Diversity in Law Firms in the Legal Profession

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RECONCEIVING THE TOURNAMENT OF LAWYERS: TRACKING, SEEDING, AND INFORMATION CONTROL IN THE INTERNAL LABOR MARKETS OF ELITE LAW FIRMS

Tournament theory has become the dominant academic model for analyzing the institutional structure of large law firms. 1 In the most influential of these accounts, Marc Galanter and Thomas Palay argue in their justly celebrated book, Tournament *1582 of Lawyers: The Transformation of the Big Law Firm, that the core institutional characteristic of large law firms is the “promotion-to-partner tournament.” 2 This tournament, Galanter and Palay contend, is structured around a simple promise made by senior lawyers (partners), who have excess human capital, to junior lawyers (associates), with little human capital but an abundant supply of labor. 3 In return for the associates' promise to work diligently and competently on the firm's business, partners promise that at the end of a probationary period, they will promote a fixed percentage of these junior lawyers to partnership. 4

Galanter and Palay contend that the dynamics of the competition for these limited partnership slots accounts for the current size and institutional structure of contemporary elite firms. Their primary contention is that the promotion-to-partner tournament creates an internal growth engine that leads large firms to grow exponentially in size. 5 Underlying this conclusion, however, is an even more fundamental claim about the tournament of lawyers' role in facilitating the creation of law firms in the first instance. 6 Specifically, Galanter and Palay assert that the firm's promise to promote a fixed percentage of every associate class to partnership provides an efficient mechanism for associates and partners to prevent each other from behaving opportunistically with respect to the quality of an associate's work. 7 With respect to associates, the lure of the financial rewards and other benefits that are supposed to come with partnership (and the corresponding fear of not making partner) reduces *1583 an associate's incentive to “shirk” (by producing inferior work or failing to invest in firm-specific capital), “grab” (by stealing the partners' clients), or “leave” (before the firm has recouped its investment in the associate's development). 8 At the same time, the firm's ex ante commitment to promote a fixed percentage of each associate class reduces its incentive to “shark” (i.e., refusing to pay for services received) by failing to promote those who have exerted the most effort. 9

Galanter and Palay's claim that the tournament of lawyers is a response to the mutual monitoring problems of partners and associates is expressly premised on the more general economic model of tournament theory. 10 Tournament theory seeks to explain an apparent anomaly in the internal labor markets of some organizations. 11 Rather than simply paying employees on the basis of their current productivity, some firms exchange a portion of a worker's current compensation

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RECONCEIVING THE TOURNAMENT OF LAWYERS: TRACKING, SEEDING, AND INFORMATION CONTROL IN THE INTERNAL LABOR MARKETS OF ELITE LAW FIRMS
for the opportunity to compete with fellow workers for promotions to a job with more security and higher income. Moreover, instead of simply promising to promote whatever number of employees actually demonstrate that they are qualified for the higher level job at the end of the probationary period, these firms commit themselves to promoting a fixed percentage of workers solely on the basis of their relative ranking among their peers.

*T1584 Tournament theorists offer two interrelated explanations for this phenomenon. First, economists contend that firms are likely to adopt rank-order compensation when the cost of directly measuring each employee's individual absolute level of productivity is high compared to the cost of ranking a pool of employees according to their relative productivity to others in the pool. To compete effectively, firms must develop efficient mechanisms for monitoring employee work quality and rewarding those who perform well while sanctioning those who perform poorly. The obvious way for a firm to accomplish this objective is to supervise closely employee work and to tie wages to employee productivity. In some industries, however, the information costs associated with direct supervision and individual evaluation are prohibitively high. Rank-order tournaments, economists assert, provide an efficient way for firms in this position to economize on these costs. Firms that adopt this structure do not have to assess the individual productivity of all of their workers. Instead, the firm can depend upon the lure of the rewards associated with promotion (and the corresponding fear of not winning the competition) to motivate employees to exert high levels of effort and care with relatively little supervision. At the end of the probationary period, firms simply have to choose those employees who performed “the best” among their peers.

Second, economists contend that rank-order tournaments provide an efficient mechanism for workers to monitor promises made by the firm. According to this view, “employees cannot know with confidence the productivity estimates on which management decides wages, and they therefore have difficulty in knowing whether an implicit agreement to increase wages on the basis of productivity improvement is being honored by the employer.” Rank-order tournaments, by basing promotion on relative, as opposed to absolute, performance provide an observable and enforceable wage process. Since total pay is fixed ex ante, the adverse incentives on the part of the employer to tell employees that they were less productive than they actually were disappears.

It is the application of this foundational economic assumption to large law firms--the claim that these institutions are structured as rank-order tournaments in order to resolve the mutual monitoring problems of partners and associates--that we dispute here. Tournament theorists have performed an enormous service by focusing attention on the importance of monitoring problems in structuring the internal labor markets of elite firms. Through the internalization of professional norms relating to competence, client loyalty, and collegiality, most lawyers are predisposed to honor their professional commitments both to their clients and to each other. Thus, associates work hard with relatively little supervision because they are taught from law school forward that doing so is an important part of what it means to be a professional. Similarly, the profession's traditional commitments to self-regulation and client service undoubtedly lead most partners to take seriously their obligation to evaluate associates fairly. Nevertheless, like any other large and complex organization, elite firms must find ways to reinforce these traditional values with institutional structures that discourage opportunistic behavior by associates and partners. Although we therefore agree that tournament theorists have identified an important problem that all elite firms must address, we disagree that the economic model of the rank-order tournament accurately describes how firms respond to this need.

We base this conclusion on our prior analysis of the effect of race on the hiring and promotion practices of large law firms. In the course of doing that work, we noted important differences between the assumptions underlying standard tournament theory and the actual operation of the promotion-to-partner tournament in contemporary elite firms.
Article elaborates these observations in light of our respective continuing investigations into the practices of corporate firms. 19

Our critique of tournament theory proceeds along two seemingly paradoxical lines. First, we argue that a theory of law firm internal labor markets must take account of the ways in which the promotion-to-partnership tournament differs from a standard rank-order economic tournament. Specifically, we argue that theorists such as Galanter and Palay fail to account for six differences between the economic tournament model and the actual practices of elite law firms: (1) Many associates are not competing in the tournament; (2) firms do not give every associate an equal chance of winning; (3) the interests of individual partners diverge from those of the firm; (4) the tournament is not divided into two (and only two) distinct stages; (5) partnership is not awarded as a reward for past performance; and (6) firms do not seek to make the tournament's rules and outcomes transparent to associates. Once we account for these differences, we contend, it is clear that the standard economic model is not an appropriate tool for analyzing the internal labor markets of large law firms.

Nevertheless, we do not advocate abandoning tournament theory altogether. The few scholars who have criticized the application of tournament theory to large law firms have typically taken this approach. 20 In their view, tournament theory should be replaced with an alternative theoretical framework that focuses on factors other than the competition for partnership. 21 This would be a mistake. Although elite firms are not structured as rank-order tournaments, the competition among certain associates for the limited number of available partnership slots does play a crucial role in structuring the hiring, promotion, and retention practices of these institutions. As a result, although we reject the basic tournament model used by Galanter and Palay and others, we contend that the tournament metaphor remains a valuable aid for constructing a model that accurately describes elite firms. We therefore propose a model of law firm internal labor markets that acknowledges the importance of the competition for partnership without assuming that this competition proceeds along the lines of a standard economic tournament.

The model begins with a problem that tournament theorists ignore. In addition to finding efficient ways for partners and associates to monitor each other’s conduct, the problem tournament theory was designed to address, elite firms must also train the next generation of partners. Training is implicit in the bargain that Galanter and Palay posit between partners and associates, since those in the pool of junior lawyers from which the firm must select new partners initially possess little or no human capital. Yet, the economic model that Galanter and Palay adopt is silent as to whether firms will train some or all of their workers. So long as the firm sticks to its promise to promote a fixed percentage of workers at the end of the probationary period, economists contend, the tournament will reduce monitoring costs. Unless those who are promoted have been trained, however, the firm will soon cease to be an economically viable enterprise.

A plausible model of the internal labor markets of elite firms, therefore, must account for the fact that these institutions must resolve two separate, albeit interrelated, problems: monitoring and training. We argue that firms have responded to this dual challenge by adopting a complex incentive system designed to motivate every associate to work hard with relatively little supervision, while at the same time ensuring that the firm has a sufficient number of trained associates to satisfy its staffing and partnership needs. The promotion-to-partner tournament is one, but only one, part of this complex system. Instead, law firms employ a multiple incentive system that, paradoxically, incorporates practices typically found in the kind of “real” tournaments upon which tournament theory is loosely based but that are not included in the standard economic model. 22 Contrary to standard economic theory, lawyers in these institutions compete in a “multiround” tournament, which includes practices such as “tracking,” “seeding,” and “information control” typically found in sporting events and other kinds of formal competitions. In the early rounds, firms employ a variety of incentive mechanisms, of which the promotion-to-partner tournament is only one (and in most cases not the most important), to induce young lawyers to join the firm and to exert high levels of effort and care with relatively little
supervision. In the rounds immediately preceding partnership, however, firms rely heavily on the lure of partnership to induce senior associates to stay at the firm and to continue to work hard. It is only in these final rounds, therefore, that the internal labor markets of elite firms resemble a standard economic tournament.

Collectively, these modifications to standard tournament theory help us to unravel some puzzling aspects of the practices of large firms. For example, if partnership constitutes the primary incentive for young lawyers, then why are many firms openly suggesting that associates “come for a few years” regardless of their commitment to making partner? Similarly, if associates know that their chances for partnership depend solely on their relative standing among their peers, than why do we observe at least as much cooperation among associates as competition? Finally, if firms have strong incentives to conduct an open and fair competition in which “the best” associates in the pool become partners, then why do some groups of lawyers continually have a more difficult time winning the tournament of lawyers than others? A multiround tournament model that includes multiple incentive systems, tracking, seeding, and information control helps to answer these questions.

Finally, taking account of these modifications to standard tournament theory underscores the need for a more complex account of human capital and its relationship to firm structure. Tournament theory incorporates a definition of human capital that consists largely of knowledge and skills that are either generally valuable to becoming a good lawyer (referred to as “general purpose” human capital) or uniquely valuable to working at a particular firm (referred to as “firm-specific” human capital). Although we agree that “skills” are undeniably important, a complete understanding of the internal labor markets of contemporary large law firms requires an examination of the way in which certain “signals,” such as graduating from an elite law school, influence the career opportunities of associates. By the same token, scholars need to augment their analysis of individual- and institutional-level factors such as “general purpose” and “firm-specific” human capital with an understanding of the crucial role that “relational capital”--the production value that inheres in relationships--plays in structuring careers.

The next four Parts develop these ideas. Part I identifies the characteristics of large law firms that have led scholars to characterize the internal labor practices of these institutions as tournaments. In particular, we defend the most controversial of these assumptions, that monitoring lawyer performance is both difficult and expensive, against the charge that adequate monitoring takes place within the context of normal working relationships. Part II describes, and then critiques, the assumptions underlying the movement from the basic characteristics of elite firms identified in Part I to the claim that the internal labor markets of these institutions are structured as rank-order tournaments. Part III presents an alternative model in which firms use a variety of incentive mechanisms, including the promotion-to-partner tournament, to address both their monitoring and training needs. Part IV concludes by highlighting some of the implications of our model for the ongoing study of large firms and for the integration of economic and social theory more generally.

I. Why Tournament Theory?

It was only a matter of time before economists studying deferred compensation systems and scholars studying large law firms found each other. The traditional structure of large law firms appears to be tailor-made for tournament theorists. Law firms traditionally have only two categories of workers: partners and associates. Associates are hired on the express understanding that at the end of a fixed probationary period, some of them will be promoted and the rest will be asked to leave. Both popular and professional observers have characterized the competition for partnership as being the central drama of professional life. Finally, salaries of partners are significantly higher than those of
senior associates to a degree that cannot adequately be explained by the increase in a lawyer's skill or productivity upon becoming a partner. 30

In addition to these superficial similarities, large law firms exhibit three of the functional characteristics that economists typically associate with tournaments. First, the quality of legal work is both expensive and difficult to supervise. Second, despite this difficulty, firms nevertheless succeed in providing enough incentives *1592 so that employees exert extremely high levels of effort. Third, there are only a finite number of partnership slots available. The next three Sections defend these foundational assumptions of tournament theory against the charge that they do not accurately reflect the practices of large law firms.

A. Why Monitoring Matters

Economists contend that firms implement tournaments in circumstances where employers and employees face high costs in monitoring each other's opportunistic conduct. Three institutional characteristics common to most elite firms suggest that these institutions find themselves in this position. First, for the most part, large firms both price their services and pay their workers according to inputs rather than outputs. 31 Clients, however, would rather be billed according to output. After all, output is what they are purchasing. The fact that law firms charge by input rather than by output suggests that output is too expensive to measure. 32 Similarly, firms pay their associates fixed salaries as opposed to paying piece-rate compensation by output. 33 Once again, this form of compensation suggests that output is difficult to measure.

Second, associate evaluation at these firms tends to be both infrequent and, when done, cursory. 34 As Lazear explains, where the costs of measuring an employee's output are low, it pays to provide workers with information early, so that the worker can make an early choice as to whether to stay at the firm or move to a more productive use of his time. 35 That evaluations tend to be both infrequent and cursory suggests that the output of employees is too difficult and expensive to measure accurately. 36

*1593 Third, the only people available to monitor junior lawyers are senior lawyers. The cost to the firm of using senior lawyer time to monitor the work of junior lawyers is high because the senior lawyers could be using that time to do their own legal work--presumably billed out at a higher rate. Hence, in simple opportunity cost terms, the fact that senior lawyers would have to do the monitoring suggests that the firm is likely to view monitoring as expensive. 37

Notwithstanding these institutional characteristics, certain critics continue to dispute that elite firms face high monitoring costs. 38 These theorists assert that legal work is easy to supervise and to evaluate. 39 Critics advance two arguments to support this conclusion. First, these theorists contend that partners can easily prevent shirking by monitoring the number of hours an associate spends on a project and by reviewing the final work product. 40 Second, they assert that monitoring is not a cost to the firm because it can be billed directly to clients. 41

Neither of these objections is well founded. To be sure, hourly billing and review by senior lawyers provide some protection against shirking. Both methods, however, contain serious shortcomings.

*1594 Hours only crudely measure the quality of a lawyer's work. As noted earlier, the fact that firms bill clients (and, on occasion, pay bonuses) by input and not output is a sign that output is hard to measure. 42 With legal work, input is a weak measure of output. As Gilson and Mnookin note, “[t]here is an enormous difference between the performance of
a lawyer who is simply putting in his time and that of a lawyer who is truly motivated to produce.” Those who have worked at a dead-end hourly job will appreciate this distinction.

Indeed, to the extent that associates believe that partners view hours as a surrogate for quality, they have an incentive to inflate them. Notwithstanding the fact that associates often must account for their time in six minute intervals, they have ample opportunity to misrepresent their time. There is evidence that associates often exaggerate the amount of time they spend on a given matter. For example, some associates fill out their time sheets weeks after the work was supposedly done. Furthermore, many associates bill to one or another of the firm’s paying clients everything from “face time” to their lunch break.

The fact that associates feel comfortable behaving opportunistically underscores the limited usefulness of using hours as a measure of associate effort. Because it is difficult to correlate the quality and quantity of work a lawyer produces with the number of hours that that lawyer should have worked, partners will generally find it difficult to detect when an associate has padded his or her hours.

Nor does pressure from clients to cut the costs of legal services make hours a reasonable measure of the quality of an associate's work. When clients demand lower fees, partners (and their senior associate surrogates) have an incentive to cut junior associate hours as opposed to their own. Indeed, to the extent that associates believe that partners look favorably on associates who can perform routine tasks in less time, associates themselves have powerful incentives to underreport their own time, i.e., the flip side of the overbilling problem. These tendencies merely reinforce the point that “hours billed” are an extremely noisy signal of the amount of effort exerted by the associate. Indeed, to the extent that junior associates routinely underreport their hours, partners will systematically undervalue the contribution that these young lawyers make to the joint product--the very “monitoring” risk that Galanter and Palay cite as the reason why associates fear opportunistic behavior by partners.

When we look at what factors are likely to influence an associate's chances for partnership, it is clear that firms view hours as only a partial--and not particularly accurate--measure of most factors relevant to the partnership decision. This is the conclusion reached by Landers, Rebitzer, and Taylor in their recent study of law firm work hours. In this study, the authors asked partners and associates to rank those qualities that were most important to the partnership decision and then to rank the importance of hours worked as a proxy for these factors. The authors then reported the proportion of respondents who considered each factor “very important” or “of the utmost importance.” With respect to the first ranking, “the number of hours billed to clients” was ranked eighth out of twelve by partners and seventh out of twelve by associates, behind such factors as “[t]he quality of work product” (first for partners and second for associates), “[a] willingness to work long hours when required” (second for partners and first for associates), “[t]he development of good working relationships with clients and peers” (third for both groups), “[a] willingness to pursue the interests of clients aggressively” (fourth for partners and tied for third for associates), and “[t]he potential for bringing in new clients and business to the firm” (seventh for partners, fifth for associates). Moreover, of all the qualities ranked above “billing hours to clients,” only one--“a willingness to work long hours when needed”--was deemed by both partners and associates to be strongly correlated with the number of hours worked. With respect to each of the other factors, that correlation was less than fifty percent. Those factors most closely linked to quality and effort, moreover--such as “[t]he quality of the work product,” or “[a] willingness to pursue the interests of clients aggressively”--fell substantially below
this level. Neither associates nor partners view hours worked as a particularly accurate or important measure of an associate's partnership potential.

Finally, critics overestimate the degree to which partners can guard against both over- and underbilling through their own observations about associate effort in the ordinary course of their working relationship. Three aspects of these working relationships make it difficult for partners to reach accurate judgments about associate quality. First, lawyers in large firms often work in teams. This structure complicates the task of judging individual associates accurately. In a team setting, partners have to monitor not only the individual's work, but also the individual's level of cooperation with other team members in producing a joint product. This extra wrinkle makes it even more difficult to monitor individual effort accurately.

Second, even when a partner seeks to evaluate the associate on the basis of his or her individual work, the kind of direct review that typically occurs in large firms does not facilitate accurate judgments about the work as easily as some suggest. Take as an example the evaluation of a brief or research memorandum that an associate is asked to prepare. A partner evaluating this product will most likely be able to tell whether the associate has good writing skills. The partner will also be able to reach a fairly accurate assessment of this associate's basic intelligence, analytical abilities, and comfort with the topic at hand. The partner will not, however, be able easily to discern the associate's effort and care in completing the assignment.

A brief or memorandum may appear well written and make many insightful points, but whether the associate has carefully read and cite-checked all of the cases mentioned will not immediately be apparent. Nor will it be obvious whether he has performed the most complete search possible of the available case law. Did he really look at the legislative history of the statute or did he merely accept what some law review commentator had to say? While routine, these kinds of tasks are crucial to the overall quality of a firm's legal work.

To monitor these aspects of an associate's work effectively, senior lawyers would have to retrace virtually every step of a junior lawyer's work. Needless to say, this kind of checking goes well beyond the level of scrutiny with which partners review the work product of associates. Partners therefore must find other ways to motivate junior lawyers to perform these routine tasks with high levels of effort and care.

Third, the task of monitoring team members in large law firms is complicated by the fact that legal work often involves short deadlines. Elite firms specialize in responding to client emergencies, and this aspect of their work increases the difficulty of monitoring the work done by junior lawyers. Firms that specialize in “just-in-time” work necessarily have less opportunity to monitor worker effort. Thus, even if partners are, in theory, willing to check up on whether an associate has, for example, thoroughly researched the legislative history or shepardized every case, they will rarely have time to do so.

Collectively, these three aspects of elite firm work--that lawyers work in teams, that they generate work that requires both high effort and discretion, and that they operate under short deadlines--substantially increase the cost of direct monitoring. Not surprisingly, firms seek to reduce these expenses.

Nor are firms likely to be able to defray these expenses by passing the costs of supervising associates directly to clients. Even if firms could bill clients for all of the time partners spend supervising associates, a dubious proposition given the level of scrutiny that accurate monitoring would require, these charges would not cover the most important cost
associated with direct supervision. As we indicated above, direct supervision in elite firms requires that partners spend time monitoring associates. Time spent monitoring is time that cannot be spent developing new business. As today's emphasis on partner productivity amply attests, the most productive use of a partner's time is in finding new clients rather than servicing old ones--let alone billing clients for past services. Not surprisingly, firms, and as we will see, individual partners within firms, seek to minimize these opportunity costs as much as possible.

When we turn to the actual practices of firms, we find further support for the proposition that monitoring associates is difficult and expensive--particularly in circumstances where, as the standard tournament model underscores, it is important that associates find the resulting evaluations credible. For example, by all accounts firms spend an enormous amount of time and energy conducting annual (and sometimes semiannual) associate evaluations. Paradoxically, these accounts also confirm that notwithstanding the time and expense firms put into this process, these evaluations are often perfunctory and unreliable, particularly in an associate's early years. As we argue below, firms have an incentive to keep these assessments vague in order to induce some associates to stay who might otherwise leave. Nevertheless, the fact remains that reaching even a general assessment of the overall quality of an associate's work--and credibly communicating that assessment to associates--requires a large investment of firm resources. At best, these resources can only be recouped to the extent that they can be amortized as part of the firm's normal hourly rates.

Finally, there is one aspect of the monitoring story that neither proponents nor critics take into account in reaching their respective judgments about tournament theory. Both critics and supporters tend to assume that the issue of monitoring only arises in the context of actual working relationships between partners and associates. There is, however, an important context in which partners must evaluate the merits of particular associates before they have had any opportunity to observe their work directly: hiring.

Since most firms hire a large percentage of their entering associates directly out of law school, decisions about which candidates are likely to make the “best” lawyers must be made on the basis of predictive judgments about the relationship between various “signals,” such as a candidate's academic record and interviewing skills, and the qualities that go into making a good lawyer. We contend that the cost of reaching accurate judgments about the potential quality of law school graduates plays an important role in structuring the institutional practices of elite firms. To see why, it is necessary to take a closer look at how the tournament works, both in the Galanter and Palay model, and in our own. Before examining these issues, however, we briefly describe two related characteristics of elite firms that support the application of the tournament model.

*1602 B. High Effort Levels and the Absence of Trades

No one disputes that elite law firm associates work extremely hard. For the reasons set out in the last Section, pervasive direct supervision by partners cannot explain this high effort. One must therefore look for alternative explanations. Tournament theory, by positing that associates are motivated to work hard by the lure of promotion (or the fear of being fired if they do not win), purports to answer precisely this question. It is not surprising, therefore, that theorists find the tournament explanation convincing.

Tournament theory also appears to explain why virtually all elite firm lawyers work extremely hard, including those lawyers who would rather trade some of their income for fewer hours. Evidence, both anecdotal and empirical, suggests that a large portion of associates would be willing to trade some portion of their income for the opportunity to work fewer hours and to have greater control over their schedules (i.e., not having their schedules be constantly at the mercy
of some law firm emergency). In a standard neoclassical market-clearing model, such trades would occur. But, in large part, these trades do not occur at elite firms.

Tournament theory provides one explanation for why these seemingly mutually beneficial trades rarely occur. That theory suggests that firms will choose to create internal labor markets instead of the standard contracting approach assumed by neoclassical models. To the extent that firms are drawn to tournaments as a means of reducing their monitoring costs, they are unlikely to institute policies that would increase these costs by requiring partners to distinguish between various effort levels of differently paid associates. Thus, the fact that such trades rarely occur reinforces the hypothesis that these firms are structured internally as tournaments.

C. Finite Number of Slots

Finally, those studying elite firms have been drawn to tournament theory by the simple fact that associates compete for a finite number of partnership positions. The central feature of a standard economic tournament is that the firm holds out the promise of a highly desirable reward at the end of the probationary period and that there are fewer rewards than there are participants. In Galanter and Palay's model, the reward offered to associates is the promotion to partnership, with all of the financial rewards, status, and job security that this position allegedly entails. Therefore, if these firms are internally structured as tournaments, we would expect to observe two elements: a finite number of partnership slots, and intense competition for these slots.

Both elements are present in elite law firms. Few of the associates hired by a given elite firm will become partners. Although partnership rates have fluctuated over the years, rarely have entering associates had more than a one in four chance of being promoted to partnership. Today, these rates hover between six and ten percent in many firms. This simple reality seems to point strongly in the direction of characterizing these institutions as tournaments.

In addition, even when we limit our pool of associates to just those senior associates who are a few years away from the partnership decision, there are still more participants in the tournament than rewards. We found, from our interviews, that senior associates who were close to the point of partnership evaluation both perceived the existence of a finite number of partnership slots, and worked extremely hard so as to win the competition for these coveted places. Once again, the widespread perception that senior associates work extremely hard because they are competing for a finite number of slots appears to confirm that large firms structure their promotion process as a tournament.

Given these three structural characteristics of elite firms--the fact that legal work is difficult to monitor, high associate effort levels coupled with the absence of trades, and the finite number of partnership slots--it is not surprising that scholars have been drawn to tournament theory as a mechanism for understanding the internal labor markets of these institutions. Determining whether tournament theory actually fulfills these lofty expectations, however, requires looking closely at whether the actual practices of elite firms conform to the model's underlying assumptions. In order to accomplish this task, we return to Galanter and Palay's account of the tournament of lawyers.

II. The Rules of the Game

Galanter and Palay's model of the promotion-to-partner tournament rests on a number of interconnected assumptions about the internal labor practices of elite firms, and the motivations and actions of those who participate in and help to shape these practices. Not surprisingly, these assumptions track the foundational assumptions underlying standard
economic tournament theory. We group these assumptions into seven categories. First, Galanter and Palay assume that every associate is competing in the tournament, and that the tournament is the primary motivational tool used by the firm. Second, by emphasizing that associates can be confident that partnership decisions will be made on the basis of merit, Galanter and Palay implicitly assume that firms give every associate an equal chance of winning the tournament, or to put the point somewhat differently, that firms will not favor some associates over others. Third, by describing these firms as operating in accordance with a single economic model where the rewards to any one person are a function of his or her rivals not performing quite as well, the implicit assumption is that cooperation among associates is not crucial, i.e., that sabotage is not an important problem. Fourth, by modeling their theory on a hypothetical contract between a single partner and her associates, Galanter and Palay implicitly assume that the interests of individual partners are synonymous with those of the firm. Fifth, the promotion-to-partner tournament Galanter and Palay describe has two, and only two, distinct periods: associateship and partnership. Sixth, they assume that victory in the tournament is a reward for production as an associate. Finally, Galanter and Palay assume that firms seek to make both the rules of the tournament and its results transparent to associates.

These assumptions do not accurately describe the internal practices of contemporary elite law firms. The following seven Sections discuss the limitations of each of these model-based assumptions.

A. Not Everyone Is Competing

It is impossible to spend time talking to law students about their career goals without coming to the conclusion that many of the young women and men who join large law firms have no intention of staying long enough to become partners. Ironically, the very pervasiveness of this sentiment among law students makes it difficult to quantify exactly how many entering associates fall into this category. At law schools like Harvard, it is now considered slightly unfashionable, or perhaps more accurately, egotistical, to declare publicly that one is interested in braving the long odds and demanding hours of the modern promotion-to-partner tournament. As a result, even students with a relatively strong commitment to participating in the tournament may disavow any interest in doing so for fear of alienating their peers. Nevertheless, anecdotal evidence, including our own barefoot empiricism, strongly suggests that a large number of associates have opted out--or, more accurately, never opted into--the tournament.

The fact that some significant percentage of entering associates do not see themselves as participating in the tournament creates two important problems for firms. First, firms must find other ways to motivate those associates who do not intend to compete in the race to make partner. This motivation includes convincing young lawyers to join firms initially, since it is at least plausible that a firm's employment needs will outstrip the number of associates committed to participating in the tournament. Relatedly, firms must find ways to prevent non-participating associates from shirking or engaging in other forms of opportunistic behavior once they arrive.

Second, firms must develop ways of identifying those associates who are interested in winning the tournament. This might seem like an insignificant issue; firms can simply rely on self-selection. The reality, however, is more complex. Those associates who initially identify themselves as tournament players might not be the ones that the firms view as the best potential partnership candidates. Although qualities such as confidence and assertiveness are highly valued by firms, it is not always true that those who declare themselves to be the most interested in a given job are actually the best candidates. This is particularly true given that firms, for reasons that we elaborate below, have an incentive to value partnership candidates from elite law schools where social mores discourage students from publicly (or perhaps even
privately) admitting their ambitions. Finally, many associates who might want to compete in the tournament will be
discouraged from doing so, or quickly persuaded to abandon their quest, by the sheer size of the firm's entering class
of associates. Many associates are likely to ask themselves, “What makes me think that I will be the one out of all the
talented members of my class to grab the partnership prize?”

Collectively, these distortions between the expressed preferences of entering associates and the needs of firms suggest that
the simple promotion-to-partner tournament does not resolve all of the firm's monitoring problems. These motivational
problems are exacerbated once we take into account that even those lawyers who see themselves as participating
in the tournament do not have an equal chance to succeed.

B. The Playing Field Is Not Level

One of the appeals of tournament theory is that it seems to confirm what law firms have always said about
themselves: Firms are meritocracies in which every associate has an equal chance to succeed. The problem with this
characterization is that it fails to account for differences in the work done by particular associates. These differences
have a profound influence on a given associate's chances of winning the tournament.

Large law firms produce two categories of work that must be done by associates. The first category consists of work
that provides valuable training in the skills and dispositions of lawyering. Although law school (one would hope) teaches
students to “think like a lawyer,” virtually all of the skills and dispositions that associates need to be good lawyers
must be learned on the job. *1609 Training, therefore, is an essential part of the bargain that Galanter and Palay
posit between partners and associates in which the latter trade their labor for the chance to develop human capital. More
important, it is essential to the long term survival of the firm.

Training work encompasses a wide variety of tasks. Examples include writing a draft motion or brief and then going
over the draft with the partner, watching a partner negotiate a contract or conduct a strategy session with a client, and
writing a comprehensive report of a new regulatory development that will be distributed to clients. As these examples
make clear, training work increases an associate's firm-specific and general human capital.

In addition, however, training work also enables an associate to develop strong relationships with particular partners.
This relational capital is crucial to an associate's partnership chances. Associates depend on their partner-mentors
to give them good work (and to protect them from bad assignments), to pass on important client relationships, and
ultimately to push for their promotion among their fellow partners. Without strong advocates in the partnership, an
associate's chances of winning the tournament are substantially diminished.

Contrary to the implicit uniformity suggested by tournament theory, training work is not the only work produced by
large law firms. Instead, these entities produce a substantial amount of “paperwork.” Examples of paperwork range
from writing, answering, and supervising discovery requests, to proofreading and making slight modifications to pre-
existing corporate documents, to writing legal memos to the file or for review by senior associates, to faxing
important documents to the client. Once again, this work can lead to the development of both firm-specific (e.g.,
knowledge of a particular client's document retention policy) and general (e.g., careful proofreading skills and the abilities
to take orders and work long hours on a regular basis) human capital. Paperwork is unlikely, however, to develop the
kind of higher order skills and judgment that partners look for when evaluating associates for partnership. Nor does this
work typically result in an associate developing relational capital, since partners rarely have much contact with those
who are only doing paperwork and tend to notice these unlucky associates only when something goes wrong. Given this division of labor, every associate who wants to have a chance of winning the promotion-to-partner tournament needs to gain access to training work.

Unfortunately, this essential good, which we have elsewhere analogized to the “royal jelly” that allows worker bees to develop into queens, is in short supply. This is true for three reasons. First, because of the sheer volume of paperwork generated by many areas of legal practice, firms must deploy a substantial number of associates to satisfy this demand. Firms therefore have strong incentives not to provide training work to those associates who are performing paperwork for fear of diverting their attention from completing these uninteresting, but nevertheless critically important, tasks. More important, training work requires the firm to commit a substantial amount of uncompensated (or, at best, undercompensated) partner time because much of this valuable training can only be transmitted in the one-on-one, on-the-job context (e.g., being with the partner at a negotiation or at a client meeting). Partner time, which can be billed out at high rates, is extremely valuable. Finally, firms do not need to provide--nor do they want to provide--all of their associates with significant firm-specific training. Paperwork associates only require minimal training. Moreover, firms realize that most associates will leave before the firm can reap the benefits of its investment in their development.

Once again the importance and scarcity of training work undermines the effectiveness of the promotion-to-partner tournament as a method for resolving the mutual monitoring problems of partners and associates. Two problems are significant.

First, those not receiving training work have strong incentives to shirk or to leave. Diligently performing paperwork is unlikely to result in partnership. Therefore, an associate who finds herself doing mostly paperwork has an incentive to shirk while she investigates other job possibilities. Moreover, she has an incentive to begin this job search sooner rather than later. Not only does an associate doing primarily paperwork have limited partnership prospects (because the associate has not been trained), but the kind of general human capital produced by paperwork is likely to be of diminishing value to employers the longer an associate stays at the firm. A general knowledge of legal practice and careful proofreading skills are valuable in junior lawyers. Senior lawyers, however, are only valuable to the extent that they bring higher order skill and judgment to their work. As a result, paperwork associates face strong pressures to leave while their marketability is still relatively high.

* Tournament theory implies that firms should be concerned about these early departures. In a standard tournament model, a firm wants its employees to stay at the firm until the end of the probationary period. Galanter and Palay endorse this general view on the ground that partners want to recoup their investment in an associate's human capital development.

The reality of law firm economics, however, suggests that firms have a more complex interest in the longevity of paperwork associates. Paperwork attorneys are not receiving the kind of partner investment that tournament theory implies all associates receive. Consequently, the marginal productivity of paperwork associates (as measured by the firm's ability to bill the associate's work to clients at the appropriate rate) remains relatively constant throughout their tenure; hence we have elsewhere described these associates as “flatlining.” After a certain number of years, the flatline of a paperwork associate's marginal utility will drop below the marginal cost (measured in terms of the associate's salary and benefits) of keeping that lawyer at the firm. When that happens, the firm has every incentive to let the associate go.

Before that time, however, firms need paperwork associates to do the enormous amount of paperwork that firms generate. In an associate's early years, this work can be billed to clients. Not only do clients recognize the need for a
certain amount of paperwork, but a paperwork associate's cost to the firm is significantly less than that of a training associate precisely because partners are not investing in his development to the same extent that they are investing in the development of the training associate. Firms therefore need to keep a sufficient number of paperwork lawyers in their employ to cover this important demand.

Of course, no associate does only paperwork. Indeed, some might object to our division between training and paperwork on the ground that every associate does a certain amount of both. Randomly distributing training and paperwork throughout the associate pool, however, is inefficient. As we noted, there is substantially more paperwork than training work, particularly in an associate's early years. Consequently, a random distribution of these two kinds of tasks ensures that associates who leave because they think they are getting too much paperwork will also take with them some amount of valuable firm-specific training. To the extent that this departure occurs early in the associate's career, the firm may very well have not yet recouped its cost in providing this training. Firms have strong incentives to minimize the loss of unrecouped training expenses through associate attrition. This has important implications for the model we construct.

The scarcity of training work creates a second problem for firms seeking to use the promotion-to-partner tournament as a means of creating the right mix of incentives for their associates. Whereas the first problem focuses on associates who are likely to leave if they are not getting sufficient training work, the second highlights problems for those who decide to stay and attempt to win the tournament. If associates recognize that their chances for succeeding at the firm are directly tied to their ability to gain access to training work, then those who want to win the tournament are likely to engage in fierce struggles to obtain this scarce good.

As with the first problem, this second phenomenon may at first look like no problem at all. After all, the whole point of the tournament is to give associates an incentive to outcompete their peers in the hopes of capturing the brass ring of partnership. This characterization of law firms as a Hobbesian world of all against all, however, ignores the degree to which these institutions rely on lawyers to work in teams.

C. It Is a Team Sport

As we indicated in Part I, a significant percentage of the work done by lawyers at elite firms is done in teams on projects that respond to client emergencies. Taken together, these characteristics of elite firm work suggest that firms must structure themselves in ways that foster cooperation as well as competition.

A firm structured entirely as a tournament would not be an environment that fostered cooperation simply because one's success in the standard tournament is a direct function of others not performing as well. If associates see themselves as directly competing against a substantial number of their peers-- for scarce training resources or client contact, for example--they may act in ways that disturb the delicate balance between competition and cooperation. Thus, associates might refuse to share important information about clients or legal developments with their peers. In the worst case scenario, associates might seek to sabotage work done by other associates, for example, by spreading rumors or giving misleading advice. Behavior of this kind creates problems for firms--problems that are exacerbated where work has to be done in cooperative teams. Put simply, the higher the rewards of the tournament, the higher the incentive to engage in sabotage for those who want these rewards.

Large law firms, however, do not appear to be characterized by high levels of employee sabotage. There are few reports of junior lawyers refusing to cooperate with their peers. To the contrary, it is our sense that these young lawyers frequently
share information about both substantive legal issues and the internal workings of the firm. The situation with senior associates is more complex. It is not uncommon, for example, to hear a junior associate accusing his senior of taking credit for the junior's work, or blaming the junior for the senior's mistake. As we indicate below, the fact that many senior associates (unlike the majority of junior associates) are competing for partnership helps to explain such reports. Nevertheless, the absence of many visible problems suggests that, for the most part, associates work well together on teams. This observation is at odds with the claim that law firms are organized as standard economic tournaments.

Nor is it plausible that the high levels of cooperation typically reported in these institutions are the result of direct monitoring and control by partners. Partners, of course, can seek to minimize the dangers of excessive competition by making clear that an associate's ability to work well with his or her peers plays an important role in partnership decisions—in other words, by setting up a competition in cooperation. Although partners undoubtedly seek to convey this message, its effect is muted by one of the monitoring problems that we identified in Part I, the difficulty of measuring cooperation (and the corresponding difficulty of detecting sabotage) when lawyers are working in teams. In addition, while the partnership as a whole has strong incentives to detect and sanction sabotage, individual partners are likely to have suboptimal incentives to participate in this joint enterprise—at least when the sabotage does not directly affect their own practices. The existence of widespread competition within the partnership itself, as we shall see, creates its own problems for the promotion-to-partner tournament.

D. Individual Umpires Have a Stake in Who Wins the Tournament

Tournaments work, in part, because a firm's commitment to promote a fixed percentage of associates sends a credible signal to these young lawyers that the “best” of their ranks will be selected for partnership. In essence, tournament theory analogizes partners to neutral umpires whose only interest is to select (albeit in a non-mechanistic way) those competitors who have performed the best during the competition. Although partners undoubtedly seek to convey this message, its effect is muted by one of the monitoring problems that we identified in Part I, the difficulty of measuring cooperation (and the corresponding difficulty of detecting sabotage) when lawyers are working in teams. In addition, while the partnership as a whole has strong incentives to detect and sanction sabotage, individual partners are likely to have suboptimal incentives to participate in this joint enterprise—at least when the sabotage does not directly affect their own practices. The existence of widespread competition within the partnership itself, as we shall see, creates its own problems for the promotion-to-partner tournament.

Partners are players with vested interests, as opposed to neutral decisionmakers, because partnership no longer means tenure. With tenure and lockstep compensation, existing partners face relatively few threats to their privileged positions. This security, in theory, frees partners from self-interest and enables them to vote to promote the best qualified associates. When one takes away tenure and makes compensation variable, partners inevitably begin asking questions such as: “If we make this person partner, will he someday vote to have my compensation reduced, or worse, to have me fired?” It is a reality of today's competitive environment that if new partners find that they are generating the lion's share of the partnership's profits, they may well decide to terminate some of their older, less productive colleagues. Further, in addition to fighting to retain their hard-earned partnership positions, partners also compete to move up within the hierarchy of partners. This competition between partners is most visible where people compete for positions on the committees (executive, management, compensation, etc.) that run most large firms. As such, individual partners are likely to have interests that are at least in tension, and potentially at odds, with the interests of the firm as a whole.

Consider, for example, the issue of training raised in the prior Section. Firms have an incentive to ensure that every associate receives a basic level of training, both as a means of improving the overall quality of the firm's work, and to minimize the risk that those who do not receive training will leave while they are still economically profitable to the firm. Individual partners, however, have suboptimal incentives to contribute to the production of this firm-wide benefit. Training is costly to individual partners—time spent training is time that the partner cannot spend either producing revenue or consuming leisure. The benefits of training, on the other hand, are diffuse. To be sure, every partner needs a certain number of well-trained associates to do his or her work. Time spent training these associates produces private
gains for the partner—assuming that the associate continues to work for that partner. Associates, however, typically work for multiple partners, and therefore no individual partner will be able to capture fully the time invested in training. As a result, partners have an incentive to ration time spent on training and to invest only in those associates who are most likely to provide direct benefit to their practices (i.e., the one or two associates for whom an individual partner can provide a steady stream of billable assignments).

One can tell a similar story about the behavior of partners when it comes to selecting tournament winners. As tournament theory predicts, with respect to an associate's past contributions, it is in the firm's interest to promote those associates who have demonstrated their commitment to the firm by exerting more effort than their peers. Individual partners, however, have strong incentives to favor their own protégés over the arguably better qualified protégés of others. By the time an associate is considered for partnership, he or she will have worked closely with a small number of partners over a number of years. These partner-mentors will frequently come to believe that their protégés (who in many cases will also have become their friends) are better qualified to become partners than associates with whom the partner-mentor has not worked.

More important, in the increasingly competitive world of large law firms, senior partners depend upon junior partner protégés for more than friendship. In the early years, senior partners need junior partners who will do their work (without trying to steal their clients) while the senior lawyers go out to look for additional business. In later years, senior partners depend on their protégés to support them (perhaps by referring clients in the other direction) when the senior lawyers are no longer able to protect their own interests in the partnership. Given these realities, we should expect tournament winners to be selected as much on the basis of politics as on firm efficiency.

The fact that partners are both adjudicators and participants raises two further difficulties for the tournament. First, the skewed incentives of individual partners are likely to skew the incentives of associates away from those that would be optimal for the firm. From the firm's perspective, associates should be willing to work for whichever partners are most in need of help. Given the importance of building relational capital with powerful partners, however, associates (particularly good associates) will seek to avoid working for partners who are less able to promote a given associate's career.

Second, partners have strong incentives to encourage this behavior by attempting to monopolize the services of star associates (even if they have to create “make-work” to do so) and by overvaluing their protégé's contributions. Firms must develop mechanisms for policing this kind of opportunistic behavior. This task is made more difficult by the fact that partners are both formally and presumptively autonomous.

E. Of Shirking Umpires and Absent Players

Galanter and Palay treat the partnership decision as the end of the tournament. One might seek to justify this conclusion on the ground that once a lawyer becomes a partner, she no longer has an incentive to shirk or to engage in other forms of opportunistic behavior since she is now a part owner of the firm. We do not believe, however, that Galanter and Palay hold this view. As two of the most trenchant observers of the legal profession, these authors are well aware that controlling opportunistic behavior by partners has become perhaps the single greatest preoccupation of large law firms. Instead, we believe that the authors' assumption that the tournament is divided into two and only two distinct phases—associateship and partnership—reflects the fact that their model is premised on a simple economic model in which there are only two categories of workers.
Characterizing the tournament as a single-round game masks two issues that have a direct bearing on how law firms structure their internal labor markets. The first issue relates to the firm's need to retain senior associates, who have been given valuable firm-specific human capital. Not all associates are fungible. Firms need both senior associates, who are capable of supervising junior lawyers and of relieving partners of many of their day-to-day responsibilities, and junior associates who can turn out the large volume of paperwork (and smaller volume of training work) required to service the needs of corporate clients. Due to the scarcity of training work, however, only a relatively small number of associates who start at a given firm are likely to “graduate” to the level of senior associates. As the years go by and senior associates confront the fact that their prospects for moving laterally may diminish the closer they get to the partnership decision, this number declines further. The net result is that firms can end up with too few senior associates.

The second issue bearing on law firms' internal labor markets is the danger that partners will shirk in ways that their fellow partners will find difficult to detect. Partners are even less supervised than associates and therefore have an even greater opportunity to shirk. Given their greater level of responsibility, the costs of a partner shirking are likely to be particularly high. For example, a partner may fail to bring his fair share of business into the firm, or may work less-than-diligently on matters that are generated by others.

Collectively, these two phenomena—the need to retain senior associates and to prevent shirking by partners—raise two additional problems for the standard promotion-to-partner tournament. First, firms must motivate junior associates to become senior associates, and motivate senior associates to stay with the firm, even though some of them will neither win the tournament nor easily find alternative employment with a comparable employer. Second, these firms must design ways to prevent shirking by partners. This last point underscores the need to make partnership decisions based on a prediction about the future as opposed to a reward for the past.

F. Choosing the Best Representatives, Not the Best Performers

In the standard tournament model, winners are selected solely on the basis of their past contributions to the firm. This selection criterion makes sense because the point of the tournament is to induce employees to exert high levels of effort and care at their current jobs by promising that those who perform the best will be rewarded in the future.

In their account of the promotion-to-partner tournament, Galanter and Palay qualify this standard assumption by suggesting that an additional criterion for selecting partners is the associate's development of his or her own human capital. Since excess human capital is what allows partners to employ additional associates, Galanter and Palay assume that by rewarding associates for their past accumulation of human capital, firms also ensure their own future growth and development.

We agree that human capital accumulation is a crucial element in the final partnership decision. This modification of the standard economic model, however, undermines tournament theory's usefulness as an explanatory model for the internal labor markets of elite firms.

One of the main virtues of tournament theory is that it provides employees with a measurable commitment that the firm will not cheat on its promise to reward those workers who have performed the best during the probationary period. In order for this commitment to be credible, however, the firm must clearly signal that tournament rewards will be given on the basis of past performance and not on the basis of the firm's prediction about future performance in the higher level job.
Two effects underlie this intuition. First, at the time the firm chooses tournament winners, it has already acquired all the benefits of the employee's work during the probationary period. As a result, it has the incentive to shirk by ignoring this work and awarding tournament prizes on the basis of what is in the firm's best interest in the future, to wit, selecting employees that the firm believes will perform better at the higher level job regardless of how these employees performed as juniors. At the same time, associates, recognizing that what will ultimately be rewarded is their capacity to do the higher level job, have strong incentives to divert their energies into acquiring the skills associated with the higher level job rather than in diligently doing the work of a junior level employee. Since the point of a standard economic tournament is for the firm to cut down on the cost of preventing shirking by junior level workers by giving them a reason to work hard with little supervision, a system that hands out tournament rewards on the basis of predictions about future performance undermines the tournament's original purpose, namely to induce people to work *1622 hard while they are associates. As a result, by including--correctly, as we will argue--the firm's assessment of an associate's accumulated human capital as part of the partnership decision, Galanter and Palay's model no longer explains why associates work so hard with relatively little supervision on the large amount of routine paperwork that has little if any effect on their accumulation of the kind of human capital that will enable them to become partners.

One might respond to this objection by arguing that in the law firm context, the difference between choosing tournament winners on the basis of their past performance and choosing them on the basis of predictions about their future ability is unimportant because an associate's past performance is highly correlated to his or her future abilities as a partner. There are good reasons to believe, however, that this is not the case. At the most elementary level, firms need associates to bill a substantial number of hours, many of which will be spent, as we have already indicated, on paperwork. Although the inclination and willingness to work hard as an associate may signal the same willingness as a partner, it is the acquisition of human capital that is crucial for the partner. If a partner does not acquire a sufficiently high amount of human capital, there will not be enough to rent out to the associates. As a result, as we indicated in Part I, partners do not rank “hours worked” highly on the list of criteria that are important to the partnership decision.

Moreover, partners need a substantially different kind of human capital than good associates need--even associates who do primarily training work. The most important work done by today's large *1623 law firm partners is bringing in business. Associates do virtually no rainmaking. Although accumulating the kind of general and firm-specific human capital that comes from being a good associate undoubtedly plays a role in whether a given lawyer is likely to become a rainmaker, even the best associate may not have the different mix of personal and professional qualities that enable someone to attract significant corporate business.

Finally, as critics of tournament theory as a method for explaining law firm growth have noted, partnership decisions are beholden to the business cycle. Even if firms feel substantial pressure to make the same number of partners every year (regardless of swings in demand), the location of these partners (i.e., corporate, litigation, tax, etc.) will depend upon the amount of business that the firm believes each of these departments is likely to produce in the future. Thus, the fundamental issue with respect to both the individual candidate and the firm's needs is one of prediction, not reward.

Given these three differences between “associate” work and “partner” work, it is not surprising that, in a recent study of large New York law firms, O'Flaherty and Siow found only a loose correlation between “past performance” as an associate and “future performance” as a partner. As they conclude, “performance as an associate is not an especially informative signal about whether a lawyer will make a good partner.” Given that “the costs of mistaken promotion [to partnership] are relatively high,” firms have an incentive to focus on future performance as a partner, rather than past performance as an associate, when making partnership decisions.
The focus on prediction raises complications for the basic tournament model, both for the firm and for associates. Although assessing an associate's past efforts and investment is undeniably difficult, *1624 it is less difficult than predicting whether the associate will perform well in an area where she has so far not been tested, and whether she will be loyal to the incumbent partners. Moreover, the stakes resting on this predictive judgment are quite high, especially if one argues, as do Galanter and Palay, that partnership is not only the end of the tournament, but essentially equivalent to tenure.148

From the associate's perspective, the fact that partnership is more of a prediction about the future than a reward for past service makes it difficult to evaluate the fairness of the firm's partnership choices. This is particularly true given the emphasis that firms place on issues such as the strength of future demand for a particular department's or office's services. Existing partners have the incentive to understate future demand in order to cut down on the number of partners who are entitled to share in future revenues. Because associates are rarely given access to information about either partner compensation or the firm's revenues, they will have a difficult time evaluating whether the firm's projections are realistic or opportunistic. This last point raises the final problem with the application of standard tournament theory to elite firms: the issue of transparency.

G. Who's on First?

Galanter and Palay assert that the promotion-to-partner tournament solves the mutual monitoring problems of associates and partners by making the rules of the game visible to all parties.149 Firms therefore need to give credible signals of their commitment to abide by the rules of the tournament game that can easily be monitored by associates.

Galanter and Palay argue that a firm's promotion rate provides a sufficient signal.150 According to their model, by promoting a fixed percentage of associates to partnership every year, the firm demonstrates that it has no incentive to shark by failing to promote the best associates from the available pool. Even assuming that firms promote a fixed percentage of associates every year--a contestable *1625 proposition151--standing alone, this signal is unlikely to reassure associates that the firm is fulfilling its obligations in the tournament.

Two features of law firm life support this conclusion. First, the growing importance of lateral hiring makes it difficult for associates to determine whether firms are abiding by their commitment to promote those associates who have produced the most during the probationary period.152 Although associates can monitor how many partners were brought in as lateral associates, they will still have difficulty determining whether the firm was justified in bringing in these senior associates to meet demand, or whether this kind of hiring is simply a way to avoid having to reward the firm's “own” associates for work during their junior years.

Moreover, to the extent that existing associates have difficulty detecting whether firms are behaving opportunistically, law students, whom Galanter and Palay rely on to boycott firms who fail to fulfill their partnership commitments,153 are likely to be even less well informed. Although law students can observe whether a firm has made partners in a given year, they are unlikely to know whether these new members came up through the ranks or were added laterally. Nor are the statistics indicating the percentage of a given law school class who make partner at a firm particularly useful. Consistent with our first qualification to Galanter and Palay's assumptions, law students know that many of the associates who start work at a given law firm have no intention of making partner. Depending upon exactly how large this group of non-participants is, even a small partnership percentage may look relatively attractive if one assumes that most of the other associates who did not become partners left of their own volition.
The second problem firms have with displaying adherence to tournament rules arises from our discussion in the preceding Section about “past” versus “future” performance. To the extent that associates know that firms will consider an associate's likely future performance as a partner (as well as her past performance as an associate) when making partnership decisions, they can no longer rely on the total number of associates who made partner in any given year as a reliable barometer of whether the firm is sharking on its commitment to promote on the basis of past performance. To reach accurate judgments about the relative weighting of past versus future performance, associates would need to know how partners assessed these different criteria in specific cases.

If firms were structured as simple economic tournaments, one would expect to see firms attempting to provide associates with this kind of information. In essence, the firm would do everything possible to make the partnership process an open book so that associates (and law students) could see that the process was indeed a fair one in which those who performed best were promoted. For example, one might expect to see firms permit associates to sit in on partnership meetings, allowing them to ask questions and to make comments, although probably not to vote. Or, to the extent that the partnership meetings involve discussions of trade secrets, one might expect to see law firms hire external verifiers, such as accounting firms, to make sure that the process involved a fair and accurate evaluation and ranking of associate past performance.

Needless to say, these standard tournament theory predictions never fail to draw laughter from associates and partners at elite firms. Why? Because the partnership decisions at these firms are explicitly structured to be a black box, i.e., to provide as little external visibility as possible. Associates have little or no information about what goes on at partnership or committee meetings, and the partnerships at these firms do not see disclosing the details of these meetings as a way to increase efficiency. In the next Part, we offer some reasons why this is so. For the moment, however, we want to emphasize that standard tournament theory would predict that firms would respond to the ambiguity in the signal provided by their yearly partnership percentages by making the internal workings of their promotion practices more visible to associates. The fact that firms appear to be doing the opposite, i.e., making their promotion practices even less visible, suggests that these firms are not structured as simple economic tournaments.

In sum, none of Galanter and Palay's seven assumptions about the operation of the promotion-to-partner tournament hold up under scrutiny. Since these assumptions are consistent with standard tournament theory, the fact that they do not correspond with our observations of elite firm practices suggests that these institutions are not structured as standard economic tournaments.

As we indicated at the outset, many academics who have raised questions about Galanter and Palay's model advocate dispensing with tournament theory altogether. We disagree. Although the basic tournament theory does not adequately explain the structure and operation of contemporary elite firms, the competitive aspect that the tournament model captures is a vital building block for constructing a more nuanced model of the large law firm. The next Part explains our reasons for reaching this conclusion and provides a preliminary look at a revised model for understanding the tournament of lawyers.

III. The Tournament Reconceived: Why This Is Not Your Father's Partnership Tournament

Contemporary elite law firms continue to follow many of the traditional practices that led scholars to characterize the promotion policies of these organizations as tournaments. Firms continue to hire the majority of their associates out of law school and, after a relatively fixed number of years, promote some to partnership and dismiss the rest. For all of
### A. There's Still a Tournament

Two observations underlie our conclusion that the tournament metaphor remains an important building block for constructing a plausible model of the internal labor markets of elite firms. The first is history. The basic institutional structure adopted by virtually every elite law firm was created at a time in which market conditions approximated those assumed by standard tournament theory. Although many of these conditions have changed significantly during the last two decades, this historical legacy continues to exert a strong pull on the contemporary practices of these institutions.

Today's elite corporate firms can trace their institutional practices, including the promotion-to-partner tournament, to the so-called “Cravath model,” first established by New York's Cravath, Swaine & Moore more than a century ago. In the early years, this organizational model was well adapted to the market conditions in which Cravath and its competitors found themselves. Given the scarcity of high-quality elite school graduates and those from other schools, the existence of long-term relationships between firms and clients, and the substantial information asymmetry between firms and clients, it made sense for firms such as Cravath to hire top law students and to pass the cost of training these new lawyers onto their clients. Moreover, the dominant position that these institutions occupied in the legal market facilitated the basic bargain contemplated by tournament theory. The rise of such contemporary rivals as investment banks, consulting firms, and lucrative in-house legal counsel positions, elite law firm partners were widely perceived--by lawyers, clients, and most important, by law students--as being at the pinnacle of the profession's income and status hierarchy. Top graduates were therefore willing to join these institutions for wages that were no more, and in some cases less, than those that they could obtain in other sectors of the legal marketplace. In return, firms promised that the “best” of these young men (and they were only men during this period) would be elevated to partnership with all of the financial rewards and prestige that accompanied
this status. Tournament losers, on the other hand, could be confident of finding jobs (with “lesser firms,” government, or clients) that paid wages similar to those that they were earning as associates.

Given these conditions, many of the assumptions discussed in Part II about institutions that are structured as rank-order tournaments were plausibly satisfied. Thus, given the gap between the income and status of elite firm partners and those of other lawyers, it is likely that many of the associates who joined these institutions were strongly committed to winning the tournament. Similarly, in light of the smaller associate-to-partner ratios in the early days of the Cravath model and the greater uniformity of the work done by these firms (i.e., smaller transactions and cases worked on by smaller teams of lawyers), the gap between “training work” and “paperwork” was arguably less than it is today, thereby making it more plausible (as standard tournament theory assumes) that every *1630 associate had a (relatively) equal chance of succeeding. Finally, a firm's long-standing client relationships reduced the need for individual partners to generate business. It was therefore rational for firms to select new partners based primarily (although perhaps not exclusively) on their past contributions to the firm. The prevalence of lockstep compensation and near lifetime tenure encouraged partners to view the interests of the firm as synonymous with their own.

Once again, it is important to emphasize that even in the early days of the Cravath model, the promotion-to-partner tournament was probably never structured according to the assumptions underlying standard economic theory. To highlight only the most obvious differences, even in those early days, firms sought to encourage cooperation as much as competition, and if anything partnership decisions were even more opaque than they are today. 159 Nevertheless, given the market conditions facing large firms at the dawn of the “Cravath” period, it is not surprising that firms created a promotion-to-partner tournament that resembles in many important respects a standard economic tournament.

As we argued in Part II, the market conditions confronting contemporary elite firms are substantially different from those that existed during this initial period. 160 There are now hundreds of large firms competing for the same pool of “top” law students from elite schools in a world in which sophisticated clients refuse to pay for anything that looks like associate training. 161 Moreover, the gap between the wages paid by large firms and other employers, combined with the reluctance of smaller firms to take in lawyers who have been “passed over” for partnership has substantially diminished the lateral job prospects of all but the top tournament losers. 162

Nevertheless, the pull of the initial path remains strong. As Lucian Bebchuk and Mark Roe argue with respect to corporate structures, once an institution starts down a particular path, the costs of changing structures and practices that are no longer optimal given current realities will often seem too great-- even in cases where *1631 everyone agrees that if they were starting fresh, a new institutional structure would be more efficient. 163 Although law firms do not face the hold-out and collective action issues associated with establishing a controlling shareholder that Bebchuk and Roe identify in the corporate context, professional firms confront their own unique barriers to change. As Robert Nelson has documented, institutional structures in law firms are frequently viewed as closely linked to professional values. 164 The promotion-to-partner tournament is a case in point. Senior partners have long claimed that the grueling workload and demanding selection process that typify the traditional tournament play an essential role in inculcating the professional values that young lawyers must acquire if they are to become competent and ethical practitioners. 165 Having consistently made these claims, senior lawyers would find it difficult to advocate a different promotion system, particularly in light of the fact that, as tournament winners, they have a vested interest in continuing to profess the bona fides of practices that validate their current position.

More important, at least one key aspect of the traditional institutional structure of elite firms is now enshrined in rules that effectively have the force of law. The rules of professional responsibility currently prohibit lawyers from sharing
fees or otherwise entering into partnership with non-lawyers. This limitation is grounded in the traditional belief that lawyers, as independent professionals, must be free from any influence or control other than from their clients or from the courts. As a result, law firms cannot sell shares to the public or adopt many of the other practices of a typical corporation.

The fact that law firms cannot become shareholder corporations inevitably produces a promotion-to-partner tournament. Without shareholders seeking to have their residual claims protected, there is no impetus to create an independent outside regulatory body, such as a board of directors, to mediate conflicts among the many parties whose human capital is tied up in the firm. The restriction on sharing revenues with non-lawyers translates into a restriction on fully aligning the incentives of any potential non-lawyer managers or directors with those of the revenue generating (and risk bearing) lawyers of the firm. That inability to align incentives, in turn, means that the lawyers at the firm have to manage the firm themselves. The need (in a large firm) to keep generating groups of lawyer-managers who will control and manage the firm, therefore, creates the dynamic for a promotion-to-partner tournament as associates try to make it into this favored class. So long as law firms are unable to bring in truly disinterested management whose interests are fully aligned with those of the partners, they are unlikely to be able to deviate substantially from this path.

The second reason why it is important not to abandon the tournament metaphor altogether is that the allure of the inevitable competition for partnership continues to play an important--albeit diminished--role in structuring the practices of these institutions. At a basic level, some of the associates who join any particular elite firm continue to be motivated by the prospect of making partner. Many more undoubtedly view partnership as an attractive prize--even if they currently do not see themselves as competing for that prize. For these associates the tournament continues to cast a shadow that gives them an additional reason (if only subconsciously) to work hard with relatively little supervision. There is, however, one group of associates for whom the prospect of making partner is their primary motivation: senior associates in their last few years before partnership. With respect to these lawyers, there does appear to be a tournament at work, albeit for reasons other than those posited by the majority of tournament theorists. Several aspects of the competition among senior associates resemble the assumptions underlying standard tournament theory. First, given that associates rationally believe that their lateral job prospects diminish in the few years before partnership (on the assumption that they are leaving because they are not “good enough” to make partner), associates without a strong commitment to winning the tournament are likely to leave before they get to this stage. Moreover, by year six or seven, a senior associate has invested heavily in developing firm-specific human capital, an investment that is not fully reflected in his or her current compensation. The only way to recoup this investment fully is to win the jump in compensation that comes with winning the partnership prize. Finally, senior associates know that there are only a finite number of partnership slots; a number, in most cases, that is smaller than the number of senior associates remaining in the pool, and that will vary depending on the state of the market for legal services at the time the partnership decision is made.

Senior associates have, in all likelihood, developed significant amounts of both human and relational capital, and are therefore competing on a roughly level playing field. Senior associates have all done significant amounts of training work. Each of these contestants has also acquired at least one important partner-mentor who, because she has invested in the associate's training, has a strong incentive to monitor other partners to ensure that her protégé associate is treated fairly in the evaluation process. Finally, senior associates tend to work in separate arenas for different partners. As a result, there is only a minimal risk of sabotage.

These conditions, i.e., closely matched contestants, assurances of fairness, and protections against sabotage, mirror those present in sports settings and other contests that are structured as tournaments. Under these conditions, a
tournament structure may efficiently induce extra effort by contestants (in this case, senior associates) in the last stages of the competition. Senior associates know that it is not enough for them to perform well in their jobs: They must be better than their peers if they are to win one of the finite partnership slots, thereby not only reaping the rewards of partnership but (equally important in today's job market) avoiding the substantial losses associated with being turned down for partnership. As a result, these lawyers have strong incentives to work extremely hard with little prompting from partners. As we indicate below, firms consciously structure their promotion practices to maximize this incentive.

The fact that senior associates, at this final stage, are locked in a competition that resembles a tournament, however, does not mean that junior associates are participating in a similar structure. Although the tournament path continues to exert a strong pull on the labor markets of large firms, these institutions have adapted their practices to the fact that many--perhaps most--junior associates do not have a strong commitment to competing for partnership. At the core of this adaptation is the use of a multiple incentive system.

1635 B. Multiple Incentive Systems

Tournament theory assumes that associates are motivated by the desire to make partner (and the fear of being terminated if they do not get that reward). In Part II, we argued that this assumption fails accurately to capture the motivations of many associates. Standing alone, this suggests that if firms are going to keep their direct monitoring costs within reasonable limits, these institutions must find additional ways to motivate associates with weak commitments to partnership to work hard with relatively little supervision. For this reason alone, firms are likely to adopt a multiple incentive strategy.

Our observations in Part II suggest, however, that firms have reasons for adopting a multiple incentive strategy that go beyond the expressed preferences of associates. For example, contrary to Galanter and Palay's model, under current conditions, elite firms cannot afford for every associate to be strongly motivated to win the tournament. As we noted, the kind of training work and relational capital that associates need to win the tournament are scarce commodities. If every associate were to compete fiercely to acquire these goods, firms would have to expend substantial resources to guard against sabotage and other forms of costly strategic behavior by associates.

More important, because firms select partners in part on the basis of which associates have acquired the greatest amounts of firm-specific and relational capital during their probationary period, it is in the best interest of these institutions if these scarce goods end up being concentrated in the small pool of senior associates from which the firm will ultimately make its selection. The smaller the number of associates competing for scarce and valuable training and mentoring opportunities, the more of these forms of capital each of those who are competing are likely to acquire. Assuming that these valued associates can be induced to stay long enough to be considered for partnership--a subject about which we will have more to say later--limiting the number of associates competing for partnership is likely to raise the average quality of the pool from which the firm ultimately selects its partners.

1636 These advantages of limiting the number of associates actively competing for partnership underscore the need for firms to implement a multiple incentive strategy. In addition to training work, firms have large amounts of paperwork that also must be done by associates. Given that this work is unlikely to lead to partnership, paperwork associates need more than the tournament to motivate them to do this tedious but necessary work competently and effectively with relatively little supervision by partners. Firms appear to be succeeding at this task. As we observed at the outset, even associates doing primarily paperwork exert high levels of effort and care in their work. The question is what is motivating these lawyers to do so.
We suggest that firms rely on three additional motivational tools (beyond the chance for partnership) to either supplement or supplant the incentive effects of the tournament: high (above market) associate wages, associate reputational bonds, and the promise of general (as opposed to firm-specific) training. We discuss each one in turn.

1. High Wages. High wages offer incentives for employees to exert high levels of effort where the wage paid is significantly higher than that paid at an alternative job. These high or “efficiency” wages serve as sufficient incentives because workers fear losing these scarce high-wage jobs; by definition, those who lose these coveted positions will have difficulty finding similarly high-paying jobs in the marketplace. At the same time, workers know that employers can easily find replacement workers who will gladly take their high-paying jobs. This fear induces employees to exert high levels of effort and care even where monitoring is low. Employers, in turn, use part of the gains from increases in worker productivity and decreases in monitoring costs to pay for the above market wages. The contemporary market for lawyers matches what one would expect to find in a sector where the elite firms pay efficiency wages. Indeed, the difference in relative wages between the salaries paid by large law firms and those paid by other legal employers is one of the most striking features of contemporary legal practice. Prior to the 1960s, this gap was almost non-existent. Today, first year associates in New York City earn over $100,000 per year, with those in the rest of the country not far behind. Only investment banks and management consulting firms come close to matching these salaries.

As a preliminary matter, many students state that the high salaries paid by corporate firms are the primary reason why they choose jobs in this sector over what they consider to be more rewarding work in government or in public interest practice. This fact is important because the labor needs of elite firms are likely to exceed the supply of students who have strong ex ante partnership intentions. In addition, since the actual preferences of most law students are relatively weak and subject to change, firms have an incentive to recruit at least some talented students for whom the lure of partnership holds little current appeal, in the hopes of changing their minds and thereby increasing the talent pool from which they will eventually select partners.

More important, once an associate joins a corporate firm, the wages paid by these employers create a substantial inducement to stay and to continue to work hard. For some associates, deferred gratification makes the prospect of acquiring a lifestyle that is at least commensurate to (if not in excess of) their high salaries virtually irresistible. Others may decide to stay at high-paying firm jobs simply to pay back student loans. Moreover, as we indicated firm leaders might predict at the hiring stage, the lure of continued high salaries (not to mention the super bonus that accompanies partnership) induces some associates to opt into the tournament once they have spent a few years at the firm.

2. Reputational Bonds. Associates risk losing something potentially even more valuable than their salaries if they lose their elite law firm jobs: They risk losing the market value of their hard-earned educational and employment related credentials. The value of this reputational “bond” is an important deterrent to shirking.

The mechanism by which this incentive structure operates is straightforward. The large law firms hire primarily from elite law schools and from the top part of the classes of non-elite law schools. These students, therefore, enter law firms with a valuable reputational credential--the signal that they attended and succeeded at an elite law school, or some other comparable signal (such as finishing first in their class at a regional law school or obtaining a prestigious clerkship). This signal is valuable because it suggests that the person who possesses it has the skills and disposition to become a good
lawyer. Because prestigious academic credentials are only a signal of whether the individual is likely to be a good lawyer--and, as we have already suggested, a loose signal at *1639 that--the value of these credentials can always be undermined by evidence of the real thing, i.e., evidence of whether the bearer of the signal is in fact a good lawyer. To the extent that there is convincing evidence that an associate is not as good as her academic credentials would suggest, she risks forfeiting much of the value of her education. Given both the price of an elite education and the overwhelming evidence that prestigious academic credentials (if untainted) pay handsome long-term dividends, forfeiting this reputational bond constitutes a substantial penalty.

