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## Retaining Color

Veronica Root  
*Notre Dame Law School*

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## RETAINING COLOR

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Veronica Root\*

*It is no secret that large law firms are struggling in their efforts to retain attorneys of color. This is despite two decades of aggressive tracking of demographic rates, mandates from clients to improve demographic diversity, and the implementation of a variety of diversity efforts within large law firms. In part, law firm retention efforts are stymied by the reality that elite, large law firms require some level of attrition to function properly under the predominant business model. This reality, however, does not explain why firms have so much difficulty retaining attorneys of color—in particular black and Hispanic attorneys.*

*And yet, there may be a relatively simple and low-cost set of incentives that law firm management and the legal profession can put in place to encourage black and Hispanic attorneys to remain at large law firms at higher rates. This Article draws on traditional theories of “the firm” and modern day understandings of workplace discrimination and applies them to the retention problem in large law firms. It argues that by incentivizing equity partners in large firms, who are overwhelmingly white males, to instill greater loyalty in black and Hispanic attorneys, firms can solve a large portion of their retention problem. As equity partners invest more time mentoring black and Hispanic attorneys, they will develop a sense of loyalty to the firm that will decrease the speed and frequency that attorneys of color exit the firm. Firms can then begin Retaining Color.*

### INTRODUCTION

*[S]mall features of social situations can have massive effects on people’s behavior.<sup>1</sup>*

*[I]t may be possible to encourage recategorization such that people from different groups conceive of themselves as common members of a more*

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\* Visiting Assistant Professor, Notre Dame Law School. J.D., University of Chicago Law School. Many thanks to Daniel Abebe, Laura Beny, Lisa Bernstein, Margaret Brinig, Father William Dailey, Rick Garnett, Sheldon Lyke, Mark McKenna, Victor D. Quintanilla, Leslie Richards-Yellen, John Robinson, Lior Strahilevitz, Jay Tidmarsh, Eli Wald, Carlton Waterhouse, Michael J. Zimmer, and the participants of the Notre Dame Law School Faculty Colloquia and the University of Chicago Legal Scholarship Workshop for their helpful comments and suggestions. Thanks also to Erinn Rigney and Kerti-Ann Rowe for invaluable research assistance and the University of Michigan Journal of Law Reform staff.

1. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 255 (2008).

*inclusive group, and thus see themselves, at least temporarily, as all ingroup members.*<sup>2</sup>

No one disputes that large law firms have difficulty retaining attorneys of color, particularly black and Hispanic attorneys. The conventional wisdom is that these problems will persist until law firms make major structural changes to the typical large law firm business model and assignment process. But what if a major structural overhaul is not needed or is incapable of completely fixing the retention problem? What if, instead, the retention rates of attorneys of color at elite, large law firms could be increased through a series of modest incentives, rather than mandates, aimed at white men?

The question is whether the context in which white males at elite, large law firms make decisions can be organized in a manner that will alter their behavior without mandating that they take particular actions. Can the choice architects at law firms—those responsible “for organizing the context in which people make decisions”<sup>3</sup>—incentivize behavior by white men that will result in increasing the retention rates of attorneys of color within the firm? This Article suggests that they can.

Part I provides an overview of the large law firm business model, drawing on the seminal work of Wilkins and Gulati<sup>4</sup> and the effects of the Great Recession on this model. It then explains that, within elite, large law firms, the model works only if high rates of attrition occur within the associate attorney ranks, even after the recession, and highlights the different rates of attrition between white males and other demographic groups.

Part II outlines the crux of the retention problem in modern day elite, large law firms. It begins by describing the efforts undertaken by client-corporations to pressure law firms into increasing their demographic diversity and explains why these efforts have not resulted in more success. In light of this market failure, it then highlights three distinct challenges law firms must address in designing efforts aimed at eliminating retention rate disparities between white attorneys and black and Hispanic attorneys. It then relies on Hirschman’s 1970 work, which discusses the roles of exit,

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2. Samuel L. Gaertner & John F. Dovidio, *Addressing Contemporary Racism: The Common Ingroup Identity Model*, in 53 NEB. SYMP. ON MOTIVATION, MOTIVATIONAL ASPECTS OF PREJUDICE AND RACISM 111, 115 (Cynthia Willis-Esqueda ed., 2008) (emphasis omitted).

3. THALER & SUNSTEIN, *supra* note 1, at 3.

4. See David B Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996) [hereinafter Wilkins & Gulati, *An Institutional Analysis*].

voice, and loyalty within firms<sup>5</sup> and the work of Wilkins and Gulati<sup>6</sup> to demonstrate that the current law firm model results in a system where the concept of “loyalty to the firm” is instilled in only a select few associates deemed the “Superstars.” Those with no loyalty to the firm exit quickly when they encounter dissatisfaction instead of exercising their voice in an attempt to motivate the firm to alleviate the source of their dissatisfaction. The different rates in attrition between white males and other demographic groups suggest that the percentage of attorneys being instilled with loyalty to the firm is greater for white men than for black and Hispanic attorneys.

Thus, in Part III, the Article argues that choice architects at large law firms and within the legal profession need to engage in an effort to change the behavior of white males so that they work to instill more loyalty in associates of other demographic groups, with a particular focus on black and Hispanic attorneys. The Article focuses on incentivizing white males because they are the overwhelming majority of equity partners in law firms.<sup>7</sup> In other words, white men own law firms, and instilling true loyalty in associates must come from the law firms’ owners. This Article then provides three such proposals aimed at incentivizing equity partners within elite, large law firms to instill loyalty in black and Hispanic attorneys:

- (1) Law firms should credit time spent on increasing diversity at the firm towards billable hours’ requirements and for bonus consideration.
- (2) Law firms should increase the demographic diversity in top management positions within the firm. First, law firms should designate an equity partner as a Chief Diversity Officer (CDO) who is responsible for implementing strategies to improve overall firm demographic diversity. Second, law firms that have equity partners who are women and persons of color should ensure that individuals from these groups are on the most powerful committees at the firm—often the executive, management, and compensation committees.

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5. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (referring to “the firm” in the “business concern” sense and not focused on “law firms” in particular).

6. Wilkins & Gulati, *An Institutional Analysis*, *supra* note 4, at 520–21.

7. *The Demographics of Equity—An Update*, NAT’L ASS’N FOR LAW PLACEMENT (Feb. 2013), [http://www.nalp.org/demographics\\_of\\_equity\\_update](http://www.nalp.org/demographics_of_equity_update).

- (3) The legal profession should create a regime for mediating incidents of bias to help encourage attorneys of color to use their voice, as opposed to immediately utilizing the choice of exit, when encountering discriminatory<sup>8</sup> events at the firm.

## I. THE STATUS QUO

Elite, large law firms<sup>9</sup> have utilized the same basic business model for over fifty years. Initially, the tournament model<sup>10</sup> was explicitly discriminatory against certain demographic groups—including attorneys of color.<sup>11</sup> Explicit discrimination is no longer a part of the model, but the long-term effect of the discrimination can still be felt in the institutions, as the overwhelming percentage of owners at

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8. Please note that an occurrence can be discriminatory without qualifying as actionable unlawful discrimination. Most of the incidents relevant to this proposal will not be incidents arising out of hiring, promotion, or termination decisions. Instead, they are the type of incidents a person might bring in a hostile work environment claim, but a hostile work environment claim must be “severe and pervasive” so as to alter the conditions of the complainant’s employment to qualify as unlawful. Of course, as the courts have recognized, not all workplace conduct that may be described as “harassment” affects a “term, condition, or privilege” of employment within the meaning of Title VII. *See Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (noting that the “mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee” would not affect the conditions of employment to sufficiently significant degree to violate Title VII). Thus, “working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers” would clearly qualify as actionable, but less discriminatory events often will not. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (quoting *Rogers*, 454 F.2d at 238).

9. Not all “large” law firms are “elite,” and the focus of this Article is primarily on the elite, large law firms. The difference in classes of large law firms has been documented previously. *See* Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1886–89 (2008) (explaining three groups of large law firms and noting that between “the two extremes of high [(Skadden)] and low growth [(Cravath)] is a middle ground of firms with lower initial endowments of reputational capital”). It is relatively difficult to precisely define the elite large law firms. Thus, this Article uses the firms ranked in the Vault top fifty as a proxy for the elite firms. Galanter and Henderson also reference and rely on the Vault rankings to demonstrate law firm prestige. *Id.* at 1925–26 (discussing firms at the top of the Vault rankings as having higher prestige and reputational capital than firms toward the bottom of the Am Law 200).

10. *See* MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991); *see also* David Wilkins, *Why Global Law Firms Should Care About Diversity: Five Lessons from the American Experience*, 2 EUR. J. L. REFORM 415, 416 (2000) (“[T]he American mode of legal production (appropriately dubbed Cravathism in honor of the US firm that over a century ago pioneered the practices that most US firms continue to follow to this day) . . .”).

11. Wilkins, *supra* note 10, at 417 (explaining that during the 1950s and 1960s, the so-called “golden age” for large law firms, “virtually everyone other than white male Anglo-Saxon Protestants” were excluded from the most prestigious law firms).

large law firms are white males.<sup>12</sup> Moreover, the percentages of blacks and Hispanics at large law firms are, when compared to their law school attendance percentages, quite low. For example, blacks and Hispanics have consistently made up over six percent and 5.5 percent, respectively, of those enrolled in the top twenty-five law schools since 2000. Yet today, only 3.31 percent of associates and counsel in elite, large law firms are black, and 3.33 percent are Hispanic.<sup>13</sup> The challenge for today's firms is how to combat the inequities that are "structurally embedded in the norms and cultural practices of an institution"<sup>14</sup> while also combating the present day effects of aversive racism, implicit bias, and the stigmas associated with affirmative action.

#### A. *The Tournament and the Great Recession*

In a typical situation, an elite law firm hires promising young law students from top law schools with impeccable grades and credentials, such as a position on the law review, for a job as an associate.<sup>15</sup> Associates are salaried employees of the firm. These students are considered the best and brightest in their law school classes and have a variety of tempting job opportunities.<sup>16</sup> Students are induced to join the firm through higher than market wages and the opportunity, for some, to eventually join the partnership, which would enable the associate to become a co-owner in the firm and split a share in the firm's profits.<sup>17</sup>

The business model employed by elite law firms is traditionally described as "the Tournament of Lawyers."<sup>18</sup> An essential element of the model is employing junior and senior level associate attorneys who do not require substantial supervision. The most profitable associate is the one who requires the least monitoring, thereby freeing up the time of the supervising attorney to supervise even more attorneys. Thus, the question is how the firm achieves a

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12. *The Demographics of Equity—An Update*, *supra* note 7.

13. *See infra* Part I.B.

14. Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 281 (2002).

15. *See* Wilkins, *supra* note 10, at 425–26.

16. Wilkins & Gulati, *An Institutional Analysis*, *supra* note 4, at 547–49 (noting that law firms utilize measures of "meritocratic" hiring based on a few highly visible signals that are easy to assess).

17. *Id.* at 518–20.

18. *See, e.g.*, Wilkins, *supra* note 10, at 424; David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1583 (1998) [hereinafter Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*].

high level of function and efficiency from associates who receive little oversight:

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. . . . 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.<sup>19</sup>

One key to the model is to ensure that, over time, associates leave the firm or, in the modern day tournament, abandon the quest to become an equity partner.<sup>20</sup> When a junior associate is hired, he is typically one of several hires that enter the firm around the same time.<sup>21</sup> Large law firms need a large number of young associates who can be engaged in less-sophisticated, yet necessary, work that is billed to clients for a large amount of money per hour.<sup>22</sup> As associates gain expertise, the number of associates needed at the more senior levels dwindles because one senior associate can supervise and direct multiple junior associates.<sup>23</sup> One partner can supervise and direct multiple senior associates.<sup>24</sup> Because partners share in the profits of the firm, they have an incentive to make as few partners as possible.<sup>25</sup> This structure allows firms to maximize the value of associates while minimizing the number of individuals who share

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19. Wilkins & Gulati, *An Institutional Analysis*, supra note 4, at 518–19.

20. See, e.g., Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*, supra note 18, at 1613 (“Firms have strong incentives to minimize the loss of unrecovered training expenses through associate attrition.”). See generally Galanter & Henderson, supra note 9, at 1867 (explaining that under the “elastic tournament,” equity partnership is reserved to a very small number of partners who control client access).

21. Modern elite, large law firms effectuate this hiring primarily through the use of summer associate programs. See *infra* text accompanying notes 36–40.

22. Wilkins and Gulati refer to these associates as “paperwork associates.” See Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*, supra note 18, at 1609–10.

23. See Wilkins & Gulati, *An Institutional Analysis*, supra note 4, at 537–39.

24. *Id.*

25. See Galanter & Henderson, supra note 9, at 1877–78 (discussing the lower rate of equity partners in the “elastic tournament”); Wilkins & Gulati, *An Institutional Analysis*, supra note 4, at 534–35; see also Janet Ellen Raasch, *Making Partner—Or Not: Is it In, Up or Over in the*

in the firms' profits. Thus, the large law firm business model depends on substantial amounts of attrition during the six to ten years<sup>26</sup> it takes to become an equity partner, and therein lies the Tournament of Lawyers.<sup>27</sup> The associates compete with each other, and only a select few are offered partnership.

The Tournament of Lawyers thrived even in the midst of structural changes to the original promotion-to-partnership model.<sup>28</sup> In 2000, large law firms in the major legal markets increased salaries by as much as thirty percent, and first-year starting salaries rose to an unprecedented 125,000 dollars.<sup>29</sup> In comparison, a first-year associate in a firm with two to twenty-five attorneys at the time made 60,000 dollars.<sup>30</sup> As salaries increased, the tournament expanded by relying on high amounts of leverage.<sup>31</sup> In the law firm model, leverage refers to the partner to associate ratio.<sup>32</sup> Over the next few years, many large law firms began striving for leverage of three associates to every one partner, thereby leaving an even higher number of attorneys destined to lose in the Tournament of Lawyers.<sup>33</sup> To effectuate this leverage, law firms employing this strategy began increasing the sizes of their summer associate classes.<sup>34</sup> From 1996 to 2006, the number of associates hired by the 250 largest law firms increased by seventy-six percent.<sup>35</sup> In the summer of 2007, more than 10,000 law students worked as summer associates in one of the 195 firms surveyed as part of the American Lawyer's (Am Law) annual summer associate survey.<sup>36</sup> That number equaled about one-quarter of all law students set to graduate from all U.S. law schools the following year.<sup>37</sup> Of the top twenty firms in American Lawyer's

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*21st Century?*, LAW PRAC., June 2007, at 32 (discussing the changing dynamics for becoming equity partner).

26. Wilkins, *supra* note 10, at 423.

27. Please note that Wilkins and Gulati do not contend that large law firms are structured in a standard rank-order economic tournament. Instead, they find the tournament metaphor to be a valuable tool for "constructing a model that accurately describes elite firms." See Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*, *supra* note 18, at 1587.

28. See generally Galanter & Henderson, *supra* note 9.

29. NALP Data Confirm It's a Buyers' Market for Juniors, COMPENSATION & BENEFITS FOR L. OFFS. (IOMA), Oct. 2001.

30. *Id.*

31. Raasch, *supra* note 25, at 34.

32. *Id.*

33. *Id.*

34. *Id.* (noting that there was "an increasing demand for entry-level associates to fill the bottom ranks of the pyramid").

35. *Id.*

36. Paul Jaskunas, *Size Does Matter*, Am. Law. Online (Nov. 19, 2007), (available on LEXIS).

37. The top twenty law schools would produce only about 6,500 graduates. Thus, even if large law firms hired every single graduate from those schools, they would still need to hire



survey, four firms had summer programs with more than one hundred students, and only nine hired thirty or fewer summer associates.<sup>38</sup> The 2007 summer associate class was four percent larger than the 2006 class, and “if these visitors were factored into firm head counts, summers would constitute 20–25% of the lawyers at AmLaw 200 firms.”<sup>39</sup> At the time, it was very unusual for a law student to spend time as a summer associate and not receive an offer for full-time employment to begin a few months after graduation.<sup>40</sup> Law firms were expecting to need even more leverage going forward, thereby bloating the ranks within the Tournament of Lawyers.<sup>41</sup> Meanwhile, large law firms raised salaries again in 2007, ultimately resulting in first-year salaries of 160,000 dollars in the major legal markets.<sup>42</sup>

In addition, during this time of unprecedented growth, large law firms began operating more like businesses and less like partnerships, and determining the winners of the Tournament of Lawyers started to depend less on legal acumen and more on the ability to develop a sustainable practice. Partnership became dependent on a person’s ability to bring in clients, and partners unable to deliver on these expectations were demoted or fired.<sup>43</sup> As stated by one interviewed senior partner: “In the past, ‘good work’ and the requisite number of years were enough at most firms [to make partner]. Today, candidates for equity partner almost always need to be rainmakers with a good book of business—so that they can contribute their share to the firm’s [profits per partner].”<sup>44</sup> As suggested by the preceding quote, during this period, large law firms also began adopting dual partnership tracks, whereby, in addition to the traditional equity partners, some partners were considered “income

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significant amounts of students from lower-ranked law schools that were not originally part of the pool of students recruited by Cravath and its peers during the Golden Age of the 1950s and 60s. See Galanter & Henderson, *supra* note 9, at 1870.

38. See Jaskunas, *supra* note 36.

39. Brian Baxter, *Endless Summer*, AM. LAW. (Aug. 1, 2007), <http://www.americanlawyer.com/PubArticleTAL.jsp?id=900005487479>.

40. Shannon Henson, *Full-Time Offers for Summer Assocs. Plunged in '08*, LAW360 (Feb. 25, 2009, 12:00 AM), <http://www.law360.com/articles/88948/full-time-offers-for-summer-assocs-plunged-in-08> (noting that in 2008 the number of offers extended, a rate of ninety percent, at the conclusion of summer associate programs was at the lowest level since 2003).

41. See Raasch, *supra* note 25, at 35 (noting that some consultants predicted eventual leverage rates of ten associates to every one partner).

42. See, e.g., Stephanie Francis Ward, *Who Will Pay for Associate Raises: Partners or Clients?*, A.B.A. J. REPORT, Feb. 2, 2007, available at <http://law.gsu.edu/dyarn/spring07/law6020/Who%20Will%20Pay%20for%20Associate%20Raises%20Partners%20or%20Clients.htm>.

43. Raasch, *supra* note 25, at 33 (noting that in March 2007, Chicago-based Mayer Brown announced that it would eliminate more than ten percent of the firm’s 427 equity partners; half were demoted and half fired).

44. *Id.* at 34.

partners.” They were partners in name only but continued to receive very large salaries. By 2007, eighty percent of the firms in the Am Law 200 utilized a two-tier model.<sup>45</sup> Becoming an equity partner became dependent upon one’s ability to bring in a sustainable book of business, which began taking even more time than before and certainly became even more competitive.<sup>46</sup> This reflected the reality that the original Tournament of Lawyers had undergone a number of structural changes that resulted in an even more competitive and elastic tournament to become an equity partner, which involved expanding the ranks of nonequity partnership as well as the number of attorneys off the partnership track.<sup>47</sup>

In 2007, many highly profitable firms had leverage of four or five associates to each partner.<sup>48</sup> Some consultants even predicted that the eventual leverage ratio would be ten to one at the largest firms.<sup>49</sup> Then, in 2008, the housing bubble burst, and the legal profession, along with the rest of the U.S. economy, was plunged into the Great Recession.<sup>50</sup> With the bursting of the housing bubble came the bursting of the bloated tournament model, and excessive leverage became a detriment instead of an asset. Law firms began reversing course and began a systematic decrease of leverage ratios. As a result, people began to wonder whether the Great Recession would have “permanent adverse effects on the legal profession”<sup>51</sup> and whether the tournament model would remain sustainable over the long term. As legal work decreased in demand, highly leveraged law firms were left with large numbers of associates without work to do, and for the first time large law firms began deep, systematic layoffs within their associate ranks. From Fall 2008 to early 2009, each

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45. *Id.* at 36.

46. *See id.* at 34. It should be noted that obtaining a sustainable book of business appears to be more difficult for persons of color, as survey evidence suggests that attorneys of color are more likely to have clients who are also persons of color instead of clients who are white. *See also* Richard O. Lempert et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 401 (2000) (“All Michigan alumni are disproportionately likely to serve same-race clients . . .”).

