: 1819–1947, at 1–4 (1946). *See generally* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976); PAUL HOFFMAN, LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS (1973); ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? (1964).

3. "BigLaw" references the largest law firms in the world, historically predominantly American yet increasingly global. "Large," however, has a dynamic meaning. "[N]o firms of large membership appeared, even in the great cities, until the end of the [nineteenth] century. The typical partnership was a two-man affair . . . ." JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 306 (The Lawbook Exch., Ltd. 2001) (1950). Through the 1920s a firm of four attorneys was considered a "large" firm. *See* HOBSON, *supra* note 2, at 161. The benchmark for "large" reached fifty attorneys by the 1950s. *See* Erwin O. Smigel, *The Impact of Recruitment on the Organization of the Large Law Firm*, 25 AM. SOC. REV. 56, 56 n.1, 58 (1960). By the late 1980s, "a firm of 50 members probably would not be considered large" in major cities. *See* Justin A. Stanley, *Should Lawyers Stick to Their Last?*, 64 IND. L.J. 473, 473 (1989). Notably, in 1988, Baker & McKenzie became the first law firm with over 1000 attorneys. Nancy Blodgett, *Law Firm Tops 1,000 Barrier*, A.B.A. J., Feb. 1988, at 30. In January 2015, multinational law firm Dentons and Dacheng Law Offices of China announced a merger, creating the world's largest law firm with over 6500 lawyers in more than fifty countries. Neil Gough, *Dentons to Merge with Dacheng of China to Create World's Largest Law Firm*, N.Y. TIMES (Jan. 27, 2015), http://dealbook.nytimes.com/2015/01/27/dentons-to-merge-with-dacheng-of-china-to-create-worlds-largest-law-firm/?_r=0; *see also* Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1873 n.23 (2008) (discussing the dynamic meaning of "large" firms).

4. Debra Cassens Weiss, *Is the Law Firm Pyramid Collapsing? BigLaw Is Aging with More Partners than Associates*, A.B.A. J. (Dec. 16, 2013, 11:45 AM), http://www.abajournal.com/news/article/is_the_law_firm_pyramid_collapsing_biglaw_is_aging/; *see also* Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives*

associates leave firms by their fourth or fifth year,[5] and some go in-house with one of the firm's entity clients.[6] Next, associates typically have a mixed bag of assignments[7] but form only a few informal mentoring relationships with senior associates and partners, who seem increasingly to have less time and interest in mentoring.[8]

In other ways, however, these typical experiences differ notably. First, while some Caucasian male associates are asked to serve on firm committees, female and minority associates are often overburdened with service commitments. While all associates are expected to participate in firm activities, diverse attorneys experience a stronger pressure to visibly attend to allow the firm to publicly feature them as members of the firm. In contrast, Caucasian men's absence is often accepted and assumed to reflect their commitment to the firm and to billable work, rather than an indication of disinterest and disloyalty. Next, while building mentorship relationships is challenging for all associates, minority associates often find the experience to be more challenging, and they are subtly directed or are drawn to minority partners, oftentimes partners without power or with less power than the firm's leading rainmakers.[9] Finally, while many associates feel the pressure to meet the firm's cultural expectations and receive generic and unhelpful feedback, these phenomena disproportionately burden minority associates: they often must invest more time and effort working their identity compared with their white male counterparts, and they are

on the Future of the Law Firm in the New Economy, 2011 COLUM. BUS. L. REV. 1, 31–33; Eli Wald, *Smart Growth: The Large Law Firm in the Twenty-First Century*, 80 FORDHAM L. REV. 2867, 2888–89 (2012).

5. *See* Galanter & Henderson, *supra* note 3, at 1924 n.247 (citing Stephanie Francis Ward, *The Ultimate Time-Money Trade-Off*, A.B.A. J., Feb. 2007, at 24–25).

6. *See* Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1060 (1997); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 486 (1989). *See generally* Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277 (1985); Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 L. & SOC'Y REV. 457 (2000).

7. David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1608–13 (1998) [hereinafter Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*]; David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 537–42 (1996) [hereinafter Wilkins & Gulati, *Why Are There So Few Black Lawyers*].

8. Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 281–83 (2000) [hereinafter Fortney, *Soul for Sale*]; Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 181 n.47 (2005) [hereinafter Fortney, *The Billable Hours Derby*].

9. *See generally* ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988); Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 7; David B. Wilkins, *"If You Can't Join 'Em, Beat 'Em!" The Rise and Fall of the Black Corporate Law Firm*, 60 STAN. L. REV. 1733, 1744–46 (2008).

often confronted with more imposing negative stereotypes, rendering the consequences of bland evaluations more pronounced.[10]

What, if anything, do these experiences tell us about BigLaw practice, equality, and discrimination? At first blush, both experiences appear to constitute stories of professional success. BigLaw partners enjoy high professional, socioeconomic, and cultural status atop the legal profession. Similarly, in-house positions have become increasingly coveted and also confer high professional status. At the same time, however, these narratives reveal disturbing patterns of disproportionately early exit, underrepresentation, and inequality affecting women and lawyers of color at BigLaw beyond the entry-level rank.[11] Caucasian males are able to work longer billable hours, receive superior training, and form stronger mentorship relationships with powerful partners. In turn, these associates receive higher quality assignments and end up better positioned to develop a book of business. As a result, having proven themselves to be the "ideal workers," white male associates do have a better chance of making partner.[12] In contrast, women and minorities—burdened by service commitments to the firm that result in fewer billable hours and undermined by relationships with less powerful partners, as well as by negative gender and racial stereotypes—gradually receive lower quality assignments.[13] By

10. Carbado & Gulati, *supra* note 1, at 1270–72. *See generally* DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA (2014); KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

11. Nancy J. Reichman & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 CAP. U. L. REV. 923, 931 (2002); Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1042–46 (2011). *See generally* Nancy J. Reichman & Joyce S. Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 TEX. J. WOMEN & L. 27 (2004); Eli Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011).

12. Joan Williams explains that "[m]arket work is structured around an ideal worker who takes no time off for childbearing, has no daytime child rearing responsibilities, and is available 'full-time' and for overtime at short notice." Joan C. Williams, *Restructuring Work and Family Entitlements Around Family Values*, 19 HARV. J.L. & PUB. POL'Y 753, 753 (1996); *see* Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822 (1989). As large law firms increasingly adopt a 24/7, around the clock, client-centered ideology as the benchmark of professional excellence, *see* Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2264–73 (2010), Caucasian male lawyers are reconstituted as BigLaw's ideal workers.

13. As Deborah Rhode reminds us, the "conventional usage . . . referring to 'women and minorities'. . . should neither obscure the unique experience of women of color, nor mask differences within and across racial and ethnic groups." Rhode, *supra* note 11, at 1042. On the challenging experience of women of color at BigLaw, see JANET E. GANS-EPNER, ABA COMM'N ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 25 (2006). *See generally* Carla D. Pratt, *Sisters in Law: Black Women Lawyers' Struggle for Advancement*, 2012 MICH. ST. L. REV. 1777; Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185 (2014).

their fourth year, exiting the firm and going in-house is often a prudent career move because they stand a lesser chance of making partner.[14]

Indeed, close scrutiny reveals the inherently different, and often lesser, outcomes typically achieved by women and minority lawyers compared to their Caucasian male counterparts. First, BigLaw partner is a coveted position of power and influence, often leading to a demanding, yet relatively stable, lucrative, and prestigious career path. A departing fourth year associate, in contrast, is likely to join an in-house department as associate general counsel or as a subject matter expert—an increasingly sought after position yet one not usually on par with that of a BigLaw partner or of general counsel.[15] Second, Caucasian males who choose to stay at BigLaw and make partner are as equally well-positioned as their women of color counterparts to go in-house if they so desire. Female minority associates, however, hardly have the same choices. Irrespective of whether they opt out or are pushed out of BigLaw, they do so facing different circumstances: they go in-house without having the realistic option of staying put and making partner, and they leave the firm endowed with less training and mentorship and having experienced a lower quality of work.

What explains these markedly different stories? That is, what explains the systematic underrepresentation of women and minority lawyers in positions of power and influence at BigLaw? The existing literature conceives of large law firms as tournaments of lawyers, in which associates exchange their labor for salaries, work assignments, training, and mentoring, and where they compete based on merit for promotion to the partnership, irrespective of their gender, race, and other facets of their personal identity. However, prevailing societal stereotypes and implicit bias disproportionately impact diverse BigLaw lawyers, leading to fewer and lower quality assignments, subpar training, compromised mentorships, and, in turn, diminished likelihood of promotion.[16]

The traditional account suggests that the underrepresentation of diverse attorneys at BigLaw is the result of exogenous societal forces mostly outside the control of BigLaw and its lawyers, and therefore offers a bleak forecast for greater representation of women and lawyers of color at BigLaw, at least until the demise of negative stereotypes and implicit bias in American society. Indeed, this grim analysis appears to find support in BigLaw's two-decade-long unsuccessful attempt to enhance diversity among its upper ranks, as well as in the diversity fatigue phenomenon.[17]

This Article advances a new *capital analysis*, depicting BigLaw relationships not as basic labor-salary exchanges but rather as complex transactions in which BigLaw and its lawyers exchange labor and various forms of capital—social, cultural, and identity. Unlike the traditional

14. Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 7, at 580–82.
15. Eli Wald, The New Generalists (unpublished manuscript) (on file with author).
16. *See infra* Part I.
17. *See* Rhode, *supra* note 11, at 1257; Veronica Root, *Retaining Color*, 47 U. MICH. J.L. REFORM 575, 587 (2014); Wald, *supra* note 11, at 1110–11.

Tournament Theory model,[18] in which BigLaw and its lawyers come across as near hopeless pawns powerless to combat vicious exogenous societal forces outside of their control, the proposed capital model conceives of BigLaw and its lawyers as active players who are very much responsible for the outcomes of their exchanges. 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.

Part I of this Article offers a brief summary of the traditional account of the organization of BigLaw—Tournament Theory—and of the underrepresentation of diverse lawyers in positions of power and influence as result of stereotypes and implicit bias. Part II introduces capital analysis, which builds on the work of Pierre Bourdieu regarding economic, cultural, and social capital. It examines the concepts of positive and negative capital, explores the meaning of capital ownership by entities, and develops the notion of identity capital—the value individuals and institutions derive from their identities. Part III presents a capital theory of BigLaw, in which large law firms and their lawyers engage in complex transactions trading labor, social, cultural, and identity capital for economic, social, cultural, and identity capital.

Parts IV and V offer a new understanding of the underrepresentation of diverse lawyers at BigLaw and suggest effective, practical means of addressing it. Part IV uses capital analysis to show that the underrepresentation of women and minority lawyers is not the result of exogenous forces but rather the outcome of the very exchanges in which BigLaw and its lawyers engage. Part V suggests policies and procedures BigLaw can and should adopt to improve the quality of the exchanges it offers to women and minority attorneys and to reduce the underrepresentation of diverse lawyers within its ranks. Employing the concepts of capital transparency, capital boundary, and capital infrastructure, 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.

I. THE TOURNAMENT THEORY OF BIGLAW

Marc Galanter and Thomas Palay's seminal theory of large law firms postulates that partners and associates participate in a tournament of lawyers.[19] Experienced partners need associates to help serve their clients

18. *See infra* Part I.

19. *See generally* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991).

but fear that the associates may leave the firm, grab the clients, or shirk their responsibilities. Associates need work and can offer their labor to partners but fear that the firm may not invest in their training and mentoring. The tournament of lawyers effectively addresses these concerns: associates receive high salaries in exchange for their long hours at the firm, which has an incentive to train and mentor its future partners; the promise of a well-compensated partnership diminishes the risk of associates leaving; and the eight-to-ten–year partnership track with its gradual increase in training, mentoring, and exposure to clients reduces the risk of grabbing and the uncertain promotion to partnership provides associates with incentives not to shirk.[20] Tournament Theory is essentially one of a basic exchange: associates trade labor (i.e., long billable hours) for a high salary, training, mentoring, and a shot at making partner. At the conclusion of the tournament the hardest working, best associates are promoted to the partnership.[21]

Over the years, Tournament Theory has been extended and refined. Galanter and William Henderson have argued that the tournament has become more elastic, by abandoning the "up or out" characteristic for associates and introducing new tracks for "permanent" associates and by recognizing new non-partnership tracks such as contract and staff attorneys. In turn, these changes have allowed law firms to reduce the number of entry-level associates and retain non-partner senior lawyers, resulting in a shift from a pyramid-shaped hiring and promotion structure to a diamond-shaped structure.[22] At the same time, law firms have also tiered up their partnerships by introducing tournament style competitions at the partner level, in which salaried or junior partners compete for the coveted positions of equity partners.[23] Bernard Burk and David McGowan have explored the nature of the relationships among firm partners, arguing that reciprocal referrals render the ties among partners brittle and leave large law firms unstable and prone to departures and defections.[24]

Tournament Theory sheds limited light on the varying experiences of different BigLaw associates and partners. If Caucasian male associates

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20. Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 330–39 (1985).

21. Of course, under the traditional tournament model, even if an associate provided all the necessary labor and received training, mentoring, and good performance evaluations, promotion was not guaranteed. Rather, the prize of promotion to the partnership was reserved for the best tournament performers, subject to the firm's needs.

22. Galanter & Henderson, *supra* note 3, at 1875–78. Nicholas Varchaver first described the changing structure of large law firms as diamond shaped in *Diamonds Are This Firm's Best Friend*, AM. LAW., Dec. 1995, at 110. *See also* Noam Scheiber, *The Last Days of Big Law*, NEW REPUBLIC (July 21, 2013), http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries.

23. *See* Galanter & Henderson, *supra* note 3; *see also* William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the AM Law 200*, 84 N.C. L. REV. 1691 (2006); Catherine Rampell, *At Well-Paying Law Firms, a Low-Paid Corner*, N.Y. TIMES (May 23, 2011), http://www.nytimes.com/2011/05/24/business/24lawyers.html?pagewanted=all&_r=0.

