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RACIAL DIVERSITY AND LAW FIRM ECONOMICS

Jack Thorlin*

INTRODUCTION

There is an eternal temptation to think that if one recognizes a moral problem and does something about it, then one is blameless even if the action taken does not solve the problem. We usually recognize that it is absurd to credit intent when the disconnect from results is vast—consider the rightfully mocked tendency of people to respond to tragedies by declaring that their “thoughts and prayers” are with the victims rather than taking any meaningful step to ameliorate their suffering.¹ People still engage in such posturing because the behavior benefits them in several ways: (a) others see that the actor is doing something and think the actor is moral, and (b) the actor can assuage her own conscience by having done *something*.² But declared good intent divorced from positive consequences is no virtue, and if it goes on long enough with the full knowledge of the actor, it turns into vice.

Racial diversity in law firms is a classic “thoughts and prayers” situation. Legal practitioners are consistently among the most socially progressive professions in the country, a tendency even more pronounced among the top-tier law school graduates who populate law firms.³ Attorneys frequently cite the

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1. See Ben Rowen, *What Science Says About ‘Thoughts and Prayers,’* ATLANTIC (Oct. 5, 2017), [<https://perma.cc/NMQ5-MKGF>] (describing the widespread use of the formulation “thoughts and prayers”).

2. See AJ Willingham, *How ‘Thoughts and Prayers’ Went from Common Condolence to Cynical Meme,* CNN (May 19, 2018), [<https://perma.cc/S6CB-8S78>] (criticizing the emptiness of thoughts and prayers compared to action of some kind).

3. Christina Pazzanese, *Gauging the Bias of Lawyers,* HARV. GAZETTE (Aug. 10, 2017), [<https://perma.cc/78TE-G8QB>] (noting that of lawyers who made political donations in the 2016 cycle, 68% donated more to Democrats, and 76% of lawyers who both donated and who went to top law schools donated more to Democrats).

profession's role in championing civil rights and upholding justice.⁴ One searches in vain to find a major law firm that does not publicly tout its commitment to improving racial diversity.⁵ That public commitment dates back decades.⁶

What outcomes have been achieved in that time? For reference, non-Hispanic Whites constitute 59.3% of the overall population, and Blacks constitute 13.6%.⁷ From 2007 to 2019, Black representation among law firm partners rose from 1.9% to 2.2%.⁸ White attorneys constitute 89.9% of equity partners, down from 93.7% in 2007.⁹ At that rate of progress, Black attorneys will still not quite be proportionally represented among law firm partners when the American Bar Association (ABA) celebrates its half-millennium birthday in 2378.¹⁰

The real question regarding racial diversity in law is why things are improving so slowly. One school of thought is that greater social forces are at work.¹¹ For example, some scholars argue women face systematic barriers to being promoted at law firms because the gendered distribution of parenting duties outside of the legal profession hinders their perceived "commitment" to the firm.¹² Perhaps a similar dynamic of racially charged assumptions leads fewer Black associates to

4. See, e.g., David L. Douglass et al., *Signposts in the Road: The Lawyer's Ethical Obligation to Promote Diversity in the Legal Profession*, IILP REV., 2019-2020, at 52, 54, 57, 60 (stating that "the first role of lawyers in society was selfless pursuit of the common good").

5. See, e.g., *Diversity, Equity, & Inclusion*, WINSTON & STRAWN LLP, [https://perma.cc/L4VN-TKTS] (last visited Jan. 24, 2023).

6. See, e.g., Paul M. Barrett, *Shearman & Sterling Strives to Keep Its Black Attorneys*, WALL ST. J. (July 8, 1997), [https://perma.cc/2XCY-FWK5].

7. *QuickFacts: United States*, U. S. CENSUS BUREAU, [https://perma.cc/B9P4-GZSW] (last visited Jan. 24, 2023).

8. VAULT & MINORITY CORP. COUNS. ASS'N, 2020 VAULT/MCCA LAW FIRM DIVERSITY SURVEY REPORT 16, [https://perma.cc/XNP2-3RSK].

9. *Id.* at 24.

10. Increasing in representation at a rate of 0.3% each decade, Black attorneys will be proportionally represented among law firm partners in 2392 (assuming for argument's sake that the Black share of the overall U.S. population remains static, which it will not). *Id.* at 16.

11. See Hilary Sommerlad, *Minorities, Merit, and Misrecognition in the Globalized Profession*, 80 FORDHAM L. REV. 2481, 2492-94 (2012) (discussing stratification theory in which broader social injustices feed into the legal profession).

12. SUSAN EHRLICH MARTIN & NANCY C. JURIK, *DOING JUSTICE, DOING GENDER: WOMEN IN LEGAL AND CRIMINAL JUSTICE OCCUPATIONS* 107, 121, 126-28 (2006) (describing the advantage men get from their "release" from domestic burdens).

eventually become partners. Similarly, some argue that socioeconomic disparities are the primary cause of later discrepancies in outcome at firms.¹³ There are many ways in which this could be true. For example, economic disparities between races in the United States are truly massive. In 2019, median White household wealth was \$189,100, compared to \$24,100 for Black households.¹⁴ These disparities in turn lead to academic disparities, decreasing the available talent pool for law firms to ultimately recruit.¹⁵

The problem with this line of reasoning is that similarly situated professions are doing significantly better than law firms and the legal profession. Consider that only 56% of active physicians are White, compared to 81% of attorneys.¹⁶ Among accountants and auditors, non-Hispanic Whites constitute 68.4%, and Blacks constitute 9%.¹⁷ As recently as 2015, an article in the *Washington Post* declared the legal profession to be one of the “least diverse” in the country.¹⁸ These data points suggest there are one or more factors limiting racial diversity in law that is not as acutely present in similar fields.

Another telling data point is that racial diversity among lawyers is comparatively far better among government lawyers than among law firms.¹⁹ Despite the fact that most legal jobs are in the private sector, Black and Hispanic lawyers are slightly more likely to work for local, state, or federal government than in a law firm.²⁰ For comparison, 40% of White lawyers are found at

13. See, e.g., EMMA BIENIAS ET AL., INTELL. PROP. OWNERS ASS’N, IMPLICIT BIAS IN THE LEGAL PROFESSION 11-12 (2017), [<https://perma.cc/6QFJ-Q99M>] (describing bias at law firms arising from cultural differences attributable to socioeconomic differences).

14. *Racial Economic Inequality*, INEQUALITY.ORG, [<https://perma.cc/WAM2-43CE>] (last visited Jan. 8, 2023).

15. BIENIAS ET AL., *supra* note 13, at 11-12.

16. *Diversity in Medicine: Facts and Figures 2019*, ASS’N. OF AM. MED. COLLS., [<https://perma.cc/297G-9QKW>] (last visited Jan. 24, 2023).

17. *Accountants & Auditors*, DATA USA, [<https://perma.cc/UXM2-9C69>] (last visited Jan. 9, 2023).

18. Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren’t Doing Enough to Change That.*, WASH. POST (May 27, 2015), [<https://perma.cc/8P24-TY77>].

19. AM. BAR ASS’N, ABA PROFILE OF THE LEGAL PROFESSION 2020, at 43 (2020), [<https://perma.cc/RU7B-GDFN>].

20. *Id.*

law firms, and just 17% work in government.²¹ Black and Hispanic lawyers are also slightly more likely than White lawyers to be solo practitioners.²² While there are certainly broader social factors deterring the entrance of Black and Hispanic lawyers into the legal profession, there is something unique about law firms that is inhibiting racial diversity.

In this Article, I will discuss several aspects of law firm structure that likely contribute to the racial diversity deficit in the legal profession. From the economics of how firms make money, to the psychology of equity partners, to the game theory of how young associates get promotions, the law firm system as it currently exists dramatically slows progress toward proportional representation. None of these factors depend on racial animus among the vast majority of attorneys. Instead, each actor in the law firm system acts in accordance with their short-term interests, and the exclusion of attorneys of color from real decision-making roles is a negative externality of those actions.

Aligning the incentives of individual actors with the overall benefit of racial diversity would solve these problems. The question is how that can be done, a thorny issue I will also discuss. In the short run, entities like the ABA can start to align incentives by researching and reporting on more meaningful metrics of racial inclusion, such as the amount of time Black attorneys actually spend with clients at big law firms. Law firms do not want to be viewed as regressive, and if they actually start losing money because of the failure to promote racial diversity, they will figure out ways to change the incentives facing everyone within the firm, including associates.

In Part I, I discuss how law firm economics and individual incentives within firms stymie racial diversity. In Part II, I describe law firm efforts to increase diversity, why they have not succeeded, and possible better initiatives. I conclude that while firms can do better, some sort of coordinated external action will likely be necessary to sufficiently alter incentives to make an appreciable difference.

21. *Id.*

22. *Id.*

I. LAW FIRMS AND RACIAL DIVERSITY

We lawyers are accustomed to thinking about ourselves as “officers of the court” representing high ideals, like ensuring every person has zealous representation and ensuring the rule of law. Even opponents in the same case are ultimately working as part of the same system striving toward justice. From this perspective, the lack of racial diversity in the legal world generally and especially toward the top echelons of law firms is puzzling. If many—possibly most—lawyers recognize the value of racial diversity, why are we failing to make progress toward it?

The short answer is that commitment to racial diversity is outweighed at every level of law firm culture by less noble but much more tangible goals—the ambition of associates, the maintenance of firm profits, upholding the image of the firm, and preserving a myopic sense of moral rightness. These factors should not be understood as personal failings but as the inevitable consequence of the high level of competition in the legal world. It is not easy for individual attorneys—whether equity partners, fresh-faced associates, or anyone in between—to survive in the intensely competitive culture if they sacrifice any advantage. The grand competition rages on between individuals at the same firm and between firms. It is difficult for outsiders to differentiate between genuine commitment to diversity and the usual promotional websites touting diversity initiatives, so firms have little incentive to make genuine commitments.

A. How Intense Competition Can Undermine Social Goals

In his influential article *Meditations on Moloch*, Scott Alexander described a simple phenomenon he calls a “multipolar trap[],” also colloquially known as a “race to the bottom”:

In some competition optimizing for X , the opportunity arises to throw some other value under the bus for improved X . Those who take it prosper. Those who don’t die out. Eventually, everyone’s relative status is about the same as before, but everyone’s absolute status is worse than before. The process continues until all other values that can be traded off have been—in other

words, until human ingenuity cannot possibly figure out a way to make things any worse.²³

Obviously, not every competition is so dire, but the more intense the competition, the likelier it is to become a multipolar trap.²⁴ What makes competition more intense? Scarcity of resources, lack of coordination, and lack of external limiting forces all contribute.²⁵ Essentially, if an entity can survive without throwing other values under the bus for improved *X*, then the competition is not a multipolar trap.

Examples of multipolar traps abound. Any situation with high stakes and few limiting factors will face pressure to sacrifice other values. The “Two-Income Trap” identified by then-Professor Elizabeth Warren is one: competition for suburban houses in good school districts leads parents to debt and demanding jobs.²⁶ Another is pesticide and fertilizer use: in the absence of environmental regulation, intense competition among farms can lead to the use of destructive amounts of pesticide and fertilizer.²⁷ In the long run, it might not be sustainable or good for the world as a whole, but the owner of an individual farm will lose on price competition and die out if they do not keep up with their competitors.

As any reader with inductive powers might surmise, I will argue that the intensity of competition in and between law firms creates a multipolar trap. Law firms optimize for making money from fees for their services. The competition is intense because successful innovation is rare in law,²⁸ but there is a tremendous amount of money and prestige associated with being a successful lawyer.²⁹ While tech companies, for example, can secure

23. Scott Alexander, *Meditations on Moloch*, SLATE STAR CODEX (July 30, 2014), [<https://perma.cc/ZJJ6-4PSE>] (emphasis added).

24. *See id.*

25. *See id.*

26. ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 6-9 (2004).

27. *See* L. Bakker et al., *Kicking the Habit: What Makes and Breaks Farmers' Intentions to Reduce Pesticide Use?*, 180 ECOLOGICAL ECON. 106868, at 2, 8-9 (2021).

28. *See* THOMPSON HINE LLP, CLOSING THE INNOVATION GAP 2 (2018), [<https://perma.cc/VL5H-QUGJ>] (discussing a study finding only 4% of corporate counsel respondents had seen “a lot” of innovation from law firms).

29. *See* Roy Strom, *Prestige Still Beats 'Quality of Life' in Big Law Talent War*, BLOOMBERG L.: BIG L. BUS. (July 29, 2021, 5:01 AM), [<https://perma.cc/2HC3-NG5G>]

temporary monopoly-like advantages for themselves by inventing (and patenting) new gadgets or methods, lawyers have little room to patent, say, a novel legal argument. Everyone has access to roughly the same set of cases from which to develop arguments, so there are not many ways to create monopoly-like profits. Adding to the competition is the fact that a lawyer cannot easily retrain for some other field, certainly not at a similar level of pay.³⁰

Competition has increased in the legal world for a variety of reasons over the past several decades. Overall law school enrollment in the United States increased from 46,666 in 1963 to a peak of 147,525 in 2010, which represents a per-capita doubling of lawyers.³¹ The widespread integration of women into the legal community is certainly a positive development, but the introduction of more talented people into the legal world increased competition as well.³² The ubiquity of legal research software has arguably made it easier to conduct better legal research, allowing more firms to compete for clients.³³ Legal self-help software has begun taking some low-lying, profitable fruit from lawyers, such as basic drafting of wills.³⁴ Big

(discussing surveys finding that the ten most prestigious law firms are hiring more than the ten firms rated best to work for).

30. Cf. William Vogeler, *Two-Thirds of Lawyers Want Out of the Profession*, FINDLAW (May 14, 2019, 11:00 AM), [https://perma.cc/WML8-YCX3] (describing the high portion of lawyers who want to leave the profession).

31. The number of enrolled law school students has declined from its 2010 peak to 112,878 in 2019, still representing a 40% per-capita increase. See *Law School Enrollment*, LAW SCH. TRANSPARENCY, [https://perma.cc/8ED3-MRJD] (last visited Jan. 8, 2023).

32. See Amanda Weinstein, *When More Women Join the Workforce, Wages Rise—Including for Men*, HARV. BUS. REV. (Jan. 31, 2018), [https://perma.cc/XW9A-WJ36] (describing the general tendency whereby increasing participation by women in a given field increases the overall competitiveness of the labor market in that field); Jennifer Cheeseman Day, *More Than 1 in 3 Lawyers Are Women*, U.S. CENSUS BUREAU (May 8, 2018), [https://perma.cc/GG5Z-Q2LZ] (discussing women's steadily increasing share of lawyer jobs).

33. See Paul Hellyer, *Assessing the Influence of Computer-Assisted Legal Research: A Study of California Supreme Court Opinions*, 97 LAW LIBR. J. 285, 285, 287-88, 290, 298 (2005) (describing the debate over whether electronic research has improved attorney work product and concluding that electronic research has not had as great of an effect as its proponents argued it would have).

