Reconceiving the Tournament of Lawyers: Tracking, Seeing, and Information Control in the Internal Labor Markets of Elite Law Firms

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

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TOURNAMENT theory has become the dominant academic model for analyzing the institutional structure of large law firms.[1] In the most influential of these accounts, Marc Galanter and Thomas Palay argue in their justly celebrated book, *Tournament*

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[1] See, e.g., Marc Galanter & Thomas Palay, Tournament of Lawyers: The Transformation of the Big Law Firm (1991) [hereinafter Galanter & Palay, Tournament of Lawyers]; Marc Galanter & Thomas M. Palay, Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms, 76 Va. L. Rev. 747 (1990) (excerpted in Lawyers: A Critical Reader 57 (Richard L. Abel ed., 1997); Renée M. Landers et al., Human Resources Practices and the Demographic Transformation of Professional Labor Markets, *in* Broken Ladders: Managerial Careers in the New Economy 215, 225 (Paul Osterman ed., 1996) (describing large law firms as characterized by an "up-or-out" tournament); Eric W. Orts, The Future of Enterprise Organization, 96 Mich. L. Rev. 1947, 1955 n.22 (1998) (book review) (same); James M. Malcomson, Contracts, Hold-Up, and Labor Markets, 35 J. Econ. Literature 1916, 1946 (1997) (same); Brendan O'Flaherty & Aloysius Siow, Up-or-Out Rules in the Market for Lawyers, 13 J. Lab. Econ. 709, 710 (1995) (testing aspects of the model); James B. Rebitzer & Lowell J. Taylor, Efficiency Wages and Employment Rents: The Employer-Size Wage Effect in the Job Market for Lawyers, 13 J. Lab. Econ. 678, 680 (1995) (same); Larry E. Ribstein, Ethical Rules, Agency Costs, and Law Firm Structure, 84 Va. L. Rev. 1707 (1998) (applying the Galanter and Palay tournament model); Robert M. Sauer, Job Mobility and the Market for Lawyers, 106 J. Pol. Econ. 147, 148 (1998) (same); see also George P. Baker et al., Compensation and Incentives: Practice vs. Theory, 43 J. Fin. 593, 605 (1988) (assuming that law firms use an up-or-out structure); Charles Kahn & Gur Huberman, Two-Sided Uncertainty and

of Lawyers: The Transformation of the Big Law Firm, that the core institutional characteristic of large law firms is the "promotion-to-partner tournament."[2] This tournament, Galanter and Palay contend, is structured around a simple promise made by senior lawyers (partners), who have excess human capital, to junior lawyers (associates), with little human capital but an abundant supply of labor.[3] In return for the associates' promise to work diligently and competently on the firm's business, partners promise that at the end of a probationary period, they will promote a fixed percentage of these junior lawyers to partnership.[4]

Galanter and Palay contend that the dynamics of the competition for these limited partnership slots accounts for the current size and institutional structure of contemporary elite firms. Their primary contention is that the promotion-to-partner tournament creates an internal growth engine that leads large firms to grow exponentially in size.[5] Underlying this conclusion, however, is an even more fundamental claim about the tournament of lawyers' role in facilitating the creation of law firms in the first instance.[6] Specifically, Galanter and Palay assert that the firm's promise to promote a fixed percentage of every associate class to partnership provides an efficient mechanism for associates and partners to prevent each other from behaving opportunistically with respect to the quality of an associate's work.[7] With respect to associates, the lure of the financial rewards and other benefits that are supposed to come with partnership (and the corresponding fear of not making partner) re-

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"Up-or-Out" Contracts, 6 J. Lab. Econ. 423 (1988) (noting that "making partner" is a distinct name for "up-or-out" policy); Ronald J. Daniels, Growing Pains: The Why and How of Law Firm Expansion, 43 U. Toronto L.J. 147 (1993) (challenging Galanter and Palay's theory of law firm growth in a study of Canadian law firms). Throughout this Article, we use interchangeably the phrases "large, elite law firm," "large law firm," "elite law firm," "law firm," and "firm." Although we do not specify exactly how "large" or "elite" a firm has to be in order to warrant this designation, we mean to refer to the same kinds of firms that Galanter and Palay analyze. For a useful history of the development of large law firms, see Mark Stevens, Power of Attorney: The Rise of the Giant Law Firms (1987). For one example of a listing of elite firms in particular cities, see The Insider's Guide to Law Firms (Francis Walsh & Sheila V. Malkani eds., 3d ed. 1997).

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

[3] See id. at 89-93.

[4] See id. at 100-102.

[5] See id. at 102-08.

[6] See id. at 96-97.

[7] See id. at 94-97.

duces an associate's incentive to "shirk" (by producing inferior work or failing to invest in firm-specific capital), "grab" (by stealing the partners' clients), or "leave" (before the firm has recouped its investment in the associate's development).[8] At the same time, the firm's ex ante commitment to promote a fixed percentage of each associate class reduces its incentive to "shark" (i.e., refusing to pay for services received) by failing to promote those who have exerted the most effort.[9]

Galanter and Palay's claim that the tournament of lawyers is a response to the mutual monitoring problems of partners and associates is expressly premised on the more general economic model of tournament theory.[10] Tournament theory seeks to explain an apparent anomaly in the internal labor markets of some organizations.[11] Rather than simply paying employees on the basis of their current productivity, some firms exchange a portion of a worker's current compensation for the opportunity to compete with fellow workers for promotions to a job with more security and higher income. Moreover, instead of simply promising to promote whatever number of employees actually demonstrate that they are qualified for the higher level job at the end of the probationary period, these firms commit themselves to promoting a fixed percentage of workers solely on the basis of their relative ranking among their peers.

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[8] See id. at 94. In essence, the chance for partnership is a part of the associate's current compensation.

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

[10] See Galanter & Palay, Tournament of Lawyers, supra note 1, at 100. For descriptions of the economic model, see Harold Demsetz, The Economics of the Business Firm: Seven Critical Commentaries 110-36 (1995); Edward P. Lazear, Personnel Economics 25-37 (1995); Lorne Carmichael, Firm-Specific Human Capital and Promotion Ladders, 14 Bell J. Econ. 251 (1983); James A. Fairburn & James M. Malcomson, Rewarding Performance by Promotion to a *Different* Job, 38 Eur. Econ. Rev. 683 (1994); Edward P. Lazear & Sherwin Rosen, Rank-Order Tournaments as Optimum Labor Contracts, 89 J. Pol. Econ. 841 (1981); James M. Malcomson, Work Incentives, Hierarchy, and Internal Labor Markets, 92 J. Pol. Econ. 486 (1984); Mary O'Keeffe et al., Economic Contests: Comparative Reward Schemes, 2 J. Lab. Econ 27 (1984).

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

Tournament theorists offer two interrelated explanations for this phenomenon. First, economists contend that firms are likely to adopt rank-order compensation when the cost of directly measuring each employee's individual absolute level of productivity is high compared to the cost of ranking a pool of employees according to their relative productivity to others in the pool.[12] To compete effectively, firms must develop efficient mechanisms for monitoring employee work quality and rewarding those who perform well while sanctioning those who perform poorly. The obvious way for a firm to accomplish this objective is to supervise closely employee work and to tie wages to employee productivity. In some industries, however, the information costs associated with direct supervision and individual evaluation are prohibitively high.[13] Rank-order tournaments, economists assert, provide an efficient way for firms in this position to economize on these costs. Firms that adopt this structure do not have to assess the individual productivity of all of their workers. Instead, the firm can depend upon the lure of the rewards associated with promotion (and the corresponding fear of not winning the competition) to motivate employees to exert high levels of effort and care with relatively little supervision. At the end of the probationary period, firms simply have to choose those employees who performed "the best" among their peers.

Second, economists contend that rank-order tournaments provide an efficient mechanism for workers to monitor promises made by the firm. According to this view, "employees cannot know with confidence the productivity estimates on which management decides wages, and they therefore have difficulty in knowing whether an implicit agreement to increase wages on the basis of productivity

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[12] See Malcomson, supra note 10, at 487-88; see also Demsetz, supra note 10, at 116 n.58 (discussing Malcomson's position).

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

improvement is being honored by the employer."[14] Rank-order tournaments, by basing promotion on relative, as opposed to absolute, performance provide an observable and enforceable wage process.[15] Since total pay is fixed ex ante, the adverse incentives on the part of the employer to tell employees that they were less productive than they actually were disappears.

It is the application of this foundational economic assumption to large law firms—the claim that these institutions are structured as rank-order tournaments in order to resolve the mutual monitoring problems of partners and associates—that we dispute here.[16] Tournament theorists have performed an enormous service by focusing attention on the importance of monitoring problems in structuring the internal labor markets of elite firms. Through the internalization of professional norms relating to competence, client loyalty, and collegiality, most lawyers are predisposed to honor their professional commitments both to their clients and to each other. Thus, associates work hard with relatively little supervision because they are taught from law school forward that doing so is an important part of what it means to be a professional. Similarly, the profession's traditional commitments to self-regulation and client

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[14] Demsetz, supra note 10, at 116 n.58.

[15] See Malcomson, supra note 10, at 501.

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

service undoubtedly lead most partners to take seriously their obligation to evaluate associates fairly. Nevertheless, like any other large and complex organization, elite firms must find ways to reinforce these traditional values with institutional structures that discourage opportunistic behavior by associates and partners. Although we therefore agree that tournament theorists have identified an important problem that all elite firms must address, we disagree that the economic model of the rank-order tournament accurately describes how firms respond to this need.

We base this conclusion on our prior analysis of the effect of race on the hiring and promotion practices of large law firms.[17] In the course of doing that work, we noted important differences between the assumptions underlying standard tournament theory and the actual operation of the promotion-to-partner tournament in contemporary elite firms.[18] This Article elaborates these observations in light of our respective continuing investigations into the practices of corporate firms.[19]

Our critique of tournament theory proceeds along two seemingly paradoxical lines. First, we argue that a theory of law firm internal labor markets must take account of the ways in which the promotion-to-partnership tournament differs from a standard rank-order economic tournament. Specifically, we argue that theorists such as Galanter and Palay fail to account for six differences between the economic tournament model and the actual practices of elite law

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[17] See 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).

[18] See id. at 541-42.

[19] See David Charny & G. Mitu Gulati, Efficiency Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High Level" Jobs, 33 Harv. C.R.-C.L. L. Rev. 57 (1998); David B. Wilkins, Partners Without Power: A Preliminary Look at the Progress of Black Partners in Elite Corporate Firms, 2 J. Inst. Study Legal Ethics (forthcoming 1999) [hereinafter Wilkins, Partners Without Power]; David B. Wilkins, Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars, 11 Geo. J. Legal Ethics (forthcoming Summer 1998).

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

firms: (1) Many associates are not competing in the tournament; (2) firms do not give every associate an equal chance of winning; (3) the interests of individual partners diverge from those of the firm; (4) the tournament is not divided into two (and only two) distinct stages; (5) partnership is not awarded as a reward for past performance; and (6) firms do not seek to make the tournament's rules and outcomes transparent to associates. Once we account for these differences, we contend, it is clear that the standard economic model is not an appropriate tool for analyzing the internal labor markets of large law firms.

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

The model begins with a problem that tournament theorists ignore. In addition to finding efficient ways for partners and associates to *monitor* each other's conduct, the problem tournament theory was designed to address, elite firms must also *train* the next generation of partners. Training is implicit in the bargain that Galanter

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[20] See Kevin A. Kordana, Note, Law Firms and Associate Careers: Tournament Theory Versus the Production-Imperative Model, 104 Yale L.J. 1907 (1995). Kordana's critique relies heavily on Henry Hansmann's work on employee ownership. See Henry Hansmann, The Ownership of Enterprise (1996). We return to Hansmann's work below. See infra note 39.

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

and Palay posit between partners and associates, since those in the pool of junior lawyers from which the firm must select new partners initially possess little or no human capital. Yet, the economic model that Galanter and Palay adopt is silent as to whether firms will train some or all of their workers. So long as the firm sticks to its promise to promote a fixed percentage of workers at the end of the probationary period, economists contend, the tournament will reduce monitoring costs. Unless those who are promoted have been trained, however, the firm will soon cease to be an economically viable enterprise.

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

[22] The emergence of tournament theory as a means of understanding internal labor markets in firms has led economists to do empirical studies on the incentive effects of sports tournaments. See Ronald G. Ehrenberg & Michael L. Bognanno, Do Tournaments Have Incentive Effects?, 98 J. Pol. Econ. 1307 (1990); Ronald G. Ehrenberg & Michael L. Bognanno, The Incentive Effects of Tournaments Revisited: Evidence From the European PGA Tour, 43 Indus. & Lab. Rel. Rev. 74-S (1990); James E. McClure & Lee C. Spector, Tournament Performance and "Agency" Problems: An Empirical Investigation of "March Madness," 21 J. Econ. & Fin. 61 (1997); see also James V. Koch, Intercollegiate Athletics: An Economic Explanation, 64 Soc. Sci. Q. 360 (1983) (explaining and predicting the significant role of intercollegiate athletics in American society by employing an economic model).

one (and in most cases not the most important), to induce young lawyers to join the firm and to exert high levels of effort and care with relatively little supervision. In the rounds immediately preceding partnership, however, firms rely heavily on the lure of partnership to induce senior associates to stay at the firm and to continue to work hard. It is only in these final rounds, therefore, that the internal labor markets of elite firms resemble a standard economic tournament.

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

Finally, taking account of these modifications to standard tournament theory underscores the need for a more complex account of human capital and its relationship to firm structure. Tournament theory incorporates a definition of human capital that consists largely of knowledge and skills that are either generally valuable to becoming a good lawyer (referred to as "general purpose" human capital) or uniquely valuable to working at a particular firm (referred to as "firm-specific" human capital).[23] Although we agree that "skills" are undeniably important, a complete understanding of the internal labor markets of contemporary large law firms re-

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

quires an examination of the way in which certain "signals," such as graduating from an elite law school, influence the career opportunities of associates.[24] By the same token, scholars need to augment their analysis of individual- and institutional-level factors such as "general purpose" and "firm-specific" human capital with an understanding of the crucial role that "relational capital"—the production value that inheres in relationships—plays in structuring careers.[25]

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

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[24] For the classic work on signaling theory, see A. Michael Spence, Market Signaling: Informational Transfer in Hiring and Related Screening Processes (1974). For an introduction to the application of signaling theory to legal problems, see Douglas G. Baird et al., Game Theory and the Law 122-58 (1994).

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

cludes by highlighting some of the implications of our model for the ongoing study of large firms and for the integration of economic and social theory more generally.

I. WHY TOURNAMENT THEORY?

It was only a matter of time before economists studying deferred compensation systems and scholars studying large law firms found each other. The traditional structure of large law firms appears to be tailor-made for tournament theorists.[26] Law firms traditionally have only two categories of workers: partners and associates.[27] Associates are hired on the express understanding that at the end of a fixed probationary period, some of them will be promoted and the rest will be asked to leave.[28] Both popular and professional observers have characterized the competition for partnership as being the central drama of professional life.[29] Finally, salaries of partners are significantly higher than those of senior associates to a degree that cannot adequately be explained by the increase in a lawyer's skill or productivity upon becoming a partner.[30]

In addition to these superficial similarities, large law firms exhibit three of the functional characteristics that economists typically associate with tournaments. First, the quality of legal work is both expensive and difficult to supervise. Second, despite this difficulty, firms nevertheless succeed in providing enough incentives

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[26] Cf. Landers et al., supra note 1, at 227 (employing the large law firm as a "vehicle for studying work norms because virtually all of these firms have the same, simple structure").