24. Burk & McGowan, *supra* note 4, at 6.

work long hours, they will secure a stable flow of work. Over time they will build relationships with senior associates and partners that will provide training and mentorships, which will result in higher quality assignments, in turn making them credible candidates for promotion to partner. In contrast, if women and minority associates bill fewer hours due to their increased service commitments to the firm they: (1) will gradually be assigned fewer and lower quality tasks, (2) will have diminished opportunities to benefit from training and mentoring, and (3) will be more likely to leave the firm sooner than their white male counterparts or accept positions as permanent associates. Yet the tournament model fails to address some fundamental questions: Why would law firms disproportionately burden women and minority associates with service commitments? Why would these associates accept such impositions? And should women and minority lawyers who do put in long billable hours expect to fare as well as their Caucasian counterparts?[25]

Critical scholars have provided insightful answers to some of these questions. David Wilkins and Mitu Gulati have challenged some of the admittedly simplistic assumptions of the basic Tournament Theory. For example, while the firm as a whole has an incentive to train and mentor all its associates, individual partners face different incentives. Once they invest in "their" associates, they have an incentive to see these associates succeed in the tournament and have others fail.[26] Moreover, with increased pressure to bill at the expense of mentoring and training, partners will tend to prefer and promote those associates they perceive, correctly or incorrectly, to be more like them and therefore more likely to learn faster.[27] Such heuristics will tend to disfavor women and minority associates, who white male partners will often experience as different, even if they are capable and in fact doing high quality work.[28] For some powerful white male partners, investment in "their" associates thus becomes a disproportionate commitment to support the career development of white male associates at the firm. In turn, women and minority associates, correctly observing that they are receiving inferior training and mentoring, may decide to leave the firm or get off the partnership track in disproportionate numbers.[29]

Many have documented the important role of stereotypes and implicit bias at the workplace.[30] At BigLaw, gender stereotypes mean that male

25. *See* RONIT DINOVITZER ET AL., AM. BAR FOUND. & NALP FOUND., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 68 (2009) (finding that women lawyers at BigLaw generally bill as many hours as their male colleagues).

26. Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*, *supra* note 7, at 1615–19.

27. Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 7, at 569–70.

28. *See, e.g.*, Kevin Woodson, *Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms*, 83 FORDHAM L. REV. 2557, 2565–70 (2015).

29. Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 7, at 569–70.

30. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK (1997); JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO

associates will benefit from the presumption that they are willing and able to work longer hours whereas female associates will be presumed to have divided loyalties—i.e., competing personal responsibilities to their families—and therefore less of a commitment to work long hours.[31] Such stereotypes become a self-fulfilling prophecy: partners who believe that female associates may be less dependable because of their presumed divided loyalties will tend to favor male associates and assign the latter more and better assignments. Over time, female associates, receiving fewer and lower quality assignments, may fall behind their male counterparts and rationally decide to leave the firm, validating the divided loyalty stereotype in the eyes of these very partners. Similarly, gender and racial stereotypes tend to favor Caucasian male associates whose work product is presumed to be competent, their mistakes understandable, and their work ethic unquestioned, whereas female and minority associates have to combat presumptions of incompetence and laziness. Partners who rely on such stereotypes will tend to mentor and train those they identify as more competent, providing Caucasian men with enhanced opportunities to improve and become more competent than female and minority lawyers.[32]

In addition to the impact of stereotypes and unequal training and mentoring, professional ideologies also tend to undermine the career trajectory of women and minority associates at BigLaw. The rise in the prestige and power of in-house counsel and the increase in the number of large law firms mean that increasingly BigLaw cannot offer cutting edge intellectual work for elite clients and can only offer relatively high salaries in exchange for long billable hours.[33] Large law firms, in their quest to maintain their elite status atop the profession in an increasingly competitive market for legal services that renders them less desirable workplaces, develop professional ideologies that define merit and excellence in terms of 24/7 service to clients; thus they end up favoring white men and disfavoring

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ABOUT IT (2000). For a survey of the literature, see Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745 (2000) (reviewing WILLIAMS, *supra*). On implicit bias, see Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1 (2010).

31. *See, e.g.*, Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI-KENT L. REV. 1753 (2001) (exploring the impact of gender stereotypes on the development of child care policies at the workplace).

32. *See* ABA COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: A REPORT ON THE STATUS OF WOMEN IN THE LEGAL PROFESSION 14 (2001); Russell G. Pearce, Eli Wald & Swethaa S. Ballakrishnen, *Difference Blindness Vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2424–25 (2015); Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39, 64–69 (1994); Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 587–94 (1996); *cf.* Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1753–55 (1991). *See generally* PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (Gabriella Gutiérrez y Muhs et al. eds., 2012) [hereinafter PRESUMED INCOMPETENT].

33. David B. Wilkins, *Partner, Shmartner!* EEOC v. Sidley Austin Brown & Wood, 120 HARV. L. REV. 1264, 1276–77 (2007).

women and minority lawyers who face negative stereotyping about their 24/7 commitment and their excellence.[34]

These accounts—first generation critical analyses of BigLaw—tend to explain the underrepresentation of women and minority lawyers at BigLaw in a manner consistent with Tournament Theory. At the same time, the accounts portray law firms, partners, and associates in a positive—or at least forgiving—light, in that all parties to the exchange appear to act without intention or explicit control over the circumstances that lead to systematically different outcomes for minority lawyers.[35] Law firms, for example, may argue that gender and racial stereotypes are a product of American culture and that they have little ability to influence them even if their practices accommodate them; that partners' training and mentoring decisions are grounded in implicit biases that are hard to detect and uproot; and that increased competition in the market for legal services shapes and forms new professional ideologies that are outside of their control.[36] Partners may assert that, to the extent they act on stereotypes and implicit biases they have little control over or awareness of, they cannot be held accountable. And associates may argue that they have little power but to play the hands they are dealt, which, in the case of female and minority associates, oftentimes means leaving the firm disproportionately early. The accounts suggest a lamentable status quo with little hope for change in the future.[37]

Put differently, first generation critical analyses successfully show that BigLaw's tournaments do not produce the results predicted by the tournament model—namely, the hardworking best being promoted to partnership. Or, more accurately, they produce a particular subset of the hardworking best—white males. However, importantly, the analyses imply that the problem is not with the theory but rather with reality: because BigLaw and its actors, in real life, experience exogenous conditions that feature implicit bias and stereotypes, their tournaments produce white male partners disproportionately. Consequently, reducing the underrepresentation of women and minority lawyers in positions of power may require a change in the external conditions—implicit bias, stereotypes, and dominant white culture—which cause it.

Recent scholarship—which may be thought of as second generation critical analyses of BigLaw—has begun to challenge the inevitability of these accounts. Devon Carbado and Gulati have shown that law firms do not simply accept "as is" their lawyers' increasingly diverse identities but in

34. Wald, *supra* note 12, at 2256.

35. Tiffani N. Darden, *The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory and the Institutional Analysis of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85 (2009); Note, *"Trading Action for Access": The Myth of Meritocracy and the Failure to Remedy Structural Discrimination*, 121 HARV. L. REV. 2156, 2172–74 (2008).

36. *Cf.* Root, *supra* note 17.

37. *See generally* Joan C. Williams & Veta Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 62 HASTINGS L.J. 597 (2011).

fact actively shape and form the ways in which firm lawyers work their identities.[38] Nancy Leong has argued that law firms disproportionately impose service commitments on minority lawyers because such "racial capitalism" allows BigLaw to derive diversity value by signaling to their clients, competitors, and recruits that they feature equal and culturally competent work environments.[39] And Carbado and his colleagues have asserted that law firms tolerate, even accommodate, concealed biases in the workplace.[40]

Second generation critical insights fatally undermine Tournament Theory and its notion of a basic exchange between associates and partners, suggesting that underrepresentation of women and minority lawyers in powerful BigLaw positions is endogenous rather than exogenous. Naive associates may believe that they are trading labor for a high salary, training, mentoring, and a shot at making partner. Critical analyses establish, however, that large law firms and their partners do not simply trade high salaries, training, mentorship, and deferred compensation for labor, nor are they merely pawns who must operate within a complex system of cultural stereotypes and implicit biases over which they have little control and influence. Rather, BigLaw actors engage in a much more complicated exchange, a *capital exchange*, best understood in terms of a *capital theory of BigLaw*. A capital analysis of large law firms, however, requires a brief grounding in capital theory.

II. A BOURDIEUESQUE THEORY OF CAPITAL: SOCIAL, CULTURAL, AND IDENTITY CAPITAL

French sociologist Pierre Bourdieu interprets capital as a structure and function of the social world, a predictable resource yielding power—a deliberate, nonrandom, non-accidental regularity that cannot be reduced to mere economics. Capital takes time to accumulate and has the "potential capacity to . . . reproduce itself in identical or expanded form."[41] Bourdieu distinguishes between three types of capital: economic, cultural, and social.[42]

Economic capital consists of economic resources such as cash and property. Cultural capital is the accumulation or acquisition of "competence in society's high-status culture."[43] A person possessing cultural capital benefits from the skills and knowledge that are afforded by

38. Carbado & Gulati, *supra* note 1, at 1299–1307.

39. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

40. Devon W. Carbado, Patrick Rock & Valerie Purdie-Vaughns, Concealed Biases (2015) (unpublished manuscript) (on file with author).

41. *See* Pierre Bourdieu, *The Forms of Capital*, *in* HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241 (John G. Richardson ed., 1986).

42. Bourdieu discusses a fourth form of capital, symbolic capital, to refer to resources such as prestige, honor, and recognition within a culture. *See* PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE 291 (Richard Nice trans., 1984); *see also* Pierre Bourdieu, *The Aristocracy of Culture*, 2 MEDIA, CULTURE & SOC'Y 225 (1980) (discussing habitus or motivations and dispositions).

43. David Throsby, *Cultural Capital*, 23 J. CULTURAL ECON. 3, 4 (1999).

the culture that she has accumulated throughout her life. Cultural capital includes communication skills, cultural awareness or sensitivity, knowledge of institutions, and the necessary credentials providing access to socioeconomic mobility. An individual endowed with a great amount of cultural capital knows multiple languages, is well-read, and has an eye for art, an ear for music, and a palate for wine. In this sense, cultural capital is a tool enabling a person to maneuver through social structures, gaining advantages and ultimately settling in a freely chosen place.[44]

Social capital exists in the change and structure of relations between people. Its value is the resource that relationships and connections can provide in the short and long term. A person with social capital is a member of a durable network—whether it is a family, a religious group, a college alumni association, or an elite club—that extends to each of its members a benefit to which she is entitled by virtue of her membership in the group. Social capital is measured by the extent to which an individual is a member of several networks and the amount of power, influence, money, and cultural capital the individual possesses by way of those networks. A person with a large amount of social capital is a member of groups that have money, influence, prestige, and power, and the person may call on any of these things when desired.[45] Capital analysis has become increasingly familiar to legal scholars.[46]

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44. *Id.* at 4–6; *see also* Bourdieu, *supra* note 41, at 243–44.

45. Bourdieu, *supra* note 41, at 243; James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. 95, 97–99 (Supp. 1988). *See generally* Paul S. Adler & Seok-Woo Kwon, *Social Capital: Prospects for a New Concept*, 27 ACAD. MGMT. REV. 17 (2002). Bourdieu has used the concepts of capital to argue that American thought systematically misrecognizes success as a personal and individual achievement based on merit. *See* Bourdieu, *supra* note 41, at 241–58. Bourdieu believes that while a person's achievements are in part the product of hard work and merit, they are also the product of a number of external factors that depend not exclusively on the person but rather on the culture in which she operates and, in particular, on the cultural and social capital with which she is endowed. *See id.*; *see also* Alejandro Portes, *The Two Meanings of Social Capital*, 15 SOC. F. 1, 2 (2000) (remarking that Bourdieu believed cultural and social capital play a primary role in facilitating access to jobs, market tips, and other benefits).

46. Yves Dezalay and Bryant Garth were among the first to explore Bourdieu's ideas within the legal field, studying forms of private justice for international business disputes such as commercial arbitration. *See* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE (1996). Many others have followed in their footsteps. *See, e.g.*, Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1159–61, 1174 (2008); Lucille A. Jewel, *Merit and Mobility: A Progressive View of Class, Culture, and the Law*, 43 U. MEM. L. REV. 239, 253–56, 269–70 (2012); *see also* James S. Coleman, *The Creation and Destruction of Social Capital: Implications for the Law*, 3 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 382–84 (1988); Ronit Dinovitzer, *Social Capital and Constraints on Legal Careers*, 40 L. & SOC'Y REV. 445, 445–47 (2006); Fiona M. Kay & John Hagan, *Building Trust: Social Capital, Distributive Justice, and Loyalty to the Firm*, 28 L. & SOC. INQUIRY 483, 488–91 (2003). *See generally* JOHN HAGAN & FIONA KAY, GENDER IN PRACTICE: A STUDY OF LAWYERS' LIVES (1995); John Hagan et al., *Cultural Capital, Gender, and the Structural Transformation of Legal Practice*, 25 L. & SOC'Y REV. 239 (1991); Hilary Sommerlad, *Minorities, Merit, and Misrecognition in the Globalized Profession*, 80 FORDHAM L. REV. 2481 (2012).

Consider the following three extensions to Bourdieu. First, capital may be either positive or negative. Just as one may possess positive economic capital (such as wealth), positive social capital (such as relationships and networks that result in enhanced opportunities to accumulate wealth and status), and positive cultural capital (such as interests, hobbies, and skills that confer value), one can also possess negative capital. Debt constitutes negative economic capital. Destructive relationships—for example, with criminals who implicate one in illegal activities or with drug addicts who lead to harmful abuse—constitute negative social capital. And harmful habits, hobbies, and skills, such as excessive drinking or gambling, are examples of negative cultural capital.

To be clear, capital in and of itself is not a positive or a negative resource,[47] yet it can be positive or negative, and the use of capital can result in positive or negative consequences. Robert Putnam, for example, has observed that social capital "can be directed toward malevolent, antisocial purposes."[48] In Putnam's formulation, what sets apart "positive and negative 'social capital' is whether it 'bridges' or 'bonds.'"[49] Bridging organizations result in positive consequences because they bring different people together, whereas bonding organizations lead to negative consequences because they connect similar people and breed exclusion.[50] In particular, while belonging to a bonding organization may confer positive consequences on its members, it may nonetheless cause great harm to those excluded.[51]

Here, building on the work of Tracey Meares and others, negative capital means not only the possible negative consequences for some from the use of capital by others, but rather that capital itself can be negative and have negative consequences. Meares argues not only that law-abiding minorities may realize that their fates are linked to those of law-breaking minorities,[52] but that minorities who have negative relationships with criminals and gangs may commit more crimes.[53] Similarly, BigLaw associates who have bad mentors can have negative social capital and lawyers who receive poor training may have negative cultural capital.

