

The Daily Work of Fitting in as a Marginalized Lawyer

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Despite increased public dialogue about the need for inclusion, marginalized lawyers adjust their behaviour to “fit” in their legal workplaces. In this article, the author presents the results of interviews with lawyers in Canada who self-identify as belonging to a marginalized group based on race, ethnicity, Indigeneity, gender or sexual identity, working-class background, and/or disability. Based on these interviews, the author advances a taxonomy of the five strategies employed by these lawyers to fit in to their workplaces: covering strategies, compensating strategies, mythologizing strategies, passing strategies, and exiting strategies.

Marginalized lawyers employ covering strategies, which may be appearance-, affiliation-, advocacy-, or association-based, to hide or minimize characteristics that may distinguish the individual from the dominant group. Compensating strategies include the individual’s efforts to work harder, obtain more credentials, maximize their social capital, be perfect, and take on extra diversity work. Each of these techniques is designed to “make-up” for the perceived failure of being a marginalized lawyer. Mythologizing strategies involve creating internal narratives to reduce the effects of discrimination. Marginalized lawyers use passing strategies to censor various aspects of themselves in an attempt to be perceived as a part of the dominant group. Finally, exiting strategies are a last resort; the marginalized lawyer leaves their workplace or limits their legal work to specific firms or areas of law.

The author argues that developing a taxonomy of strategies facilitates understanding about how law firms and lawyers may strategize to create more inclusive work environments. The author also clarifies the extent to which we require some marginalized lawyers to adjust aspects of who they are so that they can survive in their workplaces.

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Introduction

Published by *The Globe and Mail* with a front-page leader on November 4, 2017, Hadiya Roderique’s “Black on Bay Street” created a sensation.¹ Since then, Roderique has been interviewed about her experience on BNN Bloomberg, CTV, and CBC.² Her article has inspired

1. See Hadiya Roderique, “Black on Bay Street: Hadiya Roderique Had It All. But Still Could Not Fit In”, *The Globe and Mail* (last modified 22 October 2018), online: <www.theglobeandmail.com/news/toronto/hadiya-roderique-black-on-bay-street/article36823806/>.

2. See “‘Black on Bay Street’ Writer on Diversity and Inclusion in Corporate Canada” (2 May 2018), online (video): *BNN Bloomberg* <www.bnnbloomberg.ca/video/black-on-bay-street-writer-on-diversity-and-inclusion-in-corporate-canada-1269804>; CTV Your Morning, “How Microaggressions Can Reinforce and Normalize Racism” (27 February 2018), online (video): *YouTube* <www.youtube.com/watch?v=KE7FqMXWvUw>; CBC News Network, “Hadiya Roderique on CBC News Network” (last modified 30 April 2018), online (video): *CBC Player* <www.cbc.ca/player/play/1140070467938>; Matt Galloway, “Changing Workplace Culture on Bay Street and Beyond” (7 November 2017), online (podcast): *Metro Morning with Matt Galloway* <www.cbc.ca/listen/live-radio/1-39-metro-morning/clip/14706011-changing-workplace-culture-on-bay-street-and-beyond>.

hashtags,³ created space for others to tell their story,⁴ and motivated some to reflect publicly on how the legal profession needs to change.⁵ Roderique received the Gold Award for best personal essay at the 2018 Digital Publishing Awards.⁶ What is most remarkable about Roderique's story, though, is how un-extraordinary it is.⁷

One of the powerful aspects of Roderique's narrative is her clarity in articulating the myriad ways she either considers adjusting or adjusts her behaviour to conform to "Bay Street" expectations.⁸ She contemplates

3. See "#IamHadiya" (last visited 28 October 2019), online: *Twitter* <twitter.com/hashtag/iamhadiya>; "#BlackOnBayStreet" (last visited 28 October 2019), online: *Twitter* <twitter.com/hashtag/blackonbaystreet>.

4. See e.g. Rachel Chan, Solomon McKenzie & Anonymous, "Reactions to 'Black on Bay Street'", *Ultra Vires* (29 November 2017), online: <www.ultravires.ca/2017/11/5539/>; Karlyn Percil, "Leading While Black - The Power of Storytelling -Why Hadiya Roderique's Resonated With Me & So Many" (7 November 2017), online: *LinkedIn* <www.linkedin.com/pulse/why-hadiyas-black-bay-street-story-have-us-saying-me-too-percil/>; Shree Paradkar, "To Our Inner Hadiya Resisting Workplace Conformity, Carry On. Just Don't Keep Calm: Paradkar", *The Star* (10 November 2017), online: <www.thestar.com/news/gta/2017/11/10/to-our-inner-hadiya-resisting-workplace-conformity-carry-on-just-dont-keep-calm-paradkar.html>.

5. See Frank Vettese, "White on Bay Street: Corporate Canada Must Do More", *The Globe and Mail* (last modified 13 November 2017), online: <www.theglobeandmail.com/report-on-business/rob-commentary/white-on-bay-street-corporate-canada-must-do-more/article36916413/>. See also Sean MacKay, "Black on Bay Street Author Hadiya Roderique Joins ELN for Some Vital and Mind-Expanding Real Talk" (March 2018), online: *CivicAction Leadership Foundation* <leadership.civicaction.ca/whats-new/event-recap/elnrealtalk-blackonbaystreet/>.

6. See "The Globe and Mail Leads Digital Publishing Awards with 15 Honours", *The Globe and Mail* (last modified 30 May 2018), online: <www.theglobeandmail.com/canada/article-the-globe-and-mail-leads-digital-publishing-awards-with-15-honours/>.

7. The exclusion of Black lawyers by large corporate law firms is not new news, although the attention to Roderique's story suggests that parts of the legal profession may finally be waking up to that reality. For a similar story recounted twenty years earlier, see Michael St Patrick Baxter, "Black Bay Street Lawyers and Other Oxymora" (1998) 30:2 *Can Bus LJ* 267.

8. Bay Street is a major road in Toronto. The phrase "Bay Street" is often used by lawyers as a substitute for saying that a firm is a large corporate firm or that the person works at one of the most "prestigious" law firms. Generally, the reference is to firms that are located in Toronto (although not necessarily on Bay Street itself), although sometimes the phrase Bay Street may be used to invoke the ethos of a "high-octane" corporate firm that is located outside of Toronto (for example, in Calgary, Montreal, or Vancouver).

“whitening” her resume by using her anglicized name, and removing references to her membership in the Black Law Students’ Association and receipt of the Harry Jerome Scholarship;⁹ she purchases a black and grey suit to meet dress expectations and considers whether to straighten her hair; she talks to colleagues about footwear, the Leafs, yoga, cottages, and Glenfiddich; she eats slowly to avoid spilling and drinks wine in “acceptable” ways; she works demonstrably long hours and tries to display both work and extracurricular excellence; she exits uncomfortable or racist conversations without raising concerns; she strategizes about with whom to work to build her skills and substantive knowledge; she finds Black lawyers to serve as informal mentors; and she manages her own intelligence so that it does not make others uncomfortable.

Roderique’s narrative reminds some of us (those who are not conscious of the ways we strategize to “fit in” in legal practice or those of us who do not have to) that despite increased public dialogue about the need for inclusion in legal practice settings, many lawyers still have to employ strategies to be accepted within the legal profession. This article makes a novel contribution: it offers a taxonomy of work-based strategies used by marginalized lawyers seeking to “fit” within their work environments. The taxonomy is useful because understanding the types of strategies lawyers use to “get by” both helps make the work those lawyers are doing to fit in transparent and allows firms and colleagues greater access to ways in which they might change to better include their marginalized colleagues.

As a result of undertaking qualitative empirical work and careful analysis of the data collected, marginalized lawyers’ strategies for coping in their legal practices are described within five categories: covering, compensating, mythologizing, passing, and exiting. The categories are distinguished because each reflects a different response to exclusion from the workplace, or, put another way, a different set of survival strategies that the person believes—whether consciously or unconsciously, realistically or unrealistically—they have to undertake to be included, or fit, in their legal workplace and as a result to succeed as lawyers in that environment. Each also suggests a different set of possible responses that firms or legal colleagues might want to consider to better include marginalized lawyers.

Before discussing the study’s method and the qualitative findings, it is important to be explicit about what this article does not explore. First, the article accepts that the experiences of lawyers from marginalized backgrounds are different from the experiences of lawyers who are white, able-bodied,

9. The Harry Jerome Scholarship is awarded by the Black Business and Professional Association. Its object is “to support the education and development of Canada’s future leaders, through assisting Black youth in their attainment of post-secondary education”. See “BBPA National Scholarships” (last visited 20 October 2019), online: *Black Business and Professional Association* <bbpa.org/bbpa-scholarships/>.

middle- or upper-class, Canadian-born, straight, and cisgendered.¹⁰ To that end, it does not attempt to prove that marginalized lawyers face discrimination.¹¹ Second, it focuses on lawyers who have “made it” in their professional contexts. Each of the lawyers interviewed had been in practice for at least five years. As a result, the study does not offer insights on coping strategies that were not sufficient to enable lawyers to stay in the legal profession, nor does it claim that the mechanisms discussed are adequate to enable a marginalized lawyer to stay in the profession. In other words, the article is not designed to make empirical claims about the prevalence of each coping mechanism discussed nor about the consequences of adopting the highlighted mechanisms (in terms of whether these coping strategies guarantee acceptance by “normative” lawyers in the legal profession). Third, the article neither describes nor documents in detail the barriers to entry into the legal profession, the likelihood that marginalized lawyers will be retained in particular practices, or the costs and harms to marginalized lawyers of relying on these coping mechanisms to fit.¹² Finally,

10. See Charles C Smith, “Who is Afraid of the Big Bad Social Constructionists? Or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession” (2008) 45:5 *Alta L Rev* 55. See also Camille A Nelson, “Out of Sync: Reflections on the Culture of Diversity in Private Practice” (1999) 19:1/2 *Can Woman Studies* 199 [Nelson, “Out of Sync”]; Asher Alkoby & Pnina Alon-Shenker, “Out of the Closet and Up the Ladder? Diversity in Ontario’s Big Law Firms” (2017) 34:2 *Windsor YB Access Just* 40; Baxter, *supra* note 7.

