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THE RACIAL PARADOX OF THE CORPORATE LAW FIRM

by

RICHARD H. SANDER

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THE RACIAL PARADOX OF THE CORPORATE LAW FIRM

RICHARD H. SANDER*

Although nonwhites now account for nearly one-fifth of new attorneys, they still make up less than four percent of the partners at large law firms. Most commentators have blamed some combination of firm discrimination and minority disinterest for this disparity. In this Article, the author uses several new sources of data to explore this phenomenon, finding significant support for the following findings. Each of the major nonwhite groups (Asians, Hispanics and blacks) are as interested during law school in careers with large firms as are whites. Large law firms use very large hiring preferences for blacks, with the result that blacks are overrepresented among firm hires (relative to their numbers among law graduates) and tend to have much lower grades than their white counterparts. The large preferences are plausibly linked to a variety of counterproductive mechanisms that cumulatively produce very high black attrition from firms and consequently low partnership rates. Similar patterns, on a less intense scale, affect Hispanics entering large firms. While many questions are open, the author concludes that aggressive racial preferences at the law school and law firm level tend to undermine in some ways the careers of young attorneys and may, in the end, contribute to the continuing white dominance of large-firm partnerships.

* Professor of Law, University of California, Los Angeles. I wish to thank Patrick Anderson and Robert Sockloskie, who assisted me with the research for this Article and made innumerable contributions to it. I am also grateful for the comments and insights of several readers of early drafts of this work and participants at the Symposium, including George Baker, John Conley, Mitu Gulati, Fiona Harrison, William Henderson, Gita Wilder, and the editors of the North Carolina Law Review. Conley's ethnographic work in many ways anticipates statistical findings in this Article, and Gulati made particularly helpful observations on an early draft about the possible interaction of gender and race effects, and about the possible signaling function of grades. I have received exceptional support during the writing of this Article from the UCLA School of Law and its Dean's Fund. The "After the JD" study, which I helped steer from 1999 through 2003 and upon which I draw in much of this work, received support from the American Bar Foundation, the National Association for Law Placement, the National Science Foundation, the Soros Fund, the Law School Admission Council ("LSAC"), and the National Conference of Bar Examiners. I, alas, retain full responsibility for any errors that remain.

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INTRODUCTION

Perhaps no part of the legal profession is under greater scrutiny for its hiring and promotion practices than the large "corporate" law firm.[1] Although these firms collectively employ only a fraction of all

1. *See, e.g.*, Raymond C. Marshall, *Minority Hiring Made High Priority*, NAT'L L.J., Oct. 23, 1989, at S3 (discussing the San Francisco Bar Association's call for legal employers to adopt voluntary goals for the hiring and advancement of minority partners); Molly McDonough, *Demanding Diversity: Corporate Pressure Is Changing the Racial Mix at Some Law Firms*, A.B.A. J., Mar. 2005, at 52 (describing the pressure on corporations to diversify in light of client belief that diversity is necessary to compete in modern business); Lisa Stansky, *Corporate Counsel Push for Diversity: Top Firms are Hiring Diversity Managers to Ensure Compliance*, NAT'L L.J., Apr. 14, 2003, at A14 (discussing law firms hiring diversity managers to achieve a diverse workforce). Significantly, legal employer databases, such as those produced by Vault, Inc., use a "Diversity for Minorities" factor in their comprehensive firm ranking system. *See* BRIAN DAULTON, VAULT GUIDE TO THE TOP 100 LAW FIRMS 12, 89 (2006), *available at* http://vault.com/nr/lawrankings.jsp?law2006

lawyers—perhaps one in ten[2]—they have a visibility in the media, in public policy discussions, and in the consciousness of the profession that may outweigh all other types of legal practice combined. This visibility comes from the size of some of these firms (several have over 1,000 employees and over $500 million in revenues),[3] from the importance of their clients, and above all from their eliteness. The corporate law firm is an enduring symbol of power in America, and many observers question whether that power is used fairly. Certainly, even the most casual look at the demography of nearly all corporate firms shows disconcerting patterns. Women account for only about 17% of the partners at the elite firms, while blacks and Hispanics account for little more than 1% each.[4] These disparities, combined with a well-known history of exclusion at many prominent firms, create a widespread presumption that corporate firms are either overtly discriminatory or so internally rigid and hostile in their

=1&chid=240. Vault also publishes a "Best 20 Law Firms for Diversity" list. The Best 20 Law Firms for Diversity – 2006, http://vault.com/nr/lawrankings.jsp?law2006=9&ch_id242 &diversity=1 (relying on 2005 data).

2. The decennial census for 2002 counted 1.012 million lawyers and judges actively engaged in practice in the United States. U.S. Census Bureau, Public-Use Microdata Samples ("PUMS") (2000) [hereinafter PUMS], http://www.census.gov/Press-Release/ www/2003/PUMS5.html. An American Bar Foundation ("ABF") report of the same year reports nearly 96,000 attorneys working in firms with more than 100 lawyers. CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, at 29 (2004). The ABF data misses some attorneys and does not include employment information on some others, but it is, on the whole, close to the census figures, and it seems likely that the proportion of attorneys at *firms* of more than 100 lawyers in the year 2000 is close to 10%. The proportion of attorneys at *offices* with 100 or more lawyers would, of course, be smaller. In the After the JD ("AJD") database, *see* RONIT DINOVITZER ET AL., NALP FOUND. FOR LAW CAREER RESEARCH AND EDUC. & THE AM. BAR FOUND., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS (2004), http://www.nalpfoundation.org/webmodules/articles/articlefiles/87-After_JD_ 2004_web.pdf, I found that only 63% as many attorneys reported working in offices of 100 or more lawyers as reported working in firms of that size, *id.* at 27. So lawyers in offices of 100 attorneys or more—a key unit of analysis in this Article—probably accounted for 6% to 7% of all attorneys in 2000. The foregoing is based on the author's calculations taken from data included in the AJD. *Id.*

3. *The American Lawyer* publishes an annual list of the nation's largest law firms ranked by total revenue. In 2002, the list included twenty-one firms with gross revenues of over half a billion dollars and nine firms with more than 1,000 lawyers. *See* Law.com, The Am Law 100 (2002), http://www.law.com/special/professionals/amlaw/2003/amlaw100/ amlaw_100main.html.

4. These figures are based on the demographic profiles of main offices at AM LAW 100 firms and provided by the firms to the compilations annually published in the NALP Directory of Legal Employers. *See* discussion of this database, *infra* notes 33–35 and accompanying text; *see also* EEOC, Diversity in Law Firms (2003), *available at* http://www. eeoc.gov/stats/reports/diversitylaw/lawfirms.pdf; *infra* Table 7.

attitudes and practices that they create effective and all-but-insurmountable barriers for women and minorities.

Until quite recently, very little systematic data existed on the hiring practices of corporate firms, the market they face, or the internal conditions new associates confront in those firms. Past research has often been anecdotal. This Article makes use of several comparatively new data sources to look at the law firm "labor market" in greater depth, and to examine how young lawyers of different races fare in this market. I have tried to match this improved empiricism with a clearer theoretical framework about the various choices confronting young lawyers and corporate firms. This is important because a seemingly simple idea like "discrimination" can have several very different meanings—often confused in the literature—with very distinct implications.

I find that much of what we commonly assume about race and corporate law firms seems to be wrong. There is significant empirical support for each of the following propositions:

1) Nonwhites start law school with as much interest in corporate law firms as whites.[5]

2) Corporate law firms hiring new associates give much less weight than they once did to school eliteness and substantially more weight to law school performance (as measured by grades) than is commonly assumed.[6]

3) Corporate law firms generally use aggressive racial preferences in hiring and recruiting blacks, and use preferences for Hispanics to a measurable, but somewhat smaller and less consistent degree. Consequently, new black and Hispanic associates at corporate firms tend to have substantially lower grades than their white peers.[7]

4) Once inside the firm, blacks and Hispanics report treatment that, on many dimensions, is very similar to the experiences of whites. However, in some critical areas—mentoring, training, and responsibility—blacks and (to a somewhat lesser degree) Hispanics fare much worse. In these same areas, white women in corporate law firms report treatment that is indistinguishable from the treatment reported by white men.[8]

5. *See infra* notes 56–58 and accompanying text.
6. *See infra* Table 6 and accompanying text.
7. *See infra* notes 83–105 and accompanying text.
8. *See infra* Tables 17–20 and accompanying text.

5) Black and Hispanic attrition at corporate firms is devastatingly high, with blacks from their first year onwards leaving firms at two or three times the rate of whites. By the time partnership decisions roll around, black and Hispanic pools at corporate firms are tiny.[9]

These findings suggest an apparent paradox: blacks are overrepresented at corporate law firms as summer clerks and first-year associates, but they are substantially underrepresented among the ranks of new partners. Although minority candidates are the beneficiaries of large preferences on the job market,[10] their opportunities to learn and perform once inside the firm are, in some ways, distinctly inferior.

I think the most plausible explanation of this paradox is that the use of large preferences by firms leads to disparities in expectations and performance that ultimately hurt the intended beneficiaries of those preferences. If correct, this explanation touches on some of the same problems experienced by law students admitted to law school through a similar system of preferences.[11] In truth, however, the empirical findings presented in this Article are consistent with more than one story about the behavior of corporate law firms, and it is very plausible that somewhat different stories play out in different firms. Considered with an open mind, these data greatly improve our understanding of the behavior of both firms and associates. I find some clear lessons for all parties to the ongoing debate about racial diversity in firms.

This Article is organized as follows. Part I describes the key datasets and defines some terms, including the important concept of "cohort effects." Part II draws on the literature of law firm diversity to outline five distinct explanations for the small number of nonwhite partners at corporate firms. Part III explores the entry market for corporate firm associates from both the supply-side and demand-side perspectives. Part IV more closely considers the role of grades in corporate firm hiring—what exactly do employers think grades reveal about candidates? Part V describes how the experiences of mid-level associates at corporate firms vary across racial and gender lines. Part VI examines closely how cohort effects inside law firms affect the makeup of starting associates, senior associates, and partners. Part VII draws upon the Article's empirical findings to evaluate the

9. *See infra* note 139 and accompanying text.

10. *See infra* notes 83–105 and accompanying text.

11. *See* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 425–54 (2004).

theories outlined in Part II. And in the Conclusions, I suggest some specific steps law firms can take to improve diversity in their own firms and the health of the legal profession.

My goal throughout is to make discussions of these problems more informed and concrete. There is much we still need to learn and a good deal of room for reasoned debate. But many key facts are unambiguous and many misconceptions should be cleared away.

I. DATA AND DEFINITIONS

Lawyers in America generally practice in one of three types of settings: in solo practice, in law firms, or in nonlegal organizations like government agencies or corporations. Roughly one-third of contemporary lawyers work in each of these three settings.[12] Law firms are generally organized as partnerships of senior attorneys who jointly own the firm and collectively employ associates and support staff such as paralegals, managers, and secretaries. The vast majority of law firms are small and serve a mix of individual and business clients.[13]

"Corporate law firm" is something of a term of art overlapping with the terms "large law firm" and "elite law firm." All of these largely but not exclusively serve corporate clients, compete for the most able law graduates with high salaries, and use "up-or-out" systems of hiring and promotion where associates who serve for six to ten years are usually either promoted to partnership in the firm or eased out. New York, Washington, Chicago, and Los Angeles have the largest concentrations of corporate law firms, but every major city has at least one or two in addition to branch offices of major firms headquartered elsewhere. No bright line separates these firms from others, but most law firms employing 100 or more lawyers are corporate and fairly elite, making this number a convenient threshold. In some cases I will use more expansive or more restrictive definitions, but as a default the terms "corporate law firm" and "large

12. According to the Lawyer Statistical Report, there were roughly 325,000 attorneys in solo practice in 2000. *See* CARSON, *supra* note 2, at 29–30. My own analysis of the 2000 Census data finds the same number of attorneys working in government, for corporations, for non-profit firms, or in legal services. PUMS, *supra* note 2. This leaves about 350,000 attorneys working in law firms with more than one lawyer—an estimate somewhat consistent with the numbers in both the Lawyer Statistical Report and the census. *See* CARSON, *supra* note 2, at 28–29.

13. Carson counted more than 47,000 law firms with two or more attorneys in 2000. Less than 5% of these firms had more than twenty attorneys, though these medium- to large-sized firms accounted for more than half of the sector's attorneys. CARSON, *supra* note 2, at 15–30.

law firm" in this Article will both refer to American firms with more than 100 lawyers.

A second important term in this Article is "cohort effect." One wishing to compare the demography of corporate law firms with the legal profession more generally must weigh two comparable cohorts against one another. For example, it is highly misleading, though surprisingly common, to compare the proportion of women among law students today—nearly 50%—with the proportion of women among corporate firm partners—about 17%.[14] The proportion of women among law school graduates has increased by a factor of ten over the past generation.[15] Since nearly all law firm partners are age thirty-three or older, it is more reasonable to compare the proportion of corporate partners who are women to the proportion of women among all lawyers thirty-three and over—about 27%.[16] Once adjusted for cohort, the gender diversity of firms is substantially more impressive.[17]

The corporate law firm can be studied from the inside through case studies, and much of the finest work on the subject takes this form.[18] The focus in this Article is upon external and comparative data, much of it drawn from surveys and interviews but none of it

14. A recent *New York Times* story largely revolved around the following claim:

> Although the nation's law schools for years have been graduating classes that are almost evenly split between men and women . . . something unusual happens to most women after they begin to climb into the upper tiers of firms. They disappear. . . . [O]nly about 17 percent of the partners at major law firms nationwide were women in 2005.

Timothy L. O'Brien, *Up the Down Staircase: Why Do So Few Women Reach the Top of the Big Law Firms?*, N.Y. TIMES, Mar. 1, 2006, § 3, at 1.

15. According to the American Bar Association, women constituted 1,179 of the 24,267 first-year law students in accredited schools in 1967—4.9%. Their numbers rose over the next three decades to 21,499 out of 43, 518 first year law students in 2000—49.4%. *See* AM. BAR ASS'N, LEGAL EDUCATION AND BAR ADMISSION STATISTICS: 1963–2005, http://www.abanet.org/legaled/statistics/le_bastats.html.

16. This figure is based on the author's computation from 2000 PUMS data. *See* PUMS, *supra* note 2.

17. This adjustment may be a little too kind to the firms. Since corporate law firms have grown much more rapidly than the legal profession as a whole, young partners in these firms are more common. A more complex adjustment for cohorts—beyond the scope of this Article—would compare, for example, the gender makeup of thirty-three-to thirty-five-year-old partners in corporate law firms with thirty-three- to thirty-five-year-old lawyers generally, and I suspect the data adjusted in this way would show a somewhat larger shortfall of women in elite firms.

18. *See, e.g.*, ROBERT NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988); DAVID WILKINS, THE BLACK BAR: THE LEGACY OF *BROWN V. BOARD OF EDUCATION* AND THE FUTURE OF RACE AND THE AMERICAN LEGAL PROFESSION (forthcoming 2007).

focusing on individual firms. The following paragraphs introduce the key datasets.

The Bar Passage Study ("BPS")[19] was conducted by the Law School Admission Council in the 1990s. The study followed some 27,000 law students who matriculated in 1991 through graduation and across as many as five attempts to pass the bar.[20] The great strengths of the study are its scope—nearly 95% of eligible law schools participated, along with about two-thirds of the students at those schools[21]—and its linking of undergraduate, law school, and bar data for the entire sample.[22] A general weakness of the study is the lack of identifying information on individual schools or, in the case of bar data, states. In the present work, I draw on three types of BPS data: the Entering Student Questionnaire ("ESQ") administered to all participants just before or during their first weeks of law school;[23] data on law school grades available for virtually all participants;[24] and the Third Follow-Up Questionnaire ("TFQ") surveying students in the months after their law school graduation.[25] Unlike the other data, the TFQ was administered to a sub-sample of about 6,700 students—of whom only 66% responded, which implies a cumulative response rate of under 50%.[26] Because of the smaller sample size and lower response rate, the TFQ data is weaker than the other BPS data, and I rely on it only to supplement other data.

The After the JD ("AJD")[27] study was begun in 1999 by a group of legal scholars (including the author) under the leadership of Paula Patton (then the executive director of the National Association of Law Placement, or "NALP") and Bryant Garth (then the executive director of the American Bar Foundation, or "ABF").[28] AJD is, like BPS, a longitudinal study, but it is based on a sample of attorneys who entered the bar in 2000.[29] AJD completed its first wave of data

19. LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY (1998), http://www.lsacnet.org/research/LSAC-National-Longituinal-Bar-Passage-Study.pdf.

20. LINDA F. WIGHTMAN, USER'S GUIDE: LSAC NATIONAL LONGITUDINAL DATA FILE 1–3 (1999), *available at* http://bpsdata.lsac.org/bps_usersguide_layout.pdf. Wightman does not give an exact participation rate, but I estimate it to be around 70%.