Law firms rely on the fear of this potential loss to motivate their associates to work carefully and hard even in the absence of direct monitoring. Because monitoring lawyer quality is inherently difficult, and because an associate's current employer will always have more information than potential employers upon which to base qualitative judgments, both firms and associates know that the firm's judgment about the quality of an associate's work is likely to carry significant weight in the marketplace. Consequently, being fired from an elite law firm job is likely to diminish substantially the value of an associate's prestigious educational credentials. 191 Although other employers will take the fact that the fired associate graduated from a top school like Harvard into consideration when making employment decisions, that signal is likely to be swamped by the negative signal of having been terminated. 192

In essence, when an associate takes a job with a large law firm, he in effect “posts” his elite educational credentials as a bond guaranteeing his future performance. The fear of forfeiting this bond is a substantial incentive for him to work hard with little supervision. 193 Consider, for example, an associate who hopes to move in-house to the legal staff of one of the firm's clients. 194 Obviously, a negative signal from the law firm would destroy (or, at a minimum, greatly diminish) this possibility. The associate, therefore, has an incentive to exert a high level of effort and care in her work for the firm so as to preserve her reputational signal. 195

There is, however, a second level to the reputational bond story. The fact that a young lawyer has worked at an elite firm is, in and of itself, an important signal to the external labor market about that lawyer's quality. 196 According to the prevailing wisdom, those who spend a few years at a law firm acquire a number of skills that are valuable in a wide variety of legal (and non-legal) jobs, including, inter alia, practical knowledge about the operation of various legal institutions, good habits in research and craftsmanship, learning how to meet deadlines and to operate under pressure, working with others, and taking direction. This “general” training, however, is hard for the external market to observe directly when making employment decisions. As a result, market actors are likely to presume that an associate who is fired (or leaves under questionable circumstances) does not possess these qualities. Therefore, to the extent the associate wants the benefit of these signals when she applies for a job on the external market, she has an incentive not to shirk at her current law firm job.

Of course, associates want more than simply the absence of a negative signal about the level of their general training. They want the training itself. This brings us to the final incentive mechanism.

3. Training. Law students know that they need to develop their general human capital if they are to become successful lawyers. Law school offers little instruction in how to be a lawyer. Students, therefore, have good reason to seek out jobs that they believe will train them in the skills and dispositions that they need to become competent practitioners. Firms, in turn, have strong incentives to cater to this need by promising these aspiring professionals that in addition to their high salaries, associates will receive significant training that will be of value to them wherever they work. 197
The promise of general, as opposed to firm-specific, training helps firms to reduce their monitoring expenses for those associates who are not participating in the tournament. Like high wages, the promise of general training gives lawyers with low partnership aspirations a reason to join firms as opposed to working for other legal employers. This increase in the applicant pool is important to firms. In addition, law students who join firms in the hope of receiving general training will also be motivated to exert high levels of effort and care in their work as associates to the extent that they believe that hard work improves their own development.

In sum, elite firms pursue a multiple incentive strategy. Consistent with tournament theory, firms continue to hope that some lawyers will be motivated by the chance of making partner. For those who are not, firms create additional incentives through high wages, reputational bonds, and the promise of general training. Moreover, these four incentive systems (including the tournament) are interconnected. The less credible a firm's partnership promises, the more it is likely to rely on high wages or promises of providing valuable external signals.

*1642 Two examples underscore this connection. First, in 1994, Cravath unilaterally raised the salaries of its senior associates (already among the highest in the country) by ten percent. Given Cravath's notoriously low partnership rates, the firm was having a difficult time retaining senior associates (and persuading junior associates to stay long enough to become senior associates). Cravath responded by dramatically increasing the “high wage” incentive for associates to stay at the firm. Second, it is now common for many law firm interviewers to state expressly that young lawyers should join their firm “for the training” even if they only intend to stay for a few years. These comments tend to come from two types of firms: New York firms with very low partnership rates, and large firms in cities in the West and Midwest where salary structures are appreciably below those of New York. In each case, the firms appear to be using training as a substitute for the incentives created by the tournament or by high wages, respectively.

A multiple incentive system is efficient in the context of elite firms. The firms are large, and do not carefully screen entering associates in terms of their goals, motivations, or levels of risk aversion. Given the low level of initial screening and the assumption that employees do not sort themselves, it makes sense for the firm to provide a multiplicity of incentive schemes. A multiple incentive strategy enables firms to maximize their chances of finding the right incentive for each associate. The firms need all of their associates, whether doing paperwork or training work, to exert high levels of effort and care.

This strategy, however, creates its own risks. Firms need to differentiate between those associates with a genuine interest in winning the tournament (whether that interest is one that the associate arrived at the firm with or one that developed over time) and those who are primarily interested in money, protecting their reputational bond, or training. Firms need to make this distinction because of the difference between training work and paperwork. Since training work involves a substantial investment of valuable partner time, firms only want to give this work to associates who are likely to have long-term careers with the firm: in other words, associates who have some commitment to the tournament. These associates must be distinguished from the larger group who either want access to training opportunities in order to improve their employment prospects once they leave the firm, or who are interested only in a few years of high wages before they leave law altogether. The fact that at least some of these defecting associates might end up working for a firm's competitors and perhaps even steal the firm's clients only serves to intensify the firm's desire to direct its scarce training work to the right associates. Tracking associates onto a training track and a paperwork (or “flatlining”) track provides a solution to this problem.

*1644 C. Multiple Tracks and Multiple Rounds: Why Sampras and Agassi Never Meet before the Final Round
As a formal matter, firms maintain few distinctions between associates in a given class. This formal uniformity, however, masks fundamental differences between the experiences and opportunities of particular associates. In order to ensure that they have adequate supplies of senior associates and partners, firms have to train some of their associates. For reasons previously discussed, however, it is inefficient for a firm to invest in training all of its associates. Given the confluence of high leverage ratios and low levels of commitment by many associates to winning the tournament, the majority of associates who join a given large firm will leave, most before reaching the rank of senior associate. Moreover, as we noted, firms generate an enormous quantity of paperwork which can be done by associates with little or no training. Taken together, these two factors--high associate attrition and the abundance of paperwork--give firms strong incentives to separate associates into two informal, but nevertheless quite real, groups: training-work associates and paperwork associates.

Tracking is the norm in many sporting competitions. At the United States Open Tennis Tournament, for example, tournament officials do not want the best players to compete against each other until the later rounds. The reasons underlying this desire range from ones grounded in fairness (the “best” players should have the greatest opportunity to compete in the tournament's later rounds) to efficiency (since later rounds are likely to attract more attention and fan support, tournament officials have an incentive to ensure that the top players compete in these rounds). To ensure this result, tournament officials create “brackets” in which the best players are separated and paired against lesser competitors. Separating the best players prevents the second best player from being knocked out in the first round by the tournament's best player. Protecting top players by giving them easier opponents than those who are not as highly ranked helps to ensure against random effects. Although Pete Sampras, the number one seed, might lose to Jaime Yzaga, the number sixty-four seed, because he is having a “bad day,” Sampras is in much less danger of losing under these circumstances than if he were facing a more highly ranked player.

Given these incentives, it is not surprising that tournament officials intentionally separate and protect their best players. In a typical sixty-four player competition, for example, tournament officials might break the field down into four brackets of sixteen players each. The top four seeds in the tournament become the number one seeds in each bracket. Within each bracket, the number one seed first plays the number sixteen seed. Assuming he wins this match, he then plays the winner of the match between numbers eight and nine, and so on. If all goes according to plan, the top players in any bracket will not meet each other until the quarterfinals, with the four top seeds in the tournament going on to compete in the semifinals.

Tournaments in the workplace can also benefit from tracking. As Milgrom and Roberts explain, employers have an incentive to favor the winner of the first round in later rounds. To demonstrate this conclusion, the authors posit a simple two-round game in which the employer must decide whether to promote one of two employees (A or B) after the second round. Even if we assume that the employees' performances at each stage provide information about their qualifications for the promotion, the firm's optimal decision rule is to ignore second-round information and promote the winner of the first round. If candidate A wins both rounds, this is obviously the correct result. But even if candidates A and B split the victories, there is at least as much information favoring the first-round winner (A) as the second (B), so the firm is equally well off promoting A solely on the basis of the first-round results. If, however, the firm favors the first-round winner in the second round, then the firm gains additional information by seeing if A actually wins the second round. (If he loses despite being favored, then B is likely to be better.) Tracking, therefore, is a rational way for firms to reduce monitoring costs in a multiround game.

The model of elite firms we describe fits this pattern. The internal labor markets of these institutions, as we have suggested, are multiround competitions. Associates progress, first from assignment to assignment, then from the junior...
ranks to senior associate status, and finally (for the chosen few) to partnership. As Milgrom and Roberts predict, associates who do well in early rounds are favored and protected in later rounds.

Firms create a multiround tournament by the manner in which they distribute and evaluate training work. Associates who do well on their initial training assignments are given preferential access to additional training opportunities. Those junior associates who successfully complete a number of such assignments move up to become senior associates, giving them even greater access to training opportunities, and, equally important, helping them build strong relationships with partners.

These relationships, in turn, further improve a training associate's prospects when he or she enters into the actual promotion-to-partner tournament: the competition among senior associates for one of the firm's limited number of partnership slots. Although training does not guarantee partnership, it is the ticket that allows training associates to compete for the reputational capital that winning the tournament requires. As we argued, the interests of individual partners are not necessarily the same as those of the firm. Although the firm has an interest in partners spreading training opportunities to all associates who plausibly might be considered on the partnership track, individual partners in a large firm will primarily focus only on training associates who will benefit their practices. As a result, “[o]nce partners find associates they like who can do the work, they're more than happy to continue delegating work only to those associates.”

Finally, once associates are firmly on the training track, they are likely to be further protected in the evaluation process. Given that the firm has already made a substantial investment in the development of these associates' careers (in the form of unreimbursed and unrecovered training costs), partners are likely to see it as in the firm's interest to help training associates learn from their mistakes, thereby inducing them to stay at the firm and continue to work.

There are, however, limits to this indulgence. A training associate who commits a serious error can lose his or her privileged status, just as Pete Sampras can lose in one of the early rounds of a tennis tournament. The reverse is also true: By performing some visible, Herculean feat of legal brilliance, the associate equivalent of Jaime Yzaga can rise above his paperwork status to place himself on the training track. Although movements in both directions are therefore possible, we should not be surprised that those with early access to the training track constitute the largest category of winners of the promotion-to-partner tournament.

Tracking, therefore, helps firms solve the dilemma created by the fact that many entering associates have only a weak commitment to winning the tournament. As we have repeatedly stated, only a handful of the associates begin their careers at an elite firm with a strong commitment to making partner. Most other associates are uncertain about their future plans, i.e., whether they will attempt to make partner, or will leave the firm after a few years. Through tracking, firms strengthen the commitments of associates whom they want to stay while simultaneously giving those not receiving training reason to seek rewards other than winning the tournament. Associates who continue to get good work are more likely to be happy and to stay at the firm. Not only are they satisfying their desire to develop human capital, but they are also receiving a tangible signal from the firm that their chances of winning the tournament are better than the many associates who are only receiving paperwork. Even if this signal is ultimately inadequate to induce all of these favored players to stay until the final partnership decision, their presence in the senior associate ranks constitutes a substantial return on the firm's investment in their development.

At the same time, those associates who consistently receive only paperwork are likely to realize that their partnership chances are limited and leave voluntarily (as soon as they have earned enough money or obtained enough general training...
for an in-house or other job). Firms benefit from these “voluntary” departures in two ways. First, at a human level, firing someone is not easy. No matter how much the decision is dressed up, the decision to turn an associate down for partnership or to ask an associate to leave is unpleasant. Second, at the institutional level, “voluntary” departures make it easier for firms to tell both remaining associates and law students that the odds for those who “really want” to become partners are substantially better than the naked statistics showing the percentage of each entering class that actually obtains this goal would lead one to believe.

Finally, associates take this basic tracking structure into account when choosing (to the extent they are able) their assignments. At each stage in an associate's development, she must decide whether she is going to strengthen her commitment to winning the tournament or instead begin looking for another job. For reasons articulated above, one factor influencing this choice is the associate's perception of the quality of her assignments, i.e., whether she is primarily getting training work or paperwork. In many cases, however, this will not be the only--or indeed, not even the most important--factor. Even associates on the training track may decide that they do not want to become partners. From the firm's perspective, however, the most important factor is that once an associate decides that she does not want to become a partner, she has an incentive to start looking for projects that will serve her other needs, for example, projects rich in general (as opposed to firm-specific or relational) capital or ones that provide contact with potential future employers.

Collectively, these two sets of incentives—the firm's incentive to create an informal, but nevertheless powerful, tracking system in order to protect its scarce training resources, and the associates' incentive to find work that satisfies their particular desires to either make partner or find another job—reinforce the tournament structure we described in the beginning of this Section. With each passing “round,” more and more associates decide (partly in response to actions taken by the firm and its partners) to abandon thoughts of being on the partnership or training track. For these associates, the shadow of the tournament as a motivational device recedes, replaced (for as long as they stay at the firm) by their desire to keep their high wages, protect their reputational bonds, or acquire general (as opposed to firm-specific or relational) capital. As a result, they are unlikely to engage in the kind of fierce competition for training work that would, as we argued in the last Part, undermine collegial working relationships. At the same time, those associates who continue to aspire to partnership—those on the training track—are increasingly motivated by the prospect of winning the tournament.

Tracking, therefore, is an important feature of the internal labor markets of firms, including the final promotion-to-partner tournament among senior associates. The question remains, however, how some associates seem to be “tracked” from their first day at the firm. To answer this question, we turn our attention to another standard feature of the kind of sporting events upon which tournament theory is loosely based: seeding.

D. Seeding: How Sampras Gets to Be Number One

As indicated in our discussion above, it is clear that one important way that associates get on either the training track or the flatlining track is through their performance on projects, particularly their initial projects. This situation is a function of the multiround aspect of the tournament. With each set of projects, more associates decide whether or not they want to be on the partnership track. Similarly, partners decide whether or not some associates are partnership material. Theoretically, firms could rely exclusively on this mechanism, waiting until every associate has completed a few randomly chosen assignments (some training work, some paperwork) before deciding which associates to put on the training track.
This process, however, is not what we observe. Instead, some associates are “seeded” directly onto the training track. These favored associates immediately get assigned projects with the potential for creating high levels of firm-specific and relational capital, e.g., assignments with lots of client and partner contact. As a result, seeded associates are exempted from the initial competition among their peers to gain access to the training track.\footnote{1652}

In sporting tournaments such as the NCAA basketball tournament or the U.S. Open, tournament officials commonly “seed” competitors and assign them to a track before the tournament begins. Thus, to return to the example of the U.S. Open, Pete Sampras begins the tournament as the number one seed. The seeding is based on a formula involving both assessments of Sampras's past performance and projections about which combination of matches (and in what order) is likely to produce the best overall tournament. In large part, the goal is to reduce the likelihood that Sampras is knocked out before the finals.

The project assignment process at law firms resembles the seeding model. Many--perhaps most--associates obtain their initial work assignments on the basis of some combination of their expressed preferences and random selection. There are other associates, however, whose fortunes are left less to chance. Just as U.S. Open officials do not want to take the chance that Pete Sampras might get knocked out in the qualifying rounds, law firms also have an incentive to protect those recruits whom the firm believes to be especially valuable. If initial assignments are left to chance, a highly prized associate--for example, a former Supreme Court clerk--might get discouraged and leave the firm (or stop investing in winning the tournament) because he receives a bad initial assignment or believes that in order to succeed, he must outperform all of the other associates in his class. One way to prevent this from happening is to seed the especially valuable candidates by giving them immediate access to the training track.\footnote{1653}

Although firms have the same incentives as U.S. Open officials to protect their best players, firms have considerably less information than tennis officials to develop their initial rankings. Tennis officials base their decisions on Sampras's (and the other competitors') performance in competitions that are virtually identical to the tasks these players will have to perform to be successful at the U.S. Open, i.e., other tennis tournaments.

In contrast, because the elite firms hire new associates who have never practiced law, these institutions must base their initial rankings largely on predictions based on the associate's law school, clerkship, law review membership, and law school performance.\footnote{225} These easily observable signals only loosely correlate with actual lawyering skills. For reasons reviewed extensively elsewhere, the best students do not always make the best associates, let alone the best partners.\footnote{226} Although firms could uncover more detailed information about potential candidates--for example, by conducting in-depth substantive interviews, calling law professors, or closely analyzing a candidate's writing skills--collecting this kind of additional information is expensive and the results are difficult to evaluate. With a few exceptions, we have observed that elite firms do not collect this more detailed information.

Moreover, because the “average” associates recruited through this process are capable of doing “average” work (i.e., paperwork) as well as it needs to be done, firms have little incentive to expend additional resources to uncover a candidate's “true” abilities. Firms need only a few associates to develop into legitimate partnership prospects. As a result, law firm seeding is based on limited and narrow information--i.e., on signals that do not necessarily have a high correlation with skills.

Despite the low correlation between the signals used by firms to seed and the skills needed to be either an associate or a partner,\footnote{1654} firms still have an incentive to use these signals to seed associates. In part, this incentive flows from the fact that the correlation between academic success and success as a lawyer, although loose, is likely to be tighter for students at the “superstar” end of the academic distribution. By virtue of first, being admitted to a rigorous academic
environment, and second, succeeding in that environment, these academic “superstars” have demonstrated their ability to win tournaments. Firms, however, have incentives for seeding academic superstars that go beyond whatever predictive judgments can be made about their potential quality from their previous academic success. Regardless of whether they have a high correlation with job skills, signals such as law school status and grades are both “visible” and “rankable” to two communities that are of pivotal importance to elite firms: clients and law students.

The first pivotal community is the world of clients. Just as partners have difficulty evaluating the quality of an associate's legal work, clients find it hard to choose the “best” law firm to handle their matters. As a result, clients look to visible and easily rankable signals to help them judge law firm quality. In other words, while it may be both difficult and expensive to evaluate absolute quality, there may be cheap and easy measures of relative quality.

Law firms, in turn, have an incentive to signal their quality to potential clients by providing them with visible and rankable measures of their ability. While elite law firms tend to consider advertisements and solicitation as unprofessional, listing the pedigrees of their attorneys has always been considered an acceptable way for a firm to signal its quality to clients. As Galanter and Palay document, in the early part of this century, the most important aspect of a young lawyer's pedigree was his (and here we again use the pronoun advisedly) social background. In recent years, however, impressive academic credentials and Supreme Court clerkships have largely (although, as we argue extensively elsewhere, not completely) replaced social capital as the measure of a new associate's potential worth. These credentials have now become an important signal of law firm quality, both to clients and to other firms that might send the firm business.

In addition to clients, firms also need a visible and rankable signal to send to the community of law students. Elite firms must compete for the services of talented law students both with each other and with alternative employers ranging from investment banks to public interest firms. These potential recruits, however, have little information about the actual quality of firms. Instead, law students tend to rely on vague assessments of the general reputation of a particular firm. Given that many firms, particularly those in the same market, tend to have similar structures and policies (i.e., similar partnership tracks, starting salaries, and client bases), a firm's reputation among law students is substantially determined by its ability to be selective in recruiting law students. The firms that can be the most restrictive in their hiring practices tend to be regarded by law students as the “best” firms. As a result, those law students who want to be considered the “best” among their peers have an incentive to apply to and to select these institutions.

Because firms get additional signaling values by hiring lawyers with prestigious academic credentials (in addition to whatever actual productivity gains they may receive), these institutions have strong incentives to recruit heavily graduates with these credentials and to protect those that join the firm by immediately placing them on the training track. All other things being equal, firms prefer to have associates--and even more important, partners--from elite schools such as Yale, Stanford, or the University of Virginia (particularly those with prestigious academic credentials), than to have tournament winners who attended St. John's, Seton Hall, or the University of Richmond. As a result, some number of elite school graduates with strong academic credentials are likely to be seeded initially on the training track, rather than having to fight their way through the preliminary rounds. We should therefore expect to see more of these initially seeded competitors winning the tournament than their unseeded peers.

When taken together, tracking and seeding substantially improve a firm's chances of retaining those associates who have received the “royal jelly” of firm-specific training and relational capital. Retaining these associates, in turn, expands the pool of available talent from which the firm eventually selects its partners (at least those partners who are promoted from the ranks). What these two associate governance mechanisms cannot do, however, is ensure that those associates
who do win the tournament will perform well as partners. To address this problem, firms have added additional rounds
to the tournament.

E. Partnership Tournaments: Why McEnroe Will Never Be the Coach of the U.S. Davis Cup Team

In the basic tournament model, promotion to partnership is a reward for past performance. Employees work hard on
their current *1658 jobs because the firm has implicitly promised them that the most productive among them will be
promoted. The lure of promotion provides an incentive to work hard because promotion brings with it both a large
salary increase and job security akin to academic tenure.

In Part II, however, we demonstrated that firms make partnership decisions not as a reward for past associate
performance, but as a prediction of which partner candidates will contribute the most in the future. This future
contribution comes in two related forms: contributions to the firm's income and contributions to individual partners in
terms of implicit promises of future support. 239 To return to the tennis analogy, if the position of coach of the Davis
Cup team were filled by a promotion granted as a reward for past performance, then the decision to appoint former
champions like Jimmy Connors and John McEnroe as coach would be a simple one. The selection committee would
merely look at past performance to see which player had won more tournaments. However, if promotion to coach is not
a reward for past performance, but is a prediction of future performance (as a coach, not a player) the decision is likely
to be far more complex and it is no longer clear that either McEnroe or Connors would be chosen.

The fact that law firms seek to promote those associates who will make the best “coaches” (and not simply to reward those
who have been the best “players”) has two important implications for the internal labor markets of these organizations.
As an initial matter, the fact that firms select partners on the basis of future performance has important implications for
how these decisions will be made. This, in turn, affects what happens after the partnership decision.

1. The Partnership Promotion Decision. In the standard tournament model, promotions are made after an ordinal
or relative analysis of candidate performances. This occurs for two reasons. First, the model assumes that firms have
already committed themselves to promote a fixed percentage of employees. Therefore, the only relevant question is which
employees in the available pool have performed best. Moreover, one of the original hypotheses as to why some firms
structure their internal promotion mechanisms *1659 as rank-order tournaments was that relative rankings were easier
and cheaper for these firms to make than absolute evaluations. 240 As a result, firms save money by making the former
kind of assessment.

The model's predictions, however, do not hold in cases where promotion is not a reward for past performance, but instead
a prediction about future performance. In such cases, one would expect to see firms attempt to make promotions only
when they are warranted and to rank candidates on the basis of cardinal or absolute value as well.

Law firms fit the latter model. We have observed that law firms spend considerable resources carefully assessing the merits
of potential partnership candidates. 241 Only those candidates who meet some absolute level of human and relational
capital are likely to be promoted. To see why, it is necessary to return to the difference between “partner” work and
“associate” work.

Partners play a fundamentally different role in law firms than associates, even senior associates. 242 Associates are not
likely to have assumed the kind of primary responsibility on an important matter that is expected of partners. Further,
partners have obligations to bring in new business and maintain existing business that associates do not. 243 Decisions
about future productivity must be made on the basis of accumulated human capital (both general and firm-specific) and relational capital. As Nelson argues, firms are unlikely to promote an associate on the basis of these predictive factors simply because he or she is the “best” associate left in that particular class. Instead, firms will require that the candidate satisfy some absolute standard of capital that translates into potential for the future. The requirement that associates meet a high threshold level of capital explains why firms spend so many resources investigating the qualities of potential partnership candidates, as well as why even highly regarded candidates are sometimes deferred for one or more years so that they can develop additional skills.

Similarly, unless an associate has some absolute threshold level of relational capital it is unlikely that she will be promoted even if she is the “best” associate in her class. Associates need partners to speak on their behalf, both to communicate their abilities to other partners and to press reluctant partners to trade current income (in the form of a reduced share of the pie) for the chance of increasing profits in the future. Only those associates with a sufficient supply of relational capital (represented by either the number or the power of the mentors who have invested in their careers) are likely to have enough clout brought to bear on their behalf to overcome the unwillingness of the partnership in general to take a risk on an associate's potential to be a successful partner.

The fact that law firms select partners on the basis of cardinal, as opposed to ordinal, rankings is consistent with our contention that the labor markets of these institutions are organized as tournaments, albeit not the kind of tournaments envisioned by standard economic theory. At the beginning of this Part, we argued that the tournament is most salient in the last few years prior to the partnership decision. In these years, both partners and associates know that there is a risk that there will be fewer slots than candidates. Contrary to the emphasis placed on relative rankings in standard tournament theory, however, the primary reason why these slots are limited relates to an “absolute” judgment engaged in by every law firm: the level of business.

Law firms are unwilling to make new partners unless the existing level of demand for the new lawyer's services satisfies some absolute standard. Take the example of an associate who specializes in intellectual property work and has billed more hours than any of her colleagues, has a superb knowledge of the field, and has developed strong relationships with the existing partners. In all likelihood, this associate will not be made partner if it happens that the firm's intellectual property business has dried up in the year she comes up for partner. Therefore, not only is the partnership decision forward-looking and predictive, but the promotion structure is one in which the risk of fluctuations in the external market is borne by the associates and not the firm. This absolute standard—the amount of demand for new partners in a given area—defines the terms of the competition in which senior associates compete to win partnership slots.

It is ironic that in the model we describe, the core tournament aspect is created by the firm's uncertainty about the economy. This position is ironic because some economists attribute the existence of tournament-like structures in certain firms to the rank-order tournament's potential to eliminate for employees uncertainties associated with fluctuations in the firm's client base, i.e., uncertainty that was not a function of associate performance. These economists hypothesize that firms adopt tournaments because looking at relative, as opposed to absolute, performance eliminates risks that affected everyone's performance, but that employees could not control. In the context of large law firms, in contrast, the tournament aspect of these institutions—i.e., the limited number of partnership positions for senior associates—is largely caused by the existence of these common risks.

To reiterate then, assuming that an associate does not bring new clients to the table (or that existing clients would not leave with this associate), the firm will look to see whether it has, or expects to have, enough clients for this potential partner to service at the high rates that the firm charges. Partners, whose individual shares go down if they promote
unproductive associates, have an incentive to hedge their bets by ensuring that existing revenues (or number of clients) are sufficient to support making a new partner in a given area.

In addition to the risk that a potential new partner will not generate enough revenues either to sustain or to increase the existing partnership shares, there is also the risk partners will shirk. If partnership is really the end of the tournament--the equivalent of tenure--then individual partners may free ride on the efforts of their peers. Given that firms promote new partners on the basis of predictions about their future performance (as opposed to as a means of rewarding them for their past contributions), one would expect to see mechanisms in place to ensure that partners do not shirk their obligations. This brings us to a discussion of partnership tournaments and other incentives for partners.

2. The Upper Rounds. Revenue generating partners want a mechanism to protect themselves from shirking by their peers. As the number of partners in a firm grows larger, and these partners become increasingly specialized, firms can no longer rely on mutual cross monitoring or peer pressure to control the incidence of shirking. As noted earlier, shirking by a partner can be especially costly, not only because partners do the more important work on the team, but also because they supervise and their shirking can have multiplicative effects on associates below them. Because of their commitment to the “tournament path,” i.e., the notion that “making partner” requires one to “win” a competition, it is unsurprising that many firms have created additional partner-rounds to the tournament of lawyers as a means of addressing these concerns.

Partnership tournaments take multiple forms. A growing number of firms have specifically adopted a two-tiered partnership structure in which “junior” (salaried) partners compete to become “senior” (equity) partners. Unlike the promotion-to-partner tournament, the sole criteria for winning this “partner” tournament is a junior partner’s demonstrated ability to bring in business and to assume primary responsibility on major matters for senior partners. Indeed, some firms go so far as to condition their willingness to consider a lawyer for equity partnership on the junior partner’s meeting an express target for business generation.

Even firms that make no formal distinctions among partners, however, have adopted compensation systems that can be characterized as partnership tournaments or promotion ladders. As Galanter and Palay note, most firms have replaced the lockstep compensation systems that characterized these institutions in their “golden age” with distribution schemes that reward particular partners for their contributions to the firm. The reasons behind this sea change echo the justifications for associate tournaments: Firms want to prevent shirking partners from free riding on the efforts of productive partners. Nevertheless, many commentators refer to these new systems as “productivity” based, and suggest that the schemes demonstrate that, at least at the partner level, firms do not need to conduct partner tournaments because they can monitor and reward performance directly.

There is merit to this characterization. At the partnership level, firms have a variety of mechanisms for evaluating a lawyer’s productivity--most notably how much income the lawyer generated either from billings or from hours--that are, for the reasons we set out in Part I, less accurate when applied to associates.

Nevertheless, the claim that the new compensation formulas demonstrate that partner productivity is easy to measure is, at best, only half right. The argument that “eat-what-you-kill” compensation systems demonstrate that monitoring and evaluating partners is easy ignores the tremendous difficulty of determining who “killed” what. Does the partner who gets called to work on a particular matter get credit for “killing” the client, or should the credit go to the partner who has cultivated a successful relationship with this same client over many years? What happens if three lawyers from different areas approach one of the partner’s clients about a new project? The more the firm claims that partner
compensation accurately reflects actual productivity in any given period, the more it must resolve these divisive issues. Although some firms have chosen to move in this direction by enacting complex formulas designed to calibrate exactly how much each partner has produced in a given year, many others have searched for compensation systems that seek to minimize disputes over productivity and responsibility.

Not surprisingly, many firms have gravitated towards systems that closely resemble partnership tournaments. In one common variant, partners move progressively up “tiers” of compensation based on the subjective judgments of a compensation committee made up of powerful partners in the firm. Part of the compensation a partner receives at each tier is a reward for not having behaved opportunistically (by either shirking or leaving) in the prior period. In addition, the few partners who make it to the upper tiers are rewarded (sometimes automatically, but mostly as a matter of deference) with leadership positions in the firm. Those who shirk or otherwise fail to live up to expectations are not “promoted,” and, in the worst case scenario, may be dismissed.

Although we believe that the new compensation formulas create a tournament aspect in the upper rounds of the internal labor markets of elite firms, we do not mean to suggest that these rounds resemble a standard economic tournament. Just as the promotion-to-partner tournament we describe involves a complex mix of incentives and tracks, the post-partnership rounds also are characterized by multiple incentive schemes. For example, there may be partners who are content with their high salaries and work hard because they want to keep receiving these high salaries. Others work hard because to be fired for shirking would jeopardize the valuable reputation and status they have obtained by having made partner at an elite firm. Our point simply is that for some partners, the higher levels of compensation and power over the management of the firm that come with winning the upper rounds of the tournament constitute an important motivation to work hard with little or no *1665 supervision. Moreover, even those who are unsure about whether they want to become “senior partners” may be motivated by the existence of the upper-level tournament to at least work hard enough to keep their options open. As with associates, therefore, the shadow of the tournament has effects that go beyond the reach of those who have expressly committed themselves to compete for its rewards.

Although partner tournaments help firms to create the proper incentives for partners, the existence of these additional elimination rounds raises complications for the promotion-to-partner tournament. Specifically, if associates know that, notwithstanding their hard work and loyalty to the firm, they may still end up as glorified senior associates (non-equity partners) or bottom tier equity partners constantly working to make it into the next round, they may decide that the rewards of “partnership” are not worth the price. Indeed, if associates (and law students) were fully to understand the modifications to the basic tournament that we have described in this Part, there might be significant negative consequences for the firm. A multiround tournament that includes multiple incentives, tracking, seeding, and partnership tournaments inevitably creates far more losers than winners. Firms, however, need these eventual losers to stay engaged long enough for the firm to extract the “surplus” from their labor upon which the profits of tournament winners depend. To accomplish this balance, firms attempt carefully to manage the information that associates learn about the rules of the tournament.

F. Information Management: Why Agassi Is Sometimes Seeded Higher at the U.S. Open than at Other Tournaments

Tournament theory assumes that it is in the firm's interest to make the rules of the game transparent to all concerned. However, once we understand the complexity of an elite firm's internal labor market, including those aspects that are structured as a tournament, it is clear that firms have strong incentives to manage the flow of information to associates and law students in order to *1666 maximize the system's overall incentive effects. In order to accomplish this objective, firms must pay attention to the effects of various kinds of information on the effort levels exerted by associates at different stages in their careers. To understand this point, it is once again useful to look at real tournaments.
Information management systems, although not the norm, exist in some tournaments. For example, in certain debate tournaments, teams are not told whether they have won or lost their preliminary rounds until after all of these rounds have been completed. By withholding this information, tournament officials hope to induce maximum effort by all participants, since even those with poor records will believe that they have a chance to get into the elimination rounds. Similarly, until recently, in soccer only the referee knew exactly how much time was left in the game. Once again, controlling this information helps to induce “end-of-game” effort at an earlier point than would otherwise occur, as teams seek to minimize the risk that they will run out of time. Even tennis officials often refuse to disclose how they arrive at their initial seedings and brackets.261

Elite firms utilize a similar information control policy. As we indicated in Part II, firms do not have an open door policy about how they make their partnership decisions. Instead, firms pursue a “black box” approach in which associates are provided only a vague idea about the criteria for making partner and almost no information about how these criteria are applied in particular cases. Notwithstanding the fact that junior associates are formally reviewed at least once a year, most of these lawyers have relatively little information about their partnership chances. As a preliminary matter, virtually every firm we have looked at vehemently denies that there is a separate “partnership” (or training) track. Moreover, to the extent that associates are told about their own performance, they are rarely given information about the performance of their peers.262 As a result, although many associates know *1667 that there is a training track, and that some associates are seeded on that track, they are expressly denied official information about how or why this has occurred.

Indeed, the kind of information management in which the large, elite law firms engage exceeds even what one finds in sports. In debate, soccer, and tennis, participants know what the rules and criteria for victory are, even if they are unaware at any given moment of exactly how these rules are being applied. Law firms, however, seek to conceal—or more often, to reveal selectively—both the rules and the criteria themselves. Theoretically, a firm could simply tell its associates (and potential associates) that it was not going to tell them all of the relevant rules of the tournament of lawyers. Such up-front secrecy, however, is inconsistent with the profession's expressed standards. More important, an express declaration of secrecy is likely to set off the very fears about opportunistic behavior by firms that Galanter and Palay correctly identify as a major impediment to the creation of firms in the first instance.263 As a result, firms are more likely to engage in a strategy of selective disclosure, designed both to get the “right” information to the “right” people while minimizing the effects of the “wrong” information. As a preliminary matter, this involves distinguishing between senior associates who are fighting to win one of the finite number of partnership slots and the associate pool in general.

1. Information Management for the Senior Associates: Signals, Skills, and Relational Capital. Firms use a “black box” approach in making new partners. Much like the information control strategies in debate and soccer, this approach maximizes the “end-of-game” effort by senior associates. Recall that these lawyers are primarily motivated to work hard with little supervision by the desire to make partner. Having no more than a minimal amount of information about how they rank against their competitors and what weights are going to be given to different aspects of their performance/capital-acquisition, these lawyers have strong incentives to work hard at everything possible. From the firm's perspective, therefore, the black box approach—not the open door policy suggested by standard *1668 tournament theory—maximizes the incentive effects of the tournament for these lawyers.

In contrast, look at what might happen if associates knew both their relative rankings and the exact criteria (signals) used to rank them. If associates at the top knew that they were far enough ahead of those at the bottom, these front runners would have an incentive to exert less effort since they would already know that they will win. At the same time, those at the bottom might give up and leave before the partnership decision is made.
Moreover, once the factors used and, more important, the weights attached to them are disclosed, associates have every incentive to focus on maximizing their acquisition of those factors or signals with the highest weights and ignoring those with low weights. For example, if associates know that hours worked in the past will be taken as an indication of how hard someone will work in the future and this factor is disclosed to be the most important one, associates might focus solely on billing hours and ignore lower ranked factors such as recruiting or training. Such strategic behavior leads to inefficiency in that it skews the value of the indicator, and it results in associates' ignoring work that needs to be done. Keeping associates uncertain about what weights are given to the different factors (or even about precisely what those factors are) induces them to work hard on everything and not just on the acquisition of signals.

The black box approach, however, does create one important problem for the overall operation of the tournament for senior associates. Galanter and Palay correctly argue that one reason why firms gravitate toward a tournament structure is to provide associates with a mechanism (the number of partners made in any given year) that will help them guard against sharking by the firm. If partnership is a black box rather than the open book implicitly envisioned by tournament theory, what assurances do associates have that the firm will treat them fairly? This question is especially urgent, since, as Galanter and Palay also note, if associates have no assurances that the process will reward their efforts in acquiring firm-specific capital, they have strong incentives not to do so.

The tournament structure we have described suggests three possible answers. First, since partnership is not a reward for past performance, but instead is a prediction about who will be the most productive in the future, firms have less incentive to cheat. When partnership is a reward for past performance, cheating allows firms to avoid paying for the benefits already acquired while leaving the institution free to optimize its future returns. When a firm “cheats” by failing to promote those associates most likely to bring in future revenues, it reduces its future returns. As a result, associates should have somewhat more confidence about the integrity of forward-looking partnership decisions than about ones that purport to reward associates for past performance.

The fact that partnership decisions look to the future instead of the past is not a complete answer to the associates' concerns. Given that the signals upon which firms are likely to base their predictions about future performance are far from precise, distinctions among partnership candidates will be based on highly subjective judgments about performance and potential. As we have argued extensively elsewhere, these subjective judgments are likely to be influenced by a range of factors other than the quality of the associate's work, since partners (as most people) tend to evaluate those who are like themselves more positively than those who are different. These judgments will also be skewed by politics. For the reasons outlined in Part II, individual partners have strong incentives to prefer the interests of their own protégés over those of equally (or better) qualified protégés of others.

Politics, however, can also help protect senior associates. The senior associates competing for partnership, in large part, have acquired substantial relational capital. They have reached this stage in the tournament, because there are partners who have invested in their success. These partners, as we have suggested, can act as a check on whether other partners are acting opportunistically in seeking to promote the interests of their protégés. Once again, this second mechanism is far from foolproof. Some partners will simply not be powerful enough to protect their protégés from strategic behavior by more senior members of the firm. Other would-be sponsors will not want to risk their own relational capital with their peers by promoting a given senior associate to partnership. Because associates are excluded from partnership decisions, they have no way of monitoring whether their “godfathers” actually promoted their interests effectively.
Finally, firms can try to induce senior associates to bear the risk that the firm will behave opportunistically through the same high wage strategy that they use to induce associates to join firms in the first instance. Firms profit handsomely from the black box approach. Senior associates--arguably the most valuable lawyers in any law firm--are induced to work extremely hard on virtually every facet of their jobs with almost no supervision, thereby freeing *1671 partners to bring in the new business that the firm needs to survive. 273 Firms therefore have sufficient resources to pay these valuable lawyers a risk premium to compensate them for bearing the additional uncertainty produced by the black box. 274 In Part II, we described Cravath's recent decision to raise substantially senior associate compensation as a means of inducing more of these lawyers to stay even though they have relatively little chance of becoming partners. 275 Once we factor in the importance of the black box, it is likely that some portion of that wage increase was designed to compensate these lawyers for the firm's refusal to tell them exactly what criteria the firm will use in selecting partners and how these criteria will be applied.

Thus far, we have talked about information management with respect to the senior associates in competition for partnership. The information management aspect of law firms, however, extends over the entire associate career path.

2. Information Management for the General Pool. With respect to “seeded” associates and those who gain access to the training track after their initial projects, these favored associates need only know that they are favored. For the most part, this involves conveying accurate information. 276 Thus, firm leaders need to tell training associates that they will continue to get good work and that realistically, they are only competing for partnership against the relatively small number of other associates who also have been given this privileged status. 277 Firm leaders, however, must be careful to convey this information quietly. Just because an associate is not on the training track does not mean that he does not consider himself to be competing in *1672 the tournament. The less that associate knows about the opportunities afforded those on the training track (or, to put the point somewhat differently, the harder it is for a paperwork associate to evaluate the difference between the work he is doing and training work) the more likely it is that he will be motivated to work hard in order to increase his chances of making partner. This is one reason, 278 we suspect, why firms keep the evaluations of associates in their first few years vague and generally upbeat.

Firms also dangle a series of financial rewards--including substantial starting salaries, signing bonuses, and health club memberships--in order to lure those law students who are primarily interested in money. 279 The golden egg of partnership, of course, stands as the ultimate reward. At the same time, however, firms seek to discourage students from asking too many questions about compensation issues that go beyond these initial perks. For example, firms make it difficult for students to find out how much senior associates and junior partners are paid. Nor do firms readily disclose differences in partner compensation, preferring to leave the impression that all partners are rich.

Although associates receive more financial information once they join a firm, this information is often incomplete and distorted. Firms rarely give associates accurate information about the firm's revenues and expenses. This allows firms to use hard economic times strategically, for example, by refusing to promote (or in some cases firing) deserving candidates on the basis of a lack of business when in reality the partners simply are unwilling to reduce the rate at which their own compensation increases. Similarly, firms have an incentive to continue to mask differences among partners. Individual partners have strong incentives to collude in this obfuscation. This is not just a function of pride. Masking differences in partner compensation is a matter of survival. Due to the importance of relational capital for an associate's partnership chances, those associates who see themselves competing in the tournament have strong incentives to avoid working for a non-powerful partner. 278 As a result, if these lawyers are to continue to get their work done, they must hide their status from associates.
Needless to say, selectively managing information is difficult to achieve in any environment, particularly one populated by people as sophisticated as the associates and partners of large law firms (and the law students who wish to join their ranks). Traditionally, firms have been aided in this effort by the veil of secrecy that, until quite recently, covered the inner workings of large firms, and indeed, the profession as a whole. Moreover, law students and associates have often been surprisingly unwilling to look behind the big salaries and empty promises that law firm recruiters, their primary source of information about the profession, have thrown at them with increasing vigor.

Nevertheless, the secrets are beginning to escape. Sometimes this happens with the firm's tacit consent. Paperwork associates, for example, will find it increasingly difficult to hide from the fact that they face diminishing prospects at the firm. This revelation, however, is as much in the firm's interest as it is in the associate's, since paperwork associates are increasingly difficult to bill out to clients. On other occasions, firms are likely to fight disclosure. Thus, during the 1991 recession, many firms attempted to hide their true financial condition from associates and law students by continuing to hire at the same high salaries and by characterizing the large number of associates who were “fired” as terminations based on quality as opposed to layoffs based on the firm's poor revenues. Even in these instances, however, the burgeoning legal press, and the growing number of academics studying the legal profession are increasingly bringing these unpleasant facts to light.

For these reasons, we doubt that the tournament we describe constitutes a stable solution to the problem firms face in motivating and monitoring lawyers in this age of information and opportunism. What we do maintain, however, is that in order to understand the adaptations that are likely to take place in the future, scholars must pay attention to the kind of factors we have identified here.

*1674 IV. Conclusion: Toward a New Synthesis

The internal labor markets of elite law firms are not rank-order tournaments. This economic model, with its emphasis on universal participation, a level playing field, and rewards for past performance dispensed by neutral umpires, probably never captured the full complexity of the internal labor practices of large law firms. Whatever heuristic value the traditional economic model might have once had in this context has been swept away by the tidal wave of change that has rolled over the elite firm sector during the last two decades. Instead, large law firms utilize a very different structure: one that serves different purposes and creates different winners and losers than the one economists (and Galanter and Palay) envision. Because law firms remain partnerships, this structure still contains a tournament component. Even this feature, however, is a far cry from the simple structure assumed by most tournament theorists. We conclude by briefly setting out some of the implications of our reconceived model of the tournament of lawyers for the study of large law firms and for the economic analysis of law more generally.

Tournament theorists such as Galanter and Palay start from the premise that associates and firms are drawn to the tournament structure as a means of solving their respective monitoring problems. In Part I, we agreed with the basic premise underlying this intuition. Monitoring associate work is a significant cost to firms. Nevertheless, the conclusion that many economists and legal scholars reach on the basis of this premise—that large firms are structured as standard economic tournaments—is incorrect. Although firms must find ways to motivate their associates to work hard with relatively little supervision, with the exception of those senior associates who are within a short distance of partnership, the tournament is not the primary means by which firms accomplish this objective. For the most part, junior associates who join large law firms are motivated primarily by high salaries, reputational bonds, and the promise of general training. For these lawyers, the promise of partnership is at best a distant shadow of a reward. Based upon their impressions of the lives of the firm's current partners, furthermore, many entering associates are quite unsure about whether
would even want partnership if it were offered to them. To be sure, firms attempt to nurture this ambiguous spark in some associates through seeding and tracking. With respect to the rest, however, firms are content to trade high salaries and the promise--although in most cases, not the reality--of general training for a few years of paperwork before these associates redeem their reputational bonds and move on.

If monitoring were the firm's only problem, this might be the end of the story. But in addition to supervising its associates, law firms must also train the next generation of senior associates and partners. Firms have responded to this need by creating a de facto training track for certain associates. The existence of a separate training track, ironically, helps firms solve part of their monitoring problems. Associates who are being trained are also likely to be monitored. More important, the training track provides the gateway to the real promotion-to-partner tournament, since only those associates who have been trained will have the firm-specific and relational capital that it takes to have a realistic chance of becoming partners in the firm.

The real tournament, therefore, only begins when a lawyer becomes a senior associate. For these lawyers, the prospect of making partner becomes their primary incentive; anyone motivated primarily by high wages, reputational bonds, and general training will, in all likelihood, have already left the firm rather than risk the adverse signal of being “turned down” for partnership. Moreover, these associates know that they are competing for a limited number of slots on a roughly equal playing field. Whether initially seeded or not, all of these finalists have made their way onto the training track; they have their ticket to compete. Firms maximize the incentives of these few remaining contestants by shrouding the partnership decision in a black box, thereby encouraging senior associates to try to be perfect in every aspect of their work. Given that these lawyers generally work for different partners (or at a minimum, on different projects), the risk of sabotage resulting from this all-out last stage competition is relatively low.

These differences between standard tournament theory and the reconceived model we present here have important practical and theoretical implications. As a practical matter, law students and young associates have much to gain from puncturing some of the myths surrounding the promotion-to-partner tournament. These aspiring lawyers are typically presented with one of two stories about their future careers in large law firms. The first is decidedly upbeat: Large law firms are the ultimate meritocracies in which the “best” lawyers rise to the top and the rest work on interesting and rewarding cases before walking away with the best training that any lawyer can receive. It is a testament to the changes documented in Part II that it is almost impossible for anyone--even law firm partners--to recount this happy story with a straight face. As a result, the optimistic traditional story has been replaced by one of unremitting pessimism. According to this account, the work of lawyers today is all drudgery, depressing, and too specialized. There is neither any meaningful mentoring by partners nor the type of long-term relationships that developed in the “golden age” of lawyering.

The reality of the modern elite firm falls somewhere in between these two accounts. While we agree that much of the work that associates do is highly specialized, qualifies as drudgery, and involves fewer client relationships and much less mentoring, these characterizations do not define “all” of associate work. For associates on the training track, the work is not drudgery, it is not over-specialized, there is mentoring, and the associates do develop relationships with clients. Both standard accounts--the traditional optimistic one preferred by firms, and the pessimistic one that has become the ordinary religion of law students--overlook this diversity.

Once we recognize that the modern promotion-to-partner tournament makes important distinctions among associates, it is fair to ask whether these distinctions are likely to systematically disadvantage particular groups. For reasons that we set out elsewhere, we believe that this is likely to be the case. Average black lawyers, for example, are likely to find it more difficult to get themselves on the training track than average white lawyers. Similarly, “work norms”
associated with the later stages of the tournament for senior associates, such as the norm encouraged by the black box approach that senior associates must demonstrate their total commitment to the firm by being at the office for very long hours and being available to deal with emergencies at all times, may systematically disadvantage the partnership prospects of women lawyers. 286

Taking these differential impacts into account casts the remaining tournament aspect of the internal labor markets of large law firms in a very different light than the one assumed by most tournament theorists. Law firms are not the ultimate meritocracies, as the comparison to a tennis tournament might seem to suggest. Instead, the tournament of lawyers more closely resembles a figure skating competition in which factors such as a contestant's ethnicity (are you from the United States or Bulgaria?), looks (are you Katerina Witt or Debi Thomas?), style (do you skate like Oksana Baiul or Surya Bonaly?), and social class (are you Nancy Kerrigan or Tonya Harding?), as well as the judges' identity (has the Russian judge ever ranked an American skater over a Russian, or vice versa?), strongly influence the outcome of the competition. Like a figure skating competition, the promotion-to-partner tournament is still a tournament. Those who win this event, like Tara Lipinski, must still outperform their peers. But the terms on which associates compete, and their ability to influence the outcome simply by the quality of their work, is, like the skaters at the Olympics, a far cry from the meritocratic image conveyed by tournament theory. 287

Finally, the model we propose has important theoretical implications for law and economics scholarship more generally. Since its introduction to the world of legal academics by Gilson and Mnookin, 288 human capital theory has played a central role in the way legal scholars analyze the growth and development of law firms. We believe that this theoretical perspective has important explanatory value. Lawyers must find ways to develop, to exploit, and ultimately to share their legal skills if they are to construct institutions that will be both profitable and enduring.

Nevertheless, focusing exclusively on human capital distorts our analysis of law firms and other similar legal institutions. For all of its contributions, Galanter and Palay's account of the tournament of lawyers is a case in point. The authors use the following four-part definition of a lawyer's human capital: intelligence and general skill; education and experience-dependent skill; reputation for competence and integrity; and relationships with and knowledge of clients. 289 Without question, each of these qualities plays an essential role in whether any given lawyer will be successful. There is, however, more to the story. Elite firms also want lawyers who (regardless of their actual skills) signal the firm's quality to potential clients, competitors, and recruits.

Equally important, it takes more than skill to succeed at a large law firm (or, for that matter, any other complex human institution). It also takes connections, i.e., relationships. These relationships are crucial in determining the opportunities an associate is likely to receive, and in influencing how partners assess whether an associate is likely to be loyal (both to his individual mentors and to the partnership as a whole). 290 Signaling theory and relational capital must therefore be a part of any comprehensive examination of the large law firm as an economic institution.

It is easy to overlook these additional elements. Law firms have traditionally maintained that the signals that they look for in selecting their lawyers--elite school educations, high grades, prestigious clerkships, etc.--are closely correlated with actual lawyering skills. The more one believes this claim, the smaller the distinction between signaling theory and human capital theory. Similarly, firms routinely conduct their evaluation and promotion practices in the language of merit--i.e., is this associate "good enough" to become a member of our firm.

Scholars, however, have reason to look skeptically on these pronouncements. The first tip that the correlation between signals and skills may be less tight than firms typically maintain comes from the fact that firms made similar claims about
the very different set of signals that these institutions used to look for in the not too distant past. Thus, in Smigel's famous study of Wall Street firms conducted in the 1960s, he reported that firms wanted “lawyers who are Nordic, have pleasing personalities and ‘clean cut’ appearances, are graduates of the ‘right’ schools, have the ‘right’ social background and experience in the affairs of the world, and are endowed with tremendous stamina.” With the exception of going to the “right” schools and stamina, few would argue that any of these criteria are closely tied to actual lawyering skills. This initial skepticism should be reinforced by the extent to which firms continue to pay relatively little attention to easily accessible information about lawyering skill in the recruiting process.

Similarly, the claim that partnership decisions are solely about merit is belied by virtually every report of the way in which that process is conducted. Given what we have said about the incentives of individual partners, it is hard to imagine that the truth could be otherwise. Although conducted in the language of merit, partnership decisions are fundamentally political contests in which particular partners have strong incentives to support their own protégés. Given this reality, relational capital is likely to count at least as much as human capital.

In this paper, we have attempted to demonstrate that taking signaling theory and relational capital into account produces a richer and more accurate account of the internal labor markets of big firms. The importance of hiring elite school graduates with prestigious academic credentials leads firms to seed these favored associates ahead of their peers. At the same time, the strong interest that both associates and partners have in developing their respective relational capital helps to explain why tracking may be even more pervasive and rigidly enforced in firms than firm leaders, looking solely at the interest of the firm as a whole, would desire.

Finally, both signaling theory and relational capital underscore the fact that the tournament of lawyers is, at its essence, a forward-looking enterprise. For all of its undeniable importance, a simple human capital acquisition story encourages a backwards-looking orientation. The question asked is what has this associate learned that would justify his or her promotion. In a standard economic tournament, this backwards orientation is sufficient; tournament prizes are awarded on the basis of past performance, including the past acquisition of skill. Law firms, however, are primarily concerned about the future. In modeling the internal labor markets of these institutions, therefore, it is crucial to capture those practices that play an important role in preserving the future interests of the firm, i.e., how firms signal their quality to clients and future associates and how partners develop and protect strategic alliances among their peers.

Indeed, once we recognize that “rational actor” models are not inconsistent with the importance of signaling and politics, we can begin to break down the traditional barriers that have separated law and economics scholars from those who press cultural or political explanations of social institutions and practices. There are already some excellent examples of this theoretical synthesis.

Creating analytic models that synthesize different methodologies is an essential step if we are to understand the future evolution of the large law firm. It is clear that these institutions are far from equilibrium in their attempt to create institutional structures that can respond to the demands of the future while holding onto the best of their past. The traditional path that gave rise to the promotion-to-partner tournament, although still important, is fading. Bureaucratized management, multitiered partnerships, lateral hiring, contract (even “temp”) lawyers, diminished partnership income, massive workloads, demanding and powerful clients, ancillary businesses, and global competition from lawyers and non-lawyers alike have all strained to the breaking point the traditional notions of professionalism and collegial solidarity upon which the modern law firm was founded. Understanding what institutional structures are likely to emerge from these changes, and how these structures will shape and be shaped by the actions and aspirations of the next generation of lawyers, will require a broad range of knowledge from a variety of disciplines. The first step
in this process is for scholars from both law and economics to abandon their predisposition to view the internal labor markets of elite law firms as simple rank-order tournaments.

Footnotes

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2 Galanter & Palay, Tournament of Lawyers, supra note 1, at 77-120.

3 See id. at 89-93.

4 See id. at 100-102.

5 See id. at 102-08.

6 See id. at 96-97.

7 See id. at 94-97.
See id. at 94. In essence, the chance for partnership is a part of the associate's current compensation.

See id. at 96. Eric Orts uses the term “sharking” to capture the tendency of management to engage in opportunistic behavior where the employees cannot adequately monitor or restrain the actions of the employer. See Eric W. Orts, Shirking and Sharking: A Legal Theory of the Firm, 16 Yale L. & Pol'y Rev. 265, 268 (1998).


Milgrom and Roberts define internal labor markets as “[l]ong-term employment relationships” characterized by “limited ports of entry for hiring, career paths within the firm, and promotions from within.” Paul Milgrom & John Roberts, Economics, Organization & Management 359 (1992). For a recent exposition on issues on internal labor market theory by one of the pioneers in the field, see Lazear, supra note 10.

Consider, for example, the difference between a construction company and an investment bank. In the former case, the output of many workers will be easy to measure. A laborer who carries bricks, for example, can be paid according to the number of bricks he carries. In the latter context, however, measuring productivity is likely to be substantially more difficult. Evaluating the quantity--and more importantly, the quality--of an investment banker's work is inherently subjective. This fact alone will tend to drive up information costs. In addition, investment banks would have to incur substantial opportunity costs in collecting information about worker output, since those who are in the best position to reach an informed judgment about the quality of particular employees (i.e., senior managers) are precisely those whom clients most want to work on their projects.

We therefore express no opinion about Galanter and Palay's claim that tournament theory explains law firm growth except insofar as objections to their growth theory also undermine their use of tournament theory as a model for the internal labor markets of large firms. The principal objection to tournament theory as a model of law firm growth is that it overlooks important factors that also plausibly contribute to law firm growth, including the demand for legal services, the supply of lawyers, and the restructuring of the legal services market through lateral hiring, mergers, and competition. See, e.g., Frederick W. Lambert, An Academic Visit to the Modern Law Firm: Considering a Theory of Promotion-Driven Growth, 90 Mich. L. Rev. 1719 (1992) (reviewing Galanter & Palay, Tournament of Lawyers, supra note 1); Vincent Robert Johnson, On Shared Human Capital, Promotion Tournaments, and Exponential Law Firm Growth, 70 Tex. L. Rev. 537 (1991) (same); Robert L. Nelson, Of Tournaments and Transformations: Explaining the Growth of Large Law Firms, 1992 Wis. L. Rev. 733 (same); Richard H. Sander & E. Douglass Williams, A Little Theorizing About the Big Law Firm: Galanter, Palay, and the Economics of Growth, 17 L. & Soc. Inquiry 391 (1992) (same). Although we express no opinion about the merits of these objections, we do discuss the manner in which these additional factors affect the promotion-to-partner tournament. As a result, although we limit our analysis to whether these additional factors undermine the usefulness of tournament theory as a heuristic for understanding the internal labor markets of firms, we suspect that they also play an important role in any plausible theory of law firm growth.


One additional note about sources. In addition to published materials, we also rely on our own observations about the practices of large law firms. These observations are based on our respective work on, and in the case of Professor Gulati, work in elite firms. In the last eighteen months, Professor Wilkins has conducted more than 150 in-depth interviews with lawyers who are or have worked at elite firms in connection with a forthcoming book on black lawyers in corporate law practice. In addition to working in an elite corporate law firm, Professor Gulati has also informally polled more than 100 lawyers working in large firms about their careers.


See, e.g., Kordana, supra note 20, at 1928-31.


See, e.g., Galanter & Palay, Tournament of Lawyers, supra note 1, at 90-92 (defining a lawyer's human assets as consisting of her pre-law school endowment of intelligence and general skill, her legal education and experience-dependent skills, her professional reputation for competence and integrity, and her relationship with clients); Milgrom & Roberts, supra note 11, at 328 (defining “firm-specific” and “general-purpose” human capital).


We borrow the phrase “relational capital” from Dezalay and Garth. See Yves Dezalay & Bryant Garth, Law, Lawyers and Social Capital: ‘Rule of Law’ versus Relational Capitalism, 6 Soc. & Legal Stud. 109, 111-16 (1997). For a recent study on the importance of relational capital as a factor in determining success at a law firm, see Monica C. Higgins & David A. Thomas, Mentoring, Mobility, and Organizational Attachment in the Career of Lawyers: A Longitudinal Study (1997) (unpublished manuscript, on file with the Virginia Law Review Association) (finding that the structure and content of an individual lawyer's portfolio of relationships affect both early-career intentions to remain with a firm and later-career organizational and occupational mobility); see also Daniel J. Brass, A Social Network Perspective on Human Resources Management, 13 Res. Personnel & Hum. Resources Mgmt. 39, 39-79 (1995) (recognizing that progress in one's career depends, in important part, on the relationships one develops with others); Michael B. Arthur et al., Intelligent Enterprise, Intelligent Careers, Acad. Mgmt. Executives, Nov. 1995, at 7, 7-20 (noting that developing a valuable set of interpersonal relationships is a core competency needed for career progress).

Cf. Landers et al., supra note 1, at 227 (employing the large law firm as a “vehicle for studying work norms because virtually all of these firms have the same, simple structure”).
See Galanter & Palay, Tournament of Lawyers, supra note 1, at 100-01 (describing law firms as typically having only “partners” and “associates”).

See id. at 225. Galanter and Palay are careful to note that the traditional “up or out” aspect of the partnership decision is not a necessary part of the tournament. See id. at 100-01. They recognize, however, that “firing” the losers in the tournament has been the “typical” practice of firms in the past. See id. at 100.


In those instances where there is an additional bonus component, the bonus component tends to be tied to hours billed, i.e., input, and not output.

See Wilkins & Gulati, supra note 17, at 518; see also Mungin v. Katten, Muchin & Zavis, 116 F.3d 1549, 1556-57 (D.C. Cir. 1997) (describing reviews at Katten, Muchin & Zavis as “at best sporadic[]” and amounting to little more than “a pat on the back”).

See Lazear, supra note 10, at 19-21.

See Lazear, supra note 10, at 104.

See id. at 105.

See Shailendra Raj Mehta, The Law of One Price and a Theory of the Firm: A Ricardian Perspective on InterIndustry Wages, 29 RAND J. Econ. 137, 153 (1998) (arguing that where productivity of supervisors as individual producers increases, then other things equal, they will want to produce more and monitor less); cf. Milton C. Regan, Jr., Professional Reputation: Looking for the Good Lawyer, 39 S. Tex. L. Rev. 549, 552 (1998) (arguing that one reason firms have moved to limited liability partnerships is that monitoring has become increasingly difficult).

See Kordana, supra note 20, at 1914-17.


See Kordana, supra note 20, at 1914-15.

See id. at 1915.
See supra text accompanying note 32.


Although hours are no more than a weak proxy for quality of output, associates may rationally believe that the firm will look at hours billed as a proxy for other important characteristics, such as the willingness to work hard.

See Hansmann, supra note 20, at 70.


See Milgrom & Roberts, supra note 11, at 374 (discussing the “face time” phenomenon for lawyers at prestigious firms). We use the term “face time” to capture the common practice among associates of working late in order to convey the impression to partners that one is working hard.

See Lerman, supra note 47, at 718-19 (discussing how lawyers bill clients for perks, leisure, and administrative time).

Of course, a partner may detect such overbilling when it is exorbitant. For example, there are stories of the lawyer who billed over 37 hours in a single day, albeit in a different context. See Pat Dunningan, 37 Hours a Day, Am. Law., Special Report: Poor Man's Justice, Jan./Feb. 1993, at 82; cf. Stephen W. Jones & Melissa Beard Glover, The Attack on Traditional Billing Practices, 20 U. Ark. Little Rock L.J. 293, 296 (1998) (describing exorbitant billing, including that of a lawyer who billed 6,000 plus hours in a single year).

The fact that at the end of a project the billing partner may discount the hours worked by an “exaggeration” factor does not contradict our point about hours worked being no more than a rough estimator of output. Our claim has to do with the firm (or client) being unable easily to discern individual exaggeration on billing. It is possible, however, that over time partners will learn to discount time spent on a large project involving multiple employees by a certain percentage. If individual exaggeration were detectable we would expect to see it identified and penalized—something that we do not see.

See Milgrom & Roberts, supra note 11, at 374. It is interesting to ask which institutional structures push individuals towards being boastful about their work effort (e.g., overbilling) and which ones push people towards underplaying their efforts (e.g., underbilling). Undoubtedly, boastfulness and self-deprecation are to some extent a function of culture. There is, however, an economic story to be told as well. In contexts where individual output is hard to measure (perhaps because the work is done in teams) one might expect the individuals to attempt to signal that they put in extra effort. These signals can come in a variety of forms. One favorite way of signaling to others how hard one has worked is by complaining about the number of hours that one had to work on a project or the number of all-nighters in a row that a project had demanded. In contrast, in contexts in which output is measured, but input is hard to see (for example, academia), individuals who are concerned about creating impressions as to their intellectual ability may have an incentive to underplay the amount of effort it took them to produce their output. On this subject, see Alan Day Haight, Padded Prowess: A Veblenian Interpretation of the Long Hours of Salaried Workers, 31 J. Econ. Issues 29, 35 (1997) (“If the product of a job is difficult to identify, then salaried workers will flaunt their hours.... If the product of a job is clear, measurable, and enviable, then salaried workers will understate their effort....”). Needless to say, our perception that law firms are characterized by attempts to flaunt hours worked is consistent with the assertion that work product is difficult to measure in this setting.

See Galanter & Palay, Tournament of Lawyers, supra note 1, at 96-97.

Id. at 341 tbl.4.

Id. at 341 tbl.4, 342.

Id. at 341 tbl.4. Indeed, even with respect to this obvious connection, associates were more likely to view hours worked as an important indicator (92%) than partners (78%). See id.

See id.

Id. The correlation for “[t]he quality of work product” with the number of hours worked was 0.32 for both partners and associates. That correlation for “[a] willingness to pursue the interests of clients aggressively” was 0.48 for associates, but only 0.37 for partners. See id.

Needless to say, associates must work some minimal number of hours to retain their jobs. Above this minimum, however, neither partners nor associates view hours worked as a strong predictor of associate quality.

See Kordana, supra note 20, at 1915-16.

See Hansmann, supra note 20, at 95 (“In recent years, the size of corporate law firms has increased dramatically. Firms are now highly departmentalized, and the size of teams that work on major projects has also become large.”); see also Regan, supra note 37, at 575 (“[M]uch contemporary legal work is of a complex nature that requires the combined efforts of lawyers working in teams.”); cf. Avrom Sherr, Of Super Heroes and Slaves: Images and Work of the Legal Professional, 48 Current Legal Probs. 327, 334 (1995) (discussing how specialization in the practice of law has led to more group work).

See Stephen Bainbridge, Private Ordered Participatory Management: An Organizational Failures Analysis, 23 Del. J. Corp. L. (forthcoming 1998) (discussing the increase in monitoring difficulty that is created where employees have to work in teams and there are multiple layers of hierarchy).

Kordana argues that most legal work involves separately identifiable contributions to a joint product. See Kordana, supra note 20, at 1914-15. As we indicate below, we believe that Kordana underestimates the extent to which the internal labor practices of firms are shaped by the need for lawyers to cooperate in teams. For the moment, however, we simply want to emphasize that even if every lawyer's individual contribution could be properly identified, important monitoring problems remain.

See id. at 1915-17.

Even these relatively straightforward evaluations, however, are likely to be distorted. For example, many partners use senior associates to conduct initial reviews of the work of junior associates. These senior associates have strong incentives to undervalue the junior lawyer's contribution by taking credit for whatever is good and blaming the junior associate for any mistakes. See Lambert, supra note 16, at 1733. Partners, moreover, are often too busy to detect such opportunistic behavior on the part of the senior associates. Plus, the partners may have their own reasons for ignoring such behavior--for example, their desire to inflate the credentials of their senior associate protégés. Partners can also engage in the opposite form of distortion--the “invisibility hypothesis”--by keeping information about high quality associates secret from their fellow partners in an effort to monopolize the services of these talented lawyers. See Paul Milgrom & Sharon Oster, Job Discrimination, Market Forces, and the Invisibility Hypothesis, 102 Q.J. Econ. 453, 455-58 (1987) (discussing the potential for discriminating against qualified candidates for promotion because an employer can earn excess profits on workers so long as their abilities remain hidden from other potential employers). Anecdotal evidence from the interviews we have conducted suggests that all of these distortions occur with some frequency.

Inducing a high level of employee effort and care is of paramount importance to the firm, even though the work performed by these associates is often routine. The cost of an error in this routine work, after all, can be extremely high. Small errors, such as altering names and dates on corporate documents or filing litigation documents late, can result in large costs to the
client. See Michael Manove, Job Responsibility, Pay and Promotion, 107 Econ. J. 85, 85 (1997) (discussing the concept of “responsible” jobs, which are often routine but still highly sensitive to the input of worker effort, which, if strenuous, can bring substantial profits to a firm or, if lapsed, can drive it into bankruptcy). If the client fires the law firm and signals the market that it was displeased with the service the firm provided, the law firm may suffer a large setback in its reputation, and a significant portion of what these large, elite law firms offer clients is their reputation. See Ronald J. Gilson, Lawyers as Transaction Cost Engineers 23 (John M. Olin Program in Law and Economics Working Paper No. 147, Stanford Univ., 1997); Karl S. Okamoto, Reputat...
82 See Lazear, supra note 10, at 80 (“It is the fixed-slot structure that distinguishes tournaments from other kinds of compensation schemes based on relative performance.”).