11. See e.g. Smith, *supra* note 10. Ontario likely has the most diverse legal profession of the Canadian provinces. Nevertheless, Ontario’s 2017 statistical snapshot reveals that Indigenous and racialized lawyers remain underrepresented in the legal profession relative to the labour force in Ontario. Ontario does not offer comparative data (to the labour force population of Ontario) for LGBTQ+ lawyers or lawyers with disabilities. It does offer data on type of practice for Indigenous, racialized, LGBTQ+ lawyers, and lawyers with disabilities. That data suggests that with the exception of LGBTQ+ lawyers, lawyers who identify within those groups are more likely than white, straight, able-bodied lawyers to be located in sole practices or small firms and less likely to be law firm partners. LGBTQ+ lawyers are less likely to work as sole practitioners or law firm partners than straight lawyers and more likely to work in government. Ontario does not collect data on lawyers who identify as coming from working-class backgrounds. See “Statistical Snapshot of Lawyers in Ontario” (2016), online (pdf): *Law Society of Upper Canada* <annualreport.lsuc.on.ca/2017/common/documents/Snapshot-Lawyers18_English.pdf>.

12. See e.g. Equity Initiatives Department, “Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions” (2016), online (pdf): *Law Society of Ontario* <lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/w/working-together-for-change-strategies-to-address-issues-of-systemic-racism-in-the-legal-professions-final-report.pdf>; “Diversity by the Numbers: The Legal Profession—Unpacking Hegemonic Masculinity in the Culture of Private Practice Law” (25 January 2018), online (pdf): *Canadian Centre for Diversity and Inclusion* <ccdi.ca/media/1391/20180125-dbtn-qualitative-research-final-updated.pdf>.

the article does not posit, except in a preliminary way in the conclusion, legal or social responses that would reduce the likelihood that marginalized lawyers would need to rely on the strategies discussed.¹³

I. Method

The data used to illustrate how marginalized lawyers cope in their legal workplaces is drawn from a larger qualitative study of professionals who self-identify as members of groups traditionally under-represented due to race, ethnicity, Indigeneity, gender or sexual identity, working-class background, and/or disability. Given that there have been a significant number of studies on women lawyers as a discrete category—both qualitative and quantitative—we did not seek to interview lawyers who did not identify with at least one of the other listed groups. Our result was that our sample compelled us to take an intersectional approach from the outset.¹⁴

Ninety participants were recruited, thirty from each of three professions—academia, social work, and law. Participants from law were recruited through snowball sampling with invitations sent to the researchers' professional contacts as well as through law society email networks.¹⁵ Following discussion of informed consent, semi-structured interviews explored everyday experiences of belonging and marginality, inclusion and exclusion. Each participant was interviewed once, for 60 to 120 minutes, face-to-face or by telephone. Interviews were recorded and transcribed verbatim. Participants were assigned pseudonyms. Data was managed through ATLAS.ti software and coded by two research assistants to identify major themes. Weekly team discussions were held for coding consensus. Over time, a code list was developed with code definitions. Transcripts were read repeatedly, attending to meaning passages, and moving back and forth between individual transcripts and across transcripts. A summary was returned to each participant for feedback. Collective interrogation of emerging themes and theoretical frames of analysis enhanced rigor. The study did not attempt a representative sample, as generalizations were not the aim. Instead, we sought participants able to articulate depth of

13. See e.g. Gowri Ramachandran, "Intersectionality as 'Catch 22': Why Identity Performance Demands are Neither Harmless nor Reasonable" (2005) 69:1 Alb L Rev 299.

14. For an overview of intersectionality, see e.g. Devon W Carbado et al, "Intersectionality: Mapping the Movements of a Theory" (2013) 10:2 Du Bois Rev: Soc Science Research on Race 303.

15. The research team was Brenda Beagan, Kim Brooks, Merlinda Weinberg, Brenda Hattie, Tameera Mohamed, and Bea Waterfield (the Research Team).

experiences. As member checks, participants were provided with a summary of their interview. Dalhousie's Social Sciences & Humanities Research Ethics Board approved all processes.

In the larger study, where we sought to explore marginalized professionals' everyday experiences of belonging and marginality, inclusion and exclusion, we anticipated that we would find significant illustrations of instances of exclusion—whether explicit or implicit, intentional or unintentional. In the more specific analysis in this paper, I focused on the lawyers in the sample. I anticipated our participants would explain the ways they mitigate the effects of that exclusion and that their strategies would have common elements that could be clustered and described.

Participants ranged in age from their early thirties to mid-sixties. Some participants have been practicing for as little as five years, while others have been practicing for over forty years. The majority of participants entered law school in their twenties; ten participants entered law school during their thirties. Nineteen participants identified as racial and/or ethnic minorities, with four of those participants identifying as Indigenous. Seven participants identified as LGBTQ+, with two identifying along the trans spectrum. Four participants identified as having a disability and twelve as coming from a working-class and/or impoverished background. Almost half of the participants identified with multiple identification categories.

We sought diversity by region and type of practice. Nine of the participants practiced in Eastern Canada, fifteen in Central Canada, and five in Western Canada. Participants worked in private practice settings (large, small, and solo), in legal aid, as in-house counsel, and as government lawyers (federal and provincial). Their main practice focus spanned general litigation, corporate solicitor work, criminal law, human rights law, disability law, Aboriginal law, labour and employment law, international law, and poverty law. To avoid breaching confidentiality, the paper uses few demographics in describing the experiences of particular participants.

II. Workplace-Based Strategies to Facilitate “Fit”

Our interviews revealed that all participants employed some strategies to work effectively in the practice of law. An extensive review of the literature on the experience of marginalized professionals exposed a gap in the scope of theorizing about the types of strategies those workers employ to respond to processes of exclusion in their workplaces. This article seeks to fill that gap. It suggests that the types of strategies used by marginalized lawyers might be characterized as including some well-theorized techniques such as covering and passing, some under-explored techniques such as compensating, and some coping strategies that are not identified and described in the literature, which are referred to in this paper as mythologizing and exiting.

There are some advantages to fully articulating the range of strategies marginalized lawyers use in responding to the experience of exclusion. First, identifying the range of strategies helps expose the regularity with which marginalized lawyers feel they need to take steps to better fit in their legal workplaces. When, for example, only the concept of covering (where the lawyer's difference is known but they downplay that difference) is explored, the full set of responses to exclusion the person believes is necessary to fit within the legal workplace is obscured. It is possible to miss or minimize the power that exclusion continues to have. Second, articulating the range of strategies employed by marginalized lawyers allows for a more fruitful discussion of the ways a lawyer's approach to seeking inclusion might change over time or with different audiences and context. Finally, creating a taxonomy of responses allows those who care about the inclusion of lawyers in their workplaces to think more concretely about ways to respond to the exclusion that continues to be experienced by marginalized lawyers.

It should be emphasized that the taxonomy does not suggest that any of the strategies employed by marginalized lawyers should be seen as acceptable responses to systemic discrimination in the practice of law. Even what might be conceived of as the least dramatic strategy (covering) may give rise to real harm both for those who believe they need to adopt that strategy to survive and for the overall health and effectiveness of the legal profession.

A. Covering Strategies

The concept of covering originates with Erving Goffman, then a professor of sociology at the University of California, Berkeley.¹⁶ His insight was that some individuals with stigmatized identities devote time and energy to minimizing the visibility or effect of those identities.¹⁷ The motivation for covering is easily put. As Lynne observes, “you . . . have [to help] others feel like you're part of them . . . [or] you will not get the opportunities.”¹⁸

16. See Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs, NJ: Prentice-Hall, 1963) at 102–04.

17. See *ibid.* Goffman was primarily concerned with individuals facing three types of stigma—“abominations of the body”, “blemishes of individual character” (like imprisonment, homosexuality, and radical political behaviour), and “tribal stigma” (like race, nation, and religion) (*ibid.* at 4).

18. Interview of Lynne by a Member of the Research Team. All interviews were conducted between July 2017 and July 2018. Where dates were recorded, they are indicated. All interviews are on file with the author.