34. See Megan Leonhardt, *More Than Half of Americans Don't Have a Will—This App Wants to Change That*, CNBC (Nov. 13, 2019, 10:48 AM), [https://perma.cc/9VCW-72LF] (describing apps that offer free will-drafting services in exchange for anonymized data that the company behind the app can sell to third parties).

accounting firms have even begun taking on due diligence and investigative work that might have been performed by attorneys.³⁵

These developments affect both individual attorneys and entire law firms. More attorneys bring more competition for summer associate and entry-level attorney positions. Higher quality attorneys at the associate level mean that associates have to do more to stand out from their peers. Average law school debt has nearly doubled since the turn of the century, meaning that the stakes for success for individual attorneys are much higher.³⁶ At the firm level, increased competition means profit is simply more difficult to come by.

If we have established the competition aspect of a multipolar trap for the legal world, we can identify values thrown under the bus in the name of that competition. At the firm level, if increasing racial diversity would impose a significant burden, firms will do their best to avoid it to the extent they can do so without endangering their public image. On an individual level, sobriety and mental health are sacrificed far more often than in other professions.³⁷ Divorce is anecdotally more common among attorneys at big law firms.³⁸ The return for these sacrifices is the short-term ability to cope with the stress of competition and the time to bill more hours in hopes of outperforming others at the firm.³⁹ This willingness to sacrifice on the part of individual attorneys at a firm will become important later when we discuss

35. See Meg McEvoy, *Analysis: The Big 4 Is Knocking—Are State Bars Answering?*, BLOOMBERG L. (Sept. 18, 2019, 4:01 AM), [<https://perma.cc/84YR-9JUW>].

36. Melanie Hanson, *Average Law School Debt*, EDUC. DATA INITIATIVE (Nov. 7, 2022), [<https://perma.cc/4NH2-HZ63>] (showing an increase in inflation-adjusted average debt among law school graduates from \$87,900 in 1999-2000 to \$160,000 in 2019-2020).

37. Elizabeth Olson, *High Rate of Problem Drinking Reported Among Lawyers*, N.Y. TIMES (Feb. 4, 2016), [<https://perma.cc/WU38-JXXB>] (noting that “[l]awyers struggle with substance abuse, particularly drinking, and with depression and anxiety more commonly than some other professionals” and that “lawyers working in law firms had the highest rates of alcohol abuse”).

38. See Harrison Barnes, *Why Big Law Firms Attorneys Are So Likely to Get Divorced: Stressed, Tired, Mad and With Nothing More to Give*, LINKEDIN (Oct. 26, 2020), [<https://perma.cc/ZUF7-QZLP>] (discussing various reasons why law firm lawyers are particularly likely to get divorced).

39. It should be noted that substance abuse and mental health problems are generally intended to help cope with stress in the short term but come with obvious long-term problems.

individual incentives vis-à-vis perpetuating racial diversity. Consider that if an associate is willing to sacrifice things like their own family and health in the name of competition, how much guilt would they feel over sacrificing something as abstract as racial diversity?

B. How Law Firms Compete

The foregoing discussion suggests there is intense competition between law firms, and that firms are willing to sacrifice other values if doing so will help them stay competitive. This suggests an awkward question: why does increasing racial diversity impose a burden on law firms?

To answer that question, we must consider how law firms compete with each other. At the simplest level, law firms make a profit by taking in more in fees from clients than they expend in retaining attorneys, support staff, and the physical infrastructure of business. Assume, for the sake of this analysis, that firms have made the support staff and physical infrastructure components as efficient as they can be—there is no firm out there that could meaningfully outcompete the others by, say, cutting a really good deal on their office rent or computers.⁴⁰ Eliminating those aspects of the profitability equation leaves us with two factors to play with: fees taken in, and salaries paid to attorneys.

There are two dominant and countervailing considerations in maximizing fees: (1) clients fundamentally do not know whether they are being overbilled;⁴¹ and (2) there are increasing returns to doing more work for existing clients.⁴² The first point is not at all unique to law. Fields ranging from auto maintenance to medicine involve clients who hire specialists to perform a service where

40. Of course, these factors matter on the margins, but note that expenses related to employee turnover make up a much larger share of overhead costs than things like office space or technology. See Rikke Diget Fuglsang, *Law Firm Overhead: Understanding, Diagnosing, & Fixing Profit Killers*, ASKCODY (June 1, 2022), [<https://perma.cc/4Q9R-UMTJ>].

41. See Douglas E. Rosenthal, *Evaluating the Competence of Lawyers*, 11 LAW & SOC'Y REV. 257, 257 (1976) (“People do not know how to choose a lawyer at the outset, or how to evaluate his or her performance during the lawyer-client relationship.”).

42. See Tyler J. Replogle, *The Business of Law: Evolution of the Legal Services Market*, 6 MICH. BUS. & ENTREPRENEURIAL L. REV. 287, 289, 291-92 (2017) (describing close, long-term client relationships as producing a “Golden Era” for law firms).

they cannot easily verify whether they are paying for necessary work. To overcome that discrepancy in knowledge, some kind of third-party verification is generally helpful. For example, doctors have a limited ability to bill patients because they have to work with health insurance companies possessing a similar level of expertise and experience on payment for health care.⁴³ There is no direct third-party verification of that kind in law. While there are rules regarding the assessment of fair fees,⁴⁴ the entity judging whether the fees are fair—the client—has far less expertise than an insurance company. One cannot even use outcomes to judge whether a client was overbilled because there is no way to answer the counterfactual question of whether a different law firm would have done better.⁴⁵ The answer to this principal-agent dilemma in law turns out to be similar to that in auto maintenance: trust based on repeated interactions.⁴⁶

On the second point, increasing returns to additional work for existing clients, both clients and firms profit from having a longstanding relationship. Attorneys at the firm better understand the client's preferences for work product, and they bring greater knowledge to the table that can help maximize the value of their work.⁴⁷ Clients come to know they can depend on the firm's expertise, and repeated interactions can at least theoretically reduce billing because the firm already knows the background in their area of law.⁴⁸ Firms get a large and constant stream of

43. See N. GREGORY MANKIW, *THE ECONOMICS OF HEALTHCARE* 8 (2017), [<https://perma.cc/K4HX-42YF>] (describing the use of payment rules by insurers to guide physicians' recommended treatments to patients).

44. See MODEL RULES OF PRO. CONDUCT r. 1.5(a) (AM. BAR ASS'N 1983) (listing factors relevant to determining whether a fee is reasonable).

45. Rosenthal, *supra* note 41, at 263-64.

46. See *id.* at 263, 265-66. Note additionally that this is inherently conservative criteria—a client surely knows there are other competent attorneys, but they do not know how to identify them, so they rationally prefer to stick with their current choice. This unfairly casts aspersions on other competent lawyers not selected.

47. Cf. Thomas Kollar & Stephanie Mills, *Perspective: Why Secondments Are Even More Valuable to Law Firms Today*, BLOOMBERG L. (Feb. 26, 2016, 1:09 PM), [<https://perma.cc/H6F5-AFPS>] (discussing how attorneys can do their job better with better understanding of their corporate clients).

48. See Peter D. Sherer, *Leveraging Human Assets in Law Firms: Human Capital Structures and Organizational Capabilities*, 48 *INDUS. & LAB. RELS. REV.* 671, 673-74 (1995) (describing the benefits of diversification and dedication that accrue from a long-term relationship with a full service law firm).

business.⁴⁹ Consequently, the optimal situation for a large firm is to leverage its size and diversity of expertise to become a “full service” firm, i.e., they can do all or nearly all work that a client needs.⁵⁰ This is similarly beneficial to clients because the value of the overall relationship is an implicit promise of high-quality work in each issue area—the relationship is too valuable for the firm to do anything less than a satisfactory job.⁵¹

These two considerations suggest the way for law firms to profit is to maximize client trust in order to secure as long a relationship as possible. Thus, maximizing client trust is what law firms are truly optimizing for. The factors that build client trust in the firm are not difficult to surmise: (1) discernible quality of work; (2) results; (3) responsiveness; (4) familiarity and predictability in key personnel.⁵²

C. The Effect of Inter-Law Firm Competition on Racial Diversity

For a variety of unjust economic and psychological reasons, increasing racial diversity among senior members of a big law firm can undermine the four factors described above in building client trust. On discernible quality of work, as discussed above, clients do not possess the expertise to perfectly monitor performance, but they are human, and so tend to exhibit predictable biases. For example, several psychological studies have indicated that people are less inclined to view someone they perceive to be an “affirmative action hire[]” as competent.⁵³

49. See Patrick Smith, *The Art of Developing and Maintaining Make-or-Break Client Relationships*, AM. LAW. (June 29, 2021, 8:04 AM), [<https://perma.cc/A7EJ-6JPU>] (“No billion-dollar law firm could keep churning without having a few whales in the mix. And most Big Law firms have more than a few—the kind of clients with an enterprise so expansive that their need for outside counsel seems limitless.”).

50. *Id.*

51. See 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, 365-66 (1985) (comparing the full-service firm to a department store where the brand’s perception of quality rests on quality across the board in every service area).

52. Cf. Jeremy M. Evans, *Building a Client Base: Top Tips from Practitioners*, AM. BAR ASS’N, [<https://perma.cc/WE4T-TC9F>] (last visited Jan. 9, 2023).

53. See Madeline E. Heilman et al., *The Affirmative Action Stigma of Incompetence: Effects of Performance Information Ambiguity*, 40 ACAD. MGMT. J. 603, 603 (1997) (finding

People also often judge attorneys based on superficial qualities—how they talk, what their accent is, how they dress, etc.⁵⁴ One can immediately see where economic disparities would particularly disadvantage attorneys of color in this regard.

Measuring “results” is a tricky business for both clients and law firm management.⁵⁵ The “discernible quality of work” discussion in the preceding paragraph casts a shadow over this factor as well. In most legal contexts, there is a spectrum of outcomes. Yes, a case may be won or lost, but damages or settlements could be greater or smaller. Even the binary outcome of win/loss does not reliably connote quality work—perhaps the case seemed closer than it ought to have been. The less faith the client has in the attorneys she works with, the less charitably she will judge their results.

Responsiveness is a seemingly benign quality, but a simple thought experiment suggests why it ends up inhibiting racial diversity. Assume there are two equally competent attorneys, *A* and *B*, at a large law firm. *A* is a single man coming from a wealthy family. *B* is a single mother coming from a poor family. Attorney *A* has few, if any, limitations on responsiveness. Attorney *B* has countless limitations—she may not be able to check her phone constantly and respond while caring for children, helping relatives, etc. A cold-blooded, rational client who wants

that test subjects rated female affirmative-action hires as less competent than men or women not associated with affirmative action even if disconfirming performance information was provided); see also David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”*: *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1572 (2004) (“As Paul Barrett discovered when doing interviews for his revealing book about race in large law firms, several partners hold the view that the real reason why firms have so few black partners is that there are too many incompetent black lawyers who have been ‘polished up’ by affirmative action to look like Harvard Law School graduates.”).

54. See, e.g., Adrian Furnham et al., *What to Wear? The Influence of Attire on the Perceived Professionalism of Dentists and Lawyers*, 43 J. APPLIED SOC. PSYCH. 1838, 1847 (2013) (finding that male lawyers in professional and formal attire were rated as more suitable, capable, easier to talk to, and friendlier).

55. Some argue that the partner structure is necessary for law firms because non-expert owners and managers cannot monitor professionals whose work they do not understand. See, e.g., Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 754-55. I believe that partners, while better situated than non-lawyers to understand an associate’s work, cannot verify things like whether an important case was missed in research. Consequently, I think partners are largely subject to the same information asymmetry as clients and hypothetical non-lawyer managers.

maximum responsiveness will always choose Attorney *A*. As a knowledgeable reader can guess, White attorneys are far likelier than attorneys of color to resemble Attorney *A*, and attorneys of color are far likelier than White attorneys to resemble Attorney *B*.⁵⁶

Familiarity and predictability in key personnel also weighs against having attorneys of color in client-facing roles for a variety of unfair reasons. First, there is a chicken-and-egg problem: if attorneys of color are underrepresented, by definition including them more often in client relationships will require change in who the clients see.⁵⁷ Change is the very antithesis of familiarity. Second, undoubtedly due in part to lack of advancement to partner, attorneys of color leave firms more often, making them a riskier steward for a client relationship in the eyes of partners.⁵⁸ Third, racial disparities in wealth mean that large-firm clients are likelier to be White.⁵⁹ A mountain of psychological evidence indicates most people, not just Whites, *ceteris paribus* trust people of their own race more than others.⁶⁰

None of these factors *justifies* law firms' failures to meet longstanding goals for racial diversity in the legal profession. Rather, they explain what firm management might view as the cost of increasing racial diversity. Firms, or more specifically the management of firms, absolutely could choose to bear that cost. They could promote more attorneys of color to partner. They

56. See DESTINY PEERY ET AL., LEFT OUT AND LEFT BEHIND: THE HURDLES, HASSLES, AND HEARTACHES OF ACHIEVING LONG-TERM LEGAL CAREERS FOR WOMEN OF COLOR, at ix (2020), [<https://perma.cc/J6DP-STMB>] (describing studies finding, among other things, that women of color were more likely than White women and men to report having extended family responsibilities).

57. Some attorneys of color report feeling used as a token in client interactions, being “trotted out to clients only when it would help the firm look good but not necessarily in ways that helped them further their own careers.” *Id.* at viii. Clearly, my analysis here means attorneys of color having substantive relationships with clients, not just being literally in the room.

58. *Id.* at ix (finding that women of color were more likely to report that they were seriously considering leaving their law firms).

59. See Debra Cassens Weiss, *Would-Be Clients with White-Sounding Names Got 50% More Lawyer Responses in California, Report Says*, ABA J. (June 6, 2019), [<https://perma.cc/V597-9S34>].

60. See, e.g., Adam Okulicz-Kozaryn, *Are We Happier Among Our Own Race?*, 12 ECONS. & SOCIO. 11, 13 (2019) (discussing several studies finding that racially homogeneous areas have more civic engagement, more trust, and more redistributive policies).

could explain to clients that they are consciously empowering attorneys of color, and if it costs a few clients on the margins, then so be it. But the data suggest most firms do not do this.⁶¹

One important wrinkle to this analysis is that all available evidence suggests that diversity helps businesses generally and law firms in particular in the long run.⁶² The general rationale is that a more diverse team will bring complementary skills to the fore.⁶³ This is entirely plausible in the legal context, particularly given that large firms provide a wide range of services. The more varying the work, the more likely that a diverse team would do better than a homogeneous one.⁶⁴ To understand why this sort of potential long-term benefit is overshadowed by short-term client retention concerns, we must look at the incentives of individual decision-makers within the firm.