83 See Galanter & Palay, Tournament of Lawyers, supra note 1, at 100-02.

84 See Wilkins & Gulati, supra note 17, at 533 (describing partnership rates at elite firms).

85 For example, of the associates who entered the eight highest grossing New York firms from 1985 to 1987, 9.7% became partners at that same firm. See Paul Manuele, It's Tough All Over, But Still Toughest in New York, Am. Law., Mar. 1998, at 20.

86 See Galanter & Palay, Tournament of Lawyers, supra note 1, at 100 (“[T]he firm holds a tournament in which all of the associates in a particular ‘entering class’ compete....”).

87 See id. at 101 (arguing that “[a]ssociates now have an incentive to produce the maximum combination of legal work and human capital” because, among other things, “it is in the firm's own interest to award the prize of partnership to those who have produced the largest combined bundle of output, quality, and capital”).

88 See id. at 100 (“[T]he firm awards the prize of partnership to the top a1 percent of the contestants.”).

89 See Demsetz, supra note 10, at 119 (describing the “sabotage” problem created by instituting a rank-order tournament mechanism).

90 See Galanter & Palay, Tournament of Lawyers, supra note 1, at 99 (arguing that the “governance mechanism for the sharing of [a hypothetical founding partner's] human capital” inevitably leads law firms to grow exponentially).

91 See id. at 100 (noting that “during [the associateship] period the firm implicitly tells its associates that it constantly evaluates them for a ‘superbonus,’ consisting of promotion to partner”).

92 See id. at 100 (stating that partnership winners will be determined on the basis of “their production of two goods: high quality legal work and their own human capital”).

93 See id. at 102 (arguing that a firm has an incentive to “adhere to the implicit contract” established by the tournament and in so doing, to communicate “to [associates] that it will reward productivity but not shirking”).

94 In fairness to Galanter and Palay, their work does not purport to describe law firms in the late 1990s. It is possible that many of the assumptions upon which they base their tournament model were more plausible in the period they discuss (roughly speaking from 1900 to 1985) than they are today, particularly if one concentrates on the early part of this period when the promotion-to-partner model was first introduced. See id. at 4, 37-45. As we indicate in Part III, these initial conditions help to explain why, despite all of the deviations between tournament theory and the practices of today's large firms, these institutions retain certain practices that seem inconsistent with their contemporary situation. Of course, to the extent that the changes we document in this Part can be traced back to the early days of the large law firm, it suggests that these institutions were never structured as simple economic tournaments.

95 See S. Elizabeth Wilborn & Ronald J. Krotoszynski, Jr., 1996 Utah L. Rev. 1293, 1303 (“Partners know that eight of ten new associates will be gone within the next seven years.”).


97 Associates who admit openly that they want to make partner (as opposed to the usual refrain that “I’m just here for a few years to gain some experience and pay off my loans”) are likely to be viewed negatively by their peers, since such statements are a signal that this associate intends to compete with and beat the others in a competition. Understandably, many associates are reluctant to alienate themselves from their peers by making such statements or sending signals that imply such a statement. To restate the point in economic terms, associates at these firms do not self-sort in an optimal manner. See Lazear, supra note 10, at 35 (describing why, as a general matter, firms cannot rely on employees to self-sort).
In a poll one of us conducted, only 33 out of 183 current or former associates at large, elite law firms stated that they joined their firms intending to make partner. See also Cynthia Fuchs Epstein et al., Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession, 64 Fordham L. Rev. 291, 359-60 (1995) (explaining that some associates are deterred from partnership because of its financial, administrative, business, and training responsibilities, while other associates, especially women, find the balance between firm and family too difficult); Jack Kaufman, The Staff Lawyer, Law Prac. Mgmt., July/Aug. 1990, at 30, 32 (explaining that many attorneys opt out of the tournament because they do not want to “rid[e] the merry-go-round of 2,000 billable hours, plus additional commitments of time”).

Kordana makes a similar point, noting that tournament theory does not capture the “real motivations” of many new law firm associates who are not participating in the tournament. See Kordana, supra note 20, at 1918-19.

The tournament structure works optimally as an incentive device where employees are alike in abilities because differences in abilities lead to reduced incentives for low ability participants who know that the high ability ones will win. See Baker et al., supra note 1, at 602. Given the reality that employees are unlikely to be alike (at least not at the extremes), Lazear and Rosen suggest that firms using a tournament structure might handicap the higher ability players to reintroduce incentives. See Lazear & Rosen, supra note 10, at 861-63. Mary O'Keeffe, W. Kip Viscusi, and Richard J. Zeckhauser, in turn, point to the value of increasing random factors. See Mary O'Keeffe et al., Economic Contests: Comparative Reward Schemes, 2 J. Lab. Econ. 27, 48 n.17 (1984). As Baker, Jensen, and Murphy point out, however, these solutions are elegant but fall far from reality. See Baker et al., supra note 1, at 602. Indeed, as we argue in Part III, far from handicapping the strong, law firms seed them and increase their likelihood of winning.

One could probably divide the types of work at these firms into more than two categories. We use only two categories both for ease of exposition, and because the associates we interviewed tended to speak of these two broad categories of work (albeit using different terms to describe the categories).

See Henry Rose, Lawyers as Teachers--The Art of Supervision, Law Prac. Mgmt., May/June 1995, at 28, 30 (listing the skills that law school graduates should be able to perform as analyzing cases and statutes, understanding legal reasoning, performing legal research, making oral or written legal arguments, and understanding basic ethical principles).

See id. (listing skills and values that law school graduates need to learn on the job, including client skills, fact skills, interviewing, counseling, negotiation, legal drafting, practice management, business development, how to move cases and deals forward, ethical values, and legal judgment).

See supra note 25 (discussing origins of the phrase “relational capital”).

See, e.g., Higgins & Thomas, supra note 25, at 31-32 (finding, after controlling for human capital and organizational structure factors, that having relationships with high-status mentors facilitates career mobility for elite firm lawyers); Suzanne Nossel & Elizabeth Westfall, Presumed Equal: What America's Top Women Lawyers Really Think About Their Firms at xviii (1998) (finding in their survey of women at elite law firms that the central factors for advancement were mentoring, quality of assignments, and being the protégé of a partner who can bequeath clients); Jonathan Kaufman, Inside Outsiders: As Blacks Rise High In the Executive Suite, CEO is often Jewish, Wall St. J., Apr. 22, 1998, at A1 (describing how the first black partner at New York's Paul, Weiss, Rifkind, Wharton & Garrison was mentored and given important client relationships by two of the firm's most prominent lawyers).

We borrow this phrase from Kordana, although Kordana uses this term for purposes that are slightly different from our own. See Kordana, supra note 20, at 1924.

Numerous commentators, including Chief Justice Rehnquist, have noted the fact that a significant portion of the work done by junior attorneys is routine and largely unintellectual. See William H. Rehnquist, The Legal Profession Today, 62 Ind. L.J. 151, 151-54 (1987) (describing much of the work of young attorneys as “drudgery”); Patrick J. Schiltz, Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney, 82 Minn. L. Rev. 705, 725 (1998) (describing the work of the new associate as “numbingly dull”).
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108 See Lisagor & Lipsius, supra note 29, at 280 (advising associates who want to become partner at Sullivan & Cromwell to avoid time-intensive litigation assignments that limit exposure to important partner contacts).

109 We owe the “royal jelly” concept to Ian Ayres. See Wilkins & Gulati, supra note 17, at 541.

110 See, e.g., Schiltz, supra note 107, at 740-41.

111 See id. at 740; Wilborn & Krotoszyński, supra note 95, at 1299-1300 (noting that partners are so focused on making a profit, they have little incentive to mentor associates).

112 See Steven C. Bennett, From Plebe to General: Planning the Campaign, Nat'l L.J., Aug. 24, 1998, at C6 (warning that “associates who find secure nests in simple, rote areas may rarely fail, but they probably will not progress much”).

113 See Paul M. Barrett, Dreary Paper Chase Vexes Legal Rookies, Wall St. J., Oct. 21, 1996, at B1 (explaining how new associates’ dissatisfaction with document review work may cause associates to reevaluate their career options and has caused some to leave large firm practice). Associates perceive that there is an optimal time at which to leave the firm. This optimal time—which tends to be between three and five years—is a function of the point at which the associate's leaving the firm will begin to look like she is leaving because she was either told or realized herself that she was not going to make partner. See Lincoln Caplan, Skadden: Power, Money, and the Rise of a Legal Empire 240 (1993); cf. National Ass'n of Law Placement, Keeping the Keepers: Strategies for Associate Retention in Times of Attrition 53 (1998) (reporting that 43% of all associates leave their first law firm by year three and 66% leave by year five). Understandably, associates prefer to leave before the point at which their departure will be taken as a negative signal.


115 See Wilkins & Gulati, supra note 17, at 540-41.


117 See supra text accompanying notes 63-64.


119 See Milgrom & Roberts, supra note 11, at 369 (noting that a “contestant in a tournament [may seek] to get ahead by sabotaging others' performance [rather than] by honest effort,” creating obvious inefficiencies); see also supra note 63 (citing articles that observe that a significant portion of large law firm work is done in teams).

120 Devon Carbado has suggested to us that firms reward cooperative associates by giving them positive signals, such as placing them on the recruiting committee—something that involves additional work, but is often viewed as prestigious.

121 See supra text accompanying notes 63-64.

122 See Galanter & Palay, Tournament of Lawyers, supra note 1, at 101.

123 Lazear points out that “when compensation is relative, and when the individuals who do the hiring are to be in the same pool with those hired, there is an incentive” for the incumbents to hire “lower-quality people than would otherwise be optimal for the firm.” Lazear, supra note 10, at 112. Tenure partially liberates the incumbents from self-interest by insulating them from competition. See id. (citing H. Lorne Carmichael, Incentives in Academics: Why Is There Tenure?, 96 J. Pol. Econ. 453 (1988)).

Cadwalder, Wickersham & Taft compiled the names of less productive senior colleagues and forced them out, thereby cutting the size of the partnership by nearly 20%.

On the competitive nature of partnership today, see Wilkins & Gulati, supra note 17, at 535-36; Osborne, supra note 72, at 73; Baker et al., supra note 1, at 605 n.14 (noting that in accounting and law firms more and more partners are being asked to leave).

As Steve Bainbridge has pointed out, given that individual partners have both divergent interests and private information as to which associates should be promoted to partnership, one would expect to see large law firms move away from consensus-based decisionmaking to authority-based decisionmaking. See Bainbridge, supra note 64, at 70 (“[A]uthority-based decisionmaking structures arise where group members have different interests and amounts of information.... [C]ollective decisionmaking is impracticable in such settings.”); Kenneth J. Arrow, The Limits of Organization 69-70 (1974) (“Thus, authority, the centralization of decision-making, serves to economize on the transmission and handling of information.”). While the majority of the firms at which we conducted interviews did their partnership promotions through votes (i.e., consensus-based decisionmaking), a number of them had moved away from consensus-based decisionmaking in other areas of operation (in particular, with respect to compensation). Indeed, as Bainbridge predicts, the large, elite law firms do appear to be far more hierarchical and authoritarian within the partnership ranks--the firms being largely run by committees comprised of the most powerful partners--than they were 30 years ago.

Our interviewees tell us that associates typically move from project to project, depending on which project needs to be staffed. Even associates on the partnership track (i.e., those who have been “chosen”) are likely to move around a little for the reason that they typically will need support from a number of partners in order to gain a favorable partnership vote.

As we argue below, firms also seek to select tournament winners on the basis of their future potential in addition to their past accomplishments. See infra text accompanying notes 138-148.

See Nelson, supra note 16, at 744-45 (arguing that partnership decisions “reflect the power of various partners and departments to deliver for their candidates” and that “[p]artnership decisions involve a tournament, not just among associates vying for partnership, but for the partners who sponsor them”.

See Galanter & Palay, Tournament of Lawyers, supra note 1, at 100-01.

As the partnership structures of elite firms grow larger and mutual monitoring and peer pressure no longer serve to solve agency problems, it makes sense that we would see firms being increasingly concerned about opportunistic behavior by partners. Shirking by associates can be costly, but shirking by partners is likely to be far more costly because partners have greater responsibility and their shirking can have “repercussive effects throughout the firm.” Bainbridge, supra note 64, at 59 n.266. Employers may take their departure as a sign that they were not “good enough” to become partners. Cf. J. Hoult Verkerke, Legal Regulation of Employment Reference Practices, 65 U. Chi. L. Rev. 115, 146 (1998) (describing how previous dismissals, however benign, can scar an employee in the eyes of a potential employer); Lester, supra note 114, at 62 (same).

See Milgrom & Roberts, supra note 11, at 367.

See Galanter & Palay, Tournament of Lawyers, supra note 1, at 105-08.

See id. at 107.

See id. at 101.

The problem we identify is the infamous “Peter Principle.” See Milgrom & Roberts, supra note 11, at 367. As Milgrom and Roberts explain:

This tongue-in-cheek principle holds that people in organizations always get one promotion too many: They keep getting promoted until they finally reach their “levels of incompetence”–jobs they cannot do well--and then spend the remainder of
their careers doing those jobs. It is easy to see how this could happen under a system in which promotions are simply a reward for good performance.

Id. One would, therefore, expect promotions to be used as a reward for past performance only in those settings where the Peter Principle caused minimal costs. See Kenn Ariga et al., Promotions, Skill Formation, and Earnings Growth in a Corporate Hierarchy, 11 J. Japanese & Int'l Economies 347, 348 (1997).

See Landers et al., supra note 1, at 228-33 (finding, empirically, that while most associates and partners do not think that hours worked are by themselves a criterion taken into account in partnership decisions, they are useful as a predictor of who will work hard as a partner).

See supra text accompanying notes 55-60.

See Osborne, supra note 72, at 71-73.

See id. at 72.


For example, in addition to its regular promotion committee which evaluates the qualifications of partnership candidates, Skadden, Arps, Slate, Meagher & Flom has a “needs” committee, which determines whether a given department or office is likely to generate sufficient revenue in the coming years to support a new partner. See Caplan, supra note 113, at 242-43.

O’Flaherty & Siow, supra note 1, at 709.

Id.

Id.

See id. (noting that an “up-or-out policy” exists both in law firms and universities).

See Galanter & Palay, Tournament of Lawyers, supra note 1, at 100-03.

See id. at 101-02.


See, e.g., Johnson, supra note 16, at 555-57. Although Galanter and Palay disagree with most of Johnson’s criticisms, they do not dispute that lateral hiring weakens the power of the tournament to act as an incentive. See Galanter & Palay, Tournament of Lawyers, supra note 1, at 573-74.

See supra text accompanying note 20.

See Kaufman, supra note 98, at 30.

See Nelson, supra note 118, at 71-73.

See Wilkins & Gulati, supra note 17, at 608.

See id.

See Galanter & Palay, Tournament of Lawyers, supra note 1, at 69-70.

See supra text accompanying notes 95-99.
See Wilkins & Gulati, supra note 17, at 504-05; see also Kaufman, supra note 98, at 30, 32 (asserting that if law firms hired only top candidates from the top schools, there would not be enough top graduates to fill all the open slots).

See infra text accompanying notes 176-185.


See Nelson, supra note 118, at 220.

One of us has developed this idea elsewhere. See David B. Wilkins, Fragmenting Professionalism: Racial Identity and the Ideology of "Bleached Out" Lawyering, 5 Int'l J. Legal Prof. 141 (1998).


This fact accounts for the widely shared assumption that senior associates are among the firm's most valuable assets.

To be precise, what senior associates face is a risk that there will be fewer slots available than there are associates up for partnership (assuming they all have a high skill level). This risk is a function of the vagaries of the market. It is possible, of course, that the market will be unusually good in a particular field one year and all the senior associates that are up for partnership will make it. Our interviews suggest that such was the case with associates in the mergers and acquisitions field at some elite New York firms in the mid- to late-1980s.

By year six or seven, an associate who has not been trained will no longer be profitable to the firm since clients will not pay for senior lawyers to do work that can easily be done by junior lawyers. As a result, there will be few untrained senior associates.

In addition, given our claim that promotion to partner is a forward-looking prediction of future productivity and loyalty as opposed to a backward-looking reward, the incentive for the firm to understate an associate's future worth is diminished. See Canice Prendergast, The Role of Promotion in Inducing Specific Human Capital Acquisition, 108 Q.J. Econ. 523, 533 (1993) (concluding that in firms where greater skills result in higher productivity and higher paying jobs, the firm's incentive to act opportunistically and deny promotion by underrating performance should diminish).

As John Coates has pointed out to us, however, partner-mentors sometimes have the incentive to kill off one of their own protégés in order to maintain the partner's credibility with his or her peers.

See Demsetz, supra note 10, at 118-19.

See id. at 119 (“A rank-order compensation system will bring forth high levels of effort... because even a well-performing second-place contestant loses out on the big prize.”).

See supra text accompanying notes 118-121.

See infra text accompanying notes 197-204.

See Milgrom & Roberts, supra note 11, at 250-52 (describing the basic “efficiency wage” model); see also Mehta, supra note 37, at 142-43 (describing an efficiency wage model where the costs of monitoring are especially high because supervisors not
only monitor but also perform productive tasks themselves); Jeremy I. Bulow & Lawrence H. Summers, A Theory of Dual Labor Markets with Application to Industrial Policy, Discrimination, and Keynesian Unemployment, 4 J. Lab. Econ. 376 (exploring microeconomic implications of efficiency wage models); Schwab, supra note 39, at 16-18 (discussing efficiency wage models); Lester, supra note 114, at 60-66 (describing the literature on efficiency wages); Charny & Gulati, supra note 19, at 73-75 (discussing the practice of paying higher-than-market wages).

177 See Schwab, supra note 39, at 16.
178 See Lazear, supra note 10, at 70 (stating that for the efficiency wage theory to hold there must be a “queue for the job”).
179 See Wilkins & Gulati, supra note 17, at 534.
180 See Lazear, supra note 10, at 70.
181 See, e.g., Wilkins & Gulati, supra note 17, at 530-34.
182 See id. at 530-31.
183 See Richard L. Abel, American Lawyers 302 tbl.38 (1989) (reporting that in 1954, the mean income for law firm associates in the United States was $7,786 as compared to $7,915 for government lawyers).
184 See Anna Snider, Smaller Firms Meet the Challenge: Various Efforts Used to Hire the Best, N.Y. L.J., Sept. 8, 1998, at S2 (special pull-out section); Martha Neil, Big Firms Here Boost 1st-Year Pay to $90,000, Chi. Daily L. Bull., Sept. 15, 1998, at 1; Robert Carter, Jr., Legal Times, Sept. 14, 1998, at 3 (reporting D.C. starting salaries to have risen from $80,000 to $90,000).
185 See Wilkins & Gulati, supra note 17, at 531 n.121.
186 See Granfield, supra note 96, at 151-53; see also Angela Wissman, Money, Prestige and Sleep Deprivation at Skadden, Ill. Legal Times, Sept. 1998, at 1 (describing the importance of Skadden's $100,000-plus starting salaries in attracting associates).
187 See Wilkins & Gulati, supra note 17, at 532. It is no accident that associates frequently refer to their high salaries as “golden handcuffs.”
188 See Wilborn & Krotoszynski, supra note 95, at 1303 n.34 (supporting the assertion that law students may choose high-paying law firm jobs to repay law school debt).
189 See Milgrom & Roberts, supra note 11, at 189; Ribstein, supra note 1, at 1714. For the classic article on reputational bonds, see Benjamin Klein & Keith B. Leffler, The Role of Market Forces in Assuring Contractual Performance, 89 J. Pol. Econ. 615, 616 (1981); see also William A. Klein, The Modern Business Organization: Bargaining Under Constraints, 91 Yale L.J. 1521, 1536-37 (1982) (arguing that high-level managers, in effect, lease their reputations to the firm and risk losing that loan if the firm suffers failure).
191 See Wilborn & Krotoszynski, supra note 95, at 1314 n.66 (explaining that senior associates who do not make partner find it difficult to find comparable lateral law firm jobs).
192 The reputational bond story we tell is analogous to the ex post settling up incentive mechanisms described by some economists. See, e.g., Lazear, supra note 10, at 72-73 (“If worker reputation can be established, then a worker has an incentive to put forth effort, not because of what he gets from this job this period but because this period's effort affects next period's wage.”); see also Eugene F. Fama, Time, Salary, and Incentive Payoffs in Labor Contracts, 9 J. Lab. Econ. 25 (1991) (same); Bengt Holmström, Managerial Incentive Problems--A Dynamic Perspective, in Vetenskap Och Företagsledning: Studier I Ekonomi Och Ledarskap Tillägnade Lars Wahlbeck [Essays in Economics and Management in Honour of Lars Wahlbeck] 209 (Björn Wahlroos et al. eds., 1982) (same); Robert Gibbons & Kevin J. Murphy, Relative Performance Evaluation for Chief Executive Officers, Indus. Lab. Rel. Rev., Feb. 1990 Special Issue, at 30-S (same).
For example, in our informal poll of associates, 110 respondents out of 183 (or 61%) stated that they were motivated to work hard at their current positions primarily by the fear of losing their current high wages and of sending a negative signal to future employers. Cf. Verkerke, supra note 133, at 146 (discussing circumstances where discharge does not function effectively as a labor market signal); Wissman, supra note 186, at 1 (reporting that the value of working at Skadden for most associates--who work extremely hard but only stay there for two or three years--lies in the salary and the credential that having worked at a blue-chip firm provides them).

There is substantial evidence that many associates want to follow this career path. See Joel F. Henning, Law Firms and Legal Department: Can't We All Get Along, Bus. L. Today, July/Aug. 1998, at 24, 25-26 (noting how in-house jobs, once reviled, have become coveted positions).

Law firms, in turn, have an incentive to encourage and support some fraction of their associates in their desires to move in-house. The fact that former associates of a firm are now the ones who are in-house clients works to solidify the relationship between the firm and the client.

See Snider, supra note 184, at S2 (describing experience at an elite firm as a valued characteristic for later, smaller firm, employers).


See Rebitzer & Taylor, supra note 1 (statistically demonstrating that the internal labor markets of large law firms are characterized by both a tournament and high wages). See generally Jungyoll Yun, On the Efficiency of the Rank-Order Contract under Moral Hazard and Adverse Selection, 15 J. Lab. Econ. 466, 485-86 & n.11 (1997) (describing a model of the workplace where there are workers of multiple types and therefore multiple incentive schemes and multiple tracks).


See Paul M. Barrett, Cravath Prospers by Hewing to a Stuffy Status Quo, Wall St. J., Jan. 13, 1997, at B1 (noting that at Cravath only two or three incoming associates from a given year eventually make partner); Paul Manuele, It's Tough All Over But Still Toughest in New York, Am. Law., Mar. 1998, at 20 (noting that Cravath's promotion rate of 3.3% was the lowest of the New York and Chicago firms surveyed).

Put somewhat differently, the firm decreased the amount by which these associates were being undercompensated for their investment in firm-specific human capital. This formulation is consistent with the “high wages” formulation used in the text because a senior associate will never be able to recoup the full value of his investment in firm-specific human capital in the open market. (As we argued, this is one of the reasons why senior associates have a high commitment to winning the tournament, since, in theory, those who become partners will be compensated for their investment in firm-specific capital as associates.) Thus, the 10% increase in pay received by Cravath's senior associates further increased the gap between these lawyers' current compensation and what they could earn with most other employers.

Cf. Joseph A. Ritter & Lowell J. Taylor, Workers as Creditors: Performance Bonds and Efficiency Wages, 84 Am. Econ. Rev. 694 (1994) (arguing that efficiency wages can coexist with bonding); Lester, supra note 114, at 63-64 n.185 (“Rising age-wage profiles and other non-dismissal based effort incentives need not be incompatible with efficiency wages.”).

In part, associates do not sort themselves (i.e., match themselves up in terms of motivations or levels of risk tolerance with firm structures that match those characteristics) because these entering employees do not know immediately whether they want to stay at the firm long term and fight for partnership, stay a short time until they save some money and then leave the law altogether, or stay long enough to obtain general training and then move in-house.

Cf. Bainbridge, supra note 64, at 58 (noting that employee tastes invariably differ; for example there will be employees who have different tastes for hierarchy and participation); Tina Kelley, Working to Keep Eager Employees Inspired at Work, Tulsa World, Nov. 24, 1997, at A7, available in 1997 WL 3659133 (describing, based on an interview with Professor Edward Lazear,
the different goals and motivations of workers, and the fact that workplaces need to be structured with multiple incentive schemes in order to motivate these different types of workers).

In theory, a firm could hire laterals to fill all of its partner and senior associate needs. The hiring of laterals creates a problem for standard tournament theory in that these associates have not produced for this firm in the past and, therefore, in theory, should not be eligible for the reward of partnership. Put differently, the likelihood that laterals might be hired diminishes the incentives of incumbent associates to compete in the first place. To some extent, the problem with laterals can be ameliorated in the standard model--where past productivity is the key to promotion--by having laterals measured according to a different scale, i.e., solely by whether their risk-adjusted future productivity justifies their being given a partner's status and compensation. Anecdotal evidence suggests that the promotion bar is higher for laterals than it is for incumbents. See Lazear, supra note 10, at 135-36 (“The difference [within a tournament structure] between outsider ability and insider ability must be large and positive in order for the firm to be willing to hire outsiders.”); cf. Krysten Crawford, The House That Ralph Built, Am. Law., Mar. 1998, at 51, 52, 56 (describing Orrick, Herrington & Sutcliffe's strategy of hiring star laterals for top pay and how that might have discouraged more junior associates who were being lured with promises of future rewards).

See National Ass'n of Law Placement, supra note 113, at 53 (reporting that two-thirds of all associates leave by their fifth year).


See Milgrom & Roberts, supra note 11, at 365.

See id. Of course, whether this system actually produces the “best” workers depends upon the quality of the initial seeding and the objectivity of the firm's evaluation about who “wins” in the second round. As we argue below, both these issues are subject to dispute in the context of tracking in large firms. Our point is simply that it is rational for firms to attempt to track associates as a way of reducing their monitoring costs.

There is, however, one important difference between the tennis tournament context and the law firm context. In the U.S. Open, players who lose in the early rounds are eliminated entirely. In the law firm context, players who lose in the early rounds move out of the tournament, but continue to work at the firm.

See, e.g., Midlevel Associate Survey: Seeking Quality of Life, Am. Law., Oct. 1994, at 44 (special pull-out section) (reporting comments from associates at the Los Angeles office of Cleveland's Jones, Day, Reavis & Pogue indicating that once an associate demonstrates her ability, she is “a valuable commodity, and the pressure to work with various partners becomes intense”).

In fact, the “hardest way to make partner” at Sullivan & Cromwell is simply to be a capable lawyer who is “not... a great trial lawyer, [but] just... able to prepare briefs, supervise the preparation of briefs, organize evidence and generally keep the operation working behind the great lawyers and litigators who were made partner in previous generations.” Lisagor & Lipsius, supra note 29, at 278. Being a capable lawyer “merely gives you a sweepstakes ticket [for becoming partner], and while everybody has an equal chance in a sweepstakes, the chance is small. Very small.” Id. at 278-79.

See supra text accompanying notes 122-130.

In contrast, in a small firm, the interests of individual partners will be aligned more closely with those of the firm as a whole.


Cf. James N. Baron et al., The Structure of Opportunity: How Promotion Ladders Vary within and among Organizations, 31 Admin. Sci. Q. 248, 262 (1986) (reporting that work that involves firm-specific knowledge is more likely to give rise to long-term employment within an internal labor market).
We use the scare quotes here as a reminder that many of the associates who flatline would have preferred to have been on the training track.

For a poignant account of turning down an associate for partnership, see Caplan, supra note 113, at 244-45.

We do not mean to suggest that every associate is fully aware of the extent to which the firm tracks its associates. Our point simply is that associates' choices about work assignments tend to reinforce the tracking structure.

The movement off the partnership track could occur for a number of reasons. Associates might find the type of work done at elite firms boring, routine, and unintellectual. Or they might not be willing to sacrifice their personal lives for the reward of partnership. Or either they or the firm may decide that they do not have the skills to make partner. One of our colleagues who left his partnership at an elite New York law firm in order to enter the academy answered our question of “why?” by saying, “What I realized after making partner was that I had just won a pie eating contest where the reward was more pie.” See also Osborne, supra note 72, at 72 (quoting a Latham & Watkins partner with a version of the pie quip).

One could imagine that some associates would find working closely with partners an unpleasant experience and would prefer to take on work that minimizes contact with these partners. For example, if female associates perceive a higher risk of sexual harassment in working with partners (who are predominantly male), this produces a higher cost for them in doing work that involves close interaction with partners.

Assuming that the majority of elite law school graduates are highly risk-averse individuals, there is an additional reason for firms to want only a small fraction of associates competing for partnership. If all the associates are indeed competing in an up-or-out partnership tournament, accepting a job with a firm becomes a high-risk gamble. Not only is there a low probability of making partner for any one associate, but the penalty for not making partner (the negative signal of having been forced out for failure to make partner) is high. Given the assumption that the employees at issue are highly risk averse, one would not expect to see workplaces structured as high-risk gambles. Instead, one would expect the opposite. One would expect the workplace to be structured as a low-risk gamble.

The model of the elite law firm that we describe is consistent with the assumption that associates are risk averse, rather than risk loving. First, only a few associates are competing wholeheartedly for partnership, thus increasing dramatically the likelihood that any one of them will succeed in this quest. Second, as Galanter and Palay observe, the penalty for not making partner is not as severe as the stylized tournament model would predict (at least some of these senior associates are given positions as non-partners). See Galanter & Palay, Tournament of Lawyers, supra note 1, at 29, 64. Third, two of the major motivational tools for associates are high wages and reputational bonds. Given that associates are rarely fired, they face little risk of losing either. Fourth, for an associate leaving the firm within four to five years of entry, the negative signal that this person is leaving because he or she did not make partner is negligible (instead, the assumption is that the associate did not intend to compete for partnership). Cf. Yun, supra note 198, at 487 (concluding that with risk-averse agents and moral hazard, the optimal structure gives “a large penalty to any performance lower than a very low standard”).

Robert Sauer's recent paper describes and models the types of lawyers who arrive at elite law firms as one of two broad types, “high-ability” and “low-ability.” See Sauer, supra note 1, at 148-49. In Sauer's model, the high-ability lawyers have high expected future earnings at the firm, while the low-ability lawyers use their tenure at the firm as “vehicles to high-paying jobs in other sectors of the market.” Id. at 149. Sauer finds that the probability of a high-ability lawyer becoming partner is drastically higher than the probability of a low-ability lawyer becoming partner (0.764 versus 0.023). Id. at 160. Although we believe that it is better to distinguish between “ability” and “commitment and opportunity,” given that we are quite skeptical about the correlation between an associate's desire and opportunity to make partner and his or her innate ability, these findings indicate both that there are two radically separate tracks and that those associates who maintain their commitment to winning the tournament are more likely in fact to win. See also O'Flaherty & Siow, supra note 1, at 727 (estimating the probability of making partner for a high-ability type to be 0.746).

The following quote by an elite firm partner reported by Elizabeth Chambliss typifies what we observe: [The firms almost from the beginning, I think, have different notions about the lawyers that are coming in. And if anything, a kind of implicit secret tracking system in which some young lawyers very soon, if not the day after they arrive or the day
before they arrive, are identified as superstars and get special assignments and are sought after by all of the partners who have a chance to compete for them. I do this. I have a very sexy practice. I dangle it before the people who seem to me the best in the associate pool. I train the hell out of them because that's part of the bargain. The large number are not going to have that happen and they're going to do a lot more routine work.


Signals such as top grades, law review membership, and judicial clerkships become even more important in hiring graduates from less prestigious law schools. See Granfield & Koenig, supra note 190, at 346.

See Wilkins & Gulati, supra note 17, at 524-27 (discussing why law school grades do not strongly correlate with either substantive lawyering skills or the personal qualities necessary to succeed in the practice of law).

The problem of monitoring associates and partners within a firm is worse for clients than for the firm itself. See Jack Carr & Frank Mathewson, Law Firms, in 2 The New Palgrave Dictionary of Economics and the Law 497, 498-500 (Peter Newman ed., 1998); Ribstein, supra note 1, at 1709; see also Donald C. Langevoort & Robert K. Rasmussen, Skewing the Results: The Role of Lawyers in Transmitting Legal Rules, 5 S. Cal. Interdisc. L.J. 375, 440 (examining the question of whether lawyers systematically overstate risks to clients and concluding that “it would be surprising if they didn't” because legal risks generate income and status for lawyers); Sander & Williams, supra note 151, at 471 (discussing how lawyers may create work, or work too much, on cases or projects).

Clients care about a firm's relative ranking among its competitors for several reasons. First, clients hire elite firms at high rates because these firms will exert high levels of effort in order to continue to get paid at their high rates and to avoid losing their ranking as an elite firm (i.e., their reputational bond). A firm's relative ranking is one indication of the strength of this reputational bond. In addition, in situations that involve the allocation of scarce governmental resources, such as government prosecutions and investigations, a firm's relative ranking may play a substantive role in the outcome of the proceedings. Consider a governmental agency deciding which corporation to investigate for possible violations of the law. The agency has only a finite amount of resources and therefore has to choose where to allocate those resources. In part, the agency will allocate its investigative resources to the corporations or individuals more likely to have committed a violation. The reputation of a corporation's lawyers can potentially influence this decision. Some agencies may believe that clients who have the higher-reputation lawyers are less likely to have committed violations because their lawyers have more to lose if they are associated with companies that violate the law. Other agencies will refrain from prosecuting companies represented by high status law firms for fear that it will be more difficult to win cases against these firms. See George H. Brown, Financial Institution Lawyers as Quasi-Public Enforcers, 7 Geo. J. Legal Ethics 637, 695 (1994) (noting that firms' reputation for honesty may benefit clients in their dealings with regulators because regulators may be less likely to scrutinize the transactions of these clients); Richard W. Painter, The Moral Interdependence of Corporate Lawyers and Their Clients, 67 S. Cal. L. Rev. 507, 549-50 (1994) (same).

 Needless to say, today's large law firms are much more likely to engage in a broad array of marketing measures--ranging from glossy brochures and “seminars” on legal developments for existing and potential clients to outright solicitation of corporate general counsel--than their expressed condemnation of advertising would lead one to suspect.


See Galanter & Palay, Tournament of Lawyers, supra note 1, at 25.

Cf. Snider, supra note 184, at S2 (describing, as measures of associate excellence, the prestige of law school, clerkships, and law review membership). See generally Wilkins & Gulati, supra note 17 (arguing that race and other forms of social capital continue to play an important role in structuring the careers of lawyers at elite firms).

See Abel, supra note 183, at 206; Nelson, supra note 118, at 66.

Even though we assert that the multiple incentive system in law firms has created a greater demand for law firm positions, firms are still competing with other legal careers to attract the best students. For example, there is evidence that students above
a certain grade level tend to take not-for-profit jobs rather than for-profit jobs notwithstanding the significant decrease in salary associated with that choice. See Lewis A. Kornhauser & Richard L. Revesz, Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt, 70 N.Y.U. L. Rev. 829, 833 (1995).

235 At Yale Law School, students used brown paper-lined “graffiti boards” to write comments about their interview experiences and to post information about firms' hiring processes. See Judith A. Lhamon, Quality of Life: Providing Students with Data, Nat'l L.J., Apr. 30, 1990, at 22; see also Snider, supra note 184 (describing how law students tend to have little information about alternatives to big firm practice and often focus exclusively on a large firm practice).

236 See Snider, supra note 184, at S2 (describing how judicial law clerks tend to look to see which firms were able to hire the most judicial clerks in the past and migrate towards those firms). Our interviews tell us that elite school law students often look at the number of elite school graduates already working at a firm as a measure of the firm's prestige.

237 Visible and rankable credentials can have an effect beyond their actual value. For example, a law firm that can advertise the number of its associates and partners who are former Supreme Court clerks has a signal that the external world (clients, law students, regulators) can easily use to rank it against others. Modern communications technology then enables a firm to publicize this easy-to-rank signal at little additional cost (e.g., through notices and firm brochures). In a market where there is a scarcity of clients willing to pay the high rates that elite firms charge, a high ranking may be crucial in landing and keeping one of these scarce clients. Cf. Sherwin Rosen, The Economics of Superstars, 71 Am. Econ. Rev. 845 (1981) (describing the phenomenon that in a number of industries such as sports and movies, the rewards go disproportionately to those ranked at the top and hypothesizing that this is because in these markets the service in question can be made available to a number of people at very little additional cost or the markets are structured in a way that the rewards disproportionately go to the best); Robert H. Frank & Philip J. Cook, The Winner-Take-All Society 11-12, 16-17, 111, 119-21 (1995) (extending Rosen's argument to fields such as law).

238 Of course, being seeded does not guarantee that one will win the tournament. Similar to the U.S. Open, the value of a superstar recruit's initial seeding will diminish over time as he or she begins to compete for partnership against other highly ranked senior associates. Nevertheless, gaining early access to the training track increases a seeded associate's partnership chances.

239 This “future support” does not have to have an explicit quid pro quo formulation but can be in the form of senior partners deriving emotional satisfaction from the fact that associates who remind them of themselves are being promoted.

240 See, e.g., Demsetz, supra note 10, at 116; Lazear, supra note 10, at 25-26; Milgrom & Roberts, supra note 11, at 367.

241 See Charny & Gulati, supra note 19, at 86 n.95, 91.

242 See O'Flaherty & Siow, supra note 1, at 712.

243 See id; see also Osborne, supra note 72, at 71-73 (describing the new responsibilities that fall on partners).

244 See Nelson, supra note 16, at 744-45.

245 See id.

246 See id. (arguing that firms will make partnership decisions on the basis of an absolute standard of human capital rather than a purely relative one).

247 See Caplan, supra note 113, at 244-45, 272 (describing the circumstances of an associate being turned down for partner and then being promoted a year later).

248 See Nelson, supra note 16, at 744-45 (“[T]he ultimate decision will reflect the power of various partners and departments to deliver for their candidates.”).
See id.; see also Higgins & Thomas, supra note 25, at 29 (finding that the number of partner-mentors in an associate's portfolio of relationships strongly influenced his or her overall chances of becoming a partner).

See Lazear, supra note 10, at 25-26; Milgrom & Roberts, supra note 11, at 368.

See Carr & Mathewson, supra note 227, at 499 (“It is well known that lawyers in a partnership have an incentive to reduce effort if they must now share their revenues with others.”).

See Kandel & Lazear, supra note 70 (describing how in smaller partnerships forces such as peer pressure, profit sharing, shame, guilt, norms, mutual monitoring, and empathy interact to create incentives not to shirk).

See Nelson, supra note 118, at 9.

See Wilkins, supra note 165, at 8-9 (discussing the problems of black partners in two-tiered partnership structures); see also Elizabeth H. Gorman, Probationary and Permanent Employment in Professional Services: Evidence From Law Firms 10 (Aug. 1998) (unpublished manuscript, on file with the Virginia Law Review Association) (noting how firms camouflage their use of permanent employees through the use of “two-tiered” partnerships).

For example, in one firm interviewed by Professor Wilkins, junior lawyers are required to demonstrate that they can bring in $250,000 in billings for two years before they are eligible to be considered for equity partnership.

See Galanter & Palay, Tournament of Lawyers, supra note 1, at 31. Under the lockstep system, the firm's proceeds would be divided up into shares based upon seniority. See id; see also Barrett, supra note 200, at B1 (describing Cravath's lockstep system as “antique” in today's world of law firms).

See, e.g., Ronald J. Gilson & Robert H. Mnookin, Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns, 41 Stan. L. Rev. 567, 567 (1989) (describing a change in profit allocation toward “a system based on the productivity of individual partners”); Kordana, supra note 20 (claiming there are no partnership tournaments).

See supra text accompanying notes 46-60.

See Nelson, supra note 16, at 745 (noting that what Galanter and Palay call human capital is often more accurately called surplus value).

See Galanter & Palay, Tournament of Lawyers, supra note 1, at 101.

Competitors who fear that popular players like Andre Agassi will receive higher seeding than they deserve at the U.S. Open have an incentive to try to please tournament officials in order to improve their own seeding chances.

A small number of firms circulate associate hours to associates as well as partners. This information, however, is of limited value since, as we noted previously, hours worked (over some minimum threshold) are not significantly correlated with partnership. See supra note 61.

See Galanter & Palay, Tournament of Lawyers, supra note 1, at 93-98.

The black box approach used by law firms resembles in many ways the performance measurement process used to evaluate junior faculty. See Baker et al., supra note 1, at 598. As Baker, Jensen, and Murphy explain, [t]he exact nature of the valuation scheme is not specified explicitly, although many components of what makes a good scholar can be described. Even if substantial effort were made to specify ex ante the correct performance-measurement formula, it is hard to imagine it would be complete. The problems arising from making such an evaluation formula explicit are obvious: assistant professors would devote time and effort to maximizing the explicit performance measure. Ex post, it would be painfully obvious, at least in a few cases, that good performers as measured by the formula were not the best scholars.

Id.
Refraining from specifying the exact criteria for promotion allows partners to retain the power to alter the criteria if they think that those used previously have turned out not to be good predictors of future performance as a partner. Similarly, keeping the exact criteria vague allows partners to punish associates who have behaved strategically in acquiring certain credentials. In addition, the characterization of such promotion decisions as discretionary provides some protection from legal challenges.

See Galanter & Palay, Tournament of Lawyers, supra note 1, at 101-02.

The incentive to cheat is lowest when the firm follows an up-or-out model and would have to terminate an associate (with valuable firm-specific capital and relational capital) who does not make partner. See Malcomson, supra note 1, at 1946.

Once again, the fact that individual partners may have suboptimal incentives to implement the firm's promise to promote “the best” future performers reduces the value of this commitment.

See Wilkins & Gulati, supra note 17, at 569-70. Research in experimental economics supports this conclusion. People tend to overweight probabilities when they are similar to their own experiences. See Christine Jolls et al., A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1477 (1998). Therefore, a partner who perceives an associate as having taken a career path similar to the partner's (e.g., attending the same law school and having the same interests) is likely to overweight these factors as predictors of success (all the while thinking that he is making an unbiased judgment).

See supra text accompanying notes 128-130.

The fact that relational capital is, in part, what provides an assurance against strategic behavior by the firm, is another reason why it does not make sense to think of the entire associate pool as competing for partnership. Since these firms have high associate to partner ratios, the protection of relational capital is available only to a few.

These are the senior associates who have received firm-specific and relational capital and not the flatliners who by this point have either left voluntarily or have been nudged out.

See Lazear, supra note 10, at 31 (noting that the wage spread in a tournament is an increasing function of uncertainty).

Even with respect to this group, firm leaders have some incentive to keep their optimistic projections vague, since a little uncertainty about one's exact rank can be a powerful motivational tool.

In Sauer's terms, these associates must be informed that they are in the associate group with a 76% likelihood of making partner, as opposed to the group with the 2% likelihood. See Sauer, supra note 1, at 160. For a discussion of Sauer's model, see supra note 223.

This reason stands apart from our argument that these evaluations are both difficult and expensive to make. See supra text accompanying notes 75-76.

See Associates Hit the Jackpot, Am. Law., Aug. 31, 1998, at 1 (noting that “all-expenses paid four day weekends in resorts in Napa, Big Sur, Yosemite, [and] Disneyland are just a few of the benefits firms use to compete for top associates”).

See Wilkins & Gulati, supra note 17, at 531.

See Galanter & Palay, Tournament of Lawyers, supra note 1, at 98-102.

Training does not solve all of the firm's monitoring problems for training track associates, since one of the goals of training is to teach these lawyers to handle important projects with relatively little supervision.
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283 See Walt Bachman, Law v. Life: What Lawyers Are Afraid to Say about the Legal Profession 5-6 (1995) (contrasting the prosperous and expanding legal market 20 years ago with the market in 1995, in which most law students have fewer job opportunities); Mary Ann Glendon, A Nation Under Lawyers: How The Crisis in the Legal Profession Is Transforming American Society 20-39 (1994) (describing the erosion of professional understanding and the decline of tutelage since the “golden age” of the early 1980s); Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 277-79 (1993) (discussing the breakdown of internal firm allegiance in the last 20 years); Sol M. Linowitz, The Betrayed Profession 91-112 (1994) (explaining that post-World War II law firms’ expansion led to the abandonment of much of their mentoring for high wages, confused the purpose of associates' work, and reduced collegiality); Schiltz, supra note 107, at 739-46 (discussing the death of mentoring in the law profession).

284 See Wilkins & Gulati, supra note 17 (describing how subjectivity and low monitoring combine to reduce a black associate's prospects of making it on the training track).

285 See id.

286 See, e.g., Landers et al., supra note 1, at 227-41 (describing a tournament model in the context of elite law and accounting firms that screens candidates for promotion based on “work norms” that may systematically disadvantage women); cf. Lester, supra note 114 (describing a model for firms that explains the increase in “temp” lawyers). In their two important articles on work norms and law firms, Landers, Rebitzer, and Taylor focus on how norms of working unusually high numbers of hours can systematically disadvantage women. We do not disagree. However, our conversations with women lawyers at large firms suggest that over and above the long hours, what disproportionately affects women with family responsibilities is the unpredictability of the work. This unpredictability (an aspect of the just-in-time nature of the work) is more difficult to handle if one has child care or other family responsibilities.

287 Indeed, to the extent to which the rules of the tournament of lawyers are less visible to the contestants, and the process of judging less accountable, than the rules and judging in figure skating, the former may be even less meritocratic than the latter. We are grateful to Susan Koniak for suggesting the figure skating analogy.


289 See Galanter & Palay, Tournament of Lawyers, supra note 1, at 89-90.

290 To put this last point in economics terms, the calculation of whether to make someone partner is not a simple calculation of how much human capital they have accumulated, but a calculation of human capital discounted by risk as measured by the amount of relational capital. We are grateful to Steve Bainbridge for urging us to think about the relationship between human capital and relational capital in terms of a risk-adjusted calculation of future productivity. As Bainbridge describes it, promotion to partnership is neither a prize nor a prediction--it is a “predictive prize.”

291 Erwin O. Smigel, The Wall Street Lawyer: Professional Organizational Man? 37 (1969). Needless to say, all of these lawyers were white, male, and Christian.

292 To say that social background is not related to lawyering skill is not to say that having the right background is not valuable. To the contrary, the importance of social connections is the primary reason why scholars need to pay attention to relational capital.

293 See Wilkins & Gulati, supra note 17, at 546-54.

WHY ARE THERE SO FEW BLACK LAWYERS IN CORPORATE LAW FIRMS? AN INSTITUTIONAL ANALYSIS

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*496 Although the number of black students graduating from law schools has increased significantly in recent decades, blacks still make up a very small minority of the lawyers working in large corporate law firms. Available data indicate that these firms hire few blacks, and that those they do hire are more likely than their white peers to leave the firms before becoming partners. Conventional explanations blame the underrepresentation of blacks in corporate firms on either the racism of firms and their clients, or a shortage of qualified, interested black candidates. While acknowledging that in some instances these factors may help to explain the problem, this Article looks behind them to examine institutional factors that tend to perpetuate the existing underrepresentation. Specifically, the Article shows how the ways in which large corporate firms recruit and train lawyers tend both to shield discriminatory choices between black and white candidates from any competitive disadvantage, and to discourage black law students and lawyers from investing in skills that will enable them to succeed within corporate firms. Thus, the Article argues, firms' hiring and training decisions both shape and are shaped by the strategic choices of black candidates, with the net effect of keeping all but a few blacks from being hired and succeeding in the firm setting. Finally, this Article explores the implications of these incentives for five commonly proposed tools for diversifying corporate law firms: anti-discrimination laws, race-neutral institutional reforms, diversity education within firms, demand-creation initiatives, and supply-side initiatives to encourage hiring and promotion of black lawyers.

INTRODUCTION

This Article addresses what for many is an uncomfortable reality: Despite a substantial increase in the number of black students attending law school over the last forty years, African Americans still constitute only a tiny percentage of the associates and partners working *497 in the nation's largest corporate law firms. Given the legal profession's role in championing the principles of non-discrimination and equality of opportunity, this reality is particularly troubling. More generally, however, the fact that blacks have had little success breaking into the upper echelons of the elite bar is emblematic of a deeper and more intractable set of problems facing those interested in workplace integration.
Forty years after the Supreme Court's landmark decision in *Brown v. Board of Education*, society has made substantial progress toward eradicating the kind of overtly racist policies that excluded blacks from virtually every desirable sector of the economy. For many blacks, these changes have produced a dramatic growth in income and opportunity. In recent years, however, it has become painfully clear that simply dismantling America's version of apartheid has not produced economic parity between blacks and whites. Although poor blacks have benefited the least from the civil rights revolution, “high level” jobs in business and the professions have also proved surprisingly resistant to change. The fact that blacks have made so little progress in breaking into the corporate law firm elite--particularly at the partnership level--fits this larger pattern.

Commentators generally offer one of two explanations for this “glass ceiling” effect. The first, generally proffered by firms, posits a shortage of black applicants with both the qualifications and the interest necessary to succeed in the demanding world of elite corporate practice. The second, most often articulated by blacks, blames the slow progress on continued racism both inside corporate firms and among the clients upon whom these entities depend for their livelihood.

As we argue below, both the “pool problem” and continuing racism against blacks play important roles in determining the employment opportunities available to African American lawyers. Standing alone, however, each explanation begs important questions. The “pool problem” explanation begs the question of whether the existing hiring and promotion criteria utilized by elite law firms to determine who is in the pool fairly and accurately predict future productivity. The racism story, on the other hand, fails to explain why firms that discriminate by refusing to hire or promote qualified black lawyers do not suffer a competitive disadvantage when those workers are employed by their competitors.

In order to arrive at a more thorough understanding, we must move beyond this familiar dichotomy. We do so by taking a closer look than either of the standard explanations at how corporate firms structure, and are structured by, the relevant markets for labor and clients. Our interest in this neglected institutional dimension is the product of our prior work on race, professionalism, and markets. One of us is engaged in the ongoing study of the legal profession with particular attention to the experiences of black lawyers. The other is studying how particular market conditions allow firms to insulate some kinds of discriminatory decisionmaking from the disciplining effects of competition. In this Article, we seek to combine these two perspectives by offering a preliminary account of how corporate firms recruit and retain lawyers and why these practices may adversely affect the employment prospects of black lawyers.

Our argument proceeds in five parts. Part I briefly summarizes the available data on blacks in corporate law practice and defends our claim that an institutional analysis is a necessary component of any plausible explanation for these numbers. We also set out our reasons for initially bracketing (to the extent possible) the impact of affirmative action on law firm hiring and promotion practices. We return to this issue in Part IV.

In Part II, we present a stylized model of the contemporary elite corporate law firm. The model is premised on two related features of professional work: the inherent subjectivity of quality assessments and the difficulty and expense of monitoring. In response to these realities, we posit that it is efficient for firms to adopt the following tripartite strategy: high wages to create a large pool of available workers and to motivate those lawyers who are hired to work with relatively little supervision; a high associate-to-partner ratio, thus further encouraging associates to work hard in the hopes of becoming partners while at the same time allowing the firm to spread legal work among many lawyers with varying levels
of knowledge and skill at the lowest possible cost; and a tracking system whereby the pool of associates is divided into those who will receive scarce training resources and those who will work on relatively undemanding assignments.

These three institutional features of contemporary elite firms, we assert, disproportionately disadvantage black lawyers.\textsuperscript{11} Two tendencies contribute to this result. First, because firms hire a large number of associates from a pool that has been artificially inflated by high salaries and ask many of them to do relatively undemanding work, these institutions have little incentive to invest in obtaining detailed information about the quality of potential employees. Hence, individuals within the firm can use race as a factor in their decisionmaking without hurting the firm's bottom line. The same goes for retention and promotion. Decisions to invest scarce training resources in average whites as opposed to average blacks will not hurt the firm's chances of producing the small number of high quality partners that it needs to guarantee its productivity in future years. As a result, firms have little incentive to root out employment decisions that, either consciously or unconsciously, prejudice blacks or favor whites.

Second, because firms have no incentive to stop these practices, black lawyers in firms (as well as those contemplating joining firms) are more likely to choose human capital strategies that, paradoxically, decrease\textsuperscript{*500} their overall chances of success in these environments. Since blacks reasonably believe that they face an increased risk that their abilities will be unfairly devalued or overlooked, they have an incentive to overinvest either in avoiding visible negative signals or in obtaining easily observable positive signals that clearly identify them as superstars. Both of these strategies, however, are potentially counterproductive to the extent that they diminish a black lawyer's opportunity or incentive to obtain the skills upon which success at the corporate law firm ultimately depends.

In Part III, we test our model against the limited amount of currently available empirical and anecdotal evidence on black corporate lawyers and our own preliminary research on black Harvard Law School graduates. This data is far too tenuous and incomplete to prove definitively the institutional dynamic we posit. Nevertheless, what information there is points in the direction predicted by our model. Although these institutions spend a considerable amount of time and money on recruiting, firms rely on a small number of easily visible and rankable criteria at the initial screening phase, while at the same time relying on subjective judgments about “personality” and “fit” (as opposed to other easily obtainable indicia of quality) during the less visible parts of the process. This combination of objective and subjective decision-making disadvantages black applicants by falsely conveying the impression that the visible and rankable criteria that firms rely on are tightly correlated with quality, while simultaneously allowing individuals within firms to discount a black candidate's signals based on subjective judgments about personality and fit. Similarly, when selecting associates to mentor and train, partners rely on a combination of a few objective signals and their own subjective judgments in order to determine which associates are likely to have the kind of viable long-term careers with the firm that make them good training prospects. Once again, the data suggests that blacks are less likely to be selected to receive this essential good. Finally, as our model predicts, black students and associates often react to these heightened barriers by choosing human capital strategies that further diminish their chances for success in this environment.

Part IV examines the implications of our analysis for five of the most commonly proposed solutions for diversifying corporate law firms: anti-discrimination laws such as Title VII, race-neutral institutional reforms such as formal training programs and associate review, educational initiatives such as diversity training, demand-creation initiatives designed to encourage corporate clients to hire black lawyers, and supply-side initiatives that encourage firms to make affirmative efforts to increase the number of blacks they hire and promote. Each of these mechanisms has the potential to improve opportunities for black lawyers.\textsuperscript{*501} The structural characteristics of the elite firms described in Part II, however, make it difficult for this potential to be realized.
Part V therefore concludes by briefly examining why elite firms might change these structural impediments. Although we claim the existing structure is efficient, the argument that it is the only efficient response to the problems of subjectivity and monitoring ignores both historical contingencies that produced these practices and the unprecedented volatility of the market for elite firm services. Ironically, we believe that the sense of crisis that currently pervades not only elite firms, but the entire legal profession, offers a unique opportunity to chart a new path that will enable these institutions to move closer to the ideals of fairness and equality that constitute the best part of this country's legal tradition.

1. DEFINING THE PROBLEM

As the Article's title implies, two assumptions underlie our analysis. First, we assume that blacks are underrepresented in corporate law firms. Second, we hypothesize that this underrepresentation is due in part to the way in which the structural characteristics of corporate firms shape the strategic choices of black lawyers. In Sections A and B of this part, we justify both assumptions. In Section C, we explain why we have chosen as a preliminary matter to bracket questions regarding affirmative action.

A. Are Blacks Underrepresented in Corporate Firms?

One's feeling about the progress made by large corporate law firms in hiring and retaining black lawyers is likely to be influenced by the time frame one selects to examine the problem. Looking from the perspective of the corporate bar in the late 1960s, the numbers might look relatively good. Thus, when Erwin Smigel conducted his famous study of Wall Street firms in the 1960s, he reported that "in the year and a half that was spent interviewing, I heard of only three Negroes who had been hired by large law firms. Two of these were women who did not meet the client." Integration did not come much sooner in other parts of the country. Compared to this dreary portrait, recent numbers seem impressive. For example, the National Law Journal reports that as of 1995 there were more than 1,641 blacks working in the nation's 250 largest firms, of whom 351 were partners.

Viewed against the rapid expansion in corporate firms during the last twenty-five years and the dramatic growth in the number of women lawyers working in this area, the foregoing numbers are a good deal less inspiring. Thus, although there has been a significant growth in the absolute number of black lawyers in corporate firms, the percentages remain microscopically small. The same 1996 National Law Journal survey reveals that blacks constituted just 2.4% of the lawyers in corporate firms, and, more importantly, just over one percent of the partners. These percentages have remained relatively constant for the last fifteen years. Moreover, these percentages lag behind those achieved by other legal employers. For example, minorities constitute 17.2% of the lawyers employed by federal, state, and local government agencies in the Chicago metropolitan area, as compared to the 3.6% of the attorneys in large Chicago firms. At higher levels, the comparison is even more lopsided. Minority lawyers occupy 19.5% of the supervisory positions in these government offices as compared to 1.6% of the partnerships at large Chicago firms. Indeed, although the contrast is less dramatic, law firms have also failed to equal the success achieved by some of their corporate clients. Blacks occupy 2.5% percent of all of the executive or management level jobs in private sector industries--still well below the percentage of blacks in the general population, but more than double the percentage of blacks who are partners in elite firms. In certain industries, black men and women have done significantly better. For example, in the communications industry, black men hold 3.7% of all executive, administrative, and managerial positions, while black women occupy an additional 4.9%, bringing the total black participation to 8.6%.
Standing alone, however, statistics can not answer the question of whether blacks are underrepresented in corporate firms. To reach an informed judgment on this issue, one must have some idea about the number of blacks in the pool of people who are qualified to become corporate lawyers. Once again, one's vantage point is key. For example, if the relevant pool is all law school graduates, there is little doubt that blacks are seriously underrepresented in corporate firms, particularly at the partnership level. Since the mid-1970s, blacks have consistently constituted more than six percent of the students enrolled in law school--a percentage far higher than the current African American representation among law firm associates and partners cited above, even if one adjusts for the time it took for these newcomers to enter the system. 23

Many would assert, however, that the population of all law school graduates is not the relevant pool. Traditionally, corporate firms have hired most of their incoming associates from elite law schools, such as Harvard and Yale. 24 In addition, those who secure jobs in this sector often have other traditional signals of academic success, such as high grades, law review memberships, and judicial clerkships. 25

As we indicate in Part III, the claim that law firms have always employed a set of meritocratic hiring criteria that limit the eligible pool to elite law school graduates at the top of their class is belied by the historical record. 26 Even if one accepts this basic definition of the relevant pool, however, blacks may still be underrepresented. Thus, Robert Nelson reported in 1988 that the percentage of minority students attending the leading law schools from which corporate firms generally recruit “is considerably higher than the proportion of minorities among even the youngest cohorts of lawyers in firms.” 27

More importantly, whatever the traditional patterns of law firm recruitment were, the tremendous growth in the size of these institutions during the last twenty-five years has resulted in a significant expansion in the schools from which firms interview and recruit. For example, in Nelson's study of Chicago corporate firms, only 18.4% of incoming associates between 1970 and 1974 graduated from local or regional law schools. 28 Between 1975 and 1988, that number had more than doubled to 37.5%. 29 Today, the hiring needs of elite corporate firms are so great that their demand probably could not be satisfied if they hired every graduate in the top half of the class from the nation's top twenty law schools. 30 A definition of the pool that includes only those with “traditional” credentials, therefore, understates the relevant employment market.

Finally, even if we could accurately identify the criteria that law firms actually employ in choosing among prospective applicants, these criteria would only define the pool of qualified applicants (as opposed to the pool of applicants with a realistic chance of being selected) to the extent that there is a relatively tight correlation between these signals and the skills that are necessary to perform the job proficiently. It is precisely this linkage, however, that many critics bitterly attack. 31 In Part II, we argue that there is merit to this criticism, albeit for reasons different than those generally advanced. As a result, we assume that the pool of “qualified” applicants is larger than current hiring practices would lead one to believe, and, correspondingly, that blacks are in fact under-represented.

Although our assumption that blacks are underrepresented cannot entirely be separated from the merits of our theory, it is consistent with a broad array of recent initiatives designed to increase the number of minority lawyers in corporate firms. In 1986, the American Bar Association formed the Commission on Minorities in the Profession. One of the Commission's central goals has been to increase corporate law firms' hiring and retention of minority lawyers, whom the Commission asserts are seriously underrepresented in this sector. 32 In the intervening decade, at least thirteen state, county, and municipal bar associations have launched similar efforts. 33
In the absence of definitive information about current practices and the relationship between those practices and the substantive qualifications for being a successful corporate lawyer, it seems prudent to accept the opinion of these knowledgeable insiders that a problem does in fact exist. This is particularly so in light of the fact, as we explain in Part II, that the underrepresentation hypothesis is consistent with what one would expect to see given the institutional structure and practices of large firms. Before presenting that analysis, however, it is necessary briefly to examine three competing explanations for the relative shortage of blacks in corporate firms that would minimize (or in some cases deny) the importance of the institutional features we discuss.

B. Why Study Institutions and Incentives?

One can usefully divide the competing explanations for black underrepresentation in corporate firms into three categories: (1) that blacks and whites have differential abilities; (2) that blacks are less interested in corporate work; and (3) pervasive racism on the part of individuals within the firms or of the firms themselves. Although each of these theories advances our understanding of the variation we see between the success rates of blacks and whites in these institutions, each begs important questions that must be answered if one is to have a full explanation of this phenomenon. The institutional perspective we advocate helps to fill in these crucial gaps. It also responds to the concerns of those scholars and policy makers who are skeptical that race continues to be a significant obstacle for black Americans, and who doubt the efficacy of group-based policies to promote workplace integration.

1. Differential Abilities

Those who emphasize the importance of the traditional credentials for being hired by a corporate law firm often implicitly rely on empirical assumptions about the differential abilities of black and white applicants. These arguments come in two quite different forms. The first claims that blacks are inherently inferior to whites in terms of one or more attributes, for example intelligence, necessary for success in a corporate firm. The second approach rejects the claim that blacks are fundamentally inferior to whites (genetically or otherwise), but asserts that they nevertheless have acquired less of the human capital assets (that is, education, work skills, etc.) that it takes to succeed in this environment than their white peers.

Like most others of good will, we reject the first of these arguments. Although a complete statement of the fallacy of this position is beyond the scope of this Article, as others have demonstrated in pains-taking detail, the argument for innate or even deeply embedded racial differences in intelligence or any other relevant quality is based on either pseudo-science or quasi-racist premises. As we indicate below, however, the persistent myth of black intellectual inferiority continues to play an important role in shaping both the opportunities available to and the choices made by black lawyers.

The second variation on this theme, however, cannot be so easily dismissed. As we indicate in Part III, there is little reliable information on the relative attributes and performance of black and white law students and lawyers. Nevertheless, there is reason to suspect that black law school graduates may on average have fewer of the traditional markers of academic success than their white counterparts. Once again, it remains an open question whether these differences in credentials reflect actual differences in human capital that are likely to affect performance. But even assuming that there is a significant correlation, we still need to
know why blacks invest less in their own development. We posit that the answer to this question is likely to depend upon the opportunities black lawyers face and the likelihood that investing in certain kinds of human *508 capital will significantly improve those opportunities. In the world that we study, this opportunity calculus will be filtered through the institutional practices of large law firms. Understanding these practices is therefore a necessary component of any theory that seeks to explain racial differences in employment on the basis of a non-biological theory of differential ability.

2. Lack of Interest

This explanation offers an alternative account of why blacks do not invest in succeeding at corporate law firms, one based in preferences rather than incentives. According to this line of argument, many black students are uninterested in the work done by corporate law firms. Consequently, they are less likely to apply to these institutions and, if they do, leave after a relatively short time. 39 Once again, there are reasons to suspect that this factor plays a contributing role. Black lawyers are disproportionately concentrated in the government and the not-for-profit sector. 40 In addition, given the historical connection between the black bar and the struggle for racial justice, many blacks come to law school intending to use their new skills to advance the interests of the African American community. 41 Corporate law firms are not the obvious arena in which to pursue that goal.

Nevertheless, the claim that blacks are uninterested in corporate law firms is not supported by the available data. In their study of the first job choices of New York University and University of Michigan graduates, Kornhauser and Revesz discovered that after adjusting for grades, loans, law school activities, and even stated preferences, blacks were more likely to take jobs at corporate law firms than their white counterparts. 42 If anything, blacks appear to be more interested in starting work at a corporate firm than whites.

Moreover, as Vicki Schultz has observed, one should be skeptical of claims that a particular group is underrepresented because of their *509 lack of interest--especially where the group has previously faced express discriminatory barriers to entry and the job in question is both prestigious and high paying. 43 As Schultz demonstrates, firms can construct their use of labor in ways that will discourage applicants from certain groups from seeking these positions. An understanding of these institutional practices is therefore a necessary precondition to explaining why blacks “choose” careers other than corporate law practice.

3. Racism

To say that firms “construct” their use of labor in a manner that disadvantages blacks sounds as if this conduct is merely racism in a more sophisticated form. Critics of the slow progress towards integration in various sectors of the economy frequently make precisely this charge. 44 Although many of these critics do not equate “institutional racism” with the intentional racism of individuals, the two are nevertheless
often closely intertwined. Thus, scholars who discuss institutional racism generally assert that those who design and run institutions either fail to police discriminatory conduct by their subordinates and/or adopt facially neutral practices with at least the implicit knowledge (if not the express intent) that these practices will disadvantage blacks. 45

Undoubtedly, there is merit in the institutional racism story. As study after study demonstrates, there are still a substantial number of whites who hold (consciously or unconsciously) discriminatory and/or stereotypical views about blacks. 46 Scholars have put forward a plethora of theories to explain this continuing phenomenon, including, *inter alia*, that certain whites have an exogenous “taste” for discrimination, that whites employ biased stereotypes when evaluating blacks and whites, *510* that whites judge individual blacks on the basis of the average statistical achievements of blacks as a group, that the preferences of customers and/or workplace culture impose additional costs on firms that hire and promote black workers, and that individual whites reward actions that reinforce the dominant status of whites as a group. 47 Regardless of the cause, however, unless we have reason to believe that corporate law firms are immune to attitudes and beliefs prevalent in the rest of society, it is likely that a non-trivial number of whites working in these institutions hold some of these views. 48 As a result, one does not have to believe that overt racism is widespread in elite firms to conclude that these often subtle predispositions are sufficient to provide the grist for the dynamic described by institutional racism theories. Moreover, to the extent that some of the hiring and promotion policies followed by certain corporate firms bear little or no relation to the substantive qualifications of performing the job of a corporate lawyer, one can legitimately ask whether these practices actually serve a more invidious purpose.

Nevertheless, the institutional racism story, at least in the relatively straightforward terms in which it is usually presented, is at best incomplete. As a preliminary matter, this account is in tension with the widely accepted fact that overt racist attitudes are on the decline, particularly among highly educated and economically successful whites. 49 Nor does *511* it explain why many firms have adopted voluntary affirmative action programs or taken other steps to increase the number of black lawyers. 50

More fundamentally, the institutional racism story does not explain why firms neither change institutional practices in the face of evidence that they disproportionately burden blacks. Nor, in a world without *de jure* barriers to hiring blacks, can these theories explain why firms do not suffer a significant competitive disadvantage as a result of their failure to utilize black workers who, although not meeting the “discriminatory” traditional criteria, are nevertheless fully competent to perform the job. In order to answer these questions, one must construct a richer account of the actual structure and operation of corporate law firms than the ones generally offered by institutional racism theorists. As we explain below, continuing racism—as well as a host of other attitudes, dispositions, and beliefs that tend to make it more difficult for whites and blacks to live and work together as equals—is an important component of this account. 51 These individual attitudes, however, are at least in part the product of the manner in which firms hire, train, and monitor their employees. It is in the interplay between these structural factors and background assumptions about race and merit, we assert, that one must look for the answer to the question posed in this Article.
4. Preaching to the Unconverted

Notwithstanding the evidence cited in the preceding Section, many academics and policymakers are skeptical about claims that race continues to play a significant role in impeding the progress of black Americans. Building on the indisputable evidence that outright racial prejudice is on the wane, these skeptics are inclined to attribute disparities between blacks and whites to a lack of effort on the part of blacks. As a result, those who hold these views tend to oppose public and private efforts to redress racial imbalance on the grounds that these initiatives are both unnecessary, since blacks could solve their own problems by working harder to conform to traditional American values, and costly, because they will inevitably lower standards in a manner that decreases productivity and increases costs.