47. *See* Galanter & Henderson, *supra* note 9, at 1867 (explaining the modern day Tournament of Lawyers as an “elastic tournament” due to the “widening ranks of nonequity partnership and permanent ‘off track’ attorneys suggest[ing] . . . a more complex and elongated tournament structure . . . [for] both partners and associates”).

48. Raasch, *supra* note 25, at 35.

49. *Id.*

50. *See generally* Eli Wald, *The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2051 (2010) (“Perhaps with historical hindsight, 2008–2009 will be remembered not for the Great Recession that first rocked the U.S. residential mortgage credit market, then froze American and global financial markets and eventually led to a worldwide recession, but as an inflection point for world history, the U.S. economy, and the legal profession.”) (footnote omitted).

51. *Id.* at 2052.

week brought news of another round of lay-offs. In 2008, an estimated 1,922 attorneys lost their law firm positions; in 2009, an estimated 12,259 people were laid off.<sup>52</sup> During this time, many of the summer associates who had been given Fall 2009 and 2010 starting dates instead received long-term deferrals,<sup>53</sup> and in some instances rescissions,<sup>54</sup> because large law firms could not afford, at their high pay rates, to take on the former summer associates to whom they had given full-time job offers.

In 2010, however, these numbers slowed, and only an estimated 745 attorneys were laid off from large law firms.<sup>55</sup> Furthermore, in 2011, of the 126 firms that responded to American Lawyer's Summer Hiring Survey, 111 provided summer associate class figures that demonstrated an average summer associate class of 33.3 associates, up by twenty-five percent over the 2010 average of 26.7 associates.<sup>56</sup> For example, in 2009, Cravath had 123 summer associates; in 2010, twenty-three summer associates; and in 2011, fifty-two summer associates.<sup>57</sup> The largest reported summer associate class in 2011 was that of Latham & Watkins with 168 summer associates, which is striking given the large number of associates laid off by the firm in the preceding years.<sup>58</sup> In 2012, Am Law found that responding firms hired 15.5 percent more summer associates in 2012 than they had in 2011.<sup>59</sup> Moreover, nearly all of the summer associates working at large law firms in 2011 and 2012 received full-time job offers, up from an offer rate of 69.3 percent for the 2009 summer associate class.<sup>60</sup> This may be unsurprising given the fact that 2012 was "a very

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52. Ashby Jones, *2010: The Year in BigLaw Layoffs*, WALL ST. J. L. BLOG (Jan. 24, 2011, 5:52 PM), <http://blogs.wsj.com/law/2011/01/24/2010-the-year-in-biglaw-layoffs/>.

53. See, e.g., Ashby Jones, *Making Sense of the Law-Firm Deferral Situation*, WALL ST. J. L. BLOG (Oct. 6, 2009, 9:07 AM), <http://blogs.wsj.com/law/2009/10/06/making-sense-of-the-law-firm-deferral-situation/>; Ashby Jones, *Only a Few Bucking the Deferral Trend*, WALL ST. J. L. BLOG (June 18, 2009, 9:29 AM), <http://blogs.wsj.com/law/2009/06/18/deferrals-us-surely-you-jest/>; Ashby Jones, *The Mighty Are Humbled: Cravath Also Offers Associate Deferrals*, WALL ST. J. L. BLOG (June 12, 2009, 12:12 PM), <http://blogs.wsj.com/law/2009/06/12/the-mighty-are-humbled-cravath-offers-associate-deferrals/>.

54. See, e.g., Elie Mystal, *Rescission Open Thread: Which Firms Are Pulling Offers?*, ABOVE THE LAW (May 4, 2010, 6:19 PM), <http://abovethelaw.com/2010/05/rescission-open-thread-which-firms-are-pulling-offers/>.

55. Jones, *supra* note 52.

56. Tom Huddleston, Jr., *Am Law Data: Summer Associate Class Sizes Up in 2011*, LAW.COM (Aug. 11, 2011), <http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202510631301>.

57. *Id.*

58. Elie Mystal, *How Did Latham Become the Poster Child for Layoffs?*, ABOVE THE LAW (June 14, 2010, 2:17 PM), <http://abovethelaw.com/2010/06/how-did-latham-become-the-poster-child-for-layoffs/> (noting that Latham & Watkins was the first firm to lay people off and laid off a total of 440 people, 190 associates, and 250 staff).

59. Sara Randazzo, *Job Offers Abound for Summer Associates as Hiring Increases*, NAT'L L.J. (Sept. 25, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1348416443924>.

60. *Id.*

good year . . . for [large] law firm revenues,” which included a five percent increase in gross law firm revenues as compared to 2011, a net income increase of six percent, and a profits per equity partner increase of nearly five percent.<sup>61</sup> These increases in summer associate positions indicate that the tournament model, while changed and less reliant on extremely high rates of leverage, remains at elite, large law firms.<sup>62</sup> A firm like Latham & Watkins that brings in a nationwide class of more than one hundred summer associates<sup>63</sup> but that makes, for example, only eighteen partners a year,<sup>64</sup> who are not necessarily equity partners, has returned to relying on the tournament as a large component of its business model. While there are currently significant mixed messages regarding the health of large law firms generally, with reports on the same day indicating that large law firms are in the “hiring mood again”<sup>65</sup> contrasting with the news that there are more lay-offs of associates and partner demotions,<sup>66</sup> there does appear to be an elite set of large law firms that are committed to continuing their use of the basic tournament model.

Furthermore, for many, the partnership carrot and financial incentives are still strong enough that many associates ignore the costs of participating in the even more competitive tournament, at

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61. Jennifer Smith, *2012: It Was a Very Good Year (For Law Firm Revenues)*, WALL ST. J. L. BLOG (Jan. 28, 2013, 6:38 PM), <http://blogs.wsj.com/law/2013/01/28/2012-it-was-a-very-good-year-for-law-firm-revenues/?mod=WSJBlog>.

62. See CTR. FOR THE STUDY OF THE LEGAL PROFESSION & THOMPSON REUTERS PEER MONITOR, GEORGETOWN UNIV. LAW CTR., 2013 REPORT ON THE STATE OF THE LEGAL MARKET 14 (2013), available at <https://www.law.georgetown.edu/continuing-legal-education/executive-education/upload/2013-report.pdf> (“[T]here is evidence that many law firm leaders understand the realities of the changed market and the imperative for their firms to act decisively to address them. . . . And a substantial majority now sees trends like increased pricing competition, more commoditization of legal work, more non-hourly billing, fewer equity partners, more contract lawyers, reduced leverage, and smaller first year classes as permanent trends going forward.”).

63. See Huddleston, *supra* note 56.

64. In 2012, Latham & Watkins announced promotion of eighteen associates to partner and twenty-one associates to counsel, a non-partnership, salaried position. See *Latham & Watkins Names 18 New Partners, 21 New Counsel*, LATHAM & WATKINS LLP (Nov. 14, 2012), <http://www.lw.com/news/new-partners-counsel-for-2013-Nov2012>.

65. Karen Sloan, *Large Firms in A Hiring Mood Again*, NAT'L L.J. (June 24, 2013), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202607980312> (“The country’s largest law firms are wading deeper into the new associate hiring pool—a welcome development after years of recruiting declines.”).

66. Matthew Huisman, *17 Partners Plan to Leave Patton Boggs*, BLOG LEGAL TIMES (June 24, 2013, 1:25 PM), <http://legaltimes.typepad.com/blt/2013/06/17-partners-plan-to-leave-patton-boggs.html> (“Patton Boggs warned 18 partners earlier this year that their performance was unsatisfactory, and that they needed to improve or find a new firm. Now 17 of them are parting ways with Patton Boggs.”); Joe Palazzolo, *Weil Lays Off 60 Associates, 110 Staff*, WALL ST. J. L. BLOG (June 24, 2013, 10:26 AM), <http://blogs.wsj.com/law/2013/06/24/weil-lays-off-60-associates-110-staff/>.

least for a time.<sup>67</sup> These costs include working a very high number of hours per week, a loss of personal autonomy, as well as deep personal and familial sacrifice for the clients of the firm.<sup>68</sup> Arguably most important, these costs often lead to unhappiness and discontent for the associate, as well as those close to the associate.<sup>69</sup> Over time, the uncertainty of winning the tournament in conjunction with the difficult working conditions leads the majority of associates at large law firms to leave.<sup>70</sup> Thus, low rates of retention amongst attorneys joining large law firms are accepted as necessary components of the law firm business model.<sup>71</sup>

The necessity of attrition for the large law firm business model, however, does not in and of itself explain the different rates of retention between attorneys of color and whites.<sup>72</sup>

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67. Wilkins & Gulati, *An Institutional Analysis*, *supra* note 4, at 519–20 (“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. . . . Firms thus have an incentive to create a pyramid structure in which a relatively small number of 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.”).

68. See generally Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 890 (1999); Dan Slater, *Another View: In Praise of Law Firm Layoffs*, N.Y. TIMES DEALBOOK (July 1, 2009, 3:41 PM), <http://dealbook.nytimes.com/2009/07/01/another-view-in-praise-of-law-firm-layoffs/> (“For many lawyers at law firms, particularly those who spent the early part of their careers toiling in structured finance departments and contributing, in the end, nothing to nothing, this recession may be the thing that delivers them from more 3,000-hour years of such drudgery as changing the dates on securitization documents and shuffling them from one side of the desk to the other. Like a relationship gone bad, clearly hopeless to everyone but the imprisoned, it often takes a forced exit to break the leash of inertia that collars so many smart law graduates to mind-numbing work.”).

69. See generally Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171 (2005) (explaining that the results of a survey indicated that high billing requirements led to large amounts of unhappiness and attrition within large law firms); Schiltz, *supra* note 68, at 895.

70. See generally Fortney, *supra* note 69.

71. Wilkins, *supra* note 10, at 428 (“It should be abundantly clear by now . . . that retention is not just a problem for minorities and women. Large firms increasingly are having difficulty retaining *all* of their associates.”).

72. For example, the estimated annual attrition rates at large law firms amongst new and midlevel associates are ten percent for whites and thirty percent for blacks. See *The Black Experience at Major Law Firms*, N.Y. TIMES (Nov. 28, 2006), [http://www.nytimes.com/imagepages/2006/11/28/us/29diverse\\_graphic.html](http://www.nytimes.com/imagepages/2006/11/28/us/29diverse_graphic.html).

### B. After Twenty Years of Tracking, Little Progress

The available data demonstrates that large numbers of persons of color are attending the top twenty-five law schools, a much smaller percentage join large law firms, and an even smaller percentage are made partner. This is despite the fact that the American Bar Association (ABA) and the National Association for Law Placement (NALP) began questioning and tracking demographic diversity within law firms in 1993.<sup>73</sup> Twenty years later, only small gains have been made in efforts to increase large law firm demographic diversity. These small gains cannot be explained away by different employment preferences between white attorneys and black and Hispanic attorneys.

#### 1. Demographics of Law Schools and Law Firms

Every year, thousands of persons of color enroll in law schools.<sup>74</sup> From 2000 to 2013, the percentage of persons of color matriculating into the top twenty-five law schools was consistently over 23.53 percent of the student body and has recently topped 28 percent.<sup>75</sup> Enrolling in law school, however, does not guarantee a job at a law firm post-graduation, particularly at one of the top law firms. As evidenced in Figures 1 and 2,<sup>76</sup> the percentage of attorneys of

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73. See Eunice Chwenyen Peters, Note, *Making It to the Brochure But Not to Partnership*, 45 WASHBURN L.J. 625, 626 (2006).

74. See LAW SCH. ADMISSION COUNCIL, MATRICULANTS BY ETHNIC & GENDER GROUP, <http://www.lsac.org/lsacresources/data/ethnic-gender-matriculants> (last visited Nov. 28, 2013) [hereinafter LSAC, CURRENT SUMMARY]; LAW SCH. ADMISSION COUNCIL, MATRICULANTS BY ETHNIC & GENDER GROUP (ARCHIVE), <http://www.lsac.org/lsacresources/data/ethnic-gender-matriculants/archive> (last visited Nov. 28, 2013) [hereinafter LSAC, ARCHIVE SUMMARY].

75. See *infra* Figure 1. Enrollment figures are utilized in this section because graduation rates by demographic group are not reported by law schools to LSAC or the ABA, making it difficult to ascertain this data. See, e.g., GITA Z. WILDER, LAW SCH. ADMISSION COUNCIL, THE ROAD TO LAW SCHOOL AND BEYOND: EXAMINING CHALLENGES TO RACIAL AND ETHNIC DIVERSITY IN THE LEGAL PROFESSION 20 (2003) ("National data about persistence in law school are difficult to come by and often must be inferred by juxtaposing information from different sources.").

76. See *infra* Figures 1 and 2. Please note that the data in Figure 2 reflects persons of color at all law firms, not just those at large law firms, which is this Article's focus. The data in Figure 2, however, is still helpful because it demonstrates the increase in the percentages of attorneys of color at law firms over time. The data on law firms is aggregated when reported. Figure 3 reports the author's manual tally of the percentages of partners, associates, and counsel of color at the top fifty law firms for the years 2011, 2012, and 2013, as ranked by Vault and reported to NALP. See *infra* Figure 3. A comparison of the numbers at law firms generally versus those at the top fifty firms in 2011, 2012, and 2013 indicates that the differences between the two groups are small enough that these longitudinal numbers of all law firms continue to be helpful indicators of what is going on within large law firms.

color employed at law firms from 2000 to 2013 was substantially less than the percentages enrolled in law school; in 2013, persons of color made up 20.93 percent of associates and 7.1 percent of partners at law firms. At the top fifty large law firms in 2011, 22.39 percent of associates and counsel were attorneys of color, and 8.23 percent of partners were partners of color.<sup>77</sup> At the top fifty large law firms in 2012, 20.86 percent were associates and counsel of color and 8.37 percent were partners of color.<sup>78</sup> At the top fifty large law firms in 2013, 21.25 percent were associates and counsel of color and 9.33 percent were partners of color.<sup>79</sup>

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77. *See infra* Figure 3 (analysis on file with author).

78. *See infra* Figure 3. Please note that the Vault top fifty law firms in 2011, 2012, and 2013 differed, although the vast majority of firms overlapped.

79. *See infra* Figure 3.

**Figure 1: 2000–2013: Percentage of Enrollees to Law School by Race & Ethnicity at (2012) Top 25 Law Schools<sup>80</sup>**

	Black/ African Am.	Am. Indian/ AK Nat'l	Asian Am.	All Hispanic	Native HI/Pacific Islander	2 or More Races	% Enrollees of Color
2000 <sup>81</sup>	NC <sup>82</sup>	NC	NC	NC	NC	NC	24.47%
2001	6.97%	.75%	10.05%	5.76%	NC	NC	23.53%
2002	6.94%	.71%	10.25%	5.94%	NC	NC	23.84%
2003	7%	.73%	10.3%	6.08%	NC	NC	24.11%
2004	7.06%	.71%	10.75%	6.15%	NC	NC	24.67%
2005	7.29%	.78%	10.45%	6.34%	NC	NC	24.86%
2006	7.38%	.76%	11.42%	6.54%	NC	NC	26.1%
2007	7.22%	.76%	11.40%	6.65%	NC	NC	26.04%
2008	6.97%	.86%	11.53%	6.65%	NC	NC	26.02%
2009	6.76%	.9%	11.04%	6.57%	NC	NC	25.27%
2010	6.83%	.9%	11.22%	6.75%	NC	NC	25.7%
2011	6.94%	.95%	11.4%	7.14%	NC	NC	26.43%
2012	6.66%	.78%	10.88%	7.45%	.44%	1.84%	28.06%
2013	6.36%	.65%	10.92%	7.38%	.07%	2.68%	28.08%

80. Figure 1 aggregates the reported enrollees of color from 2000–2013 at the top twenty-five law schools as ranked by US News in 2012: Yale, Stanford, Harvard, Columbia, University of Chicago, NYU, University of Pennsylvania, University of Virginia, U.C. Berkeley (Boalt), Michigan, Duke, Northwestern, Georgetown, Cornell, UCLA, University of Texas, Vanderbilt, University of Southern California, Minnesota, George Washington University, University of Washington, Notre Dame, Washington University, Emory, and Washington & Lee. See LAW SCH. ADMISSION COUNCIL & AM. BAR ASS'N, ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (2000 to 2013 eds.). From 2000–2011, the publication tracked the following racial categories: African American, American Indian, Asian American, Mexican American, Puerto Rican, and Hispanic. From 2012–2013, LSAC changed the categorizations and tracked: all Hispanics; American Indian/Alaskan Native; Asian; Black/African American; National Hawaiian/Pacific islander; and two or more races. For purposes of comparison, this chart aggregates the data for Mexican American, Puerto Rican, and Hispanic into the “All Hispanic” category. These schools are used as a representative sample of the “top” law schools, although there is variation from year to year in the law school rankings, and historically other law schools are included in the top twenty-five, and some of the schools included in this analysis were not ranked in the top twenty-five in prior years. The percentage of persons of color at the top twenty-five law schools is slightly less than that for all reporting law schools. See LSAC, CURRENT SUMMARY, *supra* note 74; LSAC, ARCHIVE SUMMARY, *supra* note 74.

81. In 2000, the LSAC data reported persons of color data in the aggregate only. See AM. BAR ASS'N, OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS (Rick L. Morgan & Kurt Snyder eds., 2000 ed. 1999).

82. “NC” refers to information that was not collected.



Figure 2: Percentage Persons of Color Lawyers at Law Firms		
	% Partners of Color	% Associates of Color
2000 <sup>83</sup>	3.35%	12.86%
2001 <sup>84</sup>	3.55%	13.70%
2002 <sup>85</sup>	3.71%	14.27%
2003 <sup>86</sup>	4.04%	14.63%
2004 <sup>87</sup>	4.32%	15.06%
2005 <sup>88</sup>	4.63%	15.62%
2006 <sup>89</sup>	5.01%	16.72%
2007 <sup>90</sup>	5.40%	18.07%
2008 <sup>91</sup>	5.92%	19.08%
2009 <sup>92</sup>	6.05%	19.67%
2010 <sup>93</sup>	6.16%	19.53%
2011 <sup>94</sup>	6.56%	19.90%
2012 <sup>95</sup>	6.71%	20.32%
2013 <sup>96</sup>	7.1%	20.93%

83. Press Release, Nat'l Ass'n for Law Placement, Presence of Women and Attorneys of Color in Large Law Firms Continues to Rise Slowly (Nov. 15, 2000), *available at* <http://www.nalp.org/2000presenceofwomenattorneyscolor>.

84. Press Release, Nat'l Ass'n for Law Placement, Dearth of Women and Attorneys of Color Remains in Law Firms (Dec. 3, 2001), *available at* <http://www.nalp.org/2001dearthofwomenattorneyscolor>.

85. Press Release, Nat'l Ass'n for Law Placement, Presence of Women and Attorneys of Color in Large Law Firms Continues to Rise Slowly but Steadily (Oct. 3, 2002), *available at* <http://www.nalp.org/2002presenceofwomenandattorneyscolor>.

86. Press Release, Nat'l Ass'n for Law Placement, Women and Attorneys of Color Continue to Make Small Gains at Large Law Firms, (Nov. 7, 2003), *available at* <http://www.nalp.org/2003womenandattorneyscolor>.

87. Press Release, Nat'l Ass'n for Law Placement, Women and Attorneys of Color Continue to Make Only Small Gains at Large Law Firms, (Nov. 5, 2004), *available at* <http://www.nalp.org/2004womenandattorneyscolor>.

88. Press Release, Nat'l Ass'n for Law Placement, Women and Attorneys of Color Continue to Make Small Gains at Large Law Firms, (Nov. 17, 2005), *available at* <http://www.nalp.org/2005womenandattorneyscolor>.

89. Press Release, Nat'l Ass'n for Law Placement, Partnership at Law Firms Elusive for Minority Women (Nov. 8, 2006), *available at* <http://www.nalp.org/2006partnershipelusiveforminoritywomen>.

90. Press Release, Nat'l Ass'n for Law Placement, Minority Women Still Underrepresented in Law Firm Partnership Ranks—Change in Diversity of Law Firm Leadership Very Slow Overall, (Nov. 1, 2007), *available at* <http://www.nalp.org/minoritywomenstillunderrepresented>.

91. Press Release, Nat'l Ass'n for Law Placement, Law Firm Diversity Demographics Slow to Change—Minority Women Remain Particularly Scarce in Law Firm Partnership Ranks, (Oct. 10, 2008), *available at* <http://www.nalp.org/lawfirmdiversity>.