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47. Bourdieu, *supra* note 41; Dinovitzer, *supra* note 46, at 448.

48. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 22 (2001).

49. Corey Robin, *Fragmented State, Pluralist Society: How Liberal Institutions Promote Fear*, 69 MO. L. REV. 1061, 1083 n.131 (internal citations omitted).

50. *Id.*; *see also* Susan D. Bennett, *Creating a Client Consortium: Building Social Capital, Bridging Structural Holes*, 13 CLINICAL L. REV. 67, 99 (2006).

51. As Stephanie Stern points out, "the fact that individuals living in segregated communities and likely participating in homogenous groups and organizations report more tolerance may prove little [to those excluded]." Stephanie M. Stern, *The Dark Side of Town: The Social Capital Revolution in Residential Property Law*, 99 VA. L. REV. 811, 840 (2013).

52. Tracey L. Meares, *Place and Crime*, 73 CHI-KENT L. REV. 669, 682–83 (1998).

53. *See* TRACEY L. MEARES & DAN M. KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 13–14 (1999); Tracy L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 813 (1998).

Second, capital may be possessed by institutions and organizations. That is, in addition to serving as the arenas in which individuals use capital,[54] institutions themselves can own capital. It is understood that institutions as well as individuals may own economic capital, such as money. Yet institutions may also own social and cultural capital. For example, a law school's relationships with its alumni, community, or peer institutions—or a law firm's relationships with current and former lawyers, clients, judges, and opposing counsel—are forms of social capital, which importantly transcend relationships with individuals who act on behalf of the institutions. Alumni, of course, interact with the Dean and the alumni office, but their relationships are fundamentally with the institution and not with its constituencies, which come and go. Similarly, an institution's reputation and credentials are a form of cultural capital,[55] which build on but are distinct from the reputation and credentials of institutional actors. Law students, for example, may enroll in a particular law school given the reputation of some of its faculty members, but the law school's reputation is distinct from that of its individual faculty members. And while clients increasingly claim to hire individual lawyers and not large law firms, a firm's reputation hardly ever depends on the reputation of particular partners.[56]

Finally, in addition to economic, social, and cultural capital, individuals and institutions possess another form of capital: identity capital. Dr. Meg Jay has defined identity capital as a "collection of personal assets. It is the repertoire of individual resources that we assemble over time. These are the investments we make in ourselves, the things we do well enough, or long enough, that they become a part of who we are."[57] Dr. Jay's broad definition of identity capital, akin to what some legal scholars have called human capital,[58] is essentially a shorthand for social and cultural capital.[59]

In contrast, I use identity capital to mean the values one derives from various facets of one's personal identity—for example, gender, racial, ethnic, class, national, or sexual orientation identity—facets that trigger reactions, perceptions, and stereotypes in others. Notably, some aspects of

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54. PUTNAM, *supra* note 48, at 22–24, 350–63.

55. Or, more accurately, a form of symbolic-cultural capital. *See* BOURDIEU, *supra* note 42.

56. John C. Coates et al., *Hiring Teams, Firms, and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market*, 36 L. & SOC. INQUIRY 999, 1000 (2011) (finding that clients base hiring and firing decisions on the qualities of teams and departments, as well as individual members); Wilkins, *supra* note 9, at 2136.

57. MEG JAY, THE DEFINING DECADE: WHY YOUR TWENTIES MATTER AND HOW TO MAKE THE MOST OF THEM NOW 6 (2012); *Meg Jay: Why 30 Is Not the New 20*, TED, http://www.ted.com/talks/meg_jay_why_30_is_not_the_new_20 (last visited Mar. 25, 2015).

58. *See, e.g.*, John M. Conley & Scott Baker, *Fall from Grace or Business As Usual? A Retrospective Look at Lawyers on Wall Street and Main Street*, 30 L. & SOC. INQUIRY 783 (2005); Jo Dixon & Carroll Seron, *Stratification in the Legal Profession: Sex, Sector, and Salary*, 29 L. & SOC'Y REV. 381 (1995).

59. Dr. Jay's examples of identity capital—"degrees, jobs, test scores, and clubs," as well as "how we speak, where we are from, how we solve problems"—are examples of cultural and social capital. JAY, *supra* note 57, at 6.

our identity are socially and legally constituted and construed and therefore outside of our control,[60] whereas other aspects are a function of culture, identification, and personal investment and are, at least to some extent, within our control.[61]

Only one other article has previously used the term identity capital.[62] In some ways, E. Christi Cunningham's definition of identity capital is similar to mine: she defines identity markets as venues in which identities are bought and sold,[63] contends that values derived from identity are traded as commodities in identity markets,[64] that "[i]dentity commodification . . . involves the creation of value through labor beyond that which is necessary to sustain the person,"[65] and concludes that "[t]hose who accumulate identity capital enjoy the benefits of enhanced identity value in the market."[66] In at least two ways, however, our definitions differ greatly. First, whereas Cunningham believes that "the process of commodifying and maintaining the commodification of identity requires both state force and private acts of discrimination,"[67] I believe that informed and voluntary capital exchanges may take place between private actors, need not involve the state, and need not entail discrimination. Second, whereas Cunningham argues that all "[t]rade in identity is a particular form of exploitation,"[68] that the "labor expended in refining, negotiating, combating and preserving socially construed identity constitutes identity exploitation,"[69] and therefore that "[identity] should not be commodified in identity markets,"[70] I maintain that while capital transactions may be exploitative they need not be.

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60. *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 25 (Taylor & Francis e-Library 2002) (1990) ("[G]ender is always a doing, though not a doing by a subject who might be said to preexist the deed. . . . There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its result."); *see also, e.g.*, Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27–28 (1994); Nikki Khanna & Cathryn Johnson, *Passing As Black: Racial Identity Work Among Biracial Americans*, 73 SOC. PSYCHOL. Q. 380 (2010) (discussing when and how biracial individuals manipulate physical characteristics (among other things) to strategically pass as either white or black). To the extent that Dr. Jay's definition of identity capital includes "how we look," "what we bring to the adult marketplace," and "the currency we use to metaphorically purchase jobs and relationships and other things we want," then it is inclusive of my definition of identity capital, which is consistent with the broad way with which she intended to define her term. JAY, *supra* note 57, at 6–7.

61. Carbado & Gulati, *supra* note 1.

62. E. Christi Cunningham, *Identity Markets*, 45 HOW. L.J. 491 (2002).

63. *Id*. at 492.

64. *Id*. at 493.

65. *Id*. at 501.

66. *Id*. at 502.

67. *Id*. at 491.

68. *Id*. at 501.

69. *Id*. at 502.

70. *Id*. at 494.

In contrast with Cunningham's, my proposed definition of identity capital builds on status expectation theory in sociology, which asserts that "the influence attempts of high-status individuals succeed, and those of lower-status people fail, due to socially shared cognitions and expectations that link social status to attributions about personal ability and worth."[71] According to the theory, in group settings such as the workplace, group members "form expectations about the quality of each other's contributions to an assigned task,"[72] and these expectations, in turn, "generate the emergence of status hierarchies within group settings."[73] In such a way status, or identity capital, plays a role in constituting and maintaining a group's social position and an individual's position within the group and the workplace.[74] Applying status expectation theory to the study of the legal profession and lawyers, Nancy Reichman and Joyce Sterling have argued that "employers will prefer one status group—male lawyers in the present instance—over another because they perceive them as more competent and worthy."[75] Moreover, "[t]he evaluation of . . . performance becomes a 'self-fulfilling prophesy' when certain status actors (male lawyers) are given more opportunities to participate and to demonstrate their competence in the workplace," resulting in employers interpreting "men's performances to be superior to those of women."[76]

Just like economic, social, and cultural capital, identity capital is part of the structure and function of the social world that cannot be reduced to mere economics[77]—predictable resources yielding power, which capture and reflect deliberate, nonrandom, non-accidental regularity. Gender capital, for example, a form of identity capital, denotes the value one derives from one's gender identity, including stereotypes, associations, and perceptions

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71. Karyl A. Kinsey & Loretta J. Stalans, *Which "Haves" Come Out Ahead and Why?*, *in* IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? 137, 140 (Herbert M. Kritzer & Susan S. Silbey eds., 2003); Shelley J. Correll & Cecilia L. Ridgeway, *Expectation States Theory*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 29, 31, 33 (John Delamater ed., 2003) ("Distinguishing characteristics such as occupation or race become status characteristics in a society when widely shared status beliefs develop that associate greater status worthiness and competence with those in one category of the characteristic than in another category."); Cecilia Ridgeway, *The Social Construction of Status Value: Gender and Other Nominal Characteristics*, 70 SOC. FORCES 367, 368–69 (1991); *see also* CECILIA RIDGEWAY, FRAMED BY GENDER 104 (2011); Cecilia Ridgeway & Shelley Correll, *Motherhood As a Status Characteristic*, 60 J. SOC. ISSUES 683, 683 (2004).

72. Herman N. (Rusty) Johnson, Jr., *Disambiguating the Disparate Impact Claim*, 22 TEMP. POL. & CIV. RTS. L. REV. 433, 467 (2013).

73. *Id*.

74. Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 W. & MARY L. REV. 513, 577 (2004).

75. Nancy Reichman & Joyce Sterling, *Parenthood Status and Compensation in Law Practice*, 20 IND. J. GLOBAL LEGAL STUD. 1203, 1205–06 (2013) (internal citations omitted); *see also* Joyce S. Sterling & Nancy Reichman, *Navigating the Gap: Reflections on 20 Years Researching Gender Disparities in the Legal Profession*, 8 FLA. INT'L U. L. REV. 515, 533–34 (2013).

76. *Id*.

77. Bourdieu, *supra* note 41, at 242 ("It is in fact impossible to account for the structure and functioning of the social world unless one reintroduces capital in all its forms and not solely in the one form recognized by economic theory.").

of it. Racial capital similarly reflects the value one derives from one's racial identity.[78]

A few examples demonstrate the meaning and relevance of identity capital in the practice of law. The representation of the Ku Klux Klan by Anthony Griffin, a black lawyer,[79] suggests that Mr. Griffin possessed various forms of capital. The Klan hired Mr. Griffin both because he was a leading First Amendment attorney (cultural-symbolic capital) and because of his racial identity, wishing to build its organizational legitimacy and garner public sympathy through its association with a black lawyer (identity capital). Put differently, Mr. Griffin was able to derive value from his racial identity in his representation of the Klan, in addition to deriving value from his professional merit and reputation. Similarly, a Caucasian female defense counsel who agreed to represent a black defendant accused of raping a white victim is deriving value from her racial and gender identity.[80]

While the terminology of identity capital may be new to legal scholars, its practice by lawyers and law firms dates back centuries. Caucasian male lawyers have long utilized their gender and racial identity to take advantage of positive stereotypes of competence, intelligence, and loyalty to law firms and clients—forms of identity capital.[81] And since the mid-twentieth century, Jewish lawyers have taken advantage of the flip side of bias, that is, from the surprisingly positive value of long-standing derogatory ethno-religious stereotypes, such as "Jews are smart" and "manipulative," to establish a perception that "everybody wants to have a Jewish attorney."[82]

The qualities of identity capital resemble those of the other forms of capital. Specifically, identity capital, like economic, social, and cultural capital, may be either positive or negative. For example, a Caucasian female associate who experiences negative gender stereotypes regarding her divided loyalties possesses negative identity capital. Or an Asian American associate who faces unfair assumptions by partners that he lacks the creativity and imagination to become their peer possesses negative identity capital.[83]

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78. Nancy Leong has similarly defined racial capital as "the economic and social value derived from an individual's racial identity, whether by that individual, by other individuals, or by institutions," adding that "racial capital is simply value derived from racial identity." Leong, *supra* note 39, at 2190 & n.200.

79. *See generally* David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995).

80. Eli Wald, *Lawyers' Gender and Racial Capital*, 22 INT'L J. LEGAL PROF. (forthcoming 2015) (discussing the representation of Kobe Bryant by Pamela Mackey).

81. *See supra* note 32 and accompanying text.

82. On the "flip side of bias" and the experience of Jewish lawyers, see Eli Wald, *The Rise of the Jewish Law Firm or Is the Jewish Law Firm Generic?*, 76 UMKC L. REV. 885, 929 (2008); Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1860 (2008) [hereinafter Wald, *Rise and Fall*]. *See also* Dinovitzer, *supra* note 46.

83. While some associates may benefit from the stereotype of Asian Americans as hard working, see Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1258, 1261–62 (1993), others may experience a competing negative stereotype that Asian Americans lack

Indeed, the quality and quantity of one's identity capital may sometimes be unclear. A Latina associate who joins a large law firm may derive value from her gender and racial identity because the firm may hire her in part to pursue its diversity commitments, but she may experience negative stereotypes about her competence and commitment once at the firm. The net effect of the associate's identity capital may be less than evident. Similarly, a prospective black law student may derive value from his racial identity because a law school may admit him in part to pursue its diversity agenda, but once admitted, he may be harmed by racial stereotypes regarding his competence, even if affirmative action had nothing to do with his admission to the law school.[84]

Finally, identity capital, like economic, social, and cultural capital, may be possessed by institutions as well as by individuals. Large law firms have been pioneers of cultivating capital, from social capital through establishing strong institutional ties to elite law schools,[85] to cultural and identity capital by building on their elite White Anglo-Saxon Protestant (WASP) and white-shoe credentials to develop elite professional status. Indeed, as I have argued elsewhere, the rise of large WASP law firms to prominence in the late nineteenth through the mid-twentieth centuries very much depended

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the imagination and assertiveness which play an important role in the paradigm of a successful professional attorney, see Terri Yuh-lin Chen, *Hate Violence As Border Patrol: An Asian American Theory of Hate Violence*, 7 ASIAN L.J. 69, 85 (2000); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1270–73 (1992) (describing negative stereotyping of Asian Americans in popular culture). *See generally* FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE (2002).