The institutional analysis we propose speaks directly to these concerns. As we explain in Part II, we begin by accepting two central premises generally associated with conservative thought: that the practices and policies of elite corporate firms are a rational response to the market conditions within which these firms compete for labor and clients, and that individuals within firms (and those considering joining them) respond rationally to the incentives created by these institutional structures.

We hope to demonstrate, however, that these institutional structures are less directly connected to productivity than conservatives seem to believe, and that they create incentives for blacks that are contrary to the values and objectives that conservatives wish to further. Such a showing, we believe, should help to move the debate over black participation in elite sectors of the economy away from the current impass created by conclusory charges about whether racism is or is not widespread in contemporary American society. In order to do so, however, we must temporarily bracket the most contentious issue in this debate—affirmative action.

C. Affirmative Action

Any examination of black underrepresentation in corporate firms must inevitably confront the issue of affirmative action. This is true for two reasons. First, the level of affirmative action in law school admissions, law review memberships, firm hiring, and other relevant decisions affects the definition of the pool of qualified applicants. Second, judgments about this first issue are likely to be affected by normative and factual claims about the fairness and/or efficacy of various affirmative action policies.

Judgements about both of these issues have become increasingly controversial. As to the first, perceptions vary widely about the degree to which schools, organizations, firms, and other relevant decision makers actually give some form of preference to black applicants, with some claiming that such preferences are pervasive while others assert that affirmative efforts to help blacks are much more apparent than real. Indeed, there is very little consensus on what constitutes “affirmative action” or whether policies that might fall under this rubric are properly considered as a “preference” for black applicants as opposed to a mechanism for giving blacks the same “preferences” as whites. This last debate merely underscores the deep divisions in the American public over whether affirmative action policies are a proper response to past and/or present racism or an illegitimate racial spoils system that inevitably ends up harming everyone including its intended beneficiaries.
Given this construction the debate is irresolvable. There is very little reliable data on the actual extent of affirmative action (however defined) in corporate firms. Moreover, so long as this empirical question is tied to background assumptions about the extent to which blacks are disproportionately disadvantaged (or whites are unfairly advantaged) by other aspects of the system, the information that does exist is unlikely to sway those who hold different normative presuppositions.

In order to avoid this quagmire, we have chosen to break the issue down into its component parts. Thus, in Part II we examine the choices that firms and blacks make in a world in which firms have no specific policies designed to increase the number of black lawyers. We hold to this assumption in Part III notwithstanding the fact that many of the firms we discuss have taken at least some affirmative steps to increase the number of black associates and partners. Given that these efforts should reduce the adverse effects on black lawyers that our model predicts, however, we feel justified in making this counterfactual assumption, particularly in the absence of reliable data on the extent and effectiveness of law firm affirmative action policies. In Part IV, we examine how affirmative action (along with a range of other legal, institutional, and public policies) might affect the strategic choices that our model predicts.

II

THE MODEL: MONITORING AMONG THE HUMAN CAPITALISTS

Scholars have offered a number of theories to explain the development and functioning of large law firms. The earliest emphasized that law firms are professional organizations, and sought to explain institutional practices in terms of norms such as competence, collegiality, and client service. Subsequent theorists criticized these early explanations by arguing that “professionalism” was merely the label under which law firms pursued their economic self-interest. The hard-edged economic determinism of these theories has in turn been criticized by those who point to aspects of firm structure or practice that cannot easily be explained by short-term (or even long-term) financial gain. Nevertheless, there is now an influential body of scholarship applying the tools of economic analysis to explain why lawyers as rational economic agents might choose to organize themselves into large law firms with the characteristics that we presently observe.

Our model builds on these efforts, but in a way that incorporates the importance of professional ideology, social capital, and inequality captured by the critics of economic determinism. Like those who have applied economic theory to understand professional practices, we assume that lawyers, law firms, and clients are rational actors who seek to maximize their own interests. It is important, however, to stress the limits of this standard economic assumption. First, building on the work of Herbert Simon, we assume that rationality is bounded by the information an actor receives and by that actor's ability to understand and convey this information to others. Second, the “interests” these market participants pursue are primarily--but not exclusively--monetary. For example, individual lawyers and firms compete for relative status or prestige in ways that may or may not be reducible to monetary gain. Third, as Robert Nelson's study of corporate law firms in Chicago underscores, even when these entities wish to maximize their economic interests, professional ideology and culture may restrict their ability to perceive and or implement institutional policies likely to achieve these goals efficiently. Similarly, “the social capital that lawyers bring to efforts to gain prominence in a particular field, for example their family background or cosmopolitan connections, affects significantly the success or failure of the efforts.”
Finally, to say that lawyers and firms are rational does not mean that passion, prejudice, and taste have no bearing on decisionmaking. As we develop below, stereotypes, predispositions, and other related background assumptions and tastes play an important role in lawyer and firm decisionmaking. We also assume, however, that those who have these beliefs respond rationally (as we have now defined this term) to evidence that either confirms or denies these predispositions. 69

In this Part, we explain why policies and practices common among elite corporate law firms are a rational response to the market conditions these firms confront. Section A presents a general theory to explain how firms that pay high wages and employ complex hierarchical institutional practices insulate themselves from the economic consequences of practices that unfairly disadvantage black workers. Section B applies this general theory to law firms.

*517 A. Discrimination in High-Level Jobs 70

For more than four decades, neo-classical economists have posed a trenchant query to those who advocate governmental or private intervention to prevent employment discrimination: If there are no meaningful differences between blacks and whites, as anti-discrimination advocates unanimously assert, why won't discriminating employers be driven out of business by competitors who cut labor costs by hiring qualified blacks at lower wages? 71 This challenge is based on two standard assumptions about labor markets and firms. First, those who claim that competition will eventually drive out discriminating firms assume that employers set wages to equal an employee's marginal productivity and that wages fall until there are no longer any qualified workers to fill the demand (the “market-clearing wage” hypothesis). 72 Second, they assume that all firms have perfect information about the quality of potential workers and that decisions about hiring and firing are costless (the “perfect information” hypothesis). 73

Even if one accepts these two assumptions, the conclusion that discriminating firms will inevitably be driven from the market is far from certain. 74 In recent years, however, a growing chorus of economists and sociologists have persuasively argued that both the market-clearing wage and the perfect-information hypotheses fail adequately to explain the ways in which many sectors of the labor market actually operate. 75 These theorists argue that in certain instances, firms will find it efficient to pay workers a higher than market-clearing wage and to employ complex hierarchical employment structures in order to reduce the cost of acquiring information about worker performance. By artificially creating a large pool of “unemployed” 76 workers who are both willing and competent to perform the job, firms that utilize one or both of these strategies can partially shield themselves from the kind of market pressures that neo-classical theorists assert will drive out discrimination.

In an Article written with Professor David Charny, one of us has argued that firms will find high wages and other hierarchical institutional structures particularly attractive in circumstances in which the subjective nature of performance renders monitoring and evaluating worker quality expensive. 77 The following four Sections briefly summarize and expand this argument and its implications for the employment prospects of black workers.

1. Subjectivity and Monitoring

Firms pay wages in order to induce employees to perform their jobs competently and efficiently. Once a worker is hired, however, there is always the danger that he or she will shirk by working either less hard or competently. The standard response to this danger is for firms to monitor employee performance directly and to discharge those workers who are not performing effectively.
Direct monitoring, however, is expensive. Employers must divert resources from revenue-generating activities into detection and enforcement. This is particularly true when performance cannot be evaluated by reference to easily observable objective criteria such as outputs. In circumstances in which quality judgments depend on a complex evaluation of an employee's technical competence, thoroughness, and judgment (in addition to results), a firm would have to retrace a good deal of the employee's actual decision making process before it could reach an accurate assessment about performance.

Firms seek to reduce this burden by offering employees additional incentives to work hard that do not depend exclusively on direct monitoring. These alternatives fall into two general categories: high wages and tournaments.

2. When It's Cheaper to Overpay

One way to induce effort without monitoring is to pay employees a higher wage than they could receive elsewhere in the market. This wage premium has two effects that collectively tend to lower monitoring costs. First, by offering a higher than market-clearing wage, firms generate a large pool of qualified applicants from which to hire. This reduces search costs and places the burden on applicants to differentiate themselves from the rest of the pool. Second, once a worker is hired, she has an incentive to work hard since she knows that if she is fired for shirking, she cannot obtain a similar salary elsewhere and that there are many “unemployed” workers who would gladly take her place. The net result is that firms that employ a high-wage strategy will have an easier time finding qualified workers and will have to spend fewer resources to ensure that those hired are performing their jobs efficiently.

Moreover, once one firm adopts a high-wage strategy, competitors will feel strong pressure to follow suit. Firms that seek to cut costs by refusing to pay the wage premium run the risk of losing “good” workers to firms that do while simultaneously attracting “bad” workers who cannot currently get jobs at the higher wage. High wages therefore tend to be inelastic to downward market pressures.

3. Tournament Theory

Firms also seek to induce effort by promising employees a reward (commonly either a cash bonus or a lucrative promotion) if they can credibly signal that they have successfully performed their jobs over a specified period of time. In such firms, workers compete against each other in a “tournament” that rewards those who have made the greatest contributions to the firm. Shirking, therefore, is costly to the employee because it reduces her chance of receiving the reward. Indeed, when properly designed (that is, when the reward is sufficiently large and the chances of obtaining it are reasonable--although by no means...
guaranteed), employees can be motivated to expend efforts that go beyond what could be expected in a world in which monitoring was both perfect and costless. 83

Firms can further lower their monitoring costs by structuring the tournament in ways that give employees incentives to contribute monitoring resources to the firm. For example, consider a tournament in which a senior employee's possibility of obtaining the reward (for example, promotion to partnership) depends in part upon the work of that employee's juniors. Under these circumstances, experienced employees have an incentive to monitor their subordinates more carefully than they would otherwise. Firms thus have an incentive to create a pyramid structure in which a relatively small number of experienced employees are responsible for monitoring the performance of a larger number of junior workers, who are themselves motivated to work hard by the prospect of becoming senior employees who are then eligible for the reward. 84

4. "Efficient" Discrimination

Firms that employ high wages, tournaments, or some combination thereof, to induce worker effort face reduced market pressures to detect and sanction employment decisions that either penalize blacks or favor whites. This is true for two reasons.

First, assuming that firms face a normal bell-shaped distribution of worker talent (that is, a small number of “superstars” and “unacceptable” workers at either end with the majority of candidates clustered together in the “average” range), they should be relatively indifferent as to which average candidates are hired. 85 Since quality is subjective and therefore difficult to evaluate, the signals applicants use to demonstrate their merit (for example, educational credentials, recommendations, work experience) will be “noisier” (that is, less reliable predictors of actual quality) the closer one gets to the mean. Although a thorough investigation of potential employees (for example, an in-depth interview, reading sample work product, or an apprenticeship period) might reveal whether an applicant's signals are reliable, firms that employ high wages and tournaments to save on monitoring costs have little incentive to invest in this kind of cross-checking. As a result, candidates *521 in the average range appear indistinguishable from the firm's perspective. Because the firm pays high wages, there will be a large number of average candidates available.

As a result, the firm has little reason to investigate whether those responsible for hiring systematically prefer average whites to average blacks. By definition, the firm does not lose productivity as a result of such discrimination. Average workers are merely being substituted for average workers. Furthermore, because of the inflexibility of wages, the firm will not be placed at a competitive disadvantage vis-à-vis those firms who do not discriminate since these latter employers will find it difficult to hire blacks at reduced wages, thereby cutting their costs below those of firms where average whites are favored. 86 This effect is exacerbated in firms that also utilize a tournament in order to separate those who are truly outstanding from the many who are merely competent. Because these firms know that they will be able to collect a large amount of relatively reliable information about employee performance before they promote the small number of tournament
winners to senior positions, these organizations have even less incentive to make accurate distinctions among average workers at the hiring stage.

Second, because black applicants know that they face reduced opportunities— that is, that they will lose out to average whites unless they can clearly signal themselves to be superstars—they have an incentive to invest in human capital strategies that, paradoxically, will on average decrease their chances for success. 87 As an initial matter, since black applicants face higher entry barriers, they have an increased incentive to invest in acquiring the kind of signals that employers look to when deciding which candidates are outstanding. To the extent that these signals directly measure skills that are actually necessary to perform the job effectively, this extra incentive performs a positive function by increasing black investment in human capital. In many cases, however, firms value a particular signal (for example, obtaining a high school diploma) because they view it as a surrogate for some difficult to observe personal quality (for example, hard work or perseverance) rather than because the signal actually represents a valuable job skill. 88 Moreover, where firms rely on high wages and tournaments because of the difficulty of evaluating and monitoring highly subjective job performance, the link between the signals these employers are likely to look for and either actual job skills or the personal qualities of good workers is unlikely to be tight enough to produce only beneficial effects on the investment decisions of black workers. Instead, firms are likely to prefer less accurate but easily observable signals over ones that are more difficult to observe or measure, but are ultimately better correlated with future job performance, on the ground that the gap between expected quality (as measured by these less costly signals) and actual quality can be sorted out in the course of the tournament. As a result, investing heavily in obtaining these signals can end up damaging a black employee's long-term prospects. Although black candidates who invest disproportionately in signals may increase their chances of being hired, if we make the plausible assumptions that there is at least some tradeoff between investing in signals and investing in skills (if for no other reason than the finite nature of time), and that beginning work with skills is positively correlated with success on the job, these workers may also have a decreased chance of actually winning the tournament.

The incentives that push the investment decisions of black employees in directions that decrease their chances for success are even more prevalent once the employment relationship begins. Given that the same social forces that tend to lead whites to prefer average whites over average blacks are likely to continue inside firms, those blacks who manage to secure one of these coveted positions must decide how to react to these diminished opportunities. Some black workers may seek to minimize the adverse consequences of their employers' diminished expectations by avoiding situations where they believe that their competence might be drawn into question. Others will take the opposite tack and invest heavily in their careers at the firm by taking on difficult or risky projects that, if successful, might induce firm leaders to view them as superstars instead of merely as average.

Both strategies decrease an average black worker's chances for success at the firm. The futility of the first choice is clear: although those pursuing a low-risk strategy may manage to avoid making the kinds of mistakes that will lead their employers to view them as unacceptable (and therefore candidates for being fired immediately), they are also unlikely to win a tournament in which others are investing heavily in firm-specific skills. At the same time, average black workers who pursue high-risk strategies by taking on more
than their share of difficult or risky work assignments-- assignments that would be difficult even for those with superstar abilities-- run a substantial risk of being downgraded in the estimation of their employers if they fail to pull all of these projects off successfully.

Given this dynamic, discrimination will be self-perpetuating in firms that employ high wages, tournaments, or some combination thereof to reduce monitoring costs. The next section argues that this dynamic helps to explain the current structure of large law firms.

B. Making Elite Law Firms

Elite firms depend for their economic survival upon delivering high-quality legal services at acceptable prices. As a result, a firm's most important asset is the accumulated human capital of its lawyers. Firms therefore have strong incentives to seek out lawyers who will preserve and enhance the firm's reputation and to ensure that partners and associates in fact fulfill this promise throughout their tenure with the firm.

This basic economic truth lies at the core of the standard claim, recited like a mantra by every law firm during recruiting season, that its hiring and promotion practices are solely designed to produce the “best” lawyers. In this Section we argue that these familiar claims are ultimately misleading. Firms do have an incentive to hire and promote the “best” workers, but only insofar as the cost of evaluating and monitoring worker quality does not exceed the returns from selecting marginally better workers. Hence, the resources firms are likely to devote to making distinctions among workers vary with both the cost of reaching reliable quality determinations and the expected benefit to the firm of more accurate matches between employees and jobs. As we shall see, elite law firms have developed institutional practices with respect to both of these issues that reduce their need to invest substantial resources in distinguishing among average workers at crucial stages in the employment process.

1. Good Lawyers are Made, Not Born

In the previous Section, we explained why firms gravitate towards high wages and/or tournaments in circumstances where the subjectivity of quality assessments renders monitoring both difficult and expensive. Large law firms find themselves in this position due to two related characteristics of lawyering. First, legal work contains a core element of discretionary judgment, which is the product of both contingent external factors and the lawyer's own character, insight, and experience. Second, partly as a result of this core discretionary element, good lawyering is a practice that ultimately cannot be reduced to principles or rules that can be taught in the classroom. These two related characteristics render judgments about a lawyer's quality inherently subjective and provisional.

Lawyers have long asserted that one of the most important distinctions between their “calling” and other “occupations” is the link between lawyering and judgment. Although lawyers frequently exaggerate both the uniqueness of legal judgments and the implications of recognizing that lawyers inevitably exercise discretion, the claim that good judgment lies at the core of good lawyering rests on solid ground.
Good judgment in this context derives from, but ultimately transcends, specialized knowledge and technical expertise. In order to render sound advice to clients or make persuasive arguments in court, a lawyer must have a firm command of the relevant substantive and procedural doctrines. But an effective lawyer must also be a good judge of character, a quick and accurate calculator of costs and benefits, an empathetic listener, and a thorough, balanced, and calm deliberator who nevertheless does not lose sight of the important role that passion plays in human affairs. In the world of elite law practice, she must also be a team player, a salesperson, and a manager of complex personalities, events, and institutions. Indeed, given the indeterminacy of many areas of the law, even technical legal competence involves an important element of discretionary judgment.

Moreover, lawyers develop virtually all of these relevant qualities, including technical expertise, on the job. Lawyers have always referred to what they do as the “practice” of law. As with claims about the importance of professional judgment, the profession has frequently used this standard assertion to advance its own ends. In addition, however, the word also captures how lawyers generally believe good legal skills are cultivated--in practice. Although law schools now make more of an effort to be comprehensive, including offering students a variety of clinical courses in which they actually perform legal work, the gap between what law schools teach and what practicing lawyers need to know is arguably as wide as it has ever been.

Together, these two features of good lawyering make it difficult for law firms to reach accurate judgments about the qualifications of potential recruits, to train these new lawyers once they are hired, and to ensure that they are performing competently. At the recruiting stage, because most of the qualities of a good lawyer (including the ability to reach sound discretionary judgments) are learned on the job, the firm must rely on predictors of future success as opposed to a record of demonstrated ability. The most visible signals about the potential quality of particular applicants (i.e., law school grades and other traditional academic honors), however, are not strongly correlated with either substantive lawyering skills or the personal qualities that it takes to be successful in the practice of law.

Two aspects of the grading process diminish its predictive capacity with respect to substantive lawyering skills. First, many of the substantive areas in which elite firm lawyers work are either not taught in law school at all or are covered only in introductory survey courses that spend relatively little time on the kind of cutting edge legal issues that increasingly occupy corporate lawyers. Second, even with respect to those fundamental skills taught in the standard law school curriculum, such as “thinking like a lawyer” and the basic architecture of the legal system, the predictive value of grades is distorted by the peculiar characteristics of the law school examination process. Although grades may work better as a proxy for personal qualities that are plausibly connected to success in law, such as intelligence, hard work, perseverance, or perhaps aggressiveness, even this signal is noisy. A certain percentage of students who lack some or all of these qualities nevertheless get good grades. Other equally valuable talents (such as the ability to work well with others) may be inversely correlated with success in law school. As a result of all of these factors, even law teachers acknowledge that a student’s performance in law school is a very noisy signal of her long-
term performance as a lawyer.” 101 This assessment is confirmed by empirical research finding little or no correlation between legal education or success in law school and partner income. 102 Although firms could improve the quality of their predictive judgments by looking behind a candidate's grades and other paper credentials, for example by reviewing a candidate's work product or talking to references, each additional step will inevitably increase the cost of recruiting. 103

The fact that law is a practice that must be learned on the job also increases a firm's training costs. Traditionally, firms taught young lawyers by gradually allowing them to take increasing amounts of responsibility on a broad array of projects under the direction of senior lawyers. This apprenticeship model, however, is expensive because it takes senior lawyers away from revenue-generating activities. 104

Finally, given the importance of discretionary judgment to assessing the quality of a lawyer's work, results are not an accurate measure of shirking. In many instances, the end result of the representation--for example, the fact that a motion was lost or a deal completed--is a very imperfect measure of the quality of the work that went into producing this result. 105 Even easily measurable inputs such as the time that it takes a lawyer to accomplish a given task can be misleading in the absence of further investigation. 106 Therefore, in order to make accurate judgments about lawyer quality, a firm would have to look behind both results and work product to determine whether the lawyer considered all of the relevant legal and factual considerations that might bear on the decision at hand. To accomplish this task, the evaluator must have both the technical expertise to identify considerations that may have been overlooked (or misinterpreted) and sufficiently developed powers of professional judgment to assess the discretionary judgments underlying the first lawyer's decisions. Like training, this process is expensive because it necessarily involves senior lawyers whose time could be used more productively elsewhere. 107

Recent changes in size, structure, and operation of corporate firms present firms with a host of new monitoring and training problems. 108 As firms grew in size and geographic scope, 109 their hiring needs expanded as well. Correspondingly, the opportunities for partners to monitor associates directly decreased. 110 This trend has been exacerbated by both the growth in the size of today's corporate and litigation projects and increased specialization among attorneys at all levels. Larger projects in the litigation and corporate areas have produced larger and more highly leveraged teams of lawyers. 111 As a result, partners have less contact with each associate on the team and are less likely to work jointly with associates on specific projects. 112 The fact that most firms are also more highly leveraged than they were in the past (that is, they have increased the ratio of associates to partners) further increases monitoring costs. 113 Similarly, specialization and the departmentalization that has followed in its wake reduce contact among lawyers across specialty areas and increase the difficulty of making accurate subjective evaluations of quality across departmental lines.
Size and leverage also affect the credibility of the firms' training and out-placement promises. Law school graduates still must be trained if they are to become effective lawyers. The same factors that have made direct monitoring more difficult (for example, larger teams, greater task differentiation between partners and associates, etc.) also reduce opportunities for partners to train associates. Moreover, as corporate clients have become more savvy and articulate about protecting their interests, they are less willing to pay for associate training. As a result, firms are under pressure to find ways to reduce the amount of money that they have to spend on recruiting, training, and monitoring without endangering either quality or competitiveness. As our general model predicts, many firms have gravitated towards a combination of high wages and a series of complex hierarchical institutional practices as a means of reducing these expenditures.

2. An Efficient Model in an Age of Opportunism

Three interlocking structural components typify contemporary elite firms: high wages, a steep pyramidal structure in which all lawyers compete in a series of tournaments and there is pressure to reduce work to its smallest and least demanding unit of measure, and an informal tracking system that separates associates who will be trained from those who will not. Each of these institutional characteristics and the previously mentioned monitoring problems are discussed below.

a. High Salaries

High associate salaries are now a standard fixture of the elite law firm world. This was not always the case. Prior to the late 1960s, these firms paid their associates no more--and in some instances less--than most of these young lawyers could earn in other sectors of the legal economy. Beginning with the so-called “Cravath shock” in 1968, starting salaries for associates have skyrocketed to more than $85,000 a year in New York and other comparable cities. On average, associates now earn as much as 72% more than their counterparts in government. A considerable gap also exists between associate compensation and salaries paid by corporate legal departments, small firms, and academia. Furthermore, after the second “Cravath shock” in 1986, associates’ salaries are now comparable to those of their counterparts in consulting firms and investment banks.

Nor can these differences in salary be explained solely on the ground that associates at elite firms are either better prepared or more productive than those who work in other areas. For example, in a comprehensive study of associate salaries in private firms, Rebitzer and Taylor conclude that differences in ability, human capital investments, and working conditions (including hours worked) at most account for between 42% and 57% of the wage differential between associates working in elite firms and those in small firms. Adjusting for these factors, the authors find that “an associate lawyer in the largest firm-size category makes roughly $11,000 more per year than her counterpart in the smallest firm-size category.”
Moreover, these high salaries have proven to be resistant to downward economic pressure.\textsuperscript{124} During the recent recession, not a single firm cut its starting salary for fear that the move would signal to potential recruits (as well as to clients) that the firm was in economic trouble.\textsuperscript{125} Nor have most firms created salary differentials among associates or established a separate category of “contract” lawyers who are paid lower salaries and are excluded from partnership consideration.\textsuperscript{126} Despite the obvious cost savings of both of these strategies, most firms have been dissuaded by the costs of increased monitoring and lowered morale\textsuperscript{532} that appear to flow from making these distinctions among associates.\textsuperscript{127}

Despite the frequent protestations by law firm hiring partners to the contrary, there is ample evidence that the high salaries paid by corporate firms are efficient from the perspective of recruiting and monitoring. Many students state that the high salaries paid by corporate firms are the primary reason they choose jobs in this sector over what they consider to be more rewarding work in government or public interest practice.\textsuperscript{128} More importantly, once an associate joins a corporate firm, the high salaries and other benefits create a substantial inducement to stay. After years of deferred gratification, many associates find irresistible the prospect of acquiring a lifestyle that is commensurate with (if not greater than) their income. Once they have bought (often with the firm's help) the “right” house, the “right” car, and joined the “right” clubs, however, they are dependent on continuing to earn the “right” income which they can only do by staying at the firm.\textsuperscript{129}

Moreover, the fact that elite firms also hold out the possibility of partnership as a means of inducing associates to work hard and stay in their jobs does not render high associate wages superfluous for these purposes.\textsuperscript{130} Although the promotion-to-partnership tournament might be a sufficient solution to the monitoring problems we describe if every associate actually participated in this process, both empirical and anecdotal evidence about associate career paths suggests that this is no longer the case. For reasons that we discuss more fully in the next two sections, a substantial number of the associates joining large law firms have at best a weak commitment to staying with the firm long enough to be considered for partnership.\textsuperscript{131} For these associates, the high wages paid by corporate firms are a substantial inducement to work hard in order to retain these coveted positions until they decide that they are ready to leave—a decision, as we indicated above, that the salary differential between elite firms and other legal employers may help to delay or even to change.\textsuperscript{132} Cravath's latest “shock” to the prevailing salary structure—a 30\% increase in the salaries of senior associates—demonstrates how much firms use high salaries as a means of motivating and retaining associates who have, given Cravath's notoriously low partnership rates, little chance of winning the promotion-to-partnership tournament.\textsuperscript{133}

The downturn in corporate legal services in the early 1990s has only served to reinforce these incentives. Associates are now acutely aware that they face the possibility of being laid off in tough economic times and that firms have the incentive to portray this decision as based on the associate's quality rather than on the firm's poor economic performance.\textsuperscript{134} Given that other potential employers will have relatively little information about the quality of an associate who loses her job, the negative signal that she has been
“laid off” is likely to have draconian consequences for her future employment prospects. Moreover, since associates are aware that firms have relatively little information about actual associate quality (particularly in the early years) they know that decisions about whom to lay off can be based on a wide array of small and potentially random distinctions. They therefore have a strong incentive to ensure that all aspects of their performance (from hours to dress code) are beyond reproach.

In sum, the high wages paid by elite firms help to create a culture of fear that motivates associates to work hard even in the absence of extensive monitoring. Not only do associates know that there are a large number of capable lawyers who would love the chance to work at one of these high paying jobs, but they are also aware that any hint that they are leaving their firm on anything less than the best of terms will have a devastating effect on their future employment prospects. Even those who do not see themselves as having long term careers with the firm have an incentive to work productively as a means of keeping their options open. The pyramidal structure employed by many large firms reinforces these effects.

b. Pyramiding

Even before they began paying high salaries, law firms employed a promotion-to-partnership tournament to induce both hard work and loyalty. The basic parameters of this competition have remained fairly constant: firms pay recent law school graduates along a fixed salary scale for six to ten years, at the end of which time they promise to promote those associates who have demonstrated that they have the greatest potential for making long term contributions to the firm. This practice tends to produce a pyramid structure, since in order to be an effective substitute for direct monitoring, there must be fewer tournament winners than entering associates. Recent changes in the size, competitiveness, and profit structure of large law firms, however, have accentuated this trend.

As elite firms have grown in size, they have also tended to become more highly leveraged. The reasons for this change are straightforward. Partners make money on the surplus of revenues generated by associates over the amount they are paid. Although the high salaries paid to associates increases the cost of leverage, these costs are more than offset by the profits these lawyers generate from the time that they join the firm. As a result, the size of a firm is positively correlated with partner income. Moreover, the smaller the number of partners entitled to share in this profit, the bigger each individual partner's share is likely to be. Not surprisingly, as the larger classes of associates hired in the boom years of the 1970s and 1980s moved through the system, many firms decided that “there was just not room at the top” to accommodate even the same percentage of partners that the firm was prepared to make from the smaller associate classes of the 1960s.

In addition, the growing competitiveness of the legal market has also led law firms to institute a new tournament to solve a problem that, for many, has proved to be even more important and intractable than the problems of monitoring and motivating associates: preventing shirking by partners. Traditional
structures such as lifetime tenure, lock-step compensation, and autonomous working conditions afford partners ample opportunity to shirk on both the quantity and quality of their work for the firm. At the opposite extreme, non-shirking partners (particularly those with their own clients) now have access to an active lateral market where they can sell their services to the highest bidder.

Firms have generally responded to these problems by raising the income of productive partners and by cutting the compensation of--and in some cases dismissing--unproductive partners. At the same time, many firms have effectively recreated the promotion-to-partnership tournament for partners by establishing multi-tiered partnership systems.

These changes in the structure of large law firms threaten to undermine the effectiveness of the promotion-to-partnership tournament as a device for motivating associates to work diligently and competently with relatively little supervision. The combination of diminished chances of becoming a partner and reduced rewards (e.g., diminished job security, greater delay in obtaining substantial financial rewards) for those who win the tournament are likely to lead some number of associates to conclude that becoming a partner is neither sufficiently plausible--nor perhaps even sufficiently desirable--to justify the tremendous sacrifices that it takes to reach this goal.

This dynamic presents two challenges for elite firms. First, many associates do not see themselves as participating in the tournament. Second, because outside employment prospects are likely to decrease the closer they get to the partnership decision, firms will have difficulty retaining senior associates.

The pyramid structure ameliorates both of these potential pitfalls to firm profitability. As Heinz and Loumann observe: “In the practice of law-- as on the assembly line and in many other sorts of work--an almost inevitable consequence of the division of labor has been a routinization of tasks for most of the workers.” Both client pressures and the firm's economic interests dictate that wherever possible, work should be divided into those aspects that require discretionary judgment and those that do not, with the latter “flowing to the lowest level within the firm that can perform it satisfactorily.” As a result, firms generate a good deal of “repetitive and ministerial tasks” that can be profitably be assigned to junior associates. This, in turn, helps to insulate firms from the economic consequences of the high associate turn-over rates produced by the diminished attractiveness of the promotion-to-partnership tournament.

Nevertheless, firms must still produce senior lawyers who both monitor the ministerial work of junior lawyers and perform those tasks that do call for expertise or judgment. This brings us to the issue of training.
c. Tracking and Training

The continued viability of any elite law firm rests on its ability to reproduce its partners and to maintain a cadre of able and motivated senior associates. Although firms can look to the burgeoning lateral market to satisfy some of their needs, most senior lawyers must come up through the ranks. As a result, firms must invest some resources in training.

Given their pyramid structure, however, it is grossly inefficient for firms to train all of their associates. This structure ensures that most associates will leave the firm before becoming partners. Hence, while the firm needs a few trained senior associates, it has little incentive to invest scarce training resources on lawyers who are not going to stay at the firm long enough for the firm to recoup that investment. Moreover, so long as there is work that can be done profitably by inexperienced lawyers, firms have an incentive to keep some number of untrained associates on their staffs.

In addition, even if the firm as a whole has an interest in ensuring that every associate gets some minimal level of training, individual partners do not. Associate training is both a public good for the firm and a private good for individual partners. The firm as a whole arguably benefits when all associates receive some credible level of training. Individual partners, however, have sub-optimal incentives to contribute to the production of this firm-wide benefit. Training is costly to individual partners; time spent training is time that the partner cannot spend either producing revenue or consuming leisure. The benefits of training, on the other hand, are diffuse. To be sure, every partner needs a certain number of well-trained associates to do his or her work. Time spent training these associates produces private gains for the partner--if that associate continues to work for the training partner. Given that associates typically work for more than one partner, however, no individual partner will be able to capture the full value of time invested in training. As a result, partners have strong incentives to ration time spent on training and to invest only in those associates who are likely to benefit them and their practices directly.

Given these incentives, we expect partners to make decisions about how to staff projects according to the following criteria:

First, partners will have a preference for associates who need little or no training. Monitoring the work of other lawyers is both difficult and expensive. Partners want to staff their projects with associates who will be able to do the work with relatively little supervision. Finding lawyers who can perform tasks competently and quickly is therefore the preeminent selection criterion.

Second, if the partner can secure the services of such an associate, the partner will invest in further training that lawyer. Although this seems paradoxical (since the lawyer was selected because he or she only needed
minimal training to do the job), training superstar associates is nevertheless an important part of the implicit bargain that partners strike with these new entrants and their colleagues. 153

Third, to the extent possible, partners will leave training and supervisory functions to senior associates. These lawyers, however, have little incentive to invest in training, as opposed to supervising, their charges. As an initial matter, there is a limit to what any particular senior associate knows. More importantly, since senior associates are also competing for scarce training opportunities and attempting to signal partners that they are well trained, these associates have an incentive to keep good work assignments (e.g., those involving client contact, court appearances, or plum writing assignments) for themselves instead of passing them down the line. The fact that only a few of these lawyers will become partners further increases their incentive to take credit for good work done by their juniors and to blame their charges for their own mistakes. 154

As a result, associates will gradually be divided into two broad categories: those who have received training (or are considered worthy of receiving training) and those who have not (and who are not considered good training prospects). Although the boundaries between these two groups are fluid, they nevertheless will tend to be self-perpetuating. Trained associates can lose their privileged status by making mistakes that cause partners to doubt that their training investment will be recouped (or to suspect that the reputational costs of being seen as pushing a relatively weak associate outweigh the benefits of providing training). Similarly, previously untrained associates can come to the attention of partners by doing exemplary work on routine assignments. More often, however, once an associate has been trained, other partners have an incentive to use her and to provide additional training. Those *540 who do not get trained, on the other hand, are less likely to receive the kind of work that will give them the opportunity to become trained (or otherwise to demonstrate their talent).

Those who have not been trained face diminishing opportunities for success. Although we have seen that firms generate a substantial amount of relatively routine work, clients will not pay for this work to be done by senior associates when it can be handled just as effectively by lower-cost junior associates. 155 As a result, an associate who has not been trained will gradually find that she has less and less work assigned to her as the firm becomes unable to bill her increasingly expensive time to clients. 156

Figure 1 portrays this divergence. The curved line denoting associates receiving training represents the standard story told to law students by every hiring partner during recruiting season: “Our firm loses money on associates during the first several years because we invest heavily in training these young women and men to become excellent lawyers. Even if you only stay at our firm a few years, you will develop the skills and dispositions that will help you succeed at any legal job you choose to take on.” 157 The flat line denoting associates who are not receiving training, however, portrays the reality that many enthusiastic recruits find when they join elite law firms: an initial period of grinding but undemanding work, followed by a gradual slow down until they are gently but firmly told that their services are no longer needed. 158
The separation of associates into a “training track” and a “flatlining track” highlights two important differences between elite law firms and the organizations portrayed in standard tournament theory models. First, contrary to standard tournament theory, firms do not run a competition in which every associate is given an equal chance to succeed. Instead, from a very early date, firms begin giving some employees the capital that it takes to succeed in the firm while failing to provide this essential good to others. An analogy can be drawn to the social structure of bees. If a bee larvae is fed a rich nutrient (called “Royal Jelly”) by the queen, that bee will develop into a queen. If that same bee receives no Royal Jelly, it will develop into a worker bee. Training is the Royal Jelly of elite law firms. Those who receive it have a realistic chance of becoming “queens” capable of supporting their own cadre of worker bees. Those who do not are destined to remain worker bees whose usefulness to the hive will eventually draw to an end.

Second, the process of picking partners is therefore more straightforward than tournament theory suggests. By the time tournament winners are selected, the firm will have had eight to ten years to collect information about which associates are receiving the Royal Jelly of training and to determine whether those who have received this good have developed as expected. Moreover, because firms know both that their future productivity depends upon accurately assessing this information and that associates (particularly senior associates) are in a good position to evaluate the fairness of the firm’s partnership choices, firm leaders have strong incentives to weigh the information they collect carefully. As a result, partnership decisions are likely to be much more highly correlated with future productivity than hiring decisions at the associate level.

Success at a large law firm depends, therefore, on not becoming a flatliner, which in turn is dependent on obtaining the Royal Jelly of training. This is true for all associates, white and black. We predict, however, that black associates are, on average, less likely to receive this essential good than their white peers—just as the structure of elite firms makes it less likely that they will be hired in the first instance. The next Part tests this hypothesis in the context of recruitment and training.

III

THE APPLICATION: MAPPING THE RACIAL LAW OF AVERAGES

We posit that there are two reasons why discrimination is likely to be a stable equilibrium in firms that employ high wages and complex institutional mechanisms such as tournaments and tracking to save on monitoring costs. First, these devices reduce a firm’s incentive to detect and correct practices that systematically disadvantage “average” blacks. Second, since
blacks therefore face higher barriers to success, they have a corresponding incentive to invest in human capital strategies that, paradoxically, reduce their chances for success even further. In this Section, we explore both of these hypotheses in light of publicly available statistical and anecdotal evidence and our own preliminary data.

Before proceeding, however, it is important to underscore the limitations of this inquiry. Elite law firms have recently become an important subject of academic investigation. In addition, both the legal and the popular press have taken a substantial interest in these institutions and the lives of the lawyers who work there. As a result, there is now a substantial volume of information about corporate firms in the public domain. There are, however, limitations on the usefulness and reliability of these accounts. For the most part, the academic literature is theoretical, rather than empirical, often relying on anecdotal evidence from the legal press. These latter accounts are subject to a variety of familiar defects in terms of selectivity and reliability. Our own analysis nevertheless follows in this tradition. As a result, our tone is speculative in recognition of the large gaps in our knowledge about the experiences of both black and white lawyers at elite firms.

We have, however, supplemented the publicly available data with our own preliminary research on black Harvard Law School graduates. Our data comes from three sources. First, we examined the data reported in the Harvard Law School Alumni Directory for black graduates of the classes of 1981, 1982, 1987, and 1988. Second, we sent out a brief survey to 200 Harvard black alumni associated with the Harvard Black Law Students Association. The overall results of both of these efforts are presented in the Appendix in Tables 1 and 2 respectively. Third, we sent a brief request to 250 corporate firms around the country, asking them to provide information about their entering class of associates for 1995-96. Finally, we have included, where relevant, summaries of comments during interviews conducted by Professor Wilkins.

Our emphasis on Harvard graduates is not simply parochial. Harvard graduates are an important part of the total population of black lawyers. This is true for two reasons. First, Harvard has more black students than any of the other law schools from which elite firms recruit. Second, because we hypothesize that the institutional practices we describe are most likely to disadvantage “average” blacks, the experience of black students from Harvard (given the school's overall reputation for quality and record of successfully placing its graduates) should on average be better (and certainly no worse) than the experiences of blacks from other schools. If anything, therefore, our emphasis on Harvard graduates should understated the effects we predict.

Once again, it is important to emphasize the limited use to which we intend to put these data. We make no claims that the results of our analysis are statistically significant or that they meet the relevant standards for empirical research. As Tables 1 and 2 indicate, the total number of black graduates included in our two samples is relatively small and we have no way of measuring whether those who answered our survey or sent their information to the Harvard Alumni Office are different in relevant ways from those whom we have failed to locate. In addition, we do not have comparable data on white Harvard Law School graduates. Nor is there much comparable data on white lawyers in general. We therefore do not claim to have proven anything. Instead, we offer our data, as we offer our model, as an invitation to discussion and further work.

We divide our review of the data into two parts: recruiting and retention. As those concerned with law firm integration consistently report, simply hiring more black lawyers is unlikely to change the racial composition of these institutions in light of the fact that virtually all of these new entrants leave before making partner. Retention, not recruitment, is therefore the key to increasing the number of black lawyers. Retention, however, is affected by the dynamics of the recruiting process. Obviously, before a black lawyer can successfully move herself on to the “training track,” she must first be hired. Moreover, many knowledgeable observers believe that the fewer blacks that a firm already has among its
associates and partners, the more difficult it will be to recruit black students.\footnote{171} Conversely, by focusing on a few easily observable \footnote{545} signals that are only loosely correlated with valuable job skills, the recruiting process creates incentives that will adversely affect the retention prospects of those blacks who are hired. It is therefore necessary to look at both recruiting and retention if one is to understand why blacks continue to be underrepresented at corporate firms.

\textbf{A. Recruitment}

Law firms have changed their hiring practices dramatically during the last thirty years. In the “golden age,” the process was both brief and informal, consisting primarily of walk-in interviews during the Christmas holidays.\footnote{172} In that insular world, social connections counted at least as much as academic standing.\footnote{173} Blacks were systematically excluded even in those instances where they clearly met the firm's stated qualifications.\footnote{174} Compared to these not-so-golden practices, the current recruiting system is both open and meritocratic.\footnote{175} Firms now expend enormous resources (in dollars and time) on interviewing second, third, and even some first year students for summer and full time positions.\footnote{176} Moreover, \footnote{546} every firm now claims that it screens for the “most qualified” applicants regardless of race, gender, or religion--applicants who have the potential to become partners in the firm.

Yet when we look closely at the hiring process, we are confronted with an apparent paradox: notwithstanding the vast sums that firms spend annually on recruiting, they collect little information about a law student's actual substantive legal knowledge or skills, and the information that they do acquire on these issues is generally ignored. In this Section, we argue that these seemingly paradoxical practices in fact constitute a consistent and rational response to the institutional realities of elite firm practice and the benefits firms expect to receive from recruiting. These practices, however, also systematically disadvantage black applicants.

\textit{1. The Process}

Law firm hiring typically consists of three stages: the on-campus interview, the call-back interview, and (for first and second year students) a summer internship.\footnote{177} What is striking about the first two phases is how little they have to do with the applicant's substantive knowledge or skills.

Initial interviews are primarily a function of student interest.\footnote{178} The interview consists of a brief twenty-minute discussion with a single lawyer (often an associate). Although the interviewer has access to the candidate's resume (including his transcript) prior to the interview,\footnote{179} it is rare for an interviewer to ask questions designed to test what the applicant has learned in law school.\footnote{180} Instead, this brief encounter is taken \footnote{547} up almost entirely by a discussion of the applicant's general interests, background and experience, and whatever questions the applicant has about the firm.\footnote{181} Interviewers frequently conduct as many as ten to fifteen of these sessions in a day. Finally, firms rarely supplement the information they receive from resumes and interviews with other information (e.g., writing samples, faculty recommendations) that might offer insight into an applicant's quality.\footnote{182}
Firms therefore make call-back decisions based on the information that appears on an applicant's resume and transcript and a single lawyer's assessment of the candidate's general promise and personality. Not surprisingly, grades and other traditional indicia of academic accomplishment (such as law review membership) figure prominently in this calculation. Even these traditional indicia of merit, however, are not treated as seriously as they might be. Rather than ranking candidates by academic standing, firms tend to use loose grade cutoffs pegged to the academic standing of the applicant's school. Within these rough and malleable ranges, the primary criterion is whether the candidate will “fit in” to the firm's culture.

More often than not, call-back interviews merely repeat this pattern. Although applicants see more lawyers, the content of these discussions mirrors what transpires on campus: candidates are asked almost no substantive questions and the primary issue is whether the applicant will “fit in.” As a result, at some firms, call-back interviews are almost a pro forma process in which most candidates receive summer offers unless they affirmatively demonstrate that they are not likely to fit in to the firm's culture. Even those firms that use call-back interviews as a significant screening device, however, do so primarily on the basis of personality and fit.

This lack of attention to quality in the first two phases of the recruiting process might be understandable if firms relied on their summer programs to monitor and evaluate summer associates before extending offers of permanent employment. But they do not. Although firms collect information about their summer associates, this information rarely influences hiring decisions. Figure 2 shows the average summer associate offer rates for large firms in Baltimore, Atlanta, San Francisco, New York, and Chicago. With the exception of Baltimore, all of these rates exceed 70%, with firms in the most desirable cities hovering around 90%. Many of the country's most prestigious firms grant offers to all of their summer associates. Moreover, like associate salaries, these percentages have remained remarkably consistent over time, even during the recession when firms were laying off “permanent” associates.

Elite firm hiring, therefore, is “meritocratic” only to the extent that the few highly visible signals a firm can observe at the initial on-campus interview—the most important factor in determining whether a candidate receives a permanent job offer—are accurate predictors of which law students will make the best lawyers. As noted previously, although the signals are loosely correlated with both substantive legal knowledge and important personal characteristics such as intelligence and effort, they are notoriously noisy when it comes to predicting future performance as a lawyer (as opposed to future performance as a law student). Why do law firms spend tens of thousands of dollars each year on a process that provides such an imperfect measure of the quality of their future employees? The answer lies in the firm's bottom line.

2. Signals and Signaling: Stocking the Pipeline and Protecting the Franchise
Elite law firms have two primary objectives in hiring. The first is to stock the pipeline with associates capable of competently filling the firm’s labor needs. The second is to signal the firm’s quality to clients, competitors, and potential recruits.

Stocking the pipeline requires hiring associates who can diligently perform routine tasks with a minimum of supervision. Although this is also the pool from which the firm will select most of its senior associates and partners, for the reasons stated in Part II, it is not necessary that all (or even most) of its entering associates be of “partnership quality.” Moreover, since whether any particular associate actually develops the higher order legal skills needed by senior associates and partners depends in large part on whether she receives the Royal Jelly of firm training, it is more efficient for the firm to defer looking for those likely to fill these roles until the first phases of the tournament rather than spending resources refining their predictions about future potential. It is the need for foot-soldiers, not generals, that drives the hiring process.

The high wages and benefits associated with working at an elite firm ensures that firms will be deluged with applicants who meet the basic requirements for being good foot-soldiers. The pyramidal structure of elite firms ensures that much of the work done by entering associates will be routine and redundant, calling for none of the discretionary judgment at the heart of good lawyering. Nor is it necessary that the lawyers who are assigned these tasks be exceptionally smart or well trained. Although there may be advantages to having a person with superstar intelligence keep track of documents, draft letters and memoranda to the file, respond to discovery requests, and do routine legal research, these benefits pale in relation to the value of having an associate who is careful, well organized, pays attention to detail, and has a high boredom threshold. These qualities are neither taught directly in law school nor especially rewarded in the grading process. The fact that many firms have recently turned a substantial amount of this routine work over to paralegals with no law school training, is potent proof that the range of people who can perform this work competently is larger than those with traditional signals such as an elite law school education or law review membership.

As most partners would be quick to point out, however, this description of the work of an entering associate only tells part of the story. In addition to performing routine and undemanding tasks, new associates are sometimes called upon to answer difficult legal or factual questions. Moreover, these issues can arise unexpectedly, embedded in problems that otherwise appear to be routine. Given this reality, the hypothetical partner would argue, firms need to hire associates who can recognize sophisticated legal and factual issues when they arise even if they have not yet developed the higher order skills and dispositions that are ultimately necessary to resolve these questions. Consequently, the partner would conclude, the range of applicants who are actually qualified to be associates at an elite corporate firm is much smaller than might at first appear. In addition, since legal knowledge and basic personal qualities such as intelligence and hard work are the key variables in this story, it is rational for firms to rely on traditional credentials like law school status and high grades as proxies for the characteristics they seek.
This argument trades on a confusion between “average” and “ideal.” Law firms, like all other employers, would prefer to have employees \(^{551}\) who could quickly and proficiently handle every contingency that might arise in the performance of their duties. To the extent firms can identify applicants who, because of either their legal skills or their other personal characteristics, are likely to be able to recognize complex legal issues and take appropriate action with relatively little supervision, they will prefer these candidates to those who do not have these abilities. Assuming arguendo that superstar academic performance (e.g., graduating at the top of the class at an elite law school) is even loosely correlated with these abilities—a reasonable, although as we have indicated, largely unproven assumption—a firm might choose to hire only those who have this qualification. \(^{193}\)

In today's legal marketplace, however, this strategy is no longer a realistic option. Given the explosion in the size and number of large firms competing for the pool of superstar graduates from elite law schools, not even the most prestigious and high paying firms can limit their recruiting in this fashion. \(^{194}\) Instead, firms must also hire from the much larger pool of average candidates. These candidates present an array of mixed signals: for example, average grades at high status schools or good grades at lower status schools. Unlike the small number of academic superstars, the claim that these candidates can be ranked in terms of their actual quality by referring to a few easily observable signals lacks credibility. To take just one example, to say that where a student goes to law school is an accurate proxy of either that student's legal skill or native intelligence ignores the many variables that can affect that choice. As a result, it is doubtful that many would claim that a student in the middle of her class at Harvard is inevitably better prepared or “smarter” in any way that plausibly correlates with job performance as an associate at an elite firm than a student at the top of her class at Boston University who put herself through law school by working two jobs. Yet, this kind of judgment is exactly what would be required to justify on merit grounds the enormous weight that is placed on the status of a candidate's law school in the recruiting process.

This is not to say that firms could not make more nuanced judgments about the quality of these applicants if they were so inclined. Indeed, if firms were prepared to dig deeper, perhaps by conducting in-depth interviews designed to reveal substantive knowledge and problem solving skills, or by doing an extensive investigation into the candidates' academic and work experience, they might discover that applicants \(^{552}\) whose traditional signals were on the margin actually have better skills than those whose signals were at, or near, the top. Certainly, any review of the “best” lawyers in America would reveal several who do not have the kind of traditional credentials that most corporate firms look for. \(^{195}\)

Firms, however, have little incentive to expend the added resources it would take to reach such fine-tuned judgments. The average workers that they select on the basis of the limited information they collect are perfectly capable of performing the average jobs to which they are assigned. To be sure, as the hypothetical partner discussed above would insist, the fact that firms make their hiring decisions in this manner means that sometimes an associate whose actual abilities are in the low end of the average range will fail to see a complex legal issue embedded in an otherwise straightforward discovery problem that would have been spotted by the associate the firm could have hired whose skills were in the high part of the average distribution. So long as the firm suffers relatively few negative consequences as a result of such occurrences
(e.g., because the issue is never discovered by either the client or the client's adversary, or because the firm is able to rectify--or cover up--the mistake), it is rational for employers to take this risk rather than incur the cost of reviewing the actual abilities of each applicant in the average range.

Although this explains why firms pay little attention to a candidate's substantive legal skills, the question remains why firms invest such large sums in recruiting and why they rely on a mixture of objective and subjective criteria. Given our conviction that there are a large number of lawyers who could competently perform the work of the average corporate law firm associate, we might expect firms to recruit at a large number of elite and second-tier law schools, but to expend relatively little energy choosing among average applicants. Skadden Arps, for example, used this strategy quite effectively during the 1980s when it hired large numbers of associates, including many from “second-tier” law schools such as Fordham, and then let these new recruits fight it out for partnership. Indeed, since we theorize that associates are motivated in part by the fear of losing their high-paying jobs, one would think that, other things being equal, a firm would prefer to hire a law student from Fordham as opposed to one from Yale, since elite law firm jobs are scarcer for Fordham graduates.

Elite firms, however, gain more from recruiting than simply getting lawyers to do the work of the firm. They also use recruiting as a means of signaling the firm's quality to potential clients, competitors, and potential *553 recruits. One of the traditional ways that law firms have signaled their quality to clients is by the number of former Supreme Court law clerks, law review members, and other elite law school graduates they employ. Over and above their usefulness as a business-getting device, recruits from elite law schools also increase a firm's status among its peers. Indeed, even individual lawyers within firms are likely to be biased in favor of graduates from their alma mater, since hiring these students both validates the partner's own credentials and increases his standing with his fellow alumni. Given the restrictive hiring practices followed by most firms during the “golden age,” this bias further increases the demand for elite law school graduates. As a result, firms overinvest in competing for elite law school graduates and for those with “prestige” signals.

In order to win the competition for these coveted recruits, however, firms must both credibly signal their quality to these applicants and appear to treat those who do apply fairly. This helps to explain the division of the recruiting process into a “visible” stage, in which firms review a candidate's objective credentials, and an “invisible” stage, dominated by subjective judgments about personality and fit. At the visible stage, firms signal their quality by appearing to rely on objective criteria (law school status, law review membership, and grades) that are easily accessible and rankable by law students. Those firms that can be the most restrictive on these criteria gain a reputation as being the “best” firms, and therefore attract the “best” potential recruits. If a firm is seen as acting unfairly at this visible stage (for example, by refusing to interview black candidates whose credentials are clearly superior to those of white candidates who are interviewed), the firm's reputation among law students will suffer.
At the invisible stage, however, firms no longer have to worry about this problem. Law students realize that the objective criteria used at the visible stage do not account for all of the variables on which a rational firm might want to make its employment decisions. They therefore accept the fact that firms should inquire more deeply into the qualities of candidates, particularly where the objective credentials of two or more applicants are functionally indistinguishable. Because this process occurs out of sight (for example, in call-back interviews), firms have less of an incentive to base their decisions on objective criteria. Thus, rather than reviewing writing samples or asking substantive questions designed to test legal knowledge and analytic skill, firms focus on assessing whether the applicant will fit in to the firm's culture. Although this assessment is undoubtedly an important part of any hiring process, firms are free to emphasize issues of personality and fit over arguably more relevant determinations about writing ability and analytic skill because the invisibility of the call-back stage makes it unlikely that the firm's actions in this sphere will undermine its overall reputation and ranking among law students.

Taken together, these costs and benefits unravel the paradox presented at the beginning of this Section. Although the objective signals firms employ at the visible stage are a highly imperfect measure of an applicant's potential, they do a reasonably good job of winnowing down the pool and, more importantly, they give clients, competitors, and law students an accessible and rankable method of rating firms. Given that this process will produce a large number of average applicants who could perform the job effectively, firms are free to rely on subjective criteria to make the final selections at the invisible stage while at the same time lavishly pursuing the few superstars upon whom the firm's prestige in the recruiting market for elite law school graduates ultimately rests.

3. Race and Recruiting

In the absence of countervailing policies, we predict that blacks will be disadvantaged by recruiting practices such as those described above in two ways. First, since firms have little incentive to investigate the actual quality of their potential employees, average blacks are less likely to be hired than average whites. Second, because black applicants are aware of their reduced employment prospects, they have an incentive to adopt human capital strategies that, on average, decrease their overall prospects for success. The following examination of how blacks have fared in the recruiting process supports both predictions.

The fact that firms rely on a few objective signals to identify qualified applicants at the visible stage and reserve the right to go behind these credentials to make judgments about personality and fit at the invisible stage doubly disadvantages black applicants. As others have documented, by relying on sorting devices such as law school status, grades, and law review membership, firms systematically exclude the majority of black applicants, who do not have these standard signals. Thus, although blacks may be more likely to attend higher status law schools than whites, the schools with the largest black populations are not ones from which large firms typically recruit. Even black students with superstar credentials from lower status schools have little or no chance of being hired by a large firm. Those blacks who do attend elite schools face recognized barriers (e.g., poor primary and secondary school education,
diminished expectations, hostile environments, and part-time work) to performing well in the classroom or in extra-curricular activities such as law review. Given these added pressures, it is plausible, as both conservative critics of affirmative action in elite schools and supporters of historically black schools frequently assert, that some black students who are currently admitted to elite schools would be more successful (both academically and personally) if they did not attend these academic institutions. However, given the nearly dispositive role that the status of an applicant's law school plays in the recruiting process, black students who want to have the option of working at an elite firm have little incentive to choose this option. Those who have problems at elite institutions, however, risk being branded as unacceptable by prospective employers.

Indeed, to the extent that firms make hiring decisions based on signals such as grade point averages, as opposed to the substantive content of the courses a student has taken or other indicia of the skills that the candidate has acquired in law school, black applicants have an incentive to structure their education so as to maximize the former at the expense of the latter. For example, it is widely believed that certain advanced corporate courses, such as corporate tax, commercial transactions, and securities regulation, are among the most difficult in the law school curriculum, particularly for students who have little or no prior background (academic or otherwise) in these areas. If this is true, and if black students are less likely to have the kind of background knowledge that increases their chance of doing well in these subjects, then they will have an incentive to avoid these difficult, but potentially useful, courses in favor of classes where they stand a better chance of getting a good grade.

At the same time, the emphasis on personality and fit at the invisible stage can disadvantage black applicants with traditional signals. Like the general population from which they come, law firm interviewers hold a variety of conscious and unconscious stereotypes about black law students. Although incidents such as the 1989 debacle involving a partner from Chicago's Baker & McKenzie, who demanded to know a black female applicant's high school grade point average and how she would react to being called a “black bitch” or “nigger” are undoubtedly rare, they underscore the fact that outright prejudice against blacks still exists at elite firms. Sexual harassment and other forms of overt discrimination against women mean that black women face a double burden. Such outright prejudice is no longer condoned and, when detected, is sanctioned. The subtler forms of bias or preferencing, however, are more pervasive and difficult to pin down.

For example, a consistent line of empirical research demonstrates that when whites evaluate blacks, they frequently attribute negative acts “to personal disposition, while positive acts are discounted as the product of luck or special circumstances.” Empirical and anecdotal accounts of the experiences of black and white applicants in the interviewing process confirm that this phenomenon negatively affects employment opportunities for black lawyers. Pervasive myths about black intellectual inferiority combined with lower average levels of achievement in areas such as grades and test scores tend to make white interviewers question the credentials of blacks more than those of whites. In addition, interviewers generally expect to feel less comfortable when interviewing blacks. Similarly, as we note above, interviewers
frequently tend to believe that blacks are “uninterested” in corporate practice.\textsuperscript{217} Black women are particularly vulnerable to this “lack of interest” stereotype in light of the persistent belief that women place family responsibilities above professional commitments.\textsuperscript{218}

Given that firms collect little information about an applicant's actual skills, it is not surprising that interviewers are affected by such stereotypes. Since race is costless to observe, it provides a convenient mechanism, much like “personality” and “fit,” for sorting applicants. The fact that it does not correlate to the ability to practice law is irrelevant from the point of view of firm profits, so long as the only consequence of error is that average whites are hired in the place of average blacks.

Moreover, blacks on average have less access to influential contacts and other informal networks that allow some other candidates to bypass the formal screening requirements. Consider the experiences of two students at the University of Virginia law school reported in a recent story in the\textit{American Lawyer}.\textsuperscript{219} Both students--Jay, a white male and Jennifer, a black female--had grades in the B-minus/C range. As a result, although both have strong personal qualities and extra-curricular activities, neither was able to secure an interview with a large firm in their respective cities of choice (Richmond for Jay, Atlanta for Jennifer) through the normal UVA process.\textsuperscript{220} Nevertheless, by the end of the story, Jay is headed for three promising interviews with Richmond firms while Jennifer has no such prospects. Why? Because Jay was able to call a friend “with considerable influence in Richmond."\textsuperscript{221} Jennifer had no similar connections.\textsuperscript{222}

This story also highlights another way in which the interplay between formal and informal criteria disadvantages blacks. Although her grades were uninspiring, Jennifer was a member of the UVA law review and had worked for two small firms during prior summers, including one in Atlanta. Law review membership and prior work experience are the kind of easily observable signals upon which firms generally rely, but Jennifer appears to be getting less mileage out of these signals than one might expect.\textsuperscript{223} Although there may be many explanations for this result,\textsuperscript{224} one possible explanation is that even traditional signals such as good grades and law review membership count less for blacks than they do for whites.\textsuperscript{225}

\textsuperscript{560} Even black superstars can fall victim to this phenomenon. A firm does suffer an efficiency loss if it consistently fails to hire blacks who fall into the superstar category.\textsuperscript{226} Nevertheless, the bias against average blacks also makes it more difficult for black superstars to be regarded as such. Because employers know that blacks have an incentive to signal themselves as superstars when they are in fact average, and that this strategy (if successful) will be difficult to detect, firms have an incentive to discount indicia of accomplishment as false positives. Since hiring partners know that criteria such as grades are fuzzy, lawyers who are predisposed to believe that blacks are less likely to be superstars than whites can justify looking beyond the usual signals to reach a more subjective evaluation of the candidate's quality. Anecdotal evidence suggests that this occurs with some frequency.\textsuperscript{227} At a minimum, this possibility must be counted against
the potential, documented by Stephen Carter, for whites, because of their diminished expectations of black performance to accord superstar status to average blacks because they are the “best black” in the group. 228

Together, the fact that firms prefer average whites over average blacks and the corresponding tendency for these employers to discount the credentials of blacks who signal themselves to be superstars make it harder for blacks to be hired by elite law firms. This state of affairs is self-perpetuating, since firms that substitute average whites for average blacks suffer no competitive disadvantage. Once we take into account the additional fact that the number of black lawyers already working in a particular firm is positively correlated with that firm’s likelihood of hiring additional black attorneys, the chances of moving beyond this equilibrium seem daunting.229

Ironically, these structural features of the recruiting process also lead us to predict that the blacks who are hired will tend, on average, to be clustered in the superstar range. 230 In light of the rampant discrimination during the “golden age,” it is not surprising that the few black lawyers who were hired during this period had superstar qualifications. 231 We suspect, however, that something similar may be continuing today.

In order to investigate this proposition, we asked 250 elite firms to tell us the law school attended by each member of their most recent entering class of associates and to indicate which of these lawyers is black. The results of this survey, although far from conclusive, suggest that the blacks who are hired by elite firms tend to come from the superstar end of the distribution in terms of the key variable of law school status. The percentage of black associates identified by this survey who were graduates from elite schools is only 5% higher than the percentage for non-black associates.232 However, the black associates tend to come from schools at the top of the elite range. Thus, graduates from Harvard Law School constituted 24% of all of the blacks in our law firm survey.233 Even if we limit the universe of qualified African-American applicants to the graduates of the schools from which the firms in our survey actually hired during the year in question, this percentage is nearly four times greater than the percentage of black Harvard graduates in the available pool. 234

The numbers are even more striking in New York and Washington, the two cities with the largest concentration of elite firms. In New York, Harvard graduates constitute 15.6% of the total number of black associates hired. 235 However, when we add black graduates from Columbia and New York University, the percentage rises to 51.1.236 Similarly, in Washington, D.C., black Harvard graduates account for 32% of the total blacks hired. 237 When we include black graduates from Georgetown, 238 these two schools account for 52% of the total. 239

Admittedly, there are problems with this data, as well as alternative hypotheses that can also explain these results. Only one-third of the firms responded to our survey (although the response rates in New York
and Washington, D.C. were 51% and 50% respectively). In addition, the number of blacks in the survey is small, and the results are only for one year. Moreover, because of affirmative action in law school admissions, it is possible that Harvard and other similar schools have a disproportionate share of the talented black students. Although this would still mean that firms tend to hire blacks from the superstar end of the distribution, it would weaken the corresponding implication that the black graduates from other elite schools that are less well represented are being unfairly overlooked in favor of white graduates from those same institutions. For affirmative action in law school admissions to account for these differentials, however, the gap between the quality of black students from, for example, Harvard and the University of Michigan or the University of Pennsylvania (two elite schools that contributed only two black associates apiece to our sample), must be substantially larger than that between white students from these same institutions. So far as we know, there is no evidence to support the existence of a gap of this magnitude.

Moreover, to the extent that these considerations overstate the importance of top echelon schools like Harvard in our sample, there are other forces that seem likely to pull in the opposite direction. For example, a comparison between the percentage of black associates in our sample and the latest information about blacks in corporate firms suggests that the firms that chose to respond to our survey have more blacks than average. In addition, given recent initiatives to increase minority hiring undertaken by bar associations around the country (including those in New York and Washington, D.C.), it seems likely that firms responding to our survey have engaged in more affirmative action in hiring this class of incoming associates than in previous years. Both of these factors seem likely to increase the chances that average blacks, that is, those without superstar credentials like attending an elite law school, would make it into our sample.

Indeed, when we look back to a period when by all accounts there was less affirmative action than there is today, we find evidence that going to an elite law school was even more important for blacks. Table 5 compares the law schools attended by all of the identifiable black partners listed in the Minority Partners Handbook with the credentials of all partners in five national law firms. The results suggest that the current generation of black partners are much more likely to have graduated from an elite law school then their white counterparts. Thus, 77% of all black partners attended one of the eleven elite law schools where corporate law firms have traditionally done most of their recruiting. In contrast, the combined percentage of elite graduates at five of the nation's most elite firms is 70%, with firms such as Atlanta's Kirkpatrick and Cody drawing less than half of their partners from these schools. When we narrow our focus to graduates from Harvard and Yale, the two schools generally considered to be at the top of the status hierarchy, the results are even more dramatic. Fourty-seven percent of the black partners at elite firms attended Harvard or Yale, a percentage only surpassed by Boston's Ropes & Gray. None of the other firms has more than 41% of its partners from these two institutions, and the average for the five firms is only 33%. More importantly, if we remove graduates of Howard Law School from the percentage of black partners from non-elite schools, a reasonable supposition in light of the unique position that Howard holds for black lawyers, the likelihood of a black partner attending a non-elite school is approximately a third less than that for the general population of partners at the sampled firms.
Once again, this comparison is not definitive. To highlight the most obvious complication, we do not know whether the population of black partners is representative of the other blacks who might have been hired at the same time but who did not win the tournament. Nevertheless, the fact that so many of the current generation of black partners attended elite schools at a time when law school affirmative action policies were less entrenched than they are today suggests that the similar effects we observed in our survey of associates reflect a tendency for the black associates who are hired by elite firms to come disproportionately from the superstar end of the distribution. Anecdotal descriptions of the recruiting process by some black partners provide further support for this assessment. 251 If this is correct, however, it brings up a further paradox: if black associates are disproportionately clustered in the superstar range, why are there so few black partners? This brings us the question of retention.

B. Retention, Promotion, and Survival

Virtually all the blacks who start at a given elite law firm leave before becoming partner. 252 In this Section, we examine how the institutional characteristics of elite firms—high salaries, pyramiding, and tracking—affect a black associate’s partnership prospects. Unlike others who have addressed this issue, however, we concentrate on more than partnership rates. To understand why there are so few black partners, one must investigate what happens both before and after the partnership decision—and what opportunities are available for those who leave.

1. Monitoring, Mentoring, and Marketing: Getting on the Training Track

Elite firms make few formal distinctions among entering associates. The implication is that associates in a class are part of a unified group operating on a level playing field. In Part II, we argued that the reality is otherwise. Although firms maintain few formal distinctions, the inevitable scarcity of training opportunities pushes associates along informal, but nevertheless identifiable, career paths almost from the moment they arrive. The few associates who get on the training track will receive interesting work, meaningful training, supervision, and supportive mentors. The others will end up as flatliners drowning in a sea of routine paperwork.

Empirical and anecdotal reports about the practices of elite law firms support this account. From the “golden age” forward, associates have been lured to join big firms by the promise of excellent training. 253 For the reasons outlined above, these promises are difficult to keep. 254 As a result, “associates voice strong concerns about the lack of on-the-job training, delegation, supervision, and feedback.” 255

These complaints, although pervasive, are not uniform even among associates at a single firm. 256 Instead, some associates report that they 256 receive valuable training opportunities while others do not. 257 In addition, once an associate acquires a reputation as being well-trained, she will continue to receive training in the form of demanding work. 258 Although managing partners understandably continue to deny
that firms track incoming associates, more detached observers, as well as partners in more candid moments, report the contrary.

An associate's perception about which track she is on will have a substantial impact on how long she decides to stay with the firm. Associates know that firms look for two things when they select partners: legal ability and marketing potential. An associate who has not been trained cannot credibly signal either of these capacities. Training is the Royal Jelly that enables associates to develop the job-related skills partners expect to see in those who will be elevated to their rank. Similarly, although an associate may have business contacts independent of the firm, the most likely way for an associate to demonstrate her rainmaking skills is through contact with the firm's existing clients. Such contact is one of the commodities that training can help an associate accrue.