In 2002, Kenji Yoshino, the Chief Justice Earl Warren Professor of Constitutional Law at NYU School of Law, refined Goffman's concept.¹⁹ In 2006, he suggested that individuals might engage in "appearance-based" covering, which requires adjustments to presentation (e.g., a person may not wear a sari to work in a law office in order to blend in); "affiliation-based" covering, which requires avoiding behaviours associated with the stigmatized identity (e.g., a gay lawyer may not talk about going out at night to avoid being associated with a stereotype of hypersexuality); "advocacy-based" covering, which describes how individuals might remain silent rather than defending members of their group (e.g., a working-class person may remain silent when poor people are described as lazy); and "association-based" covering, where individuals avoid contact with members of their own group so they are not associated with that group (e.g., lawyers with visible disabilities may not socialize together at work).²⁰

Yoshino's elaboration of the concept of covering seeks to achieve a different end than the articulation of covering in this taxonomy. In his 2006 book, the first sentence powerfully advances Yoshino's claim—"Everyone covers."²¹ His argument is that all of us cover in our workplaces, but that marginalized workers do so at much higher rates. His hope is that this insight helps to facilitate understanding of the experiences of marginalized workers. While Yoshino's analytical efforts to distinguish among types of covering is helpful for the analysis in this paper, his claim that everyone covers does not reflect the way the concept is deployed in this paper. While it may be the case that normative workers engage in covering behaviour, the consequences for them of covering (in terms of their well-being and career opportunities) are less severe and are not a response to historic and systemic discrimination and exclusion. Additionally, the social consequences (in terms of, for example, the diversification of the legal profession) of a white man failing to wear the ponytail he most enjoys seem less significant than the social consequences of a Black woman failing to wear natural hair.

19. See Kenji Yoshino, "Covering" (2002) 111:4 Yale LJ 769. He later elaborated further on the concept of covering and delineated four types of covering. See Kenji Yoshino, *Covering: The Hidden Assault on our Civil Rights* (New York: Random House, 2006) [Yoshino, *Covering* 2006]. Kenji Yoshino's work is motivated in part by trying to expand the concept to include non-stigmatized groups, for example, white, middle- or upper-class, able-bodied, straight, and cisgender men. See Kenji Yoshino & Christie Smith, "Uncovering Talent: A New Model of Inclusion", *Deloitte University: The Leadership Center for Inclusion* (2013), online (pdf): Diversity Council Australia <www.dca.org.au/sites/default/files/06_uncoveringtalentpaper.pdf>.

20. See Yoshino, *Covering* 2006, *supra* note 19 at 79–91.

21. *Ibid* at ix.

Appearance-based covering requires dressing and conforming to social norms in particular ways. Despite calls for the profession to reassess its socialization processes, many law firms (perhaps all, but to different degrees) embrace social norms that require their lawyers to meet inflexible standards of dress and social behaviour.²² These standards mean that marginalized lawyers are regularly confronted with the need to make decisions about whether to adjust their appearance to conform. Those decisions cover the spectrum from choosing a different name, to selecting the “right” clubs to belong to, to learning about acceptable topics for conversation, to dressing in ways that align with expectations.

Figuring out how to dress and socialize in ways that pass professional muster was both a stress and discomfort for many of the marginalized lawyers we interviewed. These requirements have particular consequences for lawyers from working-class backgrounds. Lynne dispels the common assumption that lawyers from working-class backgrounds leave those backgrounds behind when they enter a privileged profession like law. She highlights some of the “visibilities” of class that prevent many lawyers from lower-income backgrounds from covering, the consequences of which can be especially acute during recruitment:

[T]here’s another very important aspect of it, which is composure and carriage. . . . [I]f you have crooked teeth . . . You know, you can look at someone, who has been well, I think of it as being fertilized. So, they were nourished properly. They’ve always been dressed properly, so they actually know how to dress. . . . They know that their pants need to be hemmed, where somebody else might leave it all crunched up at the bottom, because they were never, nobody took the care for that. They’ve had braces, so their teeth are not crooked. These things are right in the body. And there’s mannerisms, how loud or not loud the voice is. Words and . . . expressions that a person uses when they . . . revert to their . . . more casual self, right? Which you do. . . . [T]hese [job] interviews are over multiple periods and hours over long meals. . . . Alcohol [is] involved. So, and that’s why that’s done. . . . Because they want to see all the different parts of the person and whether or not they’re going to be a good

22. See Hilary Sommerlad, “Researching and Theorizing the Processes of Professional Identity Formation” (2007) 34:2 *JL & Soc’y* 190 at 205, 210. For a fascinating study of the role of law school in socializing Asian Americans and Latinos in the United States, see Yung-Yi Diana Pan, *Incidental Racialization: Performative Assimilation in Law School* (Philadelphia: Temple University Press, 2017).

fit for the firm. So, if your speech, you know, or your mannerisms, or the way that you deal with waiters or whatever, you know, betrays a kind of roughness, or lack of polish, then, you don't fit. And the way you get that polish is, you either self-teach, or, you just grew up with it, because . . . your parents were like that. So, you don't ever question it. Whereas if you've been on your own, and you haven't had that, you have to learn it. You have to adopt it. Otherwise, you're not going anywhere. You absolutely will not get anywhere.²³

Suits—as the only acceptable form of professional dress in most legal practice environments—leave many marginalized lawyers feeling like they do not fit in. For lawyers from working-class backgrounds, the world of expensive clothing (and suit purchases) can be fraught. Sherry, a queer woman, declares, “if you force me to go . . . into a ceremony and wear a skirt, I feel like I'm in drag.”²⁴

Black lawyers continue to feel pressure not to wear natural hair. The discomfort (and racism) within law firms around Blackness (and hence presumably part of the pressure to cover) is captured in a story Fivi tells about an African Canadian fellow articling student:

It's not like I was . . . actively, consciously [hiding ethnicity]. It was very much what was happening around me . . . You know, it sort of reinforced it. So, ah, there was one African Canadian guy I remember, who was the only African Canadian actually, who was working in the law firm during the time that I was there. He was only there as a student. [N]ormally, during the week, he would slick his hair back. You know, so he had a very, kind of, smooth look. But on the weekends, he didn't; so, he had his natural hair on the weekend. And I remember him coming out of the office, and one of the senior partners in our corner, looking at him . . . and saying to him, in front of him, “Oh my god, I am so happy I didn't see you coming out of a dark alley.”²⁵

Covering around physical presentation for trans lawyers may carry yet another unique set of pressures. The pressure of “realness”—whether embraced

23. Interview of Lynne, *supra* note 18.

24. Interview of Sherry by a Member of the Research Team (18 October 2017).

25. Interview of Fivi by a Member of the Research Team (19 December 2017).

as desirable or taken on as necessary—seems likely to have a distinctive character.²⁶ Natalie was acutely conscious of the need to conform in her physical appearance to be considered acceptable to others in the profession and by clients. She reflects,

you better know how to put on make-up, you better know how to do your hair . . . you need to know all these things, and . . . do it in the context of the profession that you're in so that you're not creating something where people look at you and judge you to have overdone it. . . . [D]on't wear electric blue eyeshadow [*laughs*].²⁷

Other lawyers deliberately use their choice of clothing to fit in. For example, Reagan observes with satisfaction that other lawyers will ask her “[w]here do you get shoes like that?”²⁸ and Elizabeth lists having polished shoes and always looking good as among the reasons she believes she was hired as legal counsel.²⁹

Marginalized lawyers also work to socialize in ways that are seen to be acceptable. For lawyers with disabilities, appearance-based covering often involves demonstrating that the lawyer is “fine” even though they may be labouring under the debilitating exhaustion or extra work that comes with managing their disability.³⁰

Almost all of the interviewees identified the need to engage in some common conversation topics as part of the essential networking demanded of lawyers: golf, cottaging (a new verb to many), hockey, skiing, and vacations. The interviews reveal a complex mix of responses from marginalized lawyers who cover by engaging in these discussions instead of raising topics that might be more familiar. For example, Tanvi, a South Asian working-class woman, recounts, “I spent probably a lot of my professional life trying to ease people thinking about how . . . similar I was to them, right? ‘Oh yeah, I grew up here.’

26. For a thoughtful discussion of “realness” as connoting those trans*people “who best fit within normative understandings of gender and sexuality”, see Z Nicolazzo, “‘It’s a Hard Line to Walk’: Black Non-Binary Trans* Collegians’ Perspectives on Passing, Realness, and Trans*-Normativity” (2016) 29:9 *Intl J Qualitative Studies in Education* 1173 at 1175.

27. Interview of Natalie by a Member of the Research Team.

28. Interview of Reagan by a Member of the Research Team (2 November 2017).

29. See Interview of Elizabeth by a Member of the Research Team (8 April 2018).

30. See Margaret H Vickers, “Dark Secrets and Impression Management: Workplace Masks of People with Multiple Sclerosis (MS)” (2017) 29:4 *Employee Responsibilities & Rights J* 175 (identifying three “masks” employed by workers with Multiple Sclerosis: “(1) I’m Fine; (2) I’m Happy!; and, (3) I’m Better than the Others!” at 175, 182).