[27] See Galanter & Palay, Tournament of Lawyers, supra note 1, at 100-01 (describing law firms as typically having only "partners" and "associates").

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

[29] See Richard W. Moll, The Lure of the Law 11-12 (1990). Some authors even offer practical advice on how to become partner. See Robert Michael Greene, Making Partner: A Guide for Law Firm Associates 49-68 (1992) (advising associates to "watch your flanks" and prevent personal behavior from harming partnership chances); Nancy Lisagor & Frank Lipsius, A Law Unto Itself: The Untold Story of the Law Firm Sullivan & Cromwell 277-82 (1988) (discussing the "four ways" to become a partner at Sullivan & Cromwell).

[30] Cf. Lazear & Rosen, supra note 10, at 847 (pointing out that on the day that an executive vice-president is promoted his salary may have tripled but his skills surely have not).

so that employees exert extremely high levels of effort. Third, there are only a finite number of partnership slots available. The next three Sections defend these foundational assumptions of tournament theory against the charge that they do not accurately reflect the practices of large law firms.

A. Why Monitoring Matters

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

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

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[31] See William Kummel, Note, A Market Approach to Law Firm Economics: A New Model for Pricing, Billing, Compensation and Ownership in Corporate Legal Services, 1996 Colum. Bus. L. Rev. 379 (describing the billing practices of large law firms).

[32] See Lazear, supra note 10, at 19-21.

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

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

[35] See Lazear, supra note 10, at 104.

[36] See id. at 105.

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

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

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

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

[38] See Kordana, supra note 20, at 1914-17.

[39] See Hansmann, supra note 20, at 70. Hansmann, in turn, was criticizing a series of scholars—primarily Armen Alchian and Harold Demsetz—who had described law firms as contexts in which monitoring was difficult. See Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 Am. Econ. Rev. 777, 786 (1972); Stewart J. Schwab, Life-Cycle Justice: Accommodating Just Cause and Employment at Will, 92 Mich. L. Rev. 8, 17 (1993); see also Michael C. Jensen & William H. Meckling, Rights and Production Functions: An Application to Labor-managed Firms and Codetermination, 52 J. Bus. 469, 479-80, 485-86 (1979) (discussing monitoring problems in a corporate economy); Raymond Russell, Employee Ownership and Internal Governance, 6 J. Econ. Behav. & Org. 217, 223-24 (1985) (discussing monitoring problems in the conventional organizational firm). But see Fred S. McChesney, Team Production, Monitoring, and Profit Sharing in Law Firms: An Alternative Hypothesis, 11 J. Legal Stud. 379 (1982) (criticizing the Alchian-Demsetz model).

[40] See Kordana, supra note 20, at 1914-15.

[41] See id. at 1915.

Hours only crudely measure the quality of a lawyer's work. As noted earlier, the fact that firms bill clients (and, on occasion, pay bonuses) by input and not output is a sign that output is hard to measure.[42] With legal work, input is a weak measure of output. As Gilson and Mnookin note, "[t]here is an enormous difference between the performance of a lawyer who is simply putting in his time and that of a lawyer who is truly motivated to produce."[43] Those who have worked at a dead-end hourly job will appreciate this distinction.

Indeed, to the extent that associates believe that partners view hours as a surrogate for quality, they have an incentive to inflate them.[44] Notwithstanding the fact that associates often must account for their time in six minute intervals,[45] they have ample opportunity to misrepresent their time. There is evidence that associates often exaggerate the amount of time they spend on a given matter.[46] For example, some associates fill out their time sheets weeks after the work was supposedly done.[47] Furthermore, many associates bill to one or another of the firm's paying clients everything from "face time"[48] to their lunch break.[49]

The fact that associates feel comfortable behaving opportunistically underscores the limited usefulness of using hours as a measure of associate effort. Because it is difficult to correlate the quality and

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[42] See supra text accompanying note 32.

[43] Ronald J. Gilson & Robert H. Mnookin, Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits, 37 Stan. L. Rev. 313, 374 (1985).

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

[45] See Hansmann, supra note 20, at 70.

[46] See Carl T. Bogus, The Death of an Honorable Profession, 71 Ind. L.J. 911, 922 (1996); Lisa G. Lerman, Gross Profits? Questions about Lawyer Billing Practices, 22 Hofstra L. Rev. 645 (1994); Darlene Ricker, Greed, Ignorance and Overbilling, A.B.A. J., Aug. 1994, at 62; William G. Ross, The Ethics of Hourly Billing By Attorneys, 44 Rutgers L. Rev. 1 (1991).

[47] See Lisa G. Lerman, Lying to Clients, 138 U. Pa. L. Rev. 659, 706-07, 710, 716-17 (1990).

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

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

quantity of work a lawyer produces with the number of hours that that lawyer should have worked, partners will generally find it difficult to detect when an associate has padded his or her hours.[50]

Nor does pressure from clients to cut the costs of legal services make hours a reasonable measure of the quality of an associate's work.[51] When clients demand lower fees, partners (and their senior associate surrogates) have an incentive to cut junior associate hours as opposed to their own.[52] Indeed, to the extent that associates believe that partners look favorably on associates who can perform routine tasks in less time, associates themselves have powerful incentives to underreport their own time, i.e., the flip side of the overbilling problem.[53] These tendencies merely reinforce the point

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

[51] See Kordana, supra note 20, at 1925.

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

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

that "hours billed" are an extremely noisy signal of the amount of effort exerted by the associate. Indeed, to the extent that junior associates routinely underreport their hours, partners will systematically undervalue the contribution that these young lawyers make to the joint product—the very "monitoring" risk that Galanter and Palay cite as the reason why associates fear opportunistic behavior by partners.[54]

When we look at what factors are likely to influence an associate's chances for partnership, it is clear that firms view hours as only a partial—and not particularly accurate—measure of most factors relevant to the partnership decision. This is the conclusion reached by Landers, Rebitzer, and Taylor in their recent study of law firm work hours.[55] In this study, the authors asked partners and associates to rank those qualities that were most important to the partnership decision and then to rank the importance of hours worked as a proxy for these factors. The authors then reported the proportion of respondents who considered each factor "very important" or "of the utmost importance."[56] With respect to the first ranking, "[t]he number of hours billed to clients" was ranked eighth out of twelve by partners and seventh out of twelve by associates, behind such factors as "[t]he quality of work product" (first for partners and second for associates), "[a] willingness to work long hours when required" (second for partners and first for associates), "[t]he development of good working relationships with clients and peers" (third for both groups), "[a] willingness to pursue the interests of clients aggressively" (fourth for partners and tied for third for associates), and "[t]he potential for bringing in new clients and business to the firm" (seventh for partners, fifth for associates).[57] Moreover, of all the qualities ranked above "billing hours to clients," only one—"a willingness to work long hours when needed"—was deemed by both partners and associates to be

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Needless to say, our perception that law firms are characterized by attempts to flaunt hours worked is consistent with the assertion that work product is difficult to measure in this setting.

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

[55] See Renée M. Landers et al., Rat Race Redux: Adverse Selection in the Determination of Work Hours in Law Firms, 86 Am. Econ. Rev. 329 (1996).

[56] Id. at 341 tbl.4.

[57] Id. at 341 tbl.4, 342.

strongly correlated with the number of hours worked.[58] With respect to each of the other factors, that correlation was less than fifty percent.[59] Those factors most closely linked to quality and effort, moreover—such as "[t]he quality of the work product," or "[a] willingness to pursue the interests of clients aggressively"—fell substantially below this level.[60] Neither associates nor partners view hours worked as a particularly accurate or important measure of an associate's partnership potential.[61]

Finally, critics overestimate the degree to which partners can guard against both over- and underbilling through their own observations about associate effort in the ordinary course of their working relationship.[62] Three aspects of these working relationships make it difficult for partners to reach accurate judgments about associate quality. First, lawyers in large firms often work in teams.[63] This structure complicates the task of judging individual associates accurately. In a team setting, partners have to monitor not only the individual's work, but also the individual's level of cooperation with other team members in producing a joint product. This extra wrinkle makes it even more difficult to monitor individual effort accurately.[64]

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

[59] See id.

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

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

[62] See Kordana, supra note 20, at 1915-16.

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

[64] See Stephen Bainbridge, Private Ordered Participatory Management: An Organizational Failures Analysis, 23 Del. J. Corp. L. (forthcoming 1998) (discussing the

Second, even when a partner seeks to evaluate the associate on the basis of his or her individual work,[65] the kind of direct review that typically occurs in large firms does not facilitate accurate judgments about the work as easily as some suggest.[66] Take as an example the evaluation of a brief or research memorandum that an associate is asked to prepare. A partner evaluating this product will most likely be able to tell whether the associate has good writing skills. The partner will also be able to reach a fairly accurate assessment of this associate's basic intelligence, analytical abilities, and comfort with the topic at hand.[67] The partner will not, however, be able easily to discern the associate's effort and care in completing the assignment.

A brief or memorandum may appear well written and make many insightful points, but whether the associate has carefully read and cite-checked all of the cases mentioned will not immediately be apparent. Nor will it be obvious whether he has performed the most complete search possible of the available case law. Did he really look at the legislative history of the statute or did he

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increase in monitoring difficulty that is created where employees have to work in teams and there are multiple layers of hierarchy).

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

[66] See id. at 1915-17.

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

merely accept what some law review commentator had to say? While routine, these kinds of tasks are crucial to the overall quality of a firm's legal work.[68]

To monitor these aspects of an associate's work effectively, senior lawyers would have to retrace virtually every step of a junior lawyer's work. Needless to say, this kind of checking goes well beyond the level of scrutiny with which partners review the work product of associates. Partners therefore must find other ways to motivate junior lawyers to perform these routine tasks with high levels of effort and care.[69]

Third, the task of monitoring team members in large law firms is complicated by the fact that legal work often involves short deadlines. Elite firms specialize in responding to client emergencies, and this aspect of their work increases the difficulty of monitoring

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[68] Inducing a high level of employee effort and care is of paramount importance to the firm, even though the work performed by these associates is often routine. The cost of an error in this routine work, after all, can be extremely high. Small errors, such as altering names and dates on corporate documents or filing litigation documents late, can result in large costs to the client. See Michael Manove, Job Responsibility, Pay and Promotion, 107 Econ. J. 85, 85 (1997) (discussing the concept of "responsible" jobs, which are often routine but still highly sensitive to the input of worker effort, which, if strenuous, can bring substantial profits to a firm or, if lapsed, can drive it into bankruptcy). If the client fires the law firm and signals the market that it was displeased with the service the firm provided, the law firm may suffer a large setback in its reputation, and a significant portion of what these large, elite law firms offer clients is their reputation. See Ronald J. Gilson, Lawyers as Transaction Cost Engineers 23 (John M. Olin Program in Law and Economics Working Paper No. 147, Stanford Univ., 1997); Karl S. Okamoto, Reputation and the Value of Lawyers, 74 Or. L. Rev. 15 (1995); Regan, supra note 37, at 562 (describing how law firms that have a reputation for independence can play a role in reducing negotiation transaction costs in both the corporate and litigation settings) (citing Gilson & Mnookin, supra note 43, at 367, and Ronald J. Gilson & Robert H. Mnookin, Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation, 94 Colum. L. Rev. 509, 525 (1994)); Ribstein, supra note 1, at 1739 ("Clients can use large law firms as reputational intermediaries or signals of good behavior by choosing firms that have a reputation for honesty and fair dealing."); see also Oliver Hart & John Moore, Property Rights and the Nature of the Firm, 98 J. Pol. Econ. 1119, 1140 (1990) (describing firms as worker co-operatives where there is co-ownership of a single, primary asset, such as reputation).

[69] Moreover, many of these tasks are not merely technical. Most legal work, including many routine tasks, involves a core element of discretionary judgment. See Charny & Gulati, supra note 19, at 86. Consider, for example, the question of whether a particular document is called for by a subpoena or is protected by the attorney/client privilege. Once again, monitoring these kinds of discretionary judgments effectively would require senior lawyers to duplicate much of the effort of their juniors.

the work done by junior lawyers. Firms that specialize in "just-in-time" work necessarily have less opportunity to monitor worker effort.[70] Thus, even if partners are, in theory, willing to check up on whether an associate has, for example, thoroughly researched the legislative history or shepardized every case, they will rarely have time to do so.

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

Nor are firms likely to be able to defray these expenses by passing the costs of supervising associates directly to clients.[71] Even if firms could bill clients for all of the time partners spend supervising associates, a dubious proposition given the level of scrutiny that accurate monitoring would require, these charges would not cover the most important cost associated with direct supervision. As we indicated above, direct supervision in elite firms requires that partners spend time monitoring associates. Time spent monitoring is time that cannot be spent developing new business. As today's emphasis on partner productivity amply attests,[72] the most productive use of a partner's time is in finding new clients rather than servicing old ones—let alone billing clients for past services.[73] Not surprisingly, firms, and as we will see, individual partners within firms, seek to minimize these opportunity costs as much as possible.[74]

When we turn to the actual practices of firms, we find further support for the proposition that monitoring associates is difficult and expensive—particularly in circumstances where, as the standard tournament model underscores, it is important that associates find the resulting evaluations credible. For example, by all accounts firms spend an enormous amount of time and energy con-

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[70] But see Eugene Kandel & Edward P. Lazear, Peer Pressure and Partnerships, 100 J. Pol. Econ. 801, 811 (1992) (noting that the Japanese *kanban* systems or just-in-time inventory approach is often "mentioned as a facilitator of team monitoring").

[71] But see Kordana, supra note 20, at 1915.

[72] See, e.g., D.M. Osborne, Rude Awakening: What They Never Told You About Partnership, Am. Law., Mar. 1998, at 71.

[73] See id.

[74] See infra text accompanying notes 122-130.

ducting annual (and sometimes semiannual) associate evaluations.[75] Paradoxically, these accounts also confirm that notwithstanding the time and expense firms put into this process, these evaluations are often perfunctory and unreliable, particularly in an associate's early years. As we argue below, firms have an incentive to keep these assessments vague in order to induce some associates to stay who might otherwise leave.[76] Nevertheless, the fact remains that reaching even a general assessment of the overall quality of an associate's work—and credibly communicating that assessment to associates—requires a large investment of firm resources. At best, these resources can only be recouped to the extent that they can be amortized as part of the firm's normal hourly rates.

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

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

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[75] See Wilkins & Gulati, supra note 17, at 518, 588.

[76] See infra text accompanying note 278.

B. High Effort Levels and the Absence of Trades

No one disputes that elite law firm associates work extremely hard. For the reasons set out in the last Section, pervasive direct supervision by partners cannot explain this high effort. One must therefore look for alternative explanations. Tournament theory, by positing that associates are motivated to work hard by the lure of promotion (or the fear of being fired if they do not win), purports to answer precisely this question. It is not surprising, therefore, that theorists find the tournament explanation convincing.[77]

Tournament theory also appears to explain why virtually *all* elite firm lawyers work extremely hard, including those lawyers who would rather trade some of their income for fewer hours. Evidence, both anecdotal and empirical, suggests that a large portion of associates would be willing to trade some portion of their income for the opportunity to work fewer hours and to have greater control over their schedules (i.e., not having their schedules be constantly at the mercy of some law firm emergency).[78] In a standard neoclassical market-clearing model, such trades would occur.[79] But, in large part, these trades do not occur at elite firms.[80]

Tournament theory provides one explanation for why these seemingly mutually beneficial trades rarely occur. That theory suggests that firms will choose to create internal labor markets instead of the standard contracting approach assumed by neoclassical

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[77] See, e.g., Sauer, supra note 1, at 148; Ribstein, supra note 1, at 1719; Landers et al., supra note 1, at 225.