The effect on lateral movement is equally plain. The implicit promise that big firm associates are well trained lies at the heart of their marketability. Associates therefore work to avoid sending any signal that might tend to refute this presumption. Being fired is, of course, the ultimate negative signal, but failing to receive the same training opportunities as one's peers may also adversely affect one's lateral mobility. The fact that others are getting better work experience will not only lead an associate to doubt her own partnership chances, but may also lead her to believe that she will have less success in signaling to other potential employers that she is well-trained. Whether or not these fears are justified, they are likely to increase the pressure to look for another job.

Associates who do not find themselves on the training track have three options: (i) they can leave immediately; (ii) they can attempt to move themselves onto the training track; or (iii) they can stay at the firm but invest their time and energy in developing non-firm-specific skills that will help them get another job. Which of these strategies a given associate will pursue depends upon both the likelihood that she can change her reputation within the firm and her prospects in the external employment market. We believe that African-American associates face important barriers on both of these fronts. We therefore turn our attention to the particular experiences of black lawyers.

2. Concrete Ceilings and Slippery Floors: The Black Experience in Corporate Firms

Black associates face three significant barriers to getting on the training track. First, they are less likely than whites to find mentors who will give them challenging work and provide them with advice and counseling about how to succeed at the firm. Second, they face higher costs from making mistakes than their white peers. Third, their future employment prospects with other elite firms diminish more rapidly than those of similarly situated associates.
a. Mentoring and Irrationality

In order to get on the training track, an associate has to have mentors among the firm’s partners or senior associates who can provide the Royal Jelly of good training. Blacks consistently report that they have difficulty in forming these supportive relationships. For example, in our survey of black Harvard Law School graduates, less than 40% of those surveyed, and only 24% of the pre-1986 graduates, stated that a partner had taken interest in their work or their career. Sixty-eight percent of those who did not find a mentor, including 79% of the post-1986 graduates, stated that this was a significant factor in their decision to leave the firm. Although we do not have comparable data on white associates, our hypothesis that blacks have an especially difficult time finding mentors in consistant with the views of others who have examined the issue. There is reason to believe that the situation is even bleaker for black women, who confront gender as well as racial barriers to forming meaningful mentoring relationships.

*569 A number of factors contribute to this problem. Chief among them is the bias that potential mentors have for proteges who remind them of themselves. Studies of cross-racial and cross-gender mentoring relationships in the workplace repeatedly demonstrate that white men feel more comfortable in working relationships with other white men. Anecdotal evidence suggests that white partners in law firms are no different. This natural affinity makes it difficult for blacks to form supportive mentoring relationships.

These problems are magnified in a low-monitoring environment. Because partners have little information about a new associate's actual skills, the decision about who is a superstar worthy of training will be made as an initial matter in the same way as it is done at the recruiting stage--based on a few easily observable signals such as law school status, academic honors, and grades. Indeed, since partners not on the recruiting committee will probably not have met the great majority of incoming associates (nor seen their credentials) decisions about which of these lawyers are superstars will be even more loosely correlated with these signals than typical hiring decisions. Under these circumstances, background prejudices and preconceptions can lead white partners to believe that black associates are more likely to be average or perhaps even unacceptable.

As indicated above, blacks may also suffer from a general perception that they are “less interested” in corporate work than other lawyers. This sentiment may be reinforced by the fact that black associates appear to be more likely than their white peers to do more than the average amount of pro bono work, to hold skeptical views about the social utility of some of the goals of their corporate clients, and to leave corporate practice for jobs in the public sector. As with recruiting, black women face an additional hurdle, since partners frequently believe that family responsibilities will inevitably reduce the number of hours these associates are willing to commit to the firm. The fact that these generalizations say almost nothing about any individual black associate's level of interest or commitment to the firm is unlikely to dissuade partners from relying on such gross statistical correlations when deciding whom to mentor.
Finally, black associates will have difficulty getting onto the training track precisely because the generation of black associates before them did not. Partners have less incentive to invest scarce training resources in associates who they think are unlikely to be at the firm long enough for them to recoup their investment. Not only are black associates less likely to make partner, but their average tenure may also be shorter than that of their white peers. As a result, black associates are doubly penalized for the firm's failure to retain and promote black lawyers.

b. Visibility and Tokenism

Sociologists contend that when a group's representation in the workforce is small, individual members face increased pressures to perform and conform. Although these pressures can work to the “token's” advantage, the dominant tendency is for them to magnify the cost of making mistakes. Reports by black associates lend credence to this hypothesis.

Black associates frequently state that they are judged more harshly when they make mistakes than their white contemporaries. For example, over 40% of our survey respondents reported that they were criticized more than white associates for making similar mistakes. Even if these respondents are mistaken about this, the fact that they believe it to be true may induce some black associates to embark on the counterproductive career strategies we describe below. There is reason to suspect, however, that these reports are not simply a product of the black associates' collective imagination. A low-monitoring environment amplifies negative signals. For black associates the problem is exacerbated by expectations. If, for the reasons outlined above, partners expect black associates to be average or unacceptable, then any mistake will be seen as confirming this initial assessment. Mistakes by whites, on the other hand, are more likely to be dismissed as “aberrational” or “growing pains,” since these associates are presumed competent in the absence of conclusive evidence to the contrary.

Finally, small numbers also increase the probability that group members will be tied together in the minds of members of the dominant group. To the extent that white partners think (consciously or unconsciously) that “we had a black once and he didn't work out,” the chances of any other black lawyer having a successful career at the firm are correspondingly reduced.

Collectively, these aspects of tokenism encourage black associates to think about outside job possibilities. What they see when they examine the lateral job market, however, is likely to make them even more concerned about their future.
c. Bringing the Outside In

The pyramid structure of the elite law firm ensures that the vast majority of associates leave without becoming partners. When they leave, however, depends in part on their perceptions about the lateral market. Lawyers wishing to move laterally face conflicting incentives. On one hand, the longer they stay, the more they can claim to have accumulated valuable skills. On the other, the closer they are to partnership, the greater the danger that potential employers may presume that they are leaving because they are not “good enough” to make partner.  

For black associates, the decision is less complex but more draconian. It is less complex because blacks may not receive the beneficial presumption that comes from length of service. Length of service is only positively correlated with skill if an associate has been trained. Since making quality judgments is difficult in the lateral market, firms are likely to rely on statistical approximations. To the extent that firms are aware of the barriers faced by black associates regarding getting on the training track, employers looking for lateral hires may be less likely to believe that a black lawyer has been well trained (even if he has been). Given the large number of lateral applicants, a firm that hires fewer average black laterals will not suffer a competitive disadvantage. As a result, a black lawyer will expect more difficulty in moving laterally to another large law firm than will his white counterparts.

Our survey of black Harvard graduates provides some support for this conclusion. Only 15% of the black lawyers who had left their first elite firm went to another one. Instead, the majority went into either government (33%), corporate legal departments (20%), or small non-elite firms (17%). This distribution appears to be significantly different from that for whites.

Given this distribution, we hypothesize that the optimal time for black associates to leave firms is earlier than that for white associates because whites do not face the general market presumption that they have not been trained. Within the first few years, the common perception is that no one has received much training, so blacks suffer no particular disadvantage. Indeed, the only significant new signal potential lateral employers have to look at is the fact that the associate was hired by his first firm and has been at least minimally competent. (If a black associate were not minimally competent, he would have been fired.) This additional credential, may be even more valuable for blacks, since the second firm can rely on the first firm to screen out those blacks who are in the unacceptable range.

Blacks, therefore, have an incentive to make decisions about moving laterally even more quickly than whites. This incentive in turn affects the choices these associates make while at the firm. On average, the strategies black lawyers are likely to pursue will decrease their chances of succeeding at the firm even further.
d. Rational Strategies in the Face of Reasonable Fear

Black associates find themselves in a double bind. On one hand, they understand that they are less likely to get on the firm's training track. On the other, they face diminishing opportunities in the lateral job market the longer they stay at the firm. This combination produces a level of fear and anxiety about the future that is, even from the firm's perspective, sub-optimally high. As we argued in Part II, elite firms rely on the fear of job loss or diminished partnership prospects as a means of inducing associates to work hard at low monitoring costs. Like all motivational tools, however, fear has its own rate of diminishing marginal utility. When fear levels are sub-optimally low (in a low monitoring world), associates and partners have an incentive to shirk. When levels are sub-optimally high, lawyers have an incentive to adopt career strategies that reduce their benefit to the firm.

For the forgoing reasons, black associates are especially vulnerable to these pressures. As a result, they have strong incentives to choose career strategies that either minimize the danger of sending a negative signal or, conversely, maximize their opportunity for being regarded as superstars. Both strategies, however, can end up diminishing a black associate's long term chances for success at the firm.

i. Low-Risk Strategies

An associate wishing to reduce the chance of making mistakes can either steer clear of demanding assignments (because of either the difficulty of the work or the level or intensity of the scrutiny likely to be given by the partner) or take fewer risks in completing the work. There is some evidence to suggest that black associates disproportionately pursue both of these strategies.

Considering the choice of specialty, many observers believe that corporate practice in general (as opposed to litigation), and related specialties such as tax, securities, and banking in particular, require higher levels of substantive legal knowledge and technical skill than other fields of practice. Moreover, these areas (particularly specialties such as tax) tend to have lower associate-to-partner ratios. Consequently, associates in these areas are more closely supervised, thereby increasing the odds that mistakes will be detected.

Blacks appear to be underrepresented in these high-level corporate areas. In our survey of Harvard black alumni, only 32% (24% of the pre-1986 graduates) worked in corporate practice. Similarly, our review of the classes of 1981-1982 and 1987-1988 revealed a similar pattern: those in corporate practice accounted for 25% and 27% of the total number who were in elite firms. Of those who were in corporate practice, few worked in specialty departments such as tax. The distribution of black partners confirms this trend. Only 14% of black partners work in general corporate practice, and less than 11% specialize in technical fields such as banking (6%), bankruptcy (2%), and tax (1%).
Undoubtedly, there are many reasons why blacks do not go into these areas, ranging from a genuine lack of interest to the very real possibility that many black associates believe that specializing in other areas (particularly litigation) will improve their chances in the lateral job market. Nevertheless, just as the draconian consequences of sending a negative signal during the recruiting process can lead black students to avoid advanced corporate courses in law school, the problems associated with being a token in a particularly difficult area of practice is likely to produce a similar pattern of avoidance when blacks join firms.

Anecdotal evidence also suggests that black associates may, on average, be overly cautious when performing their work. Thus, those who study law firm interactions report that many black associates tend to speak less in meetings (particularly with clients), ask more clarifying questions when receiving work, are more likely to check (and recheck) assignments before handing them in, are more reluctant to disagree with partners or express criticism of their peers, and construe their assignments more narrowly than their white peers.

From a black associate's perspective, both of these risk-averse strategies are rational responses to his environment. Given the inherent subjectivity of “good judgment,” a risky action can be interpreted as either a sign of innovativeness and independence or a mark of stupidity and an inability to follow instructions. Since black associates have reason to fear that they are more likely to be branded with the negative description and that this characterization will be more difficult to shake, it is not surprising that they tend to be overly cautious in their choices.

Nevertheless, both of these risk-averse strategies reduce the gains (in terms of retention and promotion) that black associates can expect to receive from their work. Successfully completing “difficult” work assignments is the best way for an associate to signal her quality and therefore to demonstrate that she is worthy of training. Since partners are looking for associates who can work effectively with relatively little supervision, traits such as initiative, creativity, speed, and confidence are highly valued. The more risk-averse one is, however, the more difficult it is to signal that one has these qualities.

ii. High-Risk Strategies: The Litigation Trap

At the opposite extreme, a black associate may seek out demanding assignments in order to overcome the presumption that she is “only” average--or worse. For example, a black lawyer might volunteer to work with a particularly demanding partner or take on a large number of assignments. To the extent that a black associate successfully completes these projects, she has a better chance of signaling that she is a superstar and therefore worthy of training. The risks, however, are also high. If the project is particularly difficult or the partner especially demanding, the black associate who is in fact “average” has a greater chance of...
failing--and failing big.\textsuperscript{305} Similarly, the high effort strategy of taking on a large number of assignments can also fail if the projects suddenly become due at once.

Our research suggests that a large number of black associates are engaged, albeit unwittingly, in a particular variant of this strategy. Black associates are disproportionately concentrated in litigation departments. For example, 45\% of the respondents to our survey, including 52\% of the pre-1986 graduates, specialize in litigation.\textsuperscript{306} Our examination of the classes of 1981-1982 and 1987-1988 produced comparable numbers (50\% and 39\%, respectively).\textsuperscript{307} These data are consistent with the results of other studies.\textsuperscript{308} As Figures 4A-D indicate, these percentages are higher than the percentage of lawyers specializing in this area in all but the most litigation oriented firms.\textsuperscript{309}

*578 Just as with the shortage of blacks in high-level corporate areas of practice, many factors contribute to this over-concentration.\textsuperscript{310} One factor that is frequently overlooked, however, is that going into litigation is a plausible strategy for maximizing a black lawyer's career prospects. As an initial matter, litigation has been the most successful avenue to partnership for black lawyers. Fifty-six percent of the black partners at elite firms specialize in this area.\textsuperscript{311} Moreover, the fact that law schools tend to concentrate on teaching litigation related skills may make black lawyers feel better prepared to become litigators.\textsuperscript{312} To the extent that a black student seeks to acquire additional signals to overcome the presumption against average blacks, the ones most readily available (such as moot court, clerkships, and clinical placements) also tend to be connected to litigation. Finally, black associates might plausibly believe that litigation practice provides good opportunities for them to demonstrate their talents. Even the largest firms generally have a range of cases in their litigation departments, including some number of smaller cases that are being handled pro bono or at reduced rates as favors for important clients. Doing something visible in one of these cases might seem like a good way to get noticed.\textsuperscript{313}

In addition to these benefits to an associate's career in the firm, litigation may also appear to be the best way for black lawyers to develop marketable skills. Although many kinds of corporate work are handled exclusively by elite firms, litigators are needed in many different settings, including government, small firms, solo practice, and in-house legal departments. As we reported earlier, blacks are more likely to go into these areas when they leave corporate firms. Our survey indicates that for a substantial number of black associates, the possibility of acquiring marketable skills is an important reason for choosing litigation in the first instance.\textsuperscript{314}

Unfortunately, what look like advantages can turn out to have negative repercussions for a black associate's prospects at the firm. The lower levels of scrutiny in litigation increase the risk that an associate will fall through the cracks. On the typical case, there is a substantial amount of routine low visibility work. Because the teams are big, it is more difficult for partners to get any real sense of the quality of junior associates.\textsuperscript{315} Moreover, because clients tend to want “name” litigators arguing their cases, and because many of these
litigators are recruited laterally, litigation associates have less opportunity to develop their skills and signal their quality to partners. 316 These factors combine to make litigation one of the least likely routes to partnership for associates as a whole. 317 The prospects are worse for black associates, given the likelihood that certain clients will feel less comfortable entrusting their cases to a black lawyer. 318 Black women probably face even steeper odds. 319

Moreover, the pro bono and other small cases in which a black associate might be given major responsibility often do not generate the kind of positive feedback that might justify the risk and effort. Although many firms view pro bono projects as “training vehicles” for young lawyers, 320 this work is often not supervised closely by partners. Thus, even a good job frequently goes unnoticed. Should the case become a serious problem for the firm, however, it is the junior associate who is likely to be blamed. Moreover, as we indicated above, black lawyers who do significant amounts of pro bono work run the risk of being viewed as uninterested in the firm's paying clients, further reducing the probability that a partner will see the black associate as one worth training.

Finally, litigation is generally less stable than corporate work. Litigation is a very costly way for corporations to resolve their problems. Not surprisingly, corporate general counsel look for ways to reduce these expenses. When litigation projects end, the client is likely to go too (or at least to leave the litigation department and move to the corporate side). Moreover, although some kinds of litigation are repetitive (e.g., antitrust and securities) a good deal of the work done by junior associates involves mastering the facts of the case and doing research on fact-specific legal issues. Unlike mastery of the details of a particular kind of corporate transaction, this dispute-specific knowledge is less transferable to future cases. This makes it harder for a litigation associate to become expert in a particular substantive field and therefore to provide valuable services to the firm during lean economic times. 321

e. The Revolving Door

Given this dynamic between the structural features of elite firms and the strategic choices of black lawyers, it is not surprising that the turnover rate among these associates appears to be especially high. Because they are less likely to receive the Royal Jelly of good training in core areas of the firm's practice, black lawyers legitimately fear that they will become flatliners with no future at the firm. 322 As these lawyers increasingly focus on their lives after the firm, however, they simultaneously hasten their own departure. 323 Not only is there likely to be a divergence between what is likely to make a black lawyer more marketable outside the firm (e.g., litigation training) and what leads to success within the firm (e.g., working for partners in the core areas of firm growth), but by contracting the time frame within which they must decide whether to stay or go, black associates often forfeit the opportunity to be “discovered” by partners with an interest in the firm's productivity. In a forthcoming study of successful minority managers in corporations, David Thomas concludes that even those who ultimately make it into the top ranks do not have the same smooth
linear progression as their white peers. Instead, minority managers frequently suffer periods during which their careers stall, only to jump ahead when a senior manager notices their talents. This pattern of slow growth (and even periods of no progress) followed by relatively dramatic jumps in position is difficult enough in the general up-or-out world of elite law firms; it is virtually impossible in a world in which both firms and associates make important career decisions within the first one to two years.

There is, however, a way in which black lawyers have been able to replicate the success patterns Thomas outlines within the context of the current trend towards decreasing associate tenure. Ironically, it involves leaving the firm. A substantial percentage of all black partners in our data set worked in government (37%), in-house counsel's office (28%), and/or academia (11%) before becoming partners. Similarly, in our survey, all four black Harvard graduates who had become partners in major firms left their first firms and went into either government (3) or a small firm (1) before becoming partners. This suggests that one way for black lawyers to accumulate the kind of human capital and name recognition that law firms look for when making partners is by going outside the firm where they may have better opportunities to develop their talents. The continuing success of this strategy, however, depends upon the criteria that firms are likely to employ in making partnership decisions. This brings us to the problems encountered by black partners.

f. Unequal Partners

There are now a handful of black partners at elite firms. Although firms are quick to point to these modest gains as a sign of progress, the celebration is premature. In increasing numbers, black partners are doing the unthinkable--trading in their prestigious partnerships for a variety of other jobs ranging from in-house legal departments to partnerships in small minority firms. In this Section we argue that the three structural features of contemporary elite firms--high salaries, pyramiding, and tracking--are partly responsible for this attrition.

In the golden age, partnership in a major firm was the equivalent of academic tenure. Today, to keep their positions, partners must compete for both business and political allies. This competition takes place in two markets: outside the firm where individual partners seek to attract clients, and inside the firm where partners trade referrals and form political alliances. The structural characteristics outlined above make it more difficult for blacks to compete in both of these markets.

i. The External Market

Firms have always relied on partners to bring in business. In the golden age, however, most firms had room for partners who, although having few clients of their own, were excellent lawyers who “minded” the clients while the rainmakers were off making rain. With increasing leverage, higher associate salaries,
and the breakdown of long-term client relationships, most firms feel that they can no longer tolerate such “unproductive” partners. As a result, the command that every partner bring in a substantial amount of business is now being rigidly enforced. 332

This structure disadvantages black partners in two ways. First, black partners are less likely to have personal contacts with corporate executives able to bring in matters of the size generally handled by corporate law firms. 333 Second, these lawyers will also have greater difficulty securing clients through the competitive marketplace. Just as law firms use high wages as a means of inducing effort without incurring substantial monitoring costs, corporate clients are prepared (albeit within increasingly strict limits) to pay high legal fees to insure that they get the best legal representation possible. Since even the most vigilant corporate general counsel will have difficulty assessing the quality of the services she receives, she has an incentive to hire firms--and increasingly, individual lawyers--with substantial reputations in the area in question. 334 Although there will be some black superstar partners who meet this criterion, the average black partner is less likely to be considered the obvious and unassailable choice for receiving sensitive outside work.

ii. The Internal Market: Getting the Franchise

Black partners also compete for work from the firm's existing clients, including referrals from partners who receive inquiries about work outside of the contacted lawyer's area of specialization. Once again, this market is highly competitive, with many more qualified applicants than business to be divided. For the reasons suggested above, black partners are likely to have a more difficult time competing for this work than their white peers. Internal referrals are premised on notions of reciprocity, trust, and politics. If black partners have less access to business, a referring partner may prefer a white partner better able to return the favor in the future. If black lawyers have had fewer mentors within the partnership ranks as associates, they are less likely to be chosen as the person entrusted with one of the firm's major clients when they become partners. Finally, if black partners are not seen as powerful actors inside the firm, senior partners will be less likely to turn over clients for fear that these black lawyers will not be able to support them when the senior lawyers are less productive and influential.

*584 Given these pressures, black partners are likely to continue to exit elite law firms in search of more stable options. Moreover, as we have previously noted, this attrition is likely to affect associate integration as well, since black partners will often spur firms to hire more black associates and act as mentors and role models for blacks that are hired. The net result, therefore, is that firms are hemorrhaging black lawyers from both ends. Unless this dynamic is reversed, the meager progress that has been made over the last several years is likely to come to a halt, or even be reversed. In the next Part, we examine what might be done to stop this trend.
IV

THE SOLUTION(S)?: FINDING EFFICIENT RESPONSES TO EFFICIENT DISCRIMINATION

Advocates of greater workplace diversity frequently point to projections indicating, in the words of Labor Secretary Robert Reich, that “women and minority men will make up 62% of the work force by the year 2005.” These advocates hope such statistics convey an important message to corporate leaders (quoting Reich again): Maintaining a “glass ceiling” that inhibits the progress of women and minorities is simply “not good for business.” Indeed, diversity advocates frequently assert that “most business leaders” are aware of the economic value of a diversified work force and therefore recognize that “they simply cannot afford to rely exclusively on white males for positions of leadership.”

In this respect, diversity proponents bear a striking resemblance to the conservative economists whose opposition to government intervention in the market they frequently condemn: both assume that firms have an economic interest in eradicating employment practices that exclude women and minorities from the work force.

In an important sense, we share this assumption. Elite law firms who use high wages, tournaments, and tracking will often lose the services of blacks who either are or could become outstanding lawyers. Unfortunately, our analysis of the reasons why firms utilize these strategies leads us to be more pessimistic than Secretary Reich about whether elite firms will inevitably conclude that altering these practices in ways that might improve the employment prospects of black lawyers is so clearly “good for business.” So long as firms continue to generate both a small number of high quality partners and a steady supply of hardworking associates, they have little economic reason to alter the way they structure their business simply to change the demographic composition of tournament winners.

Those who wish to break this cycle must therefore alter the incentives that firms presently face if they wish to convince these institutions that abandoning their currently efficient employment practices is “good for business.” Proposals to alter these incentives can usefully be divided into five categories: litigation under Title VII or other similar anti-discrimination statutes; race-neutral institutional reforms, such as formal training or mentoring programs; education initiatives such as diversity training; demand-side initiatives designed to generate corporate business for black lawyers; and supply-side initiatives, including such traditional affirmative action remedies as goals and timetables for hiring and promoting black lawyers. Assessing the overall merits of each of these proposals is beyond the scope of this Article. Instead, we describe the implications of our analysis for each initiative.

A. Anti-discrimination Law

Many commentators have documented the difficulty of applying Title VII and other similar anti-discrimination laws to high-level jobs in which quality judgments are inherently subjective. Neither disparate treatment nor disparate impact analysis is well suited to rooting out the kind of adverse employment practices we describe. For the most part, the lawyers who prefer average whites to average blacks have no discriminatory animus as that term has been traditionally defined. Indeed, other things being equal, they would probably prefer to hire and/or promote superstar blacks over average whites. Nor are the institutional practices that tend to keep blacks off the training track likely to be condemned under a disparate impact analysis, given that changing these practices would involve a fundamental restructuring of the way corporate firms do business. Not surprisingly, when they have been presented with claims of this type, courts have generally refused to second guess the subjective decision making of partners in the absence of clear evidence of discrimination.
Moreover, even if one could design a Title VII remedy that could reach this conduct, it is not clear that legal intervention of this kind would be either appropriate or effective. The requirement that law firms justify objectively every choice between candidates when one is black and the other white would place a substantial burden on firm decision makers.\footnote{342} In fact, it is difficult to state exactly how that burden should be discharged. At the hiring stage, the inherently subjective and provisional character of judgments about the quality of a given candidate would make it difficult for firms to develop a set of objective criteria capable of credibly determining which candidates are in fact better qualified. Indeed, as we have argued, the fact that firms place substantial weight on objective signals such as law school status and grades in the visible part of the recruiting process already disadvantages black candidates. Precisely because they are objective, these criteria send the reassuring--but largely false--message that those who are being selected are demonstrably better than those who are not. Getting firms to recognize that these signals are only loosely correlated with either valuable substantive job skills or the personal qualities that are likely to make a candidate an effective lawyer is therefore an essential step in creating greater opportunities for black candidates. If successful, however, this project is likely to make the recruiting process even more subjective as firms weigh a broader range of information (for example, leadership in community organizations or the ability to overcome obstacles) when evaluating candidates.

Of course, to the extent that firms employ objective criteria at the visible stage, anti-discrimination law will help to ensure that they do so fairly. However, if we also make the plausible assumption that most white law students do not want to be associated with a law firm that “visibly” discriminates by preferring white candidates with lower credentials to blacks whose signals are objectively higher, this is also the kind of discrimination that is most likely to be disciplined by the market.\footnote{343}

Applying objective standards to the partnership decision would be even more complex. By the time a black associate comes up for partner, she may very well be less “qualified” precisely because she has not received the Royal Jelly that would allow her to develop these qualifications. In order to be effective, therefore, the requirement that firms objectively justify choices between average whites and average blacks would have to be applied to every staffing and mentoring decision made throughout the firm. Even if such a requirement were not per se unadministrable, which it probably is, it would undermine the kind of collegiality and informal working relationships that are essential elements of the practice of law.

Nevertheless, it is important that law firms do not feel that they are immune from anti-discrimination laws. The threat of liability undoubtedly encourages firms to pay more attention to their employment practices than they otherwise would.\footnote{344} This vigilance may help to prevent some of the more egregious instances of discriminatory conduct. In addition, discrimination lawsuits can sometimes make “visible” the largely “invisible” process by which firms choose partners.

Consider the recent case involving Lawrence Mungin, a black Harvard Law School graduate who successfully sued the Washington, D.C. office of Katten, Muchin & Zavis for “constructively discharging” him on the basis of his race.\footnote{345} At the visible level, the firm's decision not to consider Mungin for partnership seems unassailable. When Mungin requested that he be evaluated along with the other Katten, Muchin associates in his class, he was working primarily on projects that would normally have been handled by second and third year associates. Not surprisingly, Mungin's managing partner informed him that it would be impossible to make him a partner based on his current performance.\footnote{346}

Mungin's lawsuit revealed, however, that a number of actions by the firm plausibly contributed to Mungin's inability to get the kind of work that would have allowed him to demonstrate his partnership potential. According to press accounts, when Katten's Washington office lost most of its bankruptcy business (Mungin's area of specialization) he
was told he would receive work from the firm's bankruptcy lawyers in Chicago. The work never arrived. Nor was Mungin included in departmental meetings in either Washington or Chicago. Nor was he given a performance review during his first eighteen months with the firm, even though Katten, Muchin's policy was to review every associate twice a year. Instead, in words attributed to Mungin's supervising partner, he simply “fell through the cracks,” never becoming successfully integrated into the firm's practice or culture.

Whether all of this constitutes proof of discriminatory intent within the meaning of the anti-discrimination laws is subject to dispute. The firm clearly went out of its way to recruit Mungin and chose not to lay him off (as it did other associates) when the Washington office lost most of its bankruptcy business. Nevertheless, by shining light on the normally invisible world of law firm staffing and work assignment decisions, Mungin's case may encourage firms to pay more attention to whether black associates are getting access to challenging and productive work.

*589 There may, however, be other consequences. As Mungin's case suggests, the threat of litigation probably decreases a black associate's chances of being fired. Firms face both defense and reputation costs from being accused of discrimination even if the suit is ultimately unsuccessful. These costs, in addition to the firm's desire to have at least one senior black associate “visible” to the outside world (even if he was “invisible” to the firm's partners when it came to assigning work) may have been what stopped Katten from firing Mungin when a white seventh year associate who could only be billed out at second or third year rates probably would have been let go.

The fact that anti-discrimination law decreases a black lawyer's chances of being fired will have mixed effects on her opportunities at the firm. Given this phenomenon, firms are less likely to hire average black associates, and/or more inclined to flatline those who are hired, thereby inducing them to leave “voluntarily.” From the black associate's perspective, however, a reduction in the probability of being fired may help to counteract the sub-optimally high fear levels discussed in Part III.

For all of these reasons, it is not surprising that anti-discrimination cases are rarely brought in this area and even more rarely won. Moreover, even if courts were more hospitable to such lawsuits, the practical consequences of applying anti-discrimination law in this area might be less than the proponents of this strategy tend to believe. Although increasing Title VII liability may make firms more conscious of these issues, experience with other employers highlights how firms can structure their internal practices so as to blunt the effects of antidiscrimination law. We return to this issue below.

**B. Institutional Reform**

In Part II, we argued that the key difference between succeeding at a corporate firm and flatlining is training. Formal training and mentoring programs therefore seem to be the ideal solution to the institutional dynamics we describe. Moreover, since these programs are available to every associate, they sidestep many of the problems connected with race-conscious remedies such as affirmative action. There are, however, limitations on what these programs are likely to accomplish.

The widespread rush to institute formal training programs confirms two key elements of our model: that entering associates know almost nothing about the practice of law, and that it is no longer cost effective for firms to train the vast majority of associates by giving them meaningful access to good work and supervision.
firms announce their new training efforts, it is clear that those wishing to succeed must still gain access to the traditional training track. Although lectures, simulations, and drafting exercises can help associates develop technical skills, they cannot teach judgment. Nor can they build the kind of mentoring relationships that are crucial to an associate's success at the firm. Nor will they provide client contact. Put simply, what associates need is good work that will help them to develop their legal and personal skills. Formal training programs cannot substitute for this kind of real experience.

More importantly, from the perspective of integrating corporate firms, there is no guarantee that formal training programs will work to ameliorate the problems faced by black associates. Ironically, the fact that the best formal training programs are in litigation may further lure black associates into investing in this risky (from the perspective of success in the firm) area of practice. Moreover, these programs say nothing about who will actually get the type of work associates need to succeed. If all associates go through formal training, partners must still choose which ones to put on the kind of important assignments that develop an associate's skills. While it is possible that a black associate can use formal training exercises as a platform to promote her skills, these programs are often too brief and ineffective to disrupt the work assignment patterns outlined in Part II.

Formal assignment systems could breaking these patterns. As firms have become more bureaucratized, they have attempted to rationalize their assignment and evaluation systems. Although the firm's main concern is the efficient allocation of resources, formal assignment and evaluation systems can also provide associates with some protections against the vagaries of the intra-firm assignment market.

These formal systems, however, often do not work well. Powerful partners routinely bypass the system to grab superstar associates, leaving the assigning partner (who often is not a powerful partner) to divide routine or unimportant projects among the unlucky average associates who remain in the pool. Similarly, formal evaluation systems, while potentially providing valuable information and feedback, can also act as a diversion that allows partners to refrain from giving real feedback in the course of the working relationship. We suspect that this phenomenon particularly disadvantages blacks, since white partners may either feel less comfortable giving genuine negative feedback to black associates or, conversely, more comfortable allowing their background pre-conceptions to guide their assessments when talking to their peers.

For all these reasons, formal training, assignment, and evaluation systems are unlikely to rectify the most important problems facing black associates. This is simply another example of the painful truth that it often takes race-conscious remedies to rectify the continuing deleterious effects of America's history of racial oppression. The last three responses all proceed along these lines.

C. Diversity Training

A growing number of elite law firms have hired diversity consultants. These consultants come into a law firm and talk to associates and partners about coping with a diverse workforce. Diversity consultants attempt to educate lawyers about their colleagues, by (a) alerting them to differing and sometimes incorrect perceptions they may have about each other, (b) pointing out the possibility that some minority lawyers believe that they are being discriminated against, and (c) illustrating how stereotypes can often result in discriminatory behavior. One diversity consultant we heard speak boiled this all down to “communication.”
At first, these efforts seem ideally suited to counteracting the problems we describe. In Part III, we argued that the preference for average whites over average blacks is due in part to the fact that white partners often hold stereotypical beliefs about black lawyers that lead them to be *593 unduly pessimistic about their future performance. Moreover, since we also claim that such beliefs are often unconscious, a program designed to highlight these attitudes and their effects should help firms to understand the obstacles that impede black progress.

Whether diversity training actually fulfills this promise, however, depends upon both its content and the process by which it is conducted. Anecdotal reports suggest that diversity consultants tend to concentrate on exposing how racist comments, unintended slights, and cliquish social patterns marginalize black lawyers. Although undoubtedly important, our analysis suggests that this is not where the most pressing problems lie. For example, less than one third of respondents to our survey indicated that what they considered to be explicit racist comments were made in their presence, and of those who heard such remarks, less than 20% listed the incident as a major reason why they left their firm. A higher percentage of respondents (56%) stated that they did not feel welcome in the informal social networks within the firms. Nevertheless, almost half of these lawyers (46%) did not consider this a major factor in deciding whether to leave the firm. When combined with the 44% of respondents who did feel welcome, the percentage for whom social relations are a serious problem drops to less than one third.

Moreover, there is a long history of firms and courts subtly transforming informal grievance procedures, such as diversity training, into mechanisms for suppressing conflict. For example, affirmative action officers inside corporations often do not provide workers with important procedural protections and are frequently biased in favor of management. Nevertheless, courts are increasingly willing to give the determinations of these officers preclusive (or nearly preclusive) effect in litigation and to penalize plaintiffs who do not utilize these “voluntary” *594 mechanisms. Notwithstanding the good intentions of its proponents, diversity training may suffer the same fate. Diversity consultants are hired by the firm and deliver their reports and recommendations directly to firm managers. Training sessions are often conducted with both partners and associates present. When consultants interview associates privately, their comments about the firm are frequently reported (generally “anonymously”) to partners. Not surprisingly, many black associates and partners are reluctant to discuss their true feelings under these conditions. To the extent that firm leaders hear no serious complaints, they may falsely conclude that racial issues are not a serious problem in their firm. Moreover, if courts conclude that a diversity consultant's report is discoverable in a subsequent discrimination lawsuit, firms may structure their use of consultants so as to avoid producing negative information about firm practices—or perhaps to provide affirmative evidence of their lack of discriminatory intent. Given the development with respect to affirmative action offices, courts appear eager to accept this kind of evidence.

Finally, diversity training is likely to be most effective if it concentrates on structural impediments to black advancement such as the ones we have described. Changing these structures, however, is difficult. Supplying firms with information about how their practices affect the career prospects of black lawyers can provide an important impetus for change. Nevertheless, firms need more than “communication” to convince them to change practices that have proved profitable for those lucky and skillful enough to find themselves at the top of the pyramid. Demand creation initiatives are designed to provide a profit-maximizing reason for change.

*595 D. Stimulating Demand

In 1988, the American Bar Association initiated the Minority Counsel Demonstration Program. The Program's goal is straightforward: “to create opportunity for minority attorneys to become fully integrated in the profession.” In order
to accomplish this goal, the Program encourages participating corporations to retain minority firms and to ensure that minority partners in majority firms do some of their legal work. By stimulating demand for the services of minority lawyers at large law firms, the Program seeks, \textit{inter alia}, “to increase the number of minorities they recruit, hire, retain and promote to partnership.”

The ABA's program, and other similar initiatives around the country, expressly target one of the most promising avenues for getting firms to care about diversity--the bottom line. If black lawyers have unique access to particular kinds of lucrative corporate business, firms that fail to recruit and retain these lawyers will suffer a competitive loss. The essence of this strategy is, therefore, to turn every black lawyer into a superstar whose rainmaking potential provides firms with a rational reason for preferring these lawyers to average whites.

By almost any measure, the ABA's Program is a success. In its first three years, 133 corporations, 39 major law firms, and 21 minority-owned firms participated. All together, minority attorneys in both large firms and minority-owned firms collected more than $100 million in fees from corporate participants. Moreover, the number of minority associates at the fifteen majority firms filing reports in 1991 increased by over 50% during the three years that the program was in operation, and the number of minority partners grew by 57%. Although the Project does not break these results down by race, the numbers are impressive.

*Nevertheless, there is reason to be skeptical about the ability of this or any other similar program to affect substantially the opportunities of the majority of blacks in corporate firms. The Program's mission statement provides an important clue to its limitations. In setting out its goals, the Commission states that one of the major obstacles “impeding the full participation by minorities in the profession is the \textit{perception} that corporate users of legal services do not desire that minorities handle their legal affairs.” The Program seeks to counter this perception by encouraging corporate counsel to write letters to their outside law firms making it clear that they would like minority lawyers to work on their matters and requesting information about whether the firm is complying with its requests. This framework, however, assumes that corporate leaders already recognize that diversity is “good for business.” Although perceptions are important as we have already noted, the presumption that this is the primary problem faced by black lawyers is unwarranted.

The claim that diversity is good for a corporation's bottom line has substantial force in certain sectors of the economy. For example, companies that sell consumer products, trade internationally, or (because of affirmative action guidelines) do substantial business with the government have long recognized the importance of having a workforce that reflects the needs and concerns of their customer base. It is therefore not surprising, as we noted in Part I, that blacks have made substantial inroads in heavily regulated industries such as communications and insurance, that Asian-Americans are well represented in firms that do business in Asia, or that Proctor & Gamble (which markets household products) has one of the best records of hiring and promoting women.

Just because a corporation sells its products to a diverse population of customers, however, does not necessarily mean that it will want its lawyers to be diverse as well. When AT&T is considering a new joint venture agreement, for example, it wants lawyers who know how to operate in the complex world of strategic planning and corporate finance, a world that is still overwhelmingly white and male. The fact that the lawyer who has the skills and connections to operate effectively in this world may not “reflect” or “understand” the concerns of the company's customer base is likely to be of little concern to company officials. Given this dynamic, it is not surprising that most corporate participants in the ABA
Program do little more than send the same letter every year “requesting information” and dole out a few small projects that are often below the pricing structure for most major firms.\footnote{396}

Advocates of demand creation strategies argue that this dynamic is changing. In support of this claim, they point to two developments in the corporate marketplace. First, advocates note that an increasing number of positions inside corporate counsel offices are being filled by women and minorities. These new purchasing agents, the advocates contend, will be more receptive to hiring minority lawyers than were their predecessors.\footnote{397} Second, they argue that growing black political power on the federal, state, and local level will increase demand for black lawyers.

There is merit in both of these claims.\footnote{398} Anecdotal evidence suggests that black in-house lawyers are more likely to take an active interest in ensuring that work is fairly distributed to black lawyers inside firms.\footnote{399} Similarly, black political clout has frequently been translated into opportunities for black lawyers.\footnote{400} While neither development is likely to change the demand for black corporate lawyers overnight,\footnote{401} both demonstrate that as more companies have a specific reason for hiring black lawyers, demand will increase.

This evidence, however, also underscores the connection between integration and the demand for minority lawyers. Initiatives in the last category aim to achieve this goal directly.

**E. Affirmative Action**

Throughout much of this analysis, we have assumed that firms make no special efforts to hire and promote black lawyers. We did this for two reasons. The first is methodological. As we indicated in Part II, many commentators claim that affirmative efforts are unnecessary since market forces will drive out policies and practices that disadvantage blacks. Our analysis demonstrates that this claim is unlikely to be true for elite law firms.

The second reason for bracketing affirmative efforts in the earlier analysis is empirical. Although virtually every firm claims to be making special efforts to recruit and promote blacks, it is unclear how often these programs actually reach beyond competing for black superstars. Certainly the numbers do not suggest that firms are engaged in a wholesale effort to hire average blacks over average whites.\footnote{402}

Nevertheless, at least since the 1970s, many elite firms have hired black lawyers whose rankable signals were lower than the average credentials of the firm's white associates. Indeed, many firm leaders claim that they always hire black candidates when their signals are roughly comparable to those of their white peers. Moreover, the new task forces established in the late 1980s to promote diversity in law firms have made traditional affirmative action remedies such as goals and timetables for hiring, and sometimes promoting, minority lawyers a central feature of their agendas.\footnote{403} These programs appear to have increased the presence of black lawyers in the elite firms.\footnote{404}

Despite this success, affirmative action programs in this area are in danger. Affirmative action is now a controversial topic in the United States.\footnote{405} From a doctrinal standpoint, recent cases cast doubt on the legality of voluntary affirmative action programs that make choices between equally qualified applicants solely on the basis of race.\footnote{406} In addition, critics on both the right and the left raise questions about the fairness, efficiency, and efficacy of making employment decisions on the basis of race.\footnote{407}
We do not propose to resolve this complex dispute. Our analysis, however, does shed light on three of the most common objections raised to voluntary affirmative action programs in elite institutions: that affirmative action lowers standards, that it reduces worker effort, and that it stigmatizes its intended beneficiaries. Although these arguments may have force in other contexts, they do not provide persuasive grounds for abandoning the kind of affirmative action programs in use at elite firms.

*600  1. Standards

Affirmative action opponents frequently claim that such policies inevitably reduce standards. The argument sounds in efficiency. If employers hire workers with lower signals, the argument goes, the quality of the final product will suffer. Even when taken on its own terms, the standards critique misconstrues the dynamic of the law firm recruiting process. In Part III, we argued that stereotypes and unconscious bias lead firms to favor whites over blacks with functionally equal qualifications and to discount the signals of black superstars. To the extent goals and timetables or other affirmative recruiting measures give firms a reason to detect and prevent practices that favor whites, and therefore increase the incentives of black lawyers, these measures will in fact serve rather than weaken the goal of “standards.”

Moreover, the standards critique rests on an unrealistic view about both the content of the signals used by elite firms and their relationship to job related skills. Even if we confine ourselves to the criteria that seem to play the largest role in the recruiting process--law school status and grades--the standards critique ignores the tremendous growth in the size and quality of the law school applicant pool over the last few decades. Compared to the “golden age” when most of today's law firm partners went to law school, competition for law school places--particularly at elite schools--has become much more intense. Given this change, the claim that hiring a black student who has survived this competition and secured a place at a good law school lowers the quality of a firm that has many partners whose own academic performance while in college might not have been sufficient to have earned them a place in that same school today is flatly inconsistent with the timeless value that those who endorse these kinds of arguments generally give to standards.

*601  This last point underscores the loose connection between signals such as grades and law school status and the skills that go into making a good lawyer. The argument that hiring blacks with lower credentials will hurt productivity assumes that there is a direct relationship between these signals and quality. As we argued above, however, no such direct relationship exists. As a result, it is not surprising that firms consistently demonstrate by their actions that they are uninterested in making the kind of refined judgments about skills upon which the standards critique ultimately rests. Not only do firms fail to seek out information about a candidate's skill (as opposed to her signal) level during the recruiting process, but when it has been economically profitable, they have shown themselves to be willing to jettison standards arguments altogether. Consider the explosion in the use of paralegals at large firms. In the “golden age” firms maintained that keeping track of documents, drafting letters and motions, and routine legal research were the “practice of law” and therefore could only be handled by highly trained (and expensive) associates. Today, much of this work is done by people who have no legal education whatsoever.
Once again, the point is not that judgments about skill are impossible or that the traditional standards are meaningless. As we have argued, firms have an incentive to seek out superstars, no matter how imperfectly measured, and to protect themselves against unacceptable workers. In the middle, however, they are (at least on efficiency grounds) indifferent since they know that differences among candidates in this range are not worth the trouble of investigating. Given what we know about the work these associates will do when they arrive at the firm, this middle/average range is much broader and much less differentiated than the standards critique would lead one to believe. So long as the black lawyers being hired under an affirmative action program come from this middle/average range, any claim that the quality of the firm’s work will diminish, lacks credibility.

Indeed, goals and timetables like the ones established by the San Francisco bar may help firms to avoid any potential reputational loss from being seen by their clients or competitors as “lowering standards” to recruit blacks. By creating a visible competition for blacks (among others), these programs establish a new signal by which firms can be ranked alongside their competitors. Paradoxically, even in a world where some find the standards critique persuasive, the firm that hires the most black lawyers ought to be the one whose reputation among these skeptics suffers the least. Thus, firms such as San Francisco’s Morrison & Foerster and New York’s Cleary, Gottlieb, Steen & Hamilton (two firms that have dramatically increased their minority hiring) can credibly claim that they are among the “best” firms for black lawyers. This, in turn, should signal to their clients, their competitors, and the general population of law students, that the black lawyers hired by these firms are likely to be the best in the available pool. Moreover, in addition to solving the firms’ collective action problem regarding the standards issue, these policies also signal to black law students that they have a realistic chance of being hired and promoted by an elite firm. This highlights the issue of investment.

2. Effort: Lowering the Price of the Ticket to the Tournament

Opponents of affirmative action assert that it reduces socially beneficial incentives for both black and white employees. Specifically, the argument is that because employees have to exert lower amounts of effort to obtain jobs or promotions, they have reduced incentives to work hard and invest in human capital. This argument is implausible in the elite law firm context. Indeed, our analysis suggests that the opposite is more likely to be true. At present, black lawyers at elite firms have very little chance of becoming partners. As a result, the average black associate has inadequate incentives to invest in human capital strategies that might lead to success at the firm. If affirmative action provides the average black associate, who today faces a low probability of success, with a somewhat greater probability, this can only increase her incentive to work. Moreover, none of the programs we are discussing would in any way guarantee that any particular black lawyer will be hired or become a partner. Since black lawyers still know that they face countless barriers to success even with affirmative action, they have plenty of incentive to continue to work hard and invest in human capital.

*603 To the extent that our conservative colleagues perceive the problem with affirmative action to be that it reduces incentives to invest in human capital (specifically skills), our model speaks to their concerns.
In the sectors of the economy where signals are relatively uncorrelated with skill, that worry should be put to rest. Associates are choosing some combination of signals and skills to help them both get a ticket to the tournament (where the price of the ticket is the level of signals the firm requires) and then have a chance of winning the tournament (where initial skills are necessary to help one be chosen by a partner for the training track). If as a result of affirmative action, blacks have to spend less of their scarce resources on purchasing the ticket, they can use that time to acquire skills to win the tournament. This result, as conservatives should agree, is a benefit both to individual blacks and to society as a whole.

Arguments about reduced incentives for whites are similarly unconvincing. Here, the claim is that if whites see their chances of success reduced as a result of affirmative effort for blacks, they will no longer have as much of an incentive to exert effort. Given the institutional dynamics inside elite law firms, this theoretical possibility is unlikely to develop into a serious problem. In light of the enormous rewards associated with corporate law practice, it is not plausible that whites will forego the opportunity to compete for these jobs simply because a firm has committed to hiring blacks to fill ten, twelve, or even fifteen percent of its needs. From the perspective of average whites, this reduction in their chances of receiving a lucrative offer from an elite firm is minimal in light of the high odds facing average white candidates in the absence of affirmative action. Indeed, to the extent that affirmative action has any effect, it may increase the effort exerted by whites to secure one of these coveted places. In addition, to the extent that hiring blacks with fewer traditional signals convinces firms to abandon or relax these hiring standards for all candidates, some average whites whom firms might not otherwise consider will have a better chance of being hired. Finally, once they join the firm, white associates will be motivated by the same combination of fear and future rewards that currently produces high effort levels among all associates. If a firm detects a white associate shirking, the fear of an anti-discrimination lawsuit will not keep it from firing her and hiring an easily available replacement.

3. Stigma

Evidence that affirmative action does not lower standards or reduce effort would be cold comfort if these programs actually ended up hurting their intended beneficiaries. Those who press the stigma argument make just this claim. The logic is straightforward and compelling. If it is widely known that at least some significant number of blacks have benefited from affirmative action, employers will rationally discount any particular black candidate's credentials by the amount they think she has benefited. Given our analysis, this is a serious concern. In a world where decisions on the assignment of projects are made on low amounts of information, the perception that blacks on average have lower skills will hurt them. The danger is that in deciding which projects to give to white associates and which ones to give to black associates, partners will choose to give routine projects to the black associates and analytical/training related ones to the white associates. This, as we have documented, results in blacks perceiving less of a future at the firm and adopting strategies that end up justifying the partners' decisions in not choosing them.
In short, affirmative action could end up exacerbating the problems black associates are already facing at elite firms.  

*605 The solution, however, is not to abandon voluntary affirmative action in hiring, but to extend it to decisions regarding the choice of associates for projects and other internal firm decisions. Designing affirmative measures that will ensure that black associates have meaningful access to the training track is a complex task. Goals and timetables for promotion as well as hiring are a good start, but standing alone, they are unlikely to change the way that partners assign work or decide whom to mentor. If firms are truly serious about improving the prospects of their black lawyers, they must implement policies that change the incentives of partners. For example, companies such as Proctor and Gamble and AT&T rate their managers in terms of their success in promoting the firm's diversity goals and weigh these ratings in setting compensation and determining promotions. If elite firms were to institute policies of this kind, partners would have concrete incentives to insure that blacks make it onto the training track.

CONCLUSION: CHOOSING A NEW PATH

We return, therefore, to where we began. In Part II, we rejected the traditional economic assumption that firms that maintain employment policies that disadvantage black workers will necessarily be driven from the market. We argued that this optimistic projection is unlikely to be true in the context of elite law firms. These organizations have developed a series of interconnected institutional practices to reduce monitoring costs that insulate them from the consequences of permitting practices that disproportionately disadvantage black lawyers. In Part IV, we argued that there are measures that firms could take to alter this state of affairs. The question remains, however, why should firms adopt these corrective measures? From the outset, we have insisted that analyzing the institutional structure of firms and the incentives that those structures create for black lawyers is a crucial part of any comprehensive explanation of the problem of law firm integration. But if high wages, pyramiding, and tracking are “efficient,” what incentive could firms possibly have to change these practices? More to the point, by linking diversity and efficiency in this way, have we simply given firm leaders a potent excuse for rationalizing the absence of black lawyers as simply an unfortunate but inevitable consequence of their Darwinian struggle for survival?

*606 Although these arguments might seem powerful from the perspective of traditional law and economics theory, we nevertheless believe that they trade on false (or at least highly exaggerated) claims about what it means to say that a particular institutional structure is “efficient.” Standard law and economics theory often speaks as if the institutions we see are the inevitable result of an evolutionary process in which inefficient structures and practices are continually challenged and undermined through the process of competition by those that are more efficient. As a result, proponents of this evolutionary model tend to assume that the institutions that we see must be efficient, since if they were not, they could not have survived. The analogy is to biology, where, it is assumed, nature selects for those adaptations most suited to survival.

As Professor Mark Roe has recently argued, however, this evolutionary model is not only bad law, it is bad biology. Even in the natural world, the process of evolutionary development is far more complex and haphazard than the linear model endorsed by many law and economics theorists. Thus, species tend to develop through a series of punctuated equilibria rather than on some preordained path towards optimality. According to this view, species are formed quickly
in response to environmental factors and thereafter remain relatively stable, not adapting to incremental changes that do not threaten species viability. Only when there is a crisis will this state of affairs be disturbed, in which case the species will either be destroyed or a minority with a particularly adaptive trait will survive and once again congeal, freezing both its “efficient” and “inefficient” traits until the next crisis. 426

Moreover, as Roe argues, evolutionary thinking in law and economics must be modified further to account for additional aspects of the development of social institutions that have nothing to do with whether a firm's particular structural features are efficient in terms of the contemporary environment. All social institutions develop at specific moments in time and in response to particular conditions. This creates two problems for traditional evolutionary models. First, conditions existing at the time an institution is formed will influence the functioning of that institution far into the future, often in unintended *607 and unexpected ways. 427 Second, once an institution starts down a particular path, the costs of changing structures and practices that may have been well adapted to the prior conditions will often seem too great even in cases where everyone agrees that a new path is better suited for the current reality. 428 Worse yet, in those instances in which the path that has been chosen has become entrenched, institutional actors may not even be able to imagine alternative paths that might be more efficient.

Collectively, these three truths about the development of social institutions should make us hesitate before declaring that the policies and practices that we see today are not only the most, but perhaps even the only, “efficient” adaptation to contemporary conditions. 429 Although institutions that have survived and prospered in a reasonably competitive market cannot be too inefficient, it is also likely that they will incorporate pockets of inefficiency that have been carried along with more efficient practices, as well as vestigial structures and ways of thinking that are largely the result of historical accidents and are no longer particularly well suited to today's (let alone tomorrow's) reality.

The story we have told about the institutional practices of elite law firms fits the pattern Roe describes. In Part II, we argued that high wages, pyramiding, and tracking are rational responses to the problem of monitoring lawyer quality. These practices, and more importantly the manner in which these institutional structures operate to disadvantage black lawyers, are, however, the product of the historical evolution of law firms and this country's long and tragic history with “the problem of the color line.” 430

*608 Elite law firms developed their basic character in the latter years of the nineteenth century. Following Cravath's example, firms began recruiting “the best young men” from the country's “best” law schools to work as salaried associates for a period of time at the end of which they would either become partners or leave the firm. 431 This model was well adapted to the circumstances that confronted Cravath and other similar firms at the turn of the century. 432 Given the scarcity of high quality elite firms, long-term institutional relationships between firms and clients, and the knowledge asymmetry between lawyers and clients during this period, firms could pass the cost of training young lawyers on to their clients. 433 Moreover, the social practices and mores of the time made it acceptable, if not necessarily optimal, for firms to confine their recruiting efforts to a narrow range of white male Protestant graduates from a few law schools. The gap, in terms of the quality of the students and faculty, between elite schools such as Harvard and the majority of regional and local schools was probably large. At the same time, the homogeneity of the professional and business class in the United States during this period increased the economic importance of social capital (such as family background and Protestant sensibilities) relative to job skills. Finally, when it came time for those who did not make partner to leave, there were plenty of jobs with similar wages (in “lesser” firms, in government, with clients, etc.) for them to choose from.

Virtually all of these underlying conditions have changed during the last twenty years. Predictably, elite law firms have attempted to adapt to these new realities. These adaptations, however, do not deviate substantially from the path laid
down by Cravath more than a century ago. Thus, high wages, pyramiding, and tracking are all ways for firms to respond to changes in the market for clients and labor within the context of an institutional structure that is still characterized by a division of labor between “partners” and “associates,” an “up-or-out” system of associate career development, and a subtle, but nevertheless powerful, presumption in favor of white male graduates of elite law schools. Although some firms have instituted policies that deviate from each of these traditional practices, the original path continues to shape the debate over the future of elite firms.

*609 There is, however, no reason to believe that these traditional institutional practices are more efficient than others that might have been developed to respond to the problems elite firms presently face. Accounting firms, for example, confront many of the same difficulties as law firms. Yet these organizations have developed in ways that differ materially from the practices of elite law firms. The large accounting firms typically have many more categories of employees, a substantially longer “partnership” track, and no (or very relaxed) “up-or-out” policies. 434 Similarly, when we look overseas, we see that the American model of elite law practice is still more the exception than the rule. In most of Europe, for example, even the best law firms remain small, pay relatively low wages, and are characterized by intense training and supervision. More importantly, although there are a growing number of European “mega-firms,” frequently modeled on their American counterparts, even these institutions are likely to develop institutional structures and practices that differ substantially from their U.S. counterparts. 435 For example, many European firms do not bill for their services by the hour, instead relying on a combination of retainers, flat fees tied to the value of the project, and incentive compensation formulas. They also tend to have both more categories of employees and lock-step compensation systems for partners. 436

The fact that accounting firms and European law firms have developed differing, but no less successful solutions to the monitoring problems inherent in delivering professional services casts doubt on the claim that the institutional practices of elite firms constitute the sole efficient response to these questions. 437 This institutional comparison is particularly significant in light of the fact that elite firms increasingly compete with accounting firms and European mega-firms in a broad range of corporate transactions. Indeed, according to some knowledgeable observers, it is precisely because elite law firms are locked into a path that leads them to offer increasingly specialized legal services at ever higher prices that these institutions will eventually lose out to international accounting firms such as Arthur Anderson in the competition to be the premier providers of legal and business services to corporate clients. 438

America's long history of discrimination against blacks exercises a similar hold on the problems we discuss. As we argued in Part III, this history is partly responsible for the fact that high wages, pyramiding, and tracking are likely to have an especially adverse effect on the career opportunities of black lawyers. Slavery set this nation on a path in which it was necessary to portray blacks as mentally, emotionally, and spiritually incapable of self-determination. Almost a generation after the last de jure remnants of this vicious system were put to rest, the stereotypes and predispositions that can be traced back to this ignoble past continue to shape race relations in this country. One of the legacies of this history is that discussions about race inevitably proceed from a set of premises that make it difficult for many Americans to recognize forms of racial disadvantage other than the kind of intentional racism that characterized this nation's past.

There can be little doubt that America would be better off if it could escape the grip of this racialized past. Although institutions such as elite law firms can adapt to these inefficiencies by instituting policies that insulate them from the economic consequences of discrimination, the long-term effects on American society of failing to integrate “high-level” jobs cannot possibly be good. As we acknowledged in Part I, many Americans place a positive value on diversity, preferring to live and work in spaces where they can interact with blacks. Even those who do not would arguably benefit from the diminution of social conflict that arguably would flow from spreading social resources more equitably.
Although deviating from the path of the past is never easy, the turbulent nature of both the market for corporate legal services and the current debate over the continuing significance of race paradoxically provides us with an opportunity to reassess and reshape our traditional understandings. Modern evolutionary theory suggests that it is in times of crisis that species are most likely to alter their basic developmental path. There can be little doubt that elite corporate firms are in such a period. Numerous reports document that lawyers “in every type of practice and at every level of seniority, are increasingly dissatisfied with their professional lives.”

A good deal of this dissatisfaction can be traced to the very structural mechanisms-- high wages, pyramiding, and tracking--that firms have developed to cope with the rising pressures of global competition. In other words, as we have emphasized from the outset, most white lawyers are also adversely affected by the current structure of corporate practice.

To address these problems, commentators and firm leaders have begun to advocate a fundamental restructuring in elite firm practice. Reforms currently under discussion include replacing hourly billing with fixed or incentive-based compensation systems, instituting “Total Quality Management” (TQM) programs designed to foster better client services through communication and teamwork, and replacing partnership (and the current “up-or-out” system) with a more rationalized management structure under the control of professional administrators. If adopted, these structural reforms would alter the institutional dynamic we describe. In a world of fixed fees, flatlining would become a cost to the firm as opposed to a potential source of profit. TQM’s emphasis on teamwork and localized decision making would make it more difficult to leave black associates out of developmental relationships while at the same time giving firms an incentive to recruit lawyers with a broader range of interpersonal skills than those reflected in such traditional signals as elite school status and high grades. Finally, replacing overworked partners with professional administrators who have the authority and experience to implement long-range management policies would help to ensure that formal work assignment and mentoring policies are applied fairly and uniformly throughout the firm.

The explosion in information technology opens up additional possibilities. The path that has led to the current pyramidal structure that characterizes today's elite corporate firms can be traced to the fact that at the turn of the century, most of the clients of these firms were themselves centralized, hierarchical, and vertically integrated. Today, as a result of the information revolution, these clients are more likely to be characterized by a flat, decentralized management structure that incorporates telecommuting employees, a global distribution system, and multiple interlocking networks and alliances. At the same time, elite firms now have access to an unprecedented array of technology to assist them in the performance of their work. The combination of these forces creates the potential for new “efficient” firm structures. Thus, some have argued that lawyers can now form “virtual law firms” in which attorneys using state-of-the-art technology form loose relationships and alliances with other attorneys to perform particular client projects or to open up new areas of business. Others assert that twenty-first century firms are more likely to resemble “diamonds” rather than pyramids, with a large number of experienced middle-level lawyers doing the bulk of the work. Another possibility is that firms will move towards an “hourglass” structure in which technology would provide senior lawyers direct access to information, thereby reducing the need for middle-level lawyers to process and summarize data while increasing the need for junior lawyers and other paraprofessionals who would put the raw information in a form that senior lawyers could use. All of these alternative structures would substantially alter the recruitment and retention issues we described in Part III.

The current “crisis” in legal education also has the potential to transform key elements of the dynamic we described in Part III. In recent years, the bar has expressed increasing dissatisfaction with the perceived disjunction between what is taught in the academy and the skills that lawyers need to survive in the “real world.” One way that law schools might respond to this pressure is by creating new courses that allow students to integrate experiential and theoretical
knowledge. These new curricular offerings would provide students with additional avenues to demonstrate their competence, first to their professors, and second (through either the grading process or the generation of tangible products) to employers. In addition, to the extent that these new courses are more closely tied to actual lawyering skills, employers have an incentive to value them as more than simply a “signal” of basic intelligence or competency.

*613 Finally, even the much publicized crisis in American race relations might provide the shock that allows this nation to develop new and better pathways between blacks and whites. A series of recent events, many played out in the legal arena, make it painfully clear that blacks and whites frequently see the world through different eyes. Although divisive, these events also focus attention on some of the reasons why blacks and whites perceive the world so differently. In the hands of thoughtful observers, the insights gleaned from this attention can open up new ways of understanding what is wrong with American society that cut across the traditional racial divide. As Jennifer Hochschild has recently noted, African Americans are often “bellwethers” of trends likely to spread throughout the wider community. The fact that firms are hemorrhaging black lawyers from both the bottom (in the form of talented blacks who either do not get hired or find themselves flatlined) and the top (in the defection of black partners for other opportunities in the public and private sectors) is therefore an important warning sign for the profession as a whole.

Of course, there is no guarantee that any of these “crises” will produce positive effects. Firms that adopt more rationalized management structures may simply ghettoize black lawyers in relatively low status positions. Reform movements in legal education may further entrench existing hierarchies by insuring that blacks who attend lower status law schools receive an education that tracks them into lower paying legal jobs. And, as is all too apparent from much of the current debate over affirmative action, the crisis in American race relations is just as likely to produce obfuscation and demagoguery as it is to illuminate shared problems and open pathways towards new solutions.

Nevertheless, one final aspect of the legal profession's past makes us cautiously optimistic about the ability to make progress on these difficult issues. Few would dispute that the campaign to end legal segregation culminating in Brown v. Board of Education is the legal profession's finest accomplishment—just as the profession's complicity in the regime that this campaign demolished was its darkest hour. The fact that the country's most prestigious law firms are nearly as segregated today as the entire legal system was forty years ago stands as a constant rebuke to the profession's attempt to claim the noble side of this heritage. At the same time, initiatives such as the Minority Counsel Demonstration Program and the efforts by state and local bar associations to promote workplace diversity demonstrate that the ideals captured by Brown can still energize lawyers to work for institutional change. As the legal profession confronts the uncertainties of the next millennium, it is this energy that holds the best hope for charting a new path that connects the profession's future to the best of its past.

Footnotes

*614 today as the entire legal system was forty years ago stands as a constant rebuke to the profession's attempt to claim the noble side of this heritage.
Berkeley, Boalt Hall School of Law, Morrison & Foerster, and the Robert D. and Leslie Kay Raven Trust for their generous support of the lecture series at Boalt Hall where these ideas were first presented. Richard Kilbride, Yan Senouf, and Maura Kelley provided invaluable assistance. This article is dedicated to the loving memory of Professor John R. Wilkins, who was a member of the Boalt Hall faculty from 1964 until his death in 1976, and to Albert Maule, whose keen insights about the problems faced by blacks in corporate firms advanced our thinking immeasurably.

1  See infra Part I.A.


3  See, e.g., WILLIAM J. WILSON, THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS (1978) (arguing that poor blacks have benefited less than middle class blacks from the civil rights movement).

4  We borrow the phrase from Professor Bartholet, who was the first in the legal literature to identify this problem. See Elizabeth Bartholet, Application of Title VII to Jobs in High Places, 95 HARV. L. REV. 945 (1982). For an extensive evaluation of this phenomenon, see FED. GLASS CEILING COMM'N, U.S. DEPT. OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S CAPITAL (1995) [hereinafter GLASS CEILING REPORT].


6  See, e.g., Knapp & Grover, supra note 5, at 303.

7  In this respect, our account is connected to recent “structuralist” theories of workplace discrimination. See, e.g., ROSEBETH M. KANTER, MEN AND WOMEN OF THE CORPORATION (1977); Martha Chamallas, Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences, 92 MICH. L. REV. 2370 (1994); Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 HARV. L. REV. 1749 (1990). As will emerge below, however, there are important differences between these approaches and the account that we defend here. For an insightful discussion and critique of the limits of traditional structural accounts in this field, see Elizabeth Chambliss, Organizational Determinants of Law Firm Integration (AM.U. L.REV., forthcoming 1996). Our thinking on these issues has been greatly influenced by Professor Chambliss' work.


11 It is important to make clear from the outset that we do not claim that these practices only disadvantage blacks. Quite to the contrary; many whites are also disadvantaged by this system. Our point simply is that blacks as a group are more likely to bear the brunt of these practices for the reasons discussed in Part III.

12 Two additional preliminary points are in order. First, by limiting our focus to the problems of black lawyers, our analysis departs from the growing tendency among both academics and practitioners to treat these issues as merely a subset of the problems faced by all “minority” lawyers, or, even more generally, as part of an investigation of “minorities and women” in the profession. See, e.g., Carrie Menkel-Meadow, Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organizing of Lawyering, 44 CASE W. RES. L. REV. 621, 638 (1994) (discussing whether “women or other previously excluded groups” are likely to make unique contributions to the profession because of their status as “outsiders”); Rita H. Jensen, Minorities Didn't Share in Firm Growth, NAT'L L.J., Feb. 19, 1990, at 1; Frederick H. Bates & Gregory C. Whitehead, Do Something Different: Making a Commitment to Minority Lawyers, A.B.A. J., Oct. 1990, at 78. Although there are important similarities between the experiences of black lawyers and others who historically have been denied full participation in the profession, important differences nevertheless remain--differences that are likely to affect black advancement in the law and elsewhere. See, e.g., ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 5-28 (1992) (discussing the persistence and pervasiveness of racial stereotypes--particularly those concerning intellectual inferiority--directed against blacks as opposed to members of other groups). Empirical studies of the legal profession that disaggregate data for women and various minority lawyers confirm this supposition. See, e.g., Chambliss, supra note 7 (discussing several significant differences among women, blacks, Hispanics, and Asians); 1 REPORT OF THE NEW YORK STATE JUDICIAL COMM’N ON MINORITIES 74-113 (1991) [hereinafter N.Y. REPORT]. Nevertheless, because much of the data discussing diversity issues in this area is not disaggregated by race or gender, we are sometimes forced to rely on statistics about “minorities” as a surrogate for information about blacks. See, e.g., infra notes 19, 391 and accompanying text. This aggregation makes it particularly difficult to investigate the unique experiences of black women. Second, by focusing on the problems of blacks in corporate firms, we do not mean to convey the impression that these institutions are either typical of, or more important than, other settings in which black lawyers work. See BARBARA A. CURRAN & CLARA N. CARSON, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1988, at 21 (1991) (noting that firms of more than 100 lawyers comprise less than 10% of the profession); Wilkins, Two Paths, supra note 8, at 1991-92 (noting that corporate law may not be the best arena for black lawyers to pursue social justice). Instead, we simply assert that, given that these institutions sit atop the economic and status hierarchy of the profession, society ought to care whether blacks are systematically less likely to succeed in these environments than whites. ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATIONAL MAN? 45 (1969).


14 Ann Davis, Big Jump in Minority Associates, But..., NAT'L L.J., April 29, 1996, at 1; Claudia MacLachlan & Rita H. Jensen, Progress Glacial for Women, Minorities, NAT'L L.J., Jan. 27, 1992, at 1, 31 (reporting that in 1991, there were 1,311 black lawyers of 287 were partners).

15 On the growth of large law firms, and possible reasons for this growth, see infra note 109 and accompanying text. For a comparison of the progress of women and blacks, see Jensen, supra note 12, at 1 (comparing limited progress by minorities with substantial progress by women).