D. Incentives for Individuals Within Law Firms

The incentives of attorneys at law firms work against racial diversity for reasons completely unrelated to firm-level considerations. To understand why, we should consider the ways in which attorney and firm incentives are misaligned. But the incentives facing attorneys vary tremendously within a law firm depending where in their career they are. The relative importance of reputation, money, and prestige vary predictably with age and socioeconomic status.⁶⁵

In this discussion, we should be aware of the distinction between financial and personal incentives. Most professionals are motivated by some mixture of both. Virtually no one would work for free, and absurd hypotheticals aside, no amount of

61. See ROY S. GINSBURG, AM. BAR ASS'N, *DIVERSITY MAKES CENTS: THE BUSINESS CASE FOR DIVERSITY 1* (2014), [<https://perma.cc/654T-6FT6>] (finding that law firms with higher diversity attract and retain better lawyers, devise better strategies for clients, and can attract new business).

62. *Id.*

63. *Id.*

64. Cf. David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), [<https://perma.cc/9VUF-EXM2>] (describing higher innovation and more focus on facts on diverse teams).

65. See Chang-ming Hsieh, *Money and Happiness: Does Age Make a Difference?*, 31 AGEING & SOC'Y 1289, 1289 (2011) (finding that money is not significantly correlated with happiness in older adults).

money will make most people do personally repulsive work. It is far easier to identify and dissect financial incentives than personal incentives in an objective way, but in some instances, we can identify broadly shared personal goals distinct from finances. For example, many lawyers care greatly about the esteem of their colleagues and professional advancement.⁶⁶ For deep-seated psychological reasons, they may crave the approval of firm leadership. As we will see, these less tangible considerations can compound already powerful financial motivations.

1. Associate-Level Incentives

The essence of an associate is aspirational competitiveness untempered by the attachments of older attorneys. Their financial situation is complex and nuanced. They generally do not have a relationship with their clients; rather, they do work for the partners of the firm.⁶⁷ Often, they have considerable debt from law school.⁶⁸ They are typically paid a handsome salary with some limited form of performance incentive (e.g., a bonus for meeting a billable-hours goal).⁶⁹ Because they tend to live in urban areas, associates have high cost-of-living, taking a little of the shine off their handsome salary.⁷⁰ An associate at a firm in, say, New York, has a salary that almost—but not quite—puts them in the top 10% of earners in the city.⁷¹ While this is certainly

66. See, e.g., *Walker v. City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997) (describing an attorney’s professional reputation as “a lawyer’s most important and valuable asset”).

67. See Jordan Rothman, *Biglaw Associates Should Interact with Clients More*, ABOVE THE L. (June 2, 2021), [<https://perma.cc/TZ6E-FZZ3>].

68. See Hanson, *supra* note 36 (reporting average law school debt at \$180,000 in 2020-2021).

69. See Staci Zaretsky, *Associate Compensation Scorecard: Biglaw’s 2020 Bonus Bonanza*, ABOVE THE L. (Nov. 25, 2020, 10:28 AM), [<https://perma.cc/FAP2-YQQU>] (sharing a full spreadsheet of associate compensation at large law firms, many of which have bonuses).

70. See *Cost of Living Data Series*, MO. ECON. RSCH. & INFO. CTR., [<https://perma.cc/49R2-RM4N>] (last visited Jan. 9, 2023) (showing a much higher cost of living in and around urban areas).

71. See *New York City, New York Population 2023*, WORLD POPULATION REV., [<https://perma.cc/L8KJ-T2TS>] (last visited Jan. 9, 2023). Note that starting salary at the law firm Cravath, Swain, and Moore is approximately \$200,000. See Meghan Tribe, *Cravath Tops Rival Davis Polk’s Associate Pay Scale, Up to \$415k*, BLOOMBERG L. (Feb. 28, 2022), [<https://perma.cc/HQ7H-2ZVY>].

noteworthy, given where they live, associates cannot help but encounter wealthier people, including the partners they work for.

As for personal incentives, we can surmise several important factors based on demographic facts. Associates are less likely than partners to be married or have children.⁷² People with children tend to be less ferociously competitive or monomaniacal, so associates have a greater tendency to focus on career progress.⁷³ Because they are younger, associates are more likely to believe in statements like “I have a destiny.”⁷⁴ The personal incentives of associates are thus intently focused on a one-dimensional but achingly imprecise metric: success at the firm.

In a more abstract sense, associates have been primed by a decade of intense competition to optimize for individual competence and pleasing superiors. Associates have recently completed a long educational process in which they competed and competed to get into the best, in this order: college, internships, law school, academic journal, summer associateship, law firm, judicial clerkship. In that process, everything from studying for the SAT to sending out clerkship applications is geared toward individual aspiration, ambition, and competition. There is only marginal or incidental organization-wide benefit for things like making the law review, but there are intense personal benefits—namely, increased competitiveness for the next competition.

The ways in which associate incentives diverge from firm-wide incentives are clear. Baldly, the associate is focused on her own success because she does not wield sufficient power to significantly alter her firm’s fate.⁷⁵ The time horizon of associates is quite limited—most associates will leave the firm

72. See Jeena Cho, *Family Way: Lawyers on Balancing Motherhood or Choosing a Child-Free Life*, ABA J., Nov. 2018, at 26, 26; see also Esther Lee, *This Was the Average Age of Marriage in 2021*, THE KNOT (Feb. 15, 2022), [<https://perma.cc/B8RN-CLCV>].

73. See Art Markman, *How Do People’s Values Change as They Get Older?*, PSYCH. TODAY (Sept. 1, 2015), [<https://perma.cc/JWG3-5XSR>].

74. Cf. Kelly A. Durbin et al., *Optimism for the Future in Younger and Older Adults*, 74 JS. GERONTOLOGY 565, 565 (2018) (describing optimism about one’s own future decreasing with age).

75. See PETER-J. JOST, THE ECONOMICS OF MOTIVATION AND ORGANIZATION 284 (2017) (describing opportunistic behavior in employees when their individual interests diverge from those of the firm).

within eight years, unsuccessful in their pursuit of partnership.⁷⁶ Associates thus naturally focus on personal success over firm prosperity.

2. *The Effect of Associate Incentives on Racial Diversity*

Associates may seem a strange group to discuss when considering the lack of racial diversity at law firms. After all, associates do not choose their peers, and they do not decide which of their number reach the rank of partner. What associates could, in theory, control is the way in which they compete to become a partner, for therein lies the problem. Regardless of whether racial diversity would benefit the firm, it is quite irrelevant to an associate how racially diverse her firm is. Indeed, if the associate is White, racial diversity is an active impediment to winning the next round of competition and becoming a partner. Under those circumstances, it should not be surprising that associates engage in what is ordinarily benign behavior, but which has the tendency of forestalling racial diversity.

Many first-hand accounts describe the dominant strategy to becoming a partner: do your work well and forge relationships with partners.⁷⁷ The former is obvious enough, and aside from prejudicial racial aspects of the “responsiveness” factor discussed earlier in this Article, this area is not generally a limitation on racial diversity.⁷⁸ Forging relationships with partners is seemingly benign as well, but such a reaction depends on a naïve view of how such relationships work. In the words of one corporate law partner: “Partners often see themselves in the associates they assign work to. That means if you didn’t share

76. See Nicole Donnelly, *The Shelf Life of a Law Firm Associate*, LINKEDIN (May 13, 2015), [<https://perma.cc/M2MC-94PK>].

77. See *The Allocation of Work*, HARV. L. SCH. CTR. ON THE LEGAL PRO. (2017), [<https://perma.cc/X37A-7XBL>] (extensively discussing the value of an associate’s relationships with partners to succeed at a law firm).

78. But see Melanie Lasoff Levs, *The Partnership Track: Everything You Didn’t Learn in Law School*, DIVERSITY & BAR, May-June 2005, [<https://perma.cc/8YX2-6USJ>] (“[W]hereas a white associate will maybe not know exactly what he or she is doing and the work product is not the best, the response will be, ‘He’s green. He needs more training . . .’ When an African American or other minority associate makes the same error, has work product needing improvement or has the same issue of not knowing, the presumption is sometimes incompetence.”)

similar characteristics or interests, it was that much harder to build relationships of trust. There was nothing actively malicious about it, but we can't deny that it was occurring."⁷⁹

It does not take much imagination to see where this goes wrong. The upper echelons of firms are predominantly affluent White men.⁸⁰ If we expand the focus to affluent White people generally, it is an overwhelming majority.⁸¹ White associates will already naturally share more "characteristics and interests" with White partners. They will also be in a better position to feign shared interests without scorn or ridicule—imagine the varying reactions if a White associate pretends to be interested in sailing as opposed to an associate of color from a disadvantaged background. Even putting any conscious discrimination aside, a White person in their late-twenties and a White person in their, say, mid-fifties are far likelier to share interests than a Black person in their late-twenties and a White person in their mid-fifties.

The high incentives for competitiveness among associates also lead to competition in billable hours. As discussed earlier, economic disparities between races mean that it is easier for White associates to take on as many billable hours and matters as necessary to stand out.⁸² Similarly, even for associates, much legal work depends on presentation, opening another advantage for children of wealth. Whether it is simple upper-class diction or the use of highfalutin vocabulary, there are many ways to make substantively identical arguments *sound* better to a partner reviewing an associate's work. Under such circumstances, the partner may not even be consciously aware of respecting the associate's work more, and the associate is merely writing the way she learned how to over decades of schooling.

Associates could manage these problems, at least in theory. They could agree among themselves not to engage in the sort of

79. *The Allocation of Work*, *supra* note 77.

80. *Id.*

81. *Id.*

82. See *supra* Section I.C.; Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. Rev. 1755, 1800 (2006) (noting the wide gap in respondents who said they had worked on nine or more matters over the past six months—59% among White men; 33% among Blacks; 38% among Hispanics).

toadying that unfairly benefits White associates. They could jointly agree to limit their billable hours. Individual associates could decide on their own not to take advantage of the benefits. Whether one can fairly ask a twenty-six-year-old associate to take on such a responsibility is debatable, but taking the incentives facing associates into account, there is no realistic possibility of associates voluntarily relinquishing such an advantage. These problems are particularly thorny because they involve behavior that is almost always positive and good. Indeed, it sounds ludicrous to talk about friendliness, socialization with older coworkers, and hard work as things that forestall racial diversity. It is unlikely every White associate in a firm would forgo their advantage, and even if they claimed they would, there would be no way to verify that they were doing so. Very few associates behave in that way with the conscious knowledge that it is an unfair advantage.⁸³

It is difficult to quantify the effects of these factors, but available anecdotal and scientific data suggest a strong hindrance to racial diversity. As discussed earlier in this Article, people of color are dramatically underrepresented at the partner level.⁸⁴ The increased difficulty for associates of color in their career path at the firm predictably leads to higher attrition of those associates. Sure enough, Black and Hispanic associates leave law firms at a higher rate than White associates.⁸⁵ As of 2019, the average governance and compensation committees at a law firm were composed of twelve people and had only one person of color.⁸⁶ Law firms have increasingly hired associates of color, but that progress has barely made a dent in the disparity at the partner level.⁸⁷

83. *See supra* Section I.

84. *See supra* text accompanying note 80; *The Allocation of Work*, *supra* note 77.

85. VAULT & MINORITY CORP. COUNS. ASS'N, *supra* note 8, at 8.

86. NAT'L ASS'N OF WOMEN LAWS., 2019 SURVEY REPORT ON THE PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS 7 (2019), [<https://perma.cc/3H5G-LJDK>].

87. VAULT & MINORITY CORP. COUNS. ASS'N, *supra* note 8, at 6.

3. Partner-Level Incentives

In both financial and personal terms, incentives for partners weigh against increasing racial diversity. However, the financial aspect is arguably more important and the personal aspect less important in impeding racial diversity in firms. Partner compensation is tied directly to revenue creation in a way that associate compensation is not. Partners make far more money than associates, but it is taken as a share of the firm's revenues rather than a fixed salary.⁸⁸ This theoretically should create a broader perspective whereby partners will do what is good for the firm overall.⁸⁹ A partner should, as the theory goes, be a dispassionate, mature presence, willing to forgo the self-promoting passions of associates in order to do the right thing for the firm.⁹⁰ In practice, partners are often paid based on self-focused metrics like billable hours and revenue generation, meaning that their financial incentive is squarely fixed on short-term gain.⁹¹

Much has been written about how to better align partner incentives with the overall well-being of the firm, but the variety of practices between law firms suggests that no particular solution works significantly better than the others.⁹² Most feature a mix of claiming revenue directly from fees taken in from the partner's clients, billable hours, and reaching some firm-set goal.⁹³ At one extreme, in an "eat-what-you-kill" system, partner compensation is mostly or entirely based on fees taken in from the attorney's own clients.⁹⁴ That system creates a strong incentive not to refer

88. Shari Davidson, *Law Firm Compensation: How Are Partners Paid, Compensated*, JD SUPRA (June 16, 2021), [<https://perma.cc/497J-HWWU>]. This is, of course, an "equity" partner. *Id.* There are non-equity partners in many firms now as a sort of intermediary position between an associate and the classic "partner." *Id.*

89. *See* Ribstein, *supra* note 55, at 754-55 (describing compensation schemes for partners as intended to "reward[] [partners] for the firm's overall success to motivate them to contribute to this success by monitoring the other worker-owners").

90. *Id.*

91. *See* Paul Floyd & Nick Ryan, *Thinking Outside the Black Box: Reimagining Attorney Compensation for the 21st Century*, BENCH & BAR MINN., Mar. 2020, at 16, 16, 18 (2020) (describing the different current approaches to attorney compensation at large law firms).

92. *Id.* at 17-19.

93. *Id.* at 17.

94. *Id.* at 19.

clients to other attorneys in the firm—the partner profits from his own clients, not the clients of other attorneys at the firm. This dynamic weakens the value of having a “full service” firm because each partner is incentivized not to call upon the rest of the firm’s expertise if it is even remotely possible that he can provide the service.⁹⁵ At the other extreme is “lock-step” compensation, where salary is based on seniority within the firm, and everyone at the same seniority level makes the same amount.⁹⁶ While this can enable a partner to focus on what is good for the firm, it also removes a strong incentive to generate business.⁹⁷ While it is difficult to generalize, observers have noted a decline in lock-step systems, driven by a desire to attract lawyers who are particularly outstanding at generating revenue.⁹⁸

At the personal level, partners are overwhelmingly wealthy older White men—90% of equity partners are White, and 78% are male.⁹⁹ Demographically, older White men are the least likely to be receptive to making a sacrifice on behalf of racial diversity.¹⁰⁰ Older White people generally, but particularly men, are less likely to believe Blacks are treated less fairly than Whites.¹⁰¹ In one 2019 survey, about 60% of White men in Generation Z believed Blacks were treated less fairly versus 40% of the Baby Boomer generation.¹⁰² Perhaps even more notable, nearly 20% of White male Baby Boomers believe Whites are treated less fairly than Blacks.¹⁰³

Finally, it is worth noting that partners are much more sensitive to client wishes than others at the law firm. Partners manage the relationship and profit most directly from it,

95. *Id.*

96. Floyd & Ryan, *supra* note 91, at 18.

97. *Id.*

98. See John Roemer, *In the Money*, ABA J., Apr.-May 2021, at 24, 24-25 (describing the competitive disadvantage of lockstep compensation, namely that lateral hiring of “rainmakers” is a necessary practice in the modern legal marketplace).