21. *Id.* at 2.

22. *Id.* at 3–5.

23. *Id.* at 4.

24. *Id.* at 3.

25. *Id.* at 3–5.

26. *Id.* at 5.

27. DINOVITZER ET AL., *supra* note 2.

28. *Id.* at 7–10.

29. *Id.* at 14.

collection in 2003, capturing approximately 4,500 lawyers in the second, third, or fourth year of their careers.[30] A second wave, planned for 2007 or 2008, will, if completed, shed enormous light on the questions examined in this Article. AJD includes both a national sample of about 3,900 attorneys and a racial oversample, bringing the sample up to a total of around 400 attorneys in each of the three major nonwhite subgroups (blacks, Hispanics, and Asians).[31]

The AJD sample is based upon eighteen Primary Sampling Areas ("PSAs")—generally either metropolitan areas or states—that include most of the large legal markets in the nation.[32] In the aggregate, the national sample closely matches available data on the national makeup of young attorneys. The version of the AJD dataset I use is preliminary and does not include final determinations on sample eligibility or nonresponse adjusted selection probability weights, so readers should view aggregate descriptive data with some caution.

NALP has administered annual surveys to corporate law firms to create its annual Directory of Legal Employers ("DLE") for more than twenty years.[33] This data has been a prime source of information (albeit self-reported) on the demographic makeup of firm associates and partners. My research associates and I gathered data from these directories for the period from 1992 through 2004 for the 100 largest law firms as ranked by revenue in *The American Lawyer*.[34] This data, along with some other NALP surveys, appears to be a reliable source for demographic data on firms.[35]

The Public Use Microdata Sample ("PUMS")[36] is a sample of individual-level data drawn from the general population completing the long form in the decennial census. PUMS is an exceptionally

30. *Id.* at 13.

31. *Id.* at 21.

32. *Id.* at 14.

33. NALP Directory of Legal Employers, Frequently Asked Questions (2001), http://www.nalpdirectory.com/faq.asp.

34. *See* Am Law 100, *supra* note 3 (database based on 2002 list on file with the author). For the most recent version of *The American Lawyer*'s Top 100 firms as gauged by revenue, see *The Billion Dollar Club Expands*, AM. LAW., July 2005, at 109 (ranking the top 100 private firms in terms of 2004 gross revenue).

35. Note, however, that the largest law firms seem to make the greatest efforts to hire a diverse group of associates. Thus, the DLE data on the AM LAW 100 (which average over 300 lawyers) may slightly overstate the diversity of firm associates relative to the entire pool of firms with over 100 lawyers. Note, too, that the data listed here is based on each firm's statistics for its primary office (e.g., for Jenner & Block we used Chicago-only data) when the firm provided separate office data. It is possible, however, that some firms may have used national counts of minorities when reporting home-office demographics.

36. PUMS, *supra* note 2.

reliable source of data on the entire American population, and the 2000 PUMS includes data on roughly 50,000 attorneys. It is severely limited by the generality of questions asked in the decennial census, but it remains a valuable source on the topics it does cover.

Finally, this study draws on two databases compiled by researchers at the University of Michigan Law School. In the late 1960s, the school began sending an eight-page survey to alumni approaching the fifteenth anniversary of their graduation, and it has continued the series ever since.[37] In the early 1970s, the school added a survey of fifth-year alumni, and more recently it has added twenty-fifth and thirty-fifth-year waves.[38] This UMLS Alumni Survey ("UMLS")[39] includes some background information but largely focuses on the professional lives of participants. Participation rates appear to average around 70%—very respectable by social science standards, though low enough to make possible some sample selection bias. The UMLS is a uniquely powerful tool for examining the evolution of careers among a group of alumni from an elite law school. Those involved in creating the UMLS undertook a one-time survey of alumni in 1998. This Professional Development Survey ("PDS")[40] was sent to some 2,000 alumni who had graduated since 1970; nonwhites were substantially oversampled. Participation rates were 61.9% for white alumni and 51.4% for minority alumni (excluding Asians),[41] again creating some likelihood that the results are not fully representative of all Michigan alumni for those years. Together, these datasets can give us an unprecedented ability to triangulate insights into the hiring and employment of associates in corporate firms.

II. THEORIES OF CORPORATE LAW FIRM DEMOGRAPHICS

The literature on the elusive quest for law firm diversity is voluminous,[42] and any succinct attempt to consolidate theories in this

37. A description of the UMLS Alumni Survey can be found in Kenneth G. Dau-Schmidt & Kaushik Mukhopadhuya, *The Fruits of Our Labors: An Empirical Study of the Distribution of Income and Job Satisfaction Across the Legal Profession*, 49 J. LEGAL EDUC. 342, 344 (1999).

38. *Id.*

39. University of Michigan Law School, Alumni Questionnaire, Class of 1999 (unpublished survey) (on file with the North Carolina Law Review) [hereinafter UMLS].

40. University of Michigan Law School, Professional Development Survey (1997) (unpublished survey) (on file with the North Carolina Law Review) [hereinafter PDS].

41. Richard O. Lempert, David L. Chambers, & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 403 (2000).

42. *See generally* Elizabeth Chambliss, *Organizational Determinants of Law Firm*

field is necessarily simplistic. It is nonetheless helpful to clump these ideas and hypotheses into five general theories. What we are trying to account for, in a general way, is the underrepresentation of nonwhites in corporate firm partnerships and, to a lesser extent, among associate ranks. The leading explanations are these:

1) Conventional Discrimination. No one doubts that elite firms were ethnically, racially, and socially exclusive for most of the twentieth century. Given the continued significant underrepresentation of nonwhites in firm partnerships, the easiest and most obvious explanation is continued discrimination by those running the firms.[43] The term "conventional discrimination" is used here to mean a conscious aversion by an employer towards hiring or promoting members of a particular group, such as racial minorities or women. The most obvious problem with the conventional discrimination theory is the fairly conspicuous and successful efforts, detailed below,[44] by firms to diversify their hiring practices. On the other hand, discrimination is undoubtedly perceived by some women and minorities within the firm, and it seems eminently plausible that conventional discrimination plays at least some role in some firms.

2) Institutional Rigidity. Law firm partners may have embraced the idea and importance of diversity with genuine sincerity, yet believe that being "open" to new groups should not require substantive change in the firm itself. Firms may be willing to give associates from nontraditional groups the opportunity to prove that they can work and behave like the firm's existing membership.

Integration, 46 AM. U. L. REV. 669 (1997) (finding the biggest factor in racial integration at large law firms to be the racial composition of the firm's clientele and the largest factor in gender integration to be the structural aspects of the firm); J. Cunyon Gordon, *Painting by Numbers: "And, Um, Let's Have a Black Lawyer Sit at Our Table"*, 71 FORDHAM L. REV. 1257 (2003) (finding economic rather than altruistic motivations for efforts at diversity in large law firms); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727 (2000) (utilizing a lock-in model and theorizing that structural constraints such as the LSAT and legal employers' acceptance of law school success as a credential explain the low number of minorities in law school and legal employment); Akshat Tewary, *Legal Ethics as a Means to Address the Problem of Elite Law Firm Non-Diversity*, 12 ASIAN L.J. 1 (2005) (concluding the lack of diversity at large law firms is attributable to economic considerations and proposing that legal ethics rules be utilized to increase diversity); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996).

43. *See* Chambliss, *supra* note 42, at 704 n.144 (noting that "some law elite law firms continue to discriminate blatantly"); Tewary, *supra* note 42, at 10 (stating that "it would be difficult to argue that racially discriminatory hiring practices and other aspects of large-firm culture are not an important factor in creating the disparities in elite law firm composition").

44. *See infra* notes 86–105 and accompanying text; *infra* Table 7.

However, if the new associates are unable or unwilling to conform their lifestyles and values entirely to the firm's culture conflict ensues, leading to the large-scale departure of nontraditional associates. It is particularly easy to see how this story might account for small numbers of women partners. Women in their thirties may decide that it is impossible to raise children while building an elite-firm career, given the high intensity of the law firm environment and institutional inflexibility in accommodating family responsibilities.[45] Any mechanism affecting women lawyers will disproportionately affect blacks, since women make up a higher proportion of black attorneys than of any other ethnic group.[46] Institutional rigidity might also repel some nonwhite male associates if, for example, firms seem unsympathetic to an associate's interest in pro bono work, or if the associate's definition of "community involvement" differs from that of a typical white partner.[47]

3) Stereotype Discrimination. By my reading, the most influential theory among thoughtful observers of law firm racial disparities is the Wilkins and Gulati account of what I will call "stereotype discrimination" at elite firms.[48] By this account, elite partners and senior white associates fall prey to pervasive stereotypes about the strengths and weaknesses of minority associates.[49] As a result, few minorities are classified as potential "stars"—young lawyers who should be cultivated as future firm leaders—in the firm, and therefore few minorities get the careful mentorship, challenging assignments, and other opportunities that allow them to prove their value to the firm. Minority associates therefore tend to be stuck with routine work leading nowhere, and most leave the firm long before being formally passed over for partnerships.[50]

45. Chambliss, *supra* note 42, at 729, 740–42.

46. U.S. Census microdata for the year 2000 indicates that, in that year, women constituted 30.7% of all lawyers and judges, but 52% of African American lawyers and judges—the highest female proportion of any group. Author's tabulation of PUMS data, *supra* note 2.

47. Wilkins & Gulati, *supra* note 42, at 570.

48. *Id.* at 568–72.

49. *Id.* at 569–70 ("Indeed, since partners not on the recruiting committee will probably not have met the great majority of incoming associates (nor seen their credentials) decisions about which of these lawyers are superstars will be even more loosely correlated with these signals than typical hiring decisions. Under these circumstances, background prejudices and preconceptions can lead white partners to believe that black associates are more likely to be average or perhaps even unacceptable.").

50. *Id.* at 570–71.

4) Individual Preferences. Although I doubt anyone would suggest individual preferences as a complete explanation of nonwhite underrepresentation, some observers believe that disparities in career preferences account for at least some of the racial gaps.[51] This theory asserts that minority law students in general, but blacks in particular, are far more interested in public service, and far less interested in corporate law, than their white classmates. They are therefore less likely to seek jobs in big law firms. This theory also asserts that among those that do join elite firms there is simply not, among minority and especially black associates, the same "fire in the belly" driving white associates to make the extraordinary sacrifices necessary to become an elite-firm partner.[52] As Alan Jenkins noted in his thoughtful article about high black attrition at Cleary, Gottlieb, Steen & Hamilton,[53] several "black Cleary alums noted that few African American associates were enthusiastic about becoming partners."[54] Former Cleary associate Raymond Lohier supports this account, recalling a meeting of black Cleary associates where one asked, " 'Who wants to go for it?' and nobody raised their hand."[55]

5) Merit. The unspoken but widely-shared default explanation for minority underrepresentation in corporate practice is a gap in actual performance. If law firms engaged in race-neutral hiring, or if (as many contend) the hiring bar was set higher for minorities than for whites, then explanations suggesting that minority performance is a good deal lower than white performance would seem absurd at best and racist at worst. However, if we assume that elite firms generally use large racial preferences in hiring, it would be foolish to ignore the differences in performance that would very plausibly follow. The threshold issue for any account based on merit is therefore a better understanding of law firm hiring.

It is quite plausible that all five of these explanations play some role in accounting for the small number of minority partners. The interesting questions lie in their relative importance. These are

51. *See, e.g.*, *id.* at 508 (noting and discrediting the theory of preferences that blacks are less interested in corporate work than in the government and non-profit sectors).

52. *Id.* at 570 (noting the widespread perception that blacks are " 'less interested' in corporate work than other lawyers. This sentiment may be reinforced by the fact that black associates appear to be more likely than their white peers to do more than the average amount of pro bono work, to hold skeptical views about the social utility of some of the goals of their corporate clients, and to leave corporate practice for jobs in the public sector."). Wilkins and Gulati themselves view this as a mere stereotype that says little or nothing about individual associates. *Id.*

53. Alan Jenkins, *Losing the Race*, AM. LAW., Oct. 2001, at 91, 91.

54. *Id.* at 94.

55. *Id.*

remarkably difficult questions to resolve because so many of these factors might plausibly be causally intertwined. Readers should keep these theories in mind as I begin to work through the data.

III. WHAT SHAPES THE DIVERSITY OF ENTERING ASSOCIATE COHORTS

The first step in this empirical analysis is an exploration of the market for new law firm associates. This endeavor requires more than simply comparing the demographics of law students with the makeup of law firm hires. We need to understand factors shaping the size, interest, and strength of the various demographic pools from which firms hire, and also how firms select from among law students. Although there is almost no academic literature on this subject, there is an abundance of data.

A. The Supply Side: Job Preferences Among Minority Law Students

As I noted earlier,[56] many observers contend that nonwhites—particularly blacks—enter law school with a particularly strong interest in government or public service, and that this disparity continues through law school and leads to low black and Hispanic interest in large law firms and corporate jobs.[57] Some evidence is consistent with this view. Throughout law school, blacks express a higher-than-average interest in "doing good" as lawyers, and the AJD data indicate that once in practice they are more likely to work in government or public-interest settings (33% for blacks, compared to 24% for Hispanics, 19% for Asians, and 18% for whites).[58]

It turns out, however, that neither blacks nor Hispanics have a general aversion to seeking a career in corporate law firms, if their responses to surveys are to be believed. For example, the BPS asked entering first-year students detailed questions about their career plans and preferences. All four major racial groups gave large law firms the highest average ratings. It is true that blacks were more enthusiastic than whites about government career settings, but blacks were generally more enthusiastic about all settings, as shown in Table 1.

56. *See supra* notes 51–55 and accompanying text.

57. This is often cited as one of the rationales for racial preferences in law school admissions. *See* Tomilo Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1474–75 (2005); William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 ASIAN L.J. 29 *passim* (2000); Lempert et al., *supra* note 41, at 495–96.

58. Author's tabulations of the AJD National Sample.

Table 1
Ratings of Job Settings by Race
Among New Law Students, 1991

Job Setting	Proportion of Entering Law Students Who Rated Each Job Setting as "Very Appealing" To Work in "During Your First Few Years After Graduating from Law School"			
	White	**Black**	**Hispanic**	**Asian**
Large Private Firm (50 or More Attorneys)	28%	37%***	33%***	38%***
Business or Finance	21%	28%***	21%	28%***
Government	16%	22%***	19%**	15%
Public Interest	23%	30%***	26%*	22%
Academic	14%	17%**	16%*	15%

Source: BPS, ESQ Q. 67.
Note: Students rated each item independently, so columns should not add up to 100%, and there is no contradiction in figures for blacks being consistently higher than figures for whites. P-values based on logistic regression of each row's data in comparison to the white race group.
*=p<.05; **=p<.01; ***p<.001.

When asked in the same survey to report which of thirteen settings they would "most like" to work in "once you graduate from law school," the two leading responses for each of the four racial groups were "large law firms" and "medium-sized law firms." Table 2 shows that large and midsize firms were also the modal choices for students of all races when they were asked where they thought it "most probable" they would end up working. However, many students who indicated a preference for a large firm thought it more likely they would end up at a midsize firm.

Table 2
Where Entering Law Students Wanted To (and Expected To) Work After Graduation, Fall 1991

Seven Leading Job Settings	Proportion of Entering Law Students Who Rate Each Job Setting as Where They Would "Most Like" To Work After Graduating (and Where They Will "Most Probably" Work)			
	White	**Black**	**Hispanic**	**Asian**
Large Law Firm (50+ Attys)	14% (15%)	17% (15%)	16% (16%)	25% (22%)
Midsized Firm (11–50 Attys)	20% (32%)	17% (23%)	18% (29%)	19% (32%)
Small Firm	8% (10%)	5% (6%)	8% (9%)	4% (6%)
Judicial Chambers	13% (6%)	11% (8%)	11% (4%)	16% (6%)
Public Interest Firm	10% (6%)	10% (8%)	11% (7%)	8% (6%)
Legislative Office or Gov't Agency	7% (8%)	10% (12%)	8% (9%)	5% (7%)
Business or Finance	10% (10%)	10% (10%)	8% (8%)	10% (11%)
Criminal Justice	9% (9%)	11% (11%)	12% (12%)	7% (7%)
Other	8% (4%)	11% (7%)	9% (5%)	8 (3%)
Sample size (n)	*21,885 (21,642)*	*1,769 (1,736)*	*1,256 (1,236)*	*1,105 (1,073)*

Source: Author's tabulation of BPS, Qs. 68 & 69.
Notes: Due to rounding, columns may not add up to 100%. Thirteen job categories are here consolidated to nine. Sample sizes reflect the number of students of each race who answered each of the two questions.