And ‘Oh, I did that.’ And ‘Yeah, I love hockey.’ And ‘Yeah, I like to drink.’ And ‘Yeah, I like to do.’ Like, trying to assimilate.³¹

This kind of covering creates a double life. Ona, a Black Muslim woman, reflects:

[T]here is the outside me, where, when I’m dealing with white folks, to be perfectly honest with you in whatever context, whether it’s academia, whether it’s employment, whether . . . I’m at a restaurant, I always feel there’s two mes [*sic*]. [O]ne that has to be more palatable to the status quo and one that, when I’m at home and I’m speaking to my parents, then I can, I can relax.³²

Affiliation-based covering requires that marginalized lawyers distance themselves from stigmatized aspects of their identities. For some marginalized lawyers, affiliation-based covering requires them to alienate themselves from their personal lives when they are at work. For example, Sherry sometimes finds herself too exhausted to come out one more time in casual conversation:

[S]ome people would say, why would you talk about your personal life, it’s none of anyone’s business, why would it come up at work? But . . . that line gets crossed I think all the time. People . . . go for lunch, they go for dinner, . . . they’re chatting between meetings or something and . . . people ask, do you have any kids? And, what does your husband do? And there’s a lot of assumptions made. . . [S]o, I found that I was kind of constantly coming out, which was sort of exhausting and sometimes I’d find myself not doing it and then I would . . . kind of beat myself up a little bit afterwards . . . like why would I not share that? . . . [I]t’s easier sometimes to just say, you know, my husband’s also a lawyer.³³

Tyler, an African Canadian man, discusses advising his roommate about what was and was not acceptable to eat at law firm dinners. In the course of his discussion about fitting within the culture of law firms, he confides, “I always had the rule, this is just my own rule, I won’t eat watermelon in front of white people [*laughs*] . . . I don’t do those things because I don’t need their

31. Interview of Tanvi by a Member of the Research Team (16 April 2018).

32. Interview of Ona by a Member of the Research Team (13 February 2018).

33. Interview of Sherry, *supra* note 24.

looks or any of their thoughts to run back to those cartoons or any of those black exploitation type things.”³⁴

Elizabeth self-monitors her level of enthusiasm so as not to seem “too” Arab.

I am very personally invested in the wellbeing of the company. . . I find myself very passionate about my files. . . [S]ometimes I feel I’m getting a little too passionate and, and/or animated. And I do try to say “Okay, you need to take it down a notch, because you’re behaving like” [*laughs*]—this is so bad—“You’re behaving like an Arab.”

When she attends social events, she sometimes makes “a conscious decision that [she’s] not going to be as animated as [she] normally [is]”.³⁵

The strain on marginalized lawyers to distance themselves from the more “outrageous” practices of members of their communities can be acute. For example, in describing her work to transition, Natalie articulates in detail the many alternative plans that needed to be made, including the attention she paid to how she would announce her transition and how she would present herself to ensure she was accepted by clients and other lawyers:

[T]here are a lot of sort of factors that people look at that, that have a tendency to diminish your credibility. . . [T]his is why I believe it is so incredibly important to be very strategic about this. . . And very, very careful in the planning . . . have . . . at least Plan A, B, C, and D. . . [W]e had . . . made plans for each of these scenarios, so that we would be flexible enough that we would be able to pursue . . . these other strategies in the event that . . . we’d have difficulty. And I know, not from personal experience, but I know from a lot of professional friends of mine, more in the US and so on, that a lot of these professional friends . . . essentially really went down, their practice went down the tubes, they lost their jobs . . . all of this kind of stuff. And of course, the problem is that, . . . I have a very hard view about this, . . . it’s sort of a culmination of two things, one of them is . . . that they didn’t plan well enough and careful enough. . . [W]hat happens is . . . especially with . . . older transitioners, but also to some extent with younger transitioners, when you . . . hit peak trans, so when

34. Interview of Tyler by a Member of the Research Team.

35. Interview of Elizabeth, *supra* note 29.

the pressure has grown to the extent that . . . you've made the decision to transition, the problem is that people don't keep their mouths shut, and get themselves prepared to the point where they can actually socially transition and be successful in doing so. And it's the fewer who have . . . the necessary resolve not to uh, [*laughs*] not to go the miniskirts and fishnet stocking route [*laughs*].³⁶

Natalie's plan includes avoiding "trans-political advocacy" and "carrying-the-flag", too.³⁷

For some lawyers, this type of covering gives rise to a "double bind".³⁸ They have to displace stereotypical assumptions (for example, that women or Indigenous people are not smart), while still allowing the normative lawyer to feel at ease or unthreatened. Deanna, an Indigenous woman, describes how she has to act to make sure a particular judge she appears before is comfortable with her:

There's one judge . . . who's very old-fashioned. . . I've sort of learned to adapt . . . [I adopt a] false front that 'oh, I'm sort of bumbling along and doing my best here sir, please help me', and so he almost likes that sort of demeanour from female lawyers, so it wasn't just me who sort of figured out how to adapt to him that way . . . 'cause I find I get much more success doing that than being really assertive and aggressive. . . I sort of have to dumb it down a little bit, almost, to make him feel not threatened perhaps.³⁹

36. Interview of Natalie, *supra* note 27.

37. *Ibid.*

38. The idea of a double bind captures the phenomenon that a person is confronted with two options (e.g., to be perceived as incompetent and to therefore not merit a position or to be perceived as competent, but that competence is labelled in a way (for example, "uppity") that makes the person undesirable for the position). See e.g. Marilyn Frye, "Oppression" in Anne Minas, ed, *Gender Basics: Feminist Perspectives on Women and Men*, 2nd ed (Belmont, Cal: Wadsworth, 2000) 10. Frye stated, "[i]f one dresses one way, one is subject to the assumption that one is advertising one's sexual availability; if one dresses another way, one appears to 'not care about oneself' or to be 'unfeminine'" (*ibid* at 12). These strategies have also been conceptualized as "comforting" privileged members of the community. See Devon W Carbado & Mitu Gulati, "Working Identity" (2000) 85:5 Cornell L Rev 1259 at 1301-04.

39. Interview of Deanna by a Member of the Research Team.

Advocacy-based covering requires ensuring that the political or social views of marginalized lawyers, to the extent they are not shared by those in their workplaces, are not exposed. This type of covering requires remaining silent when some topics are raised and, more directly, not defending other members of their community in circumstances where they are maligned. The circumstances that compel advocacy-based coverings may serve as “tests” of the marginalized lawyer’s fit. If they are able to remain silent (or even better, agree) in contexts where the interests of their community are debated or dismissed then they pass a test of acceptability within the workplace. Camille Nelson, the Dean of American University’s Washington College of Law, describes the ways in which the racialized lawyers’ affiliations are tested:

[I]t is not uncommon for racialized legal professionals to be engaged in conversations concerning controversial or non-controversial topics alike. In this way, the “chosen few” are often forced to participate in discussions and debates which they would otherwise not choose to be a part of, given the context or the nature of the person who engaged them in conversation. These conversations are often not-so-subtle attempts to test the person of colour, to glean their commitment or opposition on subjects relevant to race.⁴⁰

Many lawyers report employing this strategy because of the serious consequences of speaking up or because of the fatigue of always feeling required to speak up.⁴¹

This aspect of covering applied not only to staying silent about issues connected to the lawyer’s identity, but also to speaking out about being asked to undertake inappropriate tasks at work. For example, a marginalized lawyer may not resist being assigned inappropriate work because she does not want to be viewed as “difficult”. In reflecting on what she would advise herself to do differently if she were starting again, Fivi emphasizes that she would have been bolder in saying no to tasks that she believed were assigned to her because of her gender and ethnicity that had nothing to do with her work:

I think “Don’t be so intimidated by people who seem to be mainstream. You know, you don’t need to be like them. And you don’t need to put up with behaviour that, you know, anybody seeing it from the outside, would be seen as completely unacceptable.” . . . I used to have partners who

40. Nelson, “Out of Sync”, *supra* note 10 at 203.

41. See *ibid* at 203–04. See also *ibid* (“[w]hile practising I quickly became aware of how lethal to one’s career and tiresome it was to be the only one constantly raising issues” at 201).

would dump their personal work on me. Like they wanted to build a tennis court, and wanted me to do their mortgage. I didn't know anything about it, but I was free, because they would write my time off. So you know, it was, it was the kind of thing that people like me were, tended to be targeted for. . . . I would have been much more likely to say [to myself], "You don't need to, you don't, you can say no." . . . Because it pulls you off your game, right? It, it means that it takes you longer to get to the work you want to do professionally.⁴²

Several lawyers reported being subject to discriminatory statements in their workplaces. Very few of them reply with a direct response. Instead, most deal with offensive or discriminatory comments either with jokes or by ignoring them. Similarly, they describe various types of discrediting. As Dianne, a woman with a disability, recounts, "sometimes . . . you say something. You think it's a pretty good point. And, people either ignore it or don't respond or minimize it. And then . . . some guy will say it, and suddenly, it's like 'Yeah, that's a good point.' You just want to shout: 'Didn't I already say that?' [*laughs*]."⁴³