99. VAULT & MINORITY CORP. COUNS. ASS’N, *supra* note 8, at 7.

100. See Philip Bump, *Most Young White Men Are Much More Open to Diversity than Older Generations*, WASH. POST (Jan. 20, 2019, 1:29 PM), [<https://perma.cc/4BR6-NYNQ>] (showing various polling indicating that White men of the boomer generation were significantly more likely to say that increasing racial and ethnic diversity is not a good thing).

101. *Id.*

102. *Id.*

103. *Id.*

especially in eat-what-you-kill systems.¹⁰⁴ To the extent that clients have racial or other bias, partners will be the ones who have to either accommodate it or figure out some way to neutralize it.

4. The Effect of Partner Incentives on Racial Diversity

Partners can inhibit racial diversity at their firms in three main ways: (1) they can steer work toward White associates; (2) they can prevent significant client interaction with minority attorneys; and (3) they can choose not to promote minority attorneys to the partner level. The data at hand strongly suggest (3) is happening currently and has been for some time—there is far more racial diversity at the associate level than at the partner level.¹⁰⁵ I contend that the incentives facing partners, primarily financial, militate against the inclusion of minority attorneys, which then snowballs into a lack of mentorship and access to senior firm leaders, culminating in the systematic failure to promote minority associates to the partner level. The incentives depend somewhat on the kind of partner-compensation strategy used by the firm, but the end result is always that racial diversity is undervalued.

In an eat-what-you-kill system, virtually all of the short-term financial sacrifices of increasing racial diversity are borne by the partner, and virtually none of the long-term benefits accrue to him. The benefits of racial diversity might be seen in better work product and a more diverse client base for the overall firm, but not for a run-of-the-mill older White male partner. Clients cannot easily discern higher quality work product, and the central flaw of the eat-what-you-kill system is that the partner does not necessarily care whether the firm gains clients if they are not *his* clients.¹⁰⁶ The short-term costs of increasing racial diversity might be less apparent stability for clients used to working with White attorneys—precisely what the partner wants most in order to keep his clients as comfortable as possible with the relationship.

104. See Floyd & Ryan, *supra* note 91, at 18-19.

105. See VAULT & MINORITY CORP. COUNS. ASS'N, *supra* note 8, at 7.

106. See Floyd & Ryan, *supra* note 91, at 18.

In a lock-step compensation system, increasing racial diversity brings different costs for partners. Recall that the major drawback of the lock-step compensation system is lack of incentive for creating new business.¹⁰⁷ The best scenario for a partner in a lock-step compensation system is to do as little work as one can get away with and be surrounded by partners who are, to use the parlance of the profession, “rainmakers.” The worst scenario is to be the most productive partner in such a firm because it means you are being compensated below your productivity. Surveys of law firms indicate that revenue generated by White partners is nearly 60% greater than that generated by Black partners.¹⁰⁸ White partners generated nearly double the revenue of Hispanic partners.¹⁰⁹ We can surmise a variety of reasons for that discrepancy—bias by clients, lack of support from others at the firm, etc., but incumbent partners at a lock-step law firm would, presumably, predict diminished income from increased diversity.

On the personal level, there are few counterweights for partners to the financial disincentives to racial diversity. As discussed above, demographically, the White men who comprise a supermajority of partners are more likely to be skeptical of claims of racial injustice.¹¹⁰ Some partners have ambitions to, say, become a judge or political figure, but confirmation hearings or television interviews are unlikely to delve into detailed specifics about whether the partner voted to promote minority associates or made a real effort to mentor them. Some partners are content to remain at the firm, perhaps because they are interested in the subject area they work in. Such partners would be similarly indifferent to the plight of minority associates. The only partners likely to ignore financial incentives to improve racial diversity would be those who care tremendously about racial injustice, did not leave to work directly on the issue in the

107. Mustaqim Mohammad Iqbal, *Long Live the Lockstep*, THE STUDENT LAW. (Oct. 21, 2019), [<https://perma.cc/LN67-PV22>].

108. See JEFFREY A. LOWE, MAJOR, LINDSEY & AFRICA, 2020 PARTNER COMPENSATION SURVEY 29 (2020), [<https://perma.cc/ZFK8-SQM5>].

109. *Id.* (listing White, non-Hispanic average originations per partner at \$2,888,000 and Hispanic average originations per partner at \$1,471,000 in 2020).

110. Bump, *supra* note 100.

nonprofit sector, and stuck with the firm long enough to realize that vision. Those partners doubtless exist, but given the paucity of partners of color, their quest for diversity has proven quixotic.

5. *Short-Term vs. Long-Term Incentives*

One attribute common to everyone at a law firm is a shorter time horizon than the firm itself. Associates are not likely to last a decade at the firm where they start their legal careers.¹¹¹ Even the longest-term partners cannot realistically hope to be at the firm for more than, say, forty years. Many of the largest firms are already significantly older than that and in all likelihood will not shut down anytime soon. Cravath, Swaine, and Moore, consistently ranked among the top law firms in the country, was founded in 1819.¹¹² The difference in time horizons creates a natural incentive to paper over problems rather than solve them.

In the racial diversity context, there is an obvious short-term cost in attempting anything ambitious: admitting there is a problem in the first place creates a negative impression in the short term. The firm itself might be better off in, say, ten years, but in the short run, clients will not want the reputational risk of being associated with a law firm known to have a racial diversity problem. As we have seen, partner compensation is much more directly tied to what clients want than the long-term well-being of the firm.¹¹³

A recent ABA publication aimed at spurring in-house law departments to retain outside counsel of color described the problem with this memorably awful circumlocution in a section titled “Highlight Law Department’s Lack of Diversity”:

An in-house law department that is not already diverse must ensure that its operations reflect D&I [diversity and inclusion] principles before implementing a law firm diversity program. If a law department does not prioritize D&I in its operations, majority-owned firms

111. See, e.g., Link Christin, *Confronting Lawyer Turnover in Law Firms*, ATT’Y AT WORK (Mar. 27, 2021), [https://perma.cc/6KHL-5LHW].

112. See *Our Story*, CRAVATH, SWAINE & MOORE LLP, [https://perma.cc/D2L5-37YP] (last visited Jan. 9, 2023).

113. See Floyd & Ryan, *supra* note 91, at 18-19.

cannot be expected to follow a department's law firm diversity guidelines.¹¹⁴

While the meaning of this guidance remains unclear, it seems to indicate that in-house lawyers who retain outside law firms should not do so unless they themselves have a sufficiently diverse workforce. Presumably, the fear is that unless one's house is already in order, any significant action relating to diversity could bring unwanted attention.

E. Why Clients Do Not Demand Diversity at Law Firms

If the incentives of firms, and in particular partners at firms, revolve around pleasing clients, we must ask why clients have not pressured the law firms they hire to improve racial diversity. The mystery deepens when we realize that most major corporations profess a commitment to racial diversity, and many at least appear to walk the walk, with far more minority representation at higher levels than in law firms.¹¹⁵ While it is impossible to look into the hearts of clients and generalize, we can examine a few relevant considerations to try to address this mystery.

First and likely foremost, clients benefit from internal diversity at their firms but have a far less direct interest in creating a diverse workplace from a law firm that they employ. Perceived short-term costs in quality and responsiveness accrue directly to the client; whatever benefits the law firm's future clients reap from a more diverse workforce do not redound to the current client. While this is a compelling argument, the one nagging doubt is that if we believe the legal world has particularly acute competition that it is suffering from a multipolar trap, can it really be the case that clients are generally subject to the same dynamics even though they are generally in less competitive industries?

While clients may work in less competitive fields, they often have high stakes in the matters for which they retain counsel, and

114. David O'Connor, *Increasing Law Firm Diversity*, DIVERSITY & INCLUSION COMM. (Am. Bar Ass'n, Chi., Ill.), Winter 2020, at 1, 7, [<https://perma.cc/BFC5-D3MW>]. The diligent reader may also note that several of the cartoon women of color in the graphic above the article appear to have been copied and pasted, with only the color of their shirt changed.

115. Tracy Jan, *The Legal Profession is Diversifying. But Not at the Top.*, WASH. POST (Nov. 27, 2017, 8:08 AM), [<https://perma.cc/XKW3-M7VE>].

therein lies the incentive against diversity. It is easy for attorneys to forget just how anomalous legal services are as a product in today's world. Most products and services are somewhat predictable (e.g., you can build 10,000 cars if you put in X amount of money), insured against loss, and not particularly dichotomous in outcomes (e.g., you might make cars of a slightly lower quality than intended, but they will still generally work). If one hires, say, an accounting firm, the likelihood of outright disaster is low because accountants' struggle is against inanimate numbers. While accountants can and do make big mistakes, they are relatively rare and can be insured against.¹¹⁶ A law firm is often hired to undertake an important and highly uncertain mission. Under those circumstances, clients understandably optimize for sheer competence and victory in their particular case above all else. They are willing to pay exorbitant fees because no one knows how high of quality the legal work must be to end in victory.¹¹⁷ Because they optimize for competence, they understandably want their law firm to do the same. And because they cannot easily judge whether the end product was high quality, they look for ancillary factors like responsiveness as proxies for quality representation, bringing us right back to the same incentives that work to hinder racial diversity inside law firms.

Against this backdrop, we can see how the outrageously unfair stereotypes of attorneys of color at major law firms end up neutralizing clients' desire for racial diversity in the law firms they employ. As discussed earlier, they cannot discern quality, but they think they know that a responsive White man is working on their case with younger responsive White men, so they are getting their money's worth.¹¹⁸

116. See Roger Russell, *It's a Good Time to Buy Liability Insurance*, ACCT. TODAY (Oct. 2, 2017, 11:52 AM), [<https://perma.cc/A9DJ-SCZN>]. Obviously, lawyers have malpractice insurance as well, but the difference is that you can lose and be competently represented by an attorney. An accountant's "loss" is much more inherently due to a fault of the accountant's.

117. See, e.g., Harry S. Margolis, *Why Are Lawyers So Expensive?*, MARGOLIS & BLOOM, [<https://perma.cc/H3Y9-3E8G>] (last visited Jan. 9, 2023) (providing a client-side view of legal services: "They are willing to pay for the right representation because so much is at stake.").

118. *Id.*

F. How Law Firms Attempt to Manage Their Racial Diversity Problem

While misaligned incentives explain much of why firms have not made progress on racial diversity, the next logical inquiry is what do firms actually *do* about racial diversity and why has it failed to produce results. Understanding what firms have done and why requires looking past stated or even honestly held intentions to hard reality. The dominant solution hit upon by major law firms involves a mixture of diversity committees, formal mentorship programs, affinity groups, and some manner of social outreach. Unsurprisingly, these efforts have not significantly altered the trajectory of racial diversity in law because they do not address the incentives at the heart of the problem. While they may be well-intentioned, these efforts largely function as public relations management, whether to aid in the recruitment of associates of color or to have something to point to when critics inevitably point out the dismal lack of racial diversity in law.

1. Law Firm Diversity Committees

The single most widely adopted measure to increase racial diversity at large law firms is the diversity committee.¹¹⁹ For large law firms, a diversity committee is usually comprised of about twenty attorneys, at least one of whom is a partner.¹²⁰ The committee's exact responsibilities and activities are usually unclear to an outside observer because firms do not generally publish meeting minutes, agendas, or the like.¹²¹ Business organizations like the U.S. Chamber of Commerce advise that diversity committees should gather data and advise on policies that should be modified or eliminated to achieve diversity-related

119. See, e.g., *Diversity Committee*, CRAVATH, SWAINE & MOORE LLP, [<https://perma.cc/B8RS-5445>] (last visited Jan. 9, 2023); O'Connor, *supra* note 114.

120. See *Diversity Committee*, *supra* note 119 (noting that 85% of firm diversity committees now have at least one partner).

121. See, e.g., *id.*

goals.¹²² As examples, the Chamber noted that adding employee benefits, creating affinity groups, and considering “more diverse” company events could fall in the ambit of the diversity committee.¹²³

This summary suggests some of the shortcomings of diversity committees. Committees are so inherently and famously ineffective at rallying consensus that a U.S. spy agency in World War II trained agents undercover at German factories to create committees and refer as many matters to the committee as possible to slow production.¹²⁴ In the limited literature on the effectiveness of diversity committees, the clear theme is that they can work if they have authority to impose accountability for diversity goals.¹²⁵ Law firm diversity committees tend not to do that. Lacking both clear goals and authority and comprised mostly of the least senior and most racially isolated people at the firm, they cannot hope to achieve much.¹²⁶ Including at least one partner, as many firms do, is not the same thing as substantial buy-in from firm management. At best, it means that if there is something easy the firm can do to improve its diversity situation, there is a designated partner to hear about it.

Just because the committees are ineffective at their stated goal does not mean they are useless, however. Distilled down, diversity committees are popular because they constitute doing

122. See Sean Peek, *6 Essential Steps to Creating a Diversity, Equity & Inclusion Committee at Your Company*, U.S. CHAMBER OF COM. (Aug. 26, 2020), [<https://perma.cc/B2Q6-SF9D>].

123. *Id.*

124. See U.S. OFF. OF STRATEGIC SERVS., SIMPLE SABOTAGE FIELD MANUAL 28 (1944), [<https://perma.cc/4UBF-4GMB>] (“When possible, refer all matters to committees for ‘further study and consideration.’ Attempt to make the committees as large as possible—never less than five.”).

125. Savita Kumra, *Busy Doing Nothing: An Exploration of the Disconnect Between Gender Equity Issues Faced by Large Law Firms in the United Kingdom and the Diversity Management Initiatives Devised to Address Them*, 83 FORDHAM L. REV. 2277, 2288 (2015) (citing studies of diversity management for the proposition that accountability is a key determinant of whether diversity initiatives succeed).

126. See CHRISTOPHER L. MEAZELL, THE BUSINESS OF CONTEMPORARY LAW PRACTICES 19 (2021) (describing many respondents to a survey saying that law firm diversity committees lacked “central focus,” and “coordinated firm-wide” goals, and “lacked the authority to make a real difference”).

something, but in a controlled, low-commitment way.¹²⁷ They offer the maximum ratio of public relations benefit to actual investment. The public relations benefit in question is not great in magnitude, but the investment is essentially zero. A firm can always point to the creation or continued existence of the committee to show that firm leadership takes the issue of diversity seriously. Indeed, most firms take exactly this tack. The typical firm has a webpage for their diversity committee noting its general task and at least some of its composition. It does not note any actual agenda or specific goals.¹²⁸

To delve more deeply into the benefits of diversity committees, we can start with their low cost. Generally, firms do not hire anyone specifically to be on a diversity committee, and they do not pay anyone a bonus to serve on one.¹²⁹ Indeed, some Black employees in tech companies have criticized the widespread use of diversity committees, seeing it as extra unpaid work that inherently lessens their ability to compete with White workers not similarly burdened.¹³⁰

An attractive aspect of diversity committees for firms is that they provide a tightly controlled outlet for complaints that might otherwise go to newspapers, blogs, or some other public venue that could potentially embarrass the firm.¹³¹ Everyone on the committee works for the firm and has a vested interest in maintaining the firm's reputation. While many committee participants doubtless care about achieving equitable outcomes whenever possible, they are inherently limited in just how

127. Cf. Kumra, *supra* note 125, at 2298 (describing the motive of some firms as “positive company image” and noting that at those firms there is a greater likelihood that the gestures toward diversity are an “empty shell”).