To me, the most striking pattern in this data is the remarkable similarity of black, white, and Hispanic aspirations. Among those aiming for the private sector, blacks tend to favor larger firms (for good reasons, as we shall see) while whites favor smaller firms, but generally preferences among the three groups track closely. Asians are noticeably more attracted to large firms, and less attracted to government service and criminal justice. This data strongly suggests that the relative scarcity of nonwhites in elite firms is not due to a lack

of interest. At the outset of law school and beyond, whites express (if anything) less interest and seem less likely to work for large law firms than any of the other racial groups. This data thus counts as an important strike against the "individual preference" theory, at least in explaining hiring patterns for starting associates at corporate law firms.

B. The Supply of Minority Law Graduates

The United States is now around 30% nonwhite, and that figure is rising by a percentage point every two or three years.[59] But the nation's pool of lawyers is far less racially diverse. At nearly every step of the educational process, from high school through the bar exam, a disproportionate number of blacks and Hispanics fall by the wayside. Table 3 presents data on how the pool narrows as we move from the general population to the actual distribution of attorneys.

Table 3 requires close study, because in it lies an important part of the story explaining why blacks and Hispanics are so significantly underrepresented in elite law firms and among lawyers generally. Let us consider each of the nonwhite groups in turn. Young Asians are about as likely to graduate from high school as are whites, but Asian graduates are more likely to go on to college—and to graduate from college—than any other group. Hence, Asians in their twenties are about half again more likely to be college graduates than are others in the general population. Asian college graduates are now about as likely as white college graduates to decide to attend law school—a fairly recent development[60]—and they experience only slightly greater attrition than do whites in graduating from law school and passing the bar. Thus, Asians are significantly overrepresented, compared to their numbers in the general population, among the ranks of young lawyers. But they are still underrepresented among the overall lawyer population because of cohort effects. Since the Asian

59. In the 2000 Census, persons who reported they were "single race," non-Hispanic whites made up 69.5% of the United States population. By July 2003, that proportion had fallen to 67.8% and the Census projects it will stand at 65.1% in 2010. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–05, 14, 18 (124th ed.), *available at* http://usa.usembassy.de/etexts/stab2004/pop.pdf.

60. According to the American Bar Association, the number of Asians in their third year of law school rose from 72 in 1971 to 473 in 1981, to 3,217 in 2004. AM. BAR ASS'N, *supra* note 15; *see also* Arthur S. Hayes, *Asians Increase at Big Firms*, NAT'L L.J., Dec. 18, 2000, at A1 ("Asian-American lawyers say that their disproportionately large numbers at IP firms reflect the choice of more second- and third-generation Asian-Americans to pursue careers outside engineering and science.").

Table 3
Comparing the Racial Composition of Lawyers with Various "Feeder" Populations, 2000

Comparison Group in 2000	Percentage of Members of the Group Who Are:			
	White	**Black**	**Hispanic**	**Asian**
(1) U.S. Population Total*	69.5%	12.7%	12.5%	3.8%
(2) U.S. Population Aged 20–24*	61.6%	14.4%	18.0%	4.5%
(3) High School Graduates**	67.6%	12.6%	11.9%	4.6%
(4) Attending College	68.3%	11.8%	10.3%	6.4%
(5) College Graduates	75.1%	8.7%	6.1%	6.3%
(6) Law School Matriculates**	78.5%	7.8%	6.1%	6.7%
(7) New Lawyers (Census)	79.6%	6.1%	4.2%	6.3%
(8) New Lawyers (AJD)	79.1%	5.6%	3.7%	6.5%
(9) Overall Lawyer Population	88.5%	4.2%	3.4%	2.3%

Sources: Rows 1 and 2 are from Table 13 of U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES ("SAUS") (2003) [hereinafter SAUS 2003], http://www.census.gov/prod/2004pubs/03statab/pop.pdf. Row 3 is calculated from PUMS for those aged 20 at the time of the 2000 census. Row 4 is from SAUS 2003, Table 278; Row 5 is from SAUS 2003, Table 299. Row 6 is from ABA statistics on legal education. The data reported is for first-year students in the 2000–2001 academic year. AM. BAR ASS'N, *supra* note 15. Rows 7 and 8 are from DINOVITZER ET AL., *supra* note 2, at 21 tbl.2.1. Row 9 is calculated from PUMS for all lawyers and judges sampled in the 2000 census. PUMS, *supra* note 2.

Notes: Data for "whites" in Row 6 includes everyone not identified as black, Asian or Hispanic; in other rows, "whites" refer to persons identifying themselves as non-Hispanic whites. The AJD figures in Row 8 should not be taken as direct estimates of the national lawyer population, since they are based on a stratified random sample.

population in the United States has both (a) grown dramatically over the past generation,[61] and (b) only turned to law school in significant proportions over the past fifteen to twenty years,[62] nearly two-thirds of all Asian lawyers in the United States in 2000 were under the age of forty.[63] Asians will therefore necessarily continue to be relatively scarce among the senior ranks of the profession for at least another decade. Hence, in Table 3 as well as in the internal law firm statistics in Table 7, Asians show the largest gap between entering cohort numbers (where they are overrepresented) and overall occupational numbers (where they are underrepresented).

The data in Table 3 indicates that Hispanics show the greatest disparity between the relative size of the youth cohort—18% of all young adults aged twenty to twenty-four—and their relative numbers among new attorneys—about 4%. There is significant attrition of Hispanics at every stage of the educational process. Most importantly, Hispanics drop out of high school far more frequently than do whites, blacks, or Asians. Hispanic high school graduates are less likely than all other groups to go on to college, and Hispanics have the highest college dropout rates. The only step in Table 3 where Hispanics do not show attrition relative to whites is between college and law school: Hispanic college graduates choose to go on to law school, and are admitted, at rates very similar to rates in the overall population. In law school and on the bar, however, they have very high attrition rates, which—though not an issue I explore in this Article—I think is due in part to the mismatch effect.[64] For now, the main point of interest is this: Hispanics are dramatically underrepresented among the ranks of lawyers primarily because they have very high attrition rates in high school, in college, in graduating from law school, and in passing the bar.

The story for blacks is similar to the story for Hispanics, but less extreme. In proportional terms (that is, taking each row's number as

61. In 1970, the Census counted 1.54 million Americans of Asian decent in the United States. 1 HISTORICAL STATISTICS OF THE UNITED STATES 1–48 (Millennial ed. 2006). In 2003, the census counted 11.92 million Asian-Americans, a nearly eightfold increase. *Id.* at 16. During the same period, the rest of the U.S. resident population increased by less than 40%. *Id.* at 7.

62. *See supra* note 60 and accompanying text.

63. Analysis of the census PUMS data for 2000 shows that 67.5% of Asian lawyers in the United States were under the age of forty, compared to 37% of lawyers of all other races. *See* PUMS, *supra* note 2.

64. *See* Sander, *supra* note 11, at 425–54 (discussing the mismatch effect, through which students whose credentials are much lower than their classmates learn less than they would at a less elite school, lowering their prospects for graduation and bar passage).

a percentage of the number above it), the largest sources of black attrition come from college entrants not graduating and law school matriculates not entering the bar—both, I suspect, greatly aggravated by mismatch effects. In any case, Table 3 reminds us that although blacks have made up 7% to 8% of entering law students for decades now, they make up only 5% to 6% of new lawyers.

Table 3 tells us about the raw percentages of law school graduates potentially available to big law firms, but it tells us nothing about their relative qualifications. Although law firms undoubtedly consider many qualities in choosing new associates, two preeminent factors are school eliteness and law school performance.[65] These two credentials are largely conditioned by racial preferences.[66] A large portion of elite law schools tend to segregate their admissions by race, admitting blacks, Hispanics, Asians and whites in rough proportion to the makeup of the applicant pool, almost regardless of the strength of each pool.[67] The "cascade effect" forces lower-tier schools to choose between imitating these policies or having student bodies with no blacks and few Hispanics.[68] This means that the racial makeup of the top ten, thirty, or fifty schools looks a lot like the racial makeup of the general law school applicant pool. But it also means that there will be large gaps in the entering LSAT scores and undergraduate grades of students of different races attending the same schools. If these factors are predictive of grades—and they are *highly* predictive when applied across large numbers of students[69]—then the law school grades of those receiving particularly large preferences will tend to suffer.

Table 4 illustrates the basic patterns, drawing on the Bar Passage Study.

65. The preeminence of these two factors is suggested both by my earlier regression analysis, *see, e.g.*, *id.* at 464–66 (explaining statistical significance of these two factors in associate hiring as supported by data in Table 7.4), and by the fact that they are the two factors that young associates themselves list as most important in explaining how they got their current job, *see infra* Table 12.

66. *See* Sander, *supra* note 11, at 439–40, 464–66.

67. *Id.* at 411.

68. *Id.* at 410–18.

69. *Id.* at 412 ("LSAT and undergraduate grades can be shown to be far more effective in predicting law school performance . . . than any factor that has been systematically tested.").

Table 4
Grade and Prestige Characteristics of U.S. Law Students, by Race, 1990–92

Characteristic	Whites	Blacks	Hispanics	Asians
(1) Law School Applicants, 1990–91	82.6%	8.0%	4.6%	4.2%
(2) All Law School Matriculates, 1991	83.5%	6.0%	4.5%	4.1%
(3) Law School Matriculates, 30 Elite Schools	79.5%	5.8%	5.6%	6.9%
(4) Median Credentials Gap (Relative to Whites)	0	-177.9	-89.5	-25.8
(5) Median First-Year GPA (Standardized)	0.15	-1.09	-0.62	-0.43
(6) Median First-Year GPA Percentile	55th	14th	27th	33rd

Sources: Figures for Row 1 are from Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions*, 72 N.Y.U. L. REV. 1, 22 tbl.5 (1997). Figures for Rows 2–6 are the author's calculations from the BPS data. The "thirty elite schools" in Row 3 come from Clusters 4 and 5 in the BPS data. The LSAC's cluster methodology is based largely but not entirely on eliteness, so these schools probably include most but not all of the "Top 30" schools determined by other ranking methods. The credentials gaps reported in Row 4 are based on a scaling method that weights applicant's LSAT and UGPA on a 0–1000 scale.

Table 5
Distribution of Law Students/Law Graduates with High GPAs, by Race, from the Bar Passage Study

Sample and Grade Range:	Proportion of Entire Student Pool with the Ascribed Characteristic by Race			
	White	Black	Hispanic	Asian
(1) Top Two Tiers in BPS (Roughly Top-30 Schools), GPAs in Top Quarter of Class	91.1%	0.9%	2.2%	4.0%
(2) Top Two Tiers in BPS, GPAs in Top Half of Class	89.2%	1.2%	3.2%	4.5%

Sources and notes: Rows 1 and 2 are calculated from BPS data for Clusters 4 and 5, which contain thirty law schools significantly more elite, on average, than those in the other LSAC clusters. Actual first-year grade data is available for all those in the database.

Large racial preferences thus produce a regime where blacks and Hispanics are very well represented among the students of elite schools, but at the price of a large credentials gap that translates into low grades. While the elite schools do graduate many underrepresented minorities, they ensure that almost no minorities will graduate from any top-fifty school with high grades.

Since the time of the BPS study, there appear to have been two important changes that would affect these statistics. The number of Hispanic and Asian applicants has increased substantially,[70] increasing their relative share of law school seats, and preferences for Asians have disappeared in many schools, increasing the academic strength of Asian law students relative to others.

C. Hiring Patterns of Large Law Firms

Jobs at corporate law firms are prestigious, highly-paid, and highly sought-after. These firms can therefore be particularly selective in their hiring. Setting aside matters of race for a moment, who do these large firms choose?

For the generation after World War II, there was a simple answer to this question. Elite corporate law firms hired from elite schools. Top New York firms hired three-quarters of their associates from Harvard, Yale, and Columbia.[71] Top Chicago firms hired from these schools along with local elites Northwestern University and the University of Chicago.[72] Top St. Louis firms presumably hired from both the top national schools and the most elite school in their city, Washington University, and so on. These practices usually yielded job candidates who not only were academically strong but also had social pedigrees befitting the firms' profiles of gentility.

In the late 1960s, several things changed more or less simultaneously. The legal profession began its phenomenal growth

70. LSAC data indicates that law school applicants in 1991 included 4,041 Hispanics and 3,711 Asians. Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 20–21, 22 tbl.5 (1997). In 2003, the applicant pool included 7,780 Hispanics—a 93% increase—and 8,059 Asians—a 117% increase. During this same period, applicants from members of all other racial groups rose, in aggregate, less than 4%. Memorandum-No. 03–15 from Robert Carr & Judy Florek, Law School Services, Law School Admissions Council, to Admissions Officers (Dec. 2003) (on file with the North Carolina Law Review).

71. *See* ERWIN O. SMIGEL, THE WALL STREET LAWYER 39 (1964).

72. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 15–16 (1982) (listing these schools among those attended by elite members of the Chicago bar).

surge with the number of lawyers more than doubling from 1965 to 1980.[73] Law school enrollments grew even more rapidly (by a factor of almost four between 1960 and 1980),[74] and admissions became far more selective and numbers-driven at a broad swath of schools.[75] The median academic credentials of students at regional schools like Loyola University of Chicago in 1980 were probably comparable to those of students at national schools like Northwestern University in the early 1960s.[76] This was partly because enrollments at elite schools remained almost unchanged even as dozens of lower-tier schools opened up or expanded.[77]

Since the elite firms were themselves growing rapidly, they could no longer fill their ranks by simply hiring from the most elite schools—and there was no longer so much reason to do so. The number of highly able students was larger and these students were attending a wider range of schools. And with the revolution in social attitudes that occurred during the 1960s, firms no longer placed quite so much emphasis on social status in hiring. The breakdown of norms against Jews during this era betokened a broader breakdown of social snobbery in favor of the pursuit of intellectual horsepower.[78]

73. *See* Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431, 433 (1989). After a period of long stability, the number of attorneys rose from roughly 218,000 in 1960 to 522,000 in 1980, with most of the growth occurring after 1965. *Id.*

74. *Id.* at 445.

75. *Id.* at 463.

76. While only a handful of law schools reported median LSAT scores above 600 in 1969, dozens of schools had medians this high by 1980 (a 600 on the old LSAT scale was comparable to a 160 on the current scale). *See id.* at 463. Admissions at nearly all law schools were only minimally "selective" before 1960.

77. *Id.*

78. The shift documented in Table 6 has been more dramatic for whites than for nonwhites. That is, most of the percentages in the last two columns would be five to fifteen points higher for Asians, Hispanics, and blacks. This is consistent with data in Table 12 showing that fewer whites than nonwhites are likely to think that the reputation of their school was critical in landing a large-firm job. On the other hand, the tendency of contemporary employers, including large firms, to weight grades more heavily than law school eliteness applies with as much force to blacks as to whites. Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963, 1980–81 (2005).

Table 6
Contrasting Hiring Patterns of Major Firms, 1960-Era and 2000-Era

Cohort of Law Schools	Percentage of Young Lawyers Recruited from Specified Sets of Schools by Three Cohorts of Law Firms		
	(1) Large New York Firms, 1950–65	(2) Large New York Firms, 2002	(3) All Other Large Firms, 2002
Top Three	73%	15%	7%
Top Ten	91%	39%	22%
Top Twenty	92%	53%	44%
Top Thirty	96%	72%	52%
Top Fifty	97%	73%	65%

Sources and notes: For Column 1 we examined the 1965 Martindale-Hubbell listings for elite New York firms, defining as elite those New York firms that went on to be members of the AM LAW 100 in 2001. We counted each listed lawyer who had graduated from law school in 1950 or later (for some firms this only included partners). Columns 2 and 3 are based on AJD data not yet available to the public. Column 2 is based on all AJD participants who worked in New York for a firm with 100 or more attorneys. Column 3 is based on all other AJD participants, wherever located, who reported working for a firm of 100 or more attorneys. Nearly all of the attorneys in Columns 2 and 3 are associates. The same set of schools is used as "top ten," "top twenty," and so on, for all three columns, but is based on a weighing of median LSAT in 1997 and academic ranking in 1997; this correlates highly with current *U.S. News & World Report* rankings. "Top three" includes Harvard, Yale, and Columbia, the latter because it has long been a principal feeder of New York elite firms.

I hypothesize that the net result of these shifts was a new hiring calculus among the elite firms. Rather than simply hire from the best schools, the firms began to evaluate the tradeoffs between high grades and school eliteness. Firms discovered that graduates of second-tier or even third-tier schools with top grades were succeeding and often making partner, and over time they gauged and calibrated the mix of grades and eliteness that were sufficient to pass muster and prosper at their firms. The most obvious result was a dramatic broadening of the range of schools from which elite firms drew associates, as shown in Table 6.