16 Davis, supra note 15, at 1; see Robert L. Nelson, The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society, 44 CASE W. RES. L. REV. 345, 379 (1994) (reporting that among 250 largest law firms only 2.2% of associates and 0.9% of partners were black).

17 In 1981, the percentages for black associates and partners were 2.3% and 0.47% respectively; in 1989, 2.22% and 0.91%. Jensen, supra note 12, at 28. In 1991, the corresponding percentages were 2.0 and 1.1. MacLachlan & Jensen, supra note 15, at 31. Elizabeth Chambliss reports comparable numbers for her sample of large law firms between 1980 and 1990. See Chambliss,
supra note 7, at 76. Given the increase in the size and number of corporate firms during this period, one might have expected more than a proportionate increase in the number of black lawyers, particularly given their stark underrepresentation in the past. See Knapp & Grover, supra note 6, at 302-03. As we argue below, the percentage increase between 1991 and 1995 is most likely due to the adoption of goals and timetables for minority hiring and promotion in several cities. See infra notes 32-33, 403-404 and accompanying text.

Harvey Berkman, Government Tops Firms in Building Diversity, CHI. LAW., July 1993, at 1. This is one of many examples where the data on minorities is not disaggregated by race.

Id.

See GLASS CEILING REPORT, supra note 4, at 77.

Id. at 79. Blacks in the insurance and business services industries have also reached executive or managerial levels in greater numbers than their counterparts in corporate law practice (in insurance, 6.2% total, 3.2% for black men and 3.0% for black women; in business services, 4.0% total, 3.5% for black men and 0.5% for black women). Id.

See Ken Myers, Statistics Show Minorities Have Bigger Share of Lower Enrollment, NAT'L L.J., Mar. 22, 1993, at 4 (reporting that blacks constitute 6.7% of law students); see also Lewis A. Kornhauser & Richard L. Revesz, Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt, 70 N.Y.U.L. REV. 829, 862-63 (1995) (reporting that “in 1991 African-Americans and Latinos were still only 4.3% of associates at elite law firms, even though they comprised 8.7% of individuals graduating from law school between 1984 and 1990.... [T]he underrepresentation was even starker among partners.”) (footnotes omitted).

See MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRMS 24 (1991); ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 131-33 (1988). Needless to say, exactly which law schools qualify for this designation is a matter of some dispute--particularly among law schools themselves. Although no list is therefore uncontroversial, for purposes of this study, we consider the following eleven law schools to be elite: Harvard, Yale, Stanford, Boalt Hall (University of California at Berkeley), University of Michigan, New York University, University of Virginia, University of Chicago, University of Pennsylvania, Columbia, and Northwestern. Cf. Chambliss, supra note 7, at 58 (using a list of thirteen schools).

GALANTER & PALAY, supra note 24, at 24.

See infra notes 172-174 and accompanying text.

NELSON, supra note 24, at 131. For example, Chambliss reports that minority students made up 12% to 18% of classes graduating from thirteen elite law schools between 1980 and 1990. Chambliss, supra note 7, at 80. Neither Nelson nor Chambliss breaks this information down by race or provides data on class rank or other academic credentials. Nevertheless, it is clear many of these students are black. For example, the percentage of blacks at Harvard Law School increased from 7.9% in 1980 to 10.5% today. Leigh Ann Mort and Milton Moskowitz, The Best Law Schools for Blacks, J. OF BLACKS IN HIGHER EDUCATION, Summer 1994, at 58.

NELSON, supra note 24, at 133.

Id.

Howard I. Bernstein, Does a Hiring Crisis Threaten the Profession?, NAT'L L.J., Dec. 28, 1987-Jan. 4, 1988, at 20 (reporting that approximately 3,040 students graduate in the top halves of their classes from top-twenty law schools each year, while in 1987, 4,807 associates began work at the top 250 law firms).

See, e.g., Knapp & Grover, supra note 6, at 305-06.
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32 See Bates & Whitehead, supra note 12, at 78 (“The ABA Commission on Opportunities for Minorities in the Profession . . . has indicted the legal community for its failure to give minority lawyers significant roles in large firms.”); AMERICAN BAR ASSOCIATION COMMISSION ON MINORITIES IN THE PROFESSION, FIVE YEAR REPORT (1991); see also Wilma J.W. Pinder, When Will Black Women Lawyers Slay the Two-Headed Dragon: Racism and Gender Bias?, 20 PEPP. L. REV. 1053, 1060 & n.16 (1993).


34 On the general weakness of the existing data on the actual practices of corporate firms, see infra notes 164-167 and accompanying text.

35 See, e.g., DINESH D’SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY 431-76 (1995) (arguing that IQ differences, whether caused by genetics or long-term environmental factors, are an important part of the reason that blacks do not succeed in certain settings); RICHARD HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994) (arguing that differences in IQ largely account for the economic and educational differentials between blacks and whites); Linda S. Gottfredson, Societal Consequences of the g Factor in Employment, 29 J. VOCATIONAL BEHAV. 379, 398-406 (1986) (arguing that in light of IQ differences between blacks and whites, blacks are overrepresented in most well-paying and prestigious positions).

36 See, e.g., GLENN C. LOURY, ONE BY ONE FROM THE INSIDE OUT: ESSAYS AND REVIEWS ON RACE AND RESPONSIBILITY IN AMERICA 97 (1995) (arguing that income gaps between blacks and whites are now largely a matter of “supply side” factors such as “poorer quality and quantity of education and work experience” for black workers). Loury goes on to attribute these “supply side” differences to factors that are similar to those we discuss below. See infra notes 87-89 and accompanying text.


39 See, e.g., N.Y. REPORT, supra note 12, at 83 (suggesting that interviewers assume that blacks are not interested in private or business practice and prefer to work in government or other public service); S.F. REPORT, supra note 33, at 17 (“There was some sentiment expressed by a few managing partners, although not stated by any minority interviewee, that minorities don’t like litigation or prefer to work in pro bono offices or other employment where their work is more in sync with what managers perceive to be their personal politics.”)

40 See Nelson, supra note 17, at 379 (reporting that one study found black lawyers were more than twice as likely as white lawyers to work for the government); J. Clay Smith, Career Patterns of Black Lawyers in the 1980’s, 7 BLACK L.J. 75, 76 (1981) (estimating that in 1980, 32% of black attorneys were in government practice).

41 See Wilkins, Social Engineers, supra note 8 (describing how Thurgood Marshall’s legacy influences the current generation of black law students and lawyers).
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See Kornhauser & Revesz, supra note 23, at 931-34 (finding that African American and Latino graduates are underrepresented in non-elite for-profit jobs and overrepresented both in elite for-profit jobs and in not-for-profit jobs).

See Schultz, supra note 7.

See, e.g., GERTRUDE EZORSKY, RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION 9-10 (1991) (arguing that when blacks are excluded from employment because they disproportionately do not have the specific training or experience necessary to perform the job, the resulting impact “is appropriately called racist impact”).

See, e.g, JAMES M. JONES, PREJUDICE AND RACISM 131 (1972) (discussing how individual intent contributes to institutional racism).


See SNIDERMAN & PIAZZA, supra note 46, at 51 (reporting that “notwithstanding the role of societal institutions like formal education in reducing the prevalence of negative racial stereotypes, negative stereotypes of blacks character are widely diffused through contemporary American society”). We provide support for Sniderman and Piazza’s conclusions in the context of elite law firms in Part III.

See HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA (1985) (reporting that virtually 100% of whites say that blacks and whites should have an equal chance to compete for jobs); cf. Michael Selmi, Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate, 42 UCLA L. REV. 1251, 1283-84 (1995) (“When the discrimination is subtle or unconscious, even a non-discriminating employer may not be able to identify and correct the resulting inefficiencies.... [S]tereotypes stem from the inability of individuals to internalize the social norms to which they openly ascribe so that while individuals proclaim they are not prejudiced their actions often indicate otherwise.”).

See D’SOUZA, supra note 35, at 291 (claiming that “racial preferences are now widespread in private sector job hiring”); Edward A. Adams, Survey Shows Diversity at Firms Still Lagging, N.Y. L.J., Mar. 29, 1995, at 1, 4.

It is possible, of course, to classify all of these complex attitudes, dispositions, and beliefs as “racist.” We reject this characterization on the ground that it conflates cause and effect in a manner that devalues the moral approbation that ought to accompany this charge. Racism is, and ought to remain, a serious charge applicable to those who consciously or unconsciously seek to devalue blacks because of the color of their skin. It should not be confused with the fact that in light of this country's
racist past, virtually all Americans view each other through the prism of stereotypes and predispositions that are deeply connected to race. As we argue, these stereotypes and predispositions disadvantage certain blacks in particular circumstances. We therefore focus attention on this historical legacy by identifying how these racialized attitudes intersect with institutional structures and practices in ways that reinforce existing inequalities. It is precisely because we believe that the majority of those who are participating in these structures are not racists that we believe that identifying this institutional dynamic might induce firms to change their behavior.

We are indebted to our friend and mentor Steve Shavell for emphasizing the need to frame our arguments in the language of those likely to be skeptical about both our description of the problem and the range of potential solutions. We hasten to add that by thanking Steve we do not mean to imply that he has been converted to our point of view.

See, e.g., SNIDERMAN & PIAZZA, supra note 46, at 41 (reporting that nearly 50% of whites surveyed agreed with the proposition that “if blacks would only try harder, they would be just as well off as whites”).

See, e.g., D’SOUZA, supra note 35. See generally, RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (arguing that anti-discrimination laws are both unfair and inefficient).

Indeed, by characterizing institutions and individuals as “rational” we risk alienating many of those who might otherwise be sympathetic to our basic conclusions but who are suspicious of “rational actor” models. Thus, a subsidiary aim of our analysis is to convince progressives that discussions of rationality and the market in the context of the microanalysis of institutions need not deny the importance of culture, ideology, discourse, or emotion. See Rubin, supra note 10. We sketch out this synthesis below. See infra notes 64-69 and accompanying text. We are grateful to Reva Siegel for pressing us on this point.


See, e.g., IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 157-59 (1995) (describing the benefits that whites receive simply by not having to think of themselves in racialized terms); LEE SIGELMAN & SUSAN WELCH, BLACK AMERICANS' VIEWS OF RACIAL INEQUALITY: THE DREAM DEFERRED 134 (1991) (arguing that many “blacks and whites actually define affirmative action differently”).

For examples of arguments in favor of affirmative action laws, see PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 103 (1991) (“‘Quotas,' 'preference,' 'reverse discrimination,' 'experienced,' and 'qualified' are con words .... As a society, we have yet to look carefully beneath them to see where the seeds of prejudice are truly hidden.”); Alan Farnham, Holding Firm on Affirmative Action, FORTUNE, Mar. 13, 1989, at 87. For examples of arguments against affirmative action laws, see Stuart Taylor, Jr., Clinton and the Quota Game: Round One, LEG. TIMES, Dec. 28, 1992, at 23 (discussing firms labeled as discriminators, whose “only sin is hiring the best employees they can find”); D’SOUZA, supra note 35, at 545 (arguing that affirmative action laws perpetuate a system of race-consciousness).

Notwithstanding this assumption, we do not rule out the possibility that individual whites within corporate firms might make special efforts to recruit or retain black lawyers. As with our treatment of discrimination in general, we simply assume that the attitudes of white corporate lawyers mirror the attitudes about race in American society as a whole.

The most famous such defense was offered by Erwin Smigel. See SMIGEL, supra note 13; Erwin Smigel, The Impact of Recruitment on the Organization of the Large Law Firm, 25 AM. SOC. REV. 56 (1960). Smigel's work was in the tradition of structural/functionalists, such as Talcott Parsons, who believed that institutional structures are driven by the functions they were designed to implement. See Robert L. Nelson & David M. Trubek, Arenas of Professionalism: The Professional Ideologies of Lawyers in Context, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 177 (Robert L. Nelson et al. eds., 1992).
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See Rubin, supra note 10, at 1424 (arguing for a new methodology that would “merge the 'hard' social science of economics with the 'soft' social sciences of organization theory and political analysis”).

See HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR xxiv-xxxvii (2d ed. 1961). For a discussion of the importance of this concept, see Rubin, supra note 10, at 1414, 1426-27.

For example, in their study of the Chicago bar, Heinz and Laumann report both that lawyers value collective projects to improve the status of the profession and that the perceived status of a given legal field affects a lawyer's decision to practice in that area. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 247 (1982) (reporting that 87.2% of the Chicago lawyers responding to a survey rated enhancing the status of the profession as very important); id. at 135-36 (noting that the prestige attached to a given field is likely to affect lawyer career choices). Moreover, “the income that a lawyer receives from his practice is not significantly associated with the prestige of his field.” Id. at 134; see also JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 93-96 (1976) (arguing that nineteenth-century lawyers sought to exclude recent immigrants from the bar primarily for status reasons rather than because allowing these new entrants into the profession would harm the economic interests of the elite bar). See also McAdams, supra note 47, (arguing that discrimination is a means for the discriminating group to produce status for its members). But see Richard A. Epstein, The Status Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake, 108 HARV. L. REV. 1085 (1995) (responding to McAdams).

See NELSON, supra note 24, at 4, 10 (arguing that professional norms of independence and collegiality inhibit the development of rational bureaucratic decision making). Lincoln Caplan chronicles an example that demonstrates both the power and the limits of professional ideology when it conflicts with economic gain. According to, Caplan, many established New York law firms were slow to get into the takeover business in part because the partners who ran these firms considered hostile bids unethical and the lawyers who pursued them unprofessional. See LINCOLN CAPLAN, SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE 52 (1993). As the established firms watched Skadden grow rich and powerful from this work, however, scruples faded, and the large firms rushed in to take advantage of this lucrative new area of practice. See id. at 207-27. Significantly, as cognitive dissonance theory predicts, these firms reinterpreted their understanding of professionalism to accommodate this new form of practice. See id. at 216. For a discussion of how lawyers reshape ideas about professionalism to accommodate changes in the economics of practice, see AUSTIN SARAT, IDEOLOGIES OF PROFESSIONALISM, CONFLICT AND CHANGE (1992).
In this respect, our analysis differs from those who assert that because racism is often “unconscious” (meaning that actors are unaware of the fact that they are influenced by racial stereotypes) it cannot be corrected by market forces. See Selmi, supra note 49, at 1288-89 (suggesting that market forces will work less efficiently when unconscious racism leads an “employer [to] forego[] profits unconsciously”). Professor Selmi's article builds on the work of Professor Charles Lawrence. See Lawrence, supra note 47, (proposing a test for judicial recognition of race-based behavior that considers unconscious racism). While we agree with Selmi that unconscious stereotyping often plays a central role in the differential treatment of black and white applicants, and that these beliefs are often resistant to falsification precisely because they are unconscious, actors who do not hold consciously racist beliefs still have an incentive to respond to evidence tending to show that their preconceptions are false when it is in their self-interest to do so. The problem, is that in many circumstances “market experience [will] not teach sellers that their preconceptions are false” because the actors have structured their activity in such a way as to insulate themselves from the economic consequences of their discriminatory conduct. Ian Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 HARV. L. REV. 817, 850 (1991).

By “discrimination” we simply mean a regime in which employers, for whatever reason, prefer average whites to average blacks. In keeping with the assumption outlined above, we do not assume that this phenomenon is the result of employers holding racist views about blacks (as we have defined that term). See supra note 51.

This theory was first developed by Gary Becker in the 1950s. See BECKER, supra note 41, at 40-43.

See Charny & Gulati, supra note 9, at 4.

Id.


By “unemployed” we simply mean that there are workers who are willing to work for the high salaries being offered even if they currently have other, lower-paying jobs.

See Charny & Gulati, supra note 9.

No firm will be able to avoid direct monitoring altogether, since without it employees would face no risk that their shirking will be detected. At best, therefore, these alternative strategies only supplement direct enforcement. See id. at, 16 n.52.

Id. at 15-16. Higher wages also attract a certain number of unqualified applicants. However, since even qualified applicants face long odds of actually securing these coveted positions (a product of the high wage exerting downward pressure on demand), unqualified applicants will find it relatively inefficient to spend much time seeking high wage jobs.

This should also reduce costs associated with turnover since workers are less likely to leave these high paying, and therefore scarce, jobs voluntarily.

See Charny and Gulati, at 12-13. Firms can attempt to avoid or reduce this effect by paying some workers more than others or by signaling that they offer workers additional benefits (such as working conditions, promotions, status) that more than offset the decrease in salary. There are, however, barriers to implementing both of these strategies. In order to pay differential
wages, firms must be able reliably to distinguish good workers from bad ones. When quality assessments are subjective, such distinctions will always be expensive (for the same reasons that monitoring is expensive) and may, for reasons we develop in our account of the large law firm, be impossible. Moreover, the more arbitrary these judgments seem, the more pay differences run the risk of decreasing employee morale. Finally, just as employees will have a difficult time assessing the fairness of case-by-case wage differentials, they will also be suspicious of promises of better working conditions, promotion rates, or other non-monetary benefits. In each of these areas, firms have an incentive (albeit tempered by reputational concerns) to promise more than they deliver or to act opportunistically after the employee has committed to the firm.


83 For example, in a world where firms only use direct monitoring to induce effort, employees have little incentive to perform above whatever minimum level the firm establishes for “good” work. In a firm that employs a tournament to save on monitoring costs, even “good” work may go unnoticed. Consequently, if getting noticed is a necessary condition for winning the tournament, employees have an incentive to do better than good work.

84 As we explain below, this is not the only incentive for firms to create a pyramidal structure. See infra Part II.B.2.b.

85 See Charney and Gulati, supra note 9, at 14-17.

86 See id. at 18. As the text implies, firms will suffer both productivity and competitive losses if they hire average whites over superstar blacks. This simple economic reality helps account for the widely held belief that blacks with outstanding credentials receive many offers from elite employers in business and the professions. For reasons that we set out below, however, the fact that a black superstar gets hired does not mean that he or she will be accorded the same opportunities and perquisites that white superstars receive. This, in turn, helps to explain why black superstars win tournaments in smaller numbers than their white counterparts. See infra Part III.B.

87 See id. at 19-24. Once again, we stress that blacks are not the only ones likely to choose one of these strategies. Because average whites also have a difficult time securing jobs in firms that employ high wages and tournaments to reduce monitoring costs, they too have an incentive to overinvest in the signals necessary to obtain the job (as opposed to actual job skills) and to pursue the kind of low investment or high investment strategies described in the text. Nevertheless, since average blacks face the additional barriers described above, we should expect that they will be even more likely to follow one of these paths--and to do so in a manner that exaggerates the dangers involved--than their white peers. Of course, in those situations where certain whites also face additional barriers, (for example, women, openly gay whites, or whites from lower socio-economic backgrounds), we might see similar skewing effects. Given our skepticism about whether the experiences of the members of one disadvantaged group are automatically transferable to other disadvantaged groups, we venture no opinion about whether the skewing effect would in fact be the same.

88 Andrew Weiss describes this “sorting process” as follows: “In sorting models, schooling is correlated with differences among workers that were present before the schooling choices were made; firms make inferences about these productivity differences from schooling choices, and students respond to this inference process by going to school longer.” Andrew Weiss, Human Capital vs. Signaling Explanations of Wages, 9 J. ECON. PERSP. 133, 134 (1995).

89 See Charney and Gulati, supra note 9, at 23.


91 See ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 3 (1993) (describing “judgment” as the core of the lawyer-statesman ideal of professional practice). Indeed, for many, this
inevitable element of discretionary judgment is a defining feature of professionalism generally. See, e.g., AMERICAN BAR
of professionalism as, inter alia, involving a practice that “requires substantial intellectual training and the use of complex judgments”).

One of us has written about this subject extensively. See David B. Wilkins, Who Should Regulate Lawyers?, 105 HARV.
L. REV. 799, 853-73 (1992) (discussing the misuse of arguments about “independent judgment” in the debate over self-
regulation); David B. Wilkins, Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics,
108 HARV. L. REV 458, 468-472 (1994) (discussing how claims that lawyers are especially gifted at making certain kinds
of judgments have been used to justify lawyer paternalism).

See KRONMAN, supra note 91, at 2 (arguing that an outstanding lawyer is “a person of good judgment, and not just an
expert in the law”); CAPLAN, supra note 67, at 3 (reporting that Skadden founder and mega-dealmaker Joe Flom’s partners
are most impressed by “the power of his brain and by his large quota of the vague but bankable resource that lawyers call
good judgment”); Angela P. Harris & Marjorie M. Shultz, “Another Critique of Pure Reason’: Toward Civic Virtue in Legal

See Gilson & Mnookin, Coming of Age, supra note 63, at 572 (arguing that “subjective personal characteristics—for example,
cooperativeness, maturity, the ability to gain respect of existing clients and to recruit new ones—traditionally have been
important to the partnership decision”); Mary Ann Galante, Firms Finding More Value in Marketing, NAT'L L.J., Nov. 18,
1985, at 28-29 (arguing that successful lawyers must learn to deal effectively with the media and public relations personnel).

indeterminacy to discretionary judgment, see William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083
(1988).

See generally CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 76 (1986) (noting that lawyers seek to distinguish
the practice of law from other forms of moral political and economic argument as a way of enhancing their own power);
Deborah L. Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice
Prohibitions, 34 STAN. L. REV. 1 (1981) (arguing that claims about the inherent distinctiveness of the practice of law are
used to support restrictive unauthorized practice rules).

See TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, SECTION OF LEGAL
EDUCATION AND ADMISSIONS TO THE BAR, AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND
PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (Robert MacCräte ed., 1992) [hereinafter
MACCRATE REPORT]. See also David Luban & Michael Millemann, Good Judgment: Ethics Teaching in Dark Times, 9
GEO. J. LEGAL ETHICS 31 (1995) (arguing that the kind of judgment that lawyers need to cultivate is best taught through
trial and error and by imitation).

As Michael Selmi demonstrates, even tests that are aimed precisely at predicting future performance (which law school grades
are not) are often unreliable due to underinclusiveness (the test's failure to capture all of the relevant criteria responsible
for success at the subsequent task), overinclusiveness (testing for qualities such as risk taking that are unrelated to future
performance), and measurement errors (individuals will score differently on the same test if taken at different times). See Selmi,
supra note 49, at 1261-76. As a result, most employment tests explain less than 15% of the variance in future performance. The
Law School Admissions Test (LSAT), for example, explains only about 10% of the variance in first-year grades among test-
takers (its intended target). See id. at 1263-64. There is little reason to expect that law school grades, which are not specifically
designed to measure future performance as a lawyer, would do any better.

Gilson & Mnookin, *Coming of Age*, supra note 63, at 572 n.16.

See James B. Rebitzer & Lowell J. Taylor, *Efficiency Wages and Employment Rents: The Employer-Size Wage Effect in the Job Market for Lawyers*, 13 J. LAB. ECON. 678, 690 (1995) (reporting that in their analysis of partner income, variables corresponding to law school prestige, law review membership, and top law school grades “are not statistically significant at the 5% level”); see also Lugo, *supra* note 56, at 624 (claiming that many law firm partners were neither former law review members nor top percentage graduates).

This is particularly true with respect to those personal qualities that are not strongly correlated with success in law school. See Brendan O'Flaherty & Aloysius Siow, *Up-or-Out Rules in the Market for Lawyers*, 13 J. LAB. ECON. 709, 712 & n.10 (1995) (noting that firms do not consider a potential associate's ability to generate business, get along with colleagues, and supervise employees because “it is probably difficult to distinguish between new law school graduates on the basis of these skills”).

See RICHARD N. FEFERMAN, *BUILDING YOUR FIRM WITH ASSOCIATES: A GUIDE FOR HIRING AND MANAGING NEW ATTORNEYS* 55-56 (1988) (acknowledging that time spent training associates is generally not billable to clients).

This is not to suggest, of course, that results have no probative value or that a pattern of results (e.g., a lawyer who loses every case) might not be even more probative.

Thus, a recent commentator's claim that “[t]he view that attorneys are difficult to monitor breaks down under closer analysis” is only half right. See Kevin A. Kordana, Note, *Law Firms and Associate Careers: Tournament Theory Versus the Production-Imperative Model*, 104 YALE L.J. 1907, 1914 (1995). Kordana correctly observes that firms keep track of the time that an attorney spends on a particular matter by monitoring the lawyer's billable hours. *Id.* at 1914-15. Moreover, as we explain below, firms can also structure their work practices to ensure that senior lawyers gain a certain amount of the information they need to measure lawyer quality in the normal course of doing their work (i.e., by requiring senior lawyers to review the work of junior lawyers). Where Kordana errs is in assuming that these sources of information provide an accurate measure of lawyer quality. See *id.* at 1915-16. While billable hours may be a reasonable measure of lawyer effort (although rampant reports of fraudulent billing practices by both junior and senior lawyers cast doubt upon even this limited claim), they are a very crude measure of the quality of that effort. As Gilson and Mnookin argue: Shirking involves more than simply putting in too few hours. In this respect, the shortcoming of a time-keeping system is the same as ... with any productivity formula: It is merely an imperfect proxy for what is really sought to be measured--effectiveness of legal work.... There is an enormous difference between the performance of a lawyer who is simply putting in his time and that of a lawyer who is truly motivated to produce.


Kordana errs once again when he asserts that “monitoring the quality of [an associate’s] output is not usually a cost to the firm” because clients pay partners to review associates. Kordana, *supra* note 106, at 1915. Time spent reviewing associate bills and evaluating whether the associate's time was well spent is costly to the firm even if partners can bill all of this time to clients--a questionable assumption in today's competitive legal marketplace. As the new productivity based compensation system employed by most firms attest, the most productive use of a partner's time is in finding new clients rather than in servicing old ones--let alone billing clients for past services. Time spent monitoring is time that cannot be spent developing new business. Not surprisingly, firms seek to avoid these opportunity costs as much as possible. As we argue below, regardless of whether the “promotion to partnership tournament” accounts for the rapid growth in firms over the last two decades, it is a rational response to the difficulty of accurately judging the quality--as opposed to the quantity--of a lawyer's work. See *infra* Part II.B.2.

For our purposes, it is not important to identify any single cause for this growth. For a discussion of law firm growth, compare GALANTER & PALAY, supra note 24, at 77-120 (arguing that tournament theory explains large law firm growth), with Kordana, supra note 106, at 1923-33 (arguing that law firm growth is better explained by the “production-imperatives” of the work these firms do for their clients). In contrast to both of these views, we believe that there is credible evidence that a variety of factors, including, inter alia, the inherent dynamics of partnership tournaments, the needs of clients, the potential for extracting higher profits through leverage, and status competition among firms for the coveted designation of being a “national”–or increasingly a “global”–leader in the corporate law firm world contributed to the rapid escalation in firm size. (On this last point, see Lincoln Caplan’s description of how Skadden lawyers measured their status vis-a-vis their more established New York competitors by scrupulously keeping track of their relative size. See CAPLAN, supra note 67, at 56). Our interest is simply in understanding how law firm size affects monitoring costs.

It is now quite common for partners at large firms to bemoan the fact that they barely recognize their fellow partners, let alone have any significant contact with the vast majority of the firm’s associates—even those associates who are eventually considered for partnership. See CAPLAN, supra note 67, at 263-74 (describing the partnership selection process).

See ROBERT J. ARNDT, MANAGING FOR PROFIT: IMPROVING OR MAINTAINING YOUR BOTTOM LINE 72 (1991) (arguing that today's litigation work permits firms to maintain a relatively high associate/partner ratio). Not all law firm departments are organized in this fashion. See Kordana, supra note 106, at 1925-28 (documenting that tax departments are less highly leveraged than either litigation or corporate departments). We return to this distinction below.

See NELSON, supra note 24, at 180 (noting that in modern law firms, “partners and associates perform very different tasks”); Samuelson, supra note 63, at 648 (noting that today’s senior partners “do not write research memoranda or draft interrogatories; they reserve their energies for complex issues of law and strategy”).

See James W. McCrae, Strategies for Dealing with Slow Growth or No Growth, LAW PRACTICE MGMT., Dec. 1992, at 29 (describing high leverage rates of the 1980s). As Galanter and Palay note, for many firms both inside and outside New York, partnership rates actually rose during the boom years of the 1970s, while the number of years to partnership fell. See GALANTER & PALAY, supra note 24, at 62-63. Since 1980, however, both trends have reversed. Id. at 63-64. These latter trends have intensified during the belt-tightening years of the 1990s.

See Rita K. Stropus, Mend it, Bend it, and Extend it: The Fate of Traditional Law School Methodology in the 21st Century, 27 LOY. U. CHI. L.J. 449, 470-71 (1996) (noting that with the breakdown of long-term relationships between clients and firms, clients are less willing to pay for associate training).

Needless to say, not every large law firm follows all aspects of the strategy we outline below. Law firms, like other similar organizations, vary in their structure, culture, and practice. See, e.g., NELSON, supra note 24, at 51-52 (describing the difference between “general service firms” and “specialty firms,” that provide spot services to a larger number of clients). Nevertheless, the policies and practices are common among firms of this type. Moreover, to the extent that these practices we describe are efficient, competitive pressures will push firms to adopt them. These pressures help to explain the growing similarity among corporate firms in various regions of the country. As we argue below, however, there is nothing inevitable about this result. See infra Conclusion.

For example, in 1954, the mean income for law firm associates in the United States was $7,786 as compared with $7,915 for government lawyers. ABEL, supra note 38, at 302. The late Professor and former Dean of the Harvard Law School Albert Sacks once told Professor Wilkins that when he joined Covington & Burling in 1950 after clerking for Justice Felix Frankfurter, he took a significant pay cut, and that when he joined the Harvard Law School Faculty two years later, he received a substantial pay raise.

In 1968, the Cravath firm, breaking with the unofficial cartel that had set New York salaries for the preceding decades, increased starting associate salaries from $10,500 to $15,000. See GALANTER & PALAY, supra note 24, at 56. These raises were then matched by the major New York firms and also exerted upward pressure on salaries in comparable firms around the country. Id.
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120 See ABEL, supra note 38, at 166-75, 206-07 (reporting salary differentials between corporate lawyers and other sectors of the profession).

121 In 1986, Cravath raised starting salaries from $53,000 to $65,000, in part due to competition from investment banks. See GALANTER & PALAY, supra note 24, at 56-57 (describing the second Cravath shock); Tamar Lewin, *The Faster Track: Why Law Firms Are Losing New Talent to Investment Banks*, L.A. DAILY J., Aug. 14, 1986, at 4. As a result, the “going rate” for associates is equivalent to (and in many cases exceeds) the starting salaries paid in comparable occupations. See John E. Morris, *Cut the Going Rate*, AM. LAW., Sept. 1993, at 5, 77 (reporting that from 1982 to 1993 the consumer price index rose 41%, salaries for Harvard MBAs 31%, base pay for consultants 45%, and starting salaries for associates 78%).

122 See Rebitzer and Taylor, supra note 102, at 696-97.

123 Id., at 697.

124 For example, the starting salary for associates in New York City has remained constant at approximately $83,000 even though the number of job openings dropped by 50% during the period from 1989-92. See Morris, supra note 121, at 77.

125 See id. (noting that firms refrain from cutting salaries in tough economic times because they do not want to be perceived by clients and potential associates as being in financial distress). As Morris notes, however, less visible items of compensation, such as bar exam stipends, generosity in expense reimbursements, leave policies, etc., vary considerably across firms in the same geographic locale. See John E. Morris, *How Do You Measure Up?*, AM. LAW., Sept. 1993, at 67-75.


127 See Alison Frankel, *Debevoise Doesn't Budge*, AM. LAW., June 1993, at 76, 78 (noting that Debevoise & Plimpton has concluded that lockstep compensation improves morale and firm collegiality). In addition, it is possible that creating a separate tier of “contract” lawyers is less advantageous than making better use of paralegals. During the last two decades, the number of paralegals employed by large law firms has skyrocketed. See GALANTER & PALAY, supra note 24, at 65 (reporting that the number of paralegals in large firms went from 14,000 in 1972 to 83,000 in 1989). As we note below, paralegals now perform a substantial number of routine legal tasks (including drafting, basic research, keeping track of documents) that once were the sole province of associates. See infra note 192 and accompanying text. By increasing the amount of work given to paralegals, firms can simultaneously cut client costs while increasing profits since paralegal hours are directly billed to clients at rates that substantially exceed their costs. See ABEL, supra note 38, at 198 (arguing that “paralegals generate between two and three times as much income for their firms as they cost in salary (and require less overhead than associates)”). Moreover, paralegals must be supervised by associates, who in turn bill this time to clients. Finally, a firm that uses this strategy can avoid the obvious problem of having to tell its clients that less than “the best” lawyers have been assigned to their cases.

128 See ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 151-53 (1992) (reporting that the high salaries paid by corporate firms are a substantial inducement for Harvard law students who decide to work for corporate firms, particularly for those with large loan burdens). Luring potential recruits from the newly emerging public interest and legal services sectors was one of Cravath's primary motivations for administering its first shock to the going rate in 1968. See GALANTER & PALAY, supra note 24, at 56. Even if they are not primarily interested in money (which many may be), applicants may mistake high salaries for a guarantee of firm quality (including the firm's financial health and stability), distrust their ability to judge nonmonetary compensation (such as training, interesting work, or quality of life), or believe that it is impossible to hold firms to their promise to deliver these other goods.
It is for this reason that associates often refer to their high salaries and other benefits as “golden handcuffs.” See Edward A. Adams, Cravath Raises Current Associates' Pay, N.Y. L.J., Dec. 20, 1994, at 1.

See Rebitzer and Taylor, supra note 102, at 697-98 (speculating that firms do not pay high wages to induce effort or save on monitoring costs because these problems are adequately taken care of by the incentives created by the promotion to partnership tournament).

See Kordana, supra note 106 (noting that many associates who now join large law firms have no intention of trying to make partner).

In this respect, high wages complement tournaments by inducing some associates to stay with firms long enough to invest (both psychologically and financially) in the possibility of becoming partners. This reinforcing effect is particularly powerful with respect to those associates whose declared intention to stay at a firm for only two years is more a device for reconciling their ideological commitments with their material interests than a real statement of interest. See GRANFIELD, supra note 127, at 151-52 (arguing that when Harvard law students state that they only intend to stay at their firms for two years to pay off their loans they are engaged in a form of ideological work).

See Adams, supra note 129 (observing that the increase was a result of Cravath's inability to retain senior associates). It remains to be seen whether these raises will actually induce associates to stay in circumstances where their prospects for winning the tournament would not justify reducing their chances of securing a good job in the lateral market. Cf. John E. Morris, Weil, Gotshal's Generation Gap, AM. LAW., Dec. 1995, at 5 (discussing the problems of retaining senior associates at New York's Weil Gotshal).

See David Machlowitz, How to Counterattack If You're Losing Your Job, BARRISTER, Spring 1991, at 16 (“To add insult to injury, many of the firms claimed the wholesale firings did not mean the firms' revenues were down, but rather that the firings were 'strictly on the basis of merit.'”).

As the head of the bankruptcy practice at an elite New York law firm is reported to have told his associates (during a morale boosting talk) a few months after a wave of firings at the firm: “Well, there is one thing I want to say to you. There are no jobs out there. But there are thousands of people who could do your jobs just as well as you. Think about it.” Jonathan Foreman, Poor People Skills Can Collapse Firms, NAT'L L.J. 1, Jan. 29, 1996.

See GALANTER & PALAY, supra note 24, at 100.

As Richard Abel cogently argued in 1989, “If we make the... realistic assumption that starting associates are billing 2000 hours annually at $75 an hour, they easily earn the firm more than three times their salaries, even though these now start at more than $50,000 at some firms.” ABEL, supra note 38, at 192. To be sure, the firm must pay the associates' overhead out of these profits (e.g., secretarial support, office space, supplies). Moreover, it is possible that firms will not be able to bill every hour a beginning associate works to a client. Despite these caveats, however, many observers believe that associates become profitable almost immediately. See, e.g., Steven Brill, The New Leverage, AM. LAW., July/Aug. 1993, at 5, 65 (arguing that under traditional billing practices, law firms make profits on associates “after 1,200-1,400 hours” depending upon overhead); James F. Fitzpatrick, Legal Future Shock: The Role of Large Law Firms by the End of the Century, 64 IND. L.J. 461, 464 (1989)(arguing that associates are immediately profitable); NELSON, supra note 24, at 77 (same). As we argue below, the less resources firms spend on training a given associate, the higher will be their return on these hours. See infra text accompanying note 149.

See ABEL, supra note 38, at 194 (citing data).


See Gilson & Mnookin, Human Capitalists, supra note 63, at 341-46 (describing how traditional partnerships are vulnerable to partner shirking).
141 See GALANTER & PALAY, supra note 24, at 54-55 (describing the lateral market for partners).

142 See ABEL, supra note 38, at 185. Significantly, the few firms that have resisted this trend (e.g., Cravath and Cleary, Gottlieb) are among the most highly leveraged (and therefore most profitable) firms in the country.

143 See ALTMAN & WEIL, INC., COMPENSATION PLANS FOR LAWYERS AND THEIR STAFFS: SALARIES, BONUSES AND PROFIT-SHARING 11 (1986) (reporting that one-half of all firms with 75 or more lawyers had at least two classes of partners); D. Weston Darby Jr., Are You Keeping Up Financially?, A.B.A. J., Dec. 1985, at 66, 68 (reporting that 25% of a sample of 150 large- and medium-size law firms had more than one class of partners). Kordana is therefore right to note that monitoring problems among partners should lead to partners engaging “in a series of tournaments throughout their careers.” See Kordana, supra note 106, at 1917 & n.54 (using this prediction to dismiss tournament theory). Given these multi-level partner compensation systems and the ever-present danger that unproductive partners will be fired, many partners effectively do face an almost endless series of promotion contests.

144 See Morris, supra note 133, at 5, 7 (discussing the problem of retaining senior associates (years seven to ten) because of the difficulty they face in getting jobs elsewhere if they do not make partner); Gilson & Mnookin, Coming of Age, supra note 63, at 591 (discussing the negative effects of being turned down for partnership on an associate's out placement prospects). We return to this issue below. Seeinfra note 288 and accompanying text.

145 HEINZ & LAUMANN, supra note 66 at 133-34.

146 JOHN G. IEZZI, RESULTS-ORIENTED FINANCIAL MANAGEMENT: A GUIDE TO SUCCESSFUL LAW FIRM FINANCIAL PERFORMANCE 7 (1993). Dividing projects in this fashion arguably serves both the firm's interest (in maximizing the number of timekeepers billing on a given matter) and the client's desire to pay the higher rates charged by partners and senior associates only when successful completion of the task actually requires the kind of discretionary judgment these senior lawyers should have acquired during their tenure with the firm. We return to this tension below. See infra text accompanying notes 155-156.

147 KRONMAN, supra note 91, at 285-86. Kronman's assessment is confirmed by a host of testimonials by young lawyers reported in a recent “insider's guide” to life in large law firms. See THE INSIDER'S GUIDE TO LAW FIRMS 331 (Sheila V. Malkani & Michael F. Walsh eds., 1994) [hereinafter “INSIDER’S GUIDE”] (quoting associates at Chadbourne and Park as complaining that most corporate and litigation associates handle “mundane” drafting and research assignments and deal with “a lot of paper”); id. at 351 (reporting that associates at Dewey Ballantine complain that their assignments involve “grunt work that has nothing to do with legal work”). Of course, not every area of practice lends itself to this kind of division. For example, litigation and general corporate departments are more highly leveraged than tax departments. See Kordana, supra note 106, at 1925-28 (linking the lower leverage rates in tax departments to the fact that there is less “paperwork” to be done in this area). Moreover, just because work is “repetitive and ministerial” does not mean that it is not important or that large negative consequences--such as losing clients or suffering malpractice judgments--might not result from an associate's failure to perform one of these simple tasks in a competent and timely fashion.

148 Theoretically, a firm could rely entirely on the lateral market to satisfy its need for qualified senior associates. Although many firms actively recruit senior associates, several factors limit the usefulness of this strategy. First, if a firm relied entirely on lateral entrants, the firm's own associates would have no incentive to participate in the promotion-to-partnership tournament since this tournament would have no winners. Moreover, a senior associate is only valuable if she has been well trained. As we have said throughout, firms will have a difficult time making this kind of quality judgment in all cases. Given that the firm is likely to have better information about its own lawyers than those working at other firms, however, it has good reason to believe that subjective quality judgments about the former group will be more reliable than evaluations of outsiders and therefore has an incentive to promote its own associates. Finally, there is some reason to believe that home-grown senior associates and partners will be more loyal to the firm than those who have already shown their willingness to switch firms when a better offer comes along.
149 The incentive to invest in those who will leave is not zero, since firms want to maintain the good will of lawyers who may end up working for potential clients.

150 We assume that well-trained lawyers are generally more productive (even on menial tasks) and that associates value training and are therefore more likely (all else being equal) to apply to and select firms that provide this good. These benefits would still have to be weighed against the cost of training all associates and the danger that even firms that do so will lose associates to their competitors who will then reap the benefits of the training without incurring the costs. As we argue below, this trade-off helps to explain why firms have moved to formal training programs, which allow them to hold themselves out as offering real training without having to incur the substantial costs associated with supervisorial training. See infra text accompanying notes 361-370 (discussing formal training programs).

151 In firms in which a relatively small number of partners freely share trained associates, as well as the revenues generated by all partners, this externality is not very important since each partner has an important incentive not to shirk his or her fair share of the training duties. Moreover, in small firms, it is easier for partners to monitor each other for compliance with this mutual obligation. For the reasons discussed above, this mutual monitoring is now less likely. See supra text accompanying notes 108-113 (discussing size and specialization).

152 This description assumes that there is no formal training or assignment system. In Part IV, we examine how various formal assignment and training systems might alter these incentives.

153 As an initial matter, a partner may hope that if she trains a superstar associate, that associate will be more likely to want to work with the partner in the future. To the extent that partners must inevitably share associates, providing good training to someone else's protege makes it more likely that your protege will also receive good training when working for others.

154 See D. Jean Veta, Grabbing the Brass Ring: Making Partner at a Large Firm, in THE WOMAN ADVOCATE: EXCELLING IN THE 90's (Jean M. Snyder & Andra B. Greene eds., 1995), at 265, 274. Although partners can increase a senior associate's incentive to invest in training junior lawyers by weighting this factor more heavily in their calculus for making new partners, the difficulty of differentiating senior lawyers on this basis is likely to deter partners from adopting this strategy.


156 Firms, of course, have an incentive to prolong this process as long as possible since a senior associate's higher billing rate potentially increases profits. Given that most firms have few senior associates, the opportunity costs of using one of these valuable assets in such a relatively unproductive manner is high enough to discourage firms from indulging in this mild form of overcharging.

157 For an example of this kind of rhetoric, see, e.g., JOEL F. HENNING, MAXIMIZING LAW FIRM PROFITABILITY: HIRING, TRAINING AND DEVELOPING PRODUCTIVE LAWYERS 3-1 (1991) (warning that many associates are not interested in long-term careers with firms; “[i]nstead, they seek postgraduate skills training to become competent lawyers, and they know that the private corporate law firm is the best place to acquire that training”).

158 As with any model, Figure 1 oversimplifies the phenomenon it attempts to represent. For example, because firms take time to determine which associates will receive training, there is a period where the marginal productivity of all associates (by which we simply mean the net income an associate generates for the firm) is roughly the same. In addition, the marginal productivity of associates who do not receive training never flattens out completely, since over time these lawyers become more proficient at the routine tasks to which they are assigned. Notwithstanding, these simplifications, Figure 1 captures the essential difference between associates who are being trained and those who are not. It also explains why the barrier to moving from the “flatlining track” to the “training track” becomes more solid as time passes. Higher billing rates both increase the opportunity costs associated with training senior associates and reduce the potential benefits since their expected future at the firm is shorter. This combination makes it extremely unlikely that partners will decide to invest in their training. Cf. Note, Why Law Firms
Cannot Afford to Maintain the Mommy Track, 109 HARV. L. REV. 1375, 1379 (1996) (with constant pressure on partners to improve their productivity, they have only a finite amount of time to invest in training associates).

See generally, Rebitzer and Taylor, supra note 102, at 681-84 (describing the standard assumptions underlying tournament theory).

We are grateful to Ian Ayres for suggesting this wonderful analogy.

See BERNHARD GRZIMEK, GRZIMEK'S ANIMAL LIFE ENCYCLOPEDIA, 461 (2d ed. 1975).

See id.

See O'Flaherty & Siow, supra note 103, at 727 (arguing that firms make correct partnership decisions 82.3% of the time). The authors nevertheless assert that firms are likely promote a substantial number of “unqualified” associates to partnership. This conclusion, however, is based in part on their assumption that the “qualifications” of potential partners are fixed before they are hired by the firm. See id. at 711. For the reasons stated above, we believe this assumption is incorrect.

See generally GALANTER & PALAY, supra note 24; Gilson & Mnookin, Coming of Age, supra note 63; Peter D. Scherer, Leveraging Human Assets in Law Firms: Human Capital Structures and Organizational Capabilities, 48 INDUS. & LAB. REL. REV. 671 (1995).

See GALANTER & PALAY, supra note 24, at 68-75 (discussing the “new information order” in which publications, such as the American Lawyer, report on the once-secret world of corporate firms).

For three notable exceptions to this trend, see JOHN HAGAN & FIONA KAY, GENDER IN PRACTICE: A STUDY OF LAWYERS’ LIVES (1995) (discussing differences among Toronto lawyers); NELSON, supra note 24 (studying four large Chicago law firms); Chambliss, supra note 7 (studying gender and racial integration in selected firms).

On the dangers of relying on anecdotal evidence, see Craig A. Nard, Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession, 30 WAKE FOREST L. REV. 347, 349 (1995) (criticizing the lack of legal scholarship based on statistical data, since without such data it is difficult to draw conclusions or formulate policy).


Our sample from the Harvard Alumni Directory contains sixty members of the classes of 1981 and 1982, and fifty-seven members of the classes of 1987 and 1988. Appendix, Table 1. In addition, sixty-six black alumni (out of approximately 200 who were sent the questionnaire) returned our survey, including twenty-one pre-1986 graduates and forty-five post-1986 graduates. Appendix, Table 2. There may be some overlap between the Alumni Directory sample and those who returned our survey.

“In fact, as in every other major city which has studied the matter, minority retention was stated by the interviewees in every large San Francisco employer to be the firm's most serious problem.” S.F. REPORT, supra note 33, at 17 (footnote omitted). See also Davis, supra note 15, at 1 (reporting “significant attrition in their latter years has left partnership ranks almost as white as five years ago.”).

“Recruitment is one thing, but if you can't keep people in, it doesn't do any good. And if you can't keep people in, that hurts you the next time you go to recruit.” Eric Herman, Committee Targets Retention of Minorities at Big Law Firms, CHI. LAW., May 1995, at 13 (quoting W. Muzette Hill, a founder of the Chicago Committee on Minorities in Large Law Firms). See also, Robert Schmidt, Minority Lawyers and the D.C. Firm: Race, Culture, and Sexism Make Integration Difficult at Law Offices, LEG. TIMES, Sept. 26, 1994, at S42, S46 (“Observers agree, however, that no matter how aggressively a firm recruits minority attorneys, if it doesn't have a 'critical mass' of minority partners, minority law students or lateral associates will likely look elsewhere.”); Chambliss supra note 7, at 190. There are a number of reasons why this might be true, including the greater willingness of black lawyers to invest in discovering the actual quality of black applicants, the ability of black insiders to point out and correct for overt and covert discriminatory practices, and the fact that black applicants are more likely to gravitate
toward a firm where there are other black lawyers. See Ed Cray, Blacks and Browns in Blue-Chip Firms, CAL. LAW., Oct. 1984, at 35, 36 (quoting Stanford's placement director as stating, “Students look to see the NALP [National Association for Law Placement] breakdown of statistics. If no minorities are represented in a firm, they ask themselves 'why,' and then 'why not.' ”). We return to the role that black lawyers can play as possible “change agents” in Part IV. See infra notes 398-401 and accompanying text. The phrase “change agents” comes from Menkel-Meadow, supra note 12.

See GALANTER & PALAY, supra note 24, at 24.

See SMIGEL, supra note 13, at 37 (noting that firms wanted “lawyers who are Nordic, have pleasing personalities and ‘clean-cut’ appearances, are graduates of the ‘right’ schools, have the ‘right’ social background and experience in the affairs of the world, and are endowed with tremendous stamina”). The group most obviously disadvantaged by these additional criteria were Jews, who, despite their superstar academic credentials, were virtually excluded from most corporate firms until the late 1960s. See GALANTER & PALAY, supra note 24, at 25. Indeed, as Paul Cravath noted in a famous speech to Harvard law students, law firms did not particularly value brilliance at all:

Brilliant intellectual powers are not essential. Too much imagination, too much wit, too great cleverness, too facile fluency, if not leavened by a sound sense of proportion are quite as likely to impede success as to promote it. The best clients are apt to be afraid of those qualities. They want as their counsel a man who is primarily honest, safe, sound and steady.


See Knapp & Grover, supra note 6, at 302.

See GALANTER & PALAY, supra note 24, at 57 (noting that “recruitment has become more competitive and more meritocratic, leading to changes in the social composition of the new recruits”).

See RICHARD D. KAHLENBERG, BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL 94 (1992) (reporting that a Harvard Law School placement official “told Calvin Trillin that the large firms spend as much money in recruitment-- travel, hotels, receptions, summer-clerk perks, and forgone billable hours--as the law school’s annual budget”).

See id. at 94-95 (describing the interview process for Harvard law students); David Eaves et al., Gender, Ethnicity and Grades: Empirical Evidence of Discrimination in Law-Firm Interviews, 7 LAW & INEQ. J. 189, 192 (1989) (describing the interview process for UCLA Law School students); INSIDER'S GUIDE, supra note 147, at 13-16 (describing the interview process). Third-year students with judicial clerkships also frequently work as summer associates.

At most elite schools, employers are required to interview every student who applies for an interview and receives a slot through a lottery system in which students rank firms according to the strength of their interest. See GRANFIELD, supra note 128, at 134; Eaves et al., supra note 177, at 192 (describing a similar system at UCLA). At many non-elite schools, firms decide whom to interview on the basis of the resumes they receive, or in many cases, skip the on-campus interviewing process altogether.

Whether the interviewer actually looks at the resume before the interview is less certain. Anecdotal testimony over the years by both interviewers and interviewees suggests that at least on some occasions they do not. See Stewart Yerton, Scenes from the Recruiting Front: The Laws of Supply and Demand Are Making Law Students at UVA Nervous, AM. LAW., NOV. 1993, at 60, 63 (quoting a University of Virginia law student's belief that an interviewer from New York's Hughes, Hubbard & Reed did not read his resume before the interview).

See GRANFIELD, supra note 128, at 136 (reporting that “[r]recruiters... rarely pose questions to students that test their legal knowledge” and quoting a second year Harvard Law student as saying “I prepared myself for a technical discussion. I thought they would ask me about strict liability or something. They didn't ask me any legal type of questions”). By way of comparison, consulting firms routinely ask applicants to analyze a typical business school case during the interview. Interview with Roger Ferguson, Principal at McKenzie and Co.

The following comments are typical of statements in the Insider's Guide:
For example, only six of the approximately 600 firms interviewing at Harvard Law School in 1994 asked candidates to bring a writing sample to their initial interview. See HARVARD LAW SCHOOL OFFICE OF CAREER SERVICES, INTERVIEWING CALENDER (1994).

See Eaves et al., supra note 177, at 197-98 (demonstrating that high grades and law review membership are both strong predictors of whether a UCLA student is likely to get a call-back interview).

See INSIDER'S GUIDE, supra note 147, at 230 (reporting that Houston's Baker & Botts “looks at people in the top quarter of their class at the University of Texas, the top five percent of their class at the University of Houston, and the top half of their classes at national law schools such as Columbia, Harvard, Stanford, the University of Chicago, the University of Virginia, and Yale”). Firms pay more attention to the perceived quality of the institution from which a candidate is graduating than to the content of the courses on an applicant's resume, rarely taking note of whether the courses a student has taken are likely to prepare him or her for corporate law practice.

The following comments about three Boston firms are typical: “[At Bingham, Dana & Gould,] [c]all-back interviews, which usually involve meeting four attorneys, were described as 'pleasant chats.' One source reported that 'they are just trying to see if you would fit in and whether you have a personality.’” Id. at 79.

[At Goulston & Storrs,] [c]allback interviews involve meeting with about four attorneys and going to lunch with a few more. Candidates who are invited to the firm for a callback are presumed to be academically qualified to work at Goulston, and the major purpose of the interview is to assess whether the applicant “fits in” with the firm culture. Attorneys ask very few “substantive legal questions” in the interviews, our contacts told us.

Id. at 98.

[At Nutter, McClennon & Fish,] [a]t the call-back, candidates usually interview with a senior partner, the hiring partner, and two associates. They then go out to lunch with two associates. Most call-back interviews are conversational. No one we interviewed was asked substantive legal questions. According to one insider, the partners make the hiring decisions, and they are mainly “looking to see if you fit” into the firm culture.

Id. at 111.

As associates at Boston's Goodwin, Procter & Hoar report:

The interview is “more an opportunity for you to find out more about the firm,” said one successful applicant. If you make it to the callback stage, “there is a presumption in your favor” that you will be hired, commented another. “They just want to make sure they can work with you.”

Id. at 95.

This was not always the case. In the go-go days of the 1970s and 1980s, summer programs were characterized by tickets to ball games and outings to partners' houses rather than by work on serious projects. During the recession, programs were tightened up. See Caroline V. Clarke, Summer of Fear, AM. LAW., Oct. 1991, supp. 6, 8; Amy Stevens, Vacation Is Over for Summer Associates as Law Firms Reduce Perks, Add Work, WALL ST. J., June 10, 1994, at B1 (describing how, as a result of the recession, firms have reduced expenses on summer programs). Nevertheless, according to many reports, social functions still play an important part in the summer experience. See INSIDER'S GUIDE, supra note 147, at 27 (describing Alston & Bird's summer program as “really social” and “summer camp-like”); see also Rick Hampson, Summer law Associates Still Want the Perks; Survey Finds Food a Concern of Many Students, LEGAL INTELLIGENCER, Nov. 3, 1993, at 3 (calling summer
programs “prenuptial honeymoons”); Saundra Torry, In Frugal ’90s, Firms Still Pamper Summer Associates, WASH. POST, July 4, 1994, at 7 (describing relatively lavish current programs).

The lower offer rate in Baltimore may be due to the fact that these firms are less leveraged and have higher partnership rates than are typical in the other four cities. Thus, according to data from the Insider’s Guide, the ratio of associates to partners in Baltimore was .83:1, as compared to 1.1:1 in San Francisco/Palo Alto and 1.9:1 in New York. See INSIDER’S GUIDE, supra note 147, at 53, 509, 305. Given these structural differences, these firms are likely to collect more information on the actual quality of their summer associates (because of the relative ease of direct monitoring) and have a greater incentive to use this information (since the smaller number of associates makes each one more valuable).

See INSIDER’S GUIDE, supra note 147, at 338, 332, 398, 428 (reporting that Cravath; Cleary, Gottlieb; Paul, Weiss; and Sullivan & Cromwell all gave offers to nearly 100% of their summer associates in 1993).

On the growth in the number of paralegals, see GALANTER & PALAY, supra note 24, at 65.

It is important to note that this supposition is belied by the fact that firms counted social background at least as highly as academic standing during a period when their hiring needs were much smaller than they are today. See supra note 173.

For example, only two of the lawyers in O.J. Simpson’s famous “Dream Team,” Alan Dershowitz and Barry Scheck, graduated from elite law schools.

On the connection between a law firm’s status and the educational background of its lawyers, see ABEL, supra note 38, at 206; NELSON, supra note 24, at 66.

See ABEL, supra note 38, at 217-18 (describing the tendency of prestigious schools’ graduates to be channeled to larger firms and local schools to produce solo practitioners).

See GRANFIELD, supra note 128, at 135 (discussing the importance of the fact that “[m]any interviewers are former [Harvard] graduates demonstrating their loyalty to the institution”); INSIDER’S GUIDE, supra note 147, at 362 (quoting an associate at Fried Frank who reported, “it’s harder to get an offer if you are from a local school; though if you are from Yale, you will definitely get an offer because Yalies stick together”).

The experience of Skadden Arps is again instructive. Lincoln Caplan reports that despite unparalleled financial success during the 1980s, Skadden partners still longed for the status and respectability of its more established “white shoe” Wall Street competitors. To achieve this goal, Skadden invested heavily in recruiting elite law school graduates, setting records for the lavishness of its recruiting events and summer program. These efforts eventually bore fruit. As a result, Skadden's hiring patterns now look like those of its competitors. See generally CAPLAN, supra note 67.

As we explain below, discriminating in this fashion might also result in legal liability.

At this stage we are interested in exploring what happens when firms make no affirmative efforts to hire black lawyers.

See Lugo, supra note 56, at 624-30 (arguing that law firm hiring criteria are racially discriminatory). Needless to say, these criteria also exclude the vast majority of white applicants, many of whom are also within the average range in terms of their skills to be average corporate associates. The percentage of whites remaining in the pool, as defined by these criteria, however,
is disproportionally larger than the corresponding percentage of blacks vis-a-vis their percentage in law schools. This is simply another example of how practices that affect all workers disproportionately disadvantage blacks.


205  See Richard Connelly, Preconceived Notions: Recruiters Pigeonhole TSU Graduates, Leaving Top Students in the Cold, TEX. LAW., May 17, 1993, at S-1 (noting that “[f]irms that talk grandly about increasing their minority hiring don’t look to do it at [Texas Southern University]’s law school, where half of the 587 students are African-American”); Jensen, supra note 12, at 29 (arguing that firms should include minority-dominated law schools in addition to Howard University in their recruiting efforts).

206  See Connelly, supra note 205, at S-1. Connelly describes a TSU student's inability to get a single offer from a large firm in Texas despite the fact that she graduated “magna cum laude, second in her class, [was a] law review editor, and ... clerk[ed] at the Texas Supreme Court.” As one hiring partner explained, “we usually can fill our needs at the top schools.” Id.

207  See Jensen, supra note 12, at 29 (quoting Lujuana Treadwell, President of the National Association for Law Placement and director of recruitment for Berkeley's Boalt Hall, as stating that “minority students are more likely to need to be employed during law school or choose to be active in student organizations, thereby making it more unlikely that they might meet the big firm rigid employment criteria”). See also, FEAGIN AND SIKES, supra note 46, at 78-129 (describing the many obstacles that black students face when seeking a good education).

208  See FEAGIN AND SIKES, supra note 46, at 130-32 (reporting that many black students feel they would be more successful at black educational institutions).

209  Empirical and anecdotal evidence suggests that this may be the case. Given that less than 40% of black households qualify as middle class (as opposed to 70% for whites) it is likely that African American law students tend to come from more disadvantaged socio-economic backgrounds than their white classmates. See CHAEL DAWSON, BEHIND THE MULE, RACE AND CLASS IN AFRICAN AMERICAN POLITICS 29 (1994). Affirmative action programs that combine race and class will reinforce this tendency. Moreover, as Dawson goes on to point out, even middle-class blacks are less likely to be connected either through employment or wealth accumulation to the upper echelon of the private sector that is the focus of the kind of high-level corporate courses we are discussing. See id. at 29-33 (arguing that middle-class blacks are less likely to work in the private sector than whites are and have accumulated substantially less household wealth than middle-class whites). Anecdotally, many black students have told Professor Wilkins over the years that their lack of knowledge or experience with the problems discussed in advanced corporate courses is one reason why they believe that they will find these courses particularly difficult. Even if black students are mistaken about the importance of this kind of background knowledge, if they believe it to be true the adverse effects described in text will persist until this misperception is corrected.

210  Two pieces of anecdotal data collected by Professor Wilkins point in this direction. First, Harvard Law School faculty who teach upper-level courses in corporations, securities and tax report that relatively few black students take these offerings. Second, several black students reported that the reputed difficulty of these courses and concerns that a low grade would diminish their overall employment prospects has discouraged them or their African American classmates from enrolling in these courses. Although we contend that most lawyering skills are learned on the job, associates who come in with more knowledge about the legal issues that are relevant to their chosen area of practice will have lower start-up costs in completing the first few assignments, and therefore, stand a better chance of signaling that they are good prospects for the training track. It is precisely these potentially valuable job-related skills, however, that the current recruiting process undervalues.

211  See Lugo, supra note 56, at 626 n.48 (describing the incident). Baker and McKenzie was temporarily banned from recruiting at several law schools because of the incident. Jensen, supra note 12, at 29.
The fact that King and Spalding proposed holding a “wet t-shirt contest” for female summer associates--to be staged while the firm had a sex discrimination lawsuit pending against it--demonstrates just how difficult these barriers will be to overcome. Upon sober reflection, the firm decided to hold a swimsuit competition instead. See HARRINGTON, supra note 168 at 36, 37. For a discussion of the double burden faced by black women, see generally Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L REV. 1241 (1991).

The classic example is that of King and Spalding, see supra note 212, which today has reformed matters so far that a 1995 study by the Harvard Women's Law Association rated it as the best of fifty-seven elite law firms for women lawyers. John E. Morris, King & Spalding Lands On Top, AM. LAW., Jan.-Feb. 1996, at 18.

Selmi, supra note 49, at 1285 (describing perception of outgroup behavior generally); see also James Jones, Piercing the Veil: Bi-cultural Strategies for Coping with Prejudice and Racism, in OPENING DOORS: PERSPECTIVES ON RACE RELATIONS IN CONTEMPORARY AMERICA, 179, 195 (Harry J. Knopke et al. eds., 1991) (noting that “the basic tendency for human beings [is] to make social categorical judgments leading to an ingroup preference”); George I. Whitehead, III et al., The Effect of Subject's Race and Other's Race on Judgments of Causality for Success and Failure, 50 J. PERSONALITY 193, 200 (1982) (noting a study finding “that the failure of another is attributed more to the lack of ability when the other is racially dissimilar than when he is similar”).

See Emily Campbell & Alan J. Tompkins, Gender, Race, Grades and Law Review Membership as Factors in Law Review Hiring Decisions: An Empirical Study, 18 J. CONTEMP. L. 211, 241 (1992) (reporting that with resumes of candidates in hand, law firms were more likely to request more information from a black candidate in the top 30% of his class than from a white candidate similarly situated).

See Arnie Kanter, Hiring of Minorities Takes Thought, NAT'L L.J., Apr. 25, 1988, at 19 (quoting a hiring partner from a major firm as stating, “When I go into an interview with a minority, I just want to get out of the thing alive”). As Kanter notes, such feelings are likely to make it more difficult for the minority interviewee to make a “good impression on the interviewer”--a major determinant of whether the candidate will receive a job offer. Id.; see also Steven Keeva, Unequal Partners: It's Tough at the Top for Minority Lawyers, A.B.A. J., Feb. 1993, at 50, 52 (arguing that whites feel less comfortable with black lawyers).

See supra note 39 and accompanying text.

See HARRINGTON, supra note 168 at 19 (reporting that women must frequently justify their commitment to law practice to law firm recruiters); Marie T. Huxter, Survey of Employment Opportunities for Articling Students and Graduates of the Bar Admission Course in Ontario, 15 LAW SOCY GAZETTE 169, 189-90 (reporting that women lawyers in Canada are frequently asked questions such as “if I intended to make a career out of practising law or planned to marry and have babies”). The fact that studies of women in the workplace have repeatedly demonstrated that women generally have higher levels of commitment to their jobs than men has so far failed to eradicate these stereotypical beliefs. See, e.g., HAGAN & KAY, supra note 166, at 185 (reporting that their study of women lawyers in Ontario did not confirm that women were less committed to their jobs than men and that “men accumulated more hourly billings than women through the use of hierarchical positions in firms, not because women gave up hours as a result of competitive demands or comparative specializations that involved investments in the family”).

See Yerton, supra note 179, at 60, 61.

Unlike many of its elite competitors, UVA allows interviewers to pre-screen resumes and to interview only selected candidates. Id. at 61.

Id.

As she pointedly observes: “The reality is, there aren't that many black men and women [at large firms] who could give jobs to their kids or friends or whatever.” Id. at 62.
Of course we would not expect Jennifer to get the same benefit from being on the law review as someone with an “A” average. However, to the extent that firms view law review membership as an independent signal, it should have value, even for those with low grades. Thus, Jennifer, who has this signal, should do better than Jay, who does not. We recognize, however, that firms may have discounted Jennifer's law review signal because they believed that the law review has an affirmative action policy. Unless they believed that this policy carried over to the work Jennifer did on the magazine, this signal still should have value. We return to affirmative action below.

For example, the article does not state whether Jennifer received an offer from the Atlanta firm where she clerked during the previous summer.

There is some empirical support for this proposition. For example, in their excellent study of gender differences among lawyers in large firms in Toronto, Professors Hagan and Kay found evidence that the “meritocratic criterion [of good grades] is applied more stringently in the selection of women than men.” HAGAN & KAY, supra note 166, at 66; Susan Duncan, What Women Need to Make It to the Top, AM. LAW. (Supp.) Jan.-Feb. 1996, at 9 (arguing that it is more important for women than for men to be superstars). Similarly, Hagan and Kay found that personal characteristics such as having a “WASP” background were statistically beneficial to men but not to women. HAGAN & KAY, supra note 166, at 66. Although not statistically significant because of the small sample size, a study of minority and non-minority students at UCLA Law School found that “even top G.P.A. minority students had lower success rates than non-minority students, and third-quartile minority students had less than half the success rate of non-minority students.” Eaves et al., supra note 177, at 201. Interestingly, this same study found that women did significantly better in obtaining call-back interviews than men with similar grades and that this disparity was greatest when men interviewed women at the bottom of the class. Id. at 204-10. Whether this difference is due to “attraction between male lawyers and women” or “a reluctance by female lawyers to offer call-backs to other women,” id. at 207, the data demonstrate how an interviewer’s subjective biases or tastes affect a candidate’s employment prospects. See also Jensen, supra note 12, at 29 (“Justice Archer of the Michigan Supreme Court claims that the large law firms—despite their claims to the contrary—reach as deep as the top 60 percent of the class for white candidates but they select minority recruits from only the top 10 percent.”); Deborah Holmes, Structural Causes of Dissatisfaction Among Large-Firm Attorneys: A Feminist Perspective, 12 WOMEN’S RTS. L. REP. 9 (1990) (reporting that unattractive or overweight female candidates have a disproportionately difficult time finding jobs).

This helps to explain the common perception that blacks with superstar traditional credentials are heavily recruited. See, e.g., Schmidt, supra note 171, at S46. Schmidt reports:

Major firms ... recruit law students in the top of their class at a select group of law schools, fostering fierce competition for the few minorities who meet the traditional description of the well-qualified associate.

“Like most of the big firms, we’re hiring outstanding students and there is quite a competition [for minorities],” says Wiley, Rein name partner Richard Wiley.

Id. Although this is often described as a competition for “qualified” blacks, we believe that it is better understood as a search for black superstars. We return in Part IV to the potentially valuable effects of fostering a competition for black applicants.

For example, a former associate at a major Washington, D.C. law firm reports that a black Harvard graduate with an A-minus/ B-plus grade point average was turned down for a summer associate position because firm partners felt that he had taken too many “easy courses.” One partner even went so far as to suggest calling one of the applicant’s professors to determine whether he really deserved the “A” he received in the course. The informant reports that during her tenure on the hiring committee, no one inquired into the difficulty of courses taken by white candidates, let alone suggested calling a faculty member to look behind a grade. Interview with Professor Wilkins.

See STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 53-54 (1991). See generally, Charny and Gulati, supra note 9, at 22-23. This dynamic may have shifted over time. For example, Chief Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia Circuit is quoted in a recent article, as remarking: “Kids like my son face constant pressure. The assumption starting out is that they're affirmative action and that someone put them there, whereas the assumption with me was I must be smart as hell.” Herman, supra note 171, at 60.
See supra note 171, and accompanying text.

As a reminder, we assert that this is the result that would obtain in the absence of affirmative action.

See SEGAL, supra note 14, at 77-78, 218-19 (documenting the extraordinary qualifications of the first generation of blacks to enter into elite law firms).