92. Press Release, Nat'l Ass'n for Law Placement, Law Firm Diversity Demographics Show Little Change, Despite Economic Downturn, (Oct. 21, 2009), *available at* <http://www.nalp.org/oct09lawfirmdiversity>.

93. Press Release, Nat'l Ass'n for Law Placement, Law Firm Diversity Among Associates Erodes in 2010, (Nov. 4, 2010), *available at* <http://www.nalp.org/2010lawfirmdiversity> [hereinafter NALP, Law Firm Diversity].

94. Press Release, Nat'l Ass'n for Law Placement, Law Firm Diversity Wobbles: Minority Numbers Bounce Back While Women Associates Extend Two-Year Decline (Nov. 3, 2011), *available at* [http://www.nalp.org/2011\\_law\\_firm\\_diversity](http://www.nalp.org/2011_law_firm_diversity).

Figure 3: Percentage of Persons of Color at Vault Top 50 Law Firms <sup>97</sup>							
	Black/ African Am.	Am. Indian/ AK Nat'l	Asian Am.	Hispanic	Native HI/Pac. Isl.	2 or More Races	% Attorneys of Color
Partners of Color							
2011	1.84%	.06%	3.99%	2.02%	.03%	.29%	8.23%
2012	1.52%	.09%	4.39%	1.9%	.18%	.29%	8.37%
2013	1.59%	.08%	4.93%	2.3%	.00%	.42%	9.33%
Associates & Counsel of Color							
2011	3.96%	.13%	12.42%	3.8%	.04%	2.04%	22.39%
2012	3.31%	.11%	12.02%	3.33%	.12%	1.96%	20.86%
2013	3.44%	.12%	11.97%	3.42%	.03%	2.27%	21.25%

One might compare consistent enrollment of more than the 23.53 percent students of color since 2000 with the 20.93 percent associates of color<sup>98</sup> at all law firms, as reported by NALP in 2013, and 21.25 percent of associates and counsel of color<sup>99</sup> at the top large law firms in 2013 and believe that the legal profession is making progress towards achieving greater demographic diversity within law firms. This sense of achievement exists because, over time, one can observe small incremental increases in the number of associates and partners of color employed by all law firms as reported by NALP.<sup>100</sup> These numbers, however, fail to reflect three important realities.

95. Press Release, Nat'l Ass'n for Law Placement, Representation of Women Among Associates Continues to Fall, Even as Minority Associates Make Gains (Dec. 13, 2012), available at <http://www.nalp.org/2012lawfirmdiversity>.

96. Press Release, Nat'l Ass'n for Law Placement, Representation of Women Associates Falls for Fourth Straight Year as Minority Associates Continue to Make Gains—Women and Minority Partners Continue to Make Small Gains (Dec. 11, 2013), available at <http://www.nalp.org/uploads/PressReleases/2013WomenMinoritiesPressRelease.pdf> [hereinafter NALP, Representation of Women Associates].

97. Vault ranks the top one hundred law firms. See *Law Firm Rankings 2012: Vault Law 100*, VAULT, <http://web.archive.org/web/20110727113459/http://www.vault.com/wps/portal/usa/rankings/individual?rankingId1=2&rankingId2=-1&rankings=1&regionId=0&rankingYear=2012> (accessed using the Internet Archive: WayBackMachine; select the desired year using the drop down) (last visited Dec. 1, 2013). These percentages come from the statistics reported to NALP by the firms ranked in the Vault top fifty. For firms that provided collective data for all offices, these numbers were used. For firms that provided information by office, the numbers included were aggregated from the firm's offices in the four major legal markets—New York, Washington, D.C., Chicago, and Los Angeles—although not all firms had offices in each of these cities. Attorneys reported in the “staff attorney” or “other attorney” columns on NALP were not included in this analysis because these attorneys are typically never tracked as eligible for the equity partner tournament. See NALP DIRECTORY OF LEGAL EMPLOYERS, <http://www.nalpdirectory.com> (last visited Nov. 28, 2013).

98. *Supra* Figure 2.

99. *Supra* Figure 3.

100. See *supra* Figure 2.

First, in 2010 the number of associates of color decreased for the first time since NALP began tracking this information in the 1990s.<sup>101</sup> The decline was slight and a result of the Great Recession but left the total percentage of associates and partners of color at law firms at just 12.40 percent in 2010. This percentage was significantly lower than the percentage of students of color enrolling in law schools over the prior ten years. The past few years have seen gains for attorneys of color within law firms, with the total percentage reaching 13.36 percent in 2013, compared with 12.91 percent in 2012, 12.70 percent in 2011, and 12.40 percent in 2010.<sup>102</sup> The decline in 2010 not only slowed the progress firms were making, but it also signaled to many that firms were willing to sacrifice demographic diversity.<sup>103</sup>

Second, the above statistics demonstrate that the percentage of persons of color from traditionally underrepresented groups—blacks and Hispanics—currently employed by prestigious law firms is significantly less than the percentage enrolled in law schools over the preceding ten year period. This is despite the fact that over the past several years, law firms have employed many different initiatives targeting demographically diverse individuals in an attempt to improve diversity within law firms. For example, from 2000 to 2013, an average of 10.89 percent of those enrolled in the top twenty-five law schools were of Asian descent, but from 2011 to 2013, an average of over twelve percent of associates and counsel in the top fifty law firms were of Asian descent.<sup>104</sup> In contrast, an average of 6.95 percent of those enrolling in law schools over the same period identify as black, but as of 2013 only 3.44 percent of associates and counsel at the same fifty law firms are black.<sup>105</sup> A similar discrepancy is apparent with Hispanics.<sup>106</sup> Thus, there appear to be additional barriers of entry to obtaining and retaining employment at the top law firms for blacks and Hispanics than for other demographic groups.<sup>107</sup>

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101. Press Release, NALP, Law Firm Diversity, *supra* note 93.

102. Press Release, NALP, Representation of Women Associates, *supra* note 96.

103. While not the focus of this Article, the decline in the rates of women within law firms has not bounced back. This is especially troubling for women of color, who have consistently struggled the most in succeeding at large law firms. Fifty-seven percent of offices reporting to NALP reported no minority women partners and over twenty-seven percent reported no minority women associates. *Id.*

104. Please note that the LSAC and NALP charts differ because the two organizations gathered racial identification data differently.

105. See *supra* Figures 1 and 3.

106. See *supra* Figures 1 and 3.

107. There are also barriers to entry to law schools for these groups, and the problems associated with garnering a sufficient “pipeline” of black and Hispanic students is well documented. See *A Disturbing Trend in Law School Diversity*, COLUMBIA U. SCH. OF L., <http://blogs.columbia.edu/blogs/2012/03/21/a-disturbing-trend-in-law-school-diversity/>.

Third, the reported percentage of partners of color reflects both income and equity partners, meaning the number of equity partners in elite, large law firms is well below 1.59 percent for blacks and 2.3 percent for Hispanics,<sup>108</sup> figures that represent both types of partners.<sup>109</sup> When NALP attempted to begin gathering data on the different partner types in a systematic way, large law firms threatened to stop providing any information to NALP.<sup>110</sup>

## 2. Black and Hispanic Attorneys' Employment Preferences

It seems fair to conclude that the low percentages of black and Hispanic associates at large law firms are, in part, a reflection of the "first generation bias" that initially excluded them from being hired at elite, large law firms. As Susan Sturm has explained, "[f]irst generation bias involves deliberate exclusion or subordination directed at identifiable members of disfavored groups."<sup>111</sup> This initial exclusion may, in part, have been motivated by what social psychologists refer to as "dominative racism," meaning the old-fashioned, blatant form of racism.<sup>112</sup> Nevertheless, large law firms stopped deliberate exclusion and subordination of attorneys of color decades ago, and overt expressions of racism have largely ceased within the workplace.

Another reason there are smaller percentages of blacks and Hispanics within large law firms is that there are lower rates of black and Hispanics attending college, which then leads to even lower rates of black and Hispanics attending law school. The result is that lower rates of blacks and Hispanics attend law school as compared to their relative population within the United States.<sup>113</sup> It is also possible that blacks and Hispanics are hired by elite, large law firms at

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law.columbia.edu/salt/ (last visited Nov. 28, 2013) (noting that law school enrollment has grown by over 3,000 students in the first-year class when compared with fifteen years ago, while over the same period African American and Mexican American enrollments have decreased not just as a percentage of the class but in the raw numbers). The barriers to entry to law school still cannot account for the failure of these groups to obtain and retain employment at large law firms.

108. See *supra* Figure 3.

109. See *supra* Figure 3.

110. See Vivia Chen, *What Women Want: Partnership Details*, AM. L. DAILY (Feb. 24, 2010, 9:06 AM), <http://amlawdaily.typepad.com/amlawdaily/2010/02/what-women-want.html>.

111. Sturm, *supra* note 14, at 280.

112. John F. Dovidio & Samuel L. Gaertner, *New Directions in Aversive Racism Research: Persistence and Pervasiveness*, in 53 NEB. SYMP. ON MOTIVATION, MOTIVATIONAL ASPECTS OF PREJUDICE AND RACISM, *supra* note 2, at 43, 44.

113. See Christine Gregory, *Building Social Justice Leaders: The University of Michigan Law School's Diversity Program*, 63 J. LEGAL EDUC. 302, 303 (2013) (citing Tamar Lewin, *Law School*

much lower rates than suggested by their percentages within the student bodies of elite law schools.<sup>114</sup> Still, the education pipeline and hiring issues are separate and distinct from that of why the attorneys of color who *are* hired by large law firms depart at such higher rates than their white counterparts. That specific issue—retention—is the focus of this Article.<sup>115</sup>

If blacks and Hispanics simply prefer to work elsewhere, then a retention problem resulting from discrimination or bias would not appear to exist.<sup>116</sup> The empirical data on the preferences of attorneys of color versus those of whites gathered in the award-winning study surveying University of Michigan Law graduates from 1970 to 1996, albeit dated, provides some guidance.<sup>117</sup> The study looked explicitly at “career moves across sectors” and found that “[m]inorities and whites are very much alike. Both have tended to leave jobs in private practice or the legal-services/public-interest sector and to move into jobs in the business/finance area and, for graduates of the last two cohorts, government.”<sup>118</sup>

Specifically, the study demonstrated that to the extent that there are differences in preferences between persons of color and whites with regards to pursuing careers in public service, government, or law firm practice, we see these preferences exhibited in students’ choices for jobs immediately after graduation.<sup>119</sup> Attorneys of color are more likely than whites to begin careers in government, public

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*Admissions Lag Among Minorities*, N.Y. TIMES, Jan. 7, 2010, at A22, available at [http://www.nytimes.com/2010/01/07/education/07law.html?\\_r=0](http://www.nytimes.com/2010/01/07/education/07law.html?_r=0).

114. Determining this would require data from law firms regarding the number of associates by class. In other words, the firms would need to report the demographic make-up of associates by year or at least year grouping. This data is not currently collected or published by NALP, although it may be a worthy endeavor to assist in efforts of those researching demographic trends in the life cycle of the elite, large law firm.

115. It should be noted that by focusing on retention, the Article is also naturally focused on promotion to partnership. For ease of reference, I will refer to this aspect as retention throughout, but the term should be construed broadly.

116. In groups that have previously experienced explicit barriers of entry to prestigious and high-paying jobs, one should be skeptical of claims that a particular group is under-represented because of a lack of interest. See generally 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).

117. The study looked at black, Hispanic, and American Indian graduates. Lempert et al., *supra* note 46, at 402 (evaluating responses to a seven-page questionnaire mailed in late 1997 and early 1998 to 2,144 members of the Michigan Law School classes of 1970–1976). These findings regarding black and Hispanic preferences are consistent with more recent empirical studies conducted by Richard Sander. See Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1768–71 (2006). A more robust qualitative study of black and Hispanic attorney preferences would be a valuable contribution to more fully understanding these issues.

118. Lempert et al., *supra* note 46, at 441.

119. *Id.* at 401.

service, or public interest positions.<sup>120</sup> This initial decision by many persons of color to enter non-law firm practice immediately after law school diminishes, at least to a certain extent, the concern that attorneys of color are leaving firms in large numbers to pursue work in the public sector, because they are already working in the public interest. Moreover, many attorneys of color participate in public service activities, such as politics or as nonprofit board members, in their spare time and do so at much higher rates than whites.<sup>121</sup> This would also tend to diminish the concern that attorneys of color leave law practice for public sector employment at higher rates than whites because attorneys of color have traditionally fulfilled their preference to engage in public sector activities in addition to their primary employment opportunities. Finally, the study demonstrates that the “propensity of minority alumni to be currently in business careers does not differ substantially from that of white alumni.”<sup>122</sup> Thus, concerns that attorneys of color are leaving law firms at higher rates than whites, due to increased opportunities to work as corporate counsel, should also be diminished. That is not to say that differences in preferences could not explain some part of the differential between the rates of retention of attorneys of color and whites. A larger percentage of persons of color than whites leave private practice to become judges, public officials, or government agency managers.<sup>123</sup> It is unclear whether this impacts associates or partners of color more heavily. Nevertheless, looking at the complete data from the Michigan study certainly does not explain the retention rate disparities.

A small, qualitative study recently undertaken by Twin Cities Diversity in Practice bolsters the findings of the Michigan study.<sup>124</sup> It examined the core reasons why associates of color were leaving law firms and what strategies might be helpful for law firms to implement in order to retain more attorneys of color.<sup>125</sup> A survey was sent to the eighty-one associate attorneys that left their organizations

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120. See *id.* But 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, 832–34 (1995) (finding that after adjusting for grades, loans, law school activities, and state preferences, blacks were more likely to take jobs at corporate law firms than their white counterparts).

121. See, e.g., Lempert et al., *supra* note 46, at 441.

122. *Id.* at 429.

123. See generally *id.* at 428.

124. See Sunil Ramlall et al., *Retaining Lawyers of Color: Understanding the Core Reasons for Turnover and Strategies for Improving Retention* (unpublished manuscript) (on file with author); Val Jensen, Twin Cities Diversity in Practice, *The Best & The Brightest: Understanding Minority Associate Attrition & Strategies for Improving Retention* (May 11, 2013) (unpublished presentation) (on file with author).

125. Jensen, *supra* note 124, at 5.

from 2005 to 2012, and they received nineteen completed surveys and/or one-on-one interviews, resulting in a 23.5 percent response rate.<sup>126</sup> Because of the small legal market, even with the response rate of 23.5 percent, they were able to ascertain where all eighty-one attorneys transitioned after leaving their positions at law firms. Thirty-four associates went on to other law firms (fourteen large, eleven small/mid-size firms, and nine solo practitioners), twenty-nine left for corporate legal departments, twelve left for the public sector, and six left for non-legal careers.<sup>127</sup>

The associates responding to the survey or participating in the one-on-one interview expressed a strong concern that they were not provided an opportunity to work on important matters at their previous firms. The study concluded that there “seemed to be a barrier as far as associates of color” in attempting to get the more lucrative projects.<sup>128</sup> This “lack of meaningful work” contributed dramatically to the decisions of associates to leave the firm.<sup>129</sup> In addition, associates of color indicated that the internal politics of the firm, as well as a “lack of relationships,” had led them to leave the organization.<sup>130</sup> Thus, while it is reasonable to believe that not all eighty-one of the associates would have stayed at the firm long-term, it is entirely possible that the thirty-four associates who left their firms for *other* law firms would have remained had the conditions within their initial law firm been more positive. It is that segment of attorneys of color that this Article is aimed at helping firms retain.

## II. THE RETENTION PROBLEM

The modern day problems facing elite, large law firms of attempting to rectify the retention disparities between whites and black and Hispanic attorneys were not predetermined. First and foremost, they are a result of the failure of client-corporations to sufficiently demand demographic diversity when hiring outside counsel at elite, large firms. To be clear, the most effective means to improve greater demographic diversity within large firms is sufficient, collective pressure from clients because harm to a law firm and individual partners' bottom line is the surest way to encourage significant change. Without this pressure from clients, equity partners within large law firms have lacked the proper incentives to

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126. *Id.* at 8.

127. *Id.* at 12.

128. Ramlall, *supra* note 124, at 8.

129. Jensen, *supra* note 124, at 11.

130. *Id.*

implement new policies and procedures that would combat structural bias, aversive racism, implicit bias, and affirmative action related stigma. This Part explains how client-corporations failed to effectively use market pressure to decrease the retention rate disparities at elite, large law firms. It next outlines three main causes for the retention rate differentials. The Part concludes by discussing the importance of instilling voice and loyalty in black and Hispanic attorneys.

#### A. Market Failure

Over the past fifty years, clients stopped becoming loyal to a particular firm and started to become loyal to particular partners.<sup>131</sup> Whether a partner at a firm is promoted or is perceived as having power depends, in part, on whether the person can “leave the firm with clients in tow.”<sup>132</sup> As a result, when a client specifies how he wishes to receive legal services, the partner connecting that client to the firm often feels significant pressure to see those changes made to ensure that the client does not defect to a different partner—whether in the person’s own firm or at another firm.<sup>133</sup> This phenomenon has resulted in a significant increase in power held by client-corporations, thereby giving them the ability to incentivize owners of large law firms to alter decision-making.

Increasing the demographic diversity of large law firms is one such situation where client-corporations have attempted to influence firms’ decision-making.<sup>134</sup> Indeed, the current low percentage of attorneys of color at large law firms might be considered surprising given that law firm clients have purportedly demanded greater demographic diversity from law firms for over fifteen years.<sup>135</sup> Client-corporations’ urging law firms to increase their demographic diversity did result in some tangible improvements. The reality, however, is that client-corporations have not utilized a strong

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131. See Galanter & Henderson, *supra* note 9, at 1876.

132. Galanter & Henderson, *supra* note 9, at 1892.

133. See CTR. FOR THE STUDY OF THE LEGAL PROFESSION & THOMPSON REUTERS PEER MONITOR, *supra* note 62, at 13 (“[T]here has been a shift from the seller’s market that traditionally dominated the legal industry to a buyer’s market that will likely remain the prevailing model for the foreseeable future. What this means is that all of the critical decisions related to the structure and delivery of legal services—including judgment about scheduling, staffing, scope of work, level of effort, pricing, etc.—are now being made primarily by clients and not by their outside lawyers. This represents a fundamental shift in the relationships between lawyers and their clients.”).

134. See *supra* Part II.A.2.

135. See *supra* Part II.A.2.



enough set of incentives to encourage large law firms and powerful partners to make the structural changes necessary to improve demographic diversity. Thus, the structural changes the market has pressured law firms into implementing—changes concerned solely with the cost and efficiency of legal services—have not had a positive effect on improving demographic diversity within large law firms.<sup>136</sup>

### 1. Market Pressure from Client-Corporations

In the fall of 1998, Charles Morgan, a former BellSouth Executive Vice President and General Counsel, developed the “Diversity in the Workplace Statement of Principle” (Statement of Principle).<sup>137</sup> Morgan hoped that the statement would “establish an expectation that ‘the law firms which represent [ ] companies will actively promote diversity within their workplace.’”<sup>138</sup> The Statement of Principle is purposefully short so that law firms maintain freedom to develop their own initiatives. It states:

We expect the law firms which represent our companies to work actively to promote diversity within their work-place. In making our respective decisions concerning selection of outside counsel, we will give significant weight to a firm’s commitment and progress in this area.<sup>139</sup>

Approximately 500 corporations signed the Statement of Principle.<sup>140</sup> Many corporations were likely willing to commit to its goals because of its rather broad language and lack of detail. In response to this proposal, large law firms began instituting new policies and procedures. For example, in 1998, Sidley Austin LLP’s (Sidley)

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136. Galanter & Henderson, *supra* note 9, at 1914 (noting that the changes leading to the more elastic tournament have resulted in “incentives at the individual-lawyer level that are likely to perpetuate the marginalized status of minority and female lawyers”).

137. Charles S. Johnson, III & Lynne Faith Saunders, *More than Words: Update on Diversity in the Workplace: A Statement of Principle*, GOAL IX (Am. Bar Ass’n, Comm’n on Racial & Ethnic Diversity in the Profession, Chicago, IL), Winter 2000, available at [http://www.americanbar.org/publications/goal\\_ix\\_newsletter\\_home/minorities\\_publications\\_g9\\_v6n2\\_more.html](http://www.americanbar.org/publications/goal_ix_newsletter_home/minorities_publications_g9_v6n2_more.html).