In his ethnographic research on lawyers, Professor John Conley summarizes the way large-firm partners describe their associate hiring standard:

> There is an overriding need to ensure that any lawyers who are hired "can do the work." Over the years, the primary means to this end has been the "cut-off," much dreaded by students at all

> but the most elite law schools. Even the largest and richest firms do not have the resources to interview every applicant. To insure that they are spending their time on applicants who can do the work, large firms will interview almost any student at the most prestigious and selective schools, but at the rest only those who rank in a certain percentage of the class. A particular school's cut-off is determined by the firm's perception of the school's competitiveness. Thus, while the mythical Washington firm of Dewey, Cheatem & Howe might talk to any interested student at Harvard, it will interview only the people in the top 10–20 percent of the class at the University of North Carolina, and perhaps only the two or three highest-ranked students at some "lesser" school.[79]

This is not to say that firms up until this point ignored grades in choosing associates. According to Erwin Smigel, the definitive analyst of New York firms in the 1950s and early 1960s, elite firms often had more or less absolute thresholds that associates had to clear to become eligible for hiring.[80] The standard was lower at firms that placed greater emphasis on the social status of associates,[81] but according to the widely imitated "Cravath System" for selecting and training associates, "[t]he recruit should have a good college record but must have a good law school record—B or better; Law Review experience is preferred."[82] (These were the quaint days when a "B" was considered a mark of academic achievement, not a consolation grade.) Forty-two percent of associates at Cravath itself from 1906 to 1948 served on a law review, as did 71% of associates at a large New York firm Smigel analyzed with 1956 data.[83]

If grades mattered significantly to firms fifty years ago, at a time when the "right" social background and school eliteness were usually crucial, grades matter even more in the current era, when firms hire from a far wider range of schools. Using a crude measure of self-reported GPA, the AJD data shows that white law school graduates with GPAs of 3.5 or higher are nearly *twenty* times as likely to be working for a large law firm as are white graduates with GPAs of 3.0

79. John Conley, *Tales of Diversity: What Lawyers Say About Racial Equity in Private Firms*, LAW & SOC. INQUIRY (forthcoming 2006) (manuscript at 16–17, on file with the North Carolina Law Review).

80. *See* SMIGEL, *supra* note 71, at 38–39.

81. *Id.* at 121.

82. *Id.* at 114.

83. *Id.* at 127.

or lower.[84] This difference means, of course, that black and Hispanic candidates, with relatively lower grades,[85] are likely to be greatly disadvantaged in the competition for corporate law jobs.

It turns out, however, that nonwhites—including blacks and Hispanics—do quite well in the competition for new associate positions in corporate law firms. The top rows of Table 7 present two types of data on these patterns. Row 1 shows the racial makeup of summer associates among firms in the "Am Law 100" (roughly, the 100 largest corporate law firms in 2001) over four years from 2000 through 2003. Blacks and Asians are overrepresented among these hires, relative to their numbers among all law students (and among elite law students), while Hispanics are moderately underrepresented. Since the NALP data indicate that nearly all summer associates at these elite firms received offers to return to the firm, it is quite likely that the racial makeup of first-year associates at these firms closely tracks these same percentages. This hypothesis seems borne out by a comparison of Rows 2 and 3 in Table 7. Row 2 simply aggregates the data in Row 1 so that it can be compared with Row 3—data aggregated from NALP reports on the starting jobs of law students graduating from 2001 through 2004.[86] Nonwhites as a group are as represented among the first-year associate classes of large law firms as they are among law students in the United States.

If we compare Row 1 of Table 7 with the data in Table 5, it seems obvious that large law firms must be using fairly substantial racial preferences in hiring new associates. This is particularly clear in the case of blacks. Blacks make up a tiny proportion of law students with high grades. If blacks make up 7% to 8% of law students,[87] 1% to 2% of students with high grades,[88] and 8% of corporate law firm hires,[89] then it is quite likely that the grade

84. *See infra* Table 9 and accompanying text. As I show below, marginal differences in grades seem to matter more in firm hiring patterns than marginal differences in eliteness.

85. *See supra* Table 4 and accompanying text.

86. The slightly smaller proportion of nonwhites in Row 3 reflects, I would guess, the broader sample of firms included (all firms with 100 or more lawyers, rather than the larger AM LAW 100). All the data I have seen indicate that nonwhite representation is closely and positively correlated with firm size.

87. *See supra* Table 3.

88. *See supra* Table 5.

89. *See infra* Table 7.

Table 7
Racial Makeup of Major Law Firms

Specified Group	Proportion of Each Specified Group Which Is:			
	White	Nonwhites		
		Black	Hispanic	Asian
(1) Am Law 100 Summer Associates, 2001–04 Average	77.6%*	8.1%	4.4%	10%
(2) Row 1 for Whites and Nonwhites	76.4%*	21.5%		
(3) Jobs of Law School Grads, 100+ Lawyer Firms, 2001–04 Average, NALP Data	79.9%	20.1%		
(4) Am Law 100 Law Firm Associates, 2002	82.9%*	4.6%	2.9%	9.6%
(5) AJD Associates in Firms 100 or Larger, 2002–03	84.9%	4.7%	2.9%	7.5%
(6) Am Law 100 Law Firm Partners, 2002	95.6%*	1.6%	1.4%	1.4%

Sources and notes: Rows 1, 2, 4, and 6 are calculated from the AM LAW 100 database, *see supra* note 3 and accompany text; Row 3 is from data provided by the National Association of Law Placement, Row 5 is calculated by the authors from AJD data, *see supra* note 2 and accompanying text. Figures for whites marked with an asterisk include all persons not identified as black, Hispanic, or Asian. Row 1 adds to 100.1% due to rounding.

gap between whites and blacks in law school is duplicated in performance once inside the firm. This would only be possible with very large and aggressive racial preferences.

For Hispanics, the data in Tables 5 and 7 imply some use of much smaller preferences. According to Table 5, Hispanics make up 2.2% to 3.2% of students with high grades at elite schools. According to Table 7, Hispanics make up 4.4% of large firm summer associates. The disparity is not very large. It would be reasonable to predict that corporate law firms use modest preferences in hiring Hispanics, and that Hispanics entering these firms have somewhat, but not dramatically, lower grades than whites in the same cohort.

Asians are somewhat similar to the Hispanic case. Asians made up one-tenth of summer associates, a figure greater than their proportion among all law students—just under 7%[90]—but lower than

90. *See supra* Table 3.

their proportion among elite students—nearly 11% by 2002. However, some of the white-Asian credentials gap seems to have persisted in most law schools, and it appears that Asian grades are lower on average than white grades.[91] Asians thus seem somewhat overrepresented relative to their numbers among elite students with good grades. However, another factor is at work with Asians. The data on career plans found in Tables 1 and 2 suggests that of all the major ethnic groups, Asian-Americans are disproportionately intent on pursuing large-firm jobs. This would produce a higher supply of Asian applicants, which would imply that for a given number with the right credentials, a higher proportion of Asian-Americans would find their way into large firms. On balance, the question of whether large firms are using preferences to recruit Asians as summer or first-year associates is indeterminate from existing data.

The last few paragraphs rely on roundabout inferences, but we can test for the existence of preferences directly with multiple regression analysis. Specifically, we can use the AJD data to estimate a young lawyer's chance of working at a large firm given the eliteness of her degree, her grades—and her race. The AJD participants were generally only twenty to forty months into their legal careers when they completed the study's survey,[92] so one might think as a general matter to view their job settings and characteristics as a good approximation of what lawyers are doing right after law school.[93] However, if we consult Table 7 a problem arises. The proportion of blacks, in particular, is much smaller in the AJD (Row 5) than it is among the ranks of summer associates (Row 1). A logical explanation is that by the third or fourth year, there has already been substantial attrition of black associates. The discussion in Part V will illustrate some reasons why this explanation is very plausible. But this means that for blacks at large firms, the AJD sample may be at least somewhat unrepresentative.

Table 8 shows the results of a very simple regression attempting to predict the probability of a lawyer surveyed by the AJD working at a large law firm. The dependent variable is whether a lawyer is

91. At the top thirty law schools (as defined in Table 6), mean cumulative GPAs among graduates in the AJD dataset were 3.36 for Asians and 3.42 for whites, a difference that is weakly statistically significant (two-tailed $p < .10$). Author's calculations based on AJD national sample and Asian oversample.

92. DINOVITZER ET AL., *supra* note 2, at 13.

93. One purpose in surveying lawyers more than a year into their careers was to avoid the complication of clerkships. Many study participants did clerkships, but nearly all of them had completed the clerkships and started their "real" jobs by the time they were surveyed.

working in a law office with 100 or more attorneys (coded as 1) or working somewhere else (coded as 0). About 16% of the entire sample was working in large offices. As one would expect, law school grades and law school eliteness are highly predictive of working at a large firm—the large law firm jobs are so highly coveted that these employers largely have their pick of law school graduates. This is not surprising, since the median salary for these large-firm jobs ($135,000)[94] is more than twice as high the median salary of the rest of the sample ($63,000).[95] Race is also fairly predictive of who gets the corporate firm jobs. Blacks are far more likely to be working at large firms than are other new lawyers with similar credentials. This is consistent with the idea that blacks are receiving large preferences. The preference for Hispanics is smaller but statistically significant, and the coefficient and p-value for "Asian" weakly support the existence of a relatively small preference for Asians.[96]

Table 8
Regression Predicting Employment at a Large Law Office

Factor	Standardized Coefficient	Chi-Square Test Statistic	Chi-Square p-value
Law School GPA	.548	224.41	< .0001
Law School Eliteness	.467	164.74	< .0001
Black	.104	11.89	.0006
Hispanic	.064	5.08	.02
Asian	.047	3.26	.07
Other	-.028	0.77	.38
Number of Observations: 3,469		Somers's D: .614	

Source: Author's computation based on AJD national sample and racial oversamples.
Note: In Tables 8–10, 12, and 15–21, the universe of "large law offices" are those for which the respondent reports 100 or more attorneys working at his/her office.

I ran a similar regression using the BPS survey of graduating law students. This source has the advantage of measuring student jobs immediately upon graduation rather than two to four years later, as in the AJD.[97] In this regression (which has nearly as many observations

94. Author's calculation from AJD national sample.
95. *Id.*
96. A positive Asian coefficient is of course also consistent with a proportionally stronger interest among Asian-Americans in working at large firms.
97. *See* WIGHTMAN, *supra* note 20, at 4–5 (referencing the Third Follow-Up

as the AJD regression in Table 8), the standardized coefficient for blacks was substantially higher (.18) and significant at the .0001 level. This is consistent with the idea that the preference given blacks is particularly pronounced at the time of graduation, and erodes somewhat through attrition by the second to fourth year.[98]

Table 9 gives us yet another window into hiring patterns, by measuring the likelihood that someone with a GPA in a given range will work at a large law firm. Consider first the column for whites. The first row of data tells us that of all the whites in the AJD sample, 32.1% of those who reported law school GPAs of 3.5 or higher also reported working in a law firm office with 100 or more attorneys. This data was the basis of my earlier remark that a high-GPA white was more than twenty times more likely to work in a large firm than a white with a low GPA.[99] Comparing the column for whites with the column for blacks, it is clear that in any given grade range blacks are roughly twice as likely as whites to be working in a large firm setting. This comparison seems to confirm both the tendency of large firms to give strong preferences to blacks in hiring as well as the high level of interest black graduates have in corporate-firm jobs. Once again, the BPS shows the same patterns even more emphatically.[100]

For Hispanics, the data in Table 9 is consistent with what I inferred from Tables 7 and 8: Hispanics also receive significant preferences, but on a smaller scale than blacks. Table 9 suggests preferences for Asians as well, but there are at least two reasons to be cautious about this conclusion. First, we know Asians are especially

Questionnaire administered to students four to six months after graduation). Note two disadvantages of the BPS data: the less-than-stellar response rate, *see* text accompanying note 26, and a dependent variable that broadly includes all recent graduates working in private firms with *fifty* or more attorneys.

98. The stronger result in the BPS might also reflect the use of school-reported, rather than self-reported GPA. However, in the BPS regression the coefficients for Asians and Hispanics were roughly flipped from those in Table 8, with the Asian coefficient significant at the .02 level and the Hispanic coefficient not quite significant. The Asian BPS result is plausibly related to the wider use of admissions preferences for Asians in the early 1990s, at the time of the BPS.

99. *See supra* note 84 and accompanying text.

100. The BPS survey of graduating students allows me to calculate the proportion of blacks and whites in various grade ranges who reported securing jobs at private firms with fifty or more lawyers. Among those with standardized grades in roughly the top half of the grade distribution, 37% of blacks and 26% of whites reported jobs in large firms. Among those with standardized grades in the range of -1.375 to -0.625, of 1.625 or higher, 12.4% of blacks and 6.7% of whites reported jobs in large firms. Among those with standardized grades of -1.375 or below, 10% of blacks and 0% of whites reported having jobs in large firms. Author's calculations from BPS Third Follow-Up Survey data.

interested in large-firm jobs,[101] so there may simply be many more Asians at each grade level who want to work in large firms. Second, we know that Asians are more highly concentrated at elite schools than the other three ethnic groups,[102] so this grade data, unadjusted for school quality, may be more misleading for Asians than for other groups.

Table 9
Proportion of New Lawyers Working at Law Offices with 100 or More Attorneys by Law School GPA

GPA Range	Attorney Race			
	White	**Black**	**Hispanic**	**Asian**
3.5 or Higher	32.1%	50.0%*	47.5%*	37.5%
3.25–3.49	16.5%	30.2%**	25.0%	33.3%***
3.00–3.24	7.0%	16.3%***	13.3%**	11.9%
Under 3.00	1.5%	4.6%**	1.2%	1.7%
Total	15.4%	15.6%	16.8%	21.4%
Sample Size	*2,509*	*282*	*262*	*281*

Source: Author's computation based on AJD national sample and racial oversamples.
Note: Individual Chi Square tests of whites in comparison with each of the other race groups by GPA group.
* = p<.10; ** = p<.05; ***= p <.01.

Table 10
Grade Distribution for New Lawyers Working at Large Law Firms (Offices of 100+)

GPA Range	Attorney Race			
	White	**Black**	**Hispanic**	**Asian**
3.75 or Higher	21%	2%	7%	5%
3.50–3.74	37%	23%	36%	35%
3.25–3.49	28%	30%	27%	42%
3.00–3.24	12%	32%	27%	17%
Under 3.0	2%	14%	2%	2%
Overall Average	*3.53*	*3.29****	*3.41**	*3.44**
Sample Size	*386*	*44*	*44*	*60*

Source: Author's computation based on AJD national sample and racial oversamples.
Note: GPA is self-reported by respondents. P-values based on individual Chi Squares in comparison to the white race group.
*=p<.05; **=p<.01; ***p<.001.

101. *See supra* Table 2.
102. *See supra* Table 7.

Table 10 is based on the same data in Table 9, but it is presented in a slightly different way, measuring the proportion of AJD lawyers working at large law firms who fall into each grade category, and estimating the average GPA of each group. These data show the familiar hierarchy: whites have the highest grades, followed by Asians, Hispanics, and blacks.

These differences may seem relatively modest, but the black-white gap amounts to a full standard deviation. More importantly, the figures in Tables 8, 9, and 10 almost certainly underestimate the grade differentials among entering associates—particularly the black-white gap. Note that even by the period between the second to fourth year stage of the AJD participants, the black proportion among

Table 11
Median Grades For Law Graduates In and Out of Large Law Firms
Bar Passage Study and UMLS Alumni Survey

	Median Standardized GPA (Sample Size)		*Black-White GPA Difference (in Standard Deviations)*
	Whites	**Blacks**	
BPS Results (using first-year GPAs) for Thirty Elite Schools			
(1) Employed and Working at Firm with 50+ Attorneys	.71 75th percentile (175)	-.91 18th percentile (48)	*-1.62*
(2) Employed but Not Working at Firm with 50+ Attorneys	.20 57th percentile (365)	-1.11 13th percentile (125)	*-1.31*
UMLS Alumni Results (using cumulative GPAs)			
(3) Employed and Working at Firm with 50+ Attorneys	.42 66th percentile (1,988)	-.96 15th percentile (84)	*1.38*
(4) Not Working at Firm with 50+ Attorneys	.09 52nd percentile (7,170)	-1.56 7th percentile (619)	*1.65*

Sources and notes: Rows 1 and 2 are author's calculations based on BPS data for Clusters 4 and 5, using data from the Third Follow-Up Questionnaire as well as GPA data. Of 620 blacks employed and responding, 15.6% were employed at firms with 50+ attorneys; of 1,706 whites responding, 18.9% were employed at firms with 50+ attorneys. Rows 3 and 4 are author's calculations based on the Michigan alumni surveys (5^{th} year), with respondents describing their first job after law school. Of 703 blacks responding, 11.9% of the first jobs were at firms with 50+ lawyers; of 9,158 whites responding, 21.7% of the first jobs were at firms with 50+ lawyers.

associate cohorts has fallen from 8% to about 5%.[103] It would not be surprising if data on new associates showed larger gaps. Table 11 explores this idea with data from the BPS and the UMLS Alumni Survey. As expected, the black/white grade disparities among new associates are even larger in both the BPS and UMLS datasets than in the AJD data. Not surprisingly, GPA thresholds for those going into large firms were lower at the elite University of Michigan than at the broader cross-section of schools represented in the BPS data. But in both surveys, whites going into large firms had grades substantially above class averages. Conversely, blacks going into large firms tended to have grades well above those of their black classmates, but far below the medians at their schools. In other words, blacks entering large firms have generally performed less strongly in terms of GPA in law school relative to their white counterparts.