Appendix, Table 3, (reporting that 57.3% of the entering black associates were from elite law schools as compared to 51.7% of non-black associates).

Id.

Id. (indicating that 24% of the total number of blacks hired graduated from Harvard and that Harvard's graduating class of black students constitutes 6.1% of all black students graduating from any law school from which any black student was hired by one of the firms responding to our survey). Table 4 lists all of the law schools from which the firms in our sample hired black associates and the number of these lawyers that were hired from each school.

Appendix, Table 3.

Id.

Id.

Id. Although Georgetown is not one of our elite schools, it is the best law school in Washington, D.C. Not surprisingly, most of the black and white associates from Georgetown in our sample were hired by Washington, D.C. firms.

Id.

Our difficulty in getting firms to respond to even this simple request for information underscores why there is so little hard data in this area. As for the small sample size for blacks, this is, of course, due in part to the very problem we are studying--the small number of blacks in corporate firms.

To the extent that attending a law school at the top of the elite range is no noisier a signal for blacks than it is for whites, in the absence of a systematic preference for average whites over average blacks, we should expect to see both groups hired at the same rate that they appear in their respective pools.

Blacks constitute 7.6% of the associates hired in our survey as compared to the national average of 2.4% of all associates who are black. Compare Appendix, Table 3 with Davis, supra note 15, at 1.

See id. (reporting that the jump in minority associates was due in part to firms agreeing to goals and timetables to increase minority participation).

The information on black partners was gathered from CONFERENCE ON MINORITY PARTNERS IN MAJORITY/CORPORATE FIRMS, AMERICAN BAR ASSOCIATION, MINORITY PARTNERS IN MAJORITY/CORPORATE FIRMS: PROFESSIONAL PROFILES (1992-93 ed.).

Appendix, Table 5.

Id.

Id.

For example, the 1995 U.S. News and World Report ranking of American law schools places Yale and Harvard as numbers one and two, respectively. See The Top 25 Law Schools, U.S. NEWS & WORLD REPORT, Mar. 20, 1995, at 84.

Appendix, Table 5.
Until the mid-1970s, Howard was virtually the only law school with a significant number of black graduates. Even after other schools began admitting blacks, Howard's reputation for excellence and its connection to the civil rights movement combined to attract black students whose credentials would have allowed them to attend an elite law school. In recognition of these factors, Howard is the only historically black law school from which elite firms recruit with any frequency.

For example, Davis reports a black partner at Chicago's Sidley & Austin as contending that firms “set higher standards for minority hires than for whites” and contending that “[i]f you're not from Harvard, not from Yale, not from the University of Chicago, you're not adequate. You're not taken seriously.” See Davis, supra note 15, at 22.

Our data on black Harvard Law School graduates supports this conclusion. For example, only 14% of our sample of black graduates from the classes of 1981 and 1982 were still affiliated with the law firms at which they started their careers. Assuming both that these lawyers all became partners and that those who left did not become partners at another elite firm, the partnership rate for black Harvard Law School graduates is substantially below the average for any major metropolitan city—including New York. See Appendix, Table 1 and Figure 3. Although both of the assumptions underlying this comparison are controversial (i.e., some of the 14% still at their original firms are “of counsel” or non-equity partners just as some who left undoubtedly made partner at other elite firms) the comparison is nevertheless instructive.

The following comments from the American Lawyer 1994 survey of mid-level associates are representative of these complaints:

“Life at [New York's Cleary, Gottlieb] does not seem to include any training, feedback, or guidance that would foster one's development as a lawyer.” Id. at 65. “No one [at Washington, D.C.'s Shaw, Pittman] takes an interest in my legal development, and when I inquire about a higher level of work--that involving more responsibility or litigation experience--I am ignored.” Id. at 88. “[T]raining [at Washington, D.C.'s McKenna and Cuneo] is so poor that [associates] are highly unmarketable.” Id. at 89.

For example, compare the following comments from two mid-level associates at Washington, D.C.'s Howrey and Simon: “There is very little opportunity for associates to get into court or get any significant litigation responsibility .... Thus, even for mid-level associates, much of the work is brief-and motion-writing--perhaps with some depositions--and little court or client contact.” Id. at 87. “The firm is a true meritocracy. Associates who do good work are rewarded with greater responsibility regardless of where they went to school, how long they have been at the firm, etc.” Id.

The American Lawyer reports on Cleveland's Baker & Hostetler and Philadelphia's Morgan, Lewis and Bockius underscore these differences. “The key to receiving topflight training at Baker & Hostetler, according to the 16 associates (out of 54 eligible) appears to be finding good mentors. Written comments indicated that the quality of associate training depended entirely upon the partners and senior associates overseeing them.” Id. at 37. The written comments provided by 20 associates in various offices of [Morgan, Lewis and Bockius] suggest that associates' experiences vary widely. One Philadelphia third-year complained that “mentoring is almost nonexistent,” but another
contended that “the firm makes a strong effort to overcome the types of problems that typically arise for associates in a large
firm (e.g., limited courtroom exposure) by providing extensive training.”
Id. at 73.

258  See id. at 44 (“The partners at Jones, Day are willing to give associates as much responsibility as they demonstrate they can
handle. This is a positive aspect--but also turns into a negative one. Once you demonstrate your ability, you are a valuable
commodity, and the pressure to work with various partners becomes intense.”).

259  See, e.g., id. at 88 (quoting a management committee member as stating, “I think this is evidence of generalized anxiety. It's
always wrong, but it's nonetheless persistent that there's some group of pre-ordained superstars.”).

260  See Henning & Friedler, supra note 254, at 61 (noting that “[o]nce partners find associates they like who can do the work,
they're more than happy to continue delegating work only to those associates”). The authors point out that this can sometimes
hurt even those who get this kind of responsibility by “pigeonhol[ing] them in narrow responsibilities” which may result in
their becoming lawyers who charge “senior-level fees for junior-level work.” Id.

261  See Chambless, supra note 7, at 94 (quoting a senior partner who acknowledges the existence of an informal tracking system
for associates).

262  We use the word perception advisedly. Firms give associates relatively little concrete information about their progress and what
is said is often unreliable. See, e.g., Associates Survey, supra note 255, at 64 (quoting a mid-level associate at Cleary, Gotlieb as
reporting “the formal evaluations are generic in tone and completely unhelpful”). This is hardly surprising. Given that firms
rely on both the “carrot” of winning the partnership tournament as well as the “stick” of losing this scarce high-paying job
to motivate their associates, they have an incentive to keep associates in the dark as long as possible about their partnership
prospects. As a result, a flatlining associate may not know that she is in trouble until it is too late. This is particularly true
because, as Figure 1 makes clear, a flatlining associate may be working quite hard in her early years--often harder (and making
more money for the firm) than an associate who is receiving Royal Jelly. It is only when she realizes that others are getting
more responsibility while her own work both diminishes and continues unchanged that she will begin to suspect that her
career has stalled.

263  See CAPLAN, supra note 67, at 263-74 (describing the criteria for making partner at Skadden Arps).

264  In addition, because skill and rainmaking potential are difficult to observe or evaluate without investing substantial time,
partners are likely to rely on the opinions of those partners who have had first-hand experience with the candidate. An associate
who has not entered into one or more of the complex mentoring/training relationships described above is less likely to have
such knowledgeable advocates among the partners.

265  In addition, partners are also likely to favor trained associates even in circumstances where it might not be in the firm's interest
to do so. When the existing partners of a firm decide on which of their eighth- to tenth-year associates to elevate to their own
ranks, each partner has an interest in promoting his or her proteges. The proteges owe their mentors allegiance because the
mentors chose to invest in them. This presumably means that the proteges will repay their mentors by providing them with
clients or voting not to fire them when the proteges are at their most productive and the mentors are older and less productive.

266  See, e.g., Kordana, supra note 106, at 1932 (arguing that government and business enterprises want to hire associates “because
a large law firm is such a good training ground for young attorneys”).

267  As we argue above, potential employers may be less able to distinguish between trained and untrained lateral candidates than
those candidates might suspect. See supra note 148 and accompanying text.

268  We borrow the phrase from David Thomas. See David A. Thomas, Mentoring and Irrationality: The Role of Racial Taboos,

269  Appendix, Table 2, Part B.
Bar associations reports on the problem of minority retention consistently emphasise that black lawyers have difficulty finding mentors. See, e.g., S.F. REPORT, supra note 33, at 14; N.Y. REPORT, supra note 12, at 84-85; see also Caroline V. Clarke, The Diversity Dilemma, AM. LAW., Oct. 1992, at 31 (reporting that “African-Americans perceive more race-related barriers to obtaining adequate mentors, challenging work, direct client contact, and partnership” than either whites or members of other minority groups); Alexander Stille, Little Room at the Top for Blacks, Hispanics, NATL L.J., Dec. 23, 1985, at 1, 9 (reporting that blacks have a harder time finding mentors than their white counterparts).

A number of important studies have documented the difficulties women face in entering meaningful mentoring relationships. See, e.g., EPSTEIN, supra note 253, at 287-88; Grace M. Giesel, The Business Client Is a Woman: The Effect of Women as In-House Counsel on Women in Law Firms and the Legal Profession, 72 NEB. L. REV. 760, 777-79 (1993). In light of both the added complexity that racial difference adds to interactions between women and men, as well as the greater difficulty that women face in creating supportive mentoring relationships across racial lines, these problems are likely to be even greater for black women. For discussion of the manner in which race and sex intersect to form unique “taboos” that inhibit mentoring relationships, see Thomas, supra note 268. See also HARRINGTON, supra note 168, at 101-02 (reporting that black women have a particularly difficult time “desexualizing” their bodies and therefore face additional barriers to forming supportive relationships with white male superiors).

This point was first made by Rosebeth Kanter in her study of women in corporations. See KANTER, supra note 7, at 47-49; see also CYNTHIA F. EPSTEIN, WOMAN'S PLACE: OPTIONS AND LIMITS IN PROFESSIONAL CAREERS 168-70 (1970) (finding that women had difficulty finding mentors; older male colleagues tended not to take on young female protegees because they did not see women associates as younger versions of themselves in the way that they saw some young male associates). But see Cynthia F. Epstein et al., Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession, 64 FORDHAM L. REV. 291, 353-56 (1995) (reporting that some women partners expressed ambivalence about mentoring women associates, both because they themselves had succeeded without mentoring and because they feared that strong support of a woman associate would be seen as self-interested). Needless to say, this latter problem further disadvantages women protegees by removing one possible avenue for making up for the lack of male mentors.

Professor David Thomas has been a leader in this research. See, e.g., David A. Thomas, Racial Dynamics in Cross-Race Developmental Relationships, 38 ADMIN. SCI. Q. 169 (1993) [hereinafter Thomas, Racial Dynamics]; David A. Thomas, The Impact of Race on Managers’ Experiences of Developmental Relationships (Mentoring and Sponsorship): An Intra-Organizational Study, 11 J. ORGANIZATIONAL BEHAV. 479 (1990); David A. Thomas & Clayton P. Alderfer, The Influence of Race on Career Dynamics: Theory and Research on Minority Career Experiences, in HANDBOOK OF CAREER THEORY 133, 141-43 (Michael B. Arthur et al. eds., 1989). Thomas emphasizes that despite these difficulties, blacks and whites can, under certain conditions, enter meaningful mentoring relationships. See, e.g., Thomas, Racial Dynamics, supra, at 176-77, 192.

For example, consider the following report by a black lawyer who went to see a partner about a possible assignment only to find the partner already talking to two white associates:

When this partner looks at these guys, he looks for himself back in [the old days], or for his son one day. I thought to myself, “The reason I’m not in this room is because my world in his mind has nothing to do with his world.” And no matter what schools you went to or how much leverage you think you have, or sometimes, even what the client says, people are going to work with whomever they feel most comfortable, with who [sic] they most identify with.

Clarke, supra note 271, at 32.

For example, in a Diversity Training videotape distributed by the San Francisco Bar, a black woman reports that when a rumor began circulating around her firm that one of the new associates had failed the bar, several partners immediately assumed that it was her even though she had in fact passed not one but two exams. See A FIRM COMMITMENT (Bar Association of San Francisco). The student who failed was white, see also Donna Gill, Lawyers of Color: Encouraging Diversity, CHI. LAW., July 1992, at 1 (“‘Minorities do not come in with [a] presumption of competence,’ [Lord, Bissel & Brook partner W. Muzette] Hill said. ‘They come in having to prove themselves. That in and of itself sets the tone. Everything flows from that.}
Then human nature being what it is, people tend to be drawn to, want to nurture, or are more tolerant of people just like them.”); Campbell & Tomkins, supra note 215.

See supra note 39 and accompanying text.

For example, in our study of black Harvard Law School graduates, 86% reported doing a significant amount of pro bono work, while 33% left their firm for a government job. Appendix, Table 2, Part A. These numbers appear to differ from what one would find in the general population. See Marc Galanter & Thomas Palay, Public Service Implications of Evolving Law Firm Size and Structure, in THE LAW FIRM AND THE PUBLIC GOOD 19, 42 (Robert A. Katzmann ed., 1995) [hereinafter PUBLIC GOOD] (reporting that less than 40% of the associates at large firms did more than 20 hours of pro bono work in 1994, up from 30% in 1993); see also Wilkins, Social Engineers, supra note 8 (citing evidence that blacks tend to be on average more skeptical about both the fairness and the social utility of the current distribution of wealth and power than whites).

See supra note 218 and accompanying text.

In our survey of black Harvard Law School graduates we found that the average tenure for black Harvard Law School graduates was 3.04 years and 2.32 years for the pre- and post-1986 samples respectively. See Appendix, Table 2, Part C. These rates appear to be lower than those for the associate population as a whole. For example, a survey of the Harvard Law School class of 1981 found that 74.52% of those starting at a large firm had not changed jobs as of 1985. See David N. Schultz, Harvard Law School Graduates: Where They Are and How They Got There 26 (1985) (unpublished manuscript on file with the author) (analyzing Harvard Law School's Career Path Study).

See KANTER, supra note 7, at 210, 212 (“The proportional rarity of tokens is associated with three perceptual tendencies: visibility, contrast, and assimilation .... Visibility tends to create performance pressures on the token. Contrast leads to heightening of dominant culture boundaries, including isolation of the token. And assimilation results in the token's role encapsulation.”) (emphasis omitted).

See Appendix, Table 2, Part B.

This is a point about calculating conditional probabilities based upon prior views about what the distribution of signals from a particular group is likely to be. Ideally, the evaluation process works as follows: An associate performs a task, that performance provides the partner with a signal, and based upon that signal the partner calculates the probability that training this associate will be a good investment. The more closely the partner can evaluate the associate's work, the less need there is to base the calculation on information extrinsic to the actual performance. In a world where information is expensive to collect, however, partners must make evaluations in light of their background hunches. The signal the partner gets is combined with the partner's prior hunches about the associate to produce an implicit calculation about the associate's potential. The vaguer the signal, the stronger the effect of the hunches in influencing the final calculation.

See also Herman, supra note 171, at 13 (quoting an associate at Jenner & Block: “When [whites] make a mistake, the reviewing attorney might have said, 'Well, maybe my instructions weren't clear enough.'...But with a minority,... '[s]uddenly that person is incompetent.'”). To be sure, small numbers can also produce the opposite asymmetry between blacks and whites: because of diminished expectations, a black associate who does an exceptionally good job may receive more credit than would a similarly situated white associate. Since we assume that blacks are at least as capable (on average) as their white peers, one might think that this positive asymmetry would more than offset the negative one described in the text. However, given that most of the work done by associates (particularly black associates) in their first few years could be done by anyone with average ability, competently performing these tasks will only signal that a black associate is located in the average range. Being considered average, however, is not generally enough to secure success in the promotion-to-partnership tournament.

This is what Kanter refers to as contrast. See KANTER, supra note 7, at 210-12.

Bates & Whitehead, supra note 12, at 84 (paraphrasing an attitude they believe is common in large law firms).
“A bright young associate can analyze something” says [Hogan & Hartson partner] Vincent Cohen. “He or she will say, ‘Look, I see what it takes to be a successful partner. I am not going to be able to produce the kind of business I need to make it, so better I make my swing now while I am still employable.’”

Keeva, supra note 2167 at 53.

See supra note 144.

Appendix, Table 2, Part A

Id.

Professors Revesz and Kornhauser's study of lawyers from the University of Michigan and New York University supports this intuition. They report that while black lawyers are equally likely, if not more so, to take elite firm jobs upon graduation, they end up disproportionately in the not-for-profit sector. Kornhauser & Revesz, supra note 23, at 931-34; cf. S. Elizabeth Foster, Comment, The Glass Ceiling in the Legal Profession: Why Do Law Firms Have So Few Female Partners, 42 UCLA L. REV. 1631, 1682 (1995) (reporting that the discriminatory environment causes women to leave “private practice” in disproportionate numbers).

It goes without saying that the constant fear and anxiety felt by many black associates is harmful to their self-interest.

It bears repeating that many whites are also vulnerable to these pressures. The added burdens of race-based disadvantage simply push blacks towards the extremes.

See HEINZ & LAUMANN, supra note 66, at 55-73. This perception undoubtedly influences, and is influenced by, the related view that law school courses in these subjects are among the most demanding. See supra notes 209-210 and accompanying text.

See Kordana, supra note 106, at 1927-28.

Appendix, Table 2, Supra A.

Appendix, Table 1.

For example, only one lawyer in our data on the class of 1987-88 specialized in tax. See Appendix, Table 1.

Appendix, Table 6 (As a very rough comparison, consider three randomly selected elite New York firms. At Jones, Day, Reavis & Pogue, 22% of the firm's lawyers are engaged in bankruptcy practice and 14% work in tax. At Kay, Scholer, Fierman, Hays & Handler, 12% are bankruptcy lawyers and 5% are in tax. At Kelley, Drye & Warren, the percentages are 4% bankruptcy and 5% tax.); INSIDER'S GUIDE, supra note 147, at 368-74 (The numbers for the banking departments were not reported.) Elizabeth Chambliss found that having a corporate, securities, or banking department was positively correlated with the number of black partners at firm, Chambliss, supra note 7, at 136. She does not claim, however, that black partners are likely to work in these practice areas. Instead, firms that have these specialty departments are more likely to have a broad range of other specialties as well, including those that attract black clients. As Chambliss demonstrates, the racial composition of a firm's client base is positively correlated with law firm integration, particularly for black lawyers. Id. at 141. We return to this issue below. See infra notes 397-400 and accompanying text.

We return to this latter possibility below. As for the former, to the extent that many blacks who go to elite firms have visions of using their legal skills to further the interests of the black community, high-level corporate practice may seem further removed from these concerns than other specialties. See Wilkins, Social Engineers, supra note 8 (discussing the relative importance of civil rights litigation and corporate practice to the black community). The fact that many people now view the struggle for racial justice in economic terms, however, may be changing these perceptions. This may account for some of the increased interest in corporate practice observed in later classes. On the other hand, this rise may also be due to the fact that recent graduates are less likely to define their career choices by their political commitments than their predecessors. In any event,
for the reasons outlined above, one should always be suspicious of “lack of interest” explanations. See supra note 43 and accompanying text.

301 Several black partners working in the corporate area have told Professor Wilkins that these concerns make it more difficult for them to recruit black associates into their departments. The two phenomena (i.e. courses and job choices) are, of course, connected, since associates who have not taken courses in these areas are less likely to feel comfortable joining high-level practice groups.

302 See Jacob H. Herring, Derailed Over Diversity, RECORDER, Nov. 6, 1992, at 7 (describing how non-participation in meetings is often interpreted differently based on the race of the silent individual); cf. Lani Guinier et. al., Becoming Gentlemen: Women's Experiences at One Ivy League Law School, 143 U. PA. L. REV. 1, 32-33 & n.86 (1994) (reporting lower law school classroom participation by women).

303 Consider the following example of a high risk strategy pursued by a young associate:
As a young associate with [a] large local law firm, Kenneth McClain saw his dream of becoming a big-time litigator within reach when he was assigned to work on the original Kansas City School District desegregation lawsuit. But instead of taking apart hostile witnesses in the courtroom, he spent week after week taking depositions in conference rooms. Four months into the trial, McClain was to get his shot at cross-examining a witness in court. He carefully set his line of questioning, only to be told the cross-exam they had in mind was probably too hard and that he could question another, easier witness. McClain was disappointed, but quickly drew up a new set of questions.
“As I was about to stand up to do my cross-examination,” McClain said, reliving as much as retelling the story, “a partner passed me a note that said, 'Ask one question,' and it had the question written out right there. And rather than being a good associate, I crumpled it up and put it in my pocket.”
The cross-examination went so well that the firm's partners couldn’t reprimand him.
Brian Kaberline, A Mind of His Own: McClain's Passion, Social Responsibility, KAN. CITY BUS. J, Jan. 28, 1994, § 1, at 3. One can easily see how McClain's actions might have been interpreted had his “success” been less clear or his evaluator less sympathetic.

304 As a former partner in an elite firm who is now the general counsel to a major university told Professor Wilkins, what was most important to her in assigning work was that the associate displayed a “take charge” attitude that gave her the confidence to believe the assignment would be completed successfully.

305 For a particularly poignant (and perhaps egregious) example in a similar context of a high risk strategy gone awry, consider the strange career of Joseph Jett. A black graduate of Harvard Business School, Jett was initially unsuccessful as a securities trader (he was fired from two jobs for poor performance). At his third Wall Street firm, however, he developed a strategy for dramatically increasing the profits of the government trading desk. After making him a “superstar,” however, this strategy eventually caused losses of $350 million. The firm now claims that his strategy was fraudulent--a claim he vehemently denies. Either way, the strategy was clearly highly risky, and Jett is now paying the price. See Sylvia Nasar & Douglas Frantz, Fallen Bond Trader Sees Himself as an Outsider and a Scapegoat, N.Y. TIMES, June 5, 1994, at 1.

306 Appendix, Table 2, Part A.

307 Appendix, Table 1.

308 See, e.g., McLachlan & Jensen, supra note 15 (suggesting that women and minorities are more highly concentrated in litigation).

309 Appendix, Figures 4 A-D (Of the four firms shown, only Paul, Weiss has more than 40% of its lawyers in litigation. The other four firms average 32.33%); see also Chambliss, supra note 7, at 117 (reporting that in her sample of large firms, the “average firm... devotes about 30 percent of its practice to litigation services”).

310 Once again, it is tempting to attribute this unusual concentration to voluntary choice. Litigation, after all, is the field of law most accessible to first-generation lawyers. See ABEL, supra note 38, at 108 (reporting that Catholics and Jews, many of whom
were recent immigrants, were disproportionately concentrated in litigation). Similarly, litigation is also the field traditionally associated with efforts to achieve social justice through law. See Wilkins, Social Engineers, supra note 8. For the reasons set out above, however, the ability of firms to structure the demand for labor limits the “voluntariness” of these resulting choices. See AUERBACH, supra note 66, at 95-96, 99-100 (discussing how prejudice against recent immigrants limited their career options).

Appendix, Table 6.

As many commentators have noted, the typical law school curriculum is heavily skewed towards litigation. See, e.g., MARY ANN GLENDON, A NATION UNDER LAWYERS 224-25 (1993).

See Louise A. Lamothe, Where Have the Mentors Gone?, in THE WOMAN ADVOCATE 252 (Jean M. Snyder & Andra B. Greene eds., 1995) (urging women who seek mentors and valuable experience to work on a pro bono case). The fact that formal training programs tend to be concentrated in the litigation area is likely to reinforce this effect. See Eric Herman, Big Firms Join Forces to Boost Lawyer Training, CHI. L.AW., June 1994, at 1 (reporting that formal training programs tend to concentrate on litigation). We return to the incentives created by formal training programs below. See infra notes 362-364 and accompanying text.

Just under 25% of our Harvard survey respondents stated that the possibility of improving their marketability was an important reason for doing either litigation or pro bono work. Significantly, the percentage was 33% for post-1986 graduates. See Appendix, Table 2a.

See NELSON, supra note 24, at 155 (arguing that litigation offers associates fewer opportunities for meaningful work or client contact).

Id. at 153 (reporting that litigation has one of the highest rates of associate attrition). The fact that black partners are concentrated in this area may simply have to do with the degree to which blacks go into this area in the first place.

See Knapp & Grover, supra note 6, at 303 (reporting that recruiters for some firms express concern with how minority candidates will get along with the firm's white clients). Studies of bias in the court system repeatedly indicate that blacks and other racial minorities face discrimination in the courts. See, e.g., N.Y. REPORT, supra note 12, at 86-87 (reporting, inter alia, that black attorneys are often treated by judges and other courtroom personnel with less respect than their white counterparts); Scarneccia, supra note 33, at 923 (reviewing the findings and state responses of task forces in Michigan, Washington, New York, Florida, and New Jersey). Cases in which a client wants to have a black lawyer may raise their own difficulties. See WILKINS, Race, Ethics, and the First Amendment, supra note 8, at 1042.

Consider the following incident involving a female associate, recounted by Elizabeth Chambliss:

We had a case where...the star witness from our side did not get along at all with the woman associate that was assigned to the case....I understand it was because she was a woman. He had this very macho sort of to hell with them all attitude. She was trying very carefully to be sort of a deliberate lawyer, and they just did not get along at all. And the case sort of rested on this guy's testimony, and knowing that he was going to have to be prepared for this trial by this woman, and then questioned on the stand by this woman, the chemistry was very important and I think the partner of his own initiative replaced her with a man. Chambliss, supra note 7, at 109-10 n.23.


Of course, this strategy also has risks, for example, if one's specialty is wiped out by a change in law.

Our survey records the predictable consequences. Fully 61% of our respondents stated that they had difficulty getting quality work assignments. Sixty-five percent, including 71% of the post-1986 graduates, reported that the problem worsened over time. Appendix Table 2, Part B. As our model predicts, those who do not get quality work will eventually be dismissed by the
firm; see also Emily Barker, Invisible Man, AM. LAW., May 1996, at 65, 67 (reporting that a senior partner at Washington, D.C.’s Katten, Muchin & Zavis justified cutting a black associate's hourly billing rate from $185 to $125 per hour on the grounds that clients were unwilling to pay senior associate rates for the routine work the lawyer was performing).

323 In Member of the Club, Lawrence Otis Graham—a black, Harvard-educated, former Wall Street lawyer—suggests that for blacks in high-end corporate and law jobs, success can come only from being myopic about their work at that firm. Without this myopia, blacks focus rationally on departure, thereby undermining their chances for success. See LAWRENCE O. GRAHAM, MEMBER OF THE CLUB: REFLECTIONS ON LIFE IN A RacialLY POLARIZED WORLD 83-84 (1995).

324 See David Thomas, Breaking the Glass: The Making of Minority Executives in Corporate America (unpublished manuscript, on file with the author).

325 Appendix, Table 6.

326 Appendix, Table 2, Part A.

327 See, e.g., Berkman, supra note 19, at 1 (describing how Chicago's government offices are much better integrated than large private law firms—particularly at the supervisor/partner level). Joining a firm laterally, however, can also be a risky strategy—particularly if the lawyer comes in as a senior associate. Senior lateral associates must quickly develop good working relationships with partners and clients if they expect to make partner. For all of the reasons discussed in the text, black laterals may find this particularly difficult. See, e.g., Barker, supra note 322, at 68 (describing how a black senior associate “fell through the cracks” in part because he did not get good work from senior lawyers).

328 See supra text accompanying notes 15-21.

329 See, e.g., Clarke, supra note 271, at 29 (reporting that eight black partners had left major Chicago law firms in the preceding year); see Keeva, supra note 216, at 50 (stating that between September 1991 and February 1993, fourteen minority partners left major law firms in Chicago).

330 See GALANTER & PALAY, supra note 24, at 37; William C. Kelly, Jr., Reflections on Lawyer Morale and Public Service in an Age of Diminishing Expectations, in PUBLIC GOOD, supra note 278, at 90, 92-93.

331 See NELSON, supra note 24, at 9 (categorizing partners as “finders, minders, and grinders”).


333 See, e.g., Keeva, supra note 216, at 50, 51 (describing the problems of black partners in Chicago). This situation may change as more blacks grow up in middle- and upper-income neighborhoods, attend elite schools, and move among the nation's movers and shakers. But see id. at 52 (arguing that, even when of equal economic status, minority lawyers must still overcome substantial systemic handicaps). Vincent Cohen, a partner since 1972 at Washington, D.C.’s Hogan and Hartson, states: equating blacks and whites, regardless of economic status, shows a lack of understanding of life in America. “I sometimes wish that most white people could be black for a year and then return to being white,” he says. “People of bad will would say, 'Yeah, I know it was hell, but good, let them catch hell.' But nobody would every say, 'Is it hell?' Everybody would know the answer to that one.”

Id. See generally, DAWSON, supra note 209, at 29-34 (discussing differences between middle-class blacks and whites).

334 See Keeva, supra note 216, at 53 (“After all, corporate boards tend to be conservative, and no one wants to be blamed for sending business to the wrong attorneys”).

335 Message from the Chairman: Secretary of Labor Robert B. Reich, in GLASS CEILING REPORT, supra note 4, at 2; see also AMERICAN BAR ASSOCIATION COMMISSION ON OPPORTUNITIES FOR MINORITIES IN THE PROFESSION, INCREASING DIVERSITY: THE RETENTION & DEVELOPMENT OF MINORITY LAWYERS IN

GLASS CEILING REPORT, supra note 4, at 2.

Id.

This hard reality may help to explain why progress in recruiting women into the associate ranks has so far failed to produce a corresponding percentage of women partners. With 40% of the graduating classes at most law schools being female, firms have no choice but to hire women if they want to satisfy their expanding need for associates. See Abdon M. Pallash, No Place Like Home for Recruiting Minorities and women, CHI. LAW., May 1995 (reporting that nearly half the graduates of Chicago law schools last year were women, 677 out of 1,455); Foster, supra note 291, at 1637 (reporting that the percentage of women graduating from law schools has risen from under 9% of all students in 1970 to between 40% and 50% today). So long as there are two or three men among the new class of associates with the skill and stamina to become outstanding partners, however, there is no necessary reason why a firm must choose to invest scarce training resources in its women associates. See Note, Why Law Firms Cannot Afford to Maintain the Mommy Track, 109 HARV. L. REV. 1375 (1996) (reporting that a 1994 National Association of Law Placement Report finding that only 13% of large law firm partners are women). The Note argues that self-interested firms have reasons to work to close this gap. We examine some of the reasons that this might be true below.

For a detailed account of why anti-discrimination law is unlikely to prevent firms that employ high wages and tournaments from utilizing employment practices that disadvantage minority workers, see Charny & Gulati, supra note 9, at 53-61.


See, e.g., Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 (3d Cir. 1992), cert. denied, 114 S. Ct. 88 (1993) (refusing to overturn a decision to deny a woman partnership in the absence of clear evidence of discrimination); see also Foster, supra note 291, at 165-71.

See Flagg, supra note 340 (advocating that employers bear such a burden of proof).

White candidates who disapprove of overt racial discrimination will lower their ranking of firms that engage in this practice. As we indicated, this can hurt both recruiting (to the extent that the firm develops a bad reputation among law students) and business development (since clients may also not want to be associated with a discriminating firm, and in any event, are also sensitive to a firm’s prestige ranking among law students). See RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAW (1992) (arguing that the market will correct for overt discriminatory practices that are not otherwise efficient). However, given that law students face substantial obstacles to acquiring accurate information about even the visible aspects of the process (for example, the short “institutional memory” of law students and the low level of communication across schools), this market mechanism can easily break down. This is one of the many reasons why we reject Epstein's prescriptive claim that anti-discrimination law is both unnecessary and harmful.

Given low monitoring, partners will often be unaware of discriminatory actions taken by other partners or associates, particularly if those actions affect persons outside the firm. The threat of discrimination lawsuits—even ones that ultimately fail (since the firm will still incur both litigation and reputational costs)—gives firms an incentive to devote more resources to monitoring than they otherwise would be inclined to do.

See Barker, supra note 322, at 66.

See id. at 68 (quoting Mungin's supervisor as stating “I told him... that he wasn't doing partner-level work” and “I couldn't imagine the [partner review committee] would have passed him through”).

See id. at 67.

See id.
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349  
See id. at 68.

350  
See id.

351  
See id. at 71.

352  See id. at 67 (saying that the lesson from Mungin's case is that “[f]irms must take steps to keep, nurture, and promote their minority hires from the day they walk in the door” and quoting a special counsel in an elite New York firm as speculating that “[n]ow management is going to have to, just as in the sexual harassment area, think about its strategy in developing associates and working with associates”). It is important not to overstate this effect. Mungin's case is in many respects unique. Not only did Mungin have superstar credentials (e.g., Harvard undergraduate and law school, fluent in Russian), but he came in as a lateral with a demonstrated record of success at other law firms. This, combined with the promises that were made to him when he was hired, made it easier for him to demonstrate that he was not being given the training and opportunity necessary to prove his abilities than would be the case for the average black associate who is flatlining at his first firm. Indeed, the primary lesson from Mungin's case is that blacks with superstar credentials may still encounter problems on their way to becoming successful law firm partners. See id. at 71 (noting that one of the jurors believed that Mungin was penalized because he was more qualified than many other Katten lawyers).

353  
See id. at 71 (quoting Katten's counsel as arguing to the jury that “[t]he reality is, they didn't fire him because he was black. Given the verdict, I feel that they should have fired him”).

354  See Richard C. Reuben, Suing the Firm, 81 A.B.A.J., Dec. 1995, at 68, 72 (discussing the costs to a firm of having an insider/associate use them for discrimination). Actually bringing a discrimination suit, however, is costly to the plaintiff. Since other firms will have little information about the merits of the black employee's claim, they are prone to be sympathetic to the firing firm's position (particularly given that both firms probably follow similar policies and practices). As a result, they are likely to view the fired employee as a “troublemaker,” as well as someone who is in the unacceptable category. In a low-monitoring world, such strong negative signals can be disastrous to a black lawyer's future job prospects. In discussions with black lawyers who have either brought or contemplated bringing suit, we have found that the danger of being branded a troublemaker has been a major consideration in their decisions. See also, Barker, supra note 322, at 70 (reporting that the Mungin is currently working as a contract lawyer for the S.E.C. making $14 per hour).

355  
See id. at 66 (describing Mungin as an “invisible man” inside the firm).

356  Theoretically, this litigation effect might decrease a black lawyer's fear levels to such a point that she begins to shirk. The fact that black associates know that partners can convey this information to future employers informally (even if the associate is not fired), combined with the significant obstacles that blacks face in the lateral job market even when they aren't burdened with additional negative signals, provide a powerful disincentive to engage in this kind of opportunistic behavior.

357  See Ramona L. Paetzold & Rafael Gelu, Through the Looking Glass: Can Title VII help Women and Minorities Shatter the Glass Ceiling?, 31 HOUS. L. REV. 1517, 1528-43 (1995). There are, however, probably more discrimination suits than the judicial record would lead one to believe. In light of the reputational interests outlined above, both potential plaintiffs and firms have an incentive to settle discrimination law suits quickly and quietly. Although each side has an interest in testing the other side's willingness to put its reputation on the line, eventually the parties are likely to find it in their interest to reach a confidential settlement. (One black lawyer involved in such negotiations described them as a “game of chicken” in which the firm waited until the lawyer demonstrated that he was prepared to risk his reputation by actually filing suit before the firm offered a lucrative settlement conditioned on the lawyer's express promise that the entire matter would remain confidential). Private settlements decrease the value of anti-discrimination law as an informational tool.

358  See St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2749 (1993) (holding that plaintiffs must demonstrate not only that the employer's justification for favoring a white worker is pretextual, but also that the justification hides a discriminatory motive).

See infra text accompanying notes 378-381.

See Sunstein, supra note 74 (describing the problems associated with affirmative action and other remedies and arguing that policy makers should have a preference for race neutral policies).

See, e.g., Richard N. Feferman, Associate Training: Raising Lawyers for Fun and Profit, LAW PRAC. MGMT., July/Aug. 1993, at 28, 30-31 (describing changes in the legal profession that make traditional associate training programs obsolete); Herman, supra note 313, at 1 (quoting a name partner in a major Chicago firm as conceding that “no longer...can lawyers rely just on being mentored or counseled by lawyers for whom they always work”).

Some firms have attempted to supplement their formal training programs with formal mentoring programs. See Steven Keeva, Good Act to Follow, A.B.A. J., Mar. 1995, at 74. The artificial constraints of such relationships, however, hinder their effectiveness. Moreover, to the extent that they do not involve real work, they can never substitute for the kind of guidance and experience being received by those on the training track. Despite these constraints, however, meaningful relationships can blossom through these programs, which sometimes give blacks access to powerful partners in the firm whom they otherwise would not get an opportunity to meet.

See Herman, supra note 313, at 20 (noting that litigation lends itself to the kind of hands-on training exercises that work well in a formal training program).

See generally NELSON, supra note 24, at 159-89 (describing the work structure of modern law firms).

Firms frequently do not want to divert the energies of powerful partners, who are most often rainmakers, into what is often seen as a ministerial duty.

See Chambliss, supra note 7, at 95-96 (giving accounts of partners “poaching” good associates).

Although we have no basis for comparison, the fact that 64% of the respondents to our survey of black Harvard Law School graduates stated that they were told of criticisms about their performance during the formal review process that were not mentioned at the time the work was performed provides some support for this intuition. See Table 2b. Negative feedback of this kind is far less useful than constructive criticism at the time the work is performed.

See Chambliss, supra note 7, at 123 (finding that, with the exception of a formal departmental structure, bureaucratization is negatively correlated with law firm integration). Moreover, to the extent that these institutional reforms superficially appear to respond to the problems of unequal access and differing standards of evaluation, they may actually impede progress by discouraging firm leaders from doing more. Id.; see infra text accompanying notes 371-376 (discussing diversity consultants and structuring).

For a theoretical defense of this point in the context of moral argument, see Wilkins, Two Paths, supra note 8.

See Dimitra Kessenides, Dealing With Diversity, AM. LAW., July-Aug. 1994, at 40. As far as we know, there are no concrete studies on the effects of diversity training. Therefore, this section relies on anecdotal evidence. Both of us have talked with numerous lawyers who have been through these programs, and one of us has participated in two diversity training sessions specifically designed for elite firms.

See Herring, supra note 302, at 7.

See Communication in the Workplace (promotional leaflet for Organizational Training, Inc., 1995) (on file with authors).

Interviews conducted by the authors at three elite New York firms that have hired diversity consultants.
Appendix, Table 2, Part C. See also, Barker, supra note 322, at 69 (noting that Mungin did not argue that there was overt racism at Katten). In any event, if white lawyers actually hold consciously racist views, it is unlikely that diversity training (or anything else for that matter) will dissuade them from these beliefs. As we indicated above, we do not believe that intentional racism is widespread among elite firm lawyers. We therefore are inclined to believe that even statements that could fairly be interpreted as “racist” will most often be the product of something less than conscious racism.

Appendix, Table 2, Part C.

Id. Twenty out of sixty-six respondents (30.3%) stated that they had left their firms in part because they felt unwelcome in informal social networks.


Given the small number of black associates, preserving anonymity is virtually impossible.

For example, one of us was told by a black lawyer at an elite firm that the night before the diversity consultants were scheduled to interview black associates, the firm's two most senior African American attorneys called all of the other black lawyers to tell them not to reveal their true feelings or experiences during the interview.

Indeed, we hope that this paper will make some modest contribution to these efforts.

We suspect that at least some firm leaders are already aware that their hiring and promotion practices can produce arbitrary decisions about which lawyers succeed at the firm. See, e.g., Feferman, supra note 362, at 28.

Years ago, some lawyers got the idea for the pyramid scheme that forms the skeleton for the modern law firm. They figured out they could hire a bunch of young lawyers to do the legal research they hated doing, and palm off their most unpleasant matters on them. They paid these junior-level attorneys chicken feed and made huge profits off their labor. The cream rose to the top, the firm dumped the sediment from the bottom, and the whole process would repeat itself.

Id.


Id.

Id.

For example, the Bar Association of San Francisco has helped to establish the California Minority Counsel Program, which is similar to the ABA's program. See S.F. REPORT, supra note 33, at 5.

PROGRAM REPORT, supra note 384, at 5.

Id. at 10.

Id. at 15 (noting that the average number of minority associates grew from 8.4 to 12.8 and the average number of partners increased from 2.5 to 3.9).

This is another example of the difficulty, described in Part III, of gathering data on black lawyers.
For example, the growth rate in minority associates and partners under the ABA's program is substantially larger than the average growth for all minorities in large firms during this period. See Jensen, supra note 12, at 1, 28 (reporting only slight changes in the percentage of minority attorneys in surveyed law firms between 1981 and 1989).

PROGRAM REPORT, supra note 384, at 4 (emphasis added).

For example, the General Counsel of General Motors sent a letter including the following language to all of the law firms doing GM business:

A matter of great concern to me, and the entire bar, is the disappointingly slow pace at which minorities are being integrated into our legal profession, particularly at the practice level at which we must engage.... I therefore ask you to be certain that minority lawyers in your firm able to provide service at the requisite level be included among those who represent G.M. In addition, I am confident that you agree with me that we must make certain we are doing all we can to introduce additional able minority attorneys into our respective organizations.

Letter from Harry I. Pearce (Feb. 29, 1988), reprinted in INCREASING DIVERSITY, supra note 335, at tab E.

Interviews conducted by Professor Wilkins. This reality reflects the fact that the Program was originally set up to benefit minority law firms. Indeed, one of the unintended effects of the Program is to encourage black partners to leave elite firms for minority-owned enterprises that can more effectively compete for this and other similar corporate work. See Keeva, supra note 216, at 50-51.

See generally GLASS CEILING REPORT, supra note 4.

Interviews conducted by Professor Wilkins. This reality reflects the fact that the Program was originally set up to benefit minority law firms. Indeed, one of the unintended effects of the Program is to encourage black partners to leave elite firms for minority-owned enterprises that can more effectively compete for this and other similar corporate work. See Keeva, supra note 216, at 50-51.

See Giesel, supra note 272, at 799-800 (arguing that as more women become in-house counsel, women in firms may enjoy increased “rainmaking” ability).

See Chambliss, supra note 7, at 133-41 (reporting a positive correlation between client demographics and law firm integration). Significantly, Chambliss found that not every demographically connected variable was significant for every group. For example, she concluded that the presence of a foreign office was positively correlated with the number of Asian lawyers but not the number of blacks. See id. at 129. As Chambliss suggests, this is probably due to the fact that there are few foreign offices in Africa or the Caribbean. Id. This is yet another example of the danger of making generalizations across minority groups.

See AMERICAN BAR ASSOCIATION COMMISSION ON OPPORTUNITIES FOR MINORITIES IN THE PROFESSION, SURVIVAL IN CORPORATE LAW FIRMS AND LAW DEPARTMENTS IN AN INCREASINGLY COMPETITIVE ENVIRONMENT (Aug. 1995) (panel of minorities in corporate counsel offices discussing their efforts to channel work to minority lawyers).

Thus, when Harold Washington became Chicago's first black mayor, the number of black lawyers doing substantial business with the city substantially increased. Interviews by Professor Wilkins with various black partners in Chicago. Similarly, the Congressional Black Caucus was largely responsible for the inclusion of Section 1216 in the Financial Institutions Reform, Recovery and Enforcement Act of 1989, which mandates the Office of Thrift Supervision to “ensure inclusion, to the maximum extent possible, of minorities and women...including providers of legal services, in all contracts entered into by the agency.” Jose O. Seda, Hiring of Women and Minority Lawyers for Bank and Thrift Bailout Work Is the Law, BANK. & THRIFT L. BUL., Aug. 1992, at 1.

Those who make optimistic predictions based on these changes frequently overlook a number of important constraints. For example, as we argued in Part III, corporate counsel are under tremendous pressure to hire lawyers whose “merit” is beyond question to protect themselves against the possibility that something might go wrong. This pressure may be particularly acute for blacks who face being accused of favoritism if they hire a black lawyer over an equally prominent white lawyer. In conversations about the Program, several black partners have mentioned that this dynamic substantially limits the ability of black corporate counsel to give good work to black lawyers. Similarly, the Supreme Court's recent decisions striking down various government set-aside programs highlight the risks of tying one's success to the political arena. See Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995) (holding that race-based federal set-aside program must satisfy strict
scrutiny). The fact that many of the lawyers who were hired by the City of Chicago when Harold Washington was mayor lost this business when he died underscores this danger. Interviews with Professor Wilkins.

402 See Davis, supra note 15 (critiquing the “hard to find good help” rationale for the limits of current law firm recruiting efforts).

403 One of the most ambitious programs has been established by the San Francisco Bar Association. In 1989, the Association adopted a goal that participating firms have 15% minority associates and 5% minority partners by December 31, 1995. By December of 2000, the goal is to raise these percentages to 25% and 10%, respectively. See S.F. REPORT, supra note 33, at 1. By comparison, the Los Angeles County Bar Association is committed to hiring each year a number of minority lawyers that is equal to 10% of the total number of attorneys hired during the years between 1992 and 1996. See Faye A. Silas, Bar, Law Firms Develop Statements of Goals to Increase Hiring, Retention and Promotion of Minority Lawyers, BAR LEADER, July-Aug. 1993, at 21, 24. New York has pledged to achieve a level of 10% minority associates by 1997. Adams, supra note 50, at 4. Many other groups either have established similar goals or have urged firms to hire and promote minority attorneys.

404 For example, in a study of large San Francisco firms, the number of black associates (105 to 122) and partners (21 to 32) rose significantly in the first three years of the Bar Association's minority hiring program. See S.F. REPORT, supra note 33, at 8. Similarly, a survey of New York law firms conducted after the Association of the City of New York adopted voluntary goals and timetables showed increases in hiring and promotion rates for blacks as well as an increase in retention. See Adams, supra note 50. See also, Davis, supra note 15 (linking recent increases in the number of minority associates to these programs).


408 By tying a law firm's reputation to making progress on hiring and promoting blacks, goals and timetables give firms a reason to pay attention to how their lawyers choose between black and white candidates in the average range. Assuming, as the advocates of standards must, that firms care about getting the applicants with the best signals, the easiest way for firms to meet this goal and protect their reputation is by ensuring that the actual skills of black applicants are fairly appraised. Since the prior practice of preferring average whites causes no efficiency loss, this added reputational interest gives firms an incentive to monitor these decisions more closely than they otherwise would.

409 See NOTE, DANIEL R. HANSEN, Do We Need The Bare Exam: A Critical Examination, 45 Case W. Res. L. Rev. 1191, 1235 nn.131-32 (1995) (documenting the rising quality and quantity of the law school applicant pool). Needless to say, a similar phenomenon has been happening in Universities, prestigious high schools, and even in elementary schools. See Bruce Webber, The Harvard Class of '00, N.Y.T. MAG., April 27, 1996, at 44 (describing the intense competition to get into Harvard College and reporting that even with affirmative action, the blacks who are admitted have superstar credentials).

410 See supra note 192.

411 See Selmi, supra note 49 (making a similar argument about slight differences in employment test scores).

Glenn Loury describes an economic model where affirmative action results in supervisors/employers holding blacks to lower standards in order to satisfy institutional pressures to promote and hire blacks. In turn, he argues, these lower standards result in rationally lower effort levels by blacks. See LOURY, supra note 36, at 114. Ward Connerly, the black member of the University of California's Board of Regents who led the charge against affirmative action at the University, also makes this argument. See William H. Honan, Regents Prepare for Storm on Affirmative Action, N.Y. TIMES, July 19, 1995, at B7.

See Jonathan S. Leonard, The Impact of Affirmative Action Regulation and Equal Employment Laws on Black Employment, 4 J. ECON. PERSP. 47, 61 (1990) (finding little negative effect of affirmative action on productivity in the context of federal contractors); Jonathan S. Leonard, Antidiscrimination or Reverse Discrimination: The Impact of Changing Demographics, Title VII, and Affirmative Action on Productivity, 19 J. HUM. RESOURCES 145 (1984) (same). One might argue that black superstars face reduced incentives since they know that they have a good chance of being hired and making partner even without affirmative action. However, accounts by even those black superstars who are skeptical about the value of affirmative action once again point in the opposite direction; these superstars believe that they have had to work twice as hard as their white colleagues to overcome the stigma that they do not deserve their superstar status. See, e.g., CARTER, supra note 228. We return to the issue of stigma below.

The only scenario in which black student or associate would not transfer her resources to investing in skills is where she is already confident enough of winning the partnership tournament that she believes that she needs no more skills—an unlikely eventuality, especially for a risk-averse individual.

See, e.g., Weiss, supra note 88 (suggesting that excessive reliance on education as a signal may encourage socially wasteful investment).


Opportunities available to superstar whites will not diminish at all, since they will still be given preference over both average blacks and average whites.

Ian Ayres argues that affirmative action and the resultant higher barrier for whites to succeed would in fact produce higher effort levels from white workers because of increased competition. See Ayres, supra note 407, at 63; see also Andrew Schotter & Keith Weigelt, Asymmetric Tournaments, Equal Opportunity Laws and Affirmative Action: Some Experimental Results, 107 Q.J. ECON. 511 (1992).

For a discussion of statistical discrimination, see David A. Strauss, The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards, 79 GEO. L.J. 1619 (1991). A related stigma argument is that affirmative action causes blacks to suffer excessive amounts of self-doubt, since they are unsure of their own qualifications for a job. While this may be true, we think it is relatively unimportant when compared to the problem of the employer doubting the employee. After all, employees know their own skill levels better than anyone else. For a discussion of this problem, see LOURY, supra note 36, at 238-41.

Perceiving a reduced set of opportunities vis-a-vis one's competitors reduces incentives to work. See Richard B. Freeman, LABOUR MARKETS IN ACTION 128 (1989) (suggesting that youths who perceived their employers as discriminatory were more likely to be absent from their jobs); see also Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 202 (1st Cir. 1987) (recognizing how discriminatory behavior by an employer can influence the incentives of an employee and result in negative behavior on the part of the employee, such as a high absence rate).

The harm is even worse for bona fide black superstars. Their superstar qualifications are doubted and discounted because of the possibility that they were achieved as a result of affirmative action. Hence, unlike white superstars, black superstars face an extra burden of proof to show that they really are superstars. Understandably, some of these black superstars resent this extra burden and find it harmful. The question is whether this harm outweighs the benefits of affirmative action for the majority of

For example, when writing from a traditional law and economics perspective, one of us has come to a more pessimistic conclusion about the possibility of successfully integrating low monitoring workplaces through a process of incremental institutional change. See Charny and Gulati, supra note 9, at 36-38.

The most famous example of this kind of reasoning is the claim by some of the original proponents of law and economics theory that the common law is efficient. See, e.g., George L. Priest, The Common Law Process and the Selection of Efficient Rules, 65 J. LEGAL STUD. 65 (1977); Paul Rubin, Why is the Common Law Efficient?, 65 J. LEGAL STUD. 51 (1977).


See id. at 663.

See id. at 642. Roe adapts this insight from Chaos theory.

See id. at 643-44. He adapts this insight from theories about path dependence.

In a recent series of lectures at Harvard Law School, Professor Roberto Unger made a similar point about what he refers to as the “institutional fetishism” of traditional American liberalism and the “structural fetishism” of the left. Unger argues that Americans tend to assume that our basic political institutions represent the best possible—and therefore the last—compromise among the competing values at stake in a representative democracy. As a result, these institutions are exempt from the fundamental experimentalism that has otherwise characterized this nation's attitude towards solving social and political problems. For its part, the American left tends to see these same institutions, as well as new ones that might be developed, as the result of an overarching and largely fixed economic and political superstructure that inevitably shapes social institutions into predictable forms. Unger rejects both of these fetishes. The first ignores the fact that our existing institutions are the product of historical traditions and contingencies, and may very well be less suited to contemporary conditions than plausible alternatives. The second underestimates society's ability, when animated by a vision of the future and an energized politics, to alter the basic character of social life through incremental changes in the structure and functioning of institutions. Although we may not always agree with Unger about how such a transformation might take place, his basic rejection of the tyranny of the present is as important an antidote for the satisfaction of the center and the fatalism of the left as Roe's analysis is for the biological determinism of the right.

The reference is to W.E.B. Dubois' famous and prophetic statement that “the problem of the Twentieth Century is the problem of the color line.” See W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 13 (Donald Gibson ed., 1989).

See generally GALANTER AND PALAY, supra note 24 (describing the historical development of elite firms).

See Gilson and Mnookin, Coming of Age, supra note 63, at 571 & n.14 (describing the advantages of the Cravath model of associate careers).


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437  See Roe, supra note 425, at 646 (making a similar argument with respect to the differing strategies for corporate control in the United States and Japan).


440  See id. at 379-87 (attributing lawyer disfunction to a “squeeze” between rising costs--most notably high associate salaries--and reduced revenues produced by growing competition that results in longer hours, less training, and diminished loyalty and collegiality).

441  See id. at 387-410 (describing initiatives).


445  Gary Griffith, Techshow 95: Dramatic Change in the Practice of Law, INFO. TODAY, June 1, 1995, at 22.


447  See MACCRATE REPORT, supra note 97. This pressure is in part a tacit acknowledgment of our claim that law firms (and other legal employers) no longer have the time or the inclination to train lawyers themselves.

448  See Nancy L. Schultz, How Do Lawyers Really Think?, 42 J. LEGAL EDUC. 57, 73 (1992) (advocating providing students with a variety of “teaching methodologies, personal visions, [and] interdisciplinary concepts” as a solution to the integration of lawyering theory and skills). For a description of one attempt to accomplish such a synthesis, see David B. Wilkins, Redefining the “Professional” in Professional Ethics: an Interdisciplinary Approach to Teaching Professional Ethics, 58 LAW & CONTEMP. PROBS. 241 (forthcoming 1996).

449  For example, the State University of New York at Buffalo School of Law has proposed radically restructuring its curriculum “to equip [graduates] to work like lawyers” as well as to “think” like lawyers. See The New Curriculum: University at Buffalo School of Law (Dean's Office description, on file with California Law Review).

450  See, e.g., JENNIFER L. HOCHSCHILD, FACING UP TO THE AMERICAN DREAM: RACE, CLASS AND THE SOUL OF THE NATION 211-12 (1995) (reporting that “over two-thirds of black Angelenos, compared with roughly two-fifths of whites, Asians, and Latinos, saw the uprising [following the acquittal of the four white police officers in the first Rodney King trial] as ‘mainly a protest by blacks against unfair conditions’ rather than ‘a way of engaging in looting and street crime’”). Black and white responses to the O.J. Simpson verdict are similarly divided.

451  For an example of what can be learned from a careful investigation of this country's current struggle to come to grips with the political and moral significance of race, see ANTHONY APPIAH & AMY GUTTMANN, COLOR CONSCIOUSNESS: THE POLITICAL MORALITY OF RACE (forthcoming 1996).
452  See HOCHSCHILD, supra note 450, at xii.

**APPENDIX**

**TABLE 1: Data on Black Alumni of Harvard Law School**

<table>
<thead>
<tr>
<th></th>
<th>CLASSES OF ’81 &amp; ’82</th>
<th></th>
<th>CLASSES OF ’87 &amp; ’88</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>#</td>
<td>%</td>
<td>#</td>
<td>%</td>
</tr>
<tr>
<td>Started Out at Elite Law Firms (not including clerkships):</td>
<td>36/60</td>
<td>60%</td>
<td>44/57</td>
<td>77%</td>
</tr>
<tr>
<td>Were Still at the Same Law Firm in 1993, (Classes of ’81 &amp; ’82); 1992, (Classes of ’87 &amp; ’88)</td>
<td>5/36</td>
<td>14%</td>
<td>12/44</td>
<td>27%</td>
</tr>
<tr>
<td>Moved into Government After Their Firm Experience:</td>
<td>5/31</td>
<td>16%</td>
<td>4/32</td>
<td>13%</td>
</tr>
</tbody>
</table>

**Breakdown by Specialty**

<table>
<thead>
<tr>
<th>Specialty</th>
<th>CLASSES OF ’81 &amp; ’82</th>
<th>CLASSES OF ’87 &amp; ’88</th>
</tr>
</thead>
<tbody>
<tr>
<td>Litigation</td>
<td>18</td>
<td>17</td>
</tr>
<tr>
<td>Corporate</td>
<td>9</td>
<td>12</td>
</tr>
<tr>
<td>Real Estate</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Entertainment</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Unknown</td>
<td>6</td>
<td>9</td>
</tr>
<tr>
<td>Public Finance</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Patent, Tax, Other Specialty</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>
Source: Harvard Law School Alumni Office

**TABLE 2: Results of Survey of Black Harvard Law School Graduates**

<table>
<thead>
<tr>
<th>TABLE 2, PART A</th>
<th>GRADUATED PRE-1986</th>
<th>GRADUATED 1986+</th>
<th>TOTAL</th>
<th>#%</th>
<th>#%</th>
<th>#%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Number of Responses</td>
<td>21 100%</td>
<td>45 100%</td>
<td>66 100%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Responses from Women</td>
<td>5 24%</td>
<td>29 64%</td>
<td>34 52%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employment History</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage Still Employed at the firm they joined initially</td>
<td>0 0%</td>
<td>20 44%</td>
<td>20 30%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Jobs of those Who Left</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Government</td>
<td>6 29%</td>
<td>9 36%</td>
<td>15 33%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Small Non-Elite Firm</td>
<td>2 10%</td>
<td>6 24%</td>
<td>8 17%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In-House Counsel</td>
<td>6 29%</td>
<td>3 12%</td>
<td>9 20%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Private Practice</td>
<td>1 5%</td>
<td>1 4%</td>
<td>2 4%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Academia</td>
<td>1 5%</td>
<td>2 8%</td>
<td>3 7%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other Elite Firm</td>
<td>3 14%</td>
<td>4 16%</td>
<td>7 15%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Investment/Banking/Consulting</td>
<td>2 10%</td>
<td>0 0%</td>
<td>2 4%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number Who Became Partners at Elite Firms (3 spent time in Gov't, 1 in a Small Firm)</td>
<td>4 6%</td>
<td>4 6%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Elite Firm Work Experience</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Litigation</td>
<td>11 52%</td>
<td>19 43%</td>
<td>30 45%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Corporate</td>
<td>5 24%</td>
<td>16 34%</td>
<td>21 32%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Real Estate</td>
<td>3 14%</td>
<td>4 9%</td>
<td>7 11%</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### TABLE 2, PART B

<table>
<thead>
<tr>
<th>Training, Supervision &amp; Evaluation at the Large Law Firm</th>
<th>GRADUATED PRE-1986</th>
<th>GRADUATED 1986+</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Had Partners Take Interest in Their Career</td>
<td>5/21</td>
<td>21/45</td>
<td>26/66</td>
</tr>
<tr>
<td>If Not, Number for Whom This Resulted in Their Departure</td>
<td>8/16</td>
<td>19/24</td>
<td>27/40</td>
</tr>
<tr>
<td>Had Difficulty Getting Good Work Assignments</td>
<td>12/21</td>
<td>28/45</td>
<td>40/66</td>
</tr>
<tr>
<td>Whose Difficulty Getting Work Worsened Over Time</td>
<td>6/12</td>
<td>20/28</td>
<td>26/40</td>
</tr>
<tr>
<td>Been Through Formal Review Process(^{a1})</td>
<td>15/21</td>
<td>42/45</td>
<td>57/66</td>
</tr>
<tr>
<td>Received Negative Feedback at the Formal Evaluation that Wasn't Mentioned Earlier (i.e. when project completed.)</td>
<td>13/21</td>
<td>29/45</td>
<td>42/66</td>
</tr>
<tr>
<td>Amount of Criticism Received Perceived as Being More than a White Associate at the Same Level Would Have Received</td>
<td>8/21</td>
<td>19/45</td>
<td>27/66</td>
</tr>
</tbody>
</table>

---

Footnotes

\(^{a1}\) Three were too new to have been through it.
WHY ARE THERE SO FEW BLACK LAWYERS IN..., 84 Cal. L. Rev. 493

<table>
<thead>
<tr>
<th>TABLE 2, PART C</th>
<th>GRADUATED PRE-1986</th>
<th>GRADUATED 1986+</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>#%</td>
<td>#%</td>
<td>#%</td>
</tr>
<tr>
<td>Social Relations</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Explicit Racist Comments While Present</td>
<td>6/21 29%</td>
<td>15/45 33%</td>
<td>21/66 32%</td>
</tr>
<tr>
<td>If So, Number for Whom This Was a Major Cause to Leave</td>
<td>0/6 0%</td>
<td>4/15 27%</td>
<td>4/21 19%</td>
</tr>
<tr>
<td>Felt Welcome Within Social Networks in the Firm</td>
<td>10/21 48%</td>
<td>19/45 42%</td>
<td>29/66 44%</td>
</tr>
<tr>
<td>If Not, Number for Whom This Was a Major Cause to Leave</td>
<td>3/11 27%</td>
<td>17/26 65%</td>
<td>20/37 54%</td>
</tr>
<tr>
<td>More Under Pressure to be Seen (e.g., nights and on weekends)</td>
<td>4/21 19%</td>
<td>15/45 33%</td>
<td>19/66 29%</td>
</tr>
<tr>
<td>Felt Inhibited Discussing Political, Social, or Moral Views at the Firm</td>
<td>6/21 29%</td>
<td>23/45 51%</td>
<td>29/66 44%</td>
</tr>
<tr>
<td>Average Number of Years Before Departure From the Law Firm</td>
<td>3.04 Years</td>
<td>2.32 Years</td>
<td></td>
</tr>
</tbody>
</table>

*737 TABLE 2 QUESTIONNAIRE

Personal History

Male _____, Female _____; HLS Class ____;

Undergraduate Institution_________________________________: 

Were you the first in your family to go to law school?_____.

Employment History

Have you ever been employed full time (i.e., excluding summers) at a corporate law firm with more than 50 lawyers? _____; If yes, are you still employed at the firm you joined immediately after graduation? _____; If no, how many years did you stay at your first law firm job? _____; Did you leave that firm to join another corporate law firm with more than 50 lawyers? _____; If so, are you still with this second firm? _____; If no, how many years did you spend at the second firm? _____; If you did not join another corporate law firm with more than fifty lawyers after leaving your first law firm job, where did you go (i.e., corporate legal department, small firm, government,
WHY ARE THERE SO FEW BLACK LAWYERS IN..., 84 Cal. L. Rev. 493

etc.)? __________________________________________; Where are you currently employed?

*738 Large Law Firm Work Experience

During your years in corporate law practice, did you work primarily in one practice area? ________________; If so, what was that area? ____________________________________; If you specialized in litigation, was the possibility of acquiring skills that might improve your marketability to non-corporate law firm employers a substantial motivating factor in your choice of field? ______; Did you do any pro bono work? ______ If yes, was the possibility of acquiring skills that might improve your marketability to non-corporate law firm employers a substantial motivating factor in your decision to take on pro bono work? ____.

Training, Supervision, and Evaluation

Did any of the firm's partners take an active interest in your career (i.e., by providing training, information, or help in selecting good projects)? _____; If no, was the sense of this kind of mentoring an important consideration in your decision about whether to stay at the firm? _____; Did you have difficulty getting good work assignments? _____; If yes, did this problem become worse the longer you stayed at the firm? _____; Did you go through a formal evaluation/review process? _____; If so, were you ever given negative feedback on your work that was not mentioned at the time the work was completed? ____; In either formal or informal discussions with supervising lawyers, have you been criticized for making a mistake that others at your experienced level would not have been criticized for making (or to the same degree)? ____.

Social Relations

Has anyone ever made an expressly racist statement either to your or in your presence? _____; If so, was this a substantial factor in your decision about whether to stay at the firm? _____; Do you feel welcome in the mainstream informal social networks inside your firm? _____; If not, is this a substantial factor in your decision about whether to stay at the firm? _____; Are you under more pressure to “be seen” at the firm on nights and weekends than your white counter-parts? _____; Do you feel inhibited in discussing your political, moral, or social views with other lawyers at the firm? ____.

Follow Up

If you would be willing to discuss these issues further or to learn more about the project, please put your name and address below. Confidentiality will be strictly observed.