84. JOHN H. MCWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA 229 (2000) (arguing that affirmative action "creates private doubt," depriving its recipients of "the unalloyed sense of personal, individual responsibility for their accomplishments"); Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 856 (1997) ("Some critics of affirmative action argue that its pervasiveness has caused successful minorities to suffer a stigma: the belief that minority achievements are the result of affirmative action, not individual merit."). In his autobiography, Justice Clarence Thomas described the process of his job search after law school as humiliating, having experienced the stigma and bias of affirmative action firsthand. CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 86–87 (2007). Others, however, have discounted the impact of stigma on recipients of affirmative action. *See, e.g.*, CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 81 (1996) ("[A]ffirmative action has a cost . . . [and] part of the cost is the risk of stigma . . . [however,] the stigma [one] may suffer is a small price compared to the price I would pay if I faced closed doors . . . ."); Randall Kennedy, Commentary, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1331 (1986). *See generally* David B. Wilkins, *Rollin' on the River: Race, Elite Schools, and the Equality Paradox*, 25 L. & SOC. INQUIRY 527 (2000) (exploring network effects on the careers of black lawyers who were "rollin' on the river" of the prestige benefits of elite institutions for many years after graduation).

85. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 51 (1983) (describing how from the beginning of the twentieth century, "the elite law schools were seen as increasingly bent on serving corporate law firms . . . . The elite law schools grew alongside the burgeoning corporate law firms"); *see also* AUERBACH, *supra* note 2, at 28–30 (describing the symbiotic relationship between elite law schools and elite corporate law firms, matching the so-called "best" law students with the "best" law firms).

on their ability to translate their elite ethno-religious and class identity as WASP and white-shoe institutions into elite professional identity.[86]

Some may raise a preliminary objection to more explicit capital trades, and, in particular, to identity capital, on the ground that such commodification is degrading to and disrespectful of identity. To capital opponents, the answer to ongoing implicit capital exchanges is to disallow or discourage them rather than streamlining commodification of identity.[87]

In an ideal world, one dramatically different than the one we live in, perhaps identity commodification might be avoidable. One's gender and racial identity, for example, would play no role in the workplace and would not be the subject matter of any explicit or implicit trades. We do, however, inhabit a world in which our identities are routinely commodified, and such commodification may be inevitable: in complex and important ways facets of our personal identity form and shape who we are as workers.[88] To forbid identity commodification may amount to bleaching out workers' identities and denying them the opportunity to be who they are as workers. That is, insisting on separating professional and personal identity may harm and disempower workers.[89]

Notably, the legal profession has long had, and continues to have, a thriving identity market, in which lawyers and law firms commodify and exchange identity capital. Identity commodificaiton is not unique, and is not uniquely harmful to women and minority lawyers. Rather, exactly because Caucasian male lawyers and WASP law firms have long traded and continue to trade in their identity, capital exchanges are inevitable. In such a professional reality, what is needed is not the prohibition of identity markets but transparent and fair capital exchanges for all.[90]

Moreover, trading in identity capital may not only be inevitable, it also may be desirable. Consider prostitution—the commodification of the human body and of sexual relations—in which a prostitute exchanges use of her body and dignity for short-term economic capital. Proponents of the legalization of prostitution advance two main arguments in support of their position. First, autonomy and, in particular, the ability to control one's body deserves respect and deference. Accordingly, if an individual wishes to commodify her body, denying her the ability to do so by criminalizing the conduct is akin to denying her autonomy.[91] Second, because our world

86. *See generally* Wald, *Rise and Fall*, *supra* note 82.

87. Cunningham, *supra* note 62, at 494; Leong, *supra* note 39.

88. *See supra* note 71 and accompanying text.

89. This is not to deny the difference between empowering workers by allowing them a space in which to allow their personal identity to inform their professional identity and involuntary commodifying identity.

90. *See, e.g.*, Richard Thompson Ford, *Capitalize on Race and Invest in Justice*, 126 HARV. L. REV. F. 252 (2013).

91. *See, e.g.*, Tracy M. Clements, *Prostitution and the American Health Care System: Denying Access to a Group of Women in Need*, 11 BERKELEY WOMEN'S L.J. 49, 53–57 (1996); Jody Freeman, *The Feminist Debate Over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, 5 BERKELEY WOMEN'S L.J. 75, 89–90 (1990).

is not ideal, prostitution is going to take place. While prostitution may be ideally undesirable, legalization is second best—if it is going to happen, prostitutes are going to be better served by commodifying their bodies under the law and its protection as opposed to operating in its shadows. Opponents retort that the harm from commodification of the human body outweighs its benefits because prostitution denigrates both the dignity of prostitutes and the dignity of all women. In addition, they argue that prostitution is a poor banner on which to advance autonomy and freewill because it is only chosen under conditions of economic and cultural duress, suggesting that instead of legalization the state ought to improve the economic conditions that compel women to resort to prostitution.[92]

Capital analysis sheds additional light on this discourse. Prostitutes exchange use of their body for relatively little short-term economic capital, without receiving social and cultural capital or any prospect for long-term or future economic capital. Moreover, the exchange endows prostitutes with negative social and cultural capital: it may surround them with destructive, criminal relationships, diminish their self-esteem, and deny them the opportunity to develop skills and interests outside of prostitution. In an ideal world, prostitution would not occur. In our nonideal world, however, legalization provides higher economic capital for prostitutes in the form of higher net earnings (e.g., owing a tax liability rather than exposure to an abusive pimp), as well as reduced health and safety risks. It also promises the possibility of higher social and cultural capital: legalization may reduce negative stereotypes and low self-esteem and at least diminish exposure to destructive harmful relationships if not access to more positive relationships.

Capital discourse thus reveals several insights about commodificaiton. First, deference to autonomy suggests that individuals may commodify their property if they so desire; however, they ought to do so only if informed of the harm to themselves and to others from the loss of dignity. Call this condition *capital transparency*, requiring that capital exchanges be informed both with regard to the exchanging individuals or institutions and to related and affected third parties.

Second, while an important value, autonomy is not the only value at stake. Commodification transactions may inflict great harm on the trading parties or on third parties or may be inherently unfair, in which case they ought to be highly regulated or even prohibited. Consider the so-called market for babies. Trading partners may wish to exchange a baby for economic capital and invoke their autonomy interest in being permitted to do so. However, they are met with society's legitimate interest in protecting children's best interests and ensuring the fairness of the exchange process, resulting in a heavily regulated adoption process rather than an

92. *See, e.g.*, Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47, 106–07 (1992). *See generally* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

outright marketplace for babies.[93] Call this the *capital boundary* constraint, which prohibits inherently unjust exchanges or trades that cause significant harm to the parties and to third parties.

Third, even when the capital boundary constraint does not prohibit exchanges outright, commodification requires close scrutiny of the conditions under which exchanges take place, with an eye toward duress conditions. Autonomy considerations hardly can be advanced compellingly when parties to the exchange have no viable alternatives. In particular, consider second-best arguments in favor of commodification: even if legalized commodification in fact results in a superior exchange—one in which vulnerable trading parties may receive more economic, social, cultural, and identity capital for the commodity they give away—commodification must also entail and the aspiration of building toward first-best outcomes. Call this the *capital infrastructure* condition. In the case of prostitution, for example, capital infrastructure means that even if legalization is permitted in the short run, society must work toward improving economic conditions for all to reduce the conditions of economic duress that drive individuals to commodify their own bodies.

III. A CAPITAL THEORY OF BIGLAW

Using capital terminology, the Tournament Theory model can be described as one in which associates and law firms exchange labor for capital: associates' billable hours are labor for which firms offer three types of capital: economic capital—a salary and deferred compensation in the form of promotion to the partnership; cultural capital—training; and social capital—mentoring. A capital theory of BigLaw, however, reveals the limited and partial scope of Tournament Theory, describing the exchange more broadly as one in which associates trade labor and various forms of capital for various forms of capital.

Contrary to the insights of Tournament Theory, associates offer not only their labor but also their cultural capital, such as their college and law school credentials, extracurricular activities and hobbies, and cultural competence.[94] BigLaw not only relies on the cultural capital of law students to make its hiring decisions, it further commodifies the cultural capital of its lawyers to derive value from it, displaying and using the credentials to attract clients, recruit law students and lawyers laterally, and to build its own reputation. Similarly, associates trade on their social capital, such as their relationships and networks, allowing law firms to make more informed hiring decisions and to utilize the capital vis-à-vis clients and other lawyers, for example, by using the alumni networks of its attorneys to recruit talent to the firm.

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93. *Compare* Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978), *with* Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979).

94. More accurately, associates thus commodify both their cultural and symbolic capital. *See supra* note 42.

Moreover, associates also allow law firms to commodify aspects of their personal identity, including their gender and racial identity. Enhanced diversity is a valuable asset that BigLaw pursues as well as cultivates.[95] The hiring of a Latina associate, for example, is valuable for the firm: it gets to count the associate toward its gender and racial diversity numbers, data it collects and reports. It gets to display the associate's hiring publicly, to other lawyers at the firm, potential recruits, its competitors, clients, and the legal profession, deriving further value from the exchange. And it gets to send a credible cultural message—"we are not a racist institution!"—both internally to its own lawyers and externally to potential recruits and clients. The law firm derives all this value by hiring the associate, strategically assigning her work with clients who value diversity, asking her to join its diversity and hiring committees, and prominently displaying her image on its website.[96]

In return, in addition to giving associates short-term economic capital, i.e., a salary, law firms also provide associates with social and cultural capital, a shot at a lot more economic capital, and even identity capital. First, associates receive social capital in the form of mentoring from the firm's senior associates and partners. BigLaw's primary asset is the people who work for it, and it attempts to recruit and retain the best lawyers available to remain competitive and retain its elite professional status. Upon joining the firm, associates gain access to these prized individuals, who become available to mentor the firm's next generation. Of course, ample literature documents the increased competition experienced by large law firms and the corresponding cultural transformation that makes their lawyers less willing and able to mentor junior associates.[97] Nonetheless, associates do find mentors at BigLaw, a significant social capital asset.[98]

Moreover, BigLaw lends and allows associates (and partners) access to valuable relationships, to its high achievers and their networks, not only within but also outside of the firm. Firm partners, for example, sit on high profile boards of for-profit and nonprofit organizations, and are well-connected within the profession and with other professionals, connections some may gradually share with interested associates. Next, the firm gradually exposes associates to its social capital, as opposed to the social capital of its individual members, for example, to high status entity clients with whom associates may be able to build relationships that may in term

95. *Cf.* SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUP, FIRMS, SCHOOLS, AND SOCIETIES (2007); 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, 1576 (2004).

96. *See generally* Leong, *supra* note 39. *See also* Stacy L. Hawkins, *Selling Diversity Short: An Essay Responding to Nancy Leong's "Racial Capitalism,"* 40 RUTGERS L. REC. 68 (2013).

97. Fortney, *Soul for Sale*, *supra* note 8, at 281–82; Fortney, *The Billable Hours Derby*, *supra* note 8, at 178.

98. This is not to suggest that all BigLaw lawyers are good mentors. To the extent that some mentors are poor or ineffective, mentorship may constitute negative social capital. *See supra* note 53 and accompanying text.

be leveraged for in-house positions, as well as to its relationships with financial institutions and real estate agencies.

Mentorship is correctly identified in contemporary literature as an important ingredient of lawyers' professional success in and outside BigLaw.[99] Trying to make partner in a large law firm without securing and benefiting from the guidance and power of mentors is ill-advised.[100] Capital analysis reveals that social capital means so much more: an associate (or junior partner) who fails to cultivate mentors or is discouraged or prevented by the firm from securing powerful mentors not only stands a lessor chance of making partner (or getting promoted to equity partner status) but also fails to understand or is prevented from taking advantage of the very bargain she struck with the firm. A constitutive feature of the exchange is the opportunity given to the firm's attorneys to cultivate and build their own social and cultural capital by utilizing the firm's resources. Failure to take advantage of this opportunity deprives oneself of valuable experiences that are inherent in the exchange with BigLaw. It essentially amounts to shortchanging oneself of fundamental aspects (and benefits) of the transaction into which one entered. For example, a senior associate who does not take advantage of the firm's connections to join a board of trustees or become publically active in an area of interest is not only diminishing her chances of making partner but also passing on an opportunity to form valuable and enriching relationships outside of the firm that may generate professional value, as well as equally important personal value and growth. At the same time, failure by the firm to extend all of its lawyers meaningful opportunities to develop their capital violates the very exchange the firm entered into.

Second, associates receive cultural capital from the firm in the form of training, enhanced valuable skills, and credentials.[101] At the firm, associates learn to draft, think, and practice at the highest professional level, honing the skills that set the stage for promotion within the firm or advancement outside of it. To the astute observer, the firm offers valuable lessons in how to serve and interact with the most powerful clients and power brokers.[102] Firms also provide exposure to high status skills and interests that may serve associates well, such as offering tickets to high culture events and high status sports events, sponsoring wine tasting, and providing opportunities to learn to play golf. The mere affiliation with

99. Bryant G. Garth & Joyce Sterling, *Exploring Inequality in the Corporate Law Firm Apprenticeship: Doing the Time, Finding the Love*, 22 GEO. J. LEGAL ETHICS 1361, 1376–77 (2009). Mentorship is equally important for promotion and professional success in business. *See* SHERYL SANDBERG, LEAN IN 66 (2013) ("Mentorship and sponsorship are crucial for career progression."); DAVID A. THOMAS & JOHN J. GABARRO, BREAKING THROUGH: THE MAKING OF MINORITY EXECUTIVES IN CORPORATE AMERICA (1999).

100. Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*, *supra* note 7, at 1609; Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 7.

101. *See generally* Wilkins, *supra* note 84.

102. Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*, *supra* note 7; David B. Wilkins & G. Mitu Gulati, *What Law Students* Think *They Know About Elite Law Firms: Preliminary Results of a Survey of Third Year Law Students*, 69 U. CIN. L. REV. 1213, 1239 (2001).