Finally, association-based covering describes the pressure marginalized lawyers feel that leads them to avoid socializing or affiliating with other lawyers who might share similar identity characteristics.⁴⁴ For some of the lawyers we interviewed, the process of "vetting" their presentation to reduce any association with their communities begins with the process of putting together application materials for their first law jobs. As Sherry recalls,

in law school . . . [I read] a paper that somebody had written about applying for articling positions . . . and . . . she . . . removed all of the references from her resume to . . . involvement in gay and lesbian organizations and that sort of thing, anything that would identify her. . . . [E]very time I applied for a job or wrote a resume, I'd consider whether or not I'm gonna [*sic*] bring that up.⁴⁵

Several lawyers we interviewed consciously avoid meeting with other lawyers from the same marginalized groups where they can be seen by their

42. Interview of Fivi, *supra* note 25.

43. Interview of Dianne by a Member of the Research Team (30 September 2017).

44. See Carbado & Gulati, *supra* note 38 at 1285–88.

45. Interview of Sherry, *supra* note 24.

colleagues.⁴⁶ For example, Camilla, an African Canadian lesbian woman says, she would say to other Black lawyers, “Don’t let them see us talking together [laughs].”⁴⁷

B. Compensating Strategies

In some cases, marginalized lawyers adopt strategies designed to make up for what might be perceived to be their “failings” (in this case, their failing is to be a marginalized lawyer). There is an established scholarship on how members of marginalized communities take on extra work to be accepted in the workplace.⁴⁸ Some lawyers explicitly recognized the trade-off between the extra work they took on and their acceptance. As Xavier observes, “I worked twice as hard, and in some ways, continue to work twice as hard, for big chunks of my career, and I think was compensated with acceptance of my homosexuality because of it.”⁴⁹ Compensating strategies might be described as fitting within five types.

First, almost every lawyer we interviewed articulated feeling the need to work harder than “other” lawyers. In some cases, lawyers explained the need to work hard as part of the requirement to prove themselves. As Camilla emphasizes, “from when I was very young . . . I already knew how this game had to be played, right? So, do I feel I need to work harder? Absolutely. Do I feel like I need to perform higher, to even be noticed, recognized, received? Absolutely.”⁵⁰ Fivi describes her work patterns:

I easily worked twelve- to sixteen-hour days, every day, six days a week, for a few years. And, it was obvious to me, that

46. See e.g. Interview of Camilla by a Member of the Research Team. See also Baxter, *supra* note 7 at 279. Baxter stated, “get to know your black colleagues. Some of us have a tendency to feel self-conscious when we get together with a group of our black colleagues. I think we fear that it will make us stand out even more as outsiders on Bay Street” (*ibid*).

47. Interview of Camilla, *supra* note 46.

48. See e.g. Christopher D DeSante, “Working Twice as Hard to Get Half as Far: Race, Work Ethic, and America’s Deserving Poor” (2013) 57:2 Am J Pol Sc 342; Frances Henry et al, *The Equity Myth: Racialization and Indigeneity at Canadian Universities* (Vancouver: UBC Press, 2017); Tameera Mohamed & Brenda L Beagan, “‘Strange Faces’ in the Academy: Experiences of Racialized and Indigenous Faculty in Canadian Universities” (2019) 22:3 Race, Ethnicity & Education 338 at 339, 349–51; Bea Waterfield, Brenda Beagan & Merlinda Weinberg, “Disabled Academics: A Case Study in Canadian Universities” (2018) 33:3 Disability & Society 327 at 342.

49. Interview of Xavier by a Member of the Research Team.

50. Interview of Camilla, *supra* note 46.

people who were from the other . . . backgrounds who were well connected, who, you know, fit in to the mold of what a lawyer's supposed to look like and be like, had it much easier. It was just the way it was. And again, you know, at the time, for people who were Black or South Asian, I mean, forget it, they didn't even, most of the time they didn't even get through the door.⁵¹

One of the lawyers we interviewed, Dianne, has a visual impairment. Not only did she feel pressure to work harder than everyone else, but because of inadequate accommodations she often took on additional work to ensure that she could effectively represent clients:

[W]hen I articulated . . . I . . . really worked hard. I had to. I had to transcribe . . . all of my material into . . . Braille notes. And these were docket courts. Like, one court, I had seventy files, which couldn't be managed in a day, but nobody cared about that. I had to be ready. . . I was a student Crown. . . [T]he courts that I was involved with went really well, and really quickly, because I didn't have to page through files and look for documents. I knew immediately. I knew well in advance. If a document was missing, [I] knew how to get it. And, [laughs] you know, . . . it was really hard work, and one of my readers said to me one day, "I can no longer work eighty hours a week." . . . So we had to get two readers.⁵²

Even with all the additional work, some lawyers expressed frustration: it will never be enough. Carla was "always required to work more billable hours". Yet, that additional work is never recognized and often she found herself subject to criticism from which it seemed others were immune:

You always feel like you have to prove yourself, all the time. . . I can go to court on five motions and have five orders in favour of my client, and that's not going to be recognized. Whereas, you know, my male colleagues will go on a minor procedural motion and get the order, and they're being heralded that, you know, they're the greatest [laughs]. . . It doesn't matter how hard you work, it's never enough. . . I don't know whether it is a by-product of the profession or

51. Interview of Fivi, *supra* note 25.

52. Interview of Dianne, *supra* note 43.

whether it just applies only to the people, certain people. I feel like . . . I get those responses [no recognition] . . . or that type of [critical] feedback . . . because I'm a woman . . . and because, I'm Russian. Right? Because, it's like "Well, you know, you could have done better. But oh well. You Russians never do right [*sic*]."53

Second, some lawyers we interviewed felt it was important for them to obtain additional credentials to be considered worthy of the same positions as non-marginalized lawyers. For example, Angela spent a semester in Singapore to be more marketable to law firms.⁵⁴ Camilla obtained her MBA degree to demonstrate that she had the appropriate credentials to take on management-level work.⁵⁵ Alongside additional formal credentials, some interviewees were explicit in describing the need to receive awards and other "objective" markers of their talents and success. Julian was unabashed in noting that he had "gotten all kinds of awards".⁵⁶

Third, a few people that we interviewed relied on their adept social skills to ensure their acceptability. They appreciated the importance of socializing and networking and made an effort, even if it was unpleasant, to excel in that area of the job. So, for example, Camilla went to every social event the firm sponsored even if it was "the last thing [she] wanted to do";⁵⁷ Tracy "attended a lot of events [hosted by the bar society] and with the law society and [she] was constantly working to see what [she] could do. [She] was making presentations, [she] was writing articles."⁵⁸

Fourth, some lawyers note that they strive for perfection. In some cases, they believe perfection is required because of the additional ramifications of any errors in their work. For example, Vince "can't ever have an inferior work product because, it goes back to the pressure of, it won't be seen as just '[I] did a crappy job.' It's . . . 'Well, he did a crappy job because he's Black.'"59 Visible difference in the courtroom (and presumably in other work venues) exacerbates the pressure to be perfect. Ona, a Black Muslim woman, recounts the stress of any errors when she appears in court:

53. Interview of Carla by a Member of the Research Team (3 January 2018).

54. See Interview of Angela by a Member of the Research Team (14 September 2017).

55. See Interview of Camilla, *supra* note 46.

56. Interview of Julian by a Member of the Research Team.

57. Interview of Camilla, *supra* note 46.

58. Interview of Tracy by a Member of the Research Team.

59. Interview of Vince by a Member of the Research Team.

I still, to this day, whenever I have to appear in court, [have] extreme anxiety about [it] . . . I think everyone says, “Yeah, I get really nervous when I go in court.” But, my anxiety is more around, “How am I going to be perceived?” And on top of that, . . . [I have] the constant pressure that I feel, that . . . [I] have to be two or three times better than everybody else . . . to compete . . . I’ve always [had] this intense pressure of “Oh, I can’t mess up. I just can’t mess up” because I’m not inconspicuous. . . . The judges will speak to each other, “Oh yeah, did you see that woman in the scarf this morning? Like, she was terrible.”⁶⁰

Fifth, marginalized lawyers are often asked by their firms to pick up extra “diversity” work; they are asked to sit on diversity and equity committees, to meet with applicants for positions (to reassure those applicants about the inclusive nature of the firm), and to mentor other marginalized lawyers in the firm.⁶¹ As Elizabeth, an Arab Canadian, jokes, “I’m being asked to sit on the diversity council. . . . I am already the chairperson of the [group]. I am the chairperson of [name of non-profit omitted]. So I was joking, that ‘Do I have a sign over my head that says like, [laughs] extracurricular, come here’.”⁶²

These compensating strategies are worth distinguishing from other strategies because in each case the lawyer believes that they are required to do more than other normative lawyers to receive the same level of acceptance. Each of these measures, however, is tied directly to the expectations of the job—working longer hours, obtaining additional credentials, building enhanced (work-based) social networks, and executing aspects of the job at the level of perfection. These are types of (additional) work that normally one would expect to see compensated with additional financial remuneration or quicker advancement. But, in the case of marginalized lawyers, this additional work is necessary for them to be seen to be “as good as” normative lawyers.