128. See, e.g., *Diversity Committee*, *supra* note 119; *Diversity Committee*, SULLIVAN & CROMWELL, [<https://perma.cc/75SH-782M>] (last visited Jan. 9, 2023); *Diversity Overview*, GIBSON DUNN, [<https://perma.cc/64QK-Q9DR>] (last visited Jan. 9, 2023).

129. Staci Zaretsky, *25 Biglaw Firm Offers Bonus-Eligible Diversity & Inclusion Billable Hours*, ABOVE THE L. (Feb. 8, 2021, 1:48 PM), [<https://perma.cc/TMW8-4PWL>].

130. See Nitasha Tiku, *Tech Companies Are Asking Their Black Employee Groups to Fix Silicon Valley's Race Problem—Often for Free*, WASH. POST (June 26, 2020, 6:00 AM), [<https://perma.cc/DFZ6-73PV>].

131. See, e.g., Patrick Dorrian, *Davis Polk Says Black Lawyer's Suit Defamatory, Wants Sanctions*, BLOOMBERG L. (Jan. 27, 2021, 9:41 AM), [<https://perma.cc/ZXW3-QNCV>] (discussing a lawsuit filed by a Black attorney alleging racial discrimination and retaliation for complaints about racial bias at a major law firm).

adversarial they can be without throwing their future career at the firm in jeopardy. At the same time, lawyers of color with a race-related grievance against the firm could do tremendous damage to the firm's image if they file a lawsuit instead of a diversity-committee complaint.¹³² If having the diversity committee as an outlet results in even one fewer lawsuit against the firm, it will have been worth whatever marginal commitment of billable hours the firm has devoted to it.

Diversity committees provide everyone involved—associates and partners—with a line on their resume that could prove useful when eventually moving to another firm. Associates of color, facing many obstacles to forming bonds with partners, can take positions in the diversity committee, where there is likely to be at least one partner, and get some face-to-face time with firm leadership. Partners can claim important management experience by serving on a diversity committee. Everyone else at the firm benefits from the improved public image of the firm.

2. *Affinity Groups*

By all available evidence, affinity groups help associates of color, but do not make a decisive difference in promoting diversity. Affinity groups are voluntary associations of firm members sharing some characteristic.¹³³ They are not at all limited to racial affinity groups; some firms have groups based on veteran status, gender identity, etc.¹³⁴ They are distinct from diversity committees because their activities are less structured. While that does limit their potential to achieve specific goals, anecdotal evidence suggests affinity groups do help minority attorneys feel a sense of community.¹³⁵ For example, the affinity groups can organize events, group chats, and even email chains that provide a common space for members of the designated community to express themselves frankly.¹³⁶ Helping associates

132. *Id.*

133. See Mishell Parreno Taylor, *Today's Affinity Groups: Risks and Rewards*, SHRM (Oct. 11, 2019), [<https://perma.cc/96YX-TA3U>].

134. *Id.*

135. *Id.*

136. *Id.*

of color cope with law firm life is certainly an accomplishment and can indirectly lead to greater representation in partner ranks if it reduces the attrition rate of associates of color.¹³⁷

One negative aspect of affinity groups from a racial-diversity standpoint is that they are still an outgrowth of the firm itself. They are intended to achieve the firm's goals.¹³⁸ Employment law attorneys frequently stress the need to align an affinity group's goals with the firm's.¹³⁹ It does not help firms if, for example, the affinity group suggests that members of the affinity group need additional support in order to succeed at the firm.¹⁴⁰ Another shortcoming of affinity groups is one shared with diversity committees: if they do not build bridges to partners, they are unlikely to directly lead to promotion of attorneys of color. Indeed, some White employees at major firms claim to feel discriminated against because they do not have an affinity group of their own.¹⁴¹ If a White partner feels that way, then an associate's being in an affinity group could unfairly harm their prospects for advancement. While claims occasionally arise that the creation of affinity groups inherently discriminates against any set of individuals not represented in the groups, such claims have not fared well in court.¹⁴²

3. Formal Mentorship Programs

The vast majority of firms have adopted formal mentoring programs, but these can fail to produce true mentorship. The problem arises from a misdiagnosis of why mentoring helps in the first place. Mentorship in its most basic form involves providing

137. Virginia G. Essandoh, *Why Law Firm Affinity Groups Are a Valuable Resource*, LAW.COM (Oct. 23, 2008, 12:00 AM), [<https://perma.cc/AAU4-2KQ3>].

138. See Sandra S. Yamate, *Affinity Groups in Large Law Firms: What to Consider*, AM. BAR. ASS'N: LITIG. NEWS, [<https://perma.cc/7T8T-PXZ5>] (last visited Jan. 24, 2023) (advising firms to be "careful in how the purpose and goals of [affinity] groups is expressed" and to "[b]e clear about the group's purpose from the firm's perspective").

139. *Id.*

140. *Id.*

141. See Anne-Marie Vercruyse Welch et al., *Legal Traps Associated with Affinity Groups*, 33 ABA J. LAB. & EMP. L. 267, 269 (2018) (describing a lawsuit at General Motors alleging precisely this kind of discrimination).

142. See *id.* ("Articulating and following a process to treat affinity groups equally will greatly reduce [the] risk [of a lawsuit].").

advice and guidance to help newcomers gain expertise in the most efficient manner possible.¹⁴³ While receiving information from a partner doubtless has some value to associates, the major benefit in a law firm is differentiation from the mass of associates in the eyes of the partner.¹⁴⁴ In the literature on mentorship, this is often described as the mentor becoming a “champion” for the mentee.¹⁴⁵ If the idea is to give every associate a “champion,” there are some obvious game theory problems to firm mentorship programs. First, everyone having a champion logically means no one has a champion. That might seem like a good, if roundabout, way to weaken the advantage of White associates in forming bonds with firm leadership. However, the reality is that all officially declared champions are not equally dedicated to the task of promoting their mentee. One survey found that only 27% of firm mentors described themselves as actively advocating for their mentees.¹⁴⁶ Another study found that informal mentorship is more effective than formal, and informal mentorship is precisely what one would expect to arise from the commonalities between White associates and partners.¹⁴⁷ This is particularly noteworthy because partners are more resistant to mentoring than associates, presumably due in part to the greater tradeoff between billable hours and mentoring time.¹⁴⁸ Informal mentorship will be voluntary on the partner’s part, whereas formal mentorship is less voluntary.

A more subtle problem with firm mentorship is that it does not bridge the divide between associates of color and White

143. See Rafael X. Zahraiddin-Aravena, *The Evolution of Mentorship in Legal Professional Development*, AM. BAR. ASS’N: BUS. L. SECTION (Mar. 19, 2020), [<https://perma.cc/UA3G-MUGK>] (describing firm mentorship programs).

144. See Levs, *supra* note 78 (describing a usual firm process where an associate is nominated by the partner they work for and the key role played by personality).

145. See, e.g., Michael L. Nguyen & Apoorva J. Patel, *Strategies for Effective Mentorship and Sponsorship*, AM. BAR. ASS’N, [<https://perma.cc/3EK9-J379>] (last visited Jan. 24, 2023).

146. See Zahraiddin-Aravena, *supra* note 143.

147. See Sonia R. Russo, *Be the Change: How Mentoring Can Improve Diversity in the Legal Profession*, LAW PRACTICE TODAY (July 14, 2016), [<https://perma.cc/537J-R8SH>].

148. See Bruce Epstein, *Mentoring in Law Firms: A Survey of Current Practices*, LINKEDIN (Sept. 27, 2017), [<https://perma.cc/VK8U-R3NN>] (“A small percentage of junior associates resist mentoring; a larger percentage of partners (perhaps 20%) also resist being mentors.”).

partners. One study found 71% of firm mentors are the same race or gender as their mentees.¹⁴⁹ Superficially, this arrangement makes sense—if we want the partner and associate to forge a bond, they may be more likely to do so if they are of the same race. However, one can logically surmise that partners of color are not the roadblock to the advancement of associates of color in the first place. If a mentorship program is not bridging divides with White partners, it has limited ability to help associates of color become partners. This tracks with anecdotal complaints by associates of color about firm mentorship programs, namely that Black associates often have Black mentors.¹⁵⁰ If the Black mentors have less power in the firm, their mentorship will not be as valuable, and they will not be able to champion their mentees in the way a White partner would.¹⁵¹ Further, since there are few partners of color and relatively more associates of color,¹⁵² one would expect the ratio of mentees to mentors to be higher among partners of color. This would dilute whatever personal connection is made with the mentor.

Some of these factors would apply in any professional context, but the intense competitiveness and lack of alternative channels of competition for associates creates a measurable problem specific to law. Recall from earlier in this Article that the medical community has a far less severe racial diversity problem.¹⁵³ Doctors also do not have a disparity in mentorship between clinicians of different races.¹⁵⁴

Given that the younger ranks of both law and medicine are composed of ambitious, hard-working, smart people, the diverging outcomes on racial diversity generally, and mentorships in particular, suggest there is something about how the profession

149. Zahraiddin-Aravena, *supra* note 143.

150. See Natalie Runyon, *Why Inclusion Matters: A Story About the Different Experiences Between White and Black Attorneys*, THOMSON REUTERS (Feb. 6, 2020), [<https://perma.cc/SXV6-G8HA>].

151. *Id.*

152. VAULT & MINORITY CORP. COUNS. ASS'N, *supra* note 8, at 7.

153. See *supra* note 16 and accompanying text.

154. See Mitchell D. Feldman et al., *Does Mentoring Matter: Results from a Survey of Faculty Mentees at a Large Health Sciences University*, 15 MED. EDUC. ONLINE 5063, at 1 (2010) (describing a study finding no difference in having a mentor based on gender or ethnicity at one of the largest and most comprehensive mentoring programs in medicine at the University of California, San Francisco).

works causing the difference. It would take a more rigorous empirical analysis to authoritatively identify the causes, but I speculate that the true root cause is how doctors and lawyers compete for career advancement. In medicine, good and bad outcomes are much easier to discern and much easier for superiors to monitor. Deciding whether, say, Patient *X*'s foot surgery went well can be answered quite authoritatively—can she walk? Is she in constant pain? If so, what exactly did the surgeon do? A commonality of experience and knowledge allows one doctor to easily pass judgment on another. Because judgment can be passed easily and frequently, a supervising doctor can easily measure a new doctor's performance on the merits.¹⁵⁵ Socializing with the supervising doctor, while advisable, is ancillary to substantive performance.

By contrast, as we have discussed, measuring lawyer performance is difficult. Aside from obvious grammatical problems or completely missing well-known case law, it is hard to know when a memo "fails" for reasons identifiable to an outside observer. Memos generally analyze unique combinations of facts and law.¹⁵⁶ Unless a partner possesses encyclopedic knowledge of that area of law *and* keeps up to date with all the published and unpublished opinions in the area, he has no way of knowing whether the associate missed something important. Winning or losing an individual case is often beyond the control of an individual associate, so the sort of binary outcomes typical in medicine are not available to judge associate performance at large law firms.

4. *Community Outreach*

Community outreach programs at major law firms, while commendable, barely count as an attempt at solving the racial diversity shortfall. Instead, they represent an entirely natural reaction to a difficult problem: attempting to solve a different

155. *Id.*

156. *Memorandum*, CORNELL L. SCH. LEGAL INFO. INST. (Sept. 2020), [<https://perma.cc/89EX-C9VB>].

problem, even if it is something that has already been solved.¹⁵⁷ It is reassuring to be able to do *something* tangible, both because it is a signal of commitment and because it provides a false sense that the problem is being addressed in some way. A more cynical view would be that flashy solutions that are not strictly related to the real problem allow public relations professionals to convince outsiders that the problem is well in hand.

In the ubiquitous “diversity” section of major firm websites, many firms advertise their charitable work with local communities in which they promote legal education or seek minority summer associates from local schools, etc.¹⁵⁸ It is certainly not a bad thing for a firm to give to charity or have outreach efforts to improve recruitment, but these sorts of programs should not be confused with a systematic effort to fix the problem. The diversity problem among associates is nowhere near as bad as with equity partners.¹⁵⁹ Similarly, diversity at law schools, while not representative of the population as a whole, is not anywhere near as skewed as in firms.¹⁶⁰ Much like diversity committees, these initiatives are easy for the firms. They require only slightly altering summer associate classes or issuing potentially tax-deductible charitable donations.

5. *The Mansfield Rule*

The Mansfield Rule is a well-intentioned step that will almost certainly fail to solve the problem of racial diversity in law firms. The rule is simple: a law firm must “affirmatively consider[]” at least 30% women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities for leadership- and governance-committee positions, equity partnerships, “formal

157. Examples include professional sports teams that heavily advertised disinfecting of seats at the height of the coronavirus pandemic despite the fact that the primary transmission mechanism was in-person transmission.

158. See, e.g., *Diversity, Equity, & Inclusion*, *supra* note 5 (noting a summer associate recruitment program for minority law students and a scholarship program).

159. VAULT & MINORITY CORP. COUNS. ASS’N, *supra* note 8, at 8.

160. Compare *id.*, with *Law School Enrollment by Race & Ethnicity (2019)*, ENJURIS, [<https://perma.cc/86ME-R7E3>] (last visited Jan. 9, 2023) (showing racial-ethnic minority law students comprising around 30-46% of all law students in large states).

client pitch opportunities,” and senior lateral positions.¹⁶¹ The rule was created by a group called the Diversity Lab, which certifies firms that follow the rule.¹⁶² The rule is rooted in the theory that promotion committees can ameliorate their conscious or subconscious biases by making their promotion pool more diverse.¹⁶³ As of this writing, 117 firms, including many of the biggest and most well-known, are Mansfield-certified.¹⁶⁴ According to the Diversity Lab, 76% of participating firms said their equity-partner promotions pool was more diverse.¹⁶⁵

One obvious problem with the Mansfield Rule is that firms can meet it very easily without improving racial diversity. Obviously, simply “affirmatively considering” candidates of color does not ensure they are selected. But more subtly, the rule requires 30% of candidates to fall into one of several underrepresented categories. For example, one way to meet the Mansfield Rule is to have 30% of the promotion pool be White women. Women currently represent 22% of equity partners,¹⁶⁶ so firms only need to be slightly more inclusive on the gender of promotion pools to meet the rule without changing racial representation a jot.