BigLaw and its credentials opens doors and legitimizes associates' status and professional standing.

As is the case with social capital, failure to cultivate one's cultural capital while at the firm undercuts the value of the transaction between lawyer and firm beyond merely diminishing the prospects of making partner at the firm. The value of the firm's reputation and credentials, as well as the skills one may acquire while practicing within it, may be worth a tremendous amount to one's professional and personal flourishing, irrespective of whether one makes partner and chooses to stay with the firm in the long run. One, for example, may develop enriching interests or develop people skills that may be pursued outside of the professional realm. Failure to acquire and cultivate cultural capital while at the firm cheats firm lawyers out of the very opportunities that are an integral part of the exchange they have agreed to. But, of course, firm lawyers only can take advantage of opportunities actually afforded them. To the extent that the firm fails to offer all of its lawyers meaningful opportunities to cultivate their cultural capital, it is breaching the terms of its capital exchange.

Third, associates receive a shot at enhanced long-term economic value, either in the form of a partnership[103] or other leveraged positions outside of the firm, such as coveted in-house positions.[104] Finally, to the extent that BigLaw still consists of predominantly masculine white institutions,[105] as part of the exchange they provide associates and partners with identity capital. Large law firms are well-endowed with and derive benefits from their gender and racial identity: they are presumed to be competent, efficient, and possess a high level of expertise well worth their high fees.[106] A lawyer hired by the firm benefits from these perceptions and the positive stereotypes associated with them.[107]

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103. However, the advent of salaried partner positions and the proliferation of partnership tracks somewhat diminishes the value and status of BigLaw partnership. *See generally* Robert W. Hillman, *Law, Culture, and the Lore of Partnership: Of Entrepreneurs, Accountability, and the Evolving Status of Partners*, 40 WAKE FOREST L. REV. 793 (2005); Douglas R. Richmond, *The Partnership Paradigm and Law Firm Non-Equity Partners*, 58 U. KAN. L. REV. 507 (2010); Ian J. Silverbrand, Note, *Modified Partnership Structures and Their Effects on Associate Satisfaction*, 21 GEO. J. LEGAL ETHICS 165 (2008).

104. *See* Eli Wald, *In-House Myths*, 2012 WIS. L. REV. 407. *But see* Larry Ribstein, *Delawyering the Corporation*, 2012 WIS. L. REV. 305.

105. *See* Wald, *Rise and Fall*, *supra* note 82, at 1806–27; Eli Wald, *The Other Legal Profession and the Orthodox View of the Bar: The Rise of Colorado's Elite Law Firms*, 80 U. COLO. L. REV. 605, 608 (2009). *See generally* Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709 (1993); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425 (2014).

106. *See generally* PRESUMED INCOMPETENT, *supra* note 32.

107. Ironically, a lawyer afflicted by negative gender and racial stereotypes may derive higher identity capital from associating with an elite white institution compared to a white male attorney who, because he is often presumed to be competent and hardworking, may derive low marginal identity capital from being employed by an elite white institution. For example, a client who may otherwise presume incompetence when dealing with a Latina attorney may not harbor such bias if the attorney is associated with an elite masculine white institution because the client may instead presume that all of the firm's lawyers are competent.

Capital analysis of the exchange between BigLaw, its partners, and its associates corrects for a significant omission of Tournament Theory. The tournament model impliedly assumed that the rules of the tournament, that is, how to compete in it—how to be a successful lawyer at a large law firm—were obvious and meritocratic. It led scholars adhering to it to assume that BigLaw institutional discrimination, if any, was nothing more than a reflection of external conditions in American society over which large law firms had little to no control. First generation critical scholars have shown that the tournament rules were neither obvious to all nor solely meritocratic, but they failed to specifically document how BigLaw's policies, procedures, and culture cause, rather than simply reflect, bias. Capital analysis, in contrast, provides the missing insights about the rules of the tournament and their consequences.

Success at BigLaw requires more than hard work and meritocracy. To be sure, success certainly requires hard work—i.e., labor as well as merit—to develop excellent skills as a lawyer and as a business developer. But success at BigLaw also requires the development and utilization of social, cultural, and identity capital. Winning the tournaments of lawyers—both as an associate competing for partnership and, increasingly, as a salary partner competing for equity status—requires cultivating and deploying networks of relationships, a sophisticated appreciation of the operation and culture of the firm and its power dynamics, and a willingness to take advantage of facets of one's personal identity. In short, success at BigLaw is a function of hard work, merit, and capital.

Indeed, the relationship between meritocracy and capital is a complex one. On the one hand, capital can help build merit when an associate uses her skills, training, and mentorship to become a better attorney. On the other hand, capital may also be misrecognized as merit, e.g., when a partner confuses an associate's nuanced understanding of the culture of the firm or her connections as expertise. As a result, positive capital helps propel firm lawyers within the firm whereas negative capital undermines success.[108]

To make matters even more complicated, certain qualities of capital make it hard to distinguish from merit. First, different lawyers and law firms will have capital in varying forms and amounts, and these different capital endowments significantly impact career prospects at BigLaw. The point, to be clear, is not merely that some lawyers will have more capital than others. Rather, varying capital endowments impact performance and its perception at BigLaw.

Consider an incoming associate whose social capital endowment includes having BigLaw lawyers in his networks. The associate may leverage his social capital to cultivate cultural capital assets—specifically, a sophisticated and nuanced understanding of the workings of BigLaw in advance of and while working at the firm: how to help secure better and high quality assignments, how to interact with partners, senior associates and staff at the firm, how to read subtle messages and meet informal

108. *See supra* note 45.

expectations, and how to carry oneself consistent with firm culture by anticipating and addressing unspoken prevailing stereotypes. In turn, such cultural capital assets allow the associate to actually perform better and visibly be perceived as performing better than his counterparts.

BigLaw ought to be keenly aware of the varying capital endowments of its attorneys. While it has long relied on capital endowments to recruit and retain lawyers as well as attract clients, and while it has ample incentives to continue to take advantage of its lawyers' capital, it also has an incentive to ensure that it recruits and retains the best, that is, the most meritorious lawyers and that it does not misrecognize capital for merit. Put differently, that different lawyers possess varying capital endowments is natural. BigLaw ought to record and track its lawyers' capital endowments so it can better support them, take advantage of them, and avoid misrecognizing them as merit.[109]

Second, acquiring positive capital, dispensing with negative capital, and generally deploying capital may be costly for firm lawyers, and the costs of utilizing capital may vary. Sometimes, the costs of deploying capital are negligible. A law school graduate applying for a BigLaw associate position incurs no cost utilizing her cultural and symbolic capital assets by listing her law school, grade point average, and class rank on her resume. A lawyer looking to move laterally and who is taking advantage of her professional networks to identify and pursue appropriate opportunities is likely to incur relatively low costs taking advantage of her social capital assets, for example, by having to return the courtesy at some point in the future. White male associates may incur no costs at all utilizing their identity capital to benefit from the positive racial and gender stereotypes of competence, intelligence, and loyalty to the firm and its clients.

At other times, however, using capital may be quite costly, even risky. Following Wilkins and Gulati,[110] as well as Gulati and Carbado,[111] consider a black associate who is trying to dispense with negative identity capital stemming from negative racial stereotypes. Determined to prove his merit and excellence, the associate may assume risk by taking on a high profile assignment he is not quite ready to handle. Or a female associate battling negative identity capital stemming from negative gender stereotypes of divided loyalties may overextend herself in the hopes of proving her loyalty to the firm.

Or consider the varying degrees of risk incurred by different associates seeking to cultivate social capital. On the one hand, a Caucasian male associate likely incurs relatively little risk approaching what he perceives to be potential mentors among the many Caucasian male partners at the firm, or a Jewish lawyer is likely treading on safe ground seeking the mentorship

109. To an extent, BigLaw already tracks capital, for example, in recording and publicizing its lawyers' educational credentials, membership in professional associations, and sometimes nonlegal hobbies and skills.

110. *See generally* Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 7.

111. *See generally* Carbado & Gulati, *supra* note 1.

of Jewish partners by implicitly trading on her ethno-religious identity capital. On the other hand, a Caucasian female associate who approaches a female partner seeking work and mentorship hoping to take advantage of her gender identity, or a black male associate who similarly approaches a black partner, is likely to incur higher degrees of risk. The female partner may resent the assumption that she ought to mentor a female associate and may believe that the female associate ought to seek male partners as she herself had to do years before.[112] Or the black partner may not be the best mentor for the black associate, for example, because he lacks power and influence within the firm.[113] Moreover, even if the female and black partners, respectively, are willing and able to mentor the associates, such acquisition of social capital may simultaneously entail acquiring negative identity capital deriving from gender and racial stereotypes regarding why these partners were willing to mentor the associates.

The point is that BigLaw should not rush to judgments regarding its lawyers' ability to cultivate and deploy their capital. While the development and use of capital by lawyers is imperative for their and BigLaw's success, different lawyers may reasonably be hesitant to deploy their capital endowments and may incur varying costs in doing so. Accordingly, BigLaw ought not to quickly draw negative inferences or penalize lawyers for failure to cultivate and utilize capital. Instead, it ought to develop policies that encourage capital buildup and decrease the costs of deploying capital within the firm.

Finally, different lawyers may have varying amounts of control over the use and value of their capital endowments. Partner A who is asked by Partner B to help facilitate B's lateral move in-house at Corporation X can choose whether to call X's General Counsel and controls what and how to recommend the colleague. As importantly, not only does A control the amount of capital he is willing to spend, he also controls the value of the social capital exchanged by assessing the qualifications of B by gauging the response of the General Counsel. Consider in contrast a diverse associate who is asked to serve on a diversity committee. The associate may have a say over the number of hours she is going to serve on the committee, but she will have no control over the value of her identity capital used because she has no control over how the firm values diversity or how it values her participation and service on the committee.[114] Moreover, different lawyers may have varying amounts of control over their capital. For example, identity capital is the value one derives from one's identity, including when one agrees to trade identity capital to the firm for some other forms of

112. *See* Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 354–55 (1995) (stating that some women partners experience a "mentoring ambivalence related more to generational issues—questions about whether women of the younger generation in the firms should be nurtured in ways that female partners were not as they were building their own careers").

113. *See generally* NELSON, *supra* note 9; David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. FOR STUDY LEGAL ETHICS 15 (1999).

114. *See* Wilkins, *supra* note 95, at 1587.

capital. But, importantly, a law firm may be deriving value from one's identity even when the lawyer in question derives no value at all, either because the exchange is involuntary or when it is unfair. A case in point is the posting of a minority lawyer's image on the firm's website. Unless the firm exchanges something of value for the usage, it is benefiting from the commodification of lawyer's identity capital while the lawyer derives no value from it.

As was the case with the varying costs of cultivating and deploying various forms of capital, BigLaw ought to put in place policies and procedures that are sensitive to the varying degrees of control its lawyers exercise over the use and value of their forms of capital and avoid erroneous judgments regarding the use of capital by different lawyers.

IV. A NEW CAPITAL ACCOUNT OF UNDERREPRESENTATION IN BIGLAW

Is the complex capital exchange, however, inherently unfair to women and minority associates (and partners), at least compared and contrasted with the exchange BigLaw makes with white male associates?

A. Capital and Underrepresentation in BigLaw

Unlike Tournament Theory, capital analysis can make sense of BigLaw's hiring, promotion, and retention policies. Tournament Theory assumes that BigLaw would recruit and then promote the most talented entry-level associates irrespective of their personal identity. Therefore, it cannot explain the de facto affirmative action recruiting policies of BigLaw. And it concludes either that external conditions beyond BigLaw's control cause the underrepresentation of women and minority lawyers in positions of power and influence, or that these lawyers are not as meritorious as the tournament's winners.

To begin with, capital analysis explains why BigLaw actively recruits women and minority associates. Diversity is a value BigLaw pursues,[115] and it can reap benefits from the gender and racial identity of its lawyers by leveraging their identity capital. Of course, diversity is not the only goal BigLaw pursues. It seeks diverse candidates with gender and racial identities as well as meritorious candidates to meet its goals of providing quality service and maintaining its elite professional status. Yet BigLaw's appetite for identity capital explains why it actively seeks to recruit women and minority lawyers.

After recruiting diverse candidates, BigLaw has an incentive to retain its diverse lawyers so it can—in addition to benefiting from their work product—continue to take advantage of their gender and racial identities. Importantly, however, BigLaw faces two countervailing forces that undermine its diversity efforts and result in the underrepresentation of women and minority lawyers in its partnership ranks.

115. Wilkins, s*upra* note 95.

First, because distinguishing merit from capital is both costly and hard to do, BigLaw tends to overplay the role of the former and downplay the latter, without attempting to avoid misrecognizing the two. As a result, firm lawyers who are well-endowed with capital systematically outperform those with less capital, both because they use their enhanced capital to become more meritorious and because their capital is misrecognized as merit. Because white male lawyers tend to possess significantly greater endowments of social, cultural, and identity capital compared with their women and minority counterparts, they end up disproportionately represented in the partnership ranks.

For example, to the extent that some BigLaw diverse candidates possess negative identity capital—e.g., gender and racial identities rendered negative by prevailing stereotypes—they underperform (negative capital undermines merit) and are unfairly perceived as underperforming even when they are not (negative capital is misrecognized as lack of merit). This capital impact, in turn, will reduce their opportunities to become better lawyers and to cultivate their social capital (mentoring) and cultural capital (training). Firm lawyers endowed with negative capital thus face an uphill retention and promotion battle at BigLaw.[116]

Second, and worse, the very processes by which BigLaw extracts value from its lawyers' gender and racial identities tend to undermine the success of women and minority lawyers at the firm. For example, by overburdening a Latina associate with service on the diversity and hiring committees, by expecting her to actively participate in firm events, and even by publicly displaying her image on its website, the firm distracts her and undermines her performance contrasted with her white male counterparts. Hours that the Latina associate spends serving on committees and socializing, so she can be paraded and displayed by the firm, are hours that she does not bill—hours that white males can spend billing and getting ahead of her. Indeed, even if a typical white male associate does not get ahead by billing more hours, he is able to spend overall fewer hours at firm related events, allowing him to relax and replenish his mental faculties at home, thereby giving him a better shot at outperforming the Latina associate when they both bill hours. In the words of Carbado and Gulati, the Latina associate ends up working her identity longer and harder than her white male counterpart, with a very disturbing and real consequence—she falls behind the competition and may have a diminished chance at securing the richness of partnership down the road.[117] And, as Nancy Leong points out, the Latina associate is not even offered higher pay for the extra service work she does.[118]

Capital analysis thus suggests that the labor-capital exchange between BigLaw and its lawyers will tend to systematically disfavor women and minority lawyers both because the former tend to have lower endowments

116. *See supra* note 45.