138. *Id.*

139. *Id.*

140. Roderick Palmore, *A Call to Action: Diversity in the Legal Profession*, ASS’N OF CORPORATE COUNSEL (Oct. 2004), <http://www.acc.com/v1/public/Article/loader.cfm?csModule=security/getfile&pageid=16074>.

“management team comprehensively reviewed the firm’s lawyer development and promotion system.”<sup>141</sup> Sidley “formed separate task forces on issues affecting women and ethnically and racially diverse lawyers. In 2001, the task forces became permanent firm administrative committees.”<sup>142</sup> Additionally, Cravath notes that as part of its commitment to diversity, “in 2003 [it] intensified [its] efforts to promote diversity and . . . established a Diversity Committee to formulate and propose diversity goals for the Firm, develop and implement practices that promote diversity, and analyze and track the Firm’s progress in achieving those goals.”<sup>143</sup>

The Statement of Principle was successful in prompting law firms to begin thinking more seriously about adopting programs to promote greater demographic diversity and establishing Diversity Committees, which have become a universal component of large law firms’ diversity plans. Nevertheless, the Statement of Principles did not succeed in achieving sufficient improvement of the demographic diversity within law firms. In 2003, only 14.63 percent of associates and 4.04 percent of partners in law firms were persons of color.<sup>144</sup>

Realizing this, in 2004 Roderick Palmore issued “A Call to Action: Diversity in the Legal Profession” (Call to Action).<sup>145</sup> The Call to Action notes that “all objective assessments show that the collective efforts and gains of law firms in diversity have reached a disappointing plateau” despite the fact that hundreds of corporations signed the Statement of Principle.<sup>146</sup> The Call to Action goes on to state:

[W]e pledge that we will make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms. We intend to look for opportunities for firms we regularly use which positively distinguish themselves in this area. We further intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.<sup>147</sup>

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141. *Diversity Committee: History*, SIDLEY AUSTIN LLP, <http://www.sidley.com/diversity/> (last visited Nov. 28, 2013).

142. *Id.*

143. *Mission Statement*, CRAVATH, SWAINE & MOORE LLP, <http://www.cravath.com/missionstatement/> (last visited Nov. 28, 2013).

144. *See supra* Figure 2.

145. Palmore, *supra* note 140.

146. *Id.*

147. *Id.*

Since the Call to Action was instituted, large law firms have implemented a series of initiatives aimed at increasing demographic diversity within firms. These efforts include employing a recruitment strategy aimed at increasing the numbers of demographically diverse associates hired by the firm by sponsoring diverse law student groups,<sup>148</sup> recruiting at the law schools of Historically Black Colleges and Universities (HBCU),<sup>149</sup> and recruiting at hiring conferences targeting attorneys of color.<sup>150</sup> In addition, many firms have established diversity scholarship programs targeted at recruiting demographically diverse law students.<sup>151</sup> Interestingly, many of these scholarship programs continued despite the economic difficulties associated with the Great Recession, and some have even been recently expanded.<sup>152</sup> Many firms have also adopted the use of

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148. For example, firms will become sponsors of a Black Law Students Association (BLSA). For the 2011–2012 school year, Harvard BLSA was able to gather sponsorships at the 12,000 dollar level. These “Platinum” sponsors received increased access to Harvard BLSA students. See HARVARD BLACK LAW STUDENTS ASS’N, BLACK LAW STUDENTS ASSOCIATION SPONSORSHIP LEVELS 2011–2012 (on file with author); see also Harvard Black Law Students Ass’n, *Sponsors*, <http://www3.law.harvard.edu/orgs/blsa/committees/fundraising/> (last visited Nov. 28, 2013).

149. For example, a review of the schools at which Kirkland & Ellis recruits includes top thirty law schools as well as Howard University School of Law. See *Kirkland & Ellis LLP—Multi-Office Domestic Form: Recruitment & Hiring*, NALP DIRECTORY OF LEGAL EMPLOYERS, [http://www.nalpdirectory.com/employer\\_profile?FormID=2946&QuestionTabID=38&SearchCondJSON={%22SearchEmployerName%22%3A%22kirkland%22}](http://www.nalpdirectory.com/employer_profile?FormID=2946&QuestionTabID=38&SearchCondJSON={%22SearchEmployerName%22%3A%22kirkland%22}) (last visited Nov. 28, 2013). A November 28, 2013 search on the Kirkland & Ellis website indicated that six associates and one partner are currently employed at the firm who graduated from Howard University School of Law. *Lawyers*, KIRKLAND & ELLIS LLP, <http://www.kirkland.com/sitecontent.cfm?contentID=184> (select “Law School” drop-down menu; then select “Howard University School of Law”) (last visited Nov. 28, 2013).

150. For example, the Cook County Bar Association (CCBA), the oldest African American bar association in the country, holds an annual Minority Law Student Job Fair that attracts recruiters from many top firms. See, e.g., COOK CNTY. BAR ASS’N, 2013 MINORITY LAW STUDENT JOB FAIR: LAW STUDENT REGISTRATION INFORMATION BROCHURE (on file with author).

151. See generally *Pipeline Diversity Directory*, AM. BAR ASS’N, [http://www.americanbar.org/groups/diversity/diversity\\_pipeline/resources/pipeline\\_diversity\\_directory.html](http://www.americanbar.org/groups/diversity/diversity_pipeline/resources/pipeline_diversity_directory.html) (select “Search the Pipeline Diversity Directory”; then select “Program Services” drop-down menu; then select “Scholarship and financial assistance”) (last visited Nov. 28, 2013) (posting diversity scholarships/fellowships from Arent Fox, King & Spalding, Milbank, Baker & McKenzie, and Goodwin Proctor, among others). Please note that the efficacy of these programs has yet to be studied, and it does appear possible that the programs motivate students to accept positions they know to be a poor cultural fit.

152. See, e.g., *Diversity*, LATHAM & WATKINS LLP, <http://www.lw.com/AboutUs/Diversity> (last visited Nov. 28, 2013) (“The program was launched in 2005, and for the first six years, the firm selected four Diversity Scholars each year to receive 10,000 dollar scholarships. In 2012, the program was expanded to award six 10,000 dollar scholarships to second-year students.”). See generally *Member Diversity Initiatives*, NAT’L ASS’N FOR LAW PLACEMENT, <http://www.nalp.org/memberdiversityinitiatives> (last visited Nov. 28, 2013) (compiling information for diversity scholarship programs, some with more than one recipient).

affinity groups to assist in the retention of demographically diverse associates.<sup>153</sup>

These diversity efforts implemented by large law firms, which largely focused on recruitment, demonstrate a commitment to find solutions to improve demographic diversity. Still, there remain significant disparities in the rates of black and Hispanic attorneys in large law firms, as demonstrated in Part I.B, because the Call to Action was not fully embraced by client-corporations.<sup>154</sup> The Call to Action differed from the Statement of Principle in two important ways: (1) it served as an explicit exhortation to client-corporations to (2) institute a mandate requiring law firms to increase demographic diversity or be fired. Still, client-corporations largely failed to take concrete action against law firms—namely, firing—that failed to make tangible improvements to their demographic diversity. Moreover, only approximately ninety general counsels signed Palmore’s Call to Action,<sup>155</sup> about one-fifth the amount that had signed on to the Statement of Principle, suggesting that the vast majority of client-corporations were not particularly concerned with law firm diversity—or not concerned enough to translate their concern into action. Wal-Mart, however, is one of the corporations that did sign Palmore’s Call to Action.<sup>156</sup>

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153. See *Internal Initiatives*, CRAVATH, SWAINE & MOORE LLP, [www.cravath.com/internalinitiatives](http://www.cravath.com/internalinitiatives) (last visited Nov. 28, 2013) (“We develop and support internal employee affinity groups, including African American/Black, Asian/Pacific Islander, Hispanic/Latino, LGBT and women networks within the Firm. Our affinity groups provide associates with an additional network where they can seek advice and informal mentoring, as well as forge and strengthen both professional relationships and friendships.”). For purposes of retention focused on promotion, affinity groups have been shown to lack effectiveness. This is because so few members of the affinity group are in equity partner positions. Thus, the mentorship needed to advance through the firm is not found in affinity groups. See, e.g., Frank Dobbin et al., *You Can’t Always Get What You Need: Organizational Determinants of Diversity Programs*, 76 AM. SOC. REV. 386 (2011) (discussing the lack of effectiveness of affinity groups at Fortune 500 companies due to a lack of top managerial positions by traditionally underrepresented groups within top companies).

154. See generally INST. FOR INCLUSION IN THE LEGAL PROFESSION, *THE BUSINESS CASE FOR DIVERSITY: REALITY OR WISHFUL THINKING?* 9 (2011), available at <http://www.theiilp.com/resources/Documents/ILLPBusinessCaseforDiversity.pdf>.

155. Amanda Bronstad, *GCs and Law Firm Managing Partners to Convene Over Diversity*, CORPORATE COUNSEL (Mar. 21, 2008), <http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=900005506495>.

156. See generally Elisabeth Frater, *A Call to Action Continues: General Counsel Still Leading the Way*, MINORITY CORPORATE COUNSEL ASS’N, <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1618> (last visited Nov. 28, 2013).

## 2. Market Pressure in Practice

In 2005, Wal-Mart changed its policies regarding the outsourcing of legal work after the company realized that, of the top one hundred firms that handled Wal-Mart's work, eighty-two of its relationship partners were white males.<sup>157</sup> A relationship partner is the attorney in charge of the day-to-day interaction with the company and makes the decisions regarding the assignment of legal work to his or her colleagues.<sup>158</sup> Therefore, this makes the relationship partner a person of great power at the firm. Wal-Mart realized that women and people of color often were not given the opportunity to serve in this role.<sup>159</sup> Wal-Mart's new policy required each of its outside legal firms to "submit a slate of three to five lawyers for [the relationship partner] role" that included at least one woman and one person of color.<sup>160</sup> At the time Wal-Mart made this announcement, its General Counsel, Thomas Mars, stated that Wal-Mart was "terminating a firm right now because of their inability to grasp our diversity expectations."<sup>161</sup>

In 2006, the New York Times reported that Wal-Mart "dropped" two law firms because of "unhappiness with the firms' lack of diversity."<sup>162</sup> Wal-Mart "also decided not to send any additional work to several other firms."<sup>163</sup> A year after its initial announcement, Wal-Mart had successfully made forty changes to the relationship partners who handled the business with their corporation.<sup>164</sup> The New York Times article cited Palmore's Call to Action as the prompting of such efforts by companies like Wal-Mart.<sup>165</sup> Even in 2006, however, with actual firings of law firms for failing to reach certain diversity goals, the director of the office for diversity at the New York City Bar stated that, "'[L]aw firms have been able to be successful while ignoring' the hiring of more minorities . . . . 'You almost can't ignore it anymore.'"<sup>166</sup> Firms were still able to continue

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157. See Karen Donovan, *Pushed by Clients, Law Firms Step Up Diversity Efforts*, N.Y. TIMES, July 21, 2006, at C6, available at <http://www.nytimes.com/2006/07/21/business/21legal.html?pagewanted=all>; Meredith Hobbs, *Wal-Mart Demands Diversity in Law Firms*, LAW.COM (July 6, 2005), <http://www.law.com/jsp/article.jsp?id=1120579809481>.

158. Donovan, *supra* note 157.

159. See *id.*

160. *Id.*

161. Hobbs, *supra* note 157.

162. Donovan, *supra* note 157.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* (emphasis added).

ignoring their low rates of women and people of color without facing serious repercussions. This is not surprising when one considers that in July 2006, almost two years after Palmore posted and circulated the Call to Action, Wal-Mart was one of the only widely-known examples of a corporation actually firing “a law firm for lack of progress on diversity.”<sup>167</sup> Wal-Mart’s actions serve as tangible proof that law firm clients can exert significant influence over the culture at law firms, but Wal-Mart is only one company, and currently there is not a critical mass of client corporations taking similar actions.<sup>168</sup>

Anecdotal evidence demonstrates that the corporations most willing to consider a law firm’s demographic diversity when making hiring decisions have general counsels of color. For example, at the 2012 Just the Beginning Foundation (JTBF) conference, several general counsels indicated that they expressly consider diversity in hiring decisions.<sup>169</sup> James Clarence Johnson, General Counsel at Loop Capital Markets, stated that “I have fired firms” who could do the work but were not sufficiently diverse.<sup>170</sup> Alfreda Bradley-Coar, Senior Executive and General Counsel with GE Healthcare-Americas stated that she had sent away pitch-teams, a team put together in an attempt to obtain legal business, of all white men.<sup>171</sup> Maria Green, Senior Vice President, General Counsel, and Secretary of Illinois Tool Works, indicated that she has fired firms who lacked a slate of attorneys who are demographically diverse.<sup>172</sup> These three general counsels are black. Now, that is not to suggest that there are not whites with similar concerns. The anecdotal evidence, however, suggests that the corporations that are most willing to cease a relationship with a firm due to a lack of diversity typically have general counsels of color.

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167. *Id.*

168. *See* INST. FOR INCLUSION IN THE LEGAL PROFESSION, *supra* note 154. Wal-Mart has remained aggressive in its efforts to mandate changes within large law firms. In 2011, Wal-Mart stated that it wanted to be part of the decision-making process for determining who at a firm received origination credit for Wal-Mart work. In other words, Wal-Mart wants to dictate who gets credit for bringing in the money that Wal-Mart spends on legal fees at the firms. Partner compensation is tied to the amount of business they bring in, and changing origination credit for a company with as large a legal spend as Wal-Mart has the potential to shift the balance of power at a firm to the partner of Wal-Mart’s choosing. The goal of Wal-Mart’s policies is to ensure that law firms guarantee that racial and gender diversity is a priority from the time associates are first year associates to the time they are equity partners. Wal-Mart realized that some firms maintained a strategy whereby their young associate ranks were demographically diverse, but white men handled all of the real client contact (and ultimately power at the firm).

169. Conference notes on file with author.

170. *Id.*

171. *Id.*

172. *See id.*

Furthermore, in 2012, the percentage of general counsels of color in Fortune 500 companies was less than ten percent.<sup>173</sup> The very client-corporations that are being called on to insist on greater demographic diversity within large law firms have yet to achieve diversity within their own ranks.<sup>174</sup> This lack of diversity on the part of corporate general counsel seems to have an effect on the amount of pressure clients are willing to put on firms to increase their demographic diversity.<sup>175</sup> Indeed, a 2011 study found that:

Corporate clients express a commitment to greater diversity and, intentionally or not, imply to outside counsel that continued or additional business will flow as law firms manifest support for and commitment to greater diversity. However, corporate clients, at best, use diversity as one of many criteria in selecting outside counsel and *rarely implement strategies to reward in-house counsel for choosing diverse outside counsel or bestow*

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173. Vivia Chen, *Minority GC Rates Hit All-Time High*, CAREERIST (Aug. 24, 2012), <http://thecareerist.typepad.com/thecareerist/2012/08/minority-gc.html>.

174. It should be noted that client-corporations are being encouraged to increase demographic diversity within corporations generally by the Securities and Exchange Commission, which has adopted new rules requiring public companies to consider “diversity in the process by which candidates for director are considered,” and now require public companies to disclose how they view diversity with respect to their boards. *See* Press Release, Secs. & Exch. Comm’n, SEC Approves Enhanced Disclosure About Risk, Compensation and Corporate Governance (Dec. 16, 2009), *available at* <http://www.sec.gov/news/press/2009/2009-268.htm>; *see also* Luis A. Aguilar, Commissioner, Secs. & Exch. Comm’n, Statement by SEC Commissioner: The Abysmal Lack of Diversity in Corporate Boardroom is Growing Worse (May 2, 2011), *available at* <http://www.sec.gov/news/speech/2011/spch050211laa.htm>.

175. The legal profession could incentivize client-corporations to increase diversity within legal departments if NALP and the Minority Corporate Counsel Association (MCCA) began consistent and transparent tracking and publishing of corporate legal department demographic diversity. In 2011, the MCCA and NALP partnered to publish a research study on the diversity within 765 corporate legal departments. *MINORITY CORPORATE COUNSEL ASS’N, SUSTAINING PATHWAYS TO DIVERSITY: A COMPREHENSIVE EXAMINATION OF DIVERSITY DEMOGRAPHICS, INITIATIVES, AND POLICIES IN CORPORATE LEGAL DEPARTMENTS (2011)*, *available at* [http://www.mcca.com/\\_data/global/images/Research/MCCA\\_CLDD\\_Book.pdf](http://www.mcca.com/_data/global/images/Research/MCCA_CLDD_Book.pdf). The data is presented in the aggregate instead of publishing the demographic diversity of each corporate legal department individually, which permits individual corporations to hide amongst their peers. If NALP and the MCCA began transparent tracking and publishing of individual corporate legal department demographic diversity, it would serve as an incentive for client-corporations to increase their internal demographic diversity. Increasing attorneys of color within corporate legal departments and amongst general counsels would have a likely effect of increasing the sustainable practice portfolio of demographically diverse attorneys. The Michigan study found that “[a]ll Michigan alumni are disproportionately likely to serve same-race clients, so minority alumni provide, on average, considerably more service to minority clients than white alumni do.” *See* Lempert et al., *supra* note 46, at 401. Developing a sustainable practice is a key component to winning the modern day Tournament of Lawyers.

*more business upon those firms that are succeeding in their diversity endeavors.*<sup>176</sup>

Client-pressure, arguably, would be the best source of market pressure to induce large law firms to implement large structural changes within their organizations that would allow them to retain greater numbers of demographically diverse associates.<sup>177</sup>

While it should be noted that Palmore is continuing his efforts, most recently through the creation of the Leadership Council on Legal Diversity in 2009, the reality is that client-corporations still fail to systematically fire firms that do not meet certain diversity standards.<sup>178</sup> If clients were aggressively firing law firms with poor demographic diversity, thus resulting in a loss of substantial revenue for the firm and individual partners, large law firms would have a serious mandate requiring them to make sweeping changes to ensure improvement. Thus, those hoping for a classic market solution to the problem of low demographic diversity at large law firms have

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176. INST. FOR INCLUSION IN THE LEGAL PROFESSION, *supra* note 154, at 8 (emphasis added).

177. It is important to remember that there are potential downsides associated with pressuring large law firms to increase demographic diversity. It is not inconceivable that these initiatives have forced law firms to focus more on their bottom line numbers and not on ensuring the long-term success of demographically diverse attorneys. See Yolanda Young, *Law Firm Segregation Reminiscent of Jim Crow*, HUFFINGTON POST (Mar. 17, 2008, 11:35 AM), [http://www.huffingtonpost.com/yolanda-young/law-firm-segregation-remi\\_b\\_91881.html](http://www.huffingtonpost.com/yolanda-young/law-firm-segregation-remi_b_91881.html) (alleging that “Covington began stockpiling its staff attorney ghetto with blacks and other minorities in 2005, shortly after the General Counsel of some of the country’s largest companies . . . [took] a tougher stance on law firm diversity. . . . Covington has certainly diversified its firm; however, its attorneys are far from equals. The vast majority of Covington’s black attorneys do no substantive work, have no control over their case assignments and no opportunity for advancement.”). Treating demographically diverse associates as mere numbers, or as a racial commodity, is likely to inhibit effectiveness of diversity initiatives. See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2169–71 (2013); see also *Complaint and Demand for Jury Trial at 4, Springs v. Mayer Brown, LLP*, No. 09-CVS-12577 (N.C. Super. Ct. May 26, 2009), available at [http://abovethelaw.com/\\_old/Springs%20v%20Mayer%20Brown.pdf](http://abovethelaw.com/_old/Springs%20v%20Mayer%20Brown.pdf) (“Springs was hired, in whole or in part, because the Charlotte office needed to increase its number of African American attorneys, as evidenced in part by [a white, male partner’s] year end performance report when he brags that one of his 2007 accomplishments was to hire an African American and two women, a double counting of Ms. Springs for both protected categories. Upon information and belief, firm documents refer to the hiring of an African American as a ‘marketing tool.’ Springs was used as a marketing tool, asked to attend on behalf of Mayer Brown minority Bar and other functions where diversity would be perceived as positive.”).