[78] See Landers et al., supra note 1, at 227-36 ("The defining feature of work norms [that the authors find apply at these law firms] is that individuals are required to work *more* hours than they would otherwise desire at the going wage."); Milgrom & Roberts, supra note 11, at 372-74 (describing the "rat race" phenomenon at law firms).

[79] See Milgrom & Roberts, supra note 11, at 327-28; Landers et al., supra note 1, at 221-22.

[80] Needless to say, the existence of incentive schemes that make such trades difficult systematically disadvantages women. See Landers et al., supra note 1, at 226; Robert Granfield, Lawyers and Power: Reproduction and Resistance in the Legal Profession, 30 L. & Soc'y Rev. 205, 215 (1996) (reviewing Ronan Shamir, Managing Legal Uncertainty: Elite Lawyers in the New Deal (1995), John Hagan & Fiona Kay, Gender and Practice: A Study of Lawyers' Lives (1995), and Austin Sarat & William L.F. Felstiner, Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process (1995)) (citing Arlie Hochschild, The Second Shift: Working Parents and the Revolution at Home (1989)). We return to the distributional consequences of the revised tournament we describe in Part IV.

models.[81] To the extent that firms are drawn to tournaments as a means of reducing their monitoring costs, they are unlikely to institute policies that would increase these costs by requiring partners to distinguish between various effort levels of differently paid associates. Thus, the fact that such trades rarely occur reinforces the hypothesis that these firms are structured internally as tournaments.

C. Finite Number of Slots

Finally, those studying elite firms have been drawn to tournament theory by the simple fact that associates compete for a finite number of partnership positions.[82] The central feature of a standard economic tournament is that the firm holds out the promise of a highly desirable reward at the end of the probationary period and that there are fewer rewards than there are participants. In Galanter and Palay's model, the reward offered to associates is the promotion to partnership, with all of the financial rewards, status, and job security that this position allegedly entails.[83] Therefore, if these firms are internally structured as tournaments, we would expect to observe two elements: a finite number of partnership slots, and intense competition for these slots.

Both elements are present in elite law firms. Few of the associates hired by a given elite firm will become partners. Although partnership rates have fluctuated over the years, rarely have entering associates had more than a one in four chance of being promoted to partnership.[84] Today, these rates hover between six and ten percent in many firms.[85] This simple reality seems to point strongly in the direction of characterizing these institutions as tournaments.

In addition, even when we limit our pool of associates to just those senior associates who are a few years away from the partnership decision, there are still more participants in the tournament than

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[81] See Galanter & Palay, Tournament of Lawyers, supra note 1, at 101; Milgrom & Roberts, supra note 11, at 327-28.

[82] See Lazear, supra note 10, at 80 ("It is the fixed-slot structure that distinguishes tournaments from other kinds of compensation schemes based on relative performance.").

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

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

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

rewards. We found, from our interviews, that senior associates who were close to the point of partnership evaluation both perceived the existence of a finite number of partnership slots, and worked extremely hard so as to win the competition for these coveted places. Once again, the widespread perception that senior associates work extremely hard because they are competing for a finite number of slots appears to confirm that large firms structure their promotion process as a tournament.

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

II. THE RULES OF THE GAME

Galanter and Palay's model of the promotion-to-partner tournament rests on a number of interconnected assumptions about the internal labor practices of elite firms, and the motivations and actions of those who participate in and help to shape these practices. Not surprisingly, these assumptions track the foundational assumptions underlying standard economic tournament theory. We group these assumptions into seven categories. First, Galanter and Palay assume that every associate is competing in the tournament, and that the tournament is the primary motivational tool used by the firm.[86] Second, by emphasizing that associates can be confident that partnership decisions will be made on the basis of merit, Galanter and Palay implicitly assume that firms give every associate an equal chance of winning the tournament, or to put the point somewhat differently, that firms will not favor some associates over oth-

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

ers.[87] Third, by describing these firms as operating in accordance with a single economic model where the rewards to any one person are a function of his or her rivals not performing quite as well,[88] the implicit assumption is that cooperation among associates is not crucial, i.e., that sabotage is not an important problem.[89] Fourth, by modeling their theory on a hypothetical contract between a single partner and her associates, Galanter and Palay implicitly assume that the interests of individual partners are synonymous with those of the firm.[90] Fifth, the promotion-to-partner tournament Galanter and Palay describe has two, and only two, distinct periods: associateship and partnership.[91] Sixth, they assume that victory in the tournament is a reward for production as an associate.[92] Finally, Galanter and Palay assume that firms seek to make both the rules of the tournament and its results transparent to associates.[93]

These assumptions do not accurately describe the internal practices of contemporary elite law firms.[94] The following seven Sections discuss the limitations of each of these model-based assumptions.

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

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

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

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

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

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

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

[94] In fairness to Galanter and Palay, their work does not purport to describe law firms in the late 1990s. It is possible that many of the assumptions upon which they base their tournament model were more plausible in the period they discuss (roughly speaking from 1900 to 1985) than they are today, particularly if one concentrates on the early part of this period when the promotion-to-partner model was first introduced. See id. at 4, 37-45. As we indicate in Part III, these initial conditions help to explain why, despite all of the deviations between tournament theory and the prac-

A. Not Everyone Is Competing

It is impossible to spend time talking to law students about their career goals without coming to the conclusion that many of the young women and men who join large law firms have no intention of staying long enough to become partners.[95] Ironically, the very pervasiveness of this sentiment among law students makes it difficult to quantify exactly how many entering associates fall into this category. At law schools like Harvard, it is now considered slightly unfashionable, or perhaps more accurately, egotistical, to declare publicly that one is interested in braving the long odds and demanding hours of the modern promotion-to-partner tournament.[96] As a result, even students with a relatively strong commitment to participating in the tournament may disavow any interest in doing so for fear of alienating their peers.[97] Nevertheless, anecdotal evidence, including our own barefoot empiricism, strongly suggests that a large number of associates have opted out—or, more accurately, never opted into—the tournament.[98]

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tices of today's large firms, these institutions retain certain practices that seem inconsistent with their contemporary situation. Of course, to the extent that the changes we document in this Part can be traced back to the early days of the large law firm, it suggests that these institutions were *never* structured as simple economic tournaments.

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

[96] See Robert Granfield, Making Elite Lawyers: Visions of Law at Harvard and Beyond 146-48 (1992).

[97] Associates who admit openly that they want to make partner (as opposed to the usual refrain that "I'm just here for a few years to gain some experience and pay off my loans") are likely to be viewed negatively by their peers, since such statements are a signal that this associate intends to compete with and beat the others in a competition. Understandably, many associates are reluctant to alienate themselves from their peers by making such statements or sending signals that imply such a statement. To restate the point in economic terms, associates at these firms do not self-sort in an optimal manner. See Lazear, supra note 10, at 35 (describing why, as a general matter, firms cannot rely on employees to self-sort).

[98] In a poll one of us conducted, only 33 out of 183 current or former associates at large, elite law firms stated that they joined their firms intending to make partner. See also Cynthia Fuchs Epstein et al., Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession, 64 Fordham L. Rev. 291, 359-60 (1995) (explaining that some associates are deterred from partnership because of its financial, administrative, business, and training responsibilities, while other associates, especially women, find the balance between firm and family too difficult); Jack Kaufman, The

The fact that some significant percentage of entering associates do not see themselves as participating in the tournament creates two important problems for firms. First, firms must find other ways to motivate those associates who do not intend to compete in the race to make partner.[99] This motivation includes convincing young lawyers to join firms initially, since it is at least plausible that a firm's employment needs will outstrip the number of associates committed to participating in the tournament. Relatedly, firms must find ways to prevent non-participating associates from shirking or engaging in other forms of opportunistic behavior once they arrive.

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

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

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Staff Lawyer, Law Prac. Mgmt., July/Aug. 1990, at 30, 32 (explaining that many attorneys opt out of the tournament because they do not want to "rid[e] the merry-go-round of 2,000 billable hours, plus additional commitments of time").

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

see themselves as participating in the tournament do not have an equal chance to succeed.

B. The Playing Field Is Not Level

One of the appeals of tournament theory is that it seems to confirm what law firms have always said about themselves: Firms are meritocracies in which every associate has an equal chance to succeed.[100] The problem with this characterization is that it fails to account for differences in the work done by particular associates. These differences have a profound influence on a given associate's chances of winning the tournament.

Large law firms produce two categories of work that must be done by associates.[101] The first category consists of work that provides valuable training in the skills and dispositions of lawyering. Although law school (one would hope) teaches students to "think like a lawyer,"[102] virtually all of the skills and dispositions that associates need to *be* good lawyers must be learned on the job.[103]

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

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

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

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

Training, therefore, is an essential part of the bargain that Galanter and Palay posit between partners and associates in which the latter trade their labor for the chance to develop human capital. More important, it is essential to the long term survival of the firm.

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

In addition, however, training work also enables an associate to develop strong relationships with particular partners. This relational capital[104] is crucial to an associate's partnership chances. Associates depend on their partner-mentors to give them good work (and to protect them from bad assignments), to pass on important client relationships, and ultimately to push for their promotion among their fellow partners. Without strong advocates in the partnership, an associate's chances of winning the tournament are substantially diminished.[105]

Contrary to the implicit uniformity suggested by tournament theory, training work is not the only work produced by large law firms. Instead, these entities produce a substantial amount of "paperwork."[106] Examples of paperwork range from writing, answering, and supervising discovery requests, to proofreading and making slight modifications to pre-existing corporate documents, to writing legal memos to the file or for review by senior associates,

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[104] See supra note 25 (discussing origins of the phrase "relational capital").

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

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

to faxing important documents to the client.[107] Once again, this work can lead to the development of both firm-specific (e.g., knowledge of a particular client's document retention policy) and general (e.g., careful proofreading skills and the abilities to take orders and work long hours on a regular basis) human capital. Paperwork is unlikely, however, to develop the kind of higher order skills and judgment that partners look for when evaluating associates for partnership. Nor does this work typically result in an associate developing relational capital, since partners rarely have much contact with those who are only doing paperwork and tend to notice these unlucky associates only when something goes wrong.[108] Given this division of labor, every associate who wants to have a chance of winning the promotion-to-partner tournament needs to gain access to training work.

Unfortunately, this essential good, which we have elsewhere analogized to the "royal jelly" that allows worker bees to develop into queens, is in short supply.[109] This is true for three reasons. First, because of the sheer volume of paperwork generated by many areas of legal practice, firms must deploy a substantial number of associates to satisfy this demand. Firms therefore have strong incentives not to provide training work to those associates who are performing paperwork for fear of diverting their attention from completing these uninteresting, but nevertheless critically important, tasks. More important, training work requires the firm to commit a substantial amount of uncompensated (or, at best, undercompensated) partner time because much of this valuable training can only be transmitted in the one-on-one, on-the-job context (e.g., being with the partner at a negotiation or at a client meeting). Partner time, which can be billed out at high rates, is extremely

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[107] Numerous commentators, including Chief Justice Rehnquist, have noted the fact that a significant portion of the work done by junior attorneys is routine and largely unintellectual. See William H. Rehnquist, The Legal Profession Today, 62 Ind. L.J. 151, 151-54 (1987) (describing much of the work of young attorneys as "drudgery"); Patrick J. Schiltz, Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney, 82 Minn. L. Rev. 705, 725 (1998) (describing the work of the new associate as "numbingly dull").

[108] See Lisagor & Lipsius, supra note 29, at 280 (advising associates who want to become partner at Sullivan & Cromwell to avoid time-intensive litigation assignments that limit exposure to important partner contacts).

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

valuable.[110] Finally, firms do not need to provide—nor do they want to provide—all of their associates with significant firm-specific training. Paperwork associates only require minimal training. Moreover, firms realize that most associates will leave before the firm can reap the benefits of its investment in their development.[111]

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

First, those not receiving training work have strong incentives to shirk or to leave. Diligently performing paperwork is unlikely to result in partnership.[112] Therefore, an associate who finds herself doing mostly paperwork has an incentive to shirk while she investigates other job possibilities. Moreover, she has an incentive to begin this job search sooner rather than later. Not only does an associate doing primarily paperwork have limited partnership prospects (because the associate has not been trained), but the kind of general human capital produced by paperwork is likely to be of diminishing value to employers the longer an associate stays at the firm. A general knowledge of legal practice and careful proofreading skills are valuable in junior lawyers. Senior lawyers, however, are only valuable to the extent that they bring higher order skill and judgment to their work. As a result, paperwork associates face strong pressures to leave while their marketability is still relatively high.[113]

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

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

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

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

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

The reality of law firm economics, however, suggests that firms have a more complex interest in the longevity of paperwork associates. Paperwork attorneys are not receiving the kind of partner investment that tournament theory implies all associates receive. Consequently, the marginal productivity of paperwork associates (as measured by the firm's ability to bill the associate's work to clients at the appropriate rate) remains relatively constant throughout their tenure; hence we have elsewhere described these associates as "flatlining."[114] After a certain number of years, the flatline of a paperwork associate's marginal utility will drop below the marginal cost (measured in terms of the associate's salary and benefits) of keeping that lawyer at the firm. When that happens, the firm has every incentive to let the associate go.[115]

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

Of course, no associate does only paperwork. Indeed, some might object to our division between training and paperwork on the ground that every associate does a certain amount of both. Randomly distributing training and paperwork throughout the associate

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(reporting that 43% of all associates leave their first law firm by year three and 66% leave by year five). Understandably, associates prefer to leave before the point at which their departure will be taken as a negative signal.

[114] See Wilkins & Gulati, supra note 17, at 540-41; cf. Gillian Lester, Careers and Contingency, 51 Stan. L. Rev. (forthcoming 1998) (describing the flatline concept in the context of part-time or temporary jobs).

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

pool, however, is inefficient. As we noted, there is substantially more paperwork than training work, particularly in an associate's early years. Consequently, a random distribution of these two kinds of tasks ensures that associates who leave because they think they are getting too much paperwork will also take with them some amount of valuable firm-specific training. To the extent that this departure occurs early in the associate's career, the firm may very well have not yet recouped its cost in providing this training. Firms have strong incentives to minimize the loss of unrecouped training expenses through associate attrition.[116] This has important implications for the model we construct.

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

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

C. It Is a Team Sport

As we indicated in Part I, a significant percentage of the work done by lawyers at elite firms is done in teams on projects that respond to client emergencies.[117] Taken together, these characteris-

[116] See Galanter & Palay, Tournament of Lawyers, supra note 1, at 99-101.

[117] See supra text accompanying notes 63-64.

tics of elite firm work suggest that firms must structure themselves in ways that foster cooperation as well as competition.[118]

A firm structured entirely as a tournament would not be an environment that fostered cooperation simply because one's success in the standard tournament is a direct function of others not performing as well. If associates see themselves as directly competing against a substantial number of their peers—for scarce training resources or client contact, for example—they may act in ways that disturb the delicate balance between competition and cooperation. Thus, associates might refuse to share important information about clients or legal developments with their peers. In the worst case scenario, associates might seek to sabotage work done by other associates, for example, by spreading rumors or giving misleading advice. Behavior of this kind creates problems for firms—problems that are exacerbated where work has to be done in cooperative teams.[119] Put simply, the higher the rewards of the tournament, the higher the incentive to engage in sabotage for those who want these rewards.