The Mansfield Rule was based on the Rooney Rule in the National Football League (NFL),¹⁶⁷ so it is worth a brief digression into the NFL to predict potential long-term results of the Mansfield Rule. The Rooney Rule requires teams with a head coaching vacancy to interview at least one racial minority candidate.¹⁶⁸ The rule has been in place since 2003,¹⁶⁹ so it may be instructive to consider the extent to which the rule has worked. There was a significant bump in the racial diversity of head

161. *An Open Letter from the 2020-2021 Mansfield Law Firms' Chairs & Managing Partners*, DIVERSITY LAB, [https://perma.cc/Y3MU-ABJH] (last visited Jan. 24, 2023).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Meghan Tribe, *Women Law Partners Weigh In on How to Close the Pay Equity Gap*, BLOOMBERG L. (June 14, 2022, 3:45 AM), [https://perma.cc/7TPU-AQSY].

167. Press Release, Diversity Lab, 44 Law Firms Pilot Version of Rooney Rule to Boost Diversity in Leadership Roles (Sept. 25, 2017), [https://perma.cc/G837-CU9A].

168. Press Release, Nat'l Football League, NFL Expands Rooney Rule Requirements to Strengthen Diversity (Dec. 12, 2018), [https://perma.cc/5JHQ-7YUQ].

169. *Id.*

coaches from about 2003 to 2016.¹⁷⁰ The share of games coached by non-White head coaches increased from about 9% to a peak of 25% in 2011.¹⁷¹ However, as of 2020, non-White head coaches coached roughly the same percentage of games as before the Rooney Rule began.¹⁷²

Analysis of the Rooney Rule has raised a number of problems that will likely also limit the effect of the Mansfield Rule. The Rooney Rule appears to have increased representation temporarily, possibly by allowing individual applicants the opportunity to make an impression on team owners who otherwise would have viewed them through a stereotypical lens. That is precisely what the Mansfield Rule hopes to accomplish. However, in college football, Black candidates who were subsequently hired after the Rooney Rule was put in place were given fewer chances to overcome disappointing seasons.¹⁷³ NFL owners also increasingly made up their minds before the hiring process began so that the nominal hiring process was merely for show.¹⁷⁴ The fundamental problem of the Rooney Rule is the illusion that one simple, mechanistic requirement can overcome wider institutional problems.

The most important difference between the Mansfield and Rooney Rules is that the former is voluntary and the latter is not.¹⁷⁵ Paradoxically, this suggests the Rooney Rule should be *more* effective. Logically, the most forward-leaning firms would be the most likely to seek Mansfield certification because the “price” of doing so (i.e., how much the firm actually needs to change) would be lower. We should then logically expect that many firms will successfully gain Mansfield certification without

170. RICHARD E. LAPCHICK, UNIV. OF CENT. FLA., THE 2022 RACIAL AND GENDER REPORT CARD: NATIONAL FOOTBALL LEAGUE 47 (Asia Ervin et al. eds., 2022), [<https://perma.cc/KQ4V-V7ZJ>].

171. *Id.*

172. Neil Paine, *The Rooney Rule Isn't Working Anymore*, FIVETHIRTYEIGHT (Jan. 14, 2020, 3:17 PM), [<https://perma.cc/J8UK-NFD2>].

173. *Id.*

174. *Id.*

175. See Press Release, *supra* note 168; Lenore Pearlstein, *Mansfield Rule for Law Firms Builds on the Rooney Rule*, INSIGHT INTO DIVERSITY (June 25, 2020), [<https://perma.cc/RZV4-XZQ4>].

changing much, and the firms we do not hear about where a Mansfield rule would be more helpful will also change nothing.

In addition to the practical problems identified above, I submit that the Mansfield Rule has not and will not work because it has misidentified the key drivers of underrepresentation at law firms. The Mansfield Rule envisions a world in which partners sitting on promotion committees consciously or unconsciously decide not to interview an otherwise good candidate because they are a racial minority. If this were the case, the problem of racial diversity in law firms should be no different from the problem of racial diversity in, say, medicine. In either case, the issue would be overcoming bias. However, we know that racial diversity is worse in law firms,¹⁷⁶ which strongly suggests something other than (or at least, in addition to) bias is afoot. I submit that incentives facing firm lawyers fill that gap and better explain the data. The Mansfield Rule, for example, has no explanatory power if a firm interviews 30% racial minority candidates, virtually none of whom had the same mentorship opportunities as their White peers, and ultimately promotes none of the minority candidates. However, we can immediately understand that structural incentive problems explain the failure to promote minority candidates.

G. How Morally Culpable Are Firms for Diversity Failures?

I have been critical of law firm efforts to promote racial diversity, but a fair rejoinder might be that ineffective options may still be the best available and better than nothing. More dramatic action to bring about racial diversity at a particular firm might be possible, but if law firm competition has produced a true multipolar trap, a firm taking on the costs of dramatic action would not survive the competitive effect. Surely, it is utopian to expect a firm to do something noble that would result in its demise.

Here it is important to distinguish between the concept of a multipolar trap and the theoretically *perfect* multipolar trap. The

176. Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. L. & SOC. CHANGE 364, 364-65 (2017).

general notion of a multipolar trap is that important values must be sacrificed in order to survive a high level of competition.¹⁷⁷ In a perfect multipolar trap, the smallest shred of value contrary to the factor being optimized results in complete destruction of the firm that attempts it.

I contend that firms and the people in them are in a multipolar trap, which limits but does not completely eliminate their ability to incorporate values other than competition. Obviously, people who work at firms still do have families and personal lives, even if their work-life balance is generally poor. However, the multipolar trap limits the ability of firms to uphold values, and because enhancing racial diversity directly contradicts the incentives of individuals within the firms, firms tend not to enhance racial diversity at senior levels.

The exclusion of Jewish lawyers from top law firms in the early twentieth century reveals how competition and discrimination did not always work the way they currently do. White Anglo-Saxon Protestants dominated elite New York law firms in the late nineteenth and early twentieth centuries.¹⁷⁸ By the latter half of the twentieth century, Jewish attorneys were overrepresented at top New York law firms.¹⁷⁹ Note that the legal field was nowhere near as competitive in the early twentieth century—there were far fewer law firms in a far poorer economy than exists today.¹⁸⁰ The racist preferences of elite law firms could only be indulged because the lack of competition allowed space for “values,” even bad values like antisemitism.

I believe the opposite is happening now. Most law firm attorneys have at least a weak preference for racial justice,¹⁸¹ but competition has reached a pitch where it takes a meaningful preference for racial justice to be willing to bear the short-term costs of increasing diversity. The incentive structure of law firms

177. See Alexander, *supra* note 23.

178. See Eli Wald, *Jewish Lawyers and the U.S. Legal Profession: The End of the Affair?*, 36 *TOURO L. REV.* 299, 308 (2020).

179. *Id.* at 308-11.

180. See Philip Gaines, *The “True Lawyer” in America: Discursive Construction of the Legal Profession in the Nineteenth Century*, 45 *AM. J. LEGAL HIST.* 132, 132-34 (2001); James Willard Hurst, *Lawyers in American Society*, 50 *MARQ. L. REV.* 594, 594, 596-97, 600-01, 606 (1967).

181. Douglass et al., *supra* note 4, at 53, 62-63.

separates the short-term costs from the long-term benefits, and so individual attorneys do not take on the sacrifices that would be necessary to increase racial diversity.

Whether law firms and their employees should face moral opprobrium for refusing to make these sacrifices is a subjective question outside the scope of this Article. I think in such situations, particularly good people can do the right thing—e.g., a senior partner can genuinely make a special effort to include associates of color in client interactions. It is also understandable that ordinary people take the easy route. For instance, a senior White partner might be glad her firm has community outreach programs but continues to mainly mentor White associates. To make real progress on an issue like racial diversity requires aligning incentives at least to the extent that an ordinary person feels comfortable taking on the necessary sacrifice to produce the outcome we all want.

II. SOLUTIONS

Understanding the multipolar trap that has forestalled racial diversity at law firms suggests an entirely different set of solutions than we typically consider. If one thinks that individual racial prejudice is what stops the advancement of attorneys of color at firms, then some combination of specific education of attorneys and general progress in society writ large will eventually solve the problem. However, if my contention in this Article is correct and racial diversity is being slowed by a multipolar trap, increasing diversity will require changing the incentives of firm attorneys. The multipolar trap by its very definition suggests that individual firms cannot escape the trap on their own—the level of competition is so high that even a short-term disadvantage could be fatal for the careers of the partners involved. The only way to disarm a multipolar trap is from the outside, whether through government regulation, ABA-driven regulation, or third-party pressure.

A. Why is Racial Diversity Among Partners Important?

We have taken it as given to this point in the Article that racial diversity is something worth some level of sacrifice to achieve, but to determine what level of intervention in the traditional firm model is justifiable, we should have some understanding of the benefits to be gained through intervention. It is worth asking at the outset: why should we want there to be a legal-profession-specific solution? One could argue that economic inequality between races is a society-wide problem. Not only is it impossible for the legal profession to solve this problem on its own, but attempting to do so uses up resources that could be directed against solvable problems. Perhaps law firms use affinity groups, diversity committees, and the like because there is no option that is as effective per dollar of cost. Here, it is crucial to recall that the lack of racial diversity in the legal world is not common to all professions.¹⁸² While racial injustice exists outside the legal world, it is worse at law firms because of identifiable dynamics and incentives.¹⁸³ Some kind of coordination is necessary to change the terms of competition to allow escape from the trap.¹⁸⁴ Even that would not guarantee fully equitable representation of minorities in law firms, but it would at least enable the profession to meet the low threshold set by other professions.

There is, of course, a moral case to be made for increasing diversity, but morality-based arguments have not proven effective. The morality case for diversity, distilled down, is that racial minorities have often in the past been excluded from both the practice and the protection of law, much to their detriment.¹⁸⁵ This anti-competitive exclusion benefitted White attorneys, both directly and because the increased resource base created better circumstances for White children, who were then better prepared

182. Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, AM. BAR ASS'N (May 2, 2018), [<https://perma.cc/4XR7-WL6M>]; Chopp, *supra* note 176, at 364-65.

183. *See supra* Section I.D.

184. *See* Alexander, *supra* note 23.

185. *See, e.g.*, Kasper Lippert-Rasmussen, *Affirmative Action, Historical Injustice, and the Concept of Beneficiaries*, 25 J. POL. PHIL., 72, 72-74 (2017) (describing the historical injustice-based arguments for affirmative action and increasing racial diversity).

to compete.¹⁸⁶ Requiring some level of sacrifice by current partners, who are overwhelmingly White, to fix the situation has some basic moral appeal. But moral arguments are inherently limited and subjective. It is easy to imagine how, say, a White associate from an impoverished background would feel about the argument that associates of color should be promoted ahead of her. My point is not that those feelings justify doing nothing about diversity, but that the persuasiveness of moral arguments will depend on the vantage point of the listener, and as such may not carry the day in arguing for racial diversity. Of course, as discussed above, firms can also defuse the morality argument by agreeing with it, but then not acting in meaningful ways to reduce diversity.

Many scholars have argued that diversity is its own reward, that businesses with diverse leadership outperform businesses with non-diverse leadership.¹⁸⁷ However, there are no detailed studies of this phenomenon in law. There are also so few major firms with racially representative equity partners that a detailed study controlling for confounding factors would be difficult.¹⁸⁸ As discussed earlier, there is an important distinction between long-term benefits and short-term profits. Presumably, if firms expected a significant short-term profit increase from increasing diversity among partners, more firms would have done it, especially given the high level of competition between firms. One can certainly imagine long-term benefits at the firm level to more racial diversity—different experiences leading to more creativity, appeal to a broader range of clients, etc. If partners do not capture that gain, however, it plays a much smaller role in decision-making.

Putting aside arguments that increasing diversity is a moral necessity or an obvious financial win, we can offer a third, less-explored rationale: increasing diversity would help the legal profession as a whole, ultimately redounding to the benefit of firms and the lawyers within them. Increasing diversity would

186. *Id.* at 72-73.

187. See Robin J. Ely & David A. Thomas, *Getting Serious About Diversity: Enough Already with the Business Case*, HARV. BUS. REV., Nov.-Dec. 2020, at 116, 118 (describing the historical and current “business case” for diversity).

188. VAULT & MINORITY CORP. COUNS. ASS’N, *supra* note 8, at 7-8, 10, 13-15, 17-19.

likely have the long-term benefits discussed above.¹⁸⁹ If most or all major firms are doing so at roughly the same time, firms will not be able to gain much of a competitive advantage by dragging their heels. The profession as a whole would of course gain a public relations win, but it would also gain an advantage over professions that are at least partial substitutes for law firms. This would include accounting firms, auditors, consultants, lobbyists, and other entities that can offer strategic advice involving law. While those substitute professions cannot provide all legal services the way a firm can, they can eat into the profit margins of firms by taking on quasi-legal issues that a firm could handle, like internal investigations.

There are also real risks to the profession as a whole from failing to diversify. The practice of law depends on barriers to entry—bar admissions, law school accreditations, etc. These barriers are sufficiently aged and ubiquitous that we lawyers take them for granted, but there are substantial and growing economic forces that could undermine them. Imagine if a behemoth like Walmart or Amazon decided there was considerable profit in, say, providing simple or large-volume legal services for things like wills, contesting parking tickets in court, or drafting employment contracts.¹⁹⁰ Consider that excluding major companies from providing important services at a low price to indigent constituents would not be a popular position for state legislators eternally bereft of campaign funds. A lobbyist for those companies would not hesitate to use the lack of diversity at law firms as a talking point to justify reducing or eliminating barriers to entry. That point can be further emphasized by noting the dramatic shortage of legal services—reportedly near 80% of the public does not have access to a lawyer.¹⁹¹ By contrast, the more law firms are seen to be positive factors in the legal world, the easier it will be to maintain a pro-licensure and pro-regulation coalition. Further, if law firms start losing the battle to exclude companies from the marketplace for legal representation, the

189. O'Connor, *supra* note 114.

190. See, e.g., *Appeal Parking Tickets in Any City*, DONOTPAY, [<https://perma.cc/HJ3G-XDN2>] (last visited Jan. 9, 2023).

191. Mary Juettten, *How Can We Reform Legal Education? Try Spotlighting the Outcomes*, ABA J. (Nov. 9, 2018), [<https://perma.cc/6JFZ-LWHC>].

multipolar trap would likely grow more intense. Less business divided over the same number of attorneys is a recipe for increasing competition, which could exacerbate the multipolar trap hindering racial diversity in a downward spiral.

B. How Should We Measure Success?

Before discussing what a good specific goal for law firm diversity would be, it is worth asking why a specific goal is important in the first place. The answer is simple: accountability. As discussed above, firms currently suffer few, if any, consequences for their lack of results on diversity.¹⁹² So long as they acknowledge diversity as a worthy goal and have diversity committees and affinity groups, they need not worry about their lack of diversity in senior roles. The first step in holding firms accountable for diversity is being able to discern true commitment to diversity.