178. The goal of the Leadership Council on Legal Diversity is to promote “diversity throughout the legal profession by involving top leaders at firms and legal departments.” Karen Sloan, *Mentorship Program Will Foster Diversity in the Profession*, NAT’L L. J. (Mar. 2, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202484088283>. The council includes representatives from sixty-five corporations and one hundred law firms. In 2011, it established a Fellows Program “to help diversify the legal profession by producing attorneys with strong leadership and networking skills who enjoy relationships with industry leaders.” *Id.*



been left waiting for client-corporations to take the issue more seriously.

### B. Retention-Limiting Bias, Discrimination, and Stigma

As is demonstrated above, the retention problem is well documented and supported by the available tracking data. The available research suggests that the retention rate differentials are not fully explained by the employment preferences held by black and Hispanic attorneys. Moreover, the retention problem has persisted despite stated pressure from clients to remedy inequities within law firms. The inquiry, therefore, turns to why there remain such stark differences between attorneys of color and whites. There appear to be three main causes for the retention rate differentials: structural bias, aversive racism and implicit bias, and perceived affirmative action-stigma.

#### 1. Structural Bias

One cause of retention rate disparities is related to what Susan Sturm calls “second generation bias”: “Structures of decision making, patterns of interaction, and cultural norms often produce ‘second generation’ inequalities that are not immediately discernible at the level of the individual.”<sup>179</sup> Sturm argues that “[u]nlike first generation bias, these problems cannot be traced to deliberate exclusions by identifiable bad actors.”<sup>180</sup> Combating second-generation bias in large law firms is particularly complicated because it includes structural bias. An example of structural bias might include an assignment system that lacks standardization or systematic checks to ensure that all similarly situated associates are receiving the same type of work.<sup>181</sup>

Because in modern day practice clients are attached to individual partners and not the firm generally,<sup>182</sup> partners are not likely to surrender their ability to dictate precisely which associates will work on

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179. Sturm, *supra* note 14, at 286.

180. *Id.* at 280.

181. See, e.g., Roberto Concepción, Jr., Note, *Organizational Citizenship Through Talent Management: An Alternative Framework to Diversity in Private Practice*, 42 COLUM. J.L. & SOC. PROBS. 43 (2008) (discussing how standardizing the assignment process at an accounting firm remedies disparities between male and female accountants).

182. See *supra* text accompanying notes 131–33.

matters that a partner owns. Law firms, unlike accounting or consulting firms, operate as mini-fiefdoms.<sup>183</sup> Thus, law firm management is limited in its ability to force individual partners to ensure that they distribute assignments equitably across associates. Management's limitations are exacerbated by the realities of lateral partner movement,<sup>184</sup> which increases the danger of the law firm attempting to mandate large structural changes onto individual partners and their ability to make unfettered choices regarding staffing decisions. If the partner feels as if the law firm is interfering with his autonomy and decision-making with regards to meeting his client's need, then the partner may leave the firm and join a new firm with less onerous requirements. For example, when King & Spalding attempted to restrict Paul Clement's ability to take on an unpopular representation, he lateraled to another firm and began the representation that King & Spalding declined to allow him to enter into.<sup>185</sup> As a result, while there are many promising and likely effective proposals that have been made suggesting structural changes to law firms that might eliminate the effects of structural bias, these types of structural changes aimed at decreasing inequities amongst demographic groups have largely been ignored by law firms. The partnership aspect of the law firm business model associated with the ease of transferring to a competing firm makes addressing workplace inequities within law firms even more challenging than doing so in organizations that have strong central management control.

## 2. Aversive Racism and Implicit Bias

A second cause for the retention rate disparities between white males and black and Hispanic attorneys appears to be rooted in aversive racism. Aversive racism, as defined in the social psychology literature, refers to those who "sympathize with victims of past injustice, support the principle of racial equality, and regard themselves as nonprejudiced, but at the same time possess negative feelings and beliefs (which may be unconscious) about Blacks."<sup>186</sup> The word

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183. See *supra* text accompanying notes 131–33.

184. Galanter & Henderson, *supra* note 9, at 1875 ("Clients and lawyers became more mobile, as long-term retainer relationships with clients gave way and the lifetime commitment of lawyers to firms was threatened by the lateral movement of lawyers.").

185. Ashby Jones, *After King & Spalding Drops DOMA Case, Clement Drops Firm*, WALL ST. J. L. BLOG (Apr. 25, 2011, 12:09 PM), <http://blogs.wsj.com/law/2011/04/25/after-king-spalding-drops-doma-case-clement-drops-firm/>.

186. Dovidio & Gaertner, *supra* note 112, at 44.

“racism” obviously evokes strong reactions, and it is not the intent of this Article to suggest that white, male equity partners at elite, large law firms are afflicted by racist tendencies. It is the suggestion of this Article that lawyers are affected by the same psychological developments as the rest of society, and the social psychology research indicates that many white Americans developed negative feelings against blacks and Hispanics “through early socialization coupled with almost unavoidable biases associated with categorizing people into different groups.”<sup>187</sup> This categorization of people into groups is normal. As part of normal psychological processes, people categorize those they interact with into “ingroups and outgroups” or “we’s and they’s.”<sup>188</sup> “People respond systematically more favorably to others whom they perceive to belong to their group than to different groups.”<sup>189</sup>

Think about diehard Notre Dame Fighting Irish and Michigan Wolverines football fans. A diehard Notre Dame fan is going to respond more positively to someone wearing a Notre Dame Fighting Irish jersey than to a person wearing a Michigan Wolverines jersey. The fan sees the Notre Dame jersey and categorizes the person as part of the ingroup of Notre Dame football fans. This categorization can be quite efficient. If one were to enter a crowded bar to watch a football game between Notre Dame and Michigan, the Notre Dame fan is going to gravitate towards the other Notre Dame fans. This gravitation may be all for the best in diminishing potential disputes amongst vying rivals within the bar. This same type of ingroup favoritism, or loyalty even, can be found within law firms.

For example, a partner engaged in interviewing candidates for summer associate positions may respond more favorably to candidates who attended his same college or law school. The partner is able to immediately place that candidate into an “ingroup.” The partner knows how rigorous an academic environment the student is learning in and may have had some of the same professors. This ingroup categorization allows the partner, at least temporarily, to find a point of commonality with the candidate. This is interesting because, depending on the view of the social categorization, that same student that was a part of the ingroup could easily be placed into an outgroup by that same partner and lose favorability. If, for example, the partner values his membership in the Federalist Society more than he values his membership as an alumni of the law

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187. *Id.* at 45.

188. Gaertner & Dovidio, *supra* note 2, at 111 (internal quotation marks omitted).

189. *Id.*

school and the candidate is a member of the American Constitution Society, then the partner may perceive the candidate as being a part of an outgroup and cease to judge the candidate in a more favorable manner. That does not mean the partner will discriminate against the candidate for his or her membership in the outgroup; it just means the candidate is no longer viewed *more favorably* than others.

The categorization of racial ingroups and outgroups is quite similar, except that social norms have trained most people in the modern day workplace against conscious discrimination against individuals on the basis of their race. “[B]ecause aversive racists consciously recognize and endorse egalitarian values and because they truly aspire to be nonprejudiced, they will *not* discriminate in situations . . . when discrimination would be obvious to others . . . .”<sup>190</sup> Thus, it is quite unlikely that an aversive racist would discriminate against a clearly more qualified black over a clearly less qualified white. “However, the unconscious negative feelings and beliefs that aversive racists also possess will produce discrimination in situations in which normative guidelines are weak or when negative actions toward a Black person can be justified or rationalized on the basis of some factor other than race.”<sup>191</sup> Thus, if the qualifications between the black and white candidate are relatively fungible—a black man from Harvard who was on the moot court board and a white man from Stanford who was an editor of the international law journal—the aversive racist will favor the person who fits most easily into his or her “ingroup,” and for the majority of equity partners in law firms, that individual may often be the white man. One social psychologist has posited that “for aversive racists, part of the problem may be that there is no emotional connection to Blacks and other minorities and they do not regard them as part of their circle of inclusion for sharing and caring as readily as they accept [w]hites.”<sup>192</sup>

An important concept within the “aversive racism framework is the conflict between the denial of personal prejudice (i.e., explicit attitudes) and the underlying unconscious negative feelings and beliefs (i.e., implicit attitudes and stereotypes).”<sup>193</sup> In the context of elite, large law firms, implicit and unconscious biases towards blacks and Hispanics have been routinely identified as a challenge to

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190. Dovidio & Gaertner, *supra* note 112, at 45–46.

191. *Id.* at 46.

192. Gaertner & Dovidio, *supra* note 2, at 112.

193. Dovidio & Gaertner, *supra* note 112, at 53.

achieving workplace equity.<sup>194</sup> Implicit bias includes automatic biases in how a person thinks about, feels toward, and treats members of other groups.<sup>195</sup> The person's mind deploys these biases without being conscious or aware. Jerry Kang and Mahzarin Banaji have extensively documented the existence of implicit bias within workplaces and demonstrated that "the presence of implicit bias can produce discrimination by causing the very basis of evaluation, merit, to be mismeasured."<sup>196</sup> Thus, not only are black and Hispanic attorneys in a racial outgroup to the majority of equity partners at the firm, the effects of implicit bias may also cause their work to be improperly evaluated and measured. Hence, a mistake by a black or Hispanic associate may oftentimes be more detrimental to the black or Hispanic associate's career than it would be to a white associate's career.

### 3. Perceived Affirmative Action-Stigma

A third cause for the retention rate differentials appears to be a result of "perceived affirmative action-stigma." The perception that all black or Hispanic associates have benefited from affirmative action in both law school admissions and the firm hiring process solidifies the idea that whites are more qualified than blacks and Hispanics. For example, one black associate recently stated that "he sometimes felt there was a 'rebuttable presumption' that he was there to fill a quota and was not as qualified as white colleagues."<sup>197</sup> This perception creates taint before the black or Hispanic associates are provided their first assignments in the firm, making this perception difficult to combat.

In elite law firms, perceived affirmative action-stigma leads to a belief that blacks and Hispanics are intellectually inferior,<sup>198</sup> greater difficulty by blacks and Hispanics in finding whites to mentor them

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194. See Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 6 (2005) (noting the "voluminous empirical evidence of the prevalence of unconscious biases against non-white minorities"); Peters, *supra* note 73, at 643 (noting that the partnership admissions process is susceptible to cognitive unconscious biases concerning race) (quoting Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987)).

195. See Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131, 171 (2006).

196. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CALIF. L. REV. 1063, 1066 (2006).

197. Nelson D. Schwartz & Michael Cooper, *Racial Diversity Efforts Ebb for Elite Careers, Analysis Finds*, N.Y. TIMES, May 27, 2013, at A1, available at <http://www.nytimes.com/2013/05/28/us/texas-firm-highlights-struggle-for-black-professionals.html?pagewanted=all>.

198. Wilkins & Gulati, *An Institutional Analysis*, *supra* note 4, at 506.

and give them counseling about how to succeed at the firm,<sup>199</sup> and blacks and Hispanics facing greater costs from making mistakes than their white peers because the mistakes serve to reinforce notions that these groups are inferior.<sup>200</sup> These false perceptions regarding blacks and Hispanics inhibit attorneys of color from developing the human capital that they need to build and sustain a practice, which requires “training, mentoring, and an appropriate array of challenging work assignments.”<sup>201</sup> These increased challenges for black and Hispanics persist despite a sustained effort to create market pressure to incentivize firms to improve demographic diversity.

The perceived affirmative action-stigma has likely been exacerbated in recent years by the highly publicized work of Richard Sander.<sup>202</sup> Sander argues that blacks and Hispanics are the beneficiaries of large preferences in admission to elite law schools, which translates into low grades. He argues this “ensure[s] that almost no minorities will graduate from any top-fifty school with high grades.”<sup>203</sup> He goes on to argue that “blacks entering large firms have generally performed less strongly in terms of GPA in law school relative to their white counterparts.”<sup>204</sup> His research implies that black and Hispanic attorneys are less qualified than white attorneys. Putting aside the question of whether law school grades are predictive of success in legal practice,<sup>205</sup> Coleman and Gulati noted the danger of this sweeping conclusion:

The harm of Sander’s article is that it will contribute to the stereotyping that already undermines the success of black associates in elite corporate law firms. . . . To the extent there is material in his article that will be understood as empirical confirmation of the lack of qualification of black students, the

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199. See, e.g., *Id.* at 568; cf. Carl G. Cooper, *Diversity: Denied, Deferred or Preferred*, 107 W. VA. L. REV. 685, 695 (2005) (“Again, the most important thing you should take away from this is, as a typical law student, if you go to a law firm that does not have a strong mentoring program and you are not totally self-sufficient, you may be in trouble within two years.”).

200. Wilkins & Gulati, *An Institutional Analysis*, *supra* note 4, at 571.

201. Galanter & Henderson, *supra* note 9, at 1914 (discussing the effects of the elastic tournament on attorneys of color).

202. See generally Sander, *supra* note 117, at 1755.

203. *Id.* at 1776.

204. *Id.* at 1787.

205. Sander has been criticized for his conclusions, and others looking at the same data set Sander utilized have determined that the lack of success in large law firms by black and Hispanic attorneys is rooted in a lack of mentorship. Monique R. Payne-Pikus et al., *Experiencing Discrimination: Race and Retention in America’s Largest Law Firms*, 44 L. & SOC’Y REV. 553, 559–60 (2010).

article imposes a high cost on those who need no additional obstacles placed before them.<sup>206</sup>

Moreover, the dangers associated with being a perceived “affirmative action user” have proven to have tangible effects within law firms.

In an empirical study evaluating the effects of “initial assignment” for employees who utilize reduced-hours programs within law firms, the findings suggested that “[v]ulnerable employees need to solidify their standing as professionals in the eyes of supervisors and clients *before*” becoming users of “employee-rights programs” similar to affirmative action programs.<sup>207</sup> By being associated with these types of programs early on, “initial powerful supervisors may negatively evaluate [users] . . . and choose not to provide them with a stream of reputation-building projects.”<sup>208</sup> Even when users are provided with such projects, “the employees will have exposure to supervisors and clients under circumstances in which their ability, commitment, and marketability is already in doubt because of their” association with the program.<sup>209</sup>

Thus, the perception that blacks and Hispanics as a group are the beneficiaries of affirmative action programs—the classification of these associates into the outgroup of the less qualified—likely contributes to poor employment outcomes for black and Hispanic attorneys. The initial perception that these attorneys lack the necessary qualifications decreases the time spent mentoring and developing them, which dooms these associates to fail within the Tournament of Lawyers, where success depends largely on adequate training. As Wilkins and Gulati noted over a decade ago, “associates will gradually be divided into two broad categories: those who have received training . . . and those who have not. . . . Although the boundaries between these two groups are fluid, they nevertheless will tend to be self-perpetuating. . . . Those who have not been trained face diminishing opportunities for success.”<sup>210</sup> Those diminished opportunities contribute to increased retention rate disparities between black and Hispanic associates and white associates.

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206. James E. Coleman, Jr. & Mitu Gulati, *A Response to Professor Sander: Is It Really All About the Grades?*, 84 N.C. L. Rev. 1823, 1825–26 (2006).

207. Forrest Briscoe & Katherine C. Kellogg, *The Initial Assignment Effect: Local Employer Practices and Positive Career Outcomes for Work-Family Program Users*, 76 AM. SOC. REV. 291, 314 (2011) (emphasis added).

208. *Id.*

209. *Id.*

210. Wilkins & Gulati, *An Institutional Analysis*, *supra* note 4, at 539–40.

*C. Instilling Loyalty and Voice*

The three sets of challenges to achieving greater retention of black and Hispanic attorneys within large law firms essentially boil down to one point of commonality: Black and Hispanic attorneys within large law firms are not receiving the mentoring and training necessary to ensure that they remain at firms at the same rates as white attorneys. Thus, the question is what the difference is between whites who succeed in firms and those that do not, and if the mechanisms leading to success of white attorneys can be replicated to achieve greater retention of some black and Hispanic attorneys. This Article argues that successful whites within large law firms have been instilled with loyalty to the firm and encouraged to utilize the options of loyalty and voice over exit. Blacks and Hispanics as an outgroup, however, are not being instilled with loyalty at the same rates as whites, leading them to lack loyalty to the firm and utilize the exit option over the voice option at much higher rates.

## 1. Exit, Voice, and Loyalty

In 1970, Albert O. Hirschman authored a work addressing repairable lapses of economic actors.<sup>211</sup> If an organization's product, performance, or service deteriorates, then the management of the organization discovers the deterioration through one of two routes.<sup>212</sup> The first is the exit option—the members leave the organization.<sup>213</sup> The second is the voice option—"the organization's members express their dissatisfaction directly to management or to some other authority to which management is subordinate or through general protest addressed to anyone who cares to listen."<sup>214</sup> A person utilizing the exit option shifts to another organization, thereby using "the market to defend his welfare or improve his position."<sup>215</sup>

If enough people exit, then the observant organization will be alerted to the fact that something is wrong with its product, performance, or service. In the employment context, the employer will know that for some reason workers are dissatisfied and seek a new place of employment. Voice also serves to alert the employer that something has gone awry, but voice "is a far more 'messy' concept

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211. HIRSCHMAN, *supra* note 5.

212. *See id.* at 4.

213. *Id.*

214. *Id.*

215. *Id.* at 15.



because it can be graduated, all the way from faint grumbling to violent protest; it implies articulation of one's critical opinions rather than a private, 'secret' vote in the anonymity of [the market]; and finally, it is direct and straightforward rather than roundabout."<sup>216</sup> Those exercising voice are attempting:

to change, rather than to escape from, an objectionable state of affairs, whether through individual or collective petition to the management directly in charge, through appeal to a higher authority with the intention of forcing a change in management, or through various types of actions and protests, including those that are meant to mobilize public opinion.<sup>217</sup>

Whether an employee will exercise voice over exit will depend, in part, on "the prospects for the effective use of voice."<sup>218</sup> If the employee believes voice may be effective, s/he may delay exit while waiting to see if exercising voice will cause a positive change to the objectionable state of affairs. Exercising voice, however, can be risky and has considerable costs associated with it: "[t]he presence of the exit alternative can therefore tend to atrophy the development of the art of voice."<sup>219</sup> Thus, in some instances it can look as if "voice is likely to play an important role in organizations only on condition that exit is virtually ruled out."<sup>220</sup>

Contrary to this assumption, Hirschman demonstrated that there are actually two principal determinants of an individual's readiness to resort to voice when exit is possible. First is "the extent to which customer-members are willing to trade off the certainty of exit against the uncertainties of an improvement in the deteriorated product."<sup>221</sup> Second is "the estimate customer-members have of their ability to influence the organization."<sup>222</sup> The former is clearly related to the concept of loyalty, which is a "special attachment to an organization," but the two factors are often intertwined:

A member with a considerable attachment to a product or organization will often search for ways to make himself influential, especially when the organization moves in what he believes is the wrong direction; conversely, a member who

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216. *Id.* at 16.

217. *Id.* at 30.

218. *Id.* at 37.

219. *Id.* at 43.

220. *Id.* at 76.

221. HIRSCHMAN, *supra* note 5, at 77.

222. *Id.*

wields (or thinks he wields) considerable power in an organization and is therefore convinced that he can get it “back on track” is likely to develop a strong affection for the organization in which he is powerful.<sup>223</sup>

Thus, “loyalty holds exit at bay and activates voice.”<sup>224</sup> Loyalty is also necessary for developing strong membership in the organization because it has the potential to “neutralize . . . the tendency of the most quality-conscious . . . members to be the first to exit. . . . Thus loyalty, far from being irrational, can serve the socially useful purpose of preventing deterioration from becoming cumulative, as it so often does when there is no barrier to exit.”<sup>225</sup> As a result, finding mechanisms to incentivize loyalty within employees can provide tangible benefits to the organizations by preventing mass exodus of employees, thereby exacerbating whatever problem is motivating employees to exit. By encouraging loyalty, employers are provided an opportunity to rectify problems without sacrificing members of their workforces.

## 2. Loyalty and Voice in the Tournament

As is indicated by Wilkins and Gulati’s work, elite, large law firms are already quite good at instilling loyalty in a certain subset of associates—the “Superstars.”<sup>226</sup> Part I stressed that it is most valuable to the firm to employ associates who need little or no training and who can perform tasks competently and quickly because monitoring is difficult and expensive.<sup>227</sup> If an associate proves that s/he can fulfill these requirements, then the partner will begin to invest time in training the associate, to ensure s/he continues to competently and quickly complete assignments even as the level of difficulty increases.<sup>228</sup> Eventually, law firm associates are put on one of two tracks: a training track and a flatlining track.<sup>229</sup> The training track

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223. *Id.* at 77–78.