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

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[118] See Robert L. Nelson, Partners with Power: The Social Transformation of the Large Law Firm 4-5 (1988) (describing the importance to law firms of maintaining an aura of collegiality even in the face of increasing bureaucratization).

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

tion is at odds with the claim that law firms are organized as standard economic tournaments.

Nor is it plausible that the high levels of cooperation typically reported in these institutions are the result of direct monitoring and control by partners. Partners, of course, can seek to minimize the dangers of excessive competition by making clear that an associate's ability to work well with his or her peers plays an important role in partnership decisions—in other words, by setting up a competition in cooperation.[120] Although partners undoubtedly seek to convey this message, its effect is muted by one of the monitoring problems that we identified in Part I, the difficulty of measuring cooperation (and the corresponding difficulty of detecting sabotage) when lawyers are working in teams.[121] In addition, while the partnership as a whole has strong incentives to detect and sanction sabotage, individual partners are likely to have suboptimal incentives to participate in this joint enterprise—at least when the sabotage does not directly affect their own practices. The existence of widespread competition *within* the partnership itself, as we shall see, creates its own problems for the promotion-to-partner tournament.

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

Tournaments work, in part, because a firm's commitment to promote a fixed percentage of associates sends a credible signal to these young lawyers that the "best" of their ranks will be selected for partnership.[122] In essence, tournament theory analogizes partners to neutral umpires whose only interest is to select (albeit in a non-mechanistic way) those competitors who have performed the best during the competition. This image of partners as neutral decisionmakers fails to capture the fact that partners are *players* as well as judges.

Partners are players with vested interests, as opposed to neutral decisionmakers, because partnership no longer means tenure.

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

[121] See supra text accompanying notes 63-64.

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

With tenure and lockstep compensation, existing partners face relatively few threats to their privileged positions. This security, in theory, frees partners from self-interest and enables them to vote to promote the best qualified associates.[123] When one takes away tenure and makes compensation variable, partners inevitably begin asking questions such as: "If we make this person partner, will he someday vote to have my compensation reduced, or worse, to have me fired?" It is a reality of today's competitive environment that if new partners find that they are generating the lion's share of the partnership's profits, they may well decide to terminate some of their older, less productive colleagues.[124] Further, in addition to fighting to retain their hard-earned partnership positions, partners also compete to move up within the hierarchy of partners.[125] This competition between partners is most visible where people compete for positions on the committees (executive, management, compensation, etc.) that run most large firms. As such, individual partners are likely to have interests that are at least in tension, and potentially at odds, with the interests of the firm as a whole.[126]

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

[124] See Wilkins, Partners Without Power, supra note 19, at 2; see also Paul M. Barrett, Putsch and Shove: A Once-Stodgy Firm Makes a Flashy Return, But at What Cost?, Wall St. J., Aug. 17, 1998, at A1 (describing how a group of young partners at Cadwalder, Wickersham & Taft compiled the names of less productive senior colleagues and forced them out, thereby cutting the size of the partnership by nearly 20%).

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

[126] As Steve Bainbridge has pointed out, given that individual partners have both divergent interests and private information as to which associates should be promoted to partnership, one would expect to see large law firms move away from consensus-based decisionmaking to authority-based decisionmaking. See Bainbridge, supra note 64, at 70 ("[A]uthority-based decisionmaking structures arise where group members have different interests and amounts of information .... [C]ollective decisionmaking is impracticable in such settings."); Kenneth J. Arrow, The Limits of Organization 69-70 (1974) ("Thus, authority, the centralization of decision-making,

Consider, for example, the issue of training raised in the prior Section. Firms have an incentive to ensure that every associate receives a basic level of training, both as a means of improving the overall quality of the firm's work, and to minimize the risk that those who do not receive training will leave while they are still economically profitable to the firm. Individual partners, however, have suboptimal incentives to contribute to the production of this firm-wide benefit. Training is costly to individual partners—time spent training is time that the partner cannot spend either producing revenue or consuming leisure. The benefits of training, on the other hand, are diffuse. To be sure, every partner needs a certain number of well-trained associates to do his or her work. Time spent training these associates produces private gains for the partner—assuming that the associate continues to work for that partner. Associates, however, typically work for multiple partners,[127] and therefore no individual partner will be able to capture fully the time invested in training. As a result, partners have an incentive to ration time spent on training and to invest only in those associates who are most likely to provide direct benefit to their practices (i.e., the one or two associates for whom an individual partner can provide a steady stream of billable assignments).[128]

One can tell a similar story about the behavior of partners when it comes to selecting tournament winners. As tournament theory predicts, with respect to an associate's past contributions,[129] it is in the firm's interest to promote those associates who have demonstrated their commitment to the firm by exerting more effort than

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serves to economize on the transmission and handling of information."). While the majority of the firms at which we conducted interviews did their partnership promotions through votes (i.e., consensus-based decisionmaking), a number of them had moved away from consensus-based decisionmaking in other areas of operation (in particular, with respect to compensation). Indeed, as Bainbridge predicts, the large, elite law firms do appear to be far more hierarchical and authoritarian within the partnership ranks—the firms being largely run by committees comprised of the most powerful partners—than they were 30 years ago.

[127] Our interviewees tell us that associates typically move from project to project, depending on which project needs to be staffed.

[128] Even associates on the partnership track (i.e., those who have been "chosen") are likely to move around a little for the reason that they typically will need support from a number of partners in order to gain a favorable partnership vote.

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

their peers. Individual partners, however, have strong incentives to favor their own protégés over the arguably better qualified protégés of others. By the time an associate is considered for partnership, he or she will have worked closely with a small number of partners over a number of years. These partner-mentors will frequently come to believe that their protégés (who in many cases will also have become their friends) are better qualified to become partners than associates with whom the partner-mentor has not worked.

More important, in the increasingly competitive world of large law firms, senior partners depend upon junior partner protégés for more than friendship. In the early years, senior partners need junior partners who will do their work (without trying to steal their clients) while the senior lawyers go out to look for additional business. In later years, senior partners depend on their protégés to support them (perhaps by referring clients in the other direction) when the senior lawyers are no longer able to protect their own interests in the partnership. Given these realities, we should expect tournament winners to be selected as much on the basis of politics as on firm efficiency.[130]

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

Second, partners have strong incentives to encourage this behavior by attempting to monopolize the services of star associates (even if they have to create "make-work" to do so) and by overvaluing their protégé's contributions. Firms must develop mechanisms for policing this kind of opportunistic behavior. This task is

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

made more difficult by the fact that partners are both formally and presumptively autonomous.

E. Of Shirking Umpires and Absent Players

Galanter and Palay treat the partnership decision as the end of the tournament.[131] One might seek to justify this conclusion on the ground that once a lawyer becomes a partner, she no longer has an incentive to shirk or to engage in other forms of opportunistic behavior since she is now a part owner of the firm. We do not believe, however, that Galanter and Palay hold this view. As two of the most trenchant observers of the legal profession, these authors are well aware that controlling opportunistic behavior by partners has become perhaps the single greatest preoccupation of large law firms.[132] Instead, we believe that the authors' assumption that the tournament is divided into two and only two distinct phases—associateship and partnership—reflects the fact that their model is premised on a simple economic model in which there are only two categories of workers.

Characterizing the tournament as a single-round game masks two issues that have a direct bearing on how law firms structure their internal labor markets. The first issue relates to the firm's need to retain senior associates, who have been given valuable firm-specific human capital. Not all associates are fungible. Firms need both senior associates, who are capable of supervising junior lawyers and of relieving partners of many of their day-to-day responsibilities, and junior associates who can turn out the large volume of paperwork (and smaller volume of training work) required to service the needs of corporate clients. Due to the scarcity of training work, however, only a relatively small number of associates who start at a given firm are likely to "graduate" to the level of senior associates. As the years go by and senior associates confront the fact that their prospects for moving laterally may diminish

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

[132] As the partnership structures of elite firms grow larger and mutual monitoring and peer pressure no longer serve to solve agency problems, it makes sense that we would see firms being increasingly concerned about opportunistic behavior by partners. Shirking by associates can be costly, but shirking by partners is likely to be far more costly because partners have greater responsibility and their shirking can have "repercussive effects throughout the firm." Bainbridge, supra note 64, at 59 n.266.

the closer they get to the partnership decision, this number declines further.[133] The net result is that firms can end up with too few senior associates.

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

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

F. Choosing the Best Representatives, Not the Best Performers

In the standard tournament model, winners are selected solely on the basis of their past contributions to the firm.[134] This selection criterion makes sense because the point of the tournament is to induce employees to exert high levels of effort and care at their current jobs by promising that those who perform the best will be rewarded in the future.

In their account of the promotion-to-partner tournament, Galanter and Palay qualify this standard assumption by suggesting that an additional criterion for selecting partners is the associate's de-

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[133] Employers may take their departure as a sign that they were not "good enough" to become partners. Cf. J. Hoult Verkerke, Legal Regulation of Employment Reference Practices, 65 U. Chi. L. Rev. 115, 146 (1998) (describing how previous dismissals, however benign, can scar an employee in the eyes of a potential employer); Lester, supra note 114, at 62 (same).

[134] See Milgrom & Roberts, supra note 11, at 367.

velopment of his or her own human capital.[135] Since excess human capital is what allows partners to employ additional associates, Galanter and Palay assume that by rewarding associates for their past accumulation of human capital, firms also ensure their own future growth and development.[136]

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

One of the main virtues of tournament theory is that it provides employees with a measurable commitment that the firm will not cheat on its promise to reward those workers who have performed the best during the probationary period.[137] In order for this commitment to be credible, however, the firm must clearly signal that tournament rewards will be given on the basis of past performance and not on the basis of the firm's prediction about future performance in the higher level job.

Two effects underlie this intuition. First, at the time the firm chooses tournament winners, it has already acquired all the benefits of the employee's work during the probationary period. As a result, it has the incentive to shark by ignoring this work and awarding tournament prizes on the basis of what is in the firm's best interest in the future, to wit, selecting employees that the firm believes will perform better at the higher level job regardless of how these employees performed as juniors. At the same time, associates, recognizing that what will ultimately be rewarded is their capacity to do the higher level job, have strong incentives to divert their energies into acquiring the skills associated with the higher level job rather than in diligently doing the work of a junior level employee. Since the point of a standard economic tournament is for the firm to cut down on the cost of preventing shirking by junior level workers by giving them a reason to work hard with little supervision, a system that hands out tournament rewards on the basis of predictions about future performance undermines the tournament's original purpose, namely to induce people to work

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

[136] See id. at 107.

[137] See id. at 101.

hard while they are associates.[138] As a result, by including—correctly, as we will argue—the firm's assessment of an associate's accumulated human capital as part of the partnership decision, Galanter and Palay's model no longer explains why associates work so hard with relatively little supervision on the large amount of routine paperwork that has little if any effect on their accumulation of the kind of human capital that will enable them to become partners.

One might respond to this objection by arguing that in the law firm context, the difference between choosing tournament winners on the basis of their past performance and choosing them on the basis of predictions about their future ability is unimportant because an associate's past performance is highly correlated to his or her future abilities as a partner. There are good reasons to believe, however, that this is not the case. At the most elementary level, firms need associates to bill a substantial number of hours, many of which will be spent, as we have already indicated, on paperwork. Although the inclination and willingness to work hard as an associate may signal the same willingness as a partner,[139] it is the acquisition of human capital that is crucial for the partner. If a partner does not acquire a sufficiently high amount of human capital, there will not be enough to rent out to the associates. As a result, as we indicated in Part I, partners do not rank "hours worked" highly on the list of criteria that are important to the partnership decision.[140]

Moreover, partners need a substantially different kind of human capital than good associates need—even associates who do primarily training work. The most important work done by today's large

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

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

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

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

[140] See supra text accompanying notes 55-60.

law firm partners is bringing in business.[141] Associates do virtually no rainmaking.[142] Although accumulating the kind of general and firm-specific human capital that comes from being a good associate undoubtedly plays a role in whether a given lawyer is likely to become a rainmaker, even the best associate may not have the different mix of personal and professional qualities that enable someone to attract significant corporate business.

Finally, as critics of tournament theory as a method for explaining law firm growth have noted, partnership decisions are beholden to the business cycle.[143] Even if firms feel substantial pressure to make the same *number* of partners every year (regardless of swings in demand), the *location* of these partners (i.e., corporate, litigation, tax, etc.) will depend upon the amount of business that the firm believes each of these departments is likely to produce in the future.[144] Thus, the fundamental issue with respect to both the individual candidate and the firm's needs is one of prediction, not reward.

Given these three differences between "associate" work and "partner" work, it is not surprising that, in a recent study of large New York law firms, O'Flaherty and Siow found only a loose correlation between "past performance" as an associate and "future performance" as a partner.[145] As they conclude, "performance as an associate is not an especially informative signal about whether a lawyer will make a good partner."[146] Given that "the costs of mistaken promotion [to partnership] are relatively high,"[147] firms have an incentive to focus on future performance as a partner, rather than past performance as an associate, when making partnership decisions.

The focus on prediction raises complications for the basic tournament model, both for the firm and for associates. Although assessing an associate's past efforts and investment is undeniably difficult,

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[141] See Osborne, supra note 72, at 71-73.

[142] See id. at 72.

[143] See, e.g., Nelson, supra note 16, at 743; Lambert, supra note 16, at 1724-28.

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

[145] O'Flaherty & Siow, supra note 1, at 709.

[146] Id.

[147] Id.

it is less difficult than predicting whether the associate will perform well in an area where she has so far not been tested, and whether she will be loyal to the incumbent partners. Moreover, the stakes resting on this predictive judgment are quite high, especially if one argues, as do Galanter and Palay, that partnership is not only the end of the tournament, but essentially equivalent to tenure.[148]

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

G. Who's on First?

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

Galanter and Palay argue that a firm's promotion rate provides a sufficient signal.[150] According to their model, by promoting a fixed percentage of associates to partnership every year, the firm demonstrates that it has no incentive to shark by failing to promote the best associates from the available pool. Even assuming that firms promote a fixed percentage of associates every year—a contestable

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[148] See id. (noting that an "up-or-out policy" exists both in law firms and universities).

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

[150] See id. at 101-02.

proposition[151]—standing alone, this signal is unlikely to reassure associates that the firm is fulfilling its obligations in the tournament.

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

Moreover, to the extent that existing associates have difficulty detecting whether firms are behaving opportunistically, law students, whom Galanter and Palay rely on to boycott firms who fail to fulfill their partnership commitments,[153] are likely to be even less well informed. Although law students can observe whether a firm has made partners in a given year, they are unlikely to know whether these new members came up through the ranks or were added laterally. Nor are the statistics indicating the percentage of a given law school class who make partner at a firm particularly useful. Consistent with our first qualification to Galanter and Palay's assumptions, law students know that many of the associates who start work at a given law firm have no intention of making partner. Depending upon exactly how large this group of non-participants is, even a small partnership percentage may look relatively attractive if one assumes that most of the other associates who did not become partners left of their own volition.

The second problem firms have with displaying adherence to tournament rules arises from our discussion in the preceding Section about "past" versus "future" performance. To the extent that associates know that firms will consider an associate's likely future

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[151] See Richard H. Sander & E. Douglass Williams, Why Are There So Many Lawyers? Perspectives on a Turbulent Market, 14 L. & Soc. Inquiry 431, 437-38 (1989) (noting the absence of government data on the number of partners at various firms).