Although not a compensating strategy deployed to fit into the legal workplace, this section ends by highlighting the use of a legal career as a compensating strategy in and of itself. Some lawyers pursue a legal career in an effort to make themselves, as outsiders, more acceptable in society and with their families:

I’m happy with my career but . . . I sometimes think I chose it in part because . . . I was looking for a respectable career

60. Interview of Ona, *supra* note 32.

61. See Eli Wald, “BigLaw Identity Capital: Pink and Blue, Black and White” (2015) 83:5 *Fordham L Rev* 2509.

62. Interview of Elizabeth, *supra* note 29.

to . . . mitigate any damage that my sexual orientation was doing in the eyes of . . . my family or . . . the world at large. . . I made some more conventional decisions because of it, than I think I would have otherwise. . . I think subconsciously it factored in because I thought . . . I could . . . end up . . . a gay, unemployed writer or a . . . lawyer which . . . is respectable and . . . almost like a retort to people criticizing you for your sexual orientation. You kind of get to say like, oh, no, well, I'm a lawyer so.⁶³

Given the expectation that pursuing a law degree might provide a life of dignity and respect that may even serve in some circles to “compensate” for the “failing” of being a person with a marginalized identity, one imagines that to have to work so much harder within the legal profession in an effort to continue to compensate for that failing (just “being”) must be especially disheartening.

C. Mythologizing Strategies

Michael St. Patrick Baxter's frank talk to students at Western Law beautifully (and distressingly) highlights the necessity of mythologizing. He directs some of his remarks directly to Black students who seek to work on Bay Street, offering them ten concrete pieces of advice.⁶⁴ After concluding that advice, he cautions students that even if they adopt all of them, they will not survive on Bay Street unless they incorporate a particular mindset:

I would be remiss if I failed to caution you. Even if you follow my advice to the letter, it still may be virtually impossible for us to succeed on Bay Street today if we lack one critical quality. To succeed on Bay Street today a black lawyer must transcend race. What do I mean by that? You must be able to function as if oblivious to race. It is not enough simply to act as such. You must believe it with every fibre of your being. . . To succeed on Bay Street, you must believe in your heart that your colour has had and will continue to have no effect on your career.⁶⁵

Baxter is not confused about the racism on Bay Street. It is not that he thinks that his proposed mindset reflects reality. He notes, however, that

63. Interview of Sherry, *supra* note 24.

64. See Baxter, *supra* note 7 at 276–79. For example, he suggests developing your credentials, finding a mentor, and having a passion for the work.

65. *Ibid* at 280.

“sometimes it is easier to meet the challenges in one’s life with less than complete information”.⁶⁶

Marginalized lawyers mythologize when they create a narrative that demands them to ignore discrimination or to remain skeptical about its presence or where they recognize discrimination but create a mantra that enables them to continue to work in discriminatory workplaces to achieve some higher order end. Sometimes mythologies are offered consciously and sometimes unconsciously. In some cases, they involve self-deception; in other cases, they seem to rely on embracing uncertainty. This section of the paper identifies five myths marginalized lawyers tell themselves so that they can go back to their workplaces every day.

(i) It’s Probably Not Discrimination, It’s Just Me

Many marginalized lawyers explain away what appears on its face to be discrimination as instead a result of a personal characteristic (like shyness), a personal preference, or a consequence of inadequate work. Quinn, a lawyer with a disability, describes attending a social event where she ends up sitting at a table with another lawyer with a disability and the rest of the people who attend sit at a different table. Quinn recounts, “[w]hen we went to leave she [the other lawyer with a disability] said, ‘well let’s stop and say hi’, and she was sort of on the outside of the circle too and I think she felt, I know she feels somewhat excluded . . . I just stood there behind her and didn’t say a word . . . That’s . . . partly my own personality.”⁶⁷ This story appears on its face to be one where two lawyers with disabilities sit at one table and everyone else sits at another. When the groups converge briefly at the end of the event (at the initiation of one of the lawyers with a disability) the lawyers with disabilities remain essentially excluded. The narrative that takes responsibility as “partly my own fault” is a form of mythologizing that enables marginalized lawyers to make sense of what appears to be discrimination in a way that makes that discrimination tolerable (because the circumstances remain within the control of the lawyer).

Tyler describes feeling like he least fits in at the obligatory social events. He summarizes that “odds are when you go to these events, you’re gonna [*sic*] be one of maybe maximum three to five Black people in the room . . . So you know, you’re just tired of going to the events and just not having more people of your colour that you can communicate with.” Yet he concludes that he does not like these events because “maybe ultimately [he is] just not wanting to be there” and not as a result of his Black identity.⁶⁸

66. *Ibid* at 281.

67. Interview of Quinn by a Member of the Research Team.

68. Interview of Tyler, *supra* note 34.

The risk of squarely acknowledging racism or homophobia in the workplace is transparent in Camilla's description of how she deals with incidences where she feels like she has been treated differentially:

If I feel that there's inexplicable differential treatment, inexplicable on the face of it, so it makes me think, [*sighs*] I wonder if there's something behind it. . . Like, someone doesn't come up and go "You know what? I'm going to treat you differently, because you're Black. And another thing, I understand you're a lesbian too."⁶⁹

In those cases, she tries to find as many possible explanations for the behaviour as she can, deliberately avoiding concluding that she has experienced discrimination. Even when she has ruled out all plausible explanations for differential treatment aside from discrimination, she avoids talking about her experiences in the hope that it will prevent them from being true. This enables her to continue in her workplace: "I feel like, often, in my experience once you start giving voice to some of these things, they can take on a life of their own. And I really want to just put it, if I can, compartmentalize it out."⁷⁰ As Camilla's interview suggests, marginalized lawyers will often work hard to create an alternative reality for themselves—one where the experiences they have had are not a function of their marginalized identity, but rather something that is within their control (to an extent at least) or the result of some less painful aspect of who they are (like their personality).

(ii) I'm Paving the Way for Others

Another mythology invoked by interviewees was that the additional work and labour they took on was worth it because it paves the way for future marginalized lawyers:

[Y]ou feel a responsibility to the other individuals coming, because I know that I'm, I need to be good, and I need to do things, so that when I go into the courtroom, before the judge, you know, that the next Black person or person of colour that goes in there, won't be, I won't be perpetuating that stereotype or providing a reason for the judge to think that there's going

69. Interview of Camilla, *supra* note 46.

70. *Ibid.*

to be inferior work here. . . . I think it's really important that what you're doing is for yourself, but it's also for the people coming in behind you. So you want to pave the way with your reputation, "Oh, this person does good work." And then when, and then when the next judge you appear before, and they're like, "Oh, he's Black. I didn't realize that."⁷¹

This sentiment was echoed by Tyler:

[E]verything I'm doing in life or in my practice is to pave the way for the next person. I think I have a sense of obligation. I gladly embrace that I am trying to open doors for those behind me because no one opened the doors for me and I'm very fortunate to be where I am, and I'd like that opportunity to be given to my kids . . . so that is something I feel about being Black and a lawyer.⁷²

(iii) I Need to Stay in My Own Lane

Deanna, an Indigenous lawyer, tells a story about working with another articling student at legal aid. The man was not organized, he did not want to do the work, and he made mistakes. He then moved to a prominent private law firm, where despite not providing good service to his clients, he makes three times more than Deanna. Deanna notes that when she sees that kind of differential treatment it can make her feel "like 'damn'. [But] then I think, well, I need to stay in my own lane, I need to focus on me, and I need to make sure that I'm doing what I need to do for my clients".⁷³

(iv) I Need to Accept This for the Client

Deanna's story hints at another mythology that lawyers use to cope with a lack of fit or discrimination they experience in the profession. Several of the lawyers invoked the need to be as unobtrusive as possible and to accept discrimination without confronting it because that stance best supports their clients. For example, Natalie justifies spending so much time and energy on her

71. Interview of Vince, *supra* note 59.

72. Interview of Tyler, *supra* note 34.

73. Interview of Deanna, *supra* note 39.

appearance and behaviour as she is transitioning because she has “an elevated sense of . . . responsibility . . . to my client. . . I did not want my client to suffer, as a result of who I was.”⁷⁴ Xavier explains that “your client should feel comfortable; it’s more important than you feeling comfortable.”⁷⁵

(v) This Is Just the Way It Is and I Need to Suck It Up

Occasionally a lawyer would explicitly acknowledge that they experience discrimination but emphasize that that is to be expected, that it is part of life, and it is to be tolerated on some level. “[M]y mother grew up with it [ethnic discrimination], and my father grew up with it. So . . . you suck it up and you move on. You don’t spend a lot of time whining about it. So it’s just the way things are, when you’re not in the majority, in a sense.”⁷⁶

D. Passing Strategies

Unlike covering, which requires minimizing characteristics or activities that might underline aspects of a person’s identity that are stigmatized, passing strategies require the person to censor those aspects with the aim of being seen to be part of the dominant groups.⁷⁷ In many instances in our interviews, the line between covering and passing was blurry. If someone with a disability walks without their cane, to those who do not know that person has a disability they may “pass” as someone without a disability; but for those who know of the disability, the failure to use a cane may more appropriately be described as covering. Many of the people we interviewed contemplated changing aspects of their initial presentation—whether on curriculum vitae or for high-stakes conversations like interviews. For example, Bao considers whether to use an anglicized name, which would presumably assist with passing in some contexts:

I’ll share with you something I always think about. . . . You know, look at [my name], right away [you know] . . . I am a minority. My parents have always talked to me about . . . just

74. Interview of Natalie, *supra* note 27.

75. Interview of Xavier, *supra* note 49.

76. Interview of Fivi, *supra* note 25.

77. The process of passing has long been theorized by sociologists. For example, in his 1963 book, Goffman includes an extended discussion of the mechanisms for passing. See Goffman, *supra* note 16 at 73–102. For a discussion of strategic passing, see Carbado & Gulati, *supra* note 38 at 1300–01.

adopting a white name, so I could be . . . Sam or Bob. In that sense . . . when somebody looks at an application or looks at your factum . . . the minority element doesn't jump out. . . . I always have a sense that having the name that I have . . . put[s] me at a disadvantage, right off the bat . . .⁷⁸

Nevertheless, because this study explores the strategies employed by lawyers in their legal workplaces, the line is likely clearer than it might be if we were interviewing people about their interactions in all aspects of their lives. In most cases, because legal workplaces require us to spend hours with the same group of people and because those people share social networks (and ideas about one another), most lawyers will either hide aspects of their identity with most (or all) of their colleagues or those colleagues will know (that they are LGBTQ+, disabled, racialized, Indigenous, or from an ethnic or working-class background, or some combination of those).