224. *Id.* at 78.

225. *Id.* at 79.

226. Wilkins & Gulati, *An Institutional Analysis*, *supra* note 4, at 534.

227. *Id.* at 538–39.

228. *See id.*

229. The existence of these two tracks stops the large law firm from employing a standard tournament theory because “firms do not run a competition in which every associate is given an equal chance to succeed.” *Id.* at 541.

associates are the Superstars, while those on the flatlining track are the paperwork associates.<sup>230</sup>

When the partner, who has limited time and resources, invests in the associate to train him or her, the associate develops a sense of *loyalty* towards that partner and vice versa. More importantly, when the associate feels that members of the firm are investing time and resources in him or her, the associate develops a sense of *loyalty towards the firm* generally, and a specific sense of loyalty towards the investing individuals. This sense of loyalty incentivizes the associate to utilize voice over exit if and when an objectionable state of affairs arises at the firm.

Thus, the question becomes why there are fewer black and Hispanic associates than white associates being placed on the training track and instilled with loyalty,<sup>231</sup> which hastens the exit of black and Hispanic attorneys from elite, large law firms at higher rates than whites.<sup>232</sup> An example demonstrates the problem. Two associates of the same year at a top law firm are working on a case together. One associate is considered demographically diverse, and one is a white male. The demographically diverse associate notices that the white male is getting the better and more substantive assignments. The demographically diverse associate, however, cannot identify exactly why. Both associates graduated from top law schools and both completed federal court clerkships. What does the demographically diverse associate do to obtain a more equal distribution of work? While there are some who argue that black and Hispanic associates are simply less qualified than whites,<sup>233</sup> the majority of

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230. See Wilkins & Gulati, *Reconceiving the Tournament of Lawyers*, *supra* note 18, at 1611–12. Paperwork associates are engaged in less-sophisticated, yet necessary, work on behalf of the firm and are not gaining substantive skills in the course of completing their assignments. See *supra* note 22 and accompanying text.

231. This Article does not argue that developing a sense of loyalty to an employer is rational. It is often quite irrational since the employment-at-will doctrine permits an employer to fire an employee without cause at any time. Rationality aside, a sense of loyalty has an effect on how employees react to their employment situation.

232. This same concept incentivizes partners with large books of business to attempt to change policies and procedures within a firm instead of moving to another firm that already has the conditions the partner wants. Firms that have equity partners of color must work quite hard to ensure loyalty to the firm so that other law firms do not poach these individuals.

233. As stated previously, the scholar most well known for arguing that black and Hispanic attorneys leave large law firms due to inferior qualifications is Richard Sander. See *generally* Sander, *supra* note 117. Sander's "Mismatch Theory" is based, in part, on his belief that racial preferences within law schools harm blacks and Hispanics, which starts a ripple effect that undermines the careers of black and Hispanic attorneys. Critiques of Sander's work abound, and entire law review symposia have been dedicated to detailing the objections to Sander's theories and noting flaws in his empirical assessments. See *generally* Danielle Holley-Walker, *Race and Socioeconomic Diversity in American Legal Education: A Response to Richard Sander*, 88 DENV. U. L. REV. 845 (2011). A broad-based discussion of the issues raised by

scholars and practitioners who have addressed this question find that the root of the problem lies in a lack of mentoring in the form of training, professional advice, and psychological support<sup>234</sup> of black and Hispanic associates.<sup>235</sup>

The lack of effective mentoring relationships for black and Hispanic attorneys in large law firms, who are relative newcomers to the Tournament of Lawyers, is not altogether surprising given the realities associated with second-generation bias, aversive racism, and implicit bias.<sup>236</sup> In large law firms, the most valuable mentors appear to be equity partners, and the vast majority of equity partners are white men. This is because they are the ones who have a

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Sander in this Article would not add much to what has already been a robust scholarly debate on this issue, so the author, who does not agree with Sander's conclusions, defers to the work of others on this topic. See, e.g., Gregory Camilli & Kevin G. Welner, *Is There a Mismatch Effect in Law School, Why Might it Arise, and What Would it Mean?*, 37 J.C. & U.L. 491 (2011) (detailing several empirical flaws in Sander's work); Darrell D. Jackson, *Sander, the Mismatch Theory, and Affirmative Action: Critiquing the Absence of Praxis in Policy*, 89 DENV. U. L. REV. 245 (2011) (collecting citations of prior critiques of Sander's work); Richard Lempert, *Reflections on Class in American Legal Education*, 88 DENV. U. L. REV. 683 (2011); Payne-Pikus et al., *supra* note 205 (looking at the same data set as Sander and concluding that black and Hispanic attorneys fail to thrive due to lack of mentoring instead of inferior ability); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005).

234. In mentor-protégé relationships, significant career support was given, and they provided "important psychosocial support to the parties as well, helping participants develop and maintain self-esteem and professional identity." David A. Thomas, *Racial Dynamics in Cross-Race Developmental Relationships*, 38 ADMIN. SCI. Q. 169, 169–70 (1993).

235. See, e.g., Cooper, *supra* note 199, at 695; Payne-Pikus et al., *supra* note 205, at 560 ("Partner contact and mentoring is increasingly recognized as a key process and source of dissatisfaction and departures from law firms, especially for African American lawyers. In contrast with human capital theory, an institutional discrimination theory suggests that disparity in social contacts with partners and mentoring experiences with partners, rather than disparities in merit and performance, can explain the 'paradox' of high rates of minority lawyers' dissatisfaction and departures after being hired into large law firms."); Wilkins, *supra* note 10, at 428 ("The failure of minorities and women to find mentors, and therefore to gain access to the training track, is one of the primary reasons why these lawyers leave large law firms in greater numbers and at the earlier stages in their careers than their white peers.").

236. There are individuals who believe that whites and blacks cannot form authentic mentoring relationships, but this belief has been dispelled by social science research for over two decades. In 1993, scholars demonstrated that success in cross-racial mentoring depended on the "parties preferred strategy for dealing with racial difference—either denying and suppressing it or discussing it openly—and whether both parties preferred the same strategy influenced the kind of relationship that developed. Only when the parties preferred the same strategy did the more supportive mentor-protégé relationship develop." Thomas, *supra* note 234, at 169. More recently, a 2008 study of the role of cross-racial mentoring using the responses of 139 members of the National Black MBA Association found that success in mentoring relationships was more attributable to "attitudinal similarity" than "demographic similarity." See Brian P. Brown et al., *The Role of Mentoring in Promoting Organizational Commitment Among Black Managers: An Evaluation of the Indirect Effects of Racial Similarity and Shared Racial Perspectives*, 61 J. BUS. RES. 732 (2008).

vote in the Tournament of Lawyers.<sup>237</sup> Bias found within the law firm makes it difficult for blacks and Hispanics to gain access to the resource of mentoring, which is quite scarce in highly leveraged environments.<sup>238</sup>

Moreover, “[s]tudies of cross-racial . . . mentoring relationships in the workplace repeatedly demonstrate that white men feel more comfortable in working relationships with other white men.”<sup>239</sup> This may be, in part, a result of the reality that social relationships leave “some black lawyers at a distance from their white colleagues . . . . ‘For the most part, they don’t go to church together on Sunday enough, they don’t have dinner together enough, and they don’t play enough golf together to develop sufficiently strong relationships of trust and confidence.’”<sup>240</sup> Additionally, “This natural affinity [amongst whites] makes it difficult for blacks [and Hispanics] to form supportive mentoring relationships.”<sup>241</sup> This lack of mentoring can often lead to demographically diverse attorneys being valued for their demographic status<sup>242</sup> instead of their contribution to the legal team—a common objectionable state of affairs within large law firms.

For example, at the 2012 JTBF Conference, a young, black, male lawyer<sup>243</sup> asked an expert panel about what should be done when firms include persons of color in pitches to clients to obtain business and then fail to staff the included persons of color on the matter. The emotion in his voice seemed to indicate that this had occurred to him, and that he felt frustrated and used as a result.<sup>244</sup> This devaluing of skill, intelligence, and work product may contribute to challenges retaining these groups within law firms.

Therefore, those concerned with increasing retention of blacks and Hispanics in large law firms must focus on changing the behavior of two groups of people: (1) white males and (2) black and Hispanic associates. White males need to be incentivized to develop mentoring relationships with black and Hispanic associates, which

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237. See *The Demographics of Equity—An Update*, *supra* note 7 (noting that eighty-five percent of equity partners are men, fifteen percent are women, and just under five percent are male or female minorities).

238. As leverage in large law firms increased, it became increasingly more difficult to obtain mentoring. Firms that employ a one-to-one leverage are more likely to have increased mentoring of all associates. See Raasch, *supra* note 25, at 34 (“When leverage was one-to-one, mentoring was part of the process. At higher levels, it becomes less likely.”).

239. Wilkins & Gulati, *An Institutional Analysis*, *supra* note 4, at 569.

240. Schwartz & Cooper, *supra* note 197.

241. Wilkins & Gulati, *An Institutional Analysis*, *supra* note 4, at 569.

242. See generally Leong, *supra* note 177, at 2155–56.

243. It became clear during the exchange with the panel that the young man was a Harvard Law School graduate.

244. Based on author’s independent observation at conference.

will in turn instill loyalty and encourage the utilization of voice over exit in black and Hispanic associates. The trickle-down effect of these incentives will be to decrease the rates of attrition by black and Hispanic associates in large law firms. Part III suggests three proposals that can be employed to start this process.

### III. SOLUTIONS FOR IMPROVED RETENTION

The proposals suggested in this Part utilize soft incentives to encourage white men, at least for a time, to consider black and Hispanic attorneys within law firms to be part of their “ingroup,” which will allow these attorneys of color to receive the benefit of favoritism. This favoritism will hopefully translate into being put on the training track by equity partners who will invest the time required for loyalty to be instilled in the associates. This investment of training will hopefully develop the trust necessary for the black and Hispanic associate to feel comfortable exercising his or her voice instead of immediately turning to the option of exit when what Hirschman calls dissatisfactory states of affairs occur. Developing proposals of this nature is challenging because it is difficult to provide these incentives at a structural level. As explained above, law firms are essentially independent businesses run through a central organization. As such, the challenge is to find a method of designing solutions that motivate individual partners—not just the law firm as an organization.

The suggestions proposed are not quick fixes. Their implementation will require years to effectuate long-term cultural change within large law firms. Still, they are not dependent on major structural changes to aspects of the large law firm model like the evaluation and assignment processes at firms.<sup>245</sup> Additionally, it is easy for individual attorneys and law firms to opt-out of participation in these programs by preserving individual actors’ abilities to

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245. For example, Tiffani Darden suggested an associate evaluation process based on transformative performance review, which would encourage mediation between an associate and the supervising attorney in instances of poor reviews by adding an objective assessment from the diversity officer to the subjective evaluation process. See Tiffani N. Darden, *The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory & the Institutional Analyses of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85, 107 (2009). In a 2008 article, it was suggested that law firms import a successful initiative used by Deloitte & Touche USA LLP to increase the retention and promotion of women in the workplace by measuring the gender distribution of work assignments to combat the informal work assignment systems’ tendency to assign out less desirable work to women. Concepción, *supra* note 181; see also Kang & Banaji, *supra* note 196, at 1091–92 (discussing changes implemented at Deloitte & Touche USA LLP).

choose to participate in these efforts. The proposals allow large law firms to retain their extremely profitable business model while combating the ills associated with workplace discrimination on an individual, attorney-to-attorney level. These initiatives are not without some costs, but those being prompted by the proposals will alter “behavior in a predictable way without” being mandated into “any options or significantly changing . . . economic incentives.”<sup>246</sup> For those law firms that are already outlaying a significant amount of money on diversity initiatives like those described in Part II, these proposals may serve to be a more efficient use of some of those diversity dollars.

The hope is that these proposals, over time, will create lasting cultural changes within large law firms that will make remaining at the firm a viable option for more black and Hispanic attorneys. The point is not to keep every black and Hispanic attorney at the firm, since that defies the logic of the tournament model and more general attorney preferences. Instead, the point is to motivate those who would choose to remain, but for the occurrence of a dissatisfactory state of affairs, to express their concerns and stay the course of learning the skills necessary to build a sustainable practice instead of prematurely exiting to another employment setting.

#### A. *Billable Diversity Hours*

This proposal is aimed at changing the culture of elite, large law firms over the long term by designing a new set of choices aimed at incentivizing white males’ participation in diversity initiatives when they enter the firm as junior associates. By encouraging greater participation in these efforts by white males, the hope is that a new ingroup will be created of individuals who assist in diversity efforts, and the interactions amongst white men and other demographic groups during the course of performing this work will help to decrease the stigma associated with the perception that black and Hispanic attorneys have been the beneficiaries of affirmative action. Currently, individuals discussing diversity initiatives within large law firms often group attorneys into two groups: diverse and non-diverse attorneys. The term non-diverse typically means straight, white men. Thus, white men are not being treated as a legitimate part of the ingroup that is the community concerned with diversity. Indeed, the current culture within large law firms often explicitly

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246. THALER & SUNSTEIN, *supra* note 1, at 6.

excludes white men from the diversity conversation, creating a situation where white men become accustomed to not participating in diversity initiatives while they are associates. When these white men become partners—and in 2011, 2012, and 2013 white men made up over eighty-four percent of partners in elite, large law firms—they continue to remain uninvolved with these initiatives. This proposal aims to change that phenomenon by encouraging greater participation in diversity initiatives by all members of the organization. Over time, the hope is that greater participation by white males in diversity initiatives will create opportunities for the development of relationships between white males and persons of color, thereby ensuring persons of color have access to the training needed to gain the skills necessary to build their own sustainable practice and bring tangible value to the firm.

### 1. Background Rationale

There are two types of work in law firms: work that is considered billable and work that is not. Billable work is performed for a client that pays the firm, typically at an hourly rate based upon the attorney's seniority with the firm. Work that is not billable is work that is not billed out to a client. Most firms have some sort of explicit billable hours requirement, but even those that do not often have an unwritten expectation of a certain amount of billable hours each year that attorneys are expected to contribute.<sup>247</sup> In addition to billable work, attorneys are often asked to engage in non-billable activities beyond mere administrative tasks.<sup>248</sup> These non-billable activities can be seen as important, but they typically are not considered when firms evaluate whether attorneys have successfully met the necessary requirements to receive their base compensation.<sup>249</sup> In addition, non-billable activities are typically not considered when bonus determinations are made for salaried attorneys in the firm (e.g., nonequity partners),<sup>250</sup> and periodic financial

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247. Fortney, *supra* note 69, at 175–76 (noting that the majority of firms surveyed had billable hours requirements).

248. Joan C. Williams & Veta Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 62 HASTINGS L.J. 597, 619 (2011) (noting that tension occurs “when a firm encourages partners to do important non-billable work, such as marketing, training, and so on, but ‘rewards those activities marginally in favor of billable hours/revenue’ collected”).

249. *See id.*

250. Fortney, *supra* note 69, at 176 (“In the survey, the majority of managers and supervising attorneys reported that associate bonuses are largely based on billable hours production.”).



incentives via year-end bonuses are an important part of the incentive structure within large law firms.<sup>251</sup>

As a result, non-billable activities are typically engaged in only by individuals at large law firms who lack sufficient negotiating power to reject the non-billable work, typically achieved by having more important billable work to complete instead of the non-billable work, or who see some sort of concrete benefit resulting from the non-billable activity. For example, an associate may sacrifice billable hours to work on a non-billable law review article in exchange for a byline. The associate may have sacrificed monetary compensation in the form of her or his end-of-year bonus in the process, but s/he received an additional publication to add to his or her resume. While not a monetary transaction, the value in working on the article is tangible to the associate and to those around the associate, such as supervising attorneys and potential clients.

Currently, diversity initiatives at large law firms lack a tangible benefit for the vast majority of those employed at the firm. A black or Hispanic associate may find value in working on these issues because he or she wants to encourage more people who look like him or her to remain members of the organization. In effect, he or she wants to cease his or her extreme minority status at the firm. That type of incentive, however, does not transfer to the individuals who are largely ignored by firm diversity initiatives, namely white males.<sup>252</sup> Working on diversity issues does not have the same value as working on, for example, a law review article because working on diversity issues has an attenuated relationship to one's law practice, whereas working on the law review article or some other sort of publication relates directly to a legal issue, typically one of interest to a subset of the firm's clients.<sup>253</sup> As a result, the vast majority of individuals currently working on diversity issues at large law firms are non-white males, the targets of the firm's diversity efforts.<sup>254</sup>

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251. Wilkins & Gulati, *An Institutional Analysis*, *supra* note 4, at 519 ("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.").

252. This is not to suggest that there are no white males who genuinely care about and participate in attempting to eliminate bias in the workplace. There are.

253. See, e.g., Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103, 112 (2000) ("Because of stereotypes, not only are outsiders [e.g., persons of color] more likely to say yes to certain tasks, they are also more likely to be asked to perform certain tasks. As we will show, the cost of taking on too many tasks (especially what we call 'lumpy citizenship tasks') undermines an outsider's ability to succeed within the workplace.").

254. See, e.g., Tristin K. Green, *Race and Sex in Organizing Work: "Diversity," Discrimination, and Integration*, 59 EMORY L.J. 585, 600 (2010) ("[R]ace- and sex-based decisions organizing work can disadvantage women and minorities by imposing extra work on members of those groups. Imagine a law school, for example, at which women and minority professors are

The diversity committee has become the near universal, and arguably the most important, component of large law firms' diversity initiatives.<sup>255</sup> The diversity committee is sometimes comprised solely of partners from various offices of the firm, with one partner who serves as the chair of the committee.<sup>256</sup> There are, however, diversity committees at law firms that are comprised of partners, associates, and administrative staff.<sup>257</sup> There does not appear to be a standard industry practice for determining how a firm should structure this type of organizational resource, and each committee may handle different assignments and tasks.<sup>258</sup> At a minimum, these committees are typically concerned with the recruitment and retention of demographically diverse attorneys.<sup>259</sup> As a result, the diversity committee is customarily involved in all of the diversity efforts outlined in Part II, as well as other initiatives that the firm believes will increase its ability to recruit and retain demographically diverse attorneys. Law firm management should encourage greater involvement by white males in the diversity committee's activities. To do that, law firm management, which is a choice architect, must employ a little added incentive to encourage participation by the individual attorneys.

## 2. Proposal

Choice architects in law firm management who truly want to obtain buy-in from all attorneys in the firm's diversity initiatives must determine a mechanism for making the time spent on those non-

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asked to attend more student recruitment functions, pose for more pictures and answer more media inquiries, and serve on more faculty panels. Even if the dean makes these requests with laudable goals in mind . . . , the women and people of color who are asked to do this extra work may suffer real job-related consequences. Time spent recruiting students and talking to the media, after all, is time spent away from other career-building work. Similar effects are likely to carry over into non-academic settings."); *see also* Carbado & Gulati, *supra* note 253.

255. *See, e.g., Diversity*, WACHTELL, LIPTON, ROSEN & KATZ, <http://www.wlrk.com/diversity/> (last visited Nov. 29, 2013) (2012 Vault #1); *Mission Statement*, *supra* note 143 (2012 Vault #2); *Diversity Committee: History*, *supra* note 141 (2012 Vault #18).

256. *See Diversity Task Force*, JONES DAY, <http://www.jonesdaydiversity.com/taskforce/> (last visited Nov. 29, 2013) (encompassing attorneys from all the domestic offices and chaired by a firm-wide Diversity Partner).

257. *See, e.g., Our Diversity Committee*, ARNOLD & PORTER LLP, [www.arnoldporter.com/about\\_the\\_firm\\_diversity\\_our\\_committee.cfm](http://www.arnoldporter.com/about_the_firm_diversity_our_committee.cfm) (last visited Nov. 29, 2013).

258. *See generally* MINORITY CORPORATE COUNSEL ASS'N, EXAMINING THE ROLE OF THE LAW FIRM DIVERSITY PROFESSIONAL 5 (2009), *available at* <http://www.alanet.org/diversity/MCCAExaminingLawFirmDiversityProfessionalsReport.pdf>.