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

[153] See Galanter & Palay, Tournament of Lawyers, supra note 1, at 107.

performance as a partner (as well as her past performance as an associate) when making partnership decisions, they can no longer rely on the total number of associates who made partner in any given year as a reliable barometer of whether the firm is sharking on its commitment to promote on the basis of past performance. To reach accurate judgments about the relative weighting of past versus future performance, associates would need to know how partners assessed these different criteria in specific cases.

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

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

In sum, none of Galanter and Palay's seven assumptions about the operation of the promotion-to-partner tournament hold up un-

der scrutiny. Since these assumptions are consistent with standard tournament theory, the fact that they do not correspond with our observations of elite firm practices suggests that these institutions are not structured as standard economic tournaments.

As we indicated at the outset, many academics who have raised questions about Galanter and Palay's model advocate dispensing with tournament theory altogether.[154] We disagree. Although the basic tournament theory does not adequately explain the structure and operation of contemporary elite firms, the competitive aspect that the tournament model captures is a vital building block for constructing a more nuanced model of the large law firm. The next Part explains our reasons for reaching this conclusion and provides a preliminary look at a revised model for understanding the tournament of lawyers.

III. THE TOURNAMENT RECONCEIVED: WHY THIS IS NOT YOUR FATHER'S PARTNERSHIP TOURNAMENT

Contemporary elite law firms continue to follow many of the traditional practices that led scholars to characterize the promotion policies of these organizations as tournaments. Firms continue to hire the majority of their associates out of law school and, after a relatively fixed number of years, promote some to partnership and dismiss the rest. For all of the fanfare surrounding the introduction of "contract lawyers," "permanent associates," "professional managers," and other similar innovations, these developments remain at the margin.[155]

As we demonstrated in the last Part, however, beneath the surface of this important continuity, the pressures exerted by the changing market conditions in which big firms compete for labor and clients have taken their toll on the traditional promotion-to-partner tournament. Thus, although the process may *look* the same as it did in the golden age, and in many important respects *is* the same, firms have made significant modifications to their internal labor practices to take account of their new environment.

In this Part, we explain this apparent paradox. Section A explains why, notwithstanding the many differences between elite

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[154] See supra text accompanying note 20.

[155] See Kaufman, supra note 98, at 30.

firm internal labor markets and the assumptions underlying standard tournament theory, the tournament metaphor is a useful heuristic for understanding the practices of these institutions. This heuristic, however, will only generate meaningful predictions for large firms if we substantially amend the assumptions underlying this standard model to reflect the factors we discussed in Part II. Section B begins this process by arguing that elite firms utilize a multiple incentive system designed to provide associates with the proper motivation to work hard with relatively little supervision, and to train the next generation of senior associates and partners. Ironically, because firms rely on multiple incentives to motivate associates (as opposed to the sole incentive of the chance of becoming a partner assumed by standard tournament theory), these institutions have also adopted practices that one often finds in "real" competitions (both sporting and otherwise) upon which tournament theory is loosely based. Specifically, elite firm labor markets are characterized by "tracking," "seeding," "multiple rounds," and "information control." Sections C through F, respectively, define and describe each of these practices. Collectively, these four practices create a very different tournament than the one assumed by tournament theorists.

A. There's Still a Tournament

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

Today's elite corporate firms can trace their institutional practices, including the promotion-to-partner tournament, to the so-called "Cravath model," first established by New York's Cravath, Swaine & Moore more than a century ago.[156] In the early years, this organizational model was well adapted to the market condi-

[156] See Nelson, supra note 118, at 71-73.

tions in which Cravath and its competitors found themselves. Given the scarcity of high-quality elite firms, the gap between the quality of elite law school graduates and those from other schools, the existence of long-term relationships between firms and clients, and the substantial information asymmetry between firms and clients, it made sense for firms such as Cravath to hire top law students and to pass the cost of training these new lawyers onto their clients.[157] Moreover, the dominant position that these institutions occupied in the legal market facilitated the basic bargain contemplated by tournament theory. In the days before the rise of such contemporary rivals as investment banks, consulting firms, and lucrative in-house legal counsel positions, elite law firm partners were widely perceived—by lawyers, clients, and most important, by law students—as being at the pinnacle of the profession's income and status hierarchy. Top graduates were therefore willing to join these institutions for wages that were no more, and in some cases less, than those that they could obtain in other sectors of the legal marketplace.[158] In return, firms promised that the "best" of these young men (and they were only men during this period) would be elevated to partnership with all of the financial rewards and prestige that accompanied this status. Tournament losers, on the other hand, could be confident of finding jobs (with "lesser firms," government, or clients) that paid wages similar to those that they were earning as associates.

Given these conditions, many of the assumptions discussed in Part II about institutions that are structured as rank-order tournaments were plausibly satisfied. Thus, given the gap between the income and status of elite firm partners and those of other lawyers, it is likely that many of the associates who joined these institutions were strongly committed to winning the tournament. Similarly, in light of the smaller associate-to-partner ratios in the early days of the Cravath model and the greater uniformity of the work done by these firms (i.e., smaller transactions and cases worked on by smaller teams of lawyers), the gap between "training work" and "paperwork" was arguably less than it is today, thereby making it more plausible (as standard tournament theory assumes) that every

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[157] See Wilkins & Gulati, supra note 17, at 608.

[158] See id.

associate had a (relatively) equal chance of succeeding. Finally, a firm's long-standing client relationships reduced the need for individual partners to generate business. It was therefore rational for firms to select new partners based primarily (although perhaps not exclusively) on their past contributions to the firm. The prevalence of lockstep compensation and near lifetime tenure encouraged partners to view the interests of the firm as synonymous with their own.

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

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

Nevertheless, the pull of the initial path remains strong. As Lucian Bebchuk and Mark Roe argue with respect to corporate structures, once an institution starts down a particular path, the costs of changing structures and practices that are no longer optimal given current realities will often seem too great—even in cases where

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

[160] See supra text accompanying notes 95-99.

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

[162] See infra text accompanying notes 176-185.

everyone agrees that if they were starting fresh, a new institutional structure would be more efficient.[163] Although law firms do not face the hold-out and collective action issues associated with establishing a controlling shareholder that Bebchuk and Roe identify in the corporate context, professional firms confront their own unique barriers to change. As Robert Nelson has documented, institutional structures in law firms are frequently viewed as closely linked to professional values.[164] The promotion-to-partner tournament is a case in point. Senior partners have long claimed that the grueling workload and demanding selection process that typify the traditional tournament play an essential role in inculcating the professional values that young lawyers must acquire if they are to become competent and ethical practitioners.[165] Having consistently made these claims, senior lawyers would find it difficult to advocate a different promotion system, particularly in light of the fact that, as tournament winners, they have a vested interest in continuing to profess the *bona fides* of practices that validate their current position.

More important, at least one key aspect of the traditional institutional structure of elite firms is now enshrined in rules that effectively have the force of law. The rules of professional responsibility currently prohibit lawyers from sharing fees or otherwise entering into partnership with non-lawyers.[166] This limitation is grounded in the traditional belief that lawyers, as independent professionals, must be free from any influence or control other than from their

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[163] See Lucian Arye Bebchuk & Mark J. Roe, A Theory of Path Dependence in Corporate Governance and Ownership (Apr. 1998) (unpublished manuscript, on file with the Virginia Law Review Association); see also Mark J. Roe, Chaos and Evolution in Law and Economics, 109 Harv. L. Rev. 641 (1996) (arguing that evolution-toward-efficiency does not fully determine the institutions we observe); Marcel Kahan & Michael Klausner, Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases, 74 Wash. U. L.Q. 347 (1996) (discussing standardization in contract terms).

[164] See Nelson, supra note 118, at 220.

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

[166] See Model Rules of Professional Conduct Rule 5.4 (1997); see also Edward S. Adams & John H. Matheson, Law Firms on the Big Board? A Proposal for Nonlawyer Investment in Law Firms, 86 Cal. L. Rev. 1 (1998) (describing the nationwide restrictions on nonlawyer investments in law firms).

clients or from the courts.[167] As a result, law firms cannot sell shares to the public or adopt many of the other practices of a typical corporation.

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

The second reason why it is important not to abandon the tournament metaphor altogether is that the allure of the inevitable competition for partnership continues to play an important—albeit diminished—role in structuring the practices of these institutions. At a basic level, some of the associates who join any particular elite firm continue to be motivated by the prospect of making partner. Many more undoubtedly view partnership as an attractive prize—even if they currently do not see themselves as competing for that prize. For these associates the tournament continues to cast a shadow that gives them an additional reason (if only subconsciously) to work hard with relatively little supervision.

There is, however, one group of associates for whom the prospect of making partner is their primary motivation: senior associ-

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[167] See Model Rules of Professional Conduct Rule 5.4 cmt. ("The provisions of this Rule express traditional limitations . . . [designed] to protect the lawyer's professional independence of judgment."). See generally David B. Wilkins, Who Should Regulate Lawyers?, 105 Harv. L. Rev. 799, 853-63 (1992) (discussing the meaning of professional independence).

ates in their last few years before partnership. With respect to these lawyers, there does appear to be a tournament at work, albeit for reasons other than those posited by the majority of tournament theorists. Several aspects of the competition among senior associates resemble the assumptions underlying standard tournament theory. First, given that associates rationally believe that their lateral job prospects diminish in the few years before partnership (on the assumption that they are leaving because they are not "good enough" to make partner), associates without a strong commitment to winning the tournament are likely to leave before they get to this stage. Moreover, by year six or seven, a senior associate has invested heavily in developing firm-specific human capital, an investment that is not fully reflected in his or her current compensation.[168] The only way to recoup this investment fully is to win the jump in compensation that comes with winning the partnership prize. Finally, senior associates know that there are only a finite number of partnership slots; a number, in most cases, that is smaller than the number of senior associates remaining in the pool, and that will vary depending on the state of the market for legal services at the time the partnership decision is made.[169]

Senior associates have, in all likelihood, developed significant amounts of both human and relational capital, and are therefore competing on a roughly level playing field. Senior associates have all done significant amounts of training work.[170] Each of these contestants has also acquired at least one important partner-mentor who, because she has invested in the associate's training, has a strong incentive to monitor other partners to ensure that her protégé asso-

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

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

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

ciate is treated fairly in the evaluation process.[171] Finally, senior associates tend to work in separate arenas for different partners. As a result, there is only a minimal risk of sabotage.

These conditions, i.e., closely matched contestants, assurances of fairness, and protections against sabotage, mirror those present in sports settings and other contests that are structured as tournaments.[172] Under these conditions, a tournament structure may efficiently induce extra effort by contestants (in this case, senior associates) in the last stages of the competition. Senior associates know that it is not enough for them to perform well in their jobs: They must be *better* than their peers if they are to win one of the finite partnership slots, thereby not only reaping the rewards of partnership but (equally important in today's job market) avoiding the substantial losses associated with being turned down for partnership.[173] As a result, these lawyers have strong incentives to work extremely hard with little prompting from partners. As we indicate below, firms consciously structure their promotion practices to maximize this incentive.

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

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

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

[172] See Demsetz, supra note 10, at 118-19.

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

B. Multiple Incentive Systems

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

Our observations in Part II suggest, however, that firms have reasons for adopting a multiple incentive strategy that go beyond the expressed preferences of associates. For example, contrary to Galanter and Palay's model, under current conditions, elite firms cannot afford for every associate to be strongly motivated to win the tournament. As we noted, the kind of training work and relational capital that associates need to win the tournament are scarce commodities. If every associate were to compete fiercely to acquire these goods, firms would have to expend substantial resources to guard against sabotage and other forms of costly strategic behavior by associates.[174]

More important, because firms select partners in part on the basis of which associates have acquired the greatest amounts of firm-specific and relational capital during their probationary period, it is in the best interest of these institutions if these scarce goods end up being concentrated in the small pool of senior associates from which the firm will ultimately make its selection. The smaller the number of associates competing for scarce and valuable training and mentoring opportunities, the more of these forms of capital each of those who are competing are likely to acquire. Assuming that these valued associates can be induced to stay long enough to be considered for partnership—a subject about which we will have more to say later[175]—limiting the number of associates competing for partnership is likely to raise the average quality of the pool from which the firm ultimately selects its partners.

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[174] See supra text accompanying notes 118-121.

[175] See infra text accompanying notes 197-204.

These advantages of limiting the number of associates actively competing for partnership underscore the need for firms to implement a multiple incentive strategy. In addition to training work, firms have large amounts of paperwork that also must be done by associates. Given that this work is unlikely to lead to partnership, paperwork associates need more than the tournament to motivate them to do this tedious but necessary work competently and effectively with relatively little supervision by partners. Firms appear to be succeeding at this task. As we observed at the outset, even associates doing primarily paperwork exert high levels of effort and care in their work. The question is what is motivating these lawyers to do so.

We suggest that firms rely on three additional motivational tools (beyond the chance for partnership) to either supplement or supplant the incentive effects of the tournament: high (above market) associate wages, associate reputational bonds, and the promise of general (as opposed to firm-specific) training. We discuss each one in turn.

1. High Wages. High wages offer incentives for employees to exert high levels of effort where the wage paid is significantly higher than that paid at an alternative job. These high or "efficiency"[176] wages serve as sufficient incentives because workers fear losing these scarce high-wage jobs; by definition, those who lose these coveted positions will have difficulty finding similarly high-paying jobs in the marketplace.[177] At the same time, workers know that employers can easily find replacement workers who will gladly take their high-paying jobs.[178] This fear induces employees to exert high levels of effort and care even where monitoring is

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

[177] See Schwab, supra note 39, at 16.

[178] See Lazear, supra note 10, at 70 (stating that for the efficiency wage theory to hold there must be a "queue for the job").

low.[179] Employers, in turn, use part of the gains from increases in worker productivity and decreases in monitoring costs to pay for the above market wages.[180]

The contemporary market for lawyers matches what one would expect to find in a sector where the elite firms pay efficiency wages.[181] Indeed, the difference in relative wages between the salaries paid by large law firms and those paid by other legal employers is one of the most striking features of contemporary legal practice.[182] Prior to the 1960s, this gap was almost non-existent.[183] Today, first year associates in New York City earn over $100,000 per year, with those in the rest of the country not far behind.[184] Only investment banks and management consulting firms come close to matching these salaries.[185]

As a preliminary matter, many students state that the high salaries paid by corporate firms are the primary reason why they choose jobs in this sector over what they consider to be more rewarding work in government or in public interest practice.[186] This fact is important because the labor needs of elite firms are likely to exceed the supply of students who have strong *ex ante* partnership intentions. In addition, since the actual preferences of most law students are relatively weak and subject to change, firms have an incentive to recruit at least some talented students for whom the lure of partnership holds little current appeal, in the hopes of changing their minds and thereby increasing the talent pool from which they will eventually select partners.

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[179] See Wilkins & Gulati, supra note 17, at 534.

[180] See Lazear, supra note 10, at 70.

[181] See, e.g., Wilkins & Gulati, supra note 17, at 530-34.

[182] See id. at 530-31.

[183] See Richard L. Abel, American Lawyers 302 tbl.38 (1989) (reporting that in 1954, the mean income for law firm associates in the United States was $7,786 as compared to $7,915 for government lawyers).

[184] See Anna Snider, Smaller Firms Meet the Challenge: Various Efforts Used to Hire the Best, N.Y. L.J., Sept. 8, 1998, at S2 (special pull-out section); Martha Neil, Big Firms Here Boost 1st-Year Pay to $90,000, Chi. Daily L. Bull., Sept. 15, 1998, at 1; Robert Carter, Jr., Legal Times, Sept. 14, 1998, at 3 (reporting D.C. starting salaries to have risen from $80,000 to $90,000).