Nonwhite associates seem well aware that racial preferences exist. The AJD study asked second- and third-year associates how important they thought various factors were in their employer's decision to offer them a job (where 1 was "not at all important" and 7 was "extremely important"). *Fifty-six percent* of the black associates in large law offices thought that their race or ethnicity was relatively important (marking a 5, 6, or 7 on this scale) in leading to a job offer, while 26% thought it was relatively unimportant (a 1, 2, or 3). As Table 12 shows, Hispanics were much less likely to think race was important, Asians even less likely, and whites overwhelmingly thought their race was irrelevant. Out of twelve factors listed, blacks going to large firms rated their race as the fourth most important factor leading to a job offer (after school prestige, law school grades, and summer clerkship at the firm)—far more important than such factors as "prior work experience" or "recommendations."

It is important to note that the patterns I have been discussing—the use of substantial racial preferences by large law firms and the consequent qualification gaps among associates of different races—are strongly correlated with firm size. The megafirms captured by the Am Law 100 seem most intent on racial representation among summer and incoming associates; large firms somewhat less so, medium-sized firms still less so, and small firms with fewer than thirty

103. *See supra* Table 7.

Table 12
Factors in Hiring as Assessed by Large Firm Associates, by Race

	"How Important Do You Believe Each of the Following Factors Was in This Organization's Decision to Make You a Job Offer?" % Indicating 5, 6, or 7 on a Scale Where "1" = "Not at All Important" and "7" = "Extremely Important"			
	White	**Black**	**Hispanic**	**Asian**
Reputation of My Law School	73%	92%*	82%	83%
Law School Grades	88%	58%***	76%	90%
Participation in L.J. or Moot Court	61%	43%	61%	59%
Reputation of My Undergraduate College	38%	39%	32%	40%
Prior Work Experience	45%	46%	50%	50%
Recommendations of Faculty	12%	4%	4%	16%
Personal Connections	15%	8%	13%	15%
My Race/Ethnicity	2%	56%***	33%***	29%***
My Gender	6%	29%***	21%	13%**
My Physical Appearance	15%	25%	19%	20%
Sample Size	*262*	*36*	*34*	*42*

Source: Author's calculations from AJD data.
Note: P-values based on logistic regression in comparison with the white racial group.
*=p<.05; **=p<.01; ***p<.001.

lawyers seem to rarely use racial preferences.[104] I have not tried to study why this should be, though it seems clear that the largest firms are under unusual scrutiny from the legal press, clients, and the public as they struggle to become more racially diverse.

IV. THE ROLE OF GRADES

I have shown that employers in general, and large firms in particular, pay great attention to grades in hiring.[105] But why exactly do they do so?

One could argue that employers should care only about eliteness. Law schools sort applicants by credentials, and the applicants tend to go to the most elite school that accepts them. So if employers are interested in some sort of general filter for cognitive skills, law schools are already providing this. If the elite schools provide the highest quality education and the best set of future contacts, then employers would arguably be maximizing a range of good qualities in their new lawyers by hiring graduates from the most elite schools they can. Put differently, when a law firm hires a high-GPA student from a second-tier school over a middle-GPA student at a first-tier school, the firm is probably hiring someone with a lower LSAT score, lower undergraduate grades, and fewer powerful contacts made at school.[106] Why do this?

104. If one replicates the regression reported in Table 8, using AJD data, for associates earning less than $100,000 per year and employed at law firms with fewer than thirty attorneys, there is no statistically significant difference between black and white earnings. If one replicates the regression with BPS data, *see supra* note 98, for law graduates going to work in firms with fewer than fifty lawyers, there is again no statistically significant difference between black and white earnings. Author's calculations based on AJD and BPS data. John Conley discusses how the pressures on small- and medium-sized firms are very different from those facing large firms, concluding that these smaller firms will rarely take "risks," one of which is the risk of forming a partnership "with people whose backgrounds are [not] similar to their own" due to the fact that discord among a small group "has the potential to cause breakup." *See* Conley, *supra* note 79, at 15–16, 21–22.

105. *See supra* notes 78–85 and accompanying text.

106. Consider the following example from the AJD data. Study participants who graduated from "top ten" schools and had "average" grades at their schools—one-half of a standard deviation above or below the school mean—had a mean standardized LSAT score of 1.18, and mean standardized undergraduate grades ("UGPA") of 0.71. For participants who attended schools ranked thirtieth to thirty-ninth, with law school grades one-half to 1.75 standard deviations above their school means, average standardized LSAT scores were 0.74 and average standardized UGPAs were 0.40. The middling students at more elite schools thus had higher LSATs and UGPAs than the high-performing students at only somewhat lower-ranked schools. (The difference in LSAT scores is significant at the .01 level; the difference in UGPAs is significant at the .06 level (two-tailed)). Author's calculations from AJD data.

I can think of two possible answers. One possibility is that employers believe that law school grades provide good information about the skills that students acquire in law school and that these skills are themselves valuable. Students who have successfully learned from their law school classes how to spot legal issues, understand the interaction of court precedents, and write lucid, concise essays will tend to receive higher grades and, the employers must believe, will perform many of the typically important tasks of new law firm associates well. These employers must believe that since the background credentials of law students do not (by any means) perfectly predict their individual level of achievement in law school, law school grades are an important and unique source of information to the firm.

A second possibility is that high law school grades simply signal to employers qualities that they prize. As Michael Spence famously argued thirty years ago, students may pursue a particular credential not because of its intrinsic worth, but simply because they are able to do so, and their ability to achieve the credential signals to employers that they have some valuable quality.[107] Large firms might be especially interested in recruiting lawyers who strive intensely for any prize dangled in front of them, theorizing that the sacrifices and effort necessary to compete successfully for high grades might signal qualities valuable to the firm in the competition among associates for partnership.

One might also argue that employers do not really view grades as predictive of much of anything. "They have to sort people some way, and grades are the easiest way to draw lines," paraphrases this account. I find this argument unpersuasive. Employers are clearly passing up more elite students with lower grades to hire less elite students with higher grades.[108] Corporate law firms pay very high salaries so that they can have their pick of candidates. If they considered a wide range of law students to be essentially fungible, then much of the rationale for high starting salaries goes away. As I have noted, there are plenty of plausible reasons to prefer graduates of more elite schools.[109] Employers must therefore believe that law school grades are predictive of qualities they prize in new lawyers.

A reader willing to concede that employers really do care about grades might nonetheless think this emphasis on grades is an

107. A. MICHAEL SPENCE, MARKET SIGNALING: INFORMATION TRANSFER IN HIRING AND RELATED PROCESSES 10 (1974).

108. *See supra* Table 6.

109. *See supra* notes 105–06 and accompanying text.

irrational prejudice. Alternatively, one might think that grades could be useful for one's work as a law clerk or starting associate, but believe that the qualities grades might measure quickly become irrelevant as one's career progresses. There are, after all, a multiplicity of skills that go into being a good lawyer: social skills involved in negotiating with opposing counsel or cultivating new clients; management skills in supervising other attorneys and support staff; speaking skills; leadership qualities; and those indefinable qualities of judgment and common sense. If grades are relied upon as hiring criteria (as they clearly are), but have little to do with associate skills and even less to do with the long-term strengths of a mature lawyer, then we would expect grades to be correlated with the initial positions of attorneys, but to become increasingly irrelevant and unpredictive as careers progress.

Consider the following thought experiment. An elite corporate firm called Smith & Jones hires a cohort of twenty first-year attorneys from National Law School ("National"), a strong law school with a national reputation that dominates the local legal market. Smith & Jones generally aims to hire students from the top third of National's class, but it does not apply this rule inflexibly: It hires students with weaker grades who have other appealing attributes such as winning personalities, obvious leadership skills, or strong performance in moot court competitions. It also hires a couple of National students with lower grades who are closely related to senior partners at the firm. This group of associates as a whole has some average GPA and associated class rank—let us say that on average these students rank at the sixty-fifth percentile of their class. If grades are unrelated or correlate weakly with performance as an associate, we would expect that as attrition sets in, the lawyers hired solely because of their high GPAs will tend to leave or be forced out, while the other lawyers hired because of readily observable qualities independent of their GPAs will tend to survive. Over time, the average GPA of the cohort remaining at Smith & Jones will tend to fall.

This would also be the outcome if grades correlated well with qualities useful to first-year associates (e.g., research and writing background memos) but did not correlate at all with the qualities of an effective partner. Here, too, the average GPA of the surviving cohort should tend to fall over time.

If, on the other hand, the firm has done an excellent job of balancing the academic and non-academic strengths of individual applicants, so that each new hire has a roughly equal chance of thriving at the firm, then we would expect the average GPA of the

surviving cohort at Smith & Jones to remain fairly constant over time. This outcome would imply that grades effectively predict the strong performance of both young and mature lawyers, at least as well as the other judgments the firm is able to make based on other qualities observable from resumes and interviews.

A final possibility is that grades are an exceptionally good predictor of performance in both the short and the long term—better than other subjective judgments the firm can make based on interviews and resumes. The firm might be aware of this and simply be unable to hire as many top-GPA students as it would like. If grades are a strong predictor of long-term performance, then the average GPA of the Smith & Jones cohort should rise over time, up to and through the culling of associates for promotion to partnership.

One way of testing these ideas would be through an examination of the personnel records of individual firms, but so far as I know no such study has ever been conducted. The large, cross-sectional databases on lawyers—such as the BPS[110] or the AJD[111]—capture only a moment in time near the beginning of lawyer careers. In fact, the only sources I know that track lawyers over time and well into their careers are the two Michigan datasets described in Part I—the UMLS[112] and the PDS.[113]

The UMLS asks participants about both their first jobs out of law school and their current job.[114] Respondents identify both the type of setting in which they worked (e.g., law firm vs. government agency) and the number of lawyers at their setting.[115] It is thus a fairly straightforward matter to identify which alumni worked at law firms with fifty or more attorneys after graduation, five years after graduation, and fifteen years after graduation. The first group will generally represent starting associates, the second group senior associates, and the third group firm partners.

Table 13 summarizes the results of this analysis. Michigan graduates who go into large firms have significantly higher grades than their classmates; about half of the white graduates at large firms have grades in the top third of the class. The same cohort five years

110. WIGHTMAN, *supra* note 19 and accompanying text.

111. DINOVITZER ET AL., *supra* note 2; *supra* notes 27–31 and accompanying text.

112. UMLS, *supra* note 39; *supra* notes 37–38 and accompanying text.

113. PDS, *supra* note 40 and accompanying text.

114. Section C, titled "Work Since Law School," asks respondents eighteen questions regarding their legal employment immediately following graduation from law school and their employment at the time of the survey. UMLS, *supra* note 39.

115. *Id.*

later is somewhat more stratified by grades, and alumni fifteen years into their careers are still more stratified. The data is consistent with the strongest of my three hypotheses about the usefulness of grades: Attorneys with higher GPAs are more likely to survive the large-firm competition for partnerships.[116]

Table 13
Cohort Grades in the Michigan Alumni Surveys
(Whites Only)

Point in Career When Attorney	Median Grade Percentile of Those Working in Firms with 50+ Attorneys	Median Grade Percentile of All Other Alumni (Sample Size)	Difference in Standardized Grades (and Significance Level)
Starting Position Based on 5th-Year Survey	66th percentile (1,988)	52nd percentile (7,170)	0.34***
5 Years After Graduation	68th percentile (1,844)	51st percentile (7,314)	0.41***
15 Years After Graduation	72nd percentile (1,108)	50th percentile (8,900)	0.55***

Source: UMLS (5th and 15th year), author's calculations.
***=p<.0001 based on individual t-tests for rows (comparing those at large firms with all other alumni). The mean difference between 5th and 15th year surveys for whites working at firms with 50+ attorneys is statistically significant at p<.05 using a between group comparison. Because the starting position was not between groups relative to the 5th and 15th year groups, significance levels for this time period could not be computed within the same test.

Table 14 provides a broader look at the same question by using the PDS data to summarize a series of regression analyses attempting to predict the incomes of Michigan alumni at different stages of their careers.[117] The survey was conducted in 1997 and 1998 and included

116. This seems to me a straightforward—but in many ways crude—approach to this data. It would probably be better (though more subjective) to examine individual career paths of alumni to understand how grades affected longevity in corporate firms. I think this analysis is biased against a finding that grades are important in one significant way: The size of firms has grown rapidly over the years covered by these surveys, and lawyer GPA is positively correlated with firm size (among all law firm associates participating in the AJD, the correlation between reported law school GPA and the number of lawyers at the respondent's firm was 0.42 ($p < 0.0001$)). Author's calculations from AJD national sample. The pool of firms that have fifty or more lawyers is thus more elite at time T than at time T + 15, and the earlier pool, ceterus paribus, will tend to have higher-GPA attorneys. The findings in Table 13 are swimming upstream over and above this current.

117. These regressions are patterned after Model 2A, Table 31, in Lempert et al., *supra* note 41, at 478. Table 14, however, breaks the respondents into three cohorts, while the Lempert piece added variables for years since graduation.

alumni from the classes of 1970 through 1996, so those in the 1990s cohort would have practiced from one to eight years at the time of the survey, those in the 1980s cohort from nine to eighteen years, and those in the 1970s cohort more than eighteen years.

Table 14
OLS Regression Predicting Logged Income of Michigan Alumni Cohorts in PDS
(Standardized Coefficients Shown)

Independent Variable	**1970s Cohort**	**1980s Cohort**	**1990s Cohort**
Age at Graduation	-0.044	-0.096	-0.028
Male	.145*	.130*	.088
Race			
Black	0.096	-0.033	0.113
Asian	-0.041	-0.058	0.121
Hispanic	0.042	0.002	0.040
American Indian	0.011	-0.016	0.045
Index	-0.128	-0.126	-0.080
Undergraduate Major			
Humanities	0.111	-0.017	0.002
Natural Science	-0.048	0.022	-0.056
Business	0.097	0.128*	0.052
Engineering	-0.037	0.147**	-0.022
Other	0.065	0.044	0.010
Law School Performance			
Standardized GPA	0.289***	0.257**	0.354***
Job Sector			
Business	0.199**	0.065	0.181**
Government	-0.192**	-0.164**	-0.240***
Legal Services and Public Interest	-0.129*	-0.158**	-0.175**
Education	-0.148*	-0.201**	-0.057
Other	-0.147*	-0.092	-0.075
Sample Size	262 Adj. R-Square=.198	306 Adj. R-Square=.199	271 Adj. R-Square=.201

Source: UMLS Professional Development Survey.
*=p<.05; **=p<.01; ***=p<.0001

Law school grades are, by a wide margin, the most important determinant of earnings among the Michigan alumni. The standardized coefficients for these alumni are larger and more statistically significant than any other explanatory variable in all of

the three equations. This means, to use the 1970s cohort as an example, that the income of a lawyer in his late forties or fifties is influenced more heavily by his law school grades than by whether he chose to work in the private sector or the public sector, by his gender, and certainly by his race—the race variables are not statistically significant. Although the coefficients on grades are slightly lower for the older cohorts, this seems inevitable since legal careers become far more heterogeneous as they progress. Some students with very high grades, for example, will migrate into relatively low-paying academic jobs after a few years of practice. Despite this fact, the salience of grades in the earnings regressions for all three cohorts is very consistent with the idea that law school grades are, at the very least, correlated with skills or qualities that continue to be relevant to effective performance throughout a legal career.

In short, grades matter. The importance firms attach to grades is rational, so far as we can tell from the data, both for the short-term skills of associates but also for long-term qualities related to success at the firm. The much lower grades that result from aggressive racial preferences would therefore logically pose a substantial handicap for minorities entering large firms.

V. INSIDE THE FIRM

I have painted a fairly clear picture of who arrives at the large law firms and under what circumstances. We would now like to understand what happens to associates once they are inside the firm. The AJD dataset is a rich source for studying these questions, asking new lawyers not only about many different aspects of their jobs,[118] but also providing data for the entire universe of associates,[119] allowing us to directly compare the experience of different groups rather than trying to infer differences by examining one group. However, the weakness of the AJD is its relatively small sample size. Although the entire sample includes some 4,500 attorneys, there are fewer than 700 participants who worked in private law offices of more than 100 attorneys at the time of the survey,[120] yielding samples of twenty-eight to sixty-six for blacks and Hispanics (depending on the question) and thirty-seven to eighty-six for Asians. Readers should keep in mind that small differences in group percentages are unlikely to be statistically robust.

118. *See* DINOVITZER ET AL., *supra* note 2, at 31–38.
119. *Id.* at 19–21.
120. *Id.* at 25–29.