117. Carbado & Gulati, *supra* note 1, at 1269–70.

118. Nancy Leong, *Reflections on Racial Capitalism*, 127 HARV. L. REV. F. 32, 35–36 (2013).

of positive capital (or may even possess negative capital) and because firms' own policies of extracting identity capital from diverse lawyers undermine their prospects of retention and promotion.

A counterargument might be that everybody works their identity, such that while diverse candidates experience an imposition when BigLaw commodifies their identity capital, other lawyers will experience a similar hardship when firms commodify their respective identities. For example, Caucasian female associates who are mothers of young children are expected to display loyalty to the firm and its clients by being available 24/7. At the same time, they are celebrated and featured by the firm as proof that the firm is sensitive to work-life concerns and often burdened with diversity and recruitment service expectations.[119] Associates who hail from lower socioeconomic status or who are graduates of lower ranked law schools may experience negative stereotypes and expectations that they conform to the culture of the firm, while at the same time are used to demonstrate the firm's commitment to egalitarianism and meritocracy.[120]

To be sure, even white male associates work their identity. Not only may they be called upon to demonstrate to other white male associates that the firm is the kind of place whereby notwithstanding its commitment to diversity, white males are welcomed and can succeed, but they are also used to show clients that the firm has the people power to serve their needs 24/7.[121] More fundamentally, while male associates work their identity by benefiting from positive gender and racial stereotyping. They are often presumed to be competent and committed to the firm, even if in reality some may prefer to spend more time with their families. Indeed, Caucasian males even benefit (i.e., "what a committed father," "what a supportive husband") when they seek the very work-life accommodations that trigger negative reactions for their female counterparts ("her commitment to her family and children undermines her loyalty to the firm").

The point, as Carbado and Gulati explain, is that while everybody works their identity, some systematically work harder; some can work their identities to their advantage, and others must work their identities simply to overcome negative stereotypes.[122] That everybody works their identity is therefore not a reassuring observation; rather, it is a reflection of the very inequalities and hurdles which BigLaw may not uniquely inflict but which it certainly features. The Latina associate, it would seem, is at an inherent disadvantage compared to her white male counterpart: while she exchanges

119. On the "mommy penalty" women lawyers experience, see, for example, Claudine V. Pease-Wingenter, *Halting the Profession's Female Brain Drain While Increasing the Provision of Legal Services to the Poor: A Proposal to Revamp and Expand Emeritus Attorney Programs*, 37 OKLA. CITY U. L. REV. 433, 444–50 (2012).

120. David Wilkins et al., *Urban Law School Graduates in Large Law Firms*, 36 SW. U. L. REV. 433 (2007); *see also* Lisa R. Pruitt, *Acting White? Or Acting Affluent? A Book Review of Carbado & Gulati's* Acting White? Rethinking Race in 'Post-Racial' America (UC Davis Legal Studies Research Paper No. 381, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2436188.

121. Wald, *supra* note 34.

122. Carbado & Gulati, *supra* note 1, at 1271.

labor for short-term economic capital like all other associates, she exchanges greater amounts of identity capital and receives less in return in terms of social and cultural capital. Fundamentally then, the core root of minority underrepresentation in positions of power and influence at BigLaw appears to boil down to this: while white male associates essentially get to exchange their labor for relatively low economic capital in the present (a salary) and a shot at cultural, social, and high economic capital in the future, female and minority associates exchange their labor as well as identity capital for relatively low economic capital in the present.

B. The Capital Obligation and the Capital Opportunity

If the underrepresentation of women and minority lawyers in the partnership ranks of BigLaw were solely the result of different firm lawyers possessing different endowments of social, cultural, and identity capital, compounded by the inability of large law firms to easily distinguish merit from capital, BigLaw might have been somewhat justified in claiming it is not responsible for remedying the situation.

However, because the underrepresentation of women and minority lawyers in positions of power and influence is also the result of BigLaw's commodificaiton of these lawyers' (indeed, of all of its lawyers') identity capital, BigLaw has an obligation to remedy the problem. To commodify the gender and racial identity of its lawyers and to derive benefit from it only to disclaim responsibility for remedying the underrepresentation and inequality the commodificaiton causes is inherently unfair and inexcusable. Indeed, such commodificaiton violates the boundary constraint on capital exchanges and renders BigLaw culpable. As long as large law firms engage in exchanges with lawyers and choose to commodify their identity capital, they are obligated to address the consequences of their exchange—the underrepresentation of women and minority lawyers in their partnership ranks—by practicing capital transparency and offering all of their lawyers equal opportunities to build their capital infrastructure.[123]

Worse, failure to practice capital transparency and afford all of its lawyers equal opportunities to cultivate the capital necessary for success constitutes capital exploitation of women and minority lawyers. Consider the following revolving door diversity dynamic at large law firms: BigLaw hires a certain number of entry-level women and minority lawyers but does not offer them meaningful opportunities to acquire social (mentoring) and cultural (training) capital. As a result, women and minority lawyers disproportionally exit BigLaw as junior attorneys, never reaching the ranks of senior associates and partners. Yet, by the time these lawyers leave, a fresh crop of entry-level women and minority lawyers are hired by BigLaw,

123. Admittedly, BigLaw may escape moral accountability for the underrepresentation of women and minority lawyers within its midst in one of two ways. It can continue to actively trade in the identity capital of women and minority capital while practicing capital transparency and investing in capital infrastructure, or it can stop trading in capital to the detriment of women and minority lawyers by not hiring them. The latter is nothing short of inconceivable, both normatively and practically.

such that at any given point in time large law firms feature ample supply of diversity, if only in their bottom ranks. Such a revolving door diversity dynamic, unintentional as it may be, allows BigLaw to derive value from the capital identity of women and minority lawyers while offering little social and cultural capital in return. In capital analysis terms, such exploitative exchange gravely violates the boundary constraint, that is, basic conditions of fairness.[124]

Fortunately, recent developments in BigLaw's practice render living up to its capital obligation easier than in the past, by turning instances of identity capital commodificaiton into opportunities of social and cultural capital buildup. Increased competitive pressures experienced by large law firms' attorneys—both externally by clients who vocally refuse to pay for training and mentoring[125] and internally by partners who feel that they cannot afford to spend the time doing it—reduce opportunities for training and mentoring at BigLaw for associates.[126] In this context, attendance at firmwide events and service on various committees, diversity and hiring committees included, may provide associates valuable opportunities to form relationships with powerful partners at the firm—the very prized networking windows and mentoring moments that are otherwise a diminished commodity at BigLaw.[127] Service on the hiring committee, for example, may allow associates to get to know the powerful hiring partner as well as department and practice group heads, and service on the diversity committee may provide associates the opportunity to form relationships with firm leaders, such as members of the management committee. Such service impositions may also provide the Latina associate with opportunities to get to know the firm culture better, that is, allowing her to acquire and cultivate valuable cultural capital. In short, service commitments, which constitute an imposition on an associate's time, are at the same time increasingly rare opportunities to cultivate social and cultural capital within the firm.

Moreover, BigLaw's commitment to diversity—the very driver that causes firms to commodify the Latina associate's gender and racial identity and at times results in negative stereotypes while with the firm—may provide her with enhanced opportunities to obtain and leverage social and cultural capital. If BigLaw practiced capital transparency, the Latina associate may be able to demand and negotiate for marginally better terms of employment when hired, and she may be able to take a visible lead when burdened with service commitments (for example, while playing a leadership role in a diversity event).

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124. I am indebted to Devon Carbado for suggesting this argument.

125. Wilkins, *supra* note 9, at 2108. *See generally* Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749.

126. Fortney, *Soul for Sale*, *supra* note 8, at 281–82. *See generally* MILTON C. REGAN, JR., EAT WHAT YOU KILL (2006).

127. Russell G. Pearce & Eli Wald, *Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles*, 2012 MICH. ST. L. REV. 513.

This analysis by no means is meant to deny the imposition on and harm to diverse lawyers when BigLaw commodifies their gender and racial identities. Yet at the same time, the processes and policies by which BigLaw extracts identity capital from its diverse lawyers provide them with increasingly rare opportunities to cultivate their social capital by building mentorship relationships with powerful partners. These relationships allow them to build their cultural capital, to receive training from powerful partners, and to better understand the firm's culture and inner workings. At the same time, these relationship help to dispose of negative identity capital stemming from negative gender and racial stereotypes by disproving them with excellent service.

Yet the opportunities for diverse lawyers to turn firm policies that extract their identity capital into arenas in which to build positive social and cultural capital are fraught with risk.[128] Service on a diversity or a hiring committee, for example, is less than ideal terrain on which to build relationships with powerful partners, some of whom may not eagerly serve on it, or do so dismissively without any intention to use the joint service with diverse lawyers as a mentorship platform. Arguably, these are exactly the kinds of committees on which women and minority lawyers are likely to face powerful incentives to work their identities so as not to be perceived by powerful partners as troublemakers. Accordingly, to make capital opportunities viable, BigLaw must meet two conditions: It needs to better understand the meaning and qualities of firm capital and, in particular, of the capital of its lawyers. It also needs to institute capital policies and procedures that increase the likelihood of equality within its ranks. Otherwise, BigLaw risks systematically engaging in exploitative capital exchanges that allow it to derive value from the gender and racial identities of its lawyers while depriving and denying its lawyers the fair value of the bargains.

V. CAPITAL AND EQUALITY AT BIGLAW

BigLaw may continue to commodify the identity capital of its lawyers as part of its capital exchange with them, as long as it practices capital transparency, respects the capital boundary constraint, and invests in building capital infrastructure for all of its lawyers. Because its commodification of identity capital contributes to inequity within its ranks, BigLaw is accountable and must remedy the underrepresentation of women and minority lawyers. This part explores transparent and fair policies and procedures meant to reduce the underrepresentation of diverse lawyers at BigLaw. But first, it addresses a preliminary objection that BigLaw ought not engage or promote capital trades because such commodification contradicts the legal profession's commitment to pursuing a universal professional identity

128. Wald, *supra* note 11, at 1126–27; Wilkins, *supra* note 95, at 1559.

A. Identity Capital and Lawyers' Professional Identity

The American Bar Association Model Rules of Professional Conduct and their predecessors have long advocated a one-size-fits-all professional identity for lawyers, lending support to capital opponents who reject the streamlining of trades in capital identity.[129] In particular, the Rules aspire to promote a universal identity that is explicitly professional rather than personal. All lawyers are expected to be competent, diligent, and loyal to clients, irrespective of their personal identity. Indeed, one's identity based on gender, race, class, sexual orientation, et cetera is irrelevant under the Rules in that it is never explicitly acknowledged and hardly even implicitly recognized.[130] The Rules' universal, professional, one-size-fits-all approach has an intuitive appeal. It celebrates merit (competence, diligence, and loyalty) above all else and promotes equality by treating all lawyers similarly, irrespective of "irrelevant" personal traits and considerations. Indeed, for the Rules to acknowledge and permit differential treatment of lawyers based on facets of their personal identity smacks of dreaded explicit discrimination.[131]

But, of course, the Rules are not truly divorced from so-called "irrelevant" non-merit value judgments. They are historically grounded in and culturally embedded in the identity of the legal profession's founding members—white men. They continue to be interpreted from the perspective of the profession's most dominant members—white men.[132] Moreover, even if ideal Rules could devise a regulatory framework that is in some meaningful ways truly universal—and what that would mean is a separate complex and controversial question—lawyers are increasingly diverse in ways that could and should inform their professional identity and exercise of professional judgment. Put differently, even if a particular brand of universal professionalism were possible, it would, to quote Wilkins, at the same time be a form of "bleached-out" professionalism, ignoring important, even constitutive, aspects of lawyers' personal identity.[133] Universal professionalism, with its commitment to competence, diligence, and loyalty, captures important, indeed, constitutive commitments of lawyers *qua* lawyers and plays an indispensable role in the definition of what it means to be a lawyer. But it does not start and end the professionalism conversation, nor does it negate the fact that lawyers' personal identities shape their professional identities.

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129. *See supra* note 87 and accompanying text.

130. Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 232 (2014); David B. Wilkins, *Everyday Practice* Is *the Troubling Case: Confronting Context in Legal Ethics*, *in* EVERYDAY PRACTICES AND TROUBLE CASES 68, 71–72 (Austin Sarat et al. eds., 1998).

131. David B. Wilkins, *Beyond "Bleached Out" Professionalism: Defining Professional Responsibility for Real Professionals*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 207, 218–25, 230–34 (Deborah L. Rhode ed., 2000).

132. *See* Wald, *supra* note 130, at 251; *see also* Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085, 3113 (2013).

133. Wilkins, *supra* note 131, at 218–25, 230–34.

When the Latina associate joins a large law firm, certain aspects of the commodified exchange between them are not inevitable. The firm need not, of course, prominently feature the associate on its website and it need not expect her to disproportionately serve on various committees or work for certain clients. Yet, other aspects of the commodification are much harder to avoid. As soon as the Latina associate joins the firm, certain assumptions will be made by various actors, and some stereotypes will be triggered: lawyers and clients will make assumptions about why the associate was hired, her competence and performance, and the law firm's commitment to diversity and its culture.