[185] See Wilkins & Gulati, supra note 17, at 531 n.121.

[186] See Granfield, supra note 96, at 151-53; see also Angela Wissman, Money, Prestige and Sleep Deprivation at Skadden, Ill. Legal Times, Sept. 1998, at 1 (describing the importance of Skadden's $100,000-plus starting salaries in attracting associates).

More important, once an associate joins a corporate firm, the wages paid by these employers create a substantial inducement to stay and to continue to work hard. For some associates, deferred gratification makes the prospect of acquiring a lifestyle that is at least commensurate to (if not in excess of) their high salaries virtually irresistible.[187] Others may decide to stay at high-paying firm jobs simply to pay back student loans.[188] Moreover, as we indicated firm leaders might predict at the hiring stage, the lure of continued high salaries (not to mention the super bonus that accompanies partnership) induces some associates to opt into the tournament once they have spent a few years at the firm.

2. Reputational Bonds. Associates risk losing something potentially even more valuable than their salaries if they lose their elite law firm jobs: They risk losing the market value of their hard-earned educational and employment related credentials. The value of this reputational "bond" is an important deterrent to shirking.[189]

The mechanism by which this incentive structure operates is straightforward. The large law firms hire primarily from elite law schools and from the top part of the classes of non-elite law schools.[190] These students, therefore, enter law firms with a valuable reputational credential—the signal that they attended and succeeded at an elite law school, or some other comparable signal (such as finishing first in their class at a regional law school or obtaining a prestigious clerkship). This signal is valuable because it suggests that the person who possesses it has the skills and disposition to become a good lawyer. Because prestigious academic credentials are only a signal of whether the individual is likely to be a good lawyer—and, as we have already suggested, a loose signal at

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[187] See Wilkins & Gulati, supra note 17, at 532. It is no accident that associates frequently refer to their high salaries as "golden handcuffs."

[188] See Wilborn & Krotoszynski, supra note 95, at 1303 n.34 (supporting the assertion that law students may choose high-paying law firm jobs to repay law school debt).

[189] See Milgrom & Roberts, supra note 11, at 189; Ribstein, supra note 1, at 1714. For the classic article on reputational bonds, see Benjamin Klein & Keith B. Leffler, The Role of Market Forces in Assuring Contractual Performance, 89 J. Pol. Econ. 615, 616 (1981); see also William A. Klein, The Modern Business Organization: Bargaining Under Constraints, 91 Yale L.J. 1521, 1536-37 (1982) (arguing that high-level managers, in effect, lease their reputations to the firm and risk losing that loan if the firm suffers failure).

[190] See Robert Granfield & Thomas Koenig, Professional Stratification and Social Networks, 4 Res. Pol. & Soc'y 325, 328 (1992).

that—the value of these credentials can always be undermined by evidence of the real thing, i.e., evidence of whether the bearer of the signal is *in fact* a good lawyer. To the extent that there is convincing evidence that an associate is not as good as her academic credentials would suggest, she risks forfeiting much of the value of her education. Given both the price of an elite education and the overwhelming evidence that prestigious academic credentials (if untainted) pay handsome long-term dividends, forfeiting this reputational bond constitutes a substantial penalty.

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

In essence, when an associate takes a job with a large law firm, he in effect "posts" his elite educational credentials as a bond guaranteeing his future performance. The fear of forfeiting this

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[191] See Wilborn & Krotoszynski, supra note 95, at 1314 n.66 (explaining that senior associates who do not make partner find it difficult to find comparable lateral law firm jobs).

[192] The reputational bond story we tell is analogous to the ex post settling up incentive mechanisms described by some economists. See, e.g., Lazear, supra note 10, at 72-73 ("If worker reputation can be established, then a worker has an incentive to put forth effort, not because of what he gets from this job this period but because this period's effort affects next period's wage."); see also Eugene F. Fama, Time, Salary, and Incentive Payoffs in Labor Contracts, 9 J. Lab. Econ. 25 (1991) (same); Bengt Holmström, Managerial Incentive Problems—A Dynamic Perspective, *in* Vetenskap Och Företagsledning: Studier I Ekonomi Och Ledarskap Tillägnade Lars Wahlbeck [Essays in Economics and Management in Honour of Lars Wahlbeck] 209 (Björn Wahlroos et al. eds., 1982) (same); Robert Gibbons & Kevin J. Murphy, Relative Performance Evaluation for Chief Executive Officers, Indus. Lab. Rel. Rev., Feb. 1990 Special Issue, at 30-S (same).

bond is a substantial incentive for him to work hard with little supervision.[193] Consider, for example, an associate who hopes to move in-house to the legal staff of one of the firm's clients.[194] Obviously, a negative signal from the law firm would destroy (or, at a minimum, greatly diminish) this possibility. The associate, therefore, has an incentive to exert a high level of effort and care in her work for the firm so as to preserve her reputational signal.[195]

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

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[193] For example, in our informal poll of associates, 110 respondents out of 183 (or 61%) stated that they were motivated to work hard at their current positions primarily by the fear of losing their current high wages and of sending a negative signal to future employers. Cf. Verkerke, supra note 133, at 146 (discussing circumstances where discharge does not function effectively as a labor market signal); Wissman, supra note 186, at 1 (reporting that the value of working at Skadden for most associates—who work extremely hard but only stay there for two or three years—lies in the salary and the credential that having worked at a blue-chip firm provides them).

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

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

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

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

3. Training. Law students know that they need to develop their general human capital if they are to become successful lawyers. Law school offers little instruction in how to be a lawyer. Students, therefore, have good reason to seek out jobs that they believe will train them in the skills and dispositions that they need to become competent practitioners. Firms, in turn, have strong incentives to cater to this need by promising these aspiring professionals that in addition to their high salaries, associates will receive significant training that will be of value to them wherever they work.[197]

The promise of general, as opposed to firm-specific, training helps firms to reduce their monitoring expenses for those associates who are not participating in the tournament. Like high wages, the promise of general training gives lawyers with low partnership aspirations a reason to join firms as opposed to working for other legal employers. This increase in the applicant pool is important to firms. In addition, law students who join firms in the hope of receiving general training will also be motivated to exert high levels of effort and care in their work as associates to the extent that they believe that hard work improves their own development.

In sum, elite firms pursue a multiple incentive strategy.[198] Consistent with tournament theory, firms continue to hope that *some* lawyers will be motivated by the chance of making partner. For those who are not, firms create additional incentives through high wages, reputational bonds, and the promise of general training. Moreover, these four incentive systems (including the tournament) are interconnected. The less credible a firm's partnership promises, the more it is likely to rely on high wages or promises of providing valuable external signals.

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[197] See, e.g., Joel F. Henning, Maximizing Law Firm Profitability: Hiring, Training and Developing Productive Lawyers 3-1 (1991).

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

Two examples underscore this connection. First, in 1994, Cravath unilaterally raised the salaries of its senior associates (already among the highest in the country) by ten percent.[199] Given Cravath's notoriously low partnership rates,[200] the firm was having a difficult time retaining senior associates (and persuading junior associates to stay long enough to become senior associates). Cravath responded by dramatically increasing the "high wage" incentive for associates to stay at the firm.[201] Second, it is now common for many law firm interviewers to state expressly that young lawyers should join their firm "for the training" even if they only intend to stay for a few years. These comments tend to come from two types of firms: New York firms with very low partnership rates, and large firms in cities in the West and Midwest where salary structures are appreciably below those of New York. In each case, the firms appear to be using training as a substitute for the incentives created by the tournament or by high wages, respectively.

A multiple incentive system is efficient in the context of elite firms.[202] The firms are large, and do not carefully screen entering associates in terms of their goals, motivations, or levels of risk aversion. Given the low level of initial screening and the assumption that employees do not sort themselves, it makes sense for the

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[199] See Edward A. Adams, Cravath Raises Current Associates' Pay, N.Y. L.J., Dec. 20, 1994, at 1.

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

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

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

firm to provide a multiplicity of incentive schemes.[203] A multiple incentive strategy enables firms to maximize their chances of finding the right incentive for each associate.[204] The firms need all of their associates, whether doing paperwork or training work, to exert high levels of effort and care.

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

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

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

C. Multiple Tracks and Multiple Rounds: Why Sampras and Agassi Never Meet before the Final Round

As a formal matter, firms maintain few distinctions between associates in a given class. This formal uniformity, however, masks fundamental differences between the experiences and opportunities of particular associates. In order to ensure that they have adequate supplies of senior associates and partners, firms have to train some of their associates.[205] For reasons previously discussed, however, it is inefficient for a firm to invest in training *all* of its associates. Given the confluence of high leverage ratios and low levels of commitment by many associates to winning the tournament, the majority of associates who join a given large firm will leave, most before reaching the rank of senior associate.[206] Moreover, as we noted, firms generate an enormous quantity of paperwork which can be done by associates with little or no training. Taken together, these two factors—high associate attrition and the abundance of paperwork—give firms strong incentives to separate associates into two informal, but nevertheless quite real, groups: training-work associates and paperwork associates.

Tracking is the norm in many sporting competitions. At the United States Open Tennis Tournament, for example, tournament officials do not want the best players to compete against each other

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

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

until the later rounds.[207] The reasons underlying this desire range from ones grounded in fairness (the "best" players should have the greatest opportunity to compete in the tournament's later rounds) to efficiency (since later rounds are likely to attract more attention and fan support, tournament officials have an incentive to ensure that the top players compete in these rounds). To ensure this result, tournament officials create "brackets" in which the best players are separated and paired against lesser competitors. Separating the best players prevents the second best player from being knocked out in the first round by the tournament's best player. Protecting top players by giving them easier opponents than those who are not as highly ranked helps to ensure against random effects. Although Pete Sampras, the number one seed, might lose to Jaime Yzaga, the number sixty-four seed, because he is having a "bad day," Sampras is in much less danger of losing under these circumstances than if he were facing a more highly ranked player.

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

Tournaments in the workplace can also benefit from tracking. As Milgrom and Roberts explain, employers have an incentive to favor the winner of the first round in later rounds.[208] To demonstrate this conclusion, the authors posit a simple two-round game in which the employer must decide whether to promote one of two employees (*A* or *B*) after the second round. Even if we assume

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[207] Tennis analogies appear to be among the favorites in applying tournament theory to labor markets. See Lazear, supra note 10, at 26; Michael E. Kanell, Tennis Anyone? Why the Rich are Rich, Atlanta Const., Dec. 31, 1997, at C2, available in 1997 WL 4010150.

[208] See Milgrom & Roberts, supra note 11, at 365.

that the employees' performances at each stage provide information about their qualifications for the promotion, the firm's optimal decision rule is to ignore second-round information and promote the winner of the first round. If candidate *A* wins both rounds, this is obviously the correct result. But even if candidates *A* and *B* split the victories, there is at least as much information favoring the first-round winner (*A*) as the second (*B*), so the firm is equally well off promoting *A* solely on the basis of the first-round results. If, however, the firm favors the first-round winner in the second round, then the firm gains additional information by seeing if *A* actually wins the second round. (If he loses despite being favored, then *B* is likely to be better.) Tracking, therefore, is a rational way for firms to reduce monitoring costs in a multiround game.[209]

The model of elite firms we describe fits this pattern.[210] The internal labor markets of these institutions, as we have suggested, are *multiround* competitions. Associates progress, first from assignment to assignment, then from the junior ranks to senior associate status, and finally (for the chosen few) to partnership. As Milgrom and Roberts predict, associates who do well in early rounds are favored and protected in later rounds.

Firms create a multiround tournament by the manner in which they distribute and evaluate training work. Associates who do well on their initial training assignments are given preferential access to additional training opportunities.[211] Those junior associates who successfully complete a number of such assignments move up to become senior associates, giving them even greater access to

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

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

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

training opportunities, and, equally important, helping them build strong relationships with partners.

These relationships, in turn, further improve a training associate's prospects when he or she enters into the actual promotion-to-partner tournament: the competition among senior associates for one of the firm's limited number of partnership slots. Although training does not guarantee partnership,[212] it is the ticket that allows training associates to compete for the reputational capital that winning the tournament requires. As we argued, the interests of individual partners are not necessarily the same as those of the firm.[213] Although the firm has an interest in partners spreading training opportunities to all associates who plausibly might be considered on the partnership track, individual partners in a large firm will primarily focus only on training associates who will benefit their practices.[214] As a result, "[o]nce partners find associates they like who can do the work, they're more than happy to continue delegating work only to those associates."[215]

Finally, once associates are firmly on the training track, they are likely to be further protected in the evaluation process. Given that the firm has already made a substantial investment in the development of these associates' careers (in the form of unreimbursed and unrecouped training costs), partners are likely to see it as in the firm's interest to help training associates learn from their mistakes, thereby inducing them to stay at the firm and continue to work.[216]

There are, however, limits to this indulgence. A training associate who commits a serious error can lose his or her privileged

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

[213] See supra text accompanying notes 122-130.

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

[215] Joel F. Henning & Mindy A. Friedler, Training Senior Lawyers To Be Better Trainers, Law Prac. Mgmt., Mar. 1993, at 60, 61.

[216] Cf. James N. Baron et al., The Structure of Opportunity: How Promotion Ladders Vary within and among Organizations, 31 Admin. Sci. Q. 248, 262 (1986) (reporting that work that involves firm-specific knowledge is more likely to give rise to long-term employment within an internal labor market).

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

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

At the same time, those associates who consistently receive only paperwork are likely to realize that their partnership chances are limited and leave voluntarily (as soon as they have earned enough money or obtained enough general training for an in-house or other job). Firms benefit from these "voluntary"[217] departures in two ways. First, at a human level, firing someone is not easy. No matter how much the decision is dressed up, the decision to turn an associate down for partnership or to ask an associate to leave is

[217] We use the scare quotes here as a reminder that many of the associates who flatline would have preferred to have been on the training track.

unpleasant.[218] Second, at the institutional level, "voluntary" departures make it easier for firms to tell both remaining associates and law students that the odds for those who "really want" to become partners are substantially better than the naked statistics showing the percentage of each entering class that actually obtains this goal would lead one to believe.

Finally, associates take this basic tracking structure into account when choosing (to the extent they are able) their assignments.[219] At each stage in an associate's development, she must decide whether she is going to strengthen her commitment to winning the tournament or instead begin looking for another job. For reasons articulated above, one factor influencing this choice is the associate's perception of the quality of her assignments, i.e., whether she is primarily getting training work or paperwork. In many cases, however, this will not be the only—or indeed, not even the most important—factor.[220] Even associates on the training track may decide that they do not want to become partners. From the firm's perspective, however, the most important factor is that once an associate decides that she does not want to become a partner, she has an incentive to start looking for projects that will serve her other needs, for example, projects rich in general (as opposed to firm-specific or relational) capital or ones that provide contact with potential future employers.[221]

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

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

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

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

Collectively, these two sets of incentives—the firm's incentive to create an informal, but nevertheless powerful, tracking system in order to protect its scarce training resources, and the associates' incentive to find work that satisfies their particular desires to either make partner or find another job—reinforce the tournament structure we described in the beginning of this Section. With each passing "round," more and more associates decide (partly in response to actions taken by the firm and its partners) to abandon thoughts of being on the partnership or training track. For these associates, the shadow of the tournament as a motivational device recedes, replaced (for as long as they stay at the firm) by their desire to keep their high wages, protect their reputational bonds, or acquire general (as opposed to firm-specific or relational) capital. As a result, they are unlikely to engage in the kind of fierce competition for training work that would, as we argued in the last Part, undermine collegial working relationships.[222] At the same time, those associates who continue to aspire to partnership—those on

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

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

the training track—are increasingly motivated by the prospect of winning the tournament.[223]

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

D. Seeding: How Sampras Gets to Be Number One

As indicated in our discussion above, it is clear that one important way that associates get on either the training track or the flatlining track is through their performance on projects, particularly their initial projects. This situation is a function of the multiround aspect of the tournament. With each set of projects, more associates decide whether or not they want to be on the partnership track. Similarly, partners decide whether or not some associates are partnership material. Theoretically, firms could rely exclusively on this mechanism, waiting until every associate has completed a few randomly chosen assignments (some training work, some paperwork) before deciding which associates to put on the training track.