259. *See, e.g., Diversity & Inclusion*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES, [www.skadden.com/Index.cfm?contentID=178](http://www.skadden.com/Index.cfm?contentID=178) (last visited Nov. 29, 2013).

billable activities worthwhile to the attorneys. The easiest, most direct way for encouraging greater participation in diversity efforts at the associate level is to tie those hours directly to compensation—count hours spent on diversity initiatives as billable. If the hours are credited towards billable hours targets, time spent on diversity initiatives ceases to be a type of community service event and instead will be perceived as real work that matters to the firm. If greater representation of traditionally underrepresented groups is truly important to law firm management, management should be willing to value time spent achieving it and demonstrate to each and every attorney in the firm why participating in diversity initiatives has a tangible benefit to them (and their pocketbooks).

There are a variety of benefits associated with this proposal. In the short-term, implementing this proposal should have an immediate effect on the conduct of non-partner attorneys at firms whose compensation is tied to achieving billable hours targets. For example, it instantly transforms a request to attend a mentoring event sponsored by the diversity committee from extra non-billable work to a different, yet still billable, hour. Thus, it incentivizes associates to participate in diversity efforts on behalf of the firm. In addition, the proposal should broaden the pool of attorneys willing to spend time on diversity efforts, thereby lessening the burden on the few attorneys currently participating in such efforts. It is well known that attorneys of color and women often bear the brunt of participating in diversity initiatives. By broadening the pool of associates willing to participate in this initiative, this burden will start to lift slightly. By lessening this burden, those currently carrying the brunt of the diversity work can reallocate that time towards clients' chargeable work, which will benefit these attorneys' quest to remain on the training track within the firm.

Over the long-term, treating diversity hours as billable for purposes of compensation is an incremental step and a soft incentive that will slowly change the culture of the firm and the incentive structure for white males to participate in diversity efforts. If a firm were to immediately adopt this proposal, its next incoming class of first-year associates would walk in the door knowing that time spent on diversity initiatives would be considered in the yearly calculation of their billable hours target and bonus. Every associate would have an incentive to participate, even if, for example, it was for just a few hours by attending a diversity reception. For those associates who are encouraged to participate voluntarily in the diversity initiatives, it would eventually become the cultural norm to remain engaged in diversity-related efforts. As they remain at the firm and, for a few,

eventually become equity partners, that cultural norm will permeate throughout all levels of the firm. This little incentive over time has the potential to change people's views on diversity initiatives from something "over and above" the minimum requirements of their position to a routine part of their working life.

More importantly, the participation of white males in the diversity initiatives will allow law firm management to create opportunities that promote the establishment and development of relationships between white males and other demographic groups. Research in organizational behavior has found that opportunities of this nature allow the natural formation of sponsor-protégé relationships, where the mentor provides career support, and mentor-protégé relationships, where the mentor goes beyond career advice and assists in developing a professional identity. These relationships will form by allowing white male and black and Hispanic attorneys to find points of what is known as attitudinal similarity. Research shows that "perceived attitudinal similarity, in terms of general outlook, values, and problem-solving approach" affects protégés' support and satisfaction with the mentoring relationship.<sup>260</sup> When mentors and mentees have similar attitudinal similarity, the cross-racial mentoring relationship is often more successful.<sup>261</sup> Over time, this proposal can assist in breaking down some of the barriers to forming mentorships created by aversive racism, implicit bias, and perceived affirmative action-stigma. This would, of course, occur slowly, but it has the potential to change norms within firms.

An example may be instructive. Training Superstar, a white male, begins at Fantastic Law Firm (Fantastic) as a second-year associate following a clerkship with Judge Importantous. During orientation, Training is informed that time spent on diversity efforts will be credited towards his billable hours requirement. Training remembers this and attends diversity committee sponsored events occasionally during his tenure at the firm. Training understands, at least at an unconscious level, that he is part of the ingroup of individuals who are welcome to participate in diversity efforts. For Training, periodic attendance at diversity events becomes a habit, but he typically spends only about five to ten hours per year at diversity related events. When Training is in his sixth year at the firm, he is asked by the Diversity Committee to give a presentation at one of the annual diversity retreats on eDiscovery issues, an area of Training's expertise. The eDiscovery group at Fantastic lacks demographic diversity, and the Diversity Committee thinks that it might

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260. Brown et al., *supra* note 236, at 733.

261. Thomas, *supra* note 234, at 169–70. *See generally* Brown et al., *supra* note 236.

be able to garner interest of attorneys of color to get involved in the eDiscovery group through Training's presentation. This requires about ten hours of preparation time in addition to the time to travel to and from the retreat, as well as the time spent giving the presentation. Because this time counts towards Training's billable requirement, he does not feel as if the time spent preparing for and giving the presentation at the retreat is taking Training away from his billable work, and he agrees to participate.

After the presentation, Training meets a new first-year associate, Hopeful Star, a Hispanic woman. Hopeful asks Training insightful<sup>262</sup> questions regarding the presentation, and Training is quite impressed. A week later, Hopeful emails Training an article discussing new eDiscovery issues, and Training is grateful for the new information. A couple months later, Partner Trainmister, a white male, ropes in a tricky eDiscovery matter, staffs Training on the matter, and tells Training to find a junior associate to help with the new case. Training remembers how engaged and interested Hopeful was in issues of eDiscovery, and he emails her to see if she has availability to assist. Hopeful has indicated that she is part of the ingroup of those interested in eDiscovery issues, so Training is treating her more favorably by seeking her out for the assignment. She accepts, very happy to have finally landed a project with Partner Trainmister, who is legendary for his ability to train new associates.

The hypothetical could be played out further, but the basic point has been made. By incentivizing the white, male senior associate to attend the diversity retreat, a set of choice architects at the firm, in this case the diversity committee, created an opportunity where he could begin to develop a relationship with an individual outside of his demographic group. This, in turn, allowed the white, male senior associate to categorize the female, Hispanic junior associate as part of his ingroup of those interested in eDiscovery. Encouraging white males to develop working relationships with individuals outside of their demographic group helps to combat the effects of bias and discrimination. The other effect of this scenario, however, is that the Hispanic female junior associate in this situation ends up being thankful for the assistance in getting an assignment working with a partner well known for his training abilities. Eventually, working on the project and being a part of the team translates into a

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262. This hypothetical depends on the white male recognizing that Hopeful's questions were insightful. It depends on the one-on-one interaction helping to fight against stereotypes Training may have regarding Hispanics that may unconsciously cloud his judgment of Hopeful. Thus, it has limits, but by increasing opportunities of this nature, the stereotypes just might start to change.

special attachment to the firm, and this attachment will deter her from making a sudden exit should an objectionable state of affairs occur during her tenure at the firm.

The obvious objection to this proposal is that law firms are in business to make profits, so a compensation regime tied to client billable requirements makes economic sense. Because diversity hours are not billable to a client, they should not be treated as billable for purposes of meeting a billable hours requirement or considered in bonus determinations.

This objection is unpersuasive for two reasons. First, it is not entirely clear that the cost to the law firm would be all that significant. The salary of nonequity attorneys in large law firms is tied directly to the hours billed by the attorney, but the money brought in by today's law firms is not as closely tied to the hours billed by attorneys. Many law firm partners, in an effort to get paid, often write-off a subset of hours billed by attorneys before submitting the bill to clients. In some instances, clients arrange reduced or alternative billing arrangements with the firm prior to the beginning of the relevant representation.<sup>263</sup> Significantly, some clients have even stopped paying for the work of junior associates because they do not want to pay for the law firm to train associates.<sup>264</sup> Thus, permitting billable diversity hours would add a small amount to the hundreds, if not thousands, of hours that law firms already fail to recoup directly from clients.<sup>265</sup> Moreover, most large law firms have already implemented a similar program to what is suggested here with respect to their pro bono policies.<sup>266</sup> Large law firms often provide billable hours credit for time spent on pro bono activities for at least fifty, and in many cases unlimited, pro bono hours.<sup>267</sup> These

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263. See Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 37 n.94.

264. *Id.* at 58.

265. Rachel M. Zahorsky, *Firms Wave Goodbye to Billing for Research Costs*, ABA J. LAW SCRIBBLER (Nov. 14, 2012, 8:30 AM), [http://www.abajournal.com/lawscribbler/article/firms\\_wave\\_goodbye\\_to\\_billing\\_for\\_research\\_costs/](http://www.abajournal.com/lawscribbler/article/firms_wave_goodbye_to_billing_for_research_costs/) (noting that clients are "increasingly primed to demand discounts, balk at hourly rates and refuse to pay for associate lawyers," leaving law firms to absorb costs like legal research).

266. The motivation behind creating billable credit for pro bono hours came as a result of the quickly increasing demand for lawyers, so law students and the profession needed a mechanism for encouraging greater pro bono participation from individuals throughout the profession. Thus, the policy of billable credit for pro bono hours was a response to explicit suggestions from the legal profession. See Cynthia R. Watkins, Note, *In Support of a Mandatory Pro Bono Rule for New York State*, 57 BROOK. L. REV. 177, 194 (1991) ("To provide additional incentives, the plan should also encourage firms to count pro bono work, or a portion thereof, as 'billable hours,' and to consider pro bono activities in their decisions regarding promotions, bonuses and partnership.").

267. See *A Look at Associate Hours and At Law Firm Pro Bono Programs*, NAT'L ASS'N FOR LAW PLACEMENT (April 2010), <http://www.nalp.org/july2009hoursandprobono> (noting that a

efforts have been largely successful.<sup>268</sup> If large law firms would allow for even just fifty hours of billable hours credit towards time spent on diversity initiatives, the hypothetical discussed above could easily become a reality. Additionally, large law firms could leverage their diversity programs to attract clients in much the same ways they utilized pro bono program—by publicizing their efforts to clients, inviting clients to special diversity programs, and partnering with clients on diversity initiatives—which would provide an added monetary benefit to adopting this proposal.

Second, incentivizing attorneys of color to remain at the firm has the potential to save large law firms a substantial amount of money if they are attorneys that the firm would need to replace. Studies have demonstrated that “‘attrition costs firms between \$200,000 and \$500,000 per associate, including lost revenues, lost training expenses, lost institutional knowledge, and replacement costs.’”<sup>269</sup> In many instances, retaining attorneys of color is much cheaper than having to recruit new ones.

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“maximum [number of pro bono hours counted as billable], if there is one, is most commonly 50 hours, reported by 51% of offices, followed by 100 hours, reported by 20% of offices.”) It is important to note that the treatment of pro bono hours varies quite broadly amongst law firms, and in some firms the pro bono hours kick in only after a person meets a certain billable hours threshold. Thus, pro bono is not a perfect comparator of what is being suggested here.

268. See Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 *BUFF. L. REV.* 1355, 1359 (2007) (“In many law firms, the institutionalization of pro bono has been demonstrated by the creation of new professional roles such as pro bono partners or managers who coordinate the pro bono initiatives of the firm and the activities of lawyers. In addition to the formalization of bureaucratic roles, some law firms now allow lawyers to credit some proportion of pro bono work to their billable hour requirements. Several large law firms have become signatories of the ‘Law Firm Pro Bono Challenge,’ an initiative launched by the ABA in 1993 and now operating under the aegis of the Pro Bono Institute located at Georgetown University Law Center. The Challenge requires law firms to demonstrate an institutional obligation to pro bono by ‘promulgating and maintaining a clearly articulated and understood firm policy’ and by ‘using their best efforts to ensure compliance’ with the goal of providing three to five percent of resources to pro bono causes. ‘In its first two years, there were over one hundred and seventy signatories to the Challenge, which included many of the nation’s elite firms.’ Currently, a third of the nation’s large law firms have accepted the Challenge.”) (citations omitted); see also Scott L. Cummings, *The Future of Public Interest Law*, 33 *U. ARK. LITTLE ROCK L. REV.* 355, 363 (2011) (discussing increase of pro bono work).

269. See Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 *J. LEGAL PROF.* 1, 11 (2009) (quoting Elizabeth K. McManus, *Intimidation and the Culture of Avoidance: Gender Issues and Mentoring in Law Firm Practice*, 33 *Fordham Urb. L.J.* 217, 222 (2005)).

### B. The “Justice” Effect

This proposal aims to change the culture of elite, large law firms over the long term by designing a new set of choices that will encourage the equity partners in large law firms to include the Chief Diversity Officer (CDO) as an equity partner of the firm, to include the CDO as a member of top management committees, and to include persons of color and women on the most powerful firm committees. Again, this proposal is aimed at creating a new expectation within law firms to include persons of color and women as part of the ingroup of law firm management. Including the CDO, persons of color, and women on these prestigious committees, will enable them to influence the decision-making of the firm by influencing their white, male colleagues. Importantly, increasing the demographic diversity in top management positions has been shown to improve demographic diversity throughout an organization, even when the demographically diverse members of the committee are not explicit champions of diversity.<sup>270</sup>

#### 1. Background Rationale

Oftentimes, the mere presence of a person of color within a group has the ability to change the group dynamics and decision-making.<sup>271</sup> This effect has been demonstrated time and again in the Supreme Court.

When discussing the impact of Justice Marshall on his Supreme Court colleagues, it is widely “acknowledged that his very presence exerted a gravitational pull more powerful than his single vote.”<sup>272</sup> Justice Scalia explained that “Marshall could be a persuasive force just by sitting there,” and noted that Marshall “wouldn’t have to open his mouth to affect the nature of the conference and how seriously the conference would take matters of race.”<sup>273</sup>

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270. See generally Dobbin et al., *supra* note 153.

271. A similar effect has also been seen at the appellate level. A recent study demonstrates that adding a black judge to a panel with two non-black judges increases the likelihood that affirmative action plans will be upheld. See Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 167 (2013). Studies have also shown that having a woman on a three-judge panel of the U.S. Courts of Appeals produces statistically significant outcomes in sex discrimination cases. See Lee Epstein et al., *Constitutional Sex Discrimination*, 1 TENN. J. L. & POL’Y 11, 63 (2004).

272. See Adam Liptak, *The Waves Minority Judges Always Make*, N.Y. TIMES, May 31, 2009, at WK1, available at <http://www.nytimes.com/2009/05/31/weekinreview/31liptak.html>.

273. See *id.*



Moreover, in *Virginia v. Black*, Justice Thomas demonstrated the import and effect an opinion from a respected colleague may have on a small decision-making body.<sup>274</sup> *Black* dealt with Virginia's law banning cross burning. It is commonly accepted by members of the legal community that the following exchange, prompted by Justice Thomas, changed the tone of questioning, and perhaps the ultimate outcome of the Supreme Court, in *Black*:

QUESTION: Mr. Dreeben, aren't you understating the—the effects of—of the burning cross? This statute was passed in what year?

MR. DREEBEN: 1952 originally.

QUESTION: Now, it's my understanding that we had almost 100 years of lynching and activity in the South by the Knights of Camellia and—and the Ku Klux Klan, and this was a reign of terror and the cross was a symbol of that reign of terror. Was—isn't that significantly greater than intimidation or a threat?

MR. DREEBEN: Well, I think they're coextensive, Justice Thomas, because it is—

QUESTION: Well, my fear is, Mr. Dreeben, that you're actually understating the symbolism on—of and the effect of the cross, the burning cross. I—I indicated, I think, in the Ohio case that the cross was not a religious symbol and that it has—it was intended to have a virulent effect. And I—I think that what you're attempting to do is to fit this into our jurisprudence rather than stating more clearly what the cross was intended to accomplish and, indeed, that it is unlike any symbol in our society.<sup>275</sup>

Justice Marshall and Justice Thomas are considered political polar opposites, and yet their presence as equally vested members of the Supreme Court ingroup impacted their colleagues' decision-making. This can easily be replicated in the law firm context, and has already been seen within corporations.<sup>276</sup>

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274. 538 U.S. 343 (2003); see also, Adam Liptak, *Strip Search of Girl by School Officials Seeking Drugs Was Illegal, Justices Rule*, N. Y. TIMES, June 26, 2009, at A16, available at <http://www.nytimes.com/2009/06/26/us/politics/26scotus.html> (noting Justice Ginsburg's belief that "her colleagues, all men, had failed to appreciate what [the female plaintiff] had endured").

275. See Transcript of Oral Argument at 22–23, *Black*, 538 U.S. 343 (No. 01-1107), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/01-1107.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/01-1107.pdf).

276. See Dobbin et al., *supra* note 153, at 386 ("Firms that lack workforce diversity are no more likely than others to adopt [diversity] programs, but firms with large contingents of

## 2. Proposal

### a. Chief Diversity Officer

Many law firms employ a Chief Diversity Officer whose sole function and role is to focus on diversity initiatives at the firm, although the precise job descriptions of these officers are often poorly defined.<sup>277</sup> The CDO is often responsible for developing initiatives to assist in the hiring and retention of demographically diverse associates.<sup>278</sup> The individual is frequently a salaried, former practicing attorney.

This structure severely limits the effectiveness of the CDO because the people with power at firms are equity partners, which leaves a nonequity partner CDO without true power within the firm. As such, the CDO, the person directed to spearhead diversity initiatives at the firm, should be an equity partner. The person should have the ability to passionately engage, and in some instances rebuke, their colleagues without being concerned about the reprisal of job termination. This can be the case only if the person is an equity partner. The CDO should employ individuals with expertise in areas like organizational behavior and human resources to ensure that the diversity initiatives employed by the firm include strategies that will actually result in improving demographic diversity. The importance of employing this type of structure was recently highlighted in the media.<sup>279</sup> In 2008, the CDO at Thompson & Knight was a partner who was “not afraid to press the issue of hiring minorities.”<sup>280</sup> When the CDO left, “she was replaced by an associate with less influence.”<sup>281</sup> Reports from current and former partners indicate that since the change from a CDO who was a partner to one who was an associate, “the diversity committee meets less often, and the firm has fewer black lawyers than before.”<sup>282</sup>

Once the firm has incorporated the CDO as a member of the firm’s ingroup of equity partners, this person suddenly has a seat at the table and a vote. The most effective CDOs will be given an automatic position on top management committees that make decisions

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women managers are more likely to do so.”); David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 51 (2003).

277. See MINORITY CORPORATE COUNSEL ASS’N, *supra* note 258.

278. See generally Cooper, *supra* note 199 (explaining the appropriate role of the Chief Diversity Officer in the firm and authored by the then CDO at Kirkpatrick & Lockhart Nicholson Graham).

279. Schwartz & Cooper, *supra* note 197.

280. *Id.*

281. *Id.*

282. *Id.*

regarding recruitment, retention, and promotion-to-partner decisions. Moreover, the CDO is uniquely positioned to attempt to enact a limited amount of policies aimed at combating structural bias. The CDO can track demographically diverse associates' time and for what partners they are working, as well as schedule qualitative interviews with demographically diverse associates to ensure they are developing professionally at the same speed as their white, male colleagues. The CDO, upon finding disparities in the allocation of work, can bring this to the attention of the individual partners, who may honestly not have noticed an inequitable distribution of work, and encourage them to assign work or increase the difficulty of assignments towards particular associates. There are, of course, limitations on what a CDO can do within the organization, but his or her ability to effectuate change by becoming an insider of the partnership while also advocating for demographically diverse associates is a uniquely powerful role.

*b. Persons of color and females in top management*

Persons of color and female equity partners should be members of the top committees at large law firms. Law firm management,<sup>283</sup> the choice architects, should ensure that women and persons of color are part of the group of candidates from which selection for these top committees occurs. If the partnership elects the members of the executive committee, then attorneys of color and women should be part of the slate of candidates, and they should receive the support of law firm management.<sup>284</sup> Law firm management should send a strong signal that these attorneys are part of the in-group of attorneys within the firm suited to participate in law firm management.

For example, compensation committees tend to have between five and ten members, although some are made up of many more

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283. The individuals in law firm management are often also the partners with the largest books of business. As has been explained repeatedly, power within law firms is often tied to one's ability to leave the firm with clients. See David Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. FOR STUDY LEGAL ETHICS 15, 16 & n.5 (1999) (citing ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 224–28 (1988) (noting that lawyers with access to important clients exercise disproportionate control over firm management)).