In an ideal world, perhaps such inevitable commodification might be avoided: the Latina associate would not experience negative gender and racial stereotypes, and her white male counterparts would not benefit from positive gender and racial stereotypes. But even in such a world, the Latina associate would still be more than a generic universal associate. In addition to being a competent, diligent, and loyal lawyer, she also brings to the table her background, upbringing, and cultural values. She is a woman and a Latina, and these features of her identity inform her professional identity as a lawyer in ways that are inevitable.[134]

BigLaw's trading in capital identity cannot and should not be avoided. In fact, ignoring implicit capital exchanges in a reality in which diverse attorneys tend to possess lower (not to mention negative) capital endowments compared with Caucasian male lawyers and in which capital both helps build merit and professional success and gets misrecognized for merit is irresponsible and unfair. Instead, BigLaw must explicitly recognize the role of capital in exchanges with its lawyers and in its culture and institute policies and procedures that ensure an equal playing field for all of its lawyers.

B. Using Capital to Enhance Equality at BigLaw

The underrepresentation of women and minority lawyers in positions of power and influence at BigLaw is in part explained by their relatively low (or even negative) endowments of capital compared with their Caucasian male counterparts, by the tendency of BigLaw to misrecognize capital with merit, and by its adoption of purportedly universal policies and procedures of retention and promotion that implicitly build on lawyers' capital endowments and therefore disproportionately disfavor women and minority attorneys. To level the playing field, namely by providing all its attorneys with equal opportunities to acquire and deploy their capital and thus compete for retention and promotion, BigLaw must develop explicit capital policies.

In particular, turning impositions and hurdles disproportionately experienced by women and lawyers of color into opportunities to cultivate social and cultural capital depends in part on both the lawyers' and firm's

134. *See generally* MARIA CHAVEZ, EVERYDAY INJUSTICE: LATINO PROFESSIONALS AND RACISM (2011).

willingness to treat them as such—these are opportunities to acquire capital, not guarantees of it. An individual partner would have to appreciate the role capital plays in BigLaw's tournament of lawyers and invest valuable time in mentoring and training firm lawyers assigned to him or her. An individual associate would have to seize the opportunities and make the most of them: work hard to showcase her commitment to the firm, its clients, and the task at hand; go above and beyond the call of duty, notwithstanding the real imposition on billable hours; and use the service platform to actively pursue relationships with powerful partners as mentors. Other firm lawyers, for example, colleagues of the associate benefiting from the mentorship and training, will have to support the mentorship. BigLaw, for its part, would have to staff its hiring and diversity committees with powerful partners and stress to them the institutional value their service, including interacting with the associates who serve on them. And it must establish policies that visibly identify and credibly acknowledge—even reward—service as a valuable aspect of BigLaw practice on par with the billable hour.

1. Capital Transparency

The capital boundary constraint, that is, basic fairness considerations inherent to capital transactions, requires transparency, such that parties to identity capital exchanges are aware of the exchange and its impact on themselves and others. But unlike some explicit exchanges, capitalizing identity often does not entail a conscious transaction and its consequences are sometimes unclear. To be sure, sometimes the exchange is relatively obvious. When the Ku Klux Klan retained Mr. Griffin to represent it in a First Amendment case, there could be little doubt that the representation entailed a commodification of Mr. Griffin's racial identity, and that Mr. Griffin understood or should have reasonably understood the nature of the exchange.[135] And when Kobe Bryant, a superstar black male basketball player, retained Pamela Mackey, a leading Caucasian female defense attorney, to defend him against rape allegations, the representation commodified Ms. Mackey's gender and racial identity.[136] Yet at other times, for example, when a large law firm hires a Latina associate, the identity commodification exchange may be less apparent. Practicing capital transparency will ensure that BigLaw and its lawyers are aware of the exchange and the consequences it entails.

If law firms are going to hire and promote associates in part because of their gender and racial identity (as they always have), they ought to be honest and transparent about their practices. Of course, BigLaw has long had a history of hiring and promoting based on gender and racial considerations, hiring and promoting near exclusively WASP males and allowing such lawyers to benefit from presumptions of competence and

135. *See generally* Wilkins, *supra* note 79.

136. *See generally* Wald, *supra* note 80; Sandy Graham, *Clearing Kobe: Pamela Mackey Reflects on Court Victory That Riveted Millions*, COLORADOBIZ, May 2005, at 18.

loyalty to the firm and its clients. Yet BigLaw often did so while confusing and misrecognizing social, cultural, and identity capital as merit. Historically, large law firms recruited, based on merit, top-ranked graduates of elite law schools with law review credentials. At the same time, the hiring and promotion were exclusive to those candidates endowed with connections and who also had elite hobbies and spoke additional languages—a misrecognition of merit and capital.[137] Thus, BigLaw was, and still is, commodifying the (male) gender identity and (white) racial identity of its lawyers. Moving forward, law firms must take steps to better monitor the misrecognition of capital as merit because failure to do so favors those who have higher capital endowments. For example, white male lawyers' mistakes are played down and more easily overlooked when these lawyers are endowed with significant social and cultural capital, undermining law firms' commitment to retaining and promoting the best lawyers. Similarly, if law firms are going to continue their practice of recruiting and promoting based in part on capital endowments, they must guard against misrecognizing identity capital as lack of merit.[138] This is not just a question of basic fairness to the Latina associate (and indeed to all firm lawyers) but rather also implicates BigLaw's commitment to meritocracy.

Lack of transparency about capital exchanges, for example, about firms' recruitment of minorities, breeds negative stereotyping and therefore negative identity capital. Absent transparency, when BigLaw actively recruits minority candidates, some of its partners and associates may speculate and make negative assumptions about the competence of the minority lawyers. To the extent that some firm partners and associates may operate under such assumptions, the firm must institute policies and procedures to combat the impact of such negative stereotyping.[139] Being endowed with identity capital that enhances the law firm's diversity profile does not mean, and cannot be allowed to mean, that the Latina associate is less qualified than her counterparts. Instead, BigLaw must transparently explain its reasons for recruiting diverse lawyers and take active steps, after the hiring stage, to ensure fair treatment of all of its lawyers, and, in particular, that no lawyers suffer from negative stereotyping, disproportionately endowing its minority lawyers with negative capital.

Of course, the law firm must ensure that it is living up to its part of the exchange. Specifically, it must put in place policies and procedures that would provide the associate with the promised opportunities to cultivate her social and cultural capital. For example, if the law firm is going to burden the associate with service on the diversity and hiring committees, expect the associate to visibly attend functions and conform to its dominant culture, and display the associate's image on its website to demonstrate its

137. Wald, *Rise and Fall*, *supra* note 82, at 1826–27. *See generally* JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON (2005).

138. Bourdieu, *supra* note 41.

139. Carbado et al., *supra* note 40.

commitment to diversity, it must at the same time make sure that the associate's commitments and service to the firm are recognized and valued, and it must ensure that powerful partners serve on the diversity and hiring committees and that they are willing to invest time and effort in mentoring and training the associate.

For her part, the Latina associate must be made aware of the exchange BigLaw is offering: economic capital, opportunities to cultivate her social and cultural capital, as well as benefitting from the law firm's identity capital, in return for the Latina associate's labor and identity capital. Once the terms of the exchange become transparent, the Latina associate would then be able to consider the dignity harm to her personal identity—as well as to minority communities'—resulting from the commodification of her identity.

Indeed, transparency would not only allow women and minority lawyers to trade identity capital on an informed basis, it has the potential to empower them to refuse to do so. Assume that the Latina associate does not wish to trade her racial and gender capital. She does not want to be featured in the law firm's diversity publications and events and does not want to serve on its diversity and recruitment committees. Absent transparency, how will the Latina associate go about communicating her preferences? Capital transparency might provide the language and the context for the Latina associate to express her preferences to the firm.

Moreover, transparency is a necessary step toward equalizing the playing field—the tournament—for all BigLaw lawyers and, specifically, breaking away from dynamics that render gender and racial inequality a problem only for women and minority attorneys. Absent transparency, a powerful white male partner might come to think about diversity as a women's issue, such that, for example, when a prospective female associate asks about gender realities at the firm, he might respond: "I do not know, but I'll put you in touch with my partner Jane Smith who can better address the issue." Or he might feel justified in refusing to personally commit significant time to serving on the diversity committee or women's committee on the ground that gender diversity is not a priority for him. Capital transparency establishes, in contrast, that diversity is a firm issue and a firmwide commitment. If the firm trades in identity capital and benefits from it, it is the duty of all of its members to see that the firm lives up to its part of the capital exchange.

Similarly, absent transparency, a white male associate might be tempted to think about service on the recruitment committee or attending a diversity event as a low priority that does not directly involve and affect him. And he might even come to resent diversity policies and procedures, understanding them as unfair to him. Yet transparency serves as a reminder not only that the firm benefits from commodifying identity capital, but also that the white male associate himself benefits from possessing positive identity capital. Viewed from this perspective, diversity policies are not an unfair impediment, but rather a necessary condition to ensure that all firm lawyers compete on equal terms and footing.

In sum, the point here is *not* that BigLaw is responsible for prevalent gender and racial stereotypes in American society, nor is it that BigLaw is responsible for varying endowments of capital among the lawyers it recruits. Rather, it is that BigLaw is responsible for the cultivation and use of capital by its lawyers when it chooses to value and trade in their capital. It is simply unfair for BigLaw to hire diverse lawyers intending to take advantage of their positive identity capital only to ignore their negative identity capital and allow it to undermine their prospects of retention and promotion by, for example, failing to combat negative gender and racial stereotypes among its partners. And it is unfair for BigLaw to allow white male lawyers to benefit from positive identity capital while putting in place policies and procedures that disproportionately impose on women and minorities, while at the same time claiming to be a meritorious institution in which capital is an irrelevant consideration for success.

Admittedly, practicing capital transparency "in a time and age when the American public, especially white Americans, are uncomfortable talking about race,"[140] may be easier said than done. As Angela Onwuachi-Willig points out, "[I]t is much easier to point to non-complaining minorities as rational and discount complaining minorities as ultrasensitive or, as the saying goes, of 'playing the race card.'"[141] Yet the likely discomfort to all parties involved and impacted by capital exchanges notwithstanding, BigLaw must discontinue its misleading and unfair practice of implicit capital exchanges and ensure that all of its lawyers are well informed about the nature and role of capital in their workplace and professional lives.

2. Capital Boundary

The harm resulting from identity commodification depends in part on the conditions of the exchange and its circumstances. The capital boundary restraint requires that identity capital exchanges take place under fair conditions. In the BigLaw context, it suggests that large law firms ought to abandon their long commitment to equal treatment of their lawyers and practice instead equal opportunity, exactly because firm lawyers vastly vary in terms of their capital endowments. Consider the assignment of both office space and work to lawyers at the firm. Equal treatment suggests that office assignments should be solely handled based on subject-matter fit, availability, and seniority. When an office space becomes available, for example, on a litigation floor, it should be assigned to a litigator with seniority and ongoing working relationships with other members of the litigation department. Work assignments must be distributed randomly within departments to ensure equal treatment of all associates within the departments. Any consideration of identity has long been understood to violate equal treatment. And indeed, when explicit discrimination was the

140. Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1914 (2007) (internal citations omitted); *see also* Sharon E. Rush, *Talking About Race and Equality*, 22 U. FLA. J.L. & PUB. POL'Y 417, 418–19 (2011); Ellen Yaroshefsky, *Waiting for the Elevator: Talking About Race*, 27 GEO. J. LEGAL ETHICS 1203 (2014).

141. Onwuachi-Willig, *supra* note 140.

evil fought by large law firms, such equal treatment, or difference blindness, was a necessary and appropriate approach.[142] But equal treatment becomes an impediment to equality in today's practice realities in which implicit bias and varying capital endowments are the cause of inequality.

Office assignments distribute social capital. Physical proximity to partners with power is a relevant consideration in determining who ends up working with these partners. If a law firm's success is determined in part by possession of social capital, and if endowments of social capital vary among firm lawyers, then equality requires ensuring access to social capital and assigning offices in part to benefit firm lawyers who have fewer social capital assets, traditionally women and minorities. Similarly, the assignment of work ought to take into account capital endowments. Savvy firm lawyers, well-endowed with cultural capital, who understand the importance of and actively seek work from powerful partners, already have an advantage vis-à-vis counterparts who possess fewer cultural capital assets. Assigning work randomly pursuant to equal treatment principles will therefore tend to perpetuate unfair capital inequality. Instead, BigLaw should practice equal opportunity and assign work in a manner that provides its lawyers who have fewer cultural capital assets access to its powerful partners.[143]

BigLaw's formal adherence to policies and procedures of equal treatment, purportedly holding all of its lawyers to the same standards of merit and professionalism—for example, the billable hour,[144] demonstrable and visible loyalty to the firm and its clients,[145] and the development of a book of business[146]—is inaccurate and misleading in ways that disproportionately burden and harm women and minority lawyers.[147] Merit and professionalism, at the risk of stating the obvious, are of course constitutive aspects of large law firms' practice. But they are not (and have never been) the only relevant considerations, because capital endowments, including identity capital, have long mattered to BigLaw and continue to matter today, albeit in changing ways. As importantly, merit and professionalism are not (and have never been) divorced from capital (whether social, cultural, or identity). Thus, BigLaw's practice of equal treatment based on merit and professionalism standards that ignores the social, cultural, and identity capital endowments of its lawyers is

142. Pearce, Wald & Ballakrishnen, *supra* note 32.

143. *Id.*

144. Fortney, *The Billable Hours Derby*, *supra* note 8; Stuart L. Pardau, *Bill, Baby, Bill: How the Billable Hour Emerged As the Primary Method of Attorney Fee Generation and Why Early Reports of Its Demise May Be Greatly Exaggerated*, 50 IDAHO L. REV. 1 (2013).