It is sometimes observed that some groups (for example, racially visible lawyers) never pass (because they are by definition visible) and other groups (for example, some queer or disabled lawyers or some lawyers from low-income backgrounds) find passing to be a more available option. As hinted to in the discussion of Lynne's insights about appearance-based covering above, our interviews suggest that the decision to pass is more nuanced than the standard story suggests. Racially visible lawyers may find ways to pass for limited periods of time. For example, as highlighted above, some of the lawyers we interviewed contemplate changing their names on their application materials. Additionally, some of the lawyers we talked to utilized passing strategies for some aspects of their identity (for example, their queerness) but not others (for example, their ethnic identity).

In some cases, our interviewees seemed surprised by their decision to pass. For example, Camilla was able to be out as a lesbian in law school ("very out and very vocal"). Nevertheless, she exposes that "[w]hat was interesting . . . for me . . . was Bay Street. . . . I've never, ever, I mean, once I came out years prior, I thought 'I am never going back in.' So then, here I am on Bay Street, and I certainly took anything from my resume that would suggest that I was lesbian. That all got removed." These decisions have costs: "I regret that . . . just in terms of my own person and personhood."⁷⁹

Other interviewees seem to pass, at least in some aspects of their identity, with comfort. Julian connects his clothing preferences with those that are perceived to be more mainstream:

78. Interview of Bao by a Member of the Research Team.

79. Interview of Camilla, *supra* note 46.

I suppose . . . compared to some gay men, . . . unless I told them or they knew that I was gay, they probably wouldn't look twice at me. I'm not somebody that dressed in any particular way. . . . [I]f you had an openly gay student, a male student who was there, who was more flamboyant or more . . . adventurous or provocative in how they dressed, and so on, that maybe they would have experienced some pushback on that.⁸⁰

Another interviewee adjusted her speech when she was on the phone. Ona recounts that if she's on the phone with a client, "the kids will say 'You know you talk differently, when you speak to clients' and whatnot. And again, it's those, the two parts of me. And . . . I have been accused by Black folks of, 'You talk white. And why do you talk like that?' And . . . so sometimes I feel like I'm in this no man's land, . . . where do I fit now?"⁸¹

Some lawyers pass early in their careers and then "come out" as they get more comfortable in the profession. For example, Angela, an Asian working-class woman, says that

early on in my career, I never told anybody [I came from a working-class family]. Because I felt it was another thing that made me not fit. . . . [B]ut now, I find it actually important to be open about that kind of thing. . . . [S]tarting out . . . in private practice, you tend not to want to disclose stuff that you think people are going to use to . . . sideline you.⁸²

Lawyers also explained how they learn to pass. In some cases, the person was able to be hyperattentive to their environment and to mimic the behaviour of normative lawyers. So, for example, Lynne explains that she was able to learn how to pass (as middle- or upper-class) by "getting into the situation and observing":

[W]hen I . . . ended up at [university in Central Canada], I made . . . friends, not intentionally . . . with a guy from a very good family. And so he and I did a lot of things together. And so what I noticed, . . . when we would go to an event together . . . I remember we were at some kind of buffet

80. Interview of Julian, *supra* note 56.

81. Interview of Ona, *supra* note 32.

82. Interview of Angela, *supra* note 54.

event. And I noticed, like, you have a plate, and you have to get your cutlery and plus you have a drink. And I was like [*makes noise*]. So I was really struggling. And then I just looked up at him. And he knew how to do it. He tucked the napkin in behind the plate, and the cutlery in between the two fingers, and held the plate, and the cup. He knew how to do it. So I just copy. Right? Just observe and incorporate. . . . I just kept doing that. And you know, you still run into things where the, I don't, you know, I still have to keep doing it.⁸³

In other cases, they were able to look for explicit guidance from friends and acquaintances in the profession. So, for example, Hannah explains that

being invited to fancy law firm dinners, . . . in the beginning was kind of overwhelming for me. But I had . . . good friends who were also in the legal profession. So I was able to say . . . “I’m going to this dinner, and I don’t think I’m going to be very comfortable.” And somebody, . . . said, . . . “This is, you know, don’t sweat it. It’s not a big deal.” and blah, blah, blah, and walked me through it.⁸⁴

Finally, marginalized lawyers were able to access explicit directions on how to fit in or pass in legal workplaces. For example, James knew that the Black Law Students’ Association offered courses to “try to groom people . . . so that they can fit in”, although he did not want to be part of that.⁸⁵ Sometimes the steps to passing (for example, as “class” appropriate) are apparent; Bao took up golf.⁸⁶

E. Exiting Strategies

Marginalized lawyers adopt exit strategies when the other strategies do not work. In these cases, the only way to manage the workplace is to exit it. In some cases, exit strategies are used by marginalized lawyers in ways that enable them to maintain their positions; in the most serious cases, exit strategies require marginalized lawyers to leave particular positions or to opt not to apply to those positions in the first place. Exiting strategies, while still staying within

83. Interview of Lynne, *supra* note 18.

84. Interview of Hannah by a Member of the Research Team (14 October 2017).

85. Interview of James by a Member of the Research Team (29 January 2017).

86. See Interview of Bao, *supra* note 78.

a particular workplace, seemed most common around social situations and mentoring.

(i) Exiting Social Situations

Many of the lawyers we interviewed figured out how social networking in legal practice works, but ultimately found social settings to be too uncomfortable. Many decide not to attend social events, even though they know how important they are to the practice of law and business development.

Many interviewees also avoided formal networking events for the same reason: that they were alienating. Hannah avoids law society events because “they’re just so disconnected from Indigenous communities”.⁸⁷ Bao avoids the Friday cocktail hour where “everybody socializes and sometimes, you even talk about cases there . . . I don’t do that. I notice there’s another Asian guy in our office—he doesn’t do that. . . I don’t know whether that’s a culture thing . . . I just want to go home to my family.” Similarly, he declines to attend the annual camping trip planned by the men in his office, which is where “you’re supposed to show how tough you are.” These kinds of activities “seem like a very white thing”.⁸⁸ In other cases, marginalized lawyers are excluded by definition. For example, male lawyers in Sherry’s firm had a regular scotch and poker night. She likes scotch and poker and would have attended if invited. She would “teas[e] them . . . but they don’t invite me cause they’re afraid I’d win or [*laughs*] know what exactly goes on at these events”.⁸⁹

(ii) Finding Mentoring and Support Outside the Workplace

Almost everything you read about how to survive in a law firm environment emphasizes the importance of mentors—not just any mentor, the *right* mentor.⁹⁰ Marginalized lawyers have well-documented difficulties in obtaining

87. Interview of Hannah, *supra* note 84.

88. Interview of Bao, *supra* note 78.

89. Interview of Sherry, *supra* note 24.

90. See Baxter, *supra* note 7 at 277. Baxter stated, “[s]uccess on Bay Street is virtually impossible if you do not have a mentor. A good mentor will look out for you, guide you and counsel you” (*ibid*). See also David B Wilkins, “Why Global Law Firms Should Care About Diversity: Five Lessons from the American Experience” (2000) 2:4 Eur J L Reform 415 (“only those associates who get access to good work and supportive developmental relationships have a realistic chance of becoming partners” at 424).

any mentor, let alone the right mentor, in their workplaces.⁹¹ In our interviews, few lawyers identified a mentor within their own workplace who was able to support and guide their career development, and of the few who did identify a mentor, even fewer were able to find a mentor who came from a similar background.

Instead, almost all of our interviewees explained that they relied on people external to their workplaces, often people who were also lawyers with similar identity characteristics, who served as informal sounding boards and supports. Sherry has

been really trying, personally, to make community. . . [J]ust recently, I got together with a couple ah, Indigenous lawyers in [name of Ontario city omitted], because I'm practicing in [name of Ontario city omitted] now. And we put together a dinner of all the Indigenous, the female Indigenous lawyers in [name of Ontario city omitted], and it was a great success. And there was, like, twenty-six people showed up and it was great. But that's just, for me, I need that. Like, I don't, I can't just, I can't operate without a community. Like, I need a community. And ah, so that's, it's important for me to have that.⁹²

This strategy, seeking work-related mentoring and support outside the workplace, was viewed by many of the lawyers we interviewed as essential to their survival; yet, the research suggests that without a major mentor embedded within the “in-group” at a law firm, lawyers will struggle to find their place in a legal workplace.⁹³

91. See Baxter, *supra* note 7 at 277. Baxter stated, “black associates are less likely than their white peers to find mentors who will give them demanding work and client contact, and counsel them about how to succeed at the firm. A primary reason for this is the natural affinity that we all have for people who remind us of ourselves” (*ibid* at 277–78).