In addition to comparing the perceptions of the four major racial groups, I have included data on white women (breaking down white responses by gender). Gender provides a valuable additional dimension for understanding law firm dynamics. Women are plausibly subject to some of the same stereotypes that might be applied to racial minorities about business acumen, suitability for dealing directly with clients, and "star" potential. Unlike the nonwhite groups, however, women at large firms have no GPA disadvantage relative to men. On the contrary, women at large law offices in the AJD sample report slightly higher average grades than do men (3.54 vs. 3.51). By comparing the experiences and frustrations of each group, I seek to create a series of issue-by-issue slices of firm life from the perspective of several demographic groups—a process that should cumulatively illuminate the treatment each group receives.[121]

A. General Assessments of Satisfaction

The AJD asked participants to evaluate a wide range of particulars in their work environment, but it also asked a few global questions. The most general evaluative question was this: "How satisfied are you with your decision to become a lawyer?"[122]

Although white women seem marginally more satisfied than white men, and minorities seem marginally less satisfied than white men, none of these differences are statistically significant. On the whole, Table 15 yields strikingly similar patterns across all five groups. Compare this with responses to another satisfaction question, aimed at assessing the respondent's current job: "If the decision were up to you, approximately how much longer would you like to stay with your current employer?"[123]

121. An important simplification in the analysis that follows is that I generalize about each nonwhite group without regard to gender. I do this for two reasons. First, the narrative and analysis would become unwieldly if I tried to discuss eight distinct groups rather than five. Second, the sample sizes for the nonwhite groups would become untenably small if broken down further by gender. My own inspection of the data suggests that there are probably important differences in the large-firm experiences of minority men and minority women, well worth more careful analysis in a separate work. For my purposes, the important point is that both minority men and women report experiences different from whites in the ways highlighted in this Section.

122. This is question number thirty posed in the AJD questionnaire. American Bar Foundation, After the JD Questionnaire (unpublished survey) (on file with the North Carolina Law Review).

123. This is question number thirty-one posed in the AJD questionnaire. *Id.*

Table 15
Satisfaction with Decision To Become a Lawyer
AJD Attorneys in Large Law Offices, by Race

	Proportion of Respondents				
	White Men	**White Women**	**Blacks**	**Hispanics**	**Asians**
Extremely or Moderately Satisfied	71%	74%	70%	71%	67%
Extremely or Moderately Dissatisfied	15%	14%	17%	21%	15%
Sample Size	*281*	*213*	*66*	*62*	*86*

Source: AJD, national and racial oversamples, author's calculations.
Note: Nonresponsive answers excluded. Individual Chi Square tests showed white men not to be statistically different from the white women, Asian, black or Hispanic groups at p<.05.

Table 16
Plans to Move On or Stay
AJD Attorneys in Large Offices, by Race

How Long Attorneys "Would Like" To Stay with Current Employer	Proportion of Respondents Giving Each Answer				
	White Men	**White Women**	**Blacks*** **	**Hispanics***	**Asians***
Less than One Year or "Already Looking for Another Position"	20%	19%	40%	34%	32%
One to Two Years	25%	29%	25%	29%	28%
Three to Five Years	20%	24%	24%	18%	21%
More than Five Years	35%	28%	11%	19%	20%
Sample Size	*271*	*206*	*63*	*62*	*82*

Source: AJD national sample and racial oversamples, author's calculations.
Note: Nonresponsive answers excluded. Individual Chi-square tests of white men in comparison to each of the other four groups found significance levels indicated.
***p<.001; **p<.01; *p<.05.

The differences here are pronounced and significant. Blacks are far less likely than whites to want to stay in their current job for very long, and far more likely to already be looking for another position. Hispanics and Asians are less disaffected than blacks, but substantially less likely to plan on sticking around than are whites. White women tend to be a little less tethered to their current jobs than white men, but the differences are minor and not statistically significant.

Why do a large proportion of the attorneys at these large firms plan to leave well before any decisions are made about partnerships? It is plausible that some associates simply decide to leave once they determine that they are not on the "partnership" track, either because they want to better position themselves with another employer or because they have no interest in "hanging on."[124] But at least part of the explanation should lie in particular areas of frustration with the firm. The AJD asked respondents to indicate "What changes would you most like to see in your job?"[125] and Table 17 details the most common responses.

Table 17 contains a lot of data and is probably consistent with more than one theory regarding why associates leave before partnership decisions are made. Comparing white men and white women, I find it striking that women are consistently less likely to seek changes in the work environment itself (items 3–6), but consistently more likely to seek less intrusion of the firm into the rest of their life (items 1, 2, and 7). This suggests that white women at large firms feel satisfied with their work and the respect they are accorded, but have concerns about reconciling a demanding firm job with their private life. Nonwhites—especially blacks—exhibit a striking concern over the absence of mentoring and training in their jobs, relative to white men. This strongly suggests that they are not receiving the kind of assignments, challenges, or education they perceive as the norm in the firm.

124. *See* SMIGEL, *supra* note 71, at 79 ("The longer an associate stays, the greater the necessity for him to decide whether he has a real chance of being asked to join the firm. If he feels his chances are poor, he must ask himself when is the best time to leave. It is generally agreed that this period must come before the lawyer loses his attractiveness to another law firm or to a corporate client, and before his colleagues feel he has been passed over.").

125. This is question number eighteen posed in the AJD questionnaire. American Bar Foundation, *supra* note 122.

Table 17
Changes Associates Would Most Like To See in Their Jobs
AJD Attorneys in Large Offices, by Race

Specific Change:	Proportion of Respondents Giving Each Answer				
	White Men	White Women	Blacks	Hispanics	Asians
(1) Fewer Hours	43%	55%*	51%	53%	51%
(2) Less Pressure To Bill	44%	51%	65%**	50%	53%
(3) More/Better Mentoring by Senior Attorneys	51%	47%	70%**	72*%	63%
(4) More/Better Training	37%	33%	54%*	47%	51%
(5) Greater Opportunity To Make Decisions on Matters I'm Working on	35%	20%**	32%	41%	35%
(6) Greater Opportunity To Shape Future of the Firm	26%	16%*	22%	22%	26%
(7) More Accommodation by the Firm of My Personal Life	35%	37%	38%	41%	44%
Sample Size	*127*	*119*	*37*	*32*	*43*

Source: AJD national sample and racial oversamples.
Note: Nonresponsive answers excluded. P-values based on logistic regression in comparison to white men for each row.
*=p<.10; **=p<.05.

B. Workload

Although the legal press abounds with stories of associates working around the clock, and though the AJD respondents do indeed often complain about the number of hours they put in,[126] the median workweek for these large-firm associates is fifty hours—substantial but hardly Herculean.[127] Table 18 shows how workloads and perceived responsibilities vary across our five demographic groups.

126. *See supra* Table 17.
127. DINOVITZER ET AL., *supra* note 2, at 33 (comparing median fifty-hour work week reported in the study with the forty-hour mean of the typical, full-time U.S. employee).

Table 18
Workload Statistics for AJD Attorneys in Large Offices, by Race

Workload Characteristics	Mean Response for Each Group (Plus Median in Row 5)				
	White Men	**White Women**	**Blacks**	**Hispanics**	**Asians**
(1) Hours Expected by Firm To Bill in Typical Week	41.1	41.7	42.0	43.2*	42.3
(2) Hours Expected by Firm to Work in Typical Week	49.6	49.7	49.2	51.1	50.4
(3) Hours Actually Worked Last Week	50.8	49.6	48.8	51.6	50.4
(4) Worked on Nine or More Matters over Past Six Months	59%	57%	33%*	38%	50%
(5) Median (Mean) Pro Bono Hours over Past Year	20 (56)	20 (52)	43 (87)	40 (68)	10 (45)
Sample Size	*133*	*122*	*36*	*34*	*42*

Source: AJD national sample and racial oversamples, author's calculations.
Note: P-values based on logistic regression in comparison to white men (for Rows 1–4) or based on t-test comparisons of the means (Row 5).
*=p<.05.

Perceptions of workload are similar across gender and racial lines, but blacks and Hispanics report working on substantially fewer assignments than Asians and especially whites. This report would not be surprising if blacks and Hispanics were given more ambitious assignments than other groups—but as we will see, the opposite seems to be the case.[128] Rather, the assignment volume suggests a pattern of "benign neglect" for many minorities, especially blacks. Low assignment volume also helps explain why a major source of black dissatisfaction is the pressure to bill. While not unhappy about the volume of work, many blacks may feel caught between the need to bill a specified number of hours and the absence of enough assignments to make those billings feasible.

C. Content of Work

After asking respondents how many matters they had worked on over the past six months, AJD asked them to describe what proportion of those matters could be characterized in particular ways

128. *See infra* Table 19.

(e.g., "On how many matters were you responsible for keeping the client updated on the matter?")[129] with possible responses of "none," "some," "half," "most," "all," and "not applicable." These questions (tabulated in Table 19) collectively provide us with a sense of what the attorneys actually did. Some activities, such as keeping clients

Table 19
AJD Associates' Characterization of Job Assignments They Have Worked on Over Past Six Months, for Large Law Offices, by Race

Characterization of Work on Assignments of Past Six Months	Proportion of Respondents Giving Answer Indicated in Parentheses				
	White Men	**White Women**	**Blacks**	**Hispanics**	**Asians**
(1) Responsible for Keeping Client Updated ("Half" or More)	47%	47%	31%*	32%	43%
(2) Involved in Formulating Strategy ("Half" or More)	67%	62%	44%**	36%***	51%*
(3) Handling Entire Matter on Your Own ("Some" or More)	53%	53%	33%**	35%*	48%
(4) Traveling To Meet With Clients, Interview Witnesses, or Make Court Appearances ("Half" or More)	23%	25%	25%	13%	24%
(5) Assigning or Supervising Work of Other Attorneys or Paralegals ("Half" or More)	25%	28%	31%	24%	31%
(6) Spending 100+ Hours Reviewing Discovered Documents/Performing Due Diligence on Prepared Materials ("Some" or More)	49%	47%	71%**	58%	53%
(7) Work Limited to Routine Research/Memo Writing ("Some" or More)	76%	70%	83%	88%	74%
Sample Size	*128–133*	*115–121*	*35–36*	*31–34*	*38–43*

Source: AJD national sample and racial oversamples, author's calculations.
Note: Nonresponsive answers excluded. P-values based on logistic regression in comparison to white men.
*=p<10; **=p<.05; ***p<.01.

informed and helping to formulate strategy, indicate high levels of responsibility and trust in the associate. Other activities, such as

129. This is a slight rephrasing of question number 16.a. on the AJD questionnaire. American Bar Foundation, *supra* note 122.

reviewing discovered documents, performing due diligence, and "routine research and memo-writing," indicate projects where an associate is given minimal responsibility.

These responses suggest some fairly dramatic differences in the content of associates' work. Rows 1–3, which imply a high level of confidence by partners in the individual associate, show almost no difference between white men and white women, but a large difference between whites on the one hand and blacks and Hispanics on the other; the latter groups are far less likely to be vested with major responsibility in a case. When we consider that blacks and Hispanics are also handling fewer cases, and that they are spending more time on pro bono matters—where they *are* likely to have full responsibility—then the racial differences are even more dramatic. This finding is reinforced by the patterns in Rows 6–7. The type of work described in Row 6 can be crucial in some cases, but plowing through reams of discovered documents or reviewing prepared documents for particular types of regulatory compliance is usually a highly-paid form of grunt work. Yet black and Hispanic associates are more likely to spend their time doing it. All associates sometimes have minor roles on particular matters (Row 7), but again, black and Hispanic associates are relegated to these minor roles more often than whites. Note that white women compare favorably here with white men—they may be slightly less likely to be assigned rote or minor tasks. The pattern for Asians on many of the Table 19 measures seems poised between the "white" pattern and the "black/Hispanic" pattern.

D. Informal Activities

AJD also asked large-firm associates about their other roles in the firm and as attorneys. Table 20 vividly suggests some differences in how the various groups "networked."

Once again, the similarities between the responses of white women and the responses of white men are striking. White women appear to be just as plugged into the firm's "old boy" network as are their male counterparts. Black associates do not appear to be socially isolated from their peers and are more likely to be involved with firm recruitment activities (what I would view as an indicator of the firm's devotion to "formal" equality), but they lag far behind whites in their informal interactions with partners. Hispanics lag as well, though somewhat less, and Asian associates report partner interactions at levels somewhere between the white and Hispanic rates.

Table 20
Other Roles and Activities of Associates at Large Law Offices, by Race

Activity	Proportion of Respondents Indicating that They Engaged in the Specified Activity "On A Recurring Basis"				
	White Men	**White Women**	**Blacks**	**Hispanics**	**Asians**
(1) Participate on the Firm Recruitment Committee	26%	38%**	41%*	43%*	22%
(2) Join Partners for Breakfast or Lunch	52%	50%	29%**	36%	38%
(3) Spend Recreational Time with Partners	19%	19%	3%**	11%	14%
(4) Spend Recreational Time with Associates	81%	83%	85%	61%	84%**
(5) Participate at Least Monthly in Bar, Civic, or Nonprofit group	27%	27%	32%	36%	22%
Sample Size	*113*	*113*	*34*	*28*	*37*

Source: AJD national sample and racial oversamples, author's calculations.
Note: Nonresponsive answers excluded. P-values based on logistic regression in comparison to white men.
*=p<.10; **=p<.05; ***p<.01.

E. Reports of Discrimination

For a final comparison of associate attitudes and experiences, consider reports of discriminatory conduct at the firm. Table 21 contains the responses of AJD participants to four questions about encounters with such conduct.[130]

130. This is question number twenty-nine posed on the AJD questionnaire. *Id.*

Table 21
Perceptions of Discrimination by Associates in Large Firms

Type of Discrimination	**"Has Any of the Following Ever Happened to You in Your Place of Work by Virtue of Your Race, Religion, Ethnicity, Gender, Disability, or Sexual Orientation?"** (% Reporting Experience)				
	White Men	**White Women**	**Blacks**	**Hispanics**	**Asians**
Demeaning Comments or Other Types of Harassment	4%	22%***	24%***	30%***	11%*
Missing Out on a Desirable Assignment	5%	18%***	30%***	15%**	14%**
Having a Client Request Someone Else To Handle a Matter	2%	6%*	3%	3%	2%
Experiencing One or More Other Forms of Discrimination	2%	10%***	27%***	19%***	12%***
Sample Size	*277*	*211*	*64*	*58*	*84*

Source: AJD national sample and racial oversamples, author's calculations.
Note: Nonresponsive answers excluded. P-values based on logistic regression in comparison to white men.
*=p<.05; **=p<.01; ***p<.001.

Table 21 shows clearly that a significant minority of all groups other than white men perceive or experience some acts of sexist or racist conduct in the firm. This data provides some support for the discrimination theory of law firm behavior.[131] Overall reports of discrimination are highest among blacks, followed by Hispanics—the two groups that also emerge as having less social contact with partners, receiving work assignments requiring less responsibility, and harboring high dissatisfaction with the training and mentoring they receive.[132] Given that blacks and Hispanics experience all of these other problems—and have extremely high rates of attrition[133]—it would not be very surprising if many perceived discrimination. On the other hand, one could argue that these reported rates are quite low given that, even in arenas that appear objectively very fair or even preferentially tilted towards minorities, some participants still perceive discrimination.[134]

131. *See supra* notes 43–44 and accompanying text.
132. *See supra* Tables 17 and 20.
133. *See infra* notes 137–40 and accompanying text.
134. In the BPS, 20% of entering black law students reported that they believed they

White women report non-trivial levels of discrimination as well. This is striking considering how similar these women are to white men on the very dimensions where blacks and Hispanics seem disadvantaged. Looked at in isolation, the data for white women suggests that while sexism might surface in some law firm interactions, it is essentially incidental to the work women do and their overall level of satisfaction with that work.

VI. PARTNER OUTCOMES, COHORT EFFECTS, AND ATTRITION

Before turning to an evaluation of the competing theories of law firm diversity, I will consider more closely the meager data available on partnerships at large firms. Data on the Am Law 100 reported in Table 7 shows that nearly 96% of law firm partners in 2002 were white, but that over 20% of starting associates were nonwhite—a proportion similar to the nonwhite presence among law graduates.[135] A broad task of this Article is to explain this disparity, but we should first try to define the disparity a little more clearly. What are the actual mechanisms connecting the new associate racial makeup to the partner racial makeup? There are three possibilities. First, some of the disparity might reflect differences in cohorts—the lagged rate at which partnership composition changes as entering cohorts change. Second, nonwhites might be turned down for partnership at rates much higher than white rates. Third, nonwhites might have much higher attrition during their associate years than whites, leaving relatively few seventh-year, nonwhite associates in the competition for partnership. If there is strong data for measuring these different possibilities, I have not found it. In this Part, I will discuss what little is currently known on this subject.