145. Wald, *supra* note 34, at 2272.

146. Lawrence J. Fox, *The End of Partnerships*, 33 FORDHAM URB. L.J. 245, 248 (2005).

147. Ronit Dinovitzer et al., *The Differential Valuation of Women's Work: A New Look at the Gender Gap in Lawyers' Incomes*, 88 SOC. FORCES 819 (2009); Sterling & Reichman, *supra* note 75; Wald, *supra* note 11.

misleading and unfair, in a way that imposes great and disproportionate harm on women and minority lawyers.[148]

Instead, BigLaw ought to develop standards and policies for hiring and promotion, work assignments, office space allocation, measurement of productivity and performance, and business development, as well as an overall culture that embodies equal opportunities for all of its attorneys by utilizing criteria that recognize merit and capital contributions to the firm and that are sensitive to the interplay of merit and capital to avoid measuring the former in terms that disproportionately disfavor women and minority lawyers. For example, capital transparency and capital boundary analysis suggest that BigLaw ought to develop policies and procedures to honestly and accurately evaluate the performance of its lawyers, for example, by replacing bland assessment tools with competency-based performance analyses,[149] rather than relying heavily on billable hours.[150] BigLaw must also recognize the various contributions different lawyers bring to the firm. Expecting diverse candidates to disproportionately serve on the diversity and hiring committees, for example, only meets fairness requirements if BigLaw is willing to recognize the value of this service on terms equal to billable hours. At a minimum, transparency and fairness require that if BigLaw refuses to acknowledge service as the billable hour equal, then it must advise its lawyers accordingly and allow diverse lawyers to make informed decisions as to whether to agree to undertake significant service commitments.

Similarly, while there is nothing wrong with a for-profit large law firm expecting and measuring its senior associates' and partners' ability to develop lucrative books of business, there is an inherent unfairness in turning a blind eye to lawyers' varying endowments of social and cultural capital. This, in turn, plays a significant role in one's ability to develop a book of business. Rather than measuring only the number of clients brought to the firm and the revenue generated from them, BigLaw ought to develop equal opportunity criteria that take into account its lawyers' capital endowments and measure their books of business in light of their ability to use and deploy capital. For example, BigLaw ought to allow all of its lawyers opportunities to cultivate the very social and cultural capital necessary for the development of a book of business and then measure their success relative to their capital endowments.

Abandoning equal treatment and replacing it with equal opportunity principles is not going to be an easy undertaking. Indeed, figuring out what a commitment to equal opportunity means in particular situations may be easier said than done. Consider mentorship pairings. A law firm committed to replacing difference blindness (for example, the random

148. *See generally* Wald, *supra* note 34.

149. *See, e.g.*, Susan G. Manch, *Competency-Based Performance Management: A Remedy for Eroding Firm Culture*, 11 U. ST. THOMAS L.J. 39 (2013).

150. Lori Berman et al., *Developing Attorneys for the Future: What Can We Learn from the Fast Trackers?*, 52 SANTA CLARA L. REV. 875, 883 (2012); Pearce & Wald, *supra* note 127.

pairing of partners and associates) with bias awareness might pair a minority associate with a minority partner or a woman associate with a woman partner in an attempt to take into account the likely affinity of firm lawyers based on their respective identities. Yet capital analysis cautions against simplistic conclusions regarding identity. First, while affinity is a relevant consideration in cultivating social capital, in the context of BigLaw access to powerful partners is by far the most dominant element of social and cultural capital. Therefore, a law firm committed to principles of equal opportunity should pair mentors and mentees based on access-to-capital considerations. Associates endowed with relatively low social and cultural capital assets should be paired up with powerful partners, even if that means pairing up a Latina associate with a white male partner. Second, pairing mentors and mentees by affinity risks overburdening the few minority and women partners thus undermining their own cultivation of social and cultural capital. Instead, equal opportunity principles suggest broadening the ranks of mentors to include powerful white male partners to spread the burden of mentorships more equally across BigLaw.

Moreover, BigLaw should abandon the practice of assigning mentors in a manner divorced from its core training activities and work assignments. In an increasingly competitive work environment, isolated mentoring is bound to result in busy partners failing to mentor or nominally and minimally "mentoring" associates by meeting with them twice a year for a quick cup of coffee. Instead, to help build the social and cultural capital of mentees, mentors should be drawn from within the pool of powerful partners while working with and training their mentees. Such an equal opportunity practice does not violate BigLaw's commitment to equality: associates well-endowed with social and cultural capital will be able to deploy their capital assets to secure mentorships and work opportunities without receiving institutional assistance from the firm. Moreover, white male associates will often be able to use identity capital assets to further secure powerful mentors. Equality in BigLaw, therefore, requires an equal opportunity approach to embedded training and mentorship to ensure all firm lawyers equal opportunities to acquire and develop capital infrastructure.

The capital boundary restraint demands that capital exchanges take place on fair conditions. Given the role of capital in achieving success at BigLaw, fairness requires that large law firms offer all of their lawyers equal opportunities to acquire and develop capital and forsake equal treatment principles, which albeit unintentionally, tend to reflect and sustain unequal capital endowments and therefore, ultimately, inequality.

3. Capital Infrastructure

Capital infrastructure considerations suggest at least two conditions on the commodification of lawyers' identity at BigLaw. First, while BigLaw trades in and takes advantage of the racial and gender identity of some of its lawyers in a nonideal, second-best professional world to demonstrate its commitment to diversity and equality, and trades in and takes advantage of

the racial and gender identity of all if its lawyers (white male lawyers included), it must at the same time build a capital infrastructure that offers all of its lawyers equal opportunities to succeed, and that would one day change the very gender and racial perceptions that lead to these identity exchanges. Specifically, firms must help women and minority lawyers build their social and cultural capital endowments while taking advantage of their identity capital; that is, they must consciously provide mentoring, training, and business development opportunities so that, over time, women and minority lawyers have an equal opportunity to grow and succeed at BigLaw and outside of it.

Put differently, if BigLaw is to acknowledge the influence of different forms of capital on merit and commit itself to affording all its lawyers equal opportunities for success, it must offer all of its lawyers meaningful opportunities to improve their merit and cultivate their respective capital endowments, recognizing that different lawyers possess different capital endowments and therefore may need different opportunities to cultivate and deploy their capital. Those well-endowed with social and cultural capital, as well as identity capital, may need fewer opportunities to cultivate these assets, whereas those with lesser endowments may require additional opportunities to build the forms of capital essential for success at large law firms.

Building capital infrastructure for all of its lawyers in a way that satisfies the capital boundary restraint, namely in a fair and just manner, is not going to be easy. Recall the example of the large law firm that expects and asks a Latina associate to serve on its hiring and diversity committees and attend firm functions, in which her gender and racial identity may be leveraged by the firm. The firm may be tempted to ensure the equal treatment of the associate by adopting a policy that would acknowledge the associate's service hours and put them on par with other associates' billable hours. Yet, while such a policy would satisfy the boundary restraint, it would fail the infrastructure condition: in the short run, if the Latina associate is allowed to count her service hours as billable hours, she will not fall behind her colleagues and will meet her billable expectancies. However, in the long run, the policy may prove to be harmful to the associate. Over time, associates who have billed more hours to quality work assignments as opposed to service would likely be able to improve their skills as lawyers and cultivate a mentoring relationship with their supervising partners. Thus, the Latina associate, even if she could count her service hours as billable hours or, in the alternative, receive additional payment for her service to the firm,[151] would be at a disadvantage. In hindsight, the Latina associate would have been better off spending less time on service and more time billing hours and cultivating her social and cultural capital. Capital transparency would require the firm to advise the associate in advance of the likely consequences of undertaking significant service commitments even if she can count them toward her billable expectancy. And capital

151. This was suggested by Nancy Leong. *See supra* note 118.

infrastructure considerations suggest that the firm should advise the associate in advance and assist her, over time, to avoid undertaking imposing service commitments and instead focus on cultivating her social and cultural assets. That is, exchanging identity capital for economic capital, for example, doing service work in exchange for a bonus, while tempting in the short run, may prove ill-advised in the long run: service commitments that are used as a platform to build one's social and cultural capital assets are conducive to making partner whereas time-consuming service commitments that stifle cultivation of cultural and social capital are not, even if one is being paid for them.

Moreover, even if the firm were committed to allowing the associate to take advantage of her imposing service commitments (by leveraging them into opportunities for building her social and cultural capital and by advising and incentivizing partners on the diversity and hiring committees to serve as the associate's mentors), transparency and boundary considerations require that the firm caution the associate in advance about the risks inherent in service to allow her to make an informed decision as to whether she should serve and risk falling behind her counterparts at the firm.

Second, mindful of the fact that personal identity components inform the identities of lawyers as professionals, BigLaw must invest in fostering an inclusive culture that recognizes, welcomes, and values the diversity of its lawyers.[152] Consider the following example. On a Monday morning, Client calls male Partner and seeks advice in negotiating a transaction "as soon as possible." Perhaps Client is correct regarding the timing of the legal assistance it requires. Any delay on the part of the law firm in doing the work may foil the transaction and undermine Partner's relationship with Client. In such an instance, a 24/7 attitude would be required on the part of Partner and his team of lawyers, irrespective of the gender identity of team members and irrespective of the fact that such an attitude may disproportionately burden female lawyers, either because some tend to shoulder heavier personal burdens outside of the firm compared to their male lawyer counterparts, or because Partner may assume they shoulder such burdens and will be less available to serve Client's needs on a 24/7 basis, even when they do not.

At other times, however, Client may be mistaken about the urgency of its needs or may not care about timing. It is in these moments that the culture of the firm and its commitment to a gender-diverse environment may come into play. Partner may still, in response to Client's request for assistance "as soon as possible," promise Client a prompt reply and trigger a 24/7 attitude, either because Client asked for it or because the male partner is used to or even prides himself on being able to provide a prompt reply. Indeed, if the firm tends to define merit and excellence in part in terms of 24/7 service to clients, Partner may instinctively promise a quick turnover,

152. Wald, *supra* note 11.

notwithstanding the uneven gender impositions on male and female team members.

A partner mindful and concerned with fostering a more gender-equal culture at the firm may, on the other hand, promise Client advice by the end of the week, allowing his team members an opportunity to do the work during the usual nine-to-five timeframe as opposed to during evenings or nights. Such seemingly subtle client management and case management strategies may go a long way toward establishing and building an inclusive gender culture at the firm, especially when done explicitly and transparently, empowering female team members and credibly conveying that the firm respects excellence and merit in terms other than 24/7 service.

BigLaw is currently recruiting diverse entry-level classes of associates. However, because different lawyers will tend to have different endowments of capital when joining the firm, attention to capital infrastructure requires tracking lawyers' various capital endowments early on.[153] Tracking capital would allow BigLaw, in turn, to offer its lawyers equal opportunities to acquire and develop capital within the firm, for example, by assigning associates with low social and cultural capital to strategic office locations by powerful partners, assigning them work with powerful partners early on and continuously, and pairing them to powerful mentors within the firm.

Attention to capital infrastructure, to reiterate, does not mean that BigLaw should abandon its long-standing reliance on the billable hour as a key factor in assessing the productivity of associates and its reliance on the book of business as a key aspect of assessing partners and their compensation. Given, however, that both the billable hour and the book of business are influenced by the capital endowments of firm lawyers, it does mean that BigLaw should develop additional means to assess the quality and productivity of associates alongside the billable hour and ensure fair access to (quality) billable hours by providing access to powerful and busy partners to those lawyers endowed with low capital assets.[154] Similarly, while encouraging and expecting firm partners to develop significant books of business is both legitimate and desirable, BigLaw must provide all of its lawyers equal opportunities to develop such portfolios. Relevant policies may include pairing powerful rainmaking partners with associates and partners endowed with little capital, as well as providing explicit training on how to develop business to all firm lawyers, while especially targeting lawyers with low social and cultural capital assets.

Finally, a word about the dominance of the 24/7 professional ideology and its hallmarks of undivided loyalty to the firm and its clients. Especially in an increasingly competitive market for corporate legal services, large law firms are expected to feature, and need to practice, a client-centered approach. Sometimes, such an approach requires the provision of legal services around the clock. Yet large law firms have developed their elite reputation and status by offering more than around-the-clock service

153. *See supra* note 109 and accompanying text.
154. *See supra* note 149 and accompanying text.

commitment. They offer high quality services and products. Ready availability, while important, has never been and should not become the litmus test for excellence and professional merit. The 24/7 approach as the defining feature of loyalty to clients does not serve the interests of either clients or large law firms, and it undermines BigLaw's commitment to equality by disproportionately endowing women and minority lawyers with negative capital. Indeed, devising capital-minded policies and procedures may not only allow BigLaw to more effectively pursue equality within its upper ranks, it may also open the door to the development of professional ideologies—alternatives to the dominant yet unappealing around the clock client-centered ideology—that would allow large law firms to continue to successfully recruit top talent and retain their elite status atop the profession.[155]

CONCLUSION

BigLaw is at a loss to meet its purported commitment to enhanced diversity and equality within its upper ranks. Its defenders claim that large law firms uphold meritorious standards of retention and promotion and are helpless to effectuate change in the face of societal stereotypes and implicit biases that plague their culture, policies, and decision makers, disproportionately impacting diverse lawyers. Critics retort that BigLaw is simply unwilling to bear the significant cost of combating negative stereotypes and implicit bias and rid itself of their harmful consequences. Importantly, both BigLaw advocates and its critics agree that the root of the problem of underrepresentation is exogenous to BigLaw: it does not create the underrepresentation of women and minority lawyers, it merely reflects and tolerates the harsh phenomena of stereotyping and implicit bias that exist outside of it.

This traditional understanding of the interplay between merit, stereotypes, and implicit bias, however, is incomplete and misleading. BigLaw and its lawyers engage in complex transactions, exchanging labor and economic, social, cultural, and identity capital, which includes commodifying gender and racial identities. The underrepresentation of diverse lawyers is therefore endogenous to the exchange and is a function of the following considerations. For one, women and minority lawyers tend to have lower (and sometimes even negative) endowments of capital, compared with their Caucasian male counterparts. Further, capital endowments both impact and are misrecognized for merit and therefore play a significant role in BigLaw's retention and promotion policies. Finally, BigLaw and its lawyers appear to be ignorant, to misunderstand, or to deny the impact of capital on their relationship.

A better, more equal future at BigLaw depends on its willingness to acknowledge the role of capital, and, in particular, of identity capital—pink and blue, black and white—in its hiring, retention and promotion policies by practicing capital transparency; on its willingness to trade capital with its

155. *See* Wilkins, *supra* note 33.

lawyers on fair and just terms honoring capital boundaries; and on its willingness to help build the capital infrastructure of all of its lawyers by abandoning its equal treatment principles and replacing them with equal opportunity policies. Fortunately, capital analysis provides BigLaw with both the language and the tools to begin to successfully pursue enhanced diversity in its positions of power and influence.