284. Because the partners with the most power, i.e., those with the biggest books of business, often have a disproportionate amount of input in decisions of this nature, it would be beneficial, although not a necessary component of this proposal, if clients expressed a desire for more demographic diversity in top law firm committees directly to their relationship partners.

members.<sup>285</sup> The membership of the committee is “most commonly determined by election by the partnership.”<sup>286</sup> The reason this committee is powerful should be self-evident—the committee determines the compensation received by the equity partners in the firm. Thus, these individuals are instantly made persons of importance within the firm. To date, there is very little demographic diversity on compensation committees. A recent study researching women in large law firms found that the representation of women on compensation committees is extremely low with about half of respondents having one woman on their compensation committees, one-fifth having none, and another fifth having two women on their compensation committees.<sup>287</sup> Representation by persons of color on compensation committees was low or virtually nonexistent. According to the survey, ninety percent of firms had no women of color and seventy-five percent of firms had no men of color on their compensation committees.<sup>288</sup>

Another recent study found that 84.1 percent of demographically diverse partners have served on the firm’s diversity committee, while only 8.1 percent have ever served on the firm’s executive committee.<sup>289</sup> When minority- or women-owned firms were removed from the sample, the percentage of demographically diverse partners serving on diversity committees jumped to 94.6 percent.<sup>290</sup> Indeed, 81.4 percent of demographically diverse attorneys have served on the hiring committee.<sup>291</sup> Thus, although demographically diverse attorneys are serving on committees, they are not serving on the ones most likely to effectuate long-term change within the firm. This trend needs to be reversed.

Including respected colleagues of color at the highest echelon of firm management can fundamentally change the rules under which the firm functions. When a trusted colleague who is known as a thoughtful, reasonable, and smart individual raises certain concerns that are important to them, the other members of his or her peer group are more likely to take those concerns more seriously than they otherwise would. The value of relationships cannot be overstated in the effort to achieve buy-in from those who have not experienced the issue personally. Moreover, the development of these relationships between demographically diverse and white,

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285. Williams & Richardson, *supra* note 248, at 606.

286. *Id.*

287. *Id.* at 607.

288. *Id.* at 606.

289. INST. FOR INCLUSION IN THE LEGAL PROFESSION, *supra* note 154, at 11.

290. *Id.*

291. *Id.*

male attorneys will help to combat the effects of aversive racism, implicit bias, and perceived affirmative action-stigma, which should aid in improving the ability of black and Hispanic associates to obtain mentorship from white males.<sup>292</sup> In addition, a recent study of Fortune 500 companies found that organizations with high rates of women in upper management had more demographic diversity overall when compared with their peers.<sup>293</sup> Females and persons of color on the committees will be able to utilize their positions of power within the firm to effect lasting cultural changes within the organization.<sup>294</sup> Thus, the mere presence of more demographically diverse equity partners on these committees will incentivize white males, who still likely will be the overwhelming majority on the committee, to join in implementing policies and procedures that will ultimately increase the effectiveness of the firm's demographic diversity initiatives.<sup>295</sup> By allowing women and attorneys of color to become part of this elite ingroup within the law firm, their opinions and input will be looked upon more favorably and have greater impact.

Moreover, seeing persons of color and women in these positions of power, as well as the firm's increased commitment to and implementation of effective diversity initiatives, will increase the loyalty that black and Hispanic attorneys feel towards the firm. This will in turn incentivize blacks and Hispanics to utilize voice over exit and assist in lowering attrition rates within these demographic groups. This is because the presence of persons of color in positions of power in conjunction with a tangible commitment to diversity generally will increase the belief by black and Hispanic attorneys that exercising voice will in fact result in a direct influence on the firm's conduct if and when an objectionable state of affairs occurs.

This proposal is essentially costless to the firm and has the added benefit of demonstrating to clients and the public that the firm has put attorneys of color in positions of power, which may assist in efforts to attract clients concerned with diverse representation. Moreover, studies demonstrate that greater demographic diversity

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292. Their presence on these committees will assist in combating ingroup favoritism, which is a "form of bias that discriminates in favor of" white men. Williams & Richardson, *supra* note 248, at 609.

293. See Dobbin et al., *supra* note 153, at 388.

294. This is not to suggest that a person of color or woman is expected to be the voice for blacks and Hispanics on these top committees. Even if the demographically diverse individuals on the committee never mention issues related to race, gender, or diversity, the research still suggests that their presence will lead to greater demographic diversity throughout the institution. See *id.* Their presence helps to change the group decision-making, which in turns has an effect of improving demographic diversity.

295. See, e.g., *id.* at 406.

within large law firms has a positive correlation with profitability, suggesting that this proposal may actually be of economic benefit to the firm.<sup>296</sup>

There are, however, some limitations associated with this proposal. First, many large law firms will be unable to increase the number of equity partners of color on their top management committees because they do not have equity partners of color within their organizations.<sup>297</sup> While this concern is obviously valid, most firms do have female equity partners. The effect of women in top managerial roles is an increased commitment to diversity within the organization as a whole, which in turn may assist the firms without equity partners of color into developing some.<sup>298</sup>

Second, there may be a concern that persons of color who become members of these top committees may be considered mere tokens. To combat this, the person of color must be thought of as a respected colleague and not as the person filling the, for example, black or woman seat on the committee. If the person on the committee is a full member of the committee, with full voting rights, and the individual pulls his or her fair share of the work needed to complete the committee's goals, then the concerns regarding tokenism should be assuaged. The concerns likely will not be eliminated, as there will often be those who will believe the individual on the committee did not earn the position. If the members of the committee know and respect the person of color or woman on the committee and internally categorize the person as a legitimate member of the "ingroup," that person's ability to effectuate change by his or her presence and deeds will remain strong.

Third, there may be concerns that demographically diverse attorneys will become over-burdened if they are asked to serve on too many committees within the firm. This concern is reasonable. Thus, this proposal does not aim to *add* another committee to the demographically diverse attorney's set of committee memberships within the firm. Instead, it suggests *substituting* membership on the top firm committees for membership on other firm committees.

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296. See generally Brayley & Nguyen, *supra* note 269.

297. As demonstrated by the recent NALP report, only five percent of equity partners at all reporting law firms are attorneys of color. This leaves a very small pool of equity partners of color to access for these roles. See *The Demographics of Equity—An Update*, *supra* note 7.

298. Again, this does not require or expect that women become the voice for black and Hispanic associates.

### C. Mediating Bias

This proposal is an attempt to design an industry-wide solution to remedying bias-related incidents in light of the lack of political will within large law firms to implement many of the organization-wide changes needed to eliminate the effects of structural bias. Bias-related incidents within the employment setting greatly inhibit the development of loyalty between the employee and the employing organization. Finding mechanisms to mediate bias-related incidents in a manner that feels safe to the employee—in this case the black or Hispanic attorney—is of great importance. This proposal aims to change the culture of elite, large law firms by creating a new choice for attorneys wishing to lodge a complaint after experiencing a bias-related incident.

This is, however, a backstop proposal that is likely less beneficial than the first two presented because “[e]ven though appropriate structural changes . . . can potentially have dramatic impact on even subtle forms of bias, more informal forces, such as social norms and personal standards[,] can also bring about significant social change.”<sup>299</sup> The first two proposals aim to remedy the sources of bias, while this proposal addresses specific bias-related incidents. That said, providing avenues for airing grievances regarding discriminatory events has a certain amount of value, and the current systems available to law firm attorneys in need of such a resource are extremely limited. This proposal provides an additional option.

#### 1. Background Rationale

The class action has been an invaluable tool used by traditionally underrepresented groups to incentivize private employers to deter discriminatory activities. For example, in 1994 black employees filed a class action lawsuit against Texaco Inc. claiming that there had been numerous problems with discrimination throughout the company, they were receiving salaries less than those of their peers, and they were being passed over for promotions because of their race.<sup>300</sup> This case was followed in 2000 with a class action lawsuit filed against the Coca-Cola Company by black current and former employees, claiming that they were paid significantly less than whites, were passed over for promotions, and were subject to an

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299. Dovidio & Gaertner, *supra* note 112, at 53 (citations omitted).

300. See, e.g., Erika Hayes James & Lynn Perry Wooten, *Diversity Crises: How Firms Manage Discrimination Lawsuits*, 49 ACAD. MGMT. J. 1103, 1103 (2006).

internal evaluation system biased against promoting and rewarding black employees.<sup>301</sup> The lawsuits settled out of court with significant concessions by the corporations to ensure an increase in demographic diversity, as well as equal and fair treatment going forward.<sup>302</sup> High profile class action lawsuits such as these have the ability to greatly influence the conduct of an organization.

The class action tool is not appropriate for attempting to incentivize large law firms to ensure that their supervising attorneys are minimizing bias-related incidents. The number of demographically diverse attorneys in one large law firm is much lower than the demographically diverse professional employees at an organization like Coca-Cola, and the more appropriate route would be individual civil actions. The problem with the individual civil action is that an attorney filing such an action may be seen as overly sensitive or as a liability by his or her firm or other future prospective employers if s/he decides to file a public lawsuit. Moreover, the cost of litigation is quite high, and the chances of winning discrimination suits against law firms have proven to be slight.<sup>303</sup> So what institutional and structural mechanisms are in place that could incentivize large law firms in the same way the class action lawsuit has pushed corporations towards greater demographic diversity? Another type of institutional oversight can be found in a division of the Department of Labor, namely the Veterans Employment and Training Service (VETS).<sup>304</sup>

Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),<sup>305</sup> when a member of the Army Reserves is deployed to Iraq, for instance, his or her private sector employer must provide reemployment options upon the service member's return.<sup>306</sup> Employers do not always adhere to this requirement, however. Under USERRA, the service member has a few different options, but basically s/he may file a private civil action against the employer, or s/he may lodge a complaint against the employer with VETS, which investigates and adjudicates the claim

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301. See, e.g., Greg Winter, *Coca-Cola Settles Racial Bias Case*, N.Y. TIMES, NOV. 17, 2000, at A1, available at <http://www.nytimes.com/2000/11/17/business/coca-cola-settles-racial-bias-case.html?pagewanted=all&src=pm>.

302. See James & Wooten, *supra* note 300, at 1103–04; Winter, *supra* note 301.

303. See Peters, *supra* note 73, at 632 (discussing unsuccessful lawsuits filed under Title VII contesting partnership decisions against King & Spalding and Katten Muchin).

304. See *Veterans' Employment and Training Services (VETS)*, U.S. DEP'T OF LABOR, <http://www.dol.gov/vets/> (last visited Nov. 30, 2013). VETS is an example of what is found throughout antidiscrimination statutes, including Title VII, which is an attempt to incentivize employers not to discriminate.

305. Pub. L. No. 103-353, 108 Stat. 3149.

306. See 38 U.S.C. § 4312 (2012).



on behalf of the service member.<sup>307</sup> The VETS investigations are not highly publicized, but they are an effective, secondary option for individuals who cannot avail themselves to legal tools such as the class action lawsuit and who do not want to file a private civil action. The service member has an avenue to effectively adjudicate his or her claims, and the employer does not have its name dragged through the press as someone unfriendly to veteran employees. Attorneys of color at law firms would likely benefit from a similar institutional choice for mediating bias-related incidents.

## 2. Proposal

The American Bar Association (ABA) is a powerful choice architect within the legal profession. It sets policy for attorneys generally and publishes best practices in a variety of areas. It does so by drawing on the expertise of its members—lawyers. The ABA should encourage states, by making changes to the ABA’s model disciplinary rules,<sup>308</sup> to add an additional set of complaints that will be heard by state hearing committees currently charged with adjudicating disciplinary complaints against individual attorneys. The committees should begin receiving, investigating, and mediating complaints of bias-related incidents within legal departments.<sup>309</sup> In addition, the ABA should encourage attorneys to report bias-related incidents by accepting reports of bias and issuing informal ethics opinions discussing the incidents in an effort to provide guidance to the legal profession on how to combat discrimination.

Lawyers in states adopting this additional scope of authority to the traditional disciplinary hearing committee would be given another outlet for filing and mediating bias-related incidents that occur in law firms. State supreme courts routinely diverge from what is suggested by the ABA model rules. Thus, there is no reason to believe this proposal forbids other options for the individual

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307. See DEP’T OF LABOR, VETERANS EMP’T & TRAINING SERV., YOUR RIGHTS UNDER USERRA (2008), available at [http://www.dol.gov/vets/programs/userra/USERRA\\_Private.pdf](http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf).

308. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT (2007).

309. There was another proposal encouraging action by the ABA published by a student in 2006. It suggests that the ABA develop a certification program in diversity for law firms aimed at ensuring associates of color have adequate support during “their track toward partnership,” while improving the “‘bottom line’ for firms that invest the resources to incorporate diversity within their culture.” Peters, *supra* note 73, at 652. The details of this proposal are quite interesting and worth serious consideration by the ABA.

states.<sup>310</sup> If adopted by a state, the existence of the system would provide an avenue for attorneys to file grievances when bias-related incidents occur within legal departments.<sup>311</sup> In addition, the ABA could encourage the reporting of bias-related incidents by expressing its willingness to provide guidance on how to deal with and prevent incidents similar to those reported. The lawyers filing complaints would not be required to do so or forbidden from choosing another source of relief or no relief at all. By utilizing the existing structure and staff of the ABA and the state hearing committees, additional costs to the ABA and states would be largely minimal.

The goal of permitting the bias-related complaint to be filed with the state disciplinary board and mediated by the hearing committee would not be to publicize every complaint. It would also not be to exercise formal discipline against individual attorneys unless an actual violation of the Rules of Professional Conduct was found. The goal would not be to result in a formal hearing for all, or even the majority, of the bias-related complaints filed.<sup>312</sup> Instead, the goal of this proposal is to create an outlet for providing outside, objective guidance to the complaining attorney (does the complained of incident seem legitimately problematic?) and, if necessary, to the legal department (why did this incident occur, why was it problematic, and how can similar incidents be avoided in the future?). Over time, the state hearing committee could track complaints and trends and publish an annual report with specific, yet anonymous, examples of bias-related incidents within legal departments. For legal departments meeting a certain threshold of legitimate complaints, the hearing committee might consider issuing a public letter of reprimand.

The goal of permitting the ABA to receive reports of bias-related incidents and providing guidance through informal ethics opinions is to give the complaining attorney an opportunity to express his or her voice and receive input on whether the complaint is valid, while also allowing the attorney to attempt to protect his or her anonymity. It also provides a service to the profession generally by allowing

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310. Compare MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, *supra* note 308, with *Disciplinary Process*, SUPREME CT. OHIO & OHIO JUD. SYS., [http://www.supremecourt.ohio.gov/Boards/BOC/Flowchart\\_legal.pdf](http://www.supremecourt.ohio.gov/Boards/BOC/Flowchart_legal.pdf) (last visited Nov. 30, 2013) (demonstrating the adoption of a disciplinary structure different than the one recommended by the ABA).

311. These legal departments would include law firms, but they would also include many governmental legal offices.

312. The vast majority of disciplinary complaints filed with state disciplinary boards never rise to the level of a formal investigation or hearing. See Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253, 258 (2012).

broad access to the ABA's advice on how to address and prevent similar bias-related incidents.

The hope is that the availability of mechanisms for voicing complaints will instill a sense of power in attorneys of color. Currently, the power at large law firms rests solely in the hands of the equity partners, very few of whom are persons of color. For attorneys of color, this reality can create a sub-culture of individuals who feel as if they do not have real power to effectuate change at the firm, which in turn decreases the sense of loyalty the attorneys have towards the firm and hastens exit when discriminatory acts occur. Providing attorneys of color mechanisms for reporting incidents of bias, which often do not rise to the level needed to file private rights of action, allows the attorneys to exercise the voice necessary to combat the development of feelings of marginalization that can increase feelings of discontent towards the firm and the legal profession more generally.

Permitting mediation through the hearing committee would encourage attorneys of color to get the guidance they need to ensure that they address issues as they arise, while providing firms an opportunity to address problems anonymously before being outed as an organization with diversity issues to the legal community and to current and potential clients.<sup>313</sup> Moreover, the ability to resolve problems anonymously would encourage equity partners at the firm to participate in the hearing and make the changes necessary to avoid similar complaints in the future so that they can avoid a public reprimand.<sup>314</sup> The guidance provided to the firm would enable it to have an outside perspective on issues that are preventing the firm from achieving its goal to increase the demographic diversity within its attorney ranks. Hopefully, firms would see this as a benefit.

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313. The mere existence of an additional regime for lodging complaints may act as a deterrent to discriminatory conduct within the firm, much like Title VII acts as a deterrent for discriminatory behavior on behalf of employers. However, because the proposed regime would allow complaints that do not rise to the level necessary to file a private right of action under Title VII, the proposal would deter a different set of behavior.

314. One major objection is that this proposal is essentially a mandate for large law firms and individual attorneys accused of bias because they cannot opt out of the hearing committee's decision to investigate a complaint, although they could refuse to participate fully in the investigation. If anything, this Article has demonstrated that the set of choice architects necessary to create the incentives needed to ensure greater demographic diversity within firms goes far beyond an individual law firm management committee. The incentives must also come from outside sources, like clients, NALP, and, in this instance, the state bar. Moreover, while the hearing is not voluntary, choosing how to address the guidance received from the committee would remain in the sole discretion of the individual legal department receiving such guidance. The guidance might encourage future action, but it would not mandate it.

There are, however, structural constraints that could limit the effectiveness of this proposal. First, many believe that the state disciplinary systems are severely lacking in competency and transparency.<sup>315</sup> Second, the state disciplinary system is often perceived as engaging in rampant under-enforcement of lawyer discipline.<sup>316</sup> Third, attorneys at large law firms are rarely subjected to professional discipline, and the firms themselves are not sanctioned generally.<sup>317</sup>

In addition to these structural concerns, attorneys of color may be reluctant to bring forth complaints due to fear of reprisal from current or prospective employers. Moreover, it could be considered draconian to grant state hearing committees the authority to investigate and reprimand legal departments. Additionally, there may be concerns that a complaining attorney may attempt to utilize the ABA's opinion or the hearing committee's finding of bias as evidence in a subsequent lawsuit. Finally, private adjudicatory regimes deprive the public of their right to information.

These are valid concerns, but they do not obfuscate the importance of the legal profession initiating its own procedures to combat discrimination:

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. . . .

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated.<sup>318</sup>

The legal profession is uniquely situated within society. The law has the ability to oppress and the ability to free. At times it promotes justice and fairness, yet it is often callous in its treatment of the layperson and the minority. It is entirely reasonable for lawyers to utilize self-regulation to combat the structures of inequity that

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315. Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PROF. 209, 333 (2011) (discussing rankings of state discipline and noting only three states have the highest ranking of a B- and the balance of the states have C's and D's).

316. See Brown & Wolf, *supra* note 312, at 254.

317. This is in part because wronged clients of large law firms have a tendency to sue for malpractice instead of initiating disciplinary proceedings. See Douglas Richmond, *Law Firm Partners as Their Brothers' Keepers*, 96 Ky. L.J. 231, 261 (2008).

318. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 10-11 (2007).

permeate throughout the profession. It is cowardice on the part of lawyers to expect another body to fulfill this function on lawyers' behalf. That is not to say this proposal should be entered into lightly or casually. Deliberate time, effort, and reflection must accompany any change of this magnitude, and the input of individuals throughout the profession would be invaluable to the process of establishing this type of change. In this circumstance, where the profession has known, observed, and tracked its systematic exclusion and inequity for entire demographic groups for literally decades, it would seem bold action is both appropriate and necessary.

#### CONCLUSION

This Article argues that the retention rates of black and Hispanic attorneys at elite, large law firms can be improved through a series of soft incentives aimed at encouraging white males, the majority of equity partners, to become more involved in mentoring and training demographically diverse attorneys. This mentoring and training will lead to black and Hispanic attorneys developing a sense of loyalty to the firm, which will in turn encourage the attorneys to express displeasure when dissatisfactory events occur instead of immediately turning to the exit option and leaving the firm.

Specifically, this Article argues that providing billable hours credit for time spent on diversity initiatives will, over the long term, change the culture at the firm and make it the norm for white men to participate in diversity initiatives, which will encourage greater interaction between white males and other demographic groups. In addition, the Article argues that CDOs, persons of color, and female equity partners should be included on top firm committees because their membership will help to create policies and procedures that will increase demographic diversity throughout the organization. Finally, this Article argues that the ABA should develop a reporting mechanism for bias-related incidents and that it should encourage states to expand the scope of authority for disciplinary hearing committees to include investigating and mediating reports of bias in legal departments. The hope is that these additional avenues for reporting bias will encourage attorneys to express their dissatisfaction when bias-related incidents occur instead of choosing to exit the law firm.

Fighting discrimination is much more about winning hearts than mandating minds or behavior, making these proposals, while not perfect or without limitations, beneficial in that they constitute

small incentives that, if implemented, could effectuate real change within elite, large law firms. They can assist law firms in their efforts aimed at Retaining Color.