So far as I know, firms do not generally report the racial makeup of persons considered for partnership and those who actually receive it. However, law firms do enumerate in their annual data reports to NALP the racial makeup of associates and partners, as well as how many persons were promoted to partnership in the preceding year.[136] We can thus determine, for example, that a firm had fourteen black

had been discriminated against in the admissions process. WIGHTMAN, *supra* note 19, at ESQ 12, C-19. Sixty percent of blacks, 33% of Hispanics, and 35% of Asians reported experiencing racial or ethnic discrimination during their second year of law school. *Id.* at Second Follow-Up Questionnaire ("SFQ") 5.

135. *See supra* Table 1.

136. *See* NAT'L ASS'N FOR LAW PLACEMENT, DIRECTORY OF LEGAL EMPLOYERS 235–1847 (2005) (reporting employment data on private law firms including, in some instances, the racial makeup of associates and partners and the number of persons promoted to partner in the previous year).

associates in 2001, that the firm promoted ten associates to partner in 2002, and that the number of black partners at the firm went from two to three between 2001 and 2002. With these and additional data, one can attempt to triangulate an estimate of promotion to partnership rates for different groups. However, some key facts are unknown—such as whether some minority partners are hired laterally or whether others leave the firm. Precise and unbiased estimates are simply not possible with this data.

What we can say with some confidence is that cohort effects explain a nontrivial part of the gap in the racial makeup of partners and new associates. Between 1997 and 2004—a period when the number of white male partners in Am Law 100 firms increased by about 15%[137]—partnerships increased by over 60% for blacks, 100% for Hispanics, and 130% for Asians,[138] apparently largely because of cohort effects. In other words, the number of minority partners is being propelled upward by the fact that young lawyers in general are far more likely to be minority (and increasingly likely to be Asian) relative to the population of older lawyers who are retiring.

At the same time, the data suggests that black associates are far less likely to become partners at corporate firms than are whites hired at the same time. A reasonable inference from the NALP data is that this disparity is on the order of one to four—blacks are one-fourth as likely as comparable whites in the same cohort of associates to become partners at large firms.[139] The odds facing Hispanics are better, and those facing Asians appear are better still, though still lower than promotion rates for whites.

It also appears that most nonwhite attrition occurs not at the time partnerships are handed out, but along the long seven- to ten-year road to partnership. By comparing Rows 1 to 3 of Table 7 with the data in Table 4, we can see that entering associates at the large firms roughly mirror the racial makeup of new lawyers, with blacks and Asians somewhat overrepresented. Row 5 in Table 7 gives us an imperfect approximation of what the ranks of associates look like two to three years later. The proportion of Asians has barely declined at the Am Law 100 firms—the lower number in the AJD data may reflect a greater Asian preference at the very largest firms. The proportion of Hispanics has fallen by about a quarter, to around 3%.

137. Author's calculations from AM LAW 100 database. Comparisons such as those reported here are difficult because not all firms report data for all years, but the estimates reported here are roughly consistent with several alternate methods of calculation.

138. *Id.*

139. Author's calculations from NALP database.

The proportion of blacks has fallen very sharply—by about 40%—to the 4% to 5% range. Note that these attrition rates follow a pattern very similar to that reported by the large firm associates in Table 16: two-fifths of the black associates say they plan to leave within the year, with a lower (but still high) rate for Hispanics, and with Asians reporting departure plans no higher than those of whites. The data show remarkable internal consistency.

Row 4 of Table 7 reports the overall racial makeup of associates at elite firms. There has been some tendency in the literature to assume that these numbers reflect the demography of associates from their first year to the brink of the partnership decision, but we can now see this is clearly not the case. It is instead the average of a sloped line. Table 22 illustrates this point by presenting a simple model of associate attrition. Table 22 assumes a pool of 1,000 newly hired associates, of whom 8.1% are black, as Table 7 suggests. Suppose the attrition rate for black associates is 30% per year, while the average attrition rate for all other associates is 10% per year. Blacks as a proportion of the total necessarily fall, so that by the end of year seven (a time often associated with partnership decisions),

Table 22
A Simple Model of Associate Attrition

Associate Year	Black Associates	All Other Associates	Blacks as % of Total
0	81	919	8.1%
1	57	827	6.4%
2	40	744	5.1%
3	28	670	4.0%
4	19	603	3.1%
5	14	543	2.4%
6	10	488	1.9%
7	7	440	1.5%
Years 2–3 (AJD)	67	1,414	4.6%
All Years	254	5,234	4.6%

blacks only constitute 1.7% of their associate cohort. Blacks are 4.6% of all associates (last line), but that is merely an average of a dynamic process.

The figures in Table 22 are made up, but they do a remarkably good job of tying together the real data we have on blacks in large firms: blacks as a proportion of summer associates, blacks as a proportion of second- and third-year associates in the AJD, blacks as a proportion of all associates, and the higher black attrition rates one can infer from Table 16. The model suggests a few further inferences. First, most of the "weeding out" of associates occurs before firms actually hand out partnerships. Some of this probably happens more or less automatically as associates feel underappreciated, have trouble getting enough work to meet their billable requirements, or otherwise become dissatisfied. Additional "weeding" is probably the result of strong hints from supervisors that one's chances of a partnership are low, and that the associate should consider other opportunities and benefit from the firm's patronage. Second, and as a consequence of the first inference, it is likely that at most firms a relatively high percentage of the associates who have not left by their seventh year have gotten formal or informal signals of their value to the firm and do in fact make partner. This leads us to the third inference, that the racial makeup of the most senior associates probably looks a lot like the racial makeup of new partners.

I asked, at the beginning of this Part, how important cohort effects, higher attrition, and lower promotion rates might be in explaining the gap between the high number of new nonwhite associates and the low number of nonwhite partners. It appears that cohort effects are important for all three of the major nonwhite groups—most important for Asians (whose numbers among new lawyers have increased most rapidly)[140] and least important for blacks. Conversely, attrition appears to be higher among all minority groups than among whites, but attrition effects are most devastating for blacks, substantial for Hispanics, and modest for Asians. Actual promotion rates from the ranks of senior associates may actually be fairly similar for all racial groups, although this cannot be determined precisely from the data.

None of this, by itself, lets corporate firms off the hook. But it means that the key racial issue in this puzzle is not why 96% of law firm partners are white (that number will certainly decline steadily) or even whether firms distribute partnerships unequally. The issue is why attrition rates are so high among minority associates, especially for blacks and Hispanics.[141]

140. *See supra* note 70 and accompanying text.

141. *See supra* notes 135–40 and accompanying text.

VII. COMPARING THE THEORIES

I have reviewed quite a bit of data. It is time to try to digest it. In this Part, I return to the five theories laid out in Part II and consider how much support each alternative theory draws from the data.

A. Discrimination

The discrimination theory is consistent with the reports from a significant fraction of black and Hispanic associates employed at large law firms. These groups also have higher attrition rates and lower partnership rates than other groups. Perhaps most importantly, we have fairly convincing evidence that many blacks and Hispanics are, by the second or third year captured by the AJD study, receiving less challenging assignments and less training and attention from their seniors. Looked at alone, these factors might seem to constitute a strong case for the discrimination theory. On the other hand, the data pose a number of difficulties for the simple discrimination account:

1) Why would firms use aggressive pro-minority preferences in hiring, only to engage in racial discrimination once associates arrive? One might argue that firms only recruit minorities because of outside pressure, but wouldn't these same forces of public and client opinion make the firms incredibly vulnerable if they openly discriminated against blacks and Hispanics?

2) Most formal indicia of equality indicate that blacks and Hispanics appear to fare well in these firms. They do not have disproportionate complaints about salary, general working conditions, or "voice" in the firm; they are overrepresented in firm recruitment activities, and they are not given heavier assignment loads or worked more hours. On the contrary, the disturbing patterns are ones of disengagement, not overburdening. Black associates in these firms work on substantially fewer matters than do white associates and are able to pursue a substantial amount of pro bono work. These associates do not seem to suffer from restrictions on their activity, but rather neglect.

3) Almost all studies of discrimination in modern America find similar levels of disparate treatment experienced by blacks and Hispanics.[142] If anything, Hispanics might be expected to suffer more

142. Over the past generation, a growing body of research has used "audits" to test for various forms of discrimination. In an audit, pairs of minority and non-minority "testers" are matched for many other characteristics apart from their race, and are trained to follow a script in applying for jobs or housing. *See* A NATIONAL REPORT CARD ON

discrimination in the elite atmosphere of a law firm since high-status whites tend to be far more cognizant and conscious of "correct" behavior towards blacks, and less conscious of biases against Hispanics. But on most of the indicia discussed in Part V, blacks fare worse than Hispanics in that they have less interaction with partners, greater complaints about mentorship and training, and fewer challenging assignments.[143] This pattern suggests that we should be looking for objective factors that would make blacks more exposed than Hispanics.

4) Although large firms are of course hierarchical, there are many competing hierarchies. New associates may be initially paired up with a particular partner, but they have great entrepreneurial freedom to secure assignments from other partners and senior associates in the firm, and likewise many different partners can seek out the help of particular associates. In such an eclectic work environment, supervisors who appear to harbor racist or sexist attitudes can be sidestepped far more easily than in a conventional work setting. While it is plausible that some partners harbor racially or sexually discriminatory animus towards minority or female associates, institutional dynamics should tend to separate those individuals from situations where they can substantively harm associate careers.

DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 1–2 (Michael E. Fix & Margery Austin Turner eds., 1998) [hereinafter NATIONAL REPORT CARD], *available at* http://www.urban.org/UploadedPDF/report_card.pdf. Three studies using audits to test employment discrimination, conducted between 1989 and 1996, found that blacks experienced net rates of discrimination of 24%, 13%, and 2%—an average of 13%. The same studies, using the same methodology, found that Hispanics experienced net rates of discrimination of 22%, 20%, and negative 10%—an average of 11%. Marc Bendick, Jr., *Adding Testing to the Nation's Portfolio of Information on Employment Discrimination*, *in* NATIONAL REPORT CARD, *supra*, at 56 tbl.2. A number of housing audit studies found broadly similar patterns of discrimination experienced by blacks and Hispanics. John Yinger reports that the national Housing Discrimination Study conducted in 1989 found that "[f]or the three housing-availability variables at the bottom of these tables, the incidence of discrimination is at least 10 percent, and perhaps as high as 40 percent, for both blacks and Hispanics." John Yinger, *Testing for Discrimination in Housing and Related Markets*, *in* NATIONAL REPORT CARD, *supra*, at 34. Yinger also reported that

> five studies conducted in the 1990s find that the gross measure of discrimination in rental housing is at least 50 percent (and as high as 77 percent) against both blacks and Hispanics in the first four areas and about 40 percent against blacks and Hispanics in the sales and rental markets in the Washington, D.C. area.

Id.

143. *See supra* Tables 19 and 20.

B. Merit and Stereotype Discrimination

I discuss these two theories of firm diversity together because, as we shall see, they are very closely intertwined.

The result of large racial preferences in law school admissions is a tendency for the beneficiaries to end up with low grades, clustering them near the bottom of the class.[144] A small fraction of students are expelled for poor performance, and others quit out of discouragement,[145] but law schools themselves are largely impassive players in this process. There is no particular reason for them to favor some students over others. Indeed, once admission decisions are made, a law school's incentives lie with trying to maximize the success of every student.[146]

The dynamics in a law firm are distinctly different. The firm's partners may make a collective decision in favor of promoting racial diversity, even if that involves granting significant preferences to underrepresented minorities. But once new associates arrive at the firm, their opportunities and experiences are heavily shaped by their selection by partners and senior associates for particular assignments and specific responsibilities. Each team leader at the firm has an overwhelming incentive to pluck from the ranks of new associates those whom the leader perceives as most able, and the leaders have

144. *See* Sander, *supra* note 11, at 425–36 (arguing that racial preferences result in lower grades for minority law students).

145. In the BPS database, nearly 90% of black students who only completed their first year of law school placed in the bottom 10% of their classes. The median class rank of black students leaving law school between the first and third year was between the second and third percentile. *Id.* at 440. But only 22% of the blacks leaving after the first year said that the major reason for their departure was "failing grades." Author's calculation from BPS dataset, Question A4, First Follow-Up Questionnaire. These data together strongly suggest that although poor grades lead many blacks to drop out, only a fraction of those dropping out actually have "failing" grades that would cause them to be expelled.

146. It might nonetheless be the case that at a typical law school, black and Hispanic students receive disproportionately little attention from faculty, for reasons related to academic performance. (Note the small proportion of blacks and Hispanics who thought faculty recommendations played any role in getting their job.) This can be tested. The BPS first-follow-up survey, administered to second-year law students, asked respondents "How well did your first year experiences match your *original* expectations about law school?" Three subparts of this question are particularly relevant: student's perception of the "quality of instruction," "accessibility of faculty," and "supportiveness of the school environment." Respondents rated each of these on a scale of 1 to 5, with 5 being the highest rating. The average rating of whites for "quality of instruction" was 3.29; for nonwhites it was 3.31. The average rating of whites for "accessibility of faculty" was 3.53; for nonwhites it was 3.55. The average rating of whites for "supportiveness of the school environment" was 3.16; for nonwhites it was 3.14. None of these differences are statistically significant.

the same incentive to shun those whom the attorney thinks for any reason may not be up to the job.

This dynamic will almost inevitably work against any group that has received a racial preference in hiring—and the harm should be more or less proportional to the preference. Firms must believe that law school grades are strongly associated with skills relevant for work at the firm. Otherwise, why would grades be such a dominant criterion in hiring?[147] If blacks at a firm have been hired with substantially lower average GPAs than whites, partners will assume that black associates may have lesser skills. Consequently, blacks will tend to be given less responsibility and fewer "proving" assignments than will whites. Those passed over on these assignments, perceiving tokenism in their firms, and who feel they are not developing as attorneys, are unlikely to stick around. Hence, black attrition would plausibly be dramatically higher than white attrition—and blacks who do stick around are likely to be passed over for partnerships.

Note how this mechanism links the Wilkins-Gulati story of stereotype discrimination to the theory that individual merit accounts for high attrition.[148] It is quite likely that a randomly selected black associate is performing at a lower level than a randomly selected white associate at a firm that has used large preferences. The firm's neglect of that associate might therefore be based on individualized evaluation. However, it also seems very likely that firm partners and senior associates will tend to stereotype black associates, including those who are entirely able to perform as well or better than white associates. This interaction was plain to Wilkins and Gulati:

> In a world where decisions on the assignment of projects are made on low amounts of information, the perception that blacks on average have lower skills will hurt them. The danger is that in deciding which projects to give to white associates and which ones to give to black associates, partners will choose to give routine projects to the black associates and analytical/training related ones to the white associates. . . . [I]n short, affirmative action could end up exacerbating the problems black associates are already facing at elite firms.[149]

Wilkins and Gulati, however, argued that racial preferences for blacks by law firms are a potential future issue facing law firms, not a

147. *See supra* notes 85–106 and accompanying text.
148. Wilkins & Gulati, *supra* note 42, at 569–70.
149. *Id.* at 604.

major feature of the real-world landscape.[150] Writing at a time when there was no systematic information available either on racial patterns in law school grades or on the importance firms attached to law school grades, they inferred from the low numbers of black associates and partners that blacks were being discriminated against, and that the typical black at a large firm probably had at least as strong a skill set as the average white.[151]

If racial preferences are pervasive at the big law firms—and it appears that they have been pervasive at least since the early 1990s[152]—then it becomes extraordinarily difficult to distinguish between "merit" explanations and "stereotype discrimination" explanations of firm behavior. It seems most plausible to me that if a pervasive credentials gap exists, then significant "merit" problems are inevitable. And if merit problems are associated with race—especially with blacks and Hispanics, who are already vulnerable to stereotyping—then any merit gap will tend to be reinforced and unfairly extended through stereotyping generalizations.

Disentangling the relative importance of these two effects would, I imagine, require extraordinarily systematic case studies of dynamics within individual firms, studying the incoming credentials of associates, the assignments they receive, the evaluations of their assignments, and the evolution of their work load. Such studies would be extremely valuable and could provide the kind of credible information necessary to make sensible improvements in the way firms operate.

One possible way of building a causal story is to examine how the various factors we have discussed in this Article correlate with one another on an individual level. Suppose, for example, we could identify some black lawyers who had credentials that matched the average of their white peers, and others who appeared to have received a large hiring preference. According to the merit theory, blacks in the first group should have the same work experiences as whites, while the second group should have worse assignments, less mentoring, and so on. If both groups have identical experiences, or if the best predictor of poor assignments is the amount of discrimination an associate reports, then that would support the view that "stereotypes" or invidious discrimination predominate.

150. *See id.* at 505. (For example, "certainly the numbers do not suggest that firms are engaged in a wholesale effort to hire average blacks over average whites." *Id.* at 598.)

151. *Id.* at 502–06.

152. *See supra* notes 88–105 and accompanying text.