*739 TABLE 3: Results of Law Firm Survey Profile of Entering Associates at 73 Elite Firms

| Total Associates | 1,257 |
**WHY ARE THERE SO FEW BLACK LAWYERS IN..., 84 Cal. L. Rev. 493**

<table>
<thead>
<tr>
<th>Black Associates</th>
<th>96</th>
</tr>
</thead>
<tbody>
<tr>
<td>% of Blacks in Total</td>
<td>7.6%</td>
</tr>
<tr>
<td>Black Associates From Elite Law Schools</td>
<td>55</td>
</tr>
<tr>
<td>% of Black Associates From Elite Law Schools</td>
<td>57.3%</td>
</tr>
<tr>
<td>Black Associates From HLS</td>
<td>23</td>
</tr>
<tr>
<td>% of Black Associates From HLS</td>
<td>24.0%</td>
</tr>
<tr>
<td>Non-Black Associates</td>
<td>1,162</td>
</tr>
<tr>
<td>Non-Black Associates From Elite Schools</td>
<td>601</td>
</tr>
<tr>
<td>% of Non-Black Associates From Elite Schools</td>
<td>51.7%</td>
</tr>
<tr>
<td>Non-Black Associates From HLS</td>
<td>138</td>
</tr>
<tr>
<td>% of Non-Black Associates From HLS</td>
<td>11.9%</td>
</tr>
</tbody>
</table>

**Number of 3L Black Law Students at Schools From Which Law Firms Hired**

| Number of 3L Black Students at HLS | 61 |
| Number of 3L Black Students at All Schools From Which Elite Firms Hired | 1,003 |
| % of HLS Blacks in Total | 6.1% |

**New York**

| Black Associates | 45 |
| Black Associates From Elite Schools | 29 |
| % of Black Associates From Elite Schools | 64.4% |
| Black Associates From HLS, Columbia, NYU | 23 |
| % of Black Associates From HLS, Columbia, NYU | 51.1% |
| Black Associates From HLS | 7 |
| % of Black Associates From HLS | 15.6% |

**Washington D.C.**

| Black Associates | 25 |
| Black Associates From Elite Schools | 14 |
| % of Black Associates From Elite Schools | 56.0% |
| Black Associates from HLS, Georgetown | 13 |
| % of Black Associates From HLS, Georgetown | 52.0% |
| Black Associates From HLS | 8 |
| % of Black Associates From HLS | 32.0% |

*740  TABLE 4: Distribution of 1995 Entering Black Associates at Elite Law Firms by Law School.*
<table>
<thead>
<tr>
<th>Law School</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>American</td>
<td>1</td>
</tr>
<tr>
<td>Brooklyn</td>
<td>1</td>
</tr>
<tr>
<td>Boston College</td>
<td>1</td>
</tr>
<tr>
<td>Boston University</td>
<td>4</td>
</tr>
<tr>
<td>Catholic</td>
<td>1</td>
</tr>
<tr>
<td>Columbia</td>
<td>10</td>
</tr>
<tr>
<td>Chicago</td>
<td>1</td>
</tr>
<tr>
<td>Duke</td>
<td>2</td>
</tr>
<tr>
<td>Duquesne</td>
<td>1</td>
</tr>
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<td>Tulane</td>
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<tr>
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<tr>
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<td>Univ. of Virginia</td>
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WHY ARE THERE SO FEW BLACK LAWYERS IN..., 84 Cal. L. Rev. 493

<table>
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<tr>
<th>SCHOOL</th>
<th>NUMBER OF BLACK PARTNERS</th>
<th>ATLANTA, GA KILPATRICK &amp; CODY</th>
<th>BOSTON, MA ROPE &amp; GRAY</th>
<th>CHICAGO, IL SIBLEY &amp; AUSTIN</th>
<th>NEW YORK, NY CLEARY, GOTTLIEB</th>
<th>SAN FRANCISCO, CA MORRISON &amp; FOERSTER</th>
<th>TOTAL 5 FIRMS</th>
</tr>
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<tr>
<td></td>
<td>#</td>
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<td>#</td>
<td>#</td>
<td>#</td>
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</tr>
<tr>
<td>13 Elite Schools</td>
<td>67</td>
<td>77%</td>
<td>42</td>
<td>47%</td>
<td>95</td>
<td>74%</td>
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<td></td>
<td>63</td>
<td>93%</td>
<td>66</td>
<td>70%</td>
<td>66</td>
<td>66%</td>
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</tr>
<tr>
<td>Non-elite</td>
<td>20</td>
<td>23%</td>
<td>48</td>
<td>53%</td>
<td>33</td>
<td>26%</td>
<td>64</td>
</tr>
<tr>
<td></td>
<td>21</td>
<td>26%</td>
<td>21</td>
<td>21%</td>
<td>7</td>
<td>9%</td>
<td>39</td>
</tr>
<tr>
<td></td>
<td>170</td>
<td>150</td>
<td>30%</td>
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<tr>
<td>Total</td>
<td>87</td>
<td>90%</td>
<td>128</td>
<td>67%</td>
<td>191</td>
<td>68%</td>
<td>564</td>
</tr>
<tr>
<td>Harvard/Yale</td>
<td>41</td>
<td>47%</td>
<td>21</td>
<td>23%</td>
<td>68</td>
<td>53%</td>
<td>37</td>
</tr>
<tr>
<td></td>
<td>40</td>
<td>41%</td>
<td>30</td>
<td>30%</td>
<td>75</td>
<td>60%</td>
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<tr>
<td></td>
<td>380</td>
<td>380</td>
<td>67%</td>
<td></td>
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<td></td>
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</tr>
<tr>
<td>All Other</td>
<td>46</td>
<td>53%</td>
<td>69</td>
<td>77%</td>
<td>60</td>
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<td>154</td>
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<td></td>
<td>50</td>
<td>59%</td>
<td>57</td>
<td>60%</td>
<td>10</td>
<td>11%</td>
<td>60</td>
</tr>
<tr>
<td></td>
<td>380</td>
<td>380</td>
<td>67%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>87</td>
<td>90%</td>
<td>128</td>
<td>67%</td>
<td>191</td>
<td>68%</td>
<td>564</td>
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EXCLUDING HOWARD

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<tr>
<th>SCHOOL</th>
<th>#</th>
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<tr>
<td>Harvard/Yale</td>
<td>41</td>
<td>49%</td>
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<td>Other</td>
<td>43</td>
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<td>11 Elite Schools</td>
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<tr>
<td>Other</td>
<td>17</td>
<td>20%</td>
</tr>
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</table>

Source: 1992-93 Directory of Minority Partners at Majority/Corporate Law Firms, Published by the ABA; Martindale Hubble
*742 TABLE 6: Summary Data for Black Partners In Elite Firms\(^1\)

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
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<th>#%</th>
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<tbody>
<tr>
<td></td>
<td>87</td>
<td>100%</td>
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<tr>
<td><strong>Breakdown by Specialty</strong></td>
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</tr>
<tr>
<td>Litigation</td>
<td>49</td>
<td>56%</td>
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</tr>
<tr>
<td>Real Estate</td>
<td>10</td>
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<tr>
<td>Banking Regulatory</td>
<td>5</td>
<td>6%</td>
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<tr>
<td>Bankruptcy</td>
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<tr>
<td>Corporate</td>
<td>12</td>
<td>14%</td>
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<tr>
<td>Environmental</td>
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</tr>
<tr>
<td>Municipal/Public Finance</td>
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<td>5%</td>
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<tr>
<td>Government Legislation</td>
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<td>1%</td>
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</tr>
<tr>
<td>ERISA/Tax</td>
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<td>1%</td>
<td></td>
</tr>
<tr>
<td>Entertainment</td>
<td>1</td>
<td>1%</td>
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<tr>
<td><strong>Breakdown by Gender</strong></td>
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</tr>
<tr>
<td>Men</td>
<td>62</td>
<td></td>
<td></td>
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<tr>
<td>Women</td>
<td>25</td>
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<tr>
<td><strong>Breakdown by Prior Work Experience</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Worked in Government</td>
<td>32/87</td>
<td>37%</td>
<td></td>
</tr>
<tr>
<td>Worked In-House or as</td>
<td>24/87</td>
<td>28%</td>
<td></td>
</tr>
<tr>
<td>Associates Elsewhere</td>
<td>10/87</td>
<td>11%</td>
<td></td>
</tr>
<tr>
<td>Were Professors Before</td>
<td></td>
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<tr>
<td>Becoming Partners</td>
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<tr>
<td><strong>Breakdown by Education</strong></td>
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</tr>
<tr>
<td>From Elite Law Schools</td>
<td>67/87</td>
<td>77%</td>
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<td>From Harvard and Yale</td>
<td>41/87</td>
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<td>Law Schools</td>
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<tr>
<td>Not from Elite Law</td>
<td>20/87</td>
<td>23%</td>
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<td>Schools</td>
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<td><strong>Prior Work Experience of Partners Not From Elite Law Schools</strong></td>
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<tr>
<td>Government</td>
<td>9/20</td>
<td>45%</td>
<td></td>
</tr>
<tr>
<td>In-House Counsel</td>
<td>1/20</td>
<td>5%</td>
<td></td>
</tr>
<tr>
<td>Associates Elsewhere</td>
<td>2/20</td>
<td>10%</td>
<td></td>
</tr>
<tr>
<td>Rose Through the Ranks</td>
<td>5/20</td>
<td>25%</td>
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</tr>
</tbody>
</table>
Law School Professors | 3/20 | 15%

Source: ABA 1992-93 Directory of Partners at Majority/Corporate Law Firms

We define elite law firms as those firms surveyed by the Insider's Guide (1993).

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Lempert, Chambers, and Adams's superb new study of the careers of minority and white graduates of the University of Michigan Law School will come as welcome news to those who value diversity on this nation's college and professional school campuses. Alongside the Bowen-Box study (1998), to which the authors link their work, the Michigan data provide powerful evidence of the many benefits of affirmative action for both minority and majority students, as well as for a constituency that is often overlooked in the debate over affirmative action--namely, the people these aspiring professionals are intended to serve. More important, the authors' careful analysis reveals what many have long suspected. LSAT scores and undergraduate GPAs “seem to have no relationship to success after law school, whether success is measured by earned income, career satisfaction, or service contributions” (Lempert, Chambers, and Adams 2000, 401).

Although the Michigan study therefore provides important ammunition to the defenders of race-conscious admissions policies, it also exposes an important and largely unexplored paradox in the manner in which diversity advocates characterize the careers of minority professionals. On the one hand, defenders of affirmative action in elite school admissions policies emphasize the postgraduation success of the minorities who are admitted under these programs. The gist of this claim, persuasively articulated by the Michigan authors, is that minority students, notwithstanding their lower entering credentials, go on to achieve levels of career success that meet or surpass the levels achieved by their white peers. This portrait of equal career outcomes, however, differs sharply from the reports of diversity advocates who study the careers of minorities in the workplace. These advocates point to the dramatic underrepresentation of minorities in high-level jobs--large law firms, executive board rooms, investment banks--and argue that a “concrete ceiling,” as one prominent report concluded, continues to limit the opportunities of minorities in the workplace (Federal Glass Ceiling Commission 1995). The gist of this claim is that notwithstanding their academic credentials, minorities continue to face special obstacles that prevent them from achieving the same levels of career success and satisfaction as their white peers (Knapp and Grover 1994, 303).

These two positions are not flatly contradictory. One might conclude, as the present authors suggest, that although “discrimination in legal job markets is today not a great problem for most … graduates” of Michigan and other elite schools (Lempert, Chambers, and Adams 2000, 501 n.72), minority graduates from non-elite schools continue to encounter substantial barriers based on race. Alternatively, one could contend that the apparent success of the minority graduates in the Michigan and Bowen-Bok studies masks important differences in the careers of minority and white graduates of even the best schools. As I argue below, each of these potential reconciliations has bite. The first underscores
the crucial importance of attending an elite educational institution for the future career success of minority lawyers. The second highlights the complexity of measuring success in a world where both relative and absolute indicia of accomplishment are highly context dependent.

Nevertheless, it is fair to say that these two commonly articulated positions are in substantial tension with one another. The more the careers of Michigan's minority and white graduates appear to be “equal,” the more credible the “pool problem” becomes as a response to why so few minorities hold high-end jobs in the profession. As so many hiring partners claim, there simply are not enough minorities graduating from Michigan (and the other top law schools) to make a dent in the racial composition of the profession's elite. By the same token, the more “unequal” the careers of minority and white graduates from the country's best institutions appear, the more those who criticize affirmative action in law school admissions will claim that the minority students admitted under these programs are not “qualified” to become competent and successful practitioners.

In this response, I will argue that rather than either resigning ourselves to glacial progress on integrating the profession's elite or dismantling affirmative action in law school admissions, recognizing that the differing characterizations of minority career success found in the two strands of the diversity literature constitute a true paradox is the key to making real progress on this crucial issue. On average, the careers of minority lawyers do look substantially like those of their white peers. At the same time, race continues to structure the careers of minority lawyers, including those from the nation's top law schools, in complex ways that, once again on average, make it more difficult for these talented women and men to succeed in certain professional environments.

Unraveling this paradox, I submit, requires challenging one of the bedrock assumptions of traditional professional culture, and indeed of modern American society--to wit, that success is primarily a matter of individual talent and effort. Without question, the minority beneficiaries of affirmative action bring a wealth of talents to their legal careers and have worked extremely hard to get where they are today. While one cannot go far without these individual attributes, however, neither are they sufficient to guarantee professional success. In addition to his or her individual talents and dedication, a minority lawyer's success--like the success of his or her white peers--depends on gaining access to the right institutional structures and opportunities. The need to gain access to these opportunities does not lead minority lawyers to careers that differ in kind from those of their white peers. The great achievement of the past three decades is that most minority lawyers attend integrated schools and work in jobs that are part of the mainstream legal and business economy. It should come as no surprise that their careers are pushed along by the same large-scale economic, social, and attitudinal forces that have transformed the profession as a whole since the so-called golden age of the 1960s. At the same time, however, the fact that minority lawyers are minorities means that they are especially vulnerable to various aspects of these winds of change in ways that many of their white peers are not. We should therefore also not be surprised when we find fewer minorities reaching the profession's highest echelons, or that those who do travel different and in many cases more arduous routes to the top than similarly situated whites who rarely have to cope with the implications of their racial identity.

I base these conclusions on my ongoing research on black lawyers in the corporate “hemisphere” of law practice (Wilkins 1999a, 1999b; Wilkins and Gulati 1996; Wilkins 1993). After more than a decade of studying the careers of black corporate lawyers, including more than 250 in-depth interviews in connection with a forthcoming book, I have found ample evidence of both sides of this “equality paradox” (Wilkins forthcoming). For black graduates of elite law schools such as the University of Michigan, the most important determinant of their future career success is the very fact that they graduated from such a prestigious institution. To keep with the river metaphor that Bowen and Bok have indelibly stamped on the affirmative action debate--but to give it a resonance with the group that both these authors and I study--the “big wheel” of the University of Michigan “keep[s] on turnin[g]” throughout the careers of all its graduates, allowing
both *531 blacks and whites to roll on rivers that are off limits to most law school graduates who cannot “hitch a ride” on a similarly elite “river boat queen.” How far one travels on this mighty river-- and what work one has to do to get there--however, vary considerably. For those “who never saw the good side of a city” before entering law school, the shoals that can derail a career are likely to be--and equally important, are likely to be seen as being--considerably more perilous than for those whose backgrounds have better prepared them for this often dangerous journey. Nor should we be surprised that even on a difficult voyage, those sleeping in the nicer cabins on the upper decks are more likely to have the stamina and commitment necessary to travel to the end of the line than those who must endure the river's fury from the boat's lower berths.

None of this means that those booked in steerage cannot successfully complete the trip. Nor does it mean that those who jump ship before the final port of call will find their careers unsatisfying. After all, even the lowest berth on a river boat queen beats “workin' for the man every night and day.” What it does mean, however, is that notwithstanding all the progress that has been made since Brown v. Board of Education--progress that has been made possible in large measure by the affirmative action programs the Michigan authors defend-- the careers of black lawyers continue to be shaped in important ways by race. For all its compelling data documenting the fundamental similarity between the careers of minority and white graduates, the Michigan study, as its authors frequently note, also provides important evidence of the racialized reality within which minority and white graduates continue to live and work. In the balance of this comment, I explore this evidence in light of my own understanding of the careers of black corporate lawyers. 4 In so doing my goal is not to undermine the authors' persuasive claims about the success of Michigan's minority graduates. Rather I hope to ensure that when we talk about diversity, we keep both *532 sides of the equality paradox firmly in mind. When we do so, the success of the intrepid minorities who have navigated the increasingly treacherous waters of the American legal profession during the last three decades--and the implications that their success holds for our understanding of professional careers more generally--become even more significant.

1. HITCHIN' A RIDE ON A RIVER BOAT QUEEN

If anything, the Michigan authors are too modest about the implications of their analysis. They claim that their data demonstrate that the river described by Bowen and Bok “runs through law school” and that notwithstanding some shoals along the way, most minority admittees end up sailing “proudly, and equally with their white counterparts, on the sea” (Lempert, Chambers, and Adams 2000, 504). This, for reasons that will be abundantly clear to anyone who reads their careful text, they do brilliantly. But in so doing, the authors also cast doubt on some of the standard orthodoxy of the American meritocracy. For as the authors correctly insist, the only reason to think that “the success of Michigan's minority graduates … is something that needs to be explained while the success of Michigan's white graduates requires no special explanation” (Lempert, Chambers, and Adams 2000, 501) is the standard presumption that there is a strong correlation between “objective” credentials such as grades and test scores--both those that are used as a criteria for admission to law school and those that typically define success in law school-- and future professional success. The Michigan study persuasively demonstrates that this standard presumption is false.

Undergraduate grades and LSAT scores appear to have no predictive power in explaining the future career success of either minority or white graduates, and law school grades explain less than 5% of the variance in income across the entire sample (Lempert, Chambers, and Adams 2000, 501). This conclusion, as my colleague Lani Guinier points out in her contribution to this volume, has profound implications for the admissions criteria that law schools should use for selecting all the students for the entering class, particularly in light of the Michigan authors' finding of an inverse correlation between LSAT scores and future service to the community (Guinier 2000). Equally important, the study's debunking of the standard assumptions about the strong correlation between grades and test scores, on the one hand, and career success on the other should also finally persuade us to shift at least some of our focus away from the individual
attributes that particular lawyers bring to their work, and onto the institutional settings in which young attorneys develop and express these attributes.

Once we discard the misleading assumption that “objective” credentials designed to measure individual accomplishment or potential such as LSAT scores, undergraduate grades, and even law school grades accurately*533 and completely predict future career success,5 the real issue that needs to be explained “is the income success of all Michigan alumni, both white and minority” (Lempert, Chambers, and Adams 2000, 502). “Surely,” as the authors insist, “an important shared ingredient in the job success of Michigan's alumni is graduation from Michigan” (Lempert, Chambers, and Adams 2000, 1408). As they go on to note, graduates of elite schools earn substantially higher incomes and work in more prestigious parts of the profession than those who earn their degree from less highly rated institutions. Consequently, they conclude, “attendance at an elite law school appears to attenuate the effects of substantial differences in the entry credentials of students entering law school” (Lempert, Chambers, and Adams 2000, 503). Professional success, in other words, is highly correlated with catching a ride on the right riverboat. To the extent that minorities and whites continue to share passage in some of this nation's most elite law schools,6 we should expect to see their careers following broadly similar courses.

What the Michigan study hints at but cannot fully demonstrate, in large measure because it focuses only on Michigan graduates, is that attending an elite law school “has higher career returns to … minorities”--and most especially to blacks--“than it does to white men” (Lempert, Chambers, and Adams 2000, 419). In order to succeed, black graduates must find ways to counteract the lingering but nevertheless powerful effects of the pervasive myth of black intellectual inferiority. One common strategy self-consciously employed by many of the black lawyers I have interviewed is to acquire as many elite credentials as possible in order to signal to employers, colleagues, and clients that despite what they might be inclined to believe, this particular black lawyer is capable of doing their work. As one interviewee*534 succinctly stated, Harvard law school is like an “H bomb.” Whenever he drops it in a professional setting, the conversation invariably takes on a new, and typically more respectful, tone.

There is ample evidence that this H bomb (or in the case of Michigan, M bomb) effect is not simply a figment of the collective imagination of black lawyers. Consider the following statistics, none of which are conclusive, but all of which suggest the special value that blacks gain from their elite school credentials. In 1995, I surveyed the nation's largest 250 law firms to determine how many associates these firms hired in the past year, how many of these new entrants were black, and where all their recruits had gone to law school.7 A third of the firms responded to the survey. In these firms, the percentage of blacks graduating from one of eleven specified elite schools8 was somewhat higher (57.3%) than the number of white graduates (51.7%) from these same institutions. The differences grow larger, however, if one concentrates on the top end of the elite spectrum. For example, in the two cities with the highest response rates, New York (51%) and Washington (50%), more than 50% of all black associates hired graduated from either Harvard or the top schools in the local market--Columbia and NYU in New York or Georgetown in Washington, D.C. The corresponding number for whites was 40.4% in New York and 23.2% in Washington, D.C.9

When we turn our attention to partners, the percentage of blacks who have broken into this exclusive club who are also graduates of elite law schools is even more startling. For example, in 1993, 77% of the identifiable black partners profiled in the ABA's directory of minority partners in majority corporate law firms were elite school graduates as I have defined that term (Wilkins and Gulati 1996, 563-64 and appendix table 5). As with the previous comparison, this percentage is somewhat, but not dramatically, higher than the percentage of elite school graduates (70%) in a sample consisting of the partners in five of the top law firms in five large legal markets around the country. Once again, however, when we look more*535 closely, it becomes clear that black partners are concentrated at the top end of the range of elite schools. Thus, nearly half (47%) the black partners in the directory graduated from either Harvard or Yale. Although
two firms in the sample (Boston's Ropes & Gray and New York's Cleary, Gottlieb) have percentages of Harvard and Yale partners that rival this total, the average for all five firms was 33%. An analysis of the black partners listed in the 1996 directory of the Chicago Committee on Minorities in Large Law Firms reveals a similar pattern. Seventy-three percent of those listed are elite school graduates, with 53% being the graduates of only three institutions: Harvard, Michigan, and Northwestern. As a rough comparison, 67% of the partners at Chicago's Sidley & Austin, one of the largest and most prestigious firms in the city, are elite school graduates, with a little over one-third (38%) coming from the three schools that contributed over half of the entire population of black partners.

None of these comparisons definitively establishes that blacks get more mileage out of their elite school credentials than comparable whites. Nevertheless, they are consistent with the countless anecdotal reports I have collected from respondents concerning the importance of elite school credentials for black corporate lawyers. As one black partner in Chicago put it in a recent news account, “If you're not from Harvard, not from Yale, not from Chicago, you're not adequate. You're not taken seriously” (Davis 1996, 22). Whether or not this is literally true, it does appear that black lawyers are likely to be taken more seriously if they have elite educational credentials.

Michigan's minority graduates appear to be aware of this effect. Thus, “minorities place a higher value on the prestige of a Michigan Law School degree than whites do.” (Lempert, Chambers, and Adams 2000, 419) As the authors speculate, minorities recognize that “a high prestige law degree can open up career opportunities” for those who face special obstacles as a result of their demographic status (Lempert, Chambers, and Adams 2000, 419). Moreover, these traditional outsiders understand that the value of their Michigan education consists of more than the sum total of the human capital that they acquired through their classes and the prestige of attending one of the country's premier educational institutions. It also inures in the relationships and contacts that are made at a school like Michigan. The Michigan authors report that minorities are “significantly more likely than whites to feel that they benefited from friends made at Michigan and from contacts with Michigan alumni after graduation” (Lempert, Chambers, and Adams 2000, 418 n.30). Although the gap between minorities and whites on the importance of the “relationship capital” they developed at Michigan closes over time, this is almost entirely due to the increasing value that succeeding generations of whites place on networking (table 6).

These trends are consistent with the way in which race differentially colors the perceptions of blacks and whites about their own success. For whites, the standard version of the American Dream posits that people succeed on the basis of their individual talents and efforts (Hochschild 1995, 18-25). This classic story has always had particular saliency for lawyers who have traditionally viewed themselves as autonomous professionals whose primary attribute is their specialized knowledge and judgment. White lawyers steeped in this potent combination of national and professional ideology tend to discount the importance of relationships to professional success. Thus, in my interviews many white partners deny that they had mentors who helped them along the way, believe that they choose associates for plum assignments solely on the basis of the associate's “candlepower,” and insist that clients come to them simply because “they are good lawyers.”

Blacks tend to have less faith in this standard account (Hochschild 1995, 64-65). By the time they come to law school, most blacks have seen the American Dream fail far too many times to deliver on its promise of equal rewards for equal work. At the same time, the central lesson of the civil rights movement for many blacks is that individual accomplishment depends on collective struggle. As a result, it is not surprising that blacks and other Michigan minority graduates have from the beginning placed a high value on their Michigan contacts.

What is more interesting is that their white contemporaries appear to be coming around to the same point of view. With each passing decade, the legal profession has had a harder and harder time delivering on the promise that those who do
“good work” will, by virtue of this fact alone, succeed. No matter how much “candlepower” a young lawyer possesses, an associate will not be able to succeed unless he or she gains access to the kind of good work and training opportunities that have become increasingly scarce in today’s elite firms with their high associate to partner ratios. And even those who do manage to gain access to what I have elsewhere called the training track will not become partners—or be able to stay partners—if they do not demonstrate that in addition to having superior legal abilities, they are also likely to attract significant amounts of business to the firm (Wilkins and Gulati 1998). Given these realities, it is not surprising that white graduates increasingly put the same value on contacts as blacks and others who are *537 less inclined to believe the standard meritocratic account place on this resource.

Although Michigan's minority and white graduates are reaching consensus on the importance of their Michigan contacts, this should not fool us into thinking that the two groups have the same contacts. Most black respondents in my study left law school with a mix of black and white friends. In addition, most have found ways to network with alumni beyond their actual circle of law school acquaintances. Nevertheless, for many of the black lawyers in my sample, the majority—often the vast majority—of their social and extracurricular activities during law school, and their professional interactions with fellow alumni after law school, were and are with other blacks. This reality, as the Michigan data underscore, pushes their careers in directions that, although still successful, nevertheless differ from those of their white peers.

II. WORKIN’ FOR THE MAN EVERY NIGHT AND DAY

The Michigan authors rightly emphasize the growing similarity between the career trajectories and outcomes of white and minority graduates. The percentage of minorities entering large law firms and other prestigious and financially lucrative areas of the profession, for example, rose dramatically between the 1970s and 1990s cohorts (table 11). So did the percentage of each succeeding cohort who remain in these positions today (table 14). By the 1990s, the careers of Michigan's minority graduates are functionally indistinguishable from their white peers on most major dimensions that the authors measure.

Lurking behind this important similarity, however, are some telltale signs of difference, particularly for Michigan's black alumni. As late as the 1980s, for example, Michigan's black alumni (as opposed to minority alumni as a whole) were substantially less likely than their white counterparts (64% to 85.1%) to start work in private practice (Lempert, Chambers, and Adams 2000, 424 n.35 and table 10). Although this gap appears to have closed in the 1990s, blacks continue to be underrepresented in this sector. Moreover, when we look more closely at where this most recent cohort is working in the private sector, an interesting pattern emerges. Although the total number of minorities starting work in firms with fewer than 50 lawyers has declined markedly from its peak in the 1970s (45% as compared to 77.8%), the percentage of Michigan's minority graduates who begin their careers in smaller firms remains substantially larger than the percentage for whites (45% as compared to 17.7%) (table 11). At the opposite end of the spectrum—firms over 100 lawyers—the trend toward minorities going to work in the largest firms (those with over 150 lawyers) appears to have slowed dramatically during the past decade. In the 1970s and 1980s, minorities who joined large firms were much more likely to take jobs in firms with more than 150 lawyers. Between the 1980s and 1990s, however, almost the entire increase in percentage of minorities working in the large-firm sector is accounted for by minorities who moved into firms with 101-150 lawyers (table 11). By contrast, the percentage of Michigan's white alumni who started at the nation's largest firms jumped 22.8% during the same period, while the percentage going to large firms with fewer than 150 lawyers declined by 3.4% (table 11).

These same trends are evident when we look at the current jobs of minorities and whites in private practice. Not surprisingly, little has changed for the most recent cohort. For the 1970s and 1980s cohorts, however, minorities remain overrepresented in solo and small-firm practice while consistently losing ground to whites in large firms. Thus,
nearly half the minorities in the 1980s cohort work in firms with fewer than 10 lawyers (up from the 14.9% who started in such firms), as compared to less than 28% of whites (table 14). At the same time, the gap between the percentage of whites and minorities from this cohort currently working in large firms nearly doubled (21.9% versus 11.5%) from the comparable percentages for the first jobs taken by these graduates (tables 11 and 14). The widest part of this gap is accounted for by the disproportionately large decrease in minorities in firms over 150 lawyers (a 12.5% decline for minorities as compared to a 5.5% decline for whites). The numbers from the 1970s cohort tell a similar story, with 66.1% of minorities (as compared to 38.8% of whites) in firms with fewer than 10 lawyers and a gap between whites and minorities working in large firms that has nearly quintupled (3.3% to 16.3%) since the time these lawyers graduated from Michigan (tables 11 and 14). Once again, despite a remarkable consistency in the percentage of minorities from the 1970s cohort who started and who currently work at the nation's largest firms (8.9%), a subject to which I will return below, it is in this sector that the gap between whites and minorities has grown the largest since the time these graduates entered practice (0.1% to 11.2%)--this time as a result of a sharp increase in whites who currently work at the nation's largest firms (9% to 20.1%).

*539 These differences place an important gloss on the equality story the Michigan authors tell. Without question, Michigan's minority graduates have made impressive strides in gaining access to the once-lily-white world of large law firms. Indeed, Michigan's minority graduates have penetrated the corporate sector in numbers that are likely to far surpass the national average. For example, a remarkable 10.7% of Michigan graduates from the 1970s cohort work in firms of more than 100 lawyers, with just under 9% in firms larger than 150 (table 14). Given their age, it is fair to assume that virtually all these lawyers are partners. At the national level, minorities make up less than 3% of the partners in the nation's 250 largest law firms (which roughly correlates with firms over 100)(Davis 1996). It is likely that Michigan graduates make up a disproportionate share of this total, particularly among minority partners who graduated in the 1970s. The same is probably true for the 1980s cohort as well. Once again, the fact that Michigan's minority lawyers appear to fare better in larger law firms than the average minority lawyer provides additional support for the claim that law school status is especially valuable to minorities.

The study's findings about retention rates further bolster his conclusion. Michigan's minority alumni may also have longer than average tenures at their first law-firm jobs. Thus, the study finds no statistically significant difference between the length of time (4.1 and 4.7 years, respectively) that minorities and whites in the 1980s cohorts stay with their first firms (Lempert, Chambers, and Adams 2000, 426). The national numbers, however, tell a different story. In a nationwide study of retention rates at large law firms conducted by the National Association for Law Placement (NALP 1998), 8% of all white male associates leave their law firms in the first year. Almost 42% leave by the third year, and over 68% have left by year six. The corresponding numbers for minority men are 11%, 54%, and 73%. Minority women leave at an even faster rate. Over 12% are gone by the end of the first year, nearly 52% by year three and more than 82% by year six. Although some of the differences between the NALP and Michigan studies may reflect a cohort effect, it is also plausible that on average Michigan's minority graduates fare better than minorities in general in gaining access to the good work and training opportunities that lead to longer tenures in large law firms.

*540 Although the “big wheel” of the Michigan law school has helped to propel its minority graduates to points along the river that few of their minority contemporaries at other schools are likely to see, their grip on the corporate sector is nevertheless tenuous, particularly with respect to the nation's largest firms. Proportionately fewer of Michigan's minority graduates than white graduates are likely to end up 10 to 15 years after graduation at firms with more than 150 lawyers. If the trend exemplified by the latest cohorts continues, a smaller percentage of minorities are likely to start their careers there as well. Instead, many will find themselves in small minority firms serving a clientele that is disproportionately minority. This is particularly true for blacks, who, if they work in firms with fewer than 10 lawyers, are the most likely to have colleagues and clients of the same race (Lempert, Chambers, and Adams 2000, 435 and tables 16B, 18, and 19).
The fact that black Michigan graduates are more likely to end up practicing in small firms that disproportionately serve black individuals and institutions has, as the Michigan authors note, many important benefits. By any measure, the black community (like most minority communities) is badly underserved by the profession. Anything that increases this community’s access to legal services should therefore be considered an important social benefit. Black private practitioners from the 1980s cohort spend significantly more of their time serving low- and moderate-income individuals--most of whom are black--than any other group from that period (Lempert, Chambers, and Adams 2000, 438 n.42). By increasing the number of black lawyers available to do this work, Michigan’s minority admission’s policy has performed a valuable service.

As the authors concede, however, their findings about the continuing saliency of race in the careers of minority lawyers also has more troubling implications (Lempert, Chambers, and Adams 2000, 438). In a prescient article written almost 30 years ago, University of Michigan law professor (now United States Circuit Judge for the District of Columbia Circuit) Harry Edwards (1971) criticized Michigan’s affirmative action efforts for too actively steering black graduates toward “service to their communities” and away from careers in large law firms and other mainstream sectors of the profession. Such efforts, Edwards warned, ran the risk of deflecting attention from society’s obligation to remedy the conditions of black poverty while leaving the corporate sector virtually all white. These unintended consequences, Edwards concluded, not only deprived black graduates of the financial and professional rewards associated with large law firms but also removed these new leaders from the centers of power where many important decisions affecting the black community are made. Today, no one at Michigan or any other law school would approve of an institutional policy that systematically steered minority graduates away from pursuing careers in large law firms.

The trends noted above, however, suggest that the dangers that Edwards articulated almost a generation ago may nevertheless have come to pass. A careful examination of the Michigan data underscores the continuing de facto segregation within the profession’s elite ranks. Consider, for example, the statistics on partnership. The Michigan authors report that 91.1% of the minority graduates from the 1970s cohort who are in private practice are partners, as are over two-thirds of the 1980s cohort (Lempert, Chambers, and Adams 2000, 432 and table 15). Although these percentages are each less than the comparable percentages for whites (96% and 80%), the differential partnership rates between minorities and whites for the 1980s cohort comparison loses its statistical significance once one controls for the fact that minorities tend to have been with their firms a shorter period of time and graduated from law school more recently than whites (Lempert, Chambers, and Adams 2000, 432). What the authors do not tell us, however, is where these lawyers are partners. Given the overrepresentation of minorities in the smallest firms and their disproportionate exodus from large firms, it seems likely that many minority partners (particularly black partners) are located in small, often primarily minority, firms. Similarly, we do not know what kind of partners the minority partners are. Many large law firms in recent years have gone to a two- (or more) tiered partnership, where only certain partners have a significant stake in the equity and management of the firm. Other studies and my own work indicate that minority lawyers (and black lawyers in particular) tend to be concentrated in the nonequity tier in firms that have followed this route. Finally, the authors do not tell us (nor could they given their methodology) whether the minority partners in their sample have power within their institutions. Even in firms with one-tier partnerships, there is no longer much pretense of equality among partners. Instead, only those partners who control significant client relationships have the power to control their own destinies in the increasingly cutthroat world of the modern elite law firm. Sadly, many black partners in large law firms have become “partners without power,” lacking significant access to each of the three markets that confer success in large law firms: the internal market for work from the firm’s existing clients, the external market for new clients, and the labor market for associates (particularly senior associates) (Wilkins 1999b, 23-26).
The fact that black partners have greater difficulty than their white peers gaining access to the markets of power in large law firms underscores that the continuing gap that lies behind the overall similarity in the partnership rates of minority and white Michigan graduates is not, as some are likely to claim, due to the fact that minority partners are incompetent lawyers who have simply been “polished up” by widespread affirmative action to look like law firm partners (Barrett 1999, 55). As a preliminary matter, there is little evidence that law firms engage in much affirmative action after a given minority lawyer joins the firm. Consider, for example, the case of Lawrence Mungin, a black Harvard Law School graduate who sued the law firm of Katten, Muchin & Zavis for failing to make him a partner (Barrett 1999). Mungin claimed that the firm failed to evaluate him, forced him to do menial work that should have been done by more junior associates, ignored his request to be included in more challenging work assignments, and generally treated him with disrespect. Although the firm disputed some of these charges, its general response was that the bad treatment Mungin received was no different than the way the firm treated most of its associates. This “equal opportunity management” defense is inconsistent with the claim that firms such as Katten Muchin engage in widespread affirmative action favoring black partnership candidates.

Moreover, whatever benefits black lawyers receive because of affirmative action once they begin working at a firm must be balanced against the burdens they continue to bear because of their race. Chief among these burdens is the difficulty black lawyers face in finding powerful mentors who will nurture and support their careers. Studies of cross-racial and cross-gender relationships in the workplace repeatedly demonstrate that white men feel more comfortable working with other white men (Thomas 1999). This natural affinity, when combined with the prevalence of negative stereotypes about black intellectual inferiority and the small number of black partners, make it more difficult for blacks to form supportive developmental relationships. Although blacks who become partners in large firms typically have developed at least one powerful mentor within the partnership, the fact that they tend to have fewer mentors than their white peers who also become partners continues negatively to affect their chances to become partners with power in the firm.

Contrary to popular belief, the majority of partners get the majority of their work from existing clients of the firm. Many obtain important clients the old-fashioned way: they inherit them from mentors. Those who do not inherit their clients nevertheless often profit from their mentoring relationships by getting referrals of specific projects from their powerful sponsors or from other lawyers inside the firm who respect their mentors' judgment. Once a lawyer is seen as an important recipient of referral business, that lawyer is likely to receive additional referrals from lawyers outside his original network simply because other lawyers see him as a person capable of returning the favor by referring business back. All of this, in turn, helps a partner to generate business from new clients, either through contacts from the lawyer's existing client relationships or through the fact that, as a result of doing referral work, the lawyer has developed a reputation in a particular substantive area.

Black lawyers, regardless of their abilities, are less likely to receive these important benefits. Having had fewer mentors as associates, they are less likely either to inherit clients or to gain easy access to the firm's internal referral market. This difficulty, in turn, reinforces the perception among other partners that their black peers are unlikely to have significant business to refer back, thereby further diminishing a black lawyer’s chances of gaining referral business. Without referrals, black lawyers face important obstacles generating the kinds of contacts and high-profile reputation that a lawyer needs to generate business from new corporate clients, most of whom have had little experience dealing with blacks in positions of trust and authority. Finally, savvy senior associates who seek to increase their own chances for partnership are unlikely to want to work for black partners who they perceive as having neither significant relationships with important partners nor clout within the partnership based on their control of important clients. Given both the shortage of senior associates in most firms and the importance of having these able lieutenants to manage the work, black partners who have difficulty in obtaining the services of senior associates must work harder to get existing work done, leaving them even less time to generate new business.
This connected web of problems, in turn, contributes to the exodus of black partners from large firms. In recent years, a surprising number of black partners have left their prestigious positions for what they perceive to be greener pastures in mid-sized or small firms, particularly small minority firms. These workplaces, however, generate their own perils. Both small minority firms and regional (as opposed to national) law firms have proven to be particularly vulnerable to the competition and consolidation that have come to characterize the market for legal services in the 1990s. For example, in the three years since I began doing interviews in Chicago, only two out of the six predominately black firms with which I have had contact has grown in size. Two have gone out of business, and the others have either significantly contracted or have had to survive dramatic instability. My experience in San Francisco, Atlanta, Detroit, Washington, D.C., and New York, as well as reports from informants in other cities, suggest that the Chicago experience is not unique. Nor will any student of the profession who has watched one medium-sized firm after another either go out of business because of acrimony and defections among the partners or be acquired (either in whole or in part) by larger, more aggressive national firms be surprised to learn that partnership in large local and regional firms has become anything but a secure job. Although blacks sometimes benefit from these consolidations—several of my interviewees have become partners in large national firms as a result of mergers or acquisitions of the regional firms of which they had been a part—others have either been excluded from the new consolidated entity or have ended up as marginal partners, isolated from the web of relationships and client contacts that made them successful in their original institutions.

Even the success stories highlighted by the Michigan study underscore the different and often more perilous route that black lawyers traverse to reach professional success. Consider once again the remarkable percentage of minority lawyers from the 1970s cohort who have become partners in large law firms. Not only is this number impressive in absolute terms, but it also appears to represent a career trajectory for at least some of these lawyers that cuts against the grain—that is, a movement from government service and other public sector jobs into private firms (Lempert, Chambers, and Adams 2000, 442 and table 20B). My own data and the work of others who study minority careers suggest that race played a role in this pattern. As the Michigan study underscores, relatively few minority graduates from the 1970s cohort started their careers in private practice, with only a small percentage going to large law firms. Regardless of whether Judge Edwards is correct in arguing that the law school itself bears some responsibility for this initial distribution, there can be little doubt that the primary cause was the unwillingness of many law firms to hire minority lawyers—even ones with a Michigan law degree. Instead of going to private firms, many of these lawyers went into government service where they developed the kind of human and relationship capital—trial experience, supervisory responsibility, political contacts—that law firms and their clients value but, for reasons I have written about extensively elsewhere, that few associates at large firms, and even fewer minority associates, have the opportunity to develop (Wilkins and Gulati 1998; 1996). When law firms began to receive pressure from law students, clients, and the press about their slow progress on diversity, these experienced government lawyers often appeared to be ideal candidates for partnership. To put the point bluntly, bringing in an experienced minority attorney from government allows a firm to make a high-visibility statement about its commitment to diversity without having to do the hard work of grooming its own minority associates.

Minorities who become partners under these circumstances, however, face special barriers to success. Because they come from the outside, they often do not have a deep network of relationships within the firm that can help them gain access to the internal referral markets that are so crucial to the success of any law firm partner. Moreover, because they come from government, these newly minted minority partners are also unlikely to have significant client relationships of their own. Instead, what these lawyers typically have are contacts with the politicians and officials with whom they worked. Political connections have been an important route to success for many black lawyers. The Michigan authors’ project that as "blacks [and other minorities] achieve political power or positions of business responsibility, lawyers with similar backgrounds may develop a market value sufficient to offset any diminution in their market value that lingering
discrimination by the white majority may entail” (Lempert, Chambers, and Adams 2000, 500-501, emphasis added). This projection, however, is likely to prove overly optimistic, especially with respect to political clout.

Relying on political connections to support one’s career is inherently risky for any lawyer. Given that black lawyers disproportionately rely on this strategy for the very reasons the Michigan authors posit--that is, because the rise in black political power gives them better access to political power than they have in the largely white corporate arena--the inherent instability of a political strategy ironically runs the risk of further entrenching the aggregate disparities between black and white partners. The pre- and post-Harold Washington experience of many black lawyers in Chicago bears this out. Washington, Chicago’s first black mayor, made opening up city business to blacks and other minorities a major priority of his administration. As a result, many black lawyers already in large firms began doing substantial work for the city and, over time, several high-level officials in Washington’s administration left their positions hoping to build successful private careers around their political connections. When Washington died suddenly, early in his second term, and was replaced by Richard M. Daly (who is white), many of those who had tied their careers to Washington’s political coattails saw their prospects die as well. For some, the results were worse than simply *546 losing business. Having tied their “business justification” for diversity to the need to have black lawyers who could attract city business, many white partners saw little value in the black lawyers working in their firms after Washington’s death. The resulting defections of black partners and associates left many Chicago firms nearly as all-white as they had been before the Washington era. The fact that blacks do not constitute a majority of Chicago’s electorate makes the danger of playing a political strategy particularly acute. Recent events, however, underscore that even in situations where blacks are unlikely to lose political power, they can still lose the economic power that typically flows from being in the majority.

Across the country, the very web of racialized contacts and relationships that the Michigan authors point to (Lempert, Chambers, and Adams 2000, 500-501) as a crucial source of value for minority lawyers is itself under political attack. Affirmative action programs in government contracting are being challenged and dismantled. These lawsuits make it more difficult for black mayors even in majority black cities such as Atlanta to ensure that black lawyers have access to city business. Although private employers have so far been largely immune from reverse discrimination suits, the assault on affirmative action in the public arena continually threatens to undermine corporate America’s emerging commitment to diversity. In this new climate, black lawyers in corporate legal departments who refer work to black outside counsel run the risk of being charged with favoritism or “reverse discrimination.” In the absence of affirmative support from either governments or employers, legal work is likely to flow through the old networks and relationships that have traditionally excluded blacks and other minorities.

Most damaging of all, however, are the kinds of attacks on affirmative action in admissions policies that gave rise to the Michigan study. As the Michigan authors persuasively demonstrate, race and ethnicity continue to play a significant role in the lives of all the lawyers in their study. In such a world, it is crucial that there be a cadre of minority lawyers who can refer work, provide information about career opportunities, and act as formal and informal mentors for each other as they traverse the treacherous waters of the vast and fast-flowing river that is the American legal profession at the end of the millennium.

It is no wonder, therefore, that Michigan's minority alumni place such a high value on their Michigan contacts, many of whom, as I have suggested, are likely to be other minorities. As the Michigan authors stress, these fellow classmates and alumni have succeeded in every corner of the legal profession. Being a part of such a successful network has helped each individual minority graduate succeed in ways that would not have been possible *547 had he or she had to go it alone. If the opponents of affirmative action are successful in their attempt to shrink dramatically the number of minority students in succeeding cohorts at Michigan and other similar law schools, they will ironically have undermined the very
mechanism that has produced the cadre of successful minority professionals and managers that these same critics point to as proof that programs such as Michigan's are no longer necessary.

Given all these complexities with, and threats to, the careers of even successful minority lawyers, one would predict that minority incomes would continue to lag behind those of whites. Notwithstanding the tremendous strides made by Michigan's minority graduates over the past three decades, the data in this study support this intuition. As the authors stress, Michigan's minority graduates are financially successful by any objective measure. Nevertheless, for the 1970s and 1980s cohorts (the only two cohorts in which one would expect to see a significant difference in income), both the median and the mean incomes of whites in private practice are substantially higher, although not statistically significantly higher, than those of minorities in this sector (Lempert, Chambers, and Adams 2000 453 and table 24). To the extent that minorities remain, on the one hand, concentrated in smaller, more precarious firms and, on the other, subject to barriers that make it more difficult for them to become successful partners in larger firms, some kind of income gap is almost inevitable.

The Michigan authors' finding that the income gap between minorities and whites in private practice seems to disappear once one controls for law school grades (Lempert, Chambers, and Adams 2000, 484 and tables 31 and 32) qualifies but does not refute this conclusion. Grades play a significant role in the hiring decisions of large law firms and other similar employers. To the extent that minority students on average have lower grades than their white peers, they are less likely to get jobs in this sector, particularly in the national firms that pay the highest salaries and have the largest profits per partner. Given that law school grades are at best only an imperfect signal of a lawyer's actual ability or potential, the fact that minorities with lower grades will tend to start their careers in lower-paying jobs in either the private or the public sectors suggests that the resulting income differentials, although explainable by grades, are nevertheless still troubling. Moreover, in an arena characterized by limited and imperfect information about a given lawyer's actual quality, even those minorities who are hired by large firms may find themselves handicapped by their lower grades. In law firms with a "free market" for associates, powerful partners often pick which entering associates to assign to their matters on the basis of their guess about the associate's academic credentials. If the associate does well, the partner will continue to give him or her work. Associates who are not tapped for these initial assignments often find it difficult to form supportive developmental relationships with similarly important partners, notwithstanding that they are producing quality work for partners with less influence and stature in the firm. Those who are not able to get on the training track are unlikely to have long-term careers with the firm. Black lawyers are particularly vulnerable to this dynamic. Many of those who leave large firms end up in the public sector where, as the authors concede (Lempert, Chambers, and Adams 2000, 480), they will earn substantially less money.

Of course, just because a lawyer leaves a large law firm does not prevent him or her from earning an impressive income. In the mid-1990s, for example, several black lawyers in Chicago left partnerships in large firms to form small minority firms precisely because they felt that they could make more money on their own than they could in their old jobs. As I argued above, however, small minority firms are often unstable. Even when they are not, partnership in these institutions often do not bring with them the access, exposure, and contacts that are so important to building a long-term career. The fact that the Michigan study found the largest gap in median income between minorities and whites for the 1970s cohort--a cohort for whom whatever differences in ability that can be measured by law school grades are likely to have been swamped in importance by differences resulting from a lawyer's experience and accomplishments in practice--suggests that the complex ways in which race structures the careers of minority lawyers continue to depress their incomes relative to the incomes of whites.

Finally, once we recognize that a high percentage of Michigan's minority graduates are women, we should understand that whatever income gap exists between blacks and whites will be difficult to close. The Michigan authors argue...
that differences in income between minorities and whites that seem substantial should nevertheless not be attributed to minority status because most of that difference is accounted for by the twin facts that minorities are more highly concentrated in the more recent classes and that a higher percentage of minorities than whites are women (Lempert, Chambers, and Adams 2000, 453 and table 32). Just as with the use of grades to explain the income gap, this explanation, although accurate nevertheless obscures something important, particularly with respect to gender. It is precisely because a majority of minority law students are now women that those interested in racial diversity must pay particular attention to gender issues in general and the issues facing minority women in particular. As the authors correctly note, women earn less than men across the profession and irrespective of race. Consequently, even if minority men earned as much as white men and minority women earned as much as white women, there would still be an income gap between “minorities” and “whites” because a higher percentage of minorities than whites are women. Although gender therefore explains at least part of the racial income gap, this explanation only serves to underline the difficulty of achieving real progress for minority lawyers.

Even if minority women only faced the same obstacles as white women, they would still confront a number of daunting barriers to success ranging from disproportionate responsibility for child care (not to mention sole responsibility for childbirth), to exclusion from the “old boys club,” to sexual harassment. My own work on black lawyers suggests that in addition to the obstacles that all women face, minority women (and black women in particular) confront additional barriers—including complex interactions with older white men, tensions with black women support staff, and sexism and sexual harassment by black men—that make achieving professional success even more difficult. The fact that the NALP retention study on large law firms found that minority women have the highest attrition rates of any group unfortunately provides further support for this conclusion. Although the Michigan authors note that in no instance did adding gender change the overall significance of minority status in their equations, they acknowledge that adding a variable capturing the interaction between gender and minority status sometimes did “affect the significance of the minority status variable” (Lempert, Chambers, and Adams 2000, 400, emphasis added). Unless and until we begin to come to grips with these complex gender issues, we will never achieve racial equality in a world in which minority women constitute an ever growing percentage of the minority talent pool.

Whether or not minority lawyers achieve true equality in the profession, however, should not be confused with the separate but equally important question of whether the recipients of affirmative action in law school admissions policies have been successful in their careers—let alone the even more fundamental question of whether minority graduates from Michigan and other elite schools are competent to become successful and satisfied practitioners. Nothing that I have said about the differential careers of minority and white graduates in the Michigan study, and nothing that I have discovered in the course of more than a decade of studying the careers of black corporate lawyers, suggests that minority lawyers are, on average, any less competent to pursue successful legal careers than their white peers. This conclusion follows directly from the primary finding of the Michigan study—that neither those signals that are most relied on to admit students to law school (i.e., LSAT scores and undergraduate grades) nor the signal relied on most by legal employers (law school grades) do even a modest job of predicting career success. Once we step outside our own parochial interests as academics, this too should not be surprising. Law school teaches very little about how to be a successful lawyer (as opposed to a successful law student or, perhaps, law professor), and much of what it does teach—for example, that success is primarily a matter of individual intelligence and effort—is wrong. Good lawyers are made not born, and they are made in the institutions where they learn how to practice.

For most graduates of any color of Michigan and other similar law schools, this formative institution is a large law firm. Just as the “big wheel” of the Michigan law schools can even out differences in entering credentials, the institutional structures and incentives that typify large law firms can either even out or accentuate the capacities and opportunities of the women and men who come to these institutions to learn how to become good lawyers. As I have argued extensively...
elsewhere, those who get access to good work and training opportunities are much more likely to develop the skills and dispositions of a good lawyer--and equally important, to be seen as having developed these skills--than those who do not get these opportunities (Wilkins and Gulati 1998, 1644-51; 1996, 537-42). As minority lawyers face obstacles to entering the kind of supportive developmental relationships that make these opportunities possible, we should not be surprised that they have a more difficult time succeeding--and once again, being seen as succeeding--in elite firms. The fact that many minorities, even those who are “doing well,” choose to leave large law firms and pursue other career opportunities is a natural outgrowth of this reality.

None of this means that the minorities who leave corporate law firms for small minority firms, government, or other professional arenas are not successful just because they did not become partners in large law firms. As the Michigan study demonstrates when the authors note the remarkable percentage of minorities in the 1970s cohort who started out in private practice only to become judges (Lempert, Chambers, and Adams 2000, 428), a stint at a large law firm can be an important stepping stone for other opportunities. Nor should we view those who stay and brave the obstacles associated with practicing at a large law firm as somehow failing if they do not manage to establish themselves as powerful partners in prestigious institutions. To the contrary, the fact that so many of Michigan's minority alumni have been able to carve out impressive careers in spite of the special obstacles they face should make us even more proud of how far these intrepid riverboat travelers have come. This success is especially impressive once we notice that these women and men perform an amount of pro bono and community service that far exceeds the contributions of the white lawyers *551 with whom they must compete (Lempert, Chambers, and Adams 2000, 456-457).

The black lawyers I have interviewed around the country have a good sense of how equality, competence, and success differ from each other, and how these factors create the paradox with which I begin this comment. My interviewees freely acknowledge that their careers are successful--often beyond their wildest dreams--without ever losing sight of the extent to which their hard-earned success was harder to come by than it should have been and has carried them less far than they should have gone. A careful reading of the Michigan data suggests that Michigan's minority alumni see themselves in much the same way.

III. WORRYIN' 'BOUT THE WAYS THINGS MIGHT HAVE BEEN

The Michigan authors report that “the great majority of minority graduates in all three decades are satisfied overall with their careers” and that there are no statistically significant differences in overall satisfaction between minorities and whites (Lempert, Chambers, and Adams 2000, 445). Given the impressive accomplishments of Michigan's minority graduates chronicled elsewhere in the study, this conclusion makes perfect sense. Moreover, when we consider the fact that some of Michigan's minority graduates probably come from disadvantaged backgrounds--and many more are from families who have only recently entered the middle class--it would be surprising if these lawyers were dissatisfied with the overall shape of their careers. Although coming from a working-class background (or from a family with strong links to such a background) may not create the kind of systematic reporting bias that would fundamentally distort the study's findings regarding career satisfaction, it would nevertheless be surprising if those who “never saw the good side of a city” before coming to law school were to be dissatisfied overall with a career that, no matter how bumpy the ride, has taken them places that few in their family have come anywhere close to seeing.

When we look more closely, however, we see signs that Michigan's minority graduates understand that their trip down the river has been especially rough. For example, Michigan's minority alumni consistently report being less satisfied than whites with their incomes (table 22A). Moreover, *552 this gap is growing over time. Similarly, although the differentials are smaller, minority graduates are growing proportionately less satisfied with their coworkers (table 22A). For the 1990s cohort, both the differentials in satisfaction with salary and coworkers are statistically significant. The authors suggest
that the differential in income is the result of minorities' lower overall wealth (as opposed to income), or alternatively that "some minority graduates may suspect they are getting paid less than their white counterparts, even when they are not" (Lempert, Chambers, and Adams 2000, 446). There are, however, alternative explanations. As the careers of Michigan's minority graduates grow to resemble those of their white classmates, minorities will naturally become more likely to compare their incomes to what they think they would have been if they were white. Many minorities believe (with good reason) that, notwithstanding their high incomes, they would have been even more successful if they did not bear the additional burdens associated with being a minority. As one of my more courageous informants retorted to a white superior who was berating her for what was in reality the superior's mistake, "If our life circumstances were reversed, you'd be shining my shoes!" It is not surprising, therefore, that a growing percentage of Michigan's minority alumni are less "satisfied" with their incomes than their white peers, even though they would be the first to acknowledge that they make good money (even in some cases marginally more on average than whites) and that they are "satisfied" with their incomes overall. By the same token, it makes sense that as minorities increasingly work in settings where the vast majority of their coworkers are white, they will, in a world still dominated by negative stereotypes about minorities, be less satisfied with their white coworkers than the average white Michigan graduate. Not surprisingly, we see similar trends for the minorities who work in business (table 22C).

Finally, the percentage of alumni who are satisfied with their jobs has declined at a faster rate for successive minority cohorts than it has for whites. For both sets of graduates, the older cohorts appear to be more satisfied with their professional careers than younger cohorts. But the decline in satisfaction between the 1970s and 1990s cohorts is more than twice as steep for minority lawyers in private practice (17.2%) as it is for whites (8.5%) (table 22A). Once again, this is what one would expect to see given the increasing percentage of minority lawyers in later cohorts who are working in mainstream legal jobs, particularly large law firms. As the Michigan authors note, lawyers in private practice are consistently less satisfied than those who work in government (Lempert, Chambers, and Adams 2000, 445). As more minorities enter private practice--particularly large law firms--it is not surprising that more of them are unhappy (or at least not entirely satisfied) with their careers.28 Given that the Michigan data also *553 confirm that minorities tend to be more committed to public service than their white peers, this trend is likely to continue as large firms increasingly move away from these values. Moreover, once minority lawyers are in these mainstream environments, the reference point for minority lawyers is not whether they are doing better than their parents (or anyone else in their families) but rather whether they are doing as well as they think that they should be doing given their talent, education, and experience. Unfortunately, on this comparison many minorities find their careers, although “satisfactory,” less than ideal.

It bears repeating that none of this should detract from the impressive record of accomplishment that Michigan's minority graduates (and other beneficiaries of affirmative action in elite school admissions policies) have been able to achieve over the past three decades. Nor should it reinforce the common, but in my experience, false perception that middle-class minorities are quick to cry racism as an excuse for any setback they happen to encounter in their careers. Quite the opposite. The Michigan data are consistent with my interview experience that a black lawyer's first reaction is to be thankful for his or her good fortune in landing in a financially secure and professionally rewarding career. Only after considerable prodding do these women and men open up about the painful experiences they've had in their climb to the top, and even then with considerable reticence about whether race played a significant role in their troubles.

Such reluctance is understandable. The truth of the first part of the equality paradox underscores that the forces that adversely affect the careers of black lawyers are also likely to adversely affect the careers of at least some whites. As a result, almost every black lawyer who believes that he or she has been treated unfairly can turn around and see a white lawyer who has been treated equally badly--or worse. The truth of the second half of the equality paradox, however, highlights that even in those circumstances where the outcomes are the same, certain factors can make black lawyers more vulnerable to the misfortunes that befall them with greater frequency than similarly situated whites. Blacks and
other minorities are aware of this too. As a result, it is hard for these lawyers not to feel a little resentful about the extra burdens they carry simply because they are black, even if some of these burdens (such as providing service to the black community) are ones that most believe they should carry because of their privileged position in relation to other blacks.

IV. NICE AND ROUGH

The Michigan authors conclude their path-breaking study with the hope that it will help society see that the shape of the river beyond undergraduate education continues to hold substantial promise for the minority graduates who attend the University of Michigan and, by implication, other elite law schools (Lempert, Chambers, and Adams 2000, 503). This they have done masterfully. Without the “big wheel” of the Michigan law school to propel them—including the superb education, prestige, and lifetime supply of contacts that come as part of this educational package cruise—many of Michigan's minority alumni would not have been able to lead the kind of productive, secure, and professionally satisfying careers that this study persuasively demonstrates that these women and men currently enjoy. The same, of course, is true for Michigan's white graduates. If we are ever to achieve true racial equality in this country, it is imperative that all Americans have a realistic opportunity to book passage on powerful riverboat queens like the Michigan Law School. Indeed, given that minority graduates appear to get more from their Michigan degrees than their white peers (given where each group of graduates would likely have ended up in the absence of a Michigan education), one could argue that a public institution like Michigan should increase the number of places going to those who can make the best use of this limited resource (Russell 2000).

We must also realize, however, that securing passage on the Proud Mary does not guarantee that one will arrive at the end of the line, and certainly not that one will be relaxed and refreshed along the way. In addition to securing passage on a riverboat queen, “the people on the river” must also be “ready to give” the training, work, and professional relationships that ultimately determine success in the rough and tumble world after graduation. The minority graduates chronicled in this study have had to fight for their success in a legal profession that has become increasingly complex, competitive, and focused on the bottom line. What is worse, because of the subtle but nevertheless pervasive ways in which race continues to color the expectations and experiences of all Americans, the waves that have buffeted the careers of every lawyer during this period have hit these new arrivals on the Proud Mary especially hard. The fact that notwithstanding these additional hardships, Michigan's minority graduates have managed to attain levels of success that are comparable, even if not identical, to those of their white classmates, whose majority status has (for the most part) spared them from the worst of the turbulence associated with passage in the lower berths, is as fine a testament as I can imagine to the capacity, commitment, and courage of these professional castaways.

Tina Turner, that ultimate riverboat queen, captures the mixed sentiments embodied in the equality paradox as only someone who has lived life in this contradiction truly can. In introducing Proud Mary, Ms. Turner teasingly acknowledges that she knows that the audience would like to hear her and Ike sing a song “nice and easy.” But, she warns, “we never ever do nothin’ nice and easy. We always do it nice and rough.” It would be far superior for all concerned if the minorities who graduated from elite law schools during the past 30 years went on to lead professional lives that were “nice and easy.” Unfortunately, progress in our color-obsessed world rarely proceeds so smoothly. The fact that affirmative action in law school admissions has not managed to produce an ideal society, however, should not dissuade us from recognizing that, largely as a result of the doors that these policies have opened, a significant number of minorities have been able to lead professional careers that are far nicer than they would otherwise have been—even though they are still rougher than they should be.

Affirmative action in law school admissions has, as the Michigan authors persuasively demonstrate, benefited both minority professionals and society at large. To the extent that these programs have not produced complete parity between
minorities and whites, it is largely because of what happens to these graduates after law school. Far from an argument for abandoning affirmative action, the differences that remain between minorities and whites should draw our attention to the manner in which the careers of all lawyers are structured by institutional forces that continue to be deeply affected by race, even in the absence of intentional discrimination. By keeping our eyes firmly trained on each side of the equality paradox--by keeping the doors of educational opportunity open to all while at the same time recognizing that career success ultimately depends on understanding and adjusting to the ways in which race affects professional opportunity--we can ensure that future Marys and Michaels, Miguels and Magdalenes, Muchikos and Mooks “keep on burnin’” and roll just as proudly--and hopefully even a bit more smoothly and successfully--on the river traveled by the proud women and men chronicled in this excellent study.

REFERENCES


Footnotes

1. David B. Wilkins is Kirkland & Ellis Professor of Law and director of the Program on the Legal Profession, Harvard Law School. Rick Lempert, Terry Adams, Elizabeth Chambliss, Lani Guinier, and Tom Russell provided helpful comments on an earlier draft.

Fogerty 1968. The song's lyrics are as follows:

Left a good job in the city Workin' for the man every night and day And I never lost one minute of sleepin' Worryin' 'bout the way things might have been Big wheel keep on Turnin' Proud Mary keep on burnin' And we're rollin' Rollin' Rollin' Rollin' on the river

Cleaned a lot plates in Memphis Rollin' Pumped a lot of pain down in New Orleans But I never saw the good side of the city 'Till I hitched a ride on a river boat queen Big wheel keep on turnin' Proud Mary keep on burnin' And we're Rollin' Rollin' Rollin' Rollin' on the river.

If you come down to the River Bet you gonna find some people who live You don' have to worry 'cause you have no money People on the river are happy to give Big wheel keep on turnin' Proud Mary keep on burnin' And we're Rollin' Rollin' Rollin' Rollin' on the river.

Of course, what cannot be duplicated here is the way Tina Turner sings this particular song. For those who have never witnessed this miracle of human movement, I recommend reruns of Soul Train or American Bandstand. Song lyrics courtesy of Fantasy, Inc. All rights reserved. Used by permission. © 1968 Jondora Music (BMI).

2. For an account of the transformation of the corporate legal sector during the past 30 years, see Galanter and Palay 1991.


4. Like Bowen and Bok, but unlike the Michigan authors, I concentrate on the experiences of blacks. For reasons that I explain elsewhere, I believe that there are good reasons to suspect that the careers of black lawyers differ in important respects from those of other minorities, most especially Asians (see Wilkins and Gulati 1996, 501 n.12). The Michigan authors report that for most of the areas they discuss, they found no significant differences among the careers of blacks, Latinos, and Native Americans, the three groups that comprise their minority sample. Given that Asians were generally excluded from both the white and minority samples (their numbers were too small prior to the 1990s cohort [Lempert, Chambers, and Adams 2000, 399 and n.5]) and the small percentage of Native Americans (5.9%) (Lempert, Chambers, and Adams 2000, 399 n.4), I do not find this result particularly surprising. Blacks and Latinos tend to look more like each other on many important dimensions than either group looks like Asians or whites (see, e.g., Kornhauser and Revesz 1995, 860-65). Moreover, to the extent that these two groups differ (and the authors do acknowledge differences, some of which I discuss below), they are likely to flow from the kind of subtle interaction among race, community, culture, and professional opportunity that is difficult to pick up through a survey methodology. Finally, two-thirds of Michigan's minority sample is black, so it is likely that their findings about “minorities” are heavily weighted toward the experiences of blacks.

5. It is important not to overstate this point. Neither the Michigan authors nor I claim that law school grades have “no bearing on lawyer competence” or professional success (Lempert, Chambers, and Adams 2000, 502). Grades may be related to some lawyering skills such as analytic ability and an aptitude for mastering complex subject matter, but relatively unrelated to others, such as teamwork, oral presentation skills, and the ability to inspire confidence. More important, grades may act as signals for qualities such as the ability to respond under pressure and competitiveness that, although unrelated to the substance of what is being taught in the classroom, may nevertheless be valued by potential employers. Finally, employers may value high grades purely for their instrumental value—for example, as a means of signaling a firm's quality to clients and future recruits (e.g., “We must be the best firm. We only hire students who were on the law review.”). My point simply is that even taking all these potential uses into account, law school grades (and other traditional indicia of academic merit) are only loosely correlated with future career success, and perhaps more to the point, with the substantive skills and dispositions of good lawyering. For a more detailed discussion of the complex relationship between grades and the hiring and promotion decisions of elite firms,
see Wilkins and Gulati 1996, 549-54. See also Rebitzer and Taylor 1995, 690 (showing no statistically significant correlation between traditional measures of academic success such as law school grades and law review membership and partner income).

Needless to say, to the extent that the Hopwood decision, California's Proposition 209, and the current lawsuit against the University of Michigan diminish the chances for minority students to attend elite law schools, this pattern will change. I return to this possibility later in this article.

For a more detailed description of this study, see Wilkins and Gulati 1996, 561-63 and appendix, tables 3 and 4.

For purposes of this survey, the following schools were considered elite: Harvard, Yale, Stanford, Chicago, University of Michigan, Columbia, NYU, Berkeley, Virginia, Pennsylvania, and Northwestern. Although no list of “elite schools” is free from controversy, we felt it important to specify what we meant by this elastic term in order to avoid ambiguity. One of my few disagreements with the methodology employed by the Michigan authors is their decision to use an open-ended list of elite schools (“Berkeley, Harvard, Michigan, Yale, etc.”) in their survey question regarding the number of a respondent's colleagues who graduated from “elite” schools as opposed to giving respondents a fixed list of which schools fall into this elusive and expansive category (table 16A).

Although Georgetown was not one of our 11 elite schools, it is the best law school in the Washington, D.C. area. Given the substantial local effects in the market for lawyers, although Georgetown may not count as an elite school nationally, it does in the Washington, D.C. market.

Davis erroneously attributes this quote to a partner at Chicago's Sidley & Austin. The black partner who made the statement however was actually from another Chicago firm. I am grateful to Eden Martin for bringing this to my attention.

Wilkins and Gulati 1998, 1678-80 (discussing the importance of “relationship capital” to the internal labor markets of large law firms).

And when they do believe it, the results can sometime be disastrous. For my own take on one particularly poignant example, see Wilkins 1999a.

The study does not report the percentage of blacks who took jobs in private practice during the 1990s. However, the authors do note that in the 1990s, blacks constituted a smaller percentage of minorities taking government jobs than they did during the 1980s (2000, 424 n.36). Nevertheless, the percentage of blacks taking government jobs during this period was close to the average for all minorities (15.4% versus 15.8%), and the percentage of all minorities in private practice in the 1990s remains below that of whites (table 10).

It is interesting to note, however, that the percentage of white alumni in solo or small-firm practice nearly doubled (17.7% to 34.3%) during the six-year period (1990-96) in which this cohort was tracked (compare tables 11 and 14).

Although, as I note below, some of these lawyers may be “nonequity” partners or “of counsel.”

More than 25% of Michigan's minority graduates from the 1980s currently work in firms with more than 100 lawyers (table 14). Even if one compares this to the percentage of minority associates working in the top 250 law firms, roughly 10% as of 1996, it seems likely that Michigan alumni are doing significantly better than the graduates of most other law schools (Davis 1996).

The Michigan authors focus on the 1980s cohort while most of NALP's data come from the 1990s, when by most accounts, attrition rates have been on the rise.

This is not to say that many individual faculty members do not encourage students to consider careers outside the corporate sector. Given the widespread view, supported by the Michigan study, that lawyers in government and public service careers often find their jobs more rewarding than those in private practice, many professors caution their students against being seduced by the monetary rewards offered by large firms. Some may also believe that minority lawyers face particular challenges when working in the corporate sector--either because of the kind of racialized barriers discussed below or because much of the work done at corporate firms may conflict with a minority lawyer's important values and commitments (Wilkins 1993,
1986-90 [discussing the latter possibility]). My point simply is that even those who endorse these views would not subscribe to a policy that systematically directs minorities away from some of the profession's highest paying and most prestigious positions. Whether Michigan ever pursued such a conscious policy, or whether, as seems more likely, the preferences about which Judge Edwards speaks resulted from a complex mix of signals from the institution and the minority students' own preferences, I leave for those who were there at the time to decide. For my own take on the issues Judge Edwards raises, see Wilkins 1997, 139-42.

Indeed, my own research suggests that much less affirmative action occurs in the hiring process than most hiring partners typically believe and that what there is must be balanced against the many ways that the dynamics of the recruiting process disadvantage black applicants (Wilkins and Gulati 1996, 554-64).

Although the study indicates that 1970s graduates show a net movement into private practice, it is not clear whether any of those who moved in this direction ended up in large law firms. Given the trends discussed in text, however, it seems likely that at least some members of this cohort have found their way into corporate law firms.

For an excellent discussion of the ways in which minorities travel different—and often more lengthy and arduous—routes to success in corporate America, see Thomas and Gabarro 1999.

I discuss the danger of grounding diversity efforts exclusively in the argument that it is “good for business” in Wilkins 1998.

Given that virtually all the minorities and whites from the 1990s cohort are still junior lawyers, mostly at large law firms (table 14) where lock-step salaries for associates are common, one would not expect to see significant salary differentials in either direction.

I use the word “guess” advisedly. Since partners often do not know an entering associate's actual credentials, they often make judgments on the basis of what they assume those credentials to be. This process often disadvantages minority lawyers (particularly black lawyers) who, because of assumptions about the prevalence of affirmative action in hiring, are often assumed to have poor law school records, even when they do not.

For a detailed discussion of this and other related phenomena, see Wilkins and Gulati 1996, 537-42, 568-82.

For a detailed version of this critique (some might say diatribe), see Wilkins 1999c.

The authors tell us that on average Michigan's minority students come from families with fewer economic resources than the families of the typical white student (Lempert, Chambers, and Adams 2000, 420). If Michigan's minority alumni—particularly its black alumni—resemble the black lawyers I have interviewed, it is likely that some (though by no means all) come from poor backgrounds. Moreover, many black families that have incomes that place them in the middle class have only recently arrived at this status and have strong ties to family members who live near or below the poverty line (see Dawson 1994).

But see Hull 1999.