The academic debate over how to measure success in racial diversity in law is reminiscent of the often-mocked tendencies of Soviet revolutionaries to endlessly argue over what the precise contours of society would be once they had eradicated capitalism.¹⁹³ Would there be no government? An all-powerful, all-benevolent government? These questions were silly because the revolutionaries had so many immediate problems—corruption, famine, crippling poverty—and were so far from addressing any of them.¹⁹⁴ Similarly, we are currently so far from addressing racial disparities at law firms that debates over measuring success are almost entirely theoretical. There is much debate among diversity experts about the difference between “[f]ormal diversity” (i.e., the distribution of attorneys by race roughly matches the distribution of race in the general population) and “[s]ubstantive diversity” (i.e., equality across a broader range of measures, such as compensation rates).¹⁹⁵

192. See *supra* Section I.G.

193. See *Revelations from the Russian Archives*, LIBR. OF CONG., [<https://perma.cc/9L76-XAH8>] (last visited Jan. 9, 2023).

194. *Id.*

195. See Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 274 (2014).

I believe this debate is largely abstract and, given the current extent of the diversity problem, premature. Only a truly naïve and obtuse formal measure of diversity would actually create problems, such as if one examined a firm composed exclusively of White attorneys and minority secretaries and concluded there was no diversity problem if overall firm employment reflected underlying population distribution. Of course, if “formal diversity” is attained someday, we scholars should confirm that firms have not manipulated diversity numbers in subtler ways. However, at this point, mere “formal diversity” would be a major improvement.

One simple way of determining success, and the one I endorse here, is that the rate of improvement in the share of racial minorities among equity partners increases to the point that firms would have roughly representative numbers of minorities in our lifetimes. That is not overly ambitious. Currently, racial minorities represent 9.1% of firm equity partners and about 40% of the U.S. population, so meeting this goal would require tripling the share of racial minorities among equity partners.¹⁹⁶ Thus, an improvement of 1% each year would solve the problem in thirty years. Within the 100 highest-grossing U.S. law firms, there were 21,258 equity partners in 2020.¹⁹⁷ In a firm of about 200 equity partners, going from twenty to eighty partners of color in thirty years requires adding two equity partners of color per year. Ambitious, but not unreasonable—the prestigious law firm Cravath, Swaine & Moore, with about 100 equity partners, promoted two Black partners in 2020 (albeit, the second and third in the firm’s history after their first left in 2017).¹⁹⁸

A results-based goal is critical to changing firm incentives, but it is also more effective than advocating a single set of best practices that every firm should use. While I do think there are generally better practices that firms should consider, which I will

196. VAULT & MINORITY CORP. COUNS. ASS’N, *supra* note 8, at 16; Nicholas Jones et al., *Improved Race and Ethnicity Measures Reveal U.S. Population Is Much More Multiracial | 2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), [<https://perma.cc/G3D6-48TC>].

197. *Total Number of Equity Partners Working at the Leading U.S. Law Firms 2016 to 2020*, STATISTA, [<https://perma.cc/76TJ-QDBF>] (last visited Jan. 9, 2023).

198. Staci Zaretsky, *Cravath Makes History in Diversity with Its New Partnership Class*, ABOVE THE L. (Oct. 30, 2020), [<https://perma.cc/L52X-ZCPP>].

discuss in more depth below, firm structure and culture can vary sufficiently that solutions will vary in success depending on the firm. There doubtless are law firms with an exemplary commitment to diversity committees that have made significant progress. If that is the case, and those firms are advancing quickly toward representation in their equity partners, then they should not tinker with a successful formula. The only universal in which I am confident is that firms will perform better on diversity measures if it is in their interests to do so. The weaker the incentives for diversity, the more reliant diversity is on partners willing to sacrifice to make it happen, the less firms will improve.

C. What Can Individual Firms Do?

The multipolar trap law firms find themselves in and their incentives structure all but precludes them from more aggressively pursuing racial diversity. Equity partners have not chosen to make the short-term sacrifice to increase racial diversity. They have settled on a basic suite of cheap pro-diversity measures and left it at that. The logic of the efficient market hypothesis suggests there are no easy and effective pro-diversity measures that firms could adopt at this point.¹⁹⁹ If there were, one of the thousands of other law firms in the United States or around the world would have figured it out, and then most of the others would copy the solution.

Still, the experience of antisemitism in law suggests that there could be widespread cultural factors that are producing a non-efficient outcome—i.e., there could be a good solution that law firms simply refuse to adopt, just as they refused to hire Jewish attorneys for no good reason. A skeptic might note that U.S. law firms in the late 1800s were much more homogeneous and parochial than today's multicultural, worldwide law firms.²⁰⁰ What self-defeating cultural assumptions could be so widespread

199. See Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383, 416 (1970) (providing the modern formulation of the efficient markets hypothesis in which prices reflect all available information).

200. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 29 (2002).

in today's firms? The search for such cultural assumptions starts with examining commonalities across firms.

While such assumptions must, by their nature, be subtle, the one possibly flawed assumption I can identify that most law firms have in common is a devotion to the partner/associate dichotomy. The partner/associate setup creates a sharp discontinuity of incentives. Associates generally do not have a stake in the firm's profits until suddenly that is the entire source of their compensation when they become partner.²⁰¹ If instead law firms created more intermediate positions and transitioned more slowly to equity stakes, the gatekeeping between associate and partner would be less severe. Associates of color could slowly take on more of a client-facing role, and White associates would have less of an incentive to capitalize on their shared culture with White partners. Some firms have, perhaps unwittingly, been taking the first steps in the process of differentiating positions by creating more senior associates and non-equity partners.²⁰² These initiatives may be aimed at other goals, like retention of talented associates. They may even be pernicious in some cases, allowing the promotion of minority associates to non-partner roles that still count toward diversity statistics. However, filling out more of a spectrum of seniority at law firms would allow intermediate steps that could ultimately produce more racially diverse equity partners. To reach that end, firms would have to grant some equity to attorneys at these sub-partner tiers.

While it is difficult to know why firms have generally not attempted such a solution, we can speculate that it would require a major departure from the traditional firm model and potentially dilute the power or income of equity partners. There are ways to structure such a transition that could ease concerns—for example, doling out equity to the new sub-equity partner attorneys as partners retired rather than transferring it pro rata from existing equity partners. I suspect that, again, the benefits of the change are dissipated across the legal profession while the “costs” (e.g.,

201. Sharon Miki, *A Guide to Law Firm Partnership Structures*, CLIO, [<https://perma.cc/CFE7-ZAHF>] (last visited Jan. 8, 2023).

202. Lateral Link, *Evolving Partnership Economics: The Equity and Non-Equity Models Are Starting to Blur*, ABOVE THE L. (Aug. 13, 2021, 1:13 PM), [<https://perma.cc/GV62-8QHM>].

learning to manage a different system, concerns that clients will feel slighted at working with non-partner-level attorneys) are concentrated on the existing equity partners. Given that few firms are under any sort of pressure to do more than the *de rigueur* affinity groups and diversity committees, it is understandable that equity partners have not adopted anything that would significantly change the traditional firm model.

D. Coordination to Promote Racial Diversity

Coordination is the key to solving a multipolar trap.²⁰³ By establishing rules limiting the terms of competition, the multipolar trap can be downgraded to productive competition instead of an all-consuming maelstrom. Coordination can be achieved either through an external authority's intervention or cooperation between the competing entities. Both options could plausibly promote racial diversity among the upper echelons of law firms, though external intervention seems more likely to succeed.

1. Coordination Through Cooperation

Law firms have already come together to create rule-enforcing entities—state- and national-level bar associations. Those associations recommend changes in laws governing lawyers to state governments and could theoretically do so in the case of racial diversity.²⁰⁴ However, the rules usually enforced by those associations relate to relatively uncontroversial ethics and professionalism practices.²⁰⁵ Bar associations enforcing rules relating to promoting racial diversity would be a vast expansion of their powers.

Some states are trying to improve racial diversity in the legal profession by requiring their state bars to take action, but those efforts are often hopelessly toothless and vague. For example,

203. See Alexander, *supra* note 23.

204. See *Governmental and Legislative Work*, AM. BAR ASS'N, [https://perma.cc/7974-5SW6] (last visited Jan. 9, 2023).

205. See, e.g., *Actions on Rule Changes and Legal Ethics Opinions*, VA. STATE BAR, [https://perma.cc/8Y9D-XMSW] (last visited Jan. 9, 2023) (listing recent rule changes, all of which seem fairly uncontroversial).

California now requires its state bar association to produce a report every other year on how it is promoting racial diversity in the legal profession.²⁰⁶ There have now been two reports submitted by the state bar association under this system. The first, issued on March 15, 2019, was laughably bureaucratic, passive, and wishy-washy.²⁰⁷ The most prominent action highlighted was the adoption of a new mission statement by the state bar board of trustees, in which they declared “support for greater access to, and inclusion in, the legal system.”²⁰⁸ After that, the report indicates the state bar intended to “[s]erve as a data repository” on diversity-related information, “[c]onvene stakeholders to discuss emerging issues,” and “[r]ecommend, incubate and/or pilot promising programs that are based on data and have the potential to scale throughout the state.”²⁰⁹

Two years later, the 2021 report noted as an accomplishment that it had published a report card on the diversity of California’s legal profession.²¹⁰ That report card does not grade firms. It contains the same findings the ABA has been putting out for at least a decade—poor racial diversity at law firms, particularly at the senior levels.²¹¹ The state bar association effectively bought itself two years of inaction by reporting what everyone already knew. The 2021 report also noted that it had indeed followed through on its promise to launch “Diversity Summits” to discuss next steps.²¹²

The 2021 report notes that the *next* two-year report will describe “aspirational” goals for law firms to “set and publicly commit to measurable diversity, equity, and inclusion goals.”²¹³

206. CAL. BUS. & PROF. CODE § 6001.3(c) (West 2020).

207. See OFF. OF ACCESS & INCLUSION, STATE BAR OF CAL., DIVERSITY & INCLUSION PLAN: 2019-2020 BIENNIAL REPORT TO THE LEGISLATURE 1 (2019), [<https://perma.cc/4FV7-XTMV>] (from the Executive Summary: “Pursuant to its Strategic Plan objectives the State Bar intends to: Serve as a data repository, research institution, and technical assistance provider” and “[c]onvene stakeholders to discuss emerging issues, best practices, and data collection”).

208. *Id.*

209. *Id.*

210. See CAROLINA ALMARANTE ET AL., STATE BAR OF CAL., REPORT CARD ON THE DIVERSITY OF CALIFORNIA’S LEGAL PROFESSION (2020), [<https://perma.cc/W27M-ZB3Z>].

211. *Id.* at 13.

212. See OFF. OF ACCESS & INCLUSION, *supra* note 207, at 27.

213. *Id.* at 17.

In the “medium term, the State Bar intends to incorporate accountability measures to ensure that employers who are certified as [diversity, equity, and inclusion] leaders demonstrate results, not just intentions.”²¹⁴ Tune in again in 2023 to see if the state bar has decided, after six years of study, how it *might* measure diversity at law firms! To be fair, the California diversity reports do note worthwhile programs on issues like attorney discipline and the bar exam, but they conspicuously fail to offer solutions about law firm diversity.²¹⁵ The reports generally seem to be the bare minimum the state bar association could get away with submitting to satisfy their statutory mandate—right down to the graphics clearly recycled between the diversity report card and the state-mandated report.²¹⁶

The California experience suggests state bar associations will not deliver results, but it is useful to consider why. A simplistic, paranoid theory would be that firms dominate the legal profession’s economics and consequently state bar associations do not want to cause problems for them. But this speculative theory does not hold up to scrutiny. First, while the trustees of the state bar are largely firm lawyers, the authors of the reports in

214. *Id.* at 5.

215. *See, e.g., id.* at 15 n.3.

216. Compare OFF. OF ACCESS & INCLUSION, *supra* note 207, at 11, with ALMARANTE ET AL., *supra* note 210, at 8. The cynical observer would also note that the 2019 report was twenty pages long with twenty-eight pages of attachments. The 2021 report was forty-one pages long with 132 pages of attachments. A prediction for 2023: look for ever-expanding attachments and little change in content in the main body. The main body of the 2021 report recapitulated the findings of the diversity report card, barely avoiding outright plagiarism. For example, see this passage from page eight of the report card:

Although the majority of attorneys, both [W]hite and of color, work in the private sector, [W]hite, Asian, Middle Eastern/North African, and attorneys categorized as “Other” are more likely to do so than Black/African American and Hispanic/Latino attorneys. Black/African American attorneys are less likely to work in law firms than all other racial/ethnic groups.

STATE BAR OF CAL., DIVERSITY, EQUITY, & INCLUSION PLAN: 2021-2022, BIENNIAL REPORT TO THE LEGISLATURE 8 (2021). Compare that to page eleven of the 2021 report:

Although the majority of attorneys work in the private sector, [W]hite, Asian, Middle Eastern/North African, and attorneys categorized as “Other” are more likely to do so than Black and Latino attorneys. Black attorneys are less likely to work in law firms than all other racial/ethnic groups.

STATE BAR OF CAL., *supra*, at 11.

question are not.²¹⁷ More fundamentally, there is no reason to believe the major law firms differ tremendously in levels of diversity. All have similar compensation schemes and all are similarly stuck in the multipolar trap. Even if the firms secretly could influence the authors of these reports, what harm would come to any specific firm by calling for more specific action by *all* law firms?

There is no practical way to know the answer, but I speculate that the state bar associations, law firm management, and the authors of these reports have many interests in common, all of which militate against strong criticism of firm diversity. Legal non-profits rely on law firms and their employees for both financial support and pro-bono assistance.²¹⁸ While the authors of these reports may not be firm attorneys, leadership of state bar associations generally have strong personal ties to law firms.²¹⁹ Firm management would have little incentive to put pressure on their firm to change diversity practices even if the resulting criticism would apply to their competitors.

The foregoing discussion does not mean that firms could not solve the diversity problem through joint action, but it does suggest the bar associations will not be the medium through which they operate. A firm that had a particular passion about diversity could start an initiative to, say, disclose detailed statistics on the ability of associates of color to become partners at their firm—the sort of thing firms usually do not publish. Competitor firms would have no incentive to join that initiative. Even if there was an agreement that firms would only publish the data if a sufficient number of competitors also pledged to, the effort would be a logistical headache for little immediate gain. There would be significant incentive to renege on the agreement,

217. See *Board of Trustees*, STATE BAR OF CAL., [<https://perma.cc/MK7Y-DFB2>] (last visited Jan. 24, 2023); ALMARANTE ET AL., *supra* note 210, at 2. Without wishing to call attention to anyone in particular, a casual examination of California bar registrations reveals several authors work at non-profits. See *Attorney Search*, STATE BAR OF CAL., [<https://perma.cc/LEF5-YUGC>] (last visited Jan. 24, 2023).