It is very difficult to create such tests with existing data. The AJD sample is too small to create a large enough pool of black or Hispanic associates in truly comparable firm settings, and without any individual firm data it is very hard to distinguish who is receiving a preference and who is not. Moreover, it would not be very surprising if something similar to the "cascade effect" I describe in *Systemic Analysis*[153] operated in law firms, too. Racial preferences may be so generalized among the elite firms, and individual job candidates so inclined to take the "best" offer they get, that very few black associates, even at second- and third-tier firms, have credentials comparable to their white associates.

I tried to deal with this limitation with a regression of all AJD lawyers in private firms, using law school grades and law school eliteness to predict each attorney's logged income. I then used each lawyer's residual in that regression to estimate the preference they received, reasoning that someone who had a relatively high income given their credentials was more likely to have received a preference. The limits of this approach are many and obvious.[154] Nonetheless, this measure was mildly and negatively correlated (-.23 correlation, .07 two-tailed p-value) with an index estimating the responsibility and quality of an associate's work assignments (the items in Table 19), which is at least consistent with the merit theory. Reported experiences of discrimination were strongly correlated with plans to leave the firm and, interestingly, the degree to which the respondent thought race had been an important factor in securing him the job (.31 correlation, .01 significance).

A different way of testing these ideas is through a comparison of blacks, Hispanics, and white women. All three groups have been subjected to nearly total exclusion from law firms in the past, all often experience discrimination in a variety of settings today, and all are subject to harmful stereotyping. But they differ sharply in the credential gaps with which they enter large-firm positions: blacks receive large preferences,[155] Hispanics smaller ones,[156] and white women none at all,[157] relative to white men. The "merit" theory would predict that the various gaps we have mapped out—in assignment quality, mentoring, social access to partners, and attrition—should all closely correspond to the relative size of

153. Sander, *supra* note 11, at 416–17.
154. *Id.* at 410–18.
155. *See supra* notes 85–106 and accompanying text.
156. *See supra* notes 85–106 and accompanying text.
157. *See supra* note 121 and accompanying text.

credential gaps for each group. This is in fact what we observe, in exactly the order predicted. Blacks are worse off than Hispanics in nearly every category,[158] Hispanics lag behind whites,[159] and white women's ratings are virtually equal to—and sometimes better than—those of white men.[160]

Of course, if partners are influenced by stereotypes that are based not on general social attitudes, but on a knowledge of how the firm hires associates, then these differences among blacks, Hispanics, and white women would not be inconsistent with the stereotype account. But this would bind the stereotyping phenomenon even tighter to the preference phenomenon—and it does seem to me that these two are probably very closely linked in individual firms.

Still another way to disentangle the "merit" and "stereotype" effects is to contrast the large firms I have been studying with small firms. As I noted earlier, small and medium-sized law firms—those with fewer than thirty or fifty lawyers—are much less likely to hire with aggressive racial preferences, and it appears that the credentials of black and white lawyers at those firms are quite similar.[161] The contrast between black experiences in small firms and large firms is remarkable. A few examples from the AJD illustrate this point: 32% of black attorneys at firms of fewer than fifty attorneys report that they "would like" to stay with their current employer for more than five years, compared to 11% of blacks at large firms. Blacks at large firms are far more likely than whites to complain about the quality of mentoring they receive—70% for blacks and only 49% for whites. At small firms, the gap is not statistically significant—48% for blacks and 44% for whites. At large firms, whites bill more hours than blacks, while at small firms blacks bill more hours than whites. Work assignments, and the nature of the associates' involvement in them, are hardly distinguishable among blacks and whites at small firms, in sharp contrast to the tendency of blacks at large firms to play more marginal, less responsible roles. Nearly two-thirds of blacks at small firms—compared to one-third of blacks at large firms—regularly join partners for breakfast or lunch, and one-third of blacks at small firms—compared to 3% of blacks at large firms—report regularly spending "recreational time" with partners.[162]

158. *See supra* Tables 19 and 20.
159. *See supra* Tables 19 and 20.
160. *See supra* Tables 18, 19, and 20.
161. *See supra* note 104 and accompanying text.
162. All statistics in this paragraph are based on the author's calculations from AJD data.

If the small firms employing these black associates were themselves minority-controlled firms, the patterns just described would support, rather than refute, the theory that invidious discrimination is driving the bad experiences of blacks at large firms. But four-fifths of the black lawyers in the AJD's sample of small firms reported that fewer than 10% of the lawyers at their firm were "members of racial-ethnic minority groups." I suspect the difference has much more to do with the presence or absence of large racial preferences in hiring. If small firms generally do not use large racial preferences in hiring, they will end up with pools of associates of roughly equal ability—and, just as important, *presumed* equal ability. Partners will expect that they can rely on the ability of black associates just as much as any other associate, and their assumptions will prove well-founded, creating a virtuous circle that truly integrates blacks into the center of the firm's life. If this reasoning is valid, one would expect to find blacks achieving partnerships at these firms at rates close or equal to white rates.

C. Institutional Rigidity

One of the most striking findings in Part V is the remarkable convergence of experiences between white men and white women associates in large firms. White women not only report high levels of satisfaction with their jobs, but appear to have the same, and sometimes better, quality of work, training, mentoring, and interaction with partners. All of this suggests that partners at large firms have succeeded in overthrowing old traditions and attitudes towards women lawyers, and are able to treat women associates—in general—on terms very similar to those experienced by white men.

Yet, despite the absence of very good data on this point, it is fairly clear that women do not attain partnerships at these firms at a rate even close to men. The disparity in promotion rates is probably a factor of two or higher. I suspect the disparity is primarily due not to active discrimination by firms, but is due to a reluctance on the part of women associates to take on, as a long-term career obligation, the hours and intensity associated with promotion to partnership. This is a critical area where institutional rigidity surely plays an important role: the failure to develop partnership structures that allow women to accommodate their personal lives, particularly in childbearing and child rearing. To the extent that minority associates—particularly blacks—are disproportionately women, then the structural rigidity that makes it difficult for women in general to become, or long remain, partners at large firms will also influence minority

partnership rates. Yet, in another respect, firms have shown some significant responsiveness to minority interests. The growth and institutionalization of pro bono work at large firms—and the ability, as measured by Table 18, of black and Hispanic associates to engage in substantial pro bono practices—indicates a promising sign of institutional flexibility.

D. Individual Preferences

Black associates in the AJD study seem generally as disaffected from the idea of seeking a corporate-firm partnership as the Cleary Gottlieb associates described by Alan Jenkins.[163] But I find it hard not to see this as simply a product of their recent experiences at the firm. Upon entering law school, blacks and Hispanics are highly enthusiastic about large-firm careers,[164] and not much of that enthusiasm has dimmed by the third year, judging either by other survey data or the actual pattern of job acceptances of high-GPA minorities.[165] But it is clear that within a couple of years of starting associate jobs many blacks and Hispanics have been largely relegated to routine, unchallenging work and deprived of most benefits of training, mentorship, and partner contact. Under the circumstances, it would require either implacable self-confidence or a sort of naiveté to remain enthusiastic about either the probability of partnership or its grandeur as a career aspiration. Disillusionment and plans to move on necessarily become widespread.[166] Thus, I would suggest that any role played by individual choice is a symptom, not an ultimate cause.

E. Summary

Given the complexity of this discussion, it is worth summarizing my comparison of theories of law firm diversity. I have found very strong support for the "merit" theory, simply because it so effectively ties together all of the patterns in this research. There is no question that large firms pay a large premium to recruit law school graduates with high grades. Among large-firm associates, those with higher grades are more likely to prosper and be promoted. Minority associates hired with large preferences thus enter the big firms with much lower credentials and at a great disadvantage. All of their

163. *See* Jenkins, *supra* note 53 and accompanying text.

164. *See supra* Tables 1 and 2.

165. *See supra* Table 9.

166. Ironically, it appears black and Hispanic partnership rates are a little higher than one would predict simply from the self-attrition reports of Table 16.

subsequent experiences—more difficulty getting training and mentoring, fewer assignments, less responsibility, higher attrition—are consistent with worse performance. And the radically different experiences of black associates versus white women associates, or large-firm black associates versus small-firm black associates, again perfectly track the presence or absence of grade disparities. The "merit" theory is not only intuitively logical; it also fits every piece of data.

The theory of "stereotype discrimination" is in tension with some of the data (for example, why would stereotypes about blacks be far less common among white partners at smaller firms?), but it fits fairly well. Moreover, once we accept the importance of merit differences in explaining minority experiences at big firms, it is difficult to avoid the conclusion that stereotype discrimination must be present as well—at least in the absence of vigorous countermeasures by a firm. Given the highly decentralized work structure of most big firms, and the intense performance pressures, it is very hard to believe that partners would not harbor stereotypes about racial groups with lower average performance levels, and that these stereotypes would not influence assignment and work patterns. Plausibly, some partners might go out of their way to "play against type" and open opportunities for minority associates. But given the obvious disparities in actual assignments, it would be naïve to think good intentions fully offset the operation of less benign attitudes.

By contrast, the "preference" theory that minorities are underrepresented in firms because minorities avoid them is effectively refuted by the data in this Article. Minorities in law school, or in the entry market, simply show no such aversion. Negative attitudes about the firms result from the experiences of minorities once they are inside.

"Overt discrimination" against minorities in firms almost surely has not disappeared, but the data strongly suggest it is a peripheral, rather than a central part of the minority experience in these firms. On any of the indicia where we can compare the explanatory power of "merit" and "stereotype" theories against "overt discrimination," overt discrimination fares poorly.

The evidence in this Article for "institutional rigidity" in large law firms is indirect: female associates appear to be fully as successful as males, but seem to disappear in large numbers as they enter their thirties and, even as new associates, chafe against the intense demands of their jobs. Since my primary focus in this Article is not on women, and since my data focuses on an early stage of lawyer

careers, before large-scale female attrition has set in at big firms, the story here is necessarily fragmentary. But the data I have presented is very consistent with the widespread perception that firms are losing legions of talented women lawyers through an inability to accommodate those who seek to raise a family.

CONCLUSIONS

In my 2004 analysis of affirmative action in American law schools, I found a terribly disturbing pattern. Elite law schools used large and aggressive preferences to "race-norm" applicants in order to create student bodies that roughly reflected the racial makeup of the schools' applicant pool. Schools farther down the hierarchy found that the minority students who would readily meet their own admissions criteria had been admitted to more elite institutions. These schools thus had little choice but to follow the same race-norming practices or accept largely segregated student bodies. The upshot of this "cascade" effect was a strikingly uniform black-white credentials gap up and down the law school hierarchy.

The patterns evident in large, elite law firms bear many uncomfortable parallels to those seen in law schools. The larger firms are under intense pressure, both external and internal, to achieve racial diversity within their practices. These firms respond by aggressively recruiting minority candidates from the ranks of graduating law students. But the single quality the firms are most interested in—strong performance in law school—is in short supply among minority candidates, particularly among blacks, in large part because of the supposedly benign discrimination of the schools themselves. The firms therefore engage in the use of very large preferences, hiring substantial numbers of minorities (again, especially blacks) whose grades are generally far below those of the white students hired at the same firms.

Of course, lower incoming grades do not guarantee that these minority associates will perform at a lower level. But it is indisputable that the larger the credentials gap between minority and white associates, the greater the likelihood that a given minority associate will turn out not to measure up. Law school grades seem to matter, a conclusion underscored by the tremendous efforts firms pour into the recruitment of high-GPA law students, and the very high salaries these students command relative to their peers. If grades didn't make a difference such efforts would simply make no economic sense. Thus, the systematic hiring of minority law students with lower grades produces a regular influx of minority associates

who are very often less able and, in other cases, merely perceived as being less able.

Thus although there are abundant signs that the typical large firm strives to provide an environment of formal equality and accommodation of pro bono work, minority associates quickly find themselves receiving far less mentoring and training than they want, performing less challenging tasks on fewer substantive assignments, and not developing the close informal relationships with partners that would be signified by regular social interaction. They find themselves marginalized and superfluous, and their predictions that they will not be long with the firm are fully borne out.

Some might argue that this is only a short-term frustration for minority associates. If the mere association with a big, elite firm gave their careers such momentum that they landed terrific jobs in other settings, it could be argued that the system was, in its own way, working properly. However, although we do not know very much about the long-term outcomes of such associates, there are reasons to think these outcomes are far from rosy. The early years of a lawyer's work are critical for the development of skills that she will draw on through the remainder of her career. If those are years of relative neglect that provide the attorney with few opportunities to develop skills and capacities, then the attorney's potential may well be permanently damaged. The reputation of the firm from which she departs may help her get a new job (just as the reputation of her law school helped her get the first job), but if the new employer discovers the attorney's skills are only partially developed, she may embark on a path of downward mobility or career stagnation. We know little of long-term career paths for those leaving large firms, but I have documented elsewhere a disturbing trend: while the incomes of young black lawyers are very close to those of young white lawyers, a racial gap opens up early in the careers of lawyers and appears to widen steadily thereafter.[167]

The set of problems that plausibly stem from the aggressive use of racial preferences by law firms are therefore considerable: the frustration and sense of failure they foster among minority associates; the reinforcement of negative racial stereotypes among majority associates and partners; the likely crippling of human capital development among many of the most able young minority attorneys; substantial economic costs and inefficiencies at the firms themselves; and, of course, the failure of the underlying goal of this whole

167. Sander, *supra* note 78, at 2010–14.

process—the integration of elite firms at the partnership level. It would be hard to imagine a more counterproductive policy.

In the end, the biggest unknown in this process is the extent to which the benign neglect of minority associates at elite firms arises from actual performance problems in the associates versus the mere expectation of such problems among the partners. The fact that similar problems appear to be nonexistent for women at these firms (for whom preferences are non-existent), and for blacks at smaller firms (who also do not seem to generally benefit from preferences) suggests that these problems at least have a foundation in real differences in performance. Nonetheless, one can imagine that law firms could materially reduce these problems with some internal, institutional reforms. I sketch here six ways in which firms can work towards breaking the self-defeating cycle they are in, and advancing toward more effective and virtuous methods of building more durable diversity.

1) To the extent that firms are still hesitant to look further down the hierarchy of law schools in their search for minority candidates, this hesitation should be overcome. Although the cascade effect ensures a sizeable average performance gap at even the regional and local law schools, firms that look only to the more elite law schools may be unnecessarily limiting their supply of high-achieving minority candidates.

2) Firms could do more to routinize and monitor job assignment and evaluation policies. There is little doubt that at most large firms, minority associates (especially blacks) receive fewer work projects, less monitoring, and lower levels of case responsibility than their white peers. Firms need to make sure that partners are making assignment decisions based on objective indicators of individual performance rather than stereotypes and general, unspoken assumptions about "diversity" hires.

3) Firms should consider instituting special programs aimed at providing special training and mentorship for their most vulnerable new associates—the equivalent of academic support programs offered by many law schools. I have shown that that the current open market approach of firms, which counts on the free interplay of firm lawyers to develop the human capital of associates, produces disastrous results. To the extent that firms really believe that associates they hire with weak academic backgrounds nonetheless have the potential to succeed within the firm, it seems only logical to provide programs that specifically seek to foster, identify and develop this potential within the confines of the firm.

4) Firms need to address the need of many associates to reconcile work with family. It seems clear from the data that firms value the work of women associates highly. It is also clear that women leave in droves as partnership decisions approach. Firms are losing talent through inflexibility, and a failure to accommodate women seeking families has a disproportionate impact on minority associates. Firms can create more flexible schedules, provide more on-site child care, and take other steps that make long-term employment compatible with a normal home life.

5) The elite firms should pressure law schools to improve black outcomes. Current policies at law schools have the effect of dramatically lowering black grades in law schools and worsening black chances of passing the bar. Reducing preferences at law schools on a systemic level is one way to improve these outcomes, but it is probably not the only way. Law schools may be able, for example, to do more in the realm of academic support. Law firms do not have to become directly involved in the debate over preferences to play an important and constructive role in highlighting the unacceptability of present patterns.

6) Elite law firms can shift the emphasis of their minority hiring from "quantity" to "quality." This makes sense at both an individual firm level, and at a collective level. If firms are less focused on achieving proportional representation among summer associates, and more focused on hiring a modest number of minority associates whom they are more committed to training and developing, they will both narrow the credentials gap and decrease the likelihood of attrition. And if the largest firms generally reduce their demand for minority associates, the "cascade effect"—which tends to maximize the credentials gap at all firms—will be mitigated.

Finally, as important as any of these individual steps is the need for firms to face the dilemma they are in with more candor and less defensiveness. Elite firms have a less than savory history of exclusion, but they now have demonstrated an obvious commitment to very diverse patterns of hiring. Discrimination lawsuits premised on the underrepresentation of black lawyers should thus cease to be a major source of concern, as should accusations of racism from the public at large. What firms need to acknowledge is that their current "diversity" hiring practices are harmful to their putative beneficiaries and self-defeating for the firm's long-term diversity goals. Many partners at these firms have no doubt already sensed the problems at the heart of their current policies; they now need to think through the implications of those problems and move to take corrective actions.