This process, however, is not what we observe. Instead, some associates are "seeded" directly onto the training track. These favored associates immediately get assigned projects with the potential for creating high levels of firm-specific and relational capital,

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

e.g., assignments with lots of client and partner contact. As a result, seeded associates are exempted from the initial competition among their peers to gain access to the training track.[224]

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

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

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[224] The following quote by an elite firm partner reported by Elizabeth Chambliss typifies what we observe:

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

Elizabeth Chambliss, Organizational Determinants of Law Firm Integration, 46 Am. U. L. Rev. 669, 693 (1997).

from happening is to seed the especially valuable candidates by giving them immediate access to the training track.

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

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

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

Despite the low correlation between the signals used by firms to seed and the skills needed to be either an associate or a partner,

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

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

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

The first pivotal community is the world of clients. Just as partners have difficulty evaluating the quality of an associate's legal work, clients find it hard to choose the "best" law firm to handle their matters.[227] As a result, clients look to visible and easily rankable signals to help them judge law firm quality. In other words, while it may be both difficult and expensive to evaluate *absolute* quality, there may be cheap and easy measures of *relative* quality.[228]

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

[228] Clients care about a firm's *relative* ranking among its competitors for several reasons. First, clients hire elite firms at high rates because these firms will exert high levels of effort in order to continue to get paid at their high rates and to avoid losing their ranking as an elite firm (i.e., their reputational bond). A firm's relative ranking is one indication of the strength of this reputational bond. In addition, in situations that involve the allocation of scarce governmental resources, such as government prosecutions and investigations, a firm's relative ranking may play a substantive role in the outcome of the proceedings. Consider a governmental agency deciding which corporation to investigate for possible violations of the law. The agency has only a finite amount of resources and therefore has to choose where to allocate those resources. In part, the agency will allocate its investigative resources to the corporations or individuals more likely to have committed a violation. The reputation of a

Law firms, in turn, have an incentive to signal their quality to potential clients by providing them with visible and rankable measures of their ability. While elite law firms tend to consider advertisements and solicitation as unprofessional,[229] listing the pedigrees of their attorneys has always been considered an acceptable way for a firm to signal its quality to clients.[230] As Galanter and Palay document, in the early part of this century, the most important aspect of a young lawyer's pedigree was his (and here we again use the pronoun advisedly) social background.[231] In recent years, however, impressive academic credentials and Supreme Court clerkships have largely (although, as we argue extensively elsewhere, not completely) replaced social capital as the measure of a new associate's potential worth.[232] These credentials have now become an important signal of law firm quality, both to clients and to other firms that might send the firm business.[233]

In addition to clients, firms also need a visible and rankable signal to send to the community of law students. Elite firms must compete for the services of talented law students both with each other and with alternative employers ranging from investment

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corporation's lawyers can potentially influence this decision. Some agencies may believe that clients who have the higher-reputation lawyers are less likely to have committed violations because their lawyers have more to lose if they are associated with companies that violate the law. Other agencies will refrain from prosecuting companies represented by high status law firms for fear that it will be more difficult to win cases against these firms. See George H. Brown, Financial Institution Lawyers as Quasi-Public Enforcers, 7 Geo. J. Legal Ethics 637, 695 (1994) (noting that firms' reputation for honesty may benefit clients in their dealings with regulators because regulators may be less likely to scrutinize the transactions of these clients); Richard W. Painter, The Moral Interdependence of Corporate Lawyers and Their Clients, 67 S. Cal. L. Rev. 507, 549-50 (1994) (same).

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

[230] See Nelson, supra note 118, at 214-15; James B. Stewart, The Partners: Inside America's Most Powerful Law Firms 15-16 (1983).

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

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

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

banks to public interest firms.[234] These potential recruits, however, have little information about the actual quality of firms. Instead, law students tend to rely on vague assessments of the general reputation of a particular firm.[235] Given that many firms, particularly those in the same market, tend to have similar structures and policies (i.e., similar partnership tracks, starting salaries, and client bases), a firm's reputation among law students is substantially determined by its ability to be selective in recruiting law students. The firms that can be the most restrictive in their hiring practices tend to be regarded by law students as the "best" firms.[236] As a result, those law students who want to be considered the "best" among their peers have an incentive to apply to and to select these institutions.

Because firms get additional signaling values by hiring lawyers with prestigious academic credentials (in addition to whatever actual productivity gains they may receive), these institutions have strong incentives to recruit heavily graduates with these credentials and to protect those that join the firm by immediately placing them on the training track. All other things being equal, firms prefer to have associates—and even more important, partners—from elite schools such as Yale, Stanford, or the University of Virginia (particularly those with prestigious academic credentials), than to have tournament winners who attended St. John's, Seton Hall, or

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

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

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

the University of Richmond.[237] As a result, some number of elite school graduates with strong academic credentials are likely to be seeded initially on the training track, rather than having to fight their way through the preliminary rounds. We should therefore expect to see more of these initially seeded competitors winning the tournament than their unseeded peers.[238]

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

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

In the basic tournament model, promotion to partnership is a reward for past performance. Employees work hard on their cur-

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

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

rent jobs because the firm has implicitly promised them that the most productive among them will be promoted. The lure of promotion provides an incentive to work hard because promotion brings with it both a large salary increase and job security akin to academic tenure.

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

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

1. The Partnership Promotion Decision. In the standard tournament model, promotions are made after an ordinal or relative analysis of candidate performances. This occurs for two reasons. First, the model assumes that firms have already committed themselves to promote a fixed percentage of employees. Therefore, the only relevant question is which employees in the available pool have performed best. Moreover, one of the original hypotheses as to why some firms structure their internal promotion mechanisms

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

as rank-order tournaments was that *relative* rankings were easier and cheaper for these firms to make than *absolute* evaluations.[240] As a result, firms save money by making the former kind of assessment.

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

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

Partners play a fundamentally different role in law firms than associates, even senior associates.[242] Associates are not likely to have assumed the kind of primary responsibility on an important matter that is expected of partners. Further, partners have obligations to bring in new business and maintain existing business that associates do not.[243] Decisions about future productivity must be made on the basis of accumulated human capital (both general and firm-specific) and relational capital.[244] As Nelson argues, firms are unlikely to promote an associate on the basis of these predictive factors simply because he or she is the "best" associate left in that particular class.[245] Instead, firms will require that the candidate satisfy some absolute standard of capital that translates into potential for the future.[246] The requirement that associates meet a high threshold level of capital explains why firms spend so many resources investigating the qualities of potential partnership candidates, as well

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

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

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

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

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

[245] See id.

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

as why even highly regarded candidates are sometimes deferred for one or more years so that they can develop additional skills.[247]

Similarly, unless an associate has some absolute threshold level of relational capital it is unlikely that she will be promoted even if she is the "best" associate in her class. Associates need partners to speak on their behalf, both to communicate their abilities to other partners and to press reluctant partners to trade current income (in the form of a reduced share of the pie) for the chance of increasing profits in the future.[248] Only those associates with a sufficient supply of relational capital (represented by either the number or the power of the mentors who have invested in their careers) are likely to have enough clout brought to bear on their behalf to overcome the unwillingness of the partnership in general to take a risk on an associate's potential to be a successful partner.[249]

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

Law firms are unwilling to make new partners unless the *existing* level of demand for the new lawyer's services satisfies some absolute standard. Take the example of an associate who specializes in intellectual property work and has billed more hours than any of her colleagues, has a superb knowledge of the field, and has developed strong relationships with the existing partners. In all likeli-

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

[248] See Nelson, supra note 16, at 744-45 ("[T]he ultimate decision will reflect the power of various partners and departments to deliver for their candidates.").

[249] See id.; see also Higgins & Thomas, supra note 25, at 29 (finding that the number of partner-mentors in an associate's portfolio of relationships strongly influenced his or her overall chances of becoming a partner).

hood, this associate will *not* be made partner if it happens that the firm's intellectual property business has dried up in the year she comes up for partner. Therefore, not only is the partnership decision forward-looking and predictive, but the promotion structure is one in which the risk of fluctuations in the external market is borne by the associates and not the firm. This absolute standard—the amount of demand for new partners in a given area—defines the terms of the competition in which senior associates compete to win partnership slots.

It is ironic that in the model we describe, the core tournament aspect is created by the firm's uncertainty about the economy. This position is ironic because some economists attribute the existence of tournament-like structures in certain firms to the rank-order tournament's potential to eliminate for employees uncertainties associated with fluctuations in the firm's client base, i.e., uncertainty that was not a function of associate performance.[250] These economists hypothesize that firms adopt tournaments because looking at relative, as opposed to absolute, performance *eliminates* risks that affected everyone's performance, but that employees could not control. In the context of large law firms, in contrast, the tournament aspect of these institutions—i.e., the limited number of partnership positions for senior associates—is largely *caused* by the existence of these common risks.

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

In addition to the risk that a potential new partner will not generate enough revenues either to sustain or to increase the existing partnership shares, there is also the risk partners will shirk. If partnership is really the end of the tournament—the equivalent of tenure—then individual partners may free ride on the efforts of

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

their peers.[251] Given that firms promote new partners on the basis of predictions about their future performance (as opposed to as a means of rewarding them for their past contributions), one would expect to see mechanisms in place to ensure that partners do not shirk their obligations. This brings us to a discussion of partnership tournaments and other incentives for partners.

2. The Upper Rounds. Revenue generating partners want a mechanism to protect themselves from shirking by their peers. As the number of partners in a firm grows larger, and these partners become increasingly specialized, firms can no longer rely on mutual cross monitoring or peer pressure to control the incidence of shirking.[252] As noted earlier, shirking by a partner can be especially costly, not only because partners do the more important work on the team, but also because they supervise and their shirking can have multiplicative effects on associates below them. Because of their commitment to the "tournament path," i.e., the notion that "making partner" requires one to "win" a competition, it is unsurprising that many firms have created additional partner-rounds to the tournament of lawyers as a means of addressing these concerns.[253]

Partnership tournaments take multiple forms. A growing number of firms have specifically adopted a two-tiered partnership structure in which "junior" (salaried) partners compete to become "senior" (equity) partners.[254] Unlike the promotion-to-partner tournament, the sole criteria for winning this "partner" tournament is a junior partner's demonstrated ability to bring in business and to assume primary responsibility on major matters for senior partners. Indeed, some firms go so far as to condition their willingness to

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

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

[253] See Nelson, supra note 118, at 9.

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

consider a lawyer for equity partnership on the junior partner's meeting an express target for business generation.[255]

Even firms that make no formal distinctions among partners, however, have adopted compensation systems that can be characterized as partnership tournaments or promotion ladders. As Galanter and Palay note, most firms have replaced the lockstep compensation systems that characterized these institutions in their "golden age" with distribution schemes that reward particular partners for their contributions to the firm.[256] The reasons behind this sea change echo the justifications for associate tournaments: Firms want to prevent shirking partners from free riding on the efforts of productive partners. Nevertheless, many commentators refer to these new systems as "productivity" based, and suggest that the schemes demonstrate that, at least at the partner level, firms do not need to conduct partner tournaments because they can monitor and reward performance directly.[257]

There is merit to this characterization. At the partnership level, firms have a variety of mechanisms for evaluating a lawyer's productivity—most notably how much income the lawyer generated either from billings or from hours—that are, for the reasons we set out in Part I, less accurate when applied to associates.[258]

Nevertheless, the claim that the new compensation formulas demonstrate that partner productivity is easy to measure is, at best, only half right. The argument that "eat-what-you-kill" compensation systems demonstrate that monitoring and evaluating partners is easy ignores the tremendous difficulty of determining who "killed" what. Does the partner who gets called to work on a particular matter get credit for "killing" the client, or should the credit go to

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

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

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

[258] See supra text accompanying notes 46-60.

the partner who has cultivated a successful relationship with this same client over many years? What happens if three lawyers from different areas approach one of the partner's clients about a new project? The more the firm claims that partner compensation accurately reflects actual productivity in any given period, the more it must resolve these divisive issues. Although some firms have chosen to move in this direction by enacting complex formulas designed to calibrate exactly how much each partner has produced in a given year, many others have searched for compensation systems that seek to minimize disputes over productivity and responsibility.

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

Although we believe that the new compensation formulas create a tournament aspect in the upper rounds of the internal labor markets of elite firms, we do not mean to suggest that these rounds resemble a standard economic tournament. Just as the promotion-to-partner tournament we describe involves a complex mix of incentives and tracks, the post-partnership rounds also are characterized by multiple incentive schemes. For example, there may be partners who are content with their high salaries and work hard because they want to keep receiving these high salaries. Others work hard because to be fired for shirking would jeopardize the valuable reputation and status they have obtained by having made partner at an elite firm. Our point simply is that for some partners, the higher levels of compensation and power over the management of the firm that come with winning the upper rounds of the tournament constitute an important motivation to work hard with little or no

supervision. Moreover, even those who are unsure about whether they want to become "senior partners" may be motivated by the existence of the upper-level tournament to at least work hard enough to keep their options open. As with associates, therefore, the shadow of the tournament has effects that go beyond the reach of those who have expressly committed themselves to compete for its rewards.

Although partner tournaments help firms to create the proper incentives for partners, the existence of these additional elimination rounds raises complications for the promotion-to-partner tournament. Specifically, if associates know that, notwithstanding their hard work and loyalty to the firm, they may still end up as glorified senior associates (non-equity partners) or bottom tier equity partners constantly working to make it into the next round, they may decide that the rewards of "partnership" are not worth the price. Indeed, if associates (and law students) were fully to understand the modifications to the basic tournament that we have described in this Part, there might be significant negative consequences for the firm. A multiround tournament that includes multiple incentives, tracking, seeding, and partnership tournaments inevitably creates far more losers than winners. Firms, however, need these eventual losers to stay engaged long enough for the firm to extract the "surplus" from their labor upon which the profits of tournament winners depend.[259] To accomplish this balance, firms attempt carefully to manage the information that associates learn about the rules of the tournament.

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

Tournament theory assumes that it is in the firm's interest to make the rules of the game transparent to all concerned.[260] However, once we understand the complexity of an elite firm's internal labor market, including those aspects that are structured as a tournament, it is clear that firms have strong incentives to manage the flow of information to associates and law students in order to

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

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

maximize the system's overall incentive effects. In order to accomplish this objective, firms must pay attention to the effects of various kinds of information on the effort levels exerted by associates at different stages in their careers. To understand this point, it is once again useful to look at real tournaments.