92. Interview of Sherry, *supra* note 24.

93. Wilkins, *supra* note 90 at 424. Wilkins stated, “[c]ontrary to the survival of the fittest rhetoric of tournament theory, therefore, success in large law firms is less a matter of innate ability and hard work – most of those who get hired by elite firms possess these qualities – and more a function of gaining access to valuable, but limited, opportunities; opportunities that are invariably mediated through relationships” (*ibid*).

(iii) Limiting Practice to Particular Areas of Law

Other exit strategies are more dramatic—the lawyer does not exit part of the job, they exit the entire area of practice or an entire type of firm. Several lawyers described deciding to limit their practice to areas of law where they believe they will be more accepted. Lawyers may move away from an area of practice they initially chose (or would have liked to have chosen) because they believe that they are not welcome in that area.⁹⁴ Bao, a Chinese Canadian man, describes telling a firm that he has an interest in constitutional law and the firm suggests that perhaps corporate law would be a better fit.⁹⁵

(iv) Limiting Practice to Particular Types of Firms

There is limited empirical evidence about how law students choose the firms they apply to for their first placements. However, there is some evidence that where students see no fit between themselves and the firm, they simply do not apply.⁹⁶ We had several lawyers in our sample who explained their decisions about what firms to apply to that way: even though they wanted to work at the firm, they did not apply because they could not imagine they would be accepted. Bao describes his interview experience: “I had pretty good marks, so I got a lot of interviews. And, I did one interview . . . and . . . my sense is, in terms of those Bay Street firms, it is a very white culture. . . . I was pretty turned off by the experience, and then I cancelled all my interviews after meeting with one of the firms.”⁹⁷

In some cases, despite trying to find a place in a particular type of firm, some marginalized lawyers could not get over the threshold. For example, Dianne, a visually impaired lawyer, tried to explain to private practice firms that it was possible to accommodate her disability. She would ask them to let her know

94. As Camille Nelson observes, there is a double standard “implicit in the streamlining of students of color away from private practice and toward areas that are seen as more traditionally suitable for persons of color”. See Camille A Nelson, “Toward a Bridge: The Role of Legal Academics in the Culture of Private Practice” (2001) 10:1 *JL & Pol’y* 97 at 108 (“[b]lack lawyers have become over-represented in solo practice, immigration law, criminal law, public interest and poverty law” at 109).

95. See Interview of Bao, *supra* note 78.

96. See e.g. Eleanor Rowan & Steven Vaughan, “‘Fitting In’ and ‘Opting Out’: Exploring How Law Students Self-Select Law Firm Employers” (2018) 52:2 *L Teacher: Intl J Leg Education* 216.

97. Interview of Bao, *supra* note 78.

what they needed to know in order to understand what accommodation might be necessary. Nevertheless, “they were very uncomfortable” and she did not receive any employment offers from them.⁹⁸

We asked all interviewees if, knowing what they now know, they would choose to be a lawyer again. Many of them said yes, but a notable number said no. As one participant concludes, “I would like to say yes . . . [but] I think that there would be more effective ways to reflect my values in my day-to-day life than the practice of law.”⁹⁹

Conclusion

One consequence of the taxonomy of strategies used by marginalized lawyers to survive the practice of law is that those who want to make the profession a more inclusive place for marginalized lawyers can more easily identify (and then address) the kinds of activities that engender the need for marginalized lawyers to adopt coping strategies in the first place. There are distinct differences in each type of strategy both for the person who adopts it and for the legal profession as a whole. For example, lawyers who adopt covering strategies do make visible (even if less visible) the presence of “others” in legal practice. Racialized, ethnic, Indigenous, LGBTQ+, low-income, or disabled clients and potential lawyers see reflections of themselves in the legal profession (although those reflections are muted by the strategy of covering). Normative lawyers may slowly build comfort with lawyers from these backgrounds, over time reducing the informal mechanisms of exclusion (many of which are rooted in discomfort) for lawyers from marginalized communities. However, marginalized lawyers would not have to engage in covering if legal workplaces revised their standard practices around “business attire”, adopted approaches that reduce the likelihood of unconscious bias in reviewing curricula vitae, hosted some social events in more accessible (both in terms of financially accessible and physically accessible) spaces, encouraged lawyers to expand their range of conversational topics or to focus on shared interests (like law) in social settings, and offered more events without alcohol. In addition to these changes, legal workplaces might embrace a broader range of social and political perspectives and build cultural competence among the current cohort of lawyers.

The use of compensating and mythologizing strategies might give rise to different concerns. When marginalized lawyers use compensating strategies they are contributing more to their practices than others. It is likely there

98. Interview of Dianne, *supra* note 43.

99. Interview of Shawna by a Member of the Research Team.

are inadequate mechanisms in place to support them, to financially reward them for the extra work they carry, or to appropriately advance them in their workplace. This uncompensated extra work undoubtedly contributes to stress, burn out, anxiety, and eventually exit. Responding to these concerns requires that legal workplaces have effective methods of measuring contribution (and compensates for the range of work undertaken by marginalized lawyers, including work building the equity profile of the firm) and that marginalized lawyers are provided with mentors who can provide them with honest input on how much work they should do and what work matters.

Mythologizing carries its own challenges. While this strategy may enhance a marginalized lawyer's ability to fit in a particular workplace, it requires the lawyer to deny the reality of exclusion. Lawyers from marginalized communities who assert that they have not faced discrimination may discourage lawyers who (accurately) assess that discrimination occurs from continuing in the profession or may leave those lawyers feeling like something is uniquely wrong about them (as opposed to systemically wrong with the design of the profession). None of the lawyers we interviewed had taken formal steps to complain about their treatment—either within their firms, with the law society, or with a human rights tribunal. This kind of mythologizing may be slowing the pace at which marginalized lawyers are able to push for change within the profession. Addressing the conditions that create the need for mythologizing is some of the most difficult work for legal workplaces. Among other steps, it would require being open to hearing about the discrimination some lawyers experience, taking that discrimination seriously, and being willing to work with the lawyer to address the discrimination.

Passing and exit strategies are of a different order. These strategies require hiding or denying, at least during the workday, entire parts of one's identity. In his work, Yoshino takes issue with what he describes as the "classical model" of anti-discrimination discourse because it assumes that covering, passing, and conversion operate independently and in order of severity. This study suggests that his general observation (that they do not operate independently) has merit. Our identities are complex and multi-faceted, more so than the classical model of anti-discrimination discourse would suggest. The lawyers in our study often employ all five strategies in different ways and at different times. For example, a lawyer may seek to pass in terms of their working-class background throughout their career, to pass in terms of their queer identity during recruitment and then to cover when their position appears to be secure (after hire back), and to exit in terms of their efforts to obtain support and mentoring. Legal workplaces can address passing strategies in part by demonstrating, in ongoing ways, their openness to marginalized groups. This requires hiring marginalized lawyers, promoting them at the same rates as normative lawyers, appointing them to leadership positions, and ensuring that marginalized lawyers are offered the same crucial, high-stakes, high-profile opportunities (with firm support) as normative lawyers.

Exit strategies, the most dramatic for the profession, result in marginalized lawyers missing from parts of the profession altogether. These strategies are responses to a more serious understanding of the risks of disclosure or presence within a particular work environment. They suggest a high level of anxiety about what types of people (or practices) are acceptable within law practice. When lawyers from marginalized groups adopt these strategies, we might expect the personal cost to them is high and we know that the cost to the legal profession is substantial.

Consistent with other research, our data suggests that legal practice environments force lawyers from marginalized communities to adopt strategies like those discussed above to survive in the profession. Those strategies enable some lawyers to spend the length of their careers in law, although often with harmful personal consequences and with great loss to the profession as a whole. Those consequences are exacerbated when even the best strategies are insufficient to compensate for the violence of compelled conformity. In those cases, lawyers like Roderique, who have a lot to contribute to the advancement of justice, exit the profession.

What is most striking on review of our interviews is the amount of work these successful lawyers have to put into the practice of law in order to stay there. And in the face of all of these efforts—pretending to be someone they are not, changing their appearance, self-censoring, isolation, extra hours, over-credentialing, aspiring to perfection, and in some cases withdrawing altogether—marginalized lawyers continue to face formal and informal exclusion from the practice of law.

The ramifications for the legal profession as a whole as a result of the adoption of these strategies is transparent—each has separate consequences that justify distinguishing among strategies. As the majority of the Supreme Court of Canada affirmed in *Trinity Western University*, “[a] diverse bar is a more competent bar”.¹⁰⁰ When lawyers from marginalized communities believe they have to cover, pass, compensate, mythologize, or exit, the structural inequities in legal workplaces remain intact and unchallenged.

100. *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 43.