218. Cf. Julianne Hill, *For More Good: Law Firms Find Other Ways to Provide Service to Society*, ABA J., Feb. 2017, at 34, 36 (describing financial donations from law firms to legal non-profits).

219. Again, without wishing to call attention to individuals, see *2020-2021 Board of Trustees*, STATE BAR OF CAL., [<https://perma.cc/FJD9-2W6W>] (last visited Jan. 9, 2023).

and firms would ultimately end up squabbling over whether a certain level of disclosure met their pledge of transparency. While effective self-policing by the firms is possible in theory, the fact that firms have not yet implemented anything like it suggests it will not be part of the ultimate solution.

2. *Coordination Through Outside Intervention: Direct Regulation*

The classic resolution of a multipolar trap is the imposition of order from outside, and it is easy to see why.²²⁰ Outside entities, most notably government, can cut through the various incentive problems inhibiting firms from cooperating and simply mandate that competitors not sacrifice certain values. In a stereotypical multipolar trap, factories pollute because they cannot otherwise keep up with their competitors.²²¹ Government can intervene and put firm limits on pollution.²²² However, outside intervention is not a choice between direct government regulation and doing absolutely nothing.

Obviously, direct intervention by some level of government *could* solve the diversity problem in law firms through some sort of simple mandate: by some specific date, some specific percentage of equity partners at law firms with over \$100 million in revenue must be non-White. How the Supreme Court—especially a six Republican-appointed Justice Court—would regard the constitutionality of such a requirement is difficult to say.²²³ While state governments typically are the direct regulators of lawyers in their jurisdictions, the federal government could offer its authority under the Fourteenth Amendment as sufficient grounds to uphold such a requirement.²²⁴ One could also envision

220. Alexander, *supra* note 23.

221. *Id.*

222. *Id.*

223. The most recent major affirmative action case, *Fisher v. Univ. of Tex.*, 579 U.S. 365 (2016), resulted in a 4-3 decision upholding the University of Texas's admissions policy. Since then, the Court has added three conservative Justices, and one liberal has left the Court. See *Supreme Court of the United States*, BALLOTPEdia, [<https://perma.cc/X76J-5SL6>] (last visited Jan. 24, 2023). While this case regarded higher education admissions, it is potentially relevant to other race-conscious policies.

224. See U.S. CONST. art. XIV, § 5 (granting Congress power to enforce the provisions of the amendment).

slightly less direct policies that might make a difference in surviving a constitutional challenge—say, a significant tax credit for firms with a certain percentage of non-White equity partners.²²⁵

Two major problems complicate direct intervention by any level of government. The first is political reality, which interestingly mirrors the Supreme Court’s own confused precedent on affirmative action.²²⁶ The concept of affirmative action polls quite well—Gallup found in a 2021 poll that 62% of Americans favor affirmative action programs for racial minorities, up from 47% in 2001.²²⁷ However, an even stronger majority—74%—said that companies and organizations should not “take a person’s race and ethnicity into account, in addition to their qualifications, in order to increase diversity in the workplace.”²²⁸ It is difficult to logically square those two views—how else would an affirmative action program work other than to “take a person’s race and ethnicity into account”? Nevertheless, a direct mandate on racial diversity would essentially require companies and organizations to do something that already polls extremely badly, suggesting that the public would not support such a plan. Such a program surviving long enough to be effective is unlikely.

That, in turn, raises the second major problem with direct intervention: reaction. One can easily imagine how cultural conservatives would react to such an initiative.²²⁹ If they could

225. There are any number of federal programs that specifically allocate funds for non-White entities, ranging from Opportunity Zones to agricultural subsidies for minority farm owners. See Alexander Golding & Charlie Metzger, *Opportunity Zones Haven’t Fully Reached Their Potential, but Don’t Write Them Off Yet*, FORTUNE (Sept. 16, 2020, 2:00 PM), [<https://perma.cc/2BAT-HWJM>]; *Minority and Women Farmers and Ranchers*, U.S. DEP’T. OF AGRIC., [<https://perma.cc/89YS-QXYV>] (last visited Jan. 24, 2023). While beyond the scope of this Article, it seems unlikely that the Supreme Court would strike down all of these programs in order to also strike down an initiative to bolster firm diversity.

226. See, e.g., Yuvraj Joshi, *Racial Indirection*, 52 U.C. DAVIS L. REV. 2495, 2497-98 (2019) (describing the Supreme Court’s willingness to uphold affirmative action so long as the policy in question is filtered through some aspect not explicitly linked to race).

227. Lydia Saad, *Americans’ Confidence in Racial Fairness Waning*, GALLUP (July 30, 2021), [<https://perma.cc/8R7G-DA7L>].

228. Frank Newport, *Affirmative Action and Public Opinion*, GALLUP (Aug. 7, 2020), [<https://perma.cc/4FPP-KBFU>].

229. My guess would be: not well. See, e.g., Evan McMorris-Santoro et al., *Students Fight Back Against a Book Ban That Has a Pennsylvania Community Divided*, (Sept. 16,

harness the negative reaction from the 74%(!) of Americans who would likely disapprove of direct intervention, they could make the situation worse than the status quo by, say, banning any race-conscious diversity efforts.²³⁰

Any attempt at direct regulation can also spur creative methods to undermine the regulatory intent. For instance, a firm could start granting tiny blocks of equity to senior associates, then start counting them as “equity partners” for regulatory purposes. That particular scheme could be avoided by defining an equity partner as requiring some specified share of firm revenue, but it would be difficult to establish a satisfactory line that would fit the range of equity partner numbers across large firms. The point is not that it is impossible to identify and counter attempts at regulatory avoidance, but it would add to the complexity and difficulty of the undertaking, particularly if the political support for direct regulation is weak.

3. Coordination Through Outside Intervention: Transparency and Shaming

Outside intervention can defuse a multipolar trap in ways other than direct regulation. The key is to alter the individual firm’s cost-benefit calculus regarding the sacrifice of the value in question.²³¹ Direct regulation achieves that end by inflicting a known, punishing cost to sacrifice of the value, but less direct methods can also increase costs or allocate benefits. A coordinated effort involving rigorous transparency and public shaming can simultaneously add a significant cost to sacrificing the value and a meaningful benefit to upholding it. In the classic pollution example, if some outside entity publishes data on

2021, 12:10 AM), [<https://perma.cc/EE63-5JHB>] (describing one Pennsylvania community that banned books teaching about the history of race in the United States in too negative a tone).

230. Those who think such a position far-fetched would do well to remember the conservative push to regulate companies they deem insufficiently conservative. See Eric Levitz, *Rubio Endorses Labor Unions (As a Punishment for ‘Woke’ Companies)*, INTELLIGENCER (Mar. 12, 2021), [<https://perma.cc/3UU5-SNRL>]. Banning all race-conscious policies administered by States is also Justice Clarence Thomas’s view, as expressed in his dissent in *Fisher v. Univ. of Tex.*, 579 U.S. 365, 389 (2016) (Thomas, J., dissenting).

231. See Alexander, *supra* note 23.

pollution by each factory, and consumers are willing to pay even a small premium to punish particularly egregious offenders, rational factory owners will accord at least some attention to reducing pollution.

In the case of racial diversity, one can easily imagine how such an effort would work. Firms would be required to measure and disclose specific data relevant to measuring efforts to improve racial diversity. Obviously, a specific breakdown of the racial composition of equity partners would be important, but there are much more nuanced and potentially damning statistics out there. For example, firms could be required to measure and disclose face-to-face time between each partner and associate. They could be required by state governments to disclose the amount of time each associate actually spends with clients, how much time partners spend on mentorship with which associates, or numerical evaluations of the work produced by associates. These are just the tip of the iceberg of known or knowable data that would be relevant to evaluate a firm's commitment to racial diversity.

To be sure, various bar associations currently release interesting data on diversity in the legal profession, several examples of which have been cited in this Article.²³² The vital difference between that and what I am proposing is specific, firm-level data. One cannot shame a law firm with statistics about all law firms in the aggregate. But if one could point out that one firm is doing significantly worse than a competitor and ask why, the issue could quickly become a liability for the firm. Corporate clients could face pressure campaigns to hire from firms that are acting consistent with the corporation's (and firm's) stated support of racial diversity.

Because of the obvious potential for embarrassment, firms are not likely to embrace this sort of transparency unless they have little choice. Regulation to force the disclosure of those statistics may be necessary, though there are intriguing alternative possibilities. A sufficiently tenacious and dedicated non-profit could assemble data on racial diversity through publicly available information on most firms' websites, publicly available

232. See *supra* note 206 and accompanying text.

information on individual equity partners (e.g., social media), and potentially even leaks of internal firm data.²³³

The transparency-plus-shaming strategy has several compelling advantages to direct regulation. First, it is not as politically or legally sensitive as mandated affirmative action. Recall that polling shows broad support for affirmative action but broad opposition to directly taking race into account in promotion decisions.²³⁴ Using client/consumer opinion as a cudgel against firms lagging on racial diversity could achieve results without crossing the political red lines evident in polling.

Second, transparency plus shaming could actually work faster than a direct mandate. The speed at which diversity is increased depends on when sanctions would actually start hurting a recalcitrant firm. In direct regulation, the sanctions are known to be sometime in the distant future.²³⁵ With shaming, the sanctions are unpredictable. They may never come, or they may come immediately upon publication of the data in question. They could even come after a few years when some high-profile case causes the public to turn its attention to the issue. Not being able to predict when sanctions could arise puts a premium on acting quickly, particularly if the cost of increasing diversity is low compared to the threat of losing clients.

CONCLUSION

Why racial diversity in law firms lags behind similar professions (and even other parts of the legal profession) calls for explanation. Often, explanations for lack of racial diversity in a specific field fall into one of two camps. One explanation is individual bias, the conscious or subconscious tendency to discriminate against people of color.²³⁶ Subconscious bias is very

233. The recipient of such leaks would be legally protected, though the person doing the leaking could be punished if detected. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 730 (1971).

234. *See supra* note 227 and accompanying text.

235. *See supra* Section II.G.7.

236. *See, e.g.*, JOAN C. WILLIAMS ET AL., AM. BAR ASS'N, YOU CAN'T CHANGE WHAT YOU CAN'T SEE: INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION 7-10 (2018), [<https://perma.cc/KY6G-3JYF>] (describing systematic bias, both conscious and not, against attorneys of color).

well studied and has indeed been proven to exist in many different contexts.²³⁷ But unless a particular industry triggers some specific stereotype or prejudice, bias does not explain why some industries do better than others at promoting racial diversity. Another explanation is the broad socioeconomic inequalities facing minorities long before they go to work at law firms.²³⁸ Again, there is undeniable truth in this explanation, but it is not industry-specific.²³⁹ If anything, lawyers are probably more aware of the history of discrimination than other professionals for the simple reason that it is impossible to understand constitutional law without it.

Understanding why law firms lag behind on racial diversity must start with broader comparison—what differences are there between law firms and, say, medical organizations? I have seen no evidence that law firm leadership is *more* prejudiced than, say, leaders of the medical community, but we can point to any number of differences of structure, evaluation, and compensation between law firms and medical organizations.²⁴⁰ These differences give us a starting place for finding the cause of law firms' diversity problems. The specific incentive problems I have identified in this Article may not completely explain law firms' failure regarding racial diversity, but I strongly believe that law firm structure and incentives merit further, exhaustive study.

Focusing on incentives and structure has many benefits. First, it allows us to ignore utopian rhetoric. Lawyers often brag about the role we played in ending many forms of discrimination, but we are less profuse about the roles we play in continuing

237. See, e.g., Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004) (finding that “Black-sounding” applicants with identical resumes get fewer calls from employers).

238. See Debra Cassens Weiss, *Study Finds ‘Lopsided’ Concentration of Socioeconomic Elites at Law Schools*, ABA J. (Oct. 5, 2011, 11:00 AM), [<https://perma.cc/597J-KGRX>].

239. See Adi Gaskell, *Why Class Diversity Matters at Work*, FORBES (Jan. 22, 2019, 8:36 AM), [<https://perma.cc/BK83-5FSK>].

240. For example, the relative ease of evaluating doctor performance means that social hobnobbing akin to that of associates at a law firm would pay fewer dividends. See Erin A. Egan et al., *Comparing Ethics Education in Medicine and Law: Combining the Best of Both Worlds*, 13 ANNALS HEALTH L. 303, 319-22 (2004) (comparing professional socialization between the legal and medical professions).

discrimination. For every attorney who participated in the NAACP's legal battles against segregation, there was an attorney on the other side fighting just as hard to keep segregation alive. Ultimately, lawyers are just people, and people fall on a spectrum of goodness. Some will sacrifice anything in the name of justice. Others will sacrifice a little. Still others will do the right thing if it is equally lucrative as evil. And some will work for evil with a passion normally reserved for doing good. Consequently, we should expect a strong correlation between good results and good incentives. The more sacrifice required to do the right thing, the less it will be done.

Another benefit to examining incentives is falsifiability. Given data and economic theory, we can offer specific predictions about, say, the role of an eat-what-you-kill system in restraining racial diversity.²⁴¹ It is harder to measure the role of, for example, subconscious prejudice in the specific failure of law firms to achieve greater diversity. While that may indeed be an important factor, how law firms could fix subconscious prejudice is much harder to discern. Similarly, the broad socioeconomic inequalities that disadvantage people of color in the United States undoubtedly play some role in the diversity travails of law firms, but if we allow firms to do essentially nothing while society at large works on inequality, we will be eternally waiting.

Finally, we should note that some of the incentive problems at law firms that have stymied racial diversity could be profitable to fix for reasons beyond diversity. It is implausible that the world and the nature of legal work has changed so dramatically since the late nineteenth century, but law firm structure has remained largely static.²⁴² Rethinking how firms work—how associates get ahead, how partners interact with associates, how clients interact with firms—could lead to better provision of legal services. We should not mistake the lack of innovation in large law firms as suggesting the perfect structure has been reached. Rather, law

241. See *supra* Section I.D.4.

242. See, e.g., Mary E. Vandenack, *Evolving Law Firm Models with Innovation: Using Lessons Learned from the Pandemic*, LAW PRAC. MAG., July-Aug. 2021, [<https://perma.cc/9RZ6-B982>] (providing as a dubious example of law firm innovation: "Add text reminders of appointments with directions to the office or links to videoconferencing.").

firms, protected from competition by bar requirements, have not faced a need to innovate.²⁴³ If a dearth of racial diversity ultimately requires changes to the fundamental structure of firms, it should provide a rare opportunity to rethink the firm model. If the current model is most efficient, then it will survive. If it is not, then we should not hesitate to experiment with new organizational schemes.

243. See generally Casey Flaherty, *On Law Firm Marketing Bullshit*, 3 GEEKS & A L. BLOG (Sept. 10, 2017), [<https://perma.cc/2FZL-U6YY>] (“We’ve cultivated the illusion of innovation where constant chatter about innovation in and of itself has convinced partners that their firms are innovative . . .”).