Information management systems, although not the norm, exist in some tournaments. For example, in certain debate tournaments, teams are not told whether they have won or lost their preliminary rounds until after all of these rounds have been completed. By withholding this information, tournament officials hope to induce maximum effort by all participants, since even those with poor records will believe that they have a chance to get into the elimination rounds. Similarly, until recently, in soccer only the referee knew exactly how much time was left in the game. Once again, controlling this information helps to induce "end-of-game" effort at an earlier point than would otherwise occur, as teams seek to minimize the risk that they will run out of time. Even tennis officials often refuse to disclose how they arrive at their initial seedings and brackets.[261]

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

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

[262] A small number of firms circulate associate hours to associates as well as partners. This information, however, is of limited value since, as we noted previously,

that there is a training track, and that some associates are seeded on that track, they are expressly denied official information about how or why this has occurred.

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

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

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hours worked (over some minimum threshold) are not significantly correlated with partnership. See supra note 61.

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

dard tournament theory—maximizes the incentive effects of the tournament for these lawyers.

In contrast, look at what might happen if associates knew both their relative rankings and the exact criteria (signals) used to rank them. If associates at the top knew that they were far enough ahead of those at the bottom, these front runners would have an incentive to exert less effort since they would already know that they will win. At the same time, those at the bottom might give up and leave before the partnership decision is made.

Moreover, once the factors used and, more important, the weights attached to them are disclosed, associates have every incentive to focus on maximizing their acquisition of those factors or signals with the highest weights and ignoring those with low weights. For example, if associates know that hours worked in the past will be taken as an indication of how hard someone will work in the future and this factor is disclosed to be the most important one, associates might focus solely on billing hours and ignore lower ranked factors such as recruiting or training. Such strategic behavior leads to inefficiency in that it skews the value of the indicator, and it results in associates' ignoring work that needs to be done.[264] Keeping associates uncertain about what weights are given to the different factors (or even about precisely what those factors are) induces them to work hard on everything and not just on the acquisition of signals.[265]

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[264] The black box approach used by law firms resembles in many ways the performance measurement process used to evaluate junior faculty. See Baker et al., supra note 1, at 598. As Baker, Jensen, and Murphy explain,

> [t]he exact nature of the valuation scheme is not specified explicitly, although many components of what makes a good scholar can be described. Even if substantial effort were made to specify *ex ante* the correct performance-measurement formula, it is hard to imagine it would be complete. The problems arising from making such an evaluation formula explicit are obvious: assistant professors would devote time and effort to maximizing the explicit performance measure. Ex post, it would be painfully obvious, at least in a few cases, that good performers as measured by the formula were not the best scholars.

Id.

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

The black box approach, however, does create one important problem for the overall operation of the tournament for senior associates. Galanter and Palay correctly argue that one reason why firms gravitate toward a tournament structure is to provide associates with a mechanism (the number of partners made in any given year) that will help them guard against sharking by the firm.[266] If partnership is a black box rather than the open book implicitly envisioned by tournament theory, what assurances do associates have that the firm will treat them fairly? This question is especially urgent, since, as Galanter and Palay also note, if associates have no assurances that the process will reward their efforts in acquiring firm-specific capital, they have strong incentives not to do so.[267]

The tournament structure we have described suggests three possible answers. First, since partnership is not a reward for past performance, but instead is a prediction about who will be the most productive in the future, firms have less incentive to cheat.[268] When partnership is a reward for past performance, cheating allows firms to avoid paying for the benefits already acquired while leaving the institution free to optimize its future returns. When a firm "cheats" by failing to promote those associates most likely to bring in future revenues, it reduces its future returns. As a result, associates should have somewhat more confidence about the integrity of forward-looking partnership decisions than about ones that purport to reward associates for past performance.[269]

The fact that partnership decisions look to the future instead of the past is not a complete answer to the associates' concerns. Given that the signals upon which firms are likely to base their predictions about future performance are far from precise, distinctions among partnership candidates will be based on highly subjective judgments about performance and potential. As we have argued extensively elsewhere, these subjective judgments are likely to be

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of such promotion decisions as discretionary provides some protection from legal challenges.

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

[267] See id. at 97.

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

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

influenced by a range of factors other than the quality of the associate's work, since partners (as most people) tend to evaluate those who are like themselves more positively than those who are different.[270] These judgments will also be skewed by politics. For the reasons outlined in Part II, individual partners have strong incentives to prefer the interests of their own protégés over those of equally (or better) qualified protégés of others.[271]

Politics, however, can also help protect senior associates. The senior associates competing for partnership, in large part, have acquired substantial relational capital. They have reached this stage in the tournament, because there are partners who have invested in their success. These partners, as we have suggested, can act as a check on whether other partners are acting opportunistically in seeking to promote the interests of their protégés.[272] Once again, this second mechanism is far from foolproof. Some partners will simply not be powerful enough to protect their protégés from strategic behavior by more senior members of the firm. Other would-be sponsors will not want to risk their own relational capital with their peers by promoting a given senior associate to partnership. Because associates are excluded from partnership decisions, they have no way of monitoring whether their "godfathers" actually promoted their interests effectively.

Finally, firms can try to induce senior associates to bear the risk that the firm will behave opportunistically through the same high wage strategy that they use to induce associates to join firms in the first instance. Firms profit handsomely from the black box approach. Senior associates—arguably the most valuable lawyers in any law firm—are induced to work extremely hard on virtually every facet of their jobs with almost no supervision, thereby freeing

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

[271] See supra text accompanying notes 128-130.

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

partners to bring in the new business that the firm needs to survive.[273] Firms therefore have sufficient resources to pay these valuable lawyers a risk premium to compensate them for bearing the additional uncertainty produced by the black box.[274] In Part II, we described Cravath's recent decision to raise substantially senior associate compensation as a means of inducing more of these lawyers to stay even though they have relatively little chance of becoming partners.[275] Once we factor in the importance of the black box, it is likely that some portion of that wage increase was designed to compensate these lawyers for the firm's refusal to tell them exactly what criteria the firm will use in selecting partners and how these criteria will be applied.

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

2. Information Management for the General Pool. With respect to "seeded" associates and those who gain access to the training track after their initial projects, these favored associates need only know that they *are* favored. For the most part, this involves conveying accurate information.[276] Thus, firm leaders need to tell training associates that they will continue to get good work and that realistically, they are only competing for partnership against the relatively small number of other associates who also have been given this privileged status.[277]

Firm leaders, however, must be careful to convey this information quietly. Just because an associate is not on the training track does not mean that he does not consider himself to be competing in

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

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

[275] See supra note 199 and accompanying text.

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

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

the tournament. The less that associate knows about the opportunities afforded those on the training track (or, to put the point somewhat differently, the harder it is for a paperwork associate to evaluate the difference between the work he is doing and training work) the more likely it is that he will be motivated to work hard in order to increase his chances of making partner. This is one reason,[278] we suspect, why firms keep the evaluations of associates in their first few years vague and generally upbeat.

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

Although associates receive more financial information once they join a firm, this information is often incomplete and distorted. Firms rarely give associates accurate information about the firm's revenues and expenses. This allows firms to use hard economic times strategically, for example, by refusing to promote (or in some cases firing) deserving candidates on the basis of a lack of business when in reality the partners simply are unwilling to reduce the rate at which their own compensation increases. Similarly, firms have an incentive to continue to mask differences among partners. Individual partners have strong incentives to collude in this obfuscation. This is not just a function of pride. Masking differences in partner compensation is a matter of survival. Due to the importance of relational capital for an associate's partnership chances, those associates who see themselves competing in the tournament have strong incentives to avoid working for a non-powerful part-

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

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

ner. As a result, if these lawyers are to continue to get their work done, they must hide their status from associates.

Needless to say, selectively managing information is difficult to achieve in any environment, particularly one populated by people as sophisticated as the associates and partners of large law firms (and the law students who wish to join their ranks). Traditionally, firms have been aided in this effort by the veil of secrecy that, until quite recently, covered the inner workings of large firms, and indeed, the profession as a whole. Moreover, law students and associates have often been surprisingly unwilling to look behind the big salaries and empty promises that law firm recruiters, their primary source of information about the profession, have thrown at them with increasing vigor.

Nevertheless, the secrets are beginning to escape. Sometimes this happens with the firm's tacit consent. Paperwork associates, for example, will find it increasingly difficult to hide from the fact that they face diminishing prospects at the firm. This revelation, however, is as much in the firm's interest as it is in the associate's, since paperwork associates are increasingly difficult to bill out to clients. On other occasions, firms are likely to fight disclosure. Thus, during the 1991 recession, many firms attempted to hide their true financial condition from associates and law students by continuing to hire at the same high salaries and by characterizing the large number of associates who were "fired" as terminations based on quality as opposed to layoffs based on the firm's poor revenues.[250] Even in these instances, however, the burgeoning legal press, and the growing number of academics studying the legal profession are increasingly bringing these unpleasant facts to light.

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

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[250] See Wilkins & Gulati, supra note 17, at 531.

IV. CONCLUSION: TOWARD A NEW SYNTHESIS

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

Tournament theorists such as Galanter and Palay start from the premise that associates and firms are drawn to the tournament structure as a means of solving their respective monitoring problems.[281] In Part I, we agreed with the basic premise underlying this intuition. Monitoring associate work is a significant cost to firms. Nevertheless, the conclusion that many economists and legal scholars reach on the basis of this premise—that large firms are structured as standard economic tournaments—is incorrect. Although firms must find ways to motivate their associates to work hard with relatively little supervision, with the exception of those senior associates who are within a short distance of partnership, *the tournament is not the primary means by which firms accomplish this objective.* For the most part, junior associates who join large law firms are motivated primarily by high salaries, reputational bonds, and the promise of general training. For these lawyers, the promise of partnership is at best a distant shadow of a reward. Based upon their impressions of the lives of the firm's current partners, furthermore, many entering associates are quite unsure about whether

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

they would even want partnership if it were offered to them. To be sure, firms attempt to nurture this ambiguous spark in some associates through seeding and tracking. With respect to the rest, however, firms are content to trade high salaries and the promise—although in most cases, not the reality—of general training for a few years of paperwork before these associates redeem their reputational bonds and move on.

If monitoring were the firm's only problem, this might be the end of the story. But in addition to *supervising* its associates, law firms must also *train* the next generation of senior associates and partners. Firms have responded to this need by creating a de facto training track for certain associates. The existence of a separate training track, ironically, helps firms solve part of their monitoring problems. Associates who are being trained are also likely to be monitored.[282] More important, the training track provides the gateway to the real promotion-to-partner tournament, since only those associates who have been trained will have the firm-specific and relational capital that it takes to have a realistic chance of becoming partners in the firm.

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

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[282] Training does not solve all of the firm's monitoring problems for training track associates, since one of the goals of training is to teach these lawyers to handle important projects with relatively little supervision.

These differences between standard tournament theory and the reconceived model we present here have important practical and theoretical implications. As a practical matter, law students and young associates have much to gain from puncturing some of the myths surrounding the promotion-to-partner tournament. These aspiring lawyers are typically presented with one of two stories about their future careers in large law firms. The first is decidedly upbeat: Large law firms are the ultimate meritocracies in which the "best" lawyers rise to the top and the rest work on interesting and rewarding cases before walking away with the best training that any lawyer can receive. It is a testament to the changes documented in Part II that it is almost impossible for anyone—even law firm partners—to recount this happy story with a straight face. As a result, the optimistic traditional story has been replaced by one of unremitting pessimism. According to this account, the work of lawyers today is all drudgery, depressing, and too specialized. There is neither any meaningful mentoring by partners nor the type of long-term relationships that developed in the "golden age" of lawyering.[283]

The reality of the modern elite firm falls somewhere in between these two accounts. While we agree that much of the work that associates do is highly specialized, qualifies as drudgery, and involves fewer client relationships and much less mentoring, these characterizations do not define "all" of associate work. For associates on the training track, the work is not drudgery, it is not over-specialized, there is mentoring, and the associates do develop relationships with clients. Both standard accounts—the traditional optimistic one

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

preferred by firms, and the pessimistic one that has become the ordinary religion of law students—overlook this diversity.

Once we recognize that the modern promotion-to-partner tournament makes important distinctions among associates, it is fair to ask whether these distinctions are likely to systematically disadvantage particular groups. For reasons that we set out elsewhere, we believe that this is likely to be the case.[284] Average black lawyers, for example, are likely to find it more difficult to get themselves on the training track than average white lawyers.[285] Similarly, "work norms" associated with the later stages of the tournament for senior associates, such as the norm encouraged by the black box approach that senior associates must demonstrate their total commitment to the firm by being at the office for very long hours and being available to deal with emergencies at all times, may systematically disadvantage the partnership prospects of women lawyers.[286]

Taking these differential impacts into account casts the remaining tournament aspect of the internal labor markets of large law firms in a very different light than the one assumed by most tournament theorists. Law firms are not the ultimate meritocracies, as the comparison to a tennis tournament might seem to suggest. Instead, the tournament of lawyers more closely resembles a figure skating competition in which factors such as a contestant's ethnicity (are you from the United States or Bulgaria?), looks (are you Katerina Witt or Debi Thomas?), style (do you skate like Oksana Baiul or Surya Bonaly?), and social class (are you Nancy Kerrigan or Tonya Harding?), as well as the judges' identity (has the Russian judge ever ranked an American skater over a Russian, or vice

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

[285] See id.

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

versa?), strongly influence the outcome of the competition. Like a figure skating competition, the promotion-to-partner tournament is still a tournament. Those who win this event, like Tara Lipinski, must still outperform their peers. But the terms on which associates compete, and their ability to influence the outcome simply by the quality of their work, is, like the skaters at the Olympics, a far cry from the meritocratic image conveyed by tournament theory.[287]

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

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

Equally important, it takes more than skill to succeed at a large law firm (or, for that matter, any other complex human institution). It also takes connections, i.e., relationships. These relationships are crucial in determining the opportunities an associate is likely to

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

[288] See Robert J. Gilson & Robert H. Mnookin, Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits, 37 Stan. L. Rev. 313 (1985).

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

receive, and in influencing how partners assess whether an associate is likely to be loyal (both to his individual mentors and to the partnership as a whole).[290] Signaling theory and relational capital must therefore be a part of any comprehensive examination of the large law firm as an economic institution.

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

Scholars, however, have reason to look skeptically on these pronouncements. The first tip that the correlation between signals and skills may be less tight than firms typically maintain comes from the fact that firms made similar claims about the very different set of signals that these institutions used to look for in the not too distant past. Thus, in Smigel's famous study of Wall Street firms conducted in the 1960s, he reported that firms wanted "lawyers who are Nordic, have pleasing personalities and 'clean cut' appearances, are graduates of the 'right' schools, have the 'right' social background and experience in the affairs of the world, and are endowed with tremendous stamina."[291] With the exception of going to the "right" schools and stamina, few would argue that any of these criteria are closely tied to actual lawyering skills.[292] This initial skepticism should be reinforced by the extent to which firms continue to

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

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

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

pay relatively little attention to easily accessible information about lawyering skill in the recruiting process.[293]

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

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

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

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

Indeed, once we recognize that "rational actor" models are not inconsistent with the importance of signaling and politics, we can begin to break down the traditional barriers that have separated law and economics scholars from those who press cultural or political explanations of social institutions and practices. There are already some excellent examples of this theoretical synthesis.[294]

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

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[294] See, e.g., Robert Ellickson, Order Without Law (1991); Bebchuk & Roe, supra note 163; Dezalay & Garth, supra note 25; Chambliss, supra note 224; Edward L. Rubin, The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions, 109 Harv. L. Rev. 1393 (1996).