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PARTNERS WITHOUT POWER? A PRELIMINARY LOOK AT BLACK PARTNERS IN CORPORATE LAW FIRMS

*David B. Wilkins**

Discussions about law firm diversity tend to treat increasing the number of minority partners as both the ultimate goal and the end of the analysis. The emphasis that diversity advocates place on partnership statistics is understandable. Although firms have hired more minority associates in recent years, the number of minority partners has remained virtually unchanged.¹ As a result, "in every . . . city which has studied the matter, minority retention was stated by the interviewees . . . to be the firm's most serious problem."²

Nevertheless, treating the partnership decision as the end of the diversity analysis is a mistake. This is true for two reasons. First, just because a minority lawyer becomes a partner does not mean that he or she will stay a partner. In today's competitive environment, partnership is no longer the equivalent of tenure. With increasing frequency, partners at large law firms leave their prestigious positions. Some leave voluntarily for partnerships in other firms, in-house legal departments, investment banks, or government service. Others depart involuntarily, when their fellow partners feel that these senior lawyers are no longer producing sufficient revenues to justify their position.³ Oftentimes, the decision to leave is prompted by some combination of positive and nega-

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1. Ann Davis, *Big Jump in Minority Associates, But . . .* NAT'L L.J., April 29, 1996, at 1 (reporting "significant attrition in their later years has left partnership ranks almost as white as five years ago.")

2. COMMITTEE ON MINORITY EMPLOYMENT, THE BAR ASSOCIATION OF SAN FRANCISCO, 1993 INTERIM REPORT: GOALS AND TIMETABLES FOR MINORITY HIRING AND ADVANCEMENT 17 (1993) [hereinafter SF INTERIM REPORT].

3. For a recent example of involuntary departures, see Paul M. Barrett, *Putch and Shove: A Once Stodgy Firm Makes a Flashy Return, But at what Cost?*, WALL ST. J., Aug. 17, 1998, at A1 (describing how a group of young partners at New York's Cadwalater, Wickersham, and Taft "compiled the names of less productive colleagues - and then forced them out, cutting the size of the partnership nearly 20%").

tive factors. The bottom line, however, is that retention now is almost as important an issue for partners as it is for associates. This is particularly true, as I will argue below, for minority partners who have recently been exiting their prestigious partnerships at alarming rates. Therefore, if a firm wants to make a lasting change in its diversity picture, it must not only promote minorities to partnership but retain them in that status as well.

Second, although the term "partner" invokes reassuring connotations of equality, it is now painfully clear that some law firm partners are substantially more equal than others. At many firms, partners are formally divided into two tiers—equity (or "share") partners who divide the profits of the firm and non-equity (or "income") partners who, like associates, continue to be paid a salary. But even among firms that maintain a formally unified partnership, partner compensation and control over firm management vary considerably within the partnership. With few exceptions, most firms have moved away from the lock-step compensation systems and "one person one vote" regimes that characterized the so-called "golden age" of the large law firm.⁴ Instead, contemporary elite firms typically employ partner compensation systems that tie a lawyer's income (at least in part) to his or her individual contribution to the firm. Partners who make the biggest contribution to the bottom line and, therefore, receive the largest slice of firm profits, also tend to have significant influence over firm management; either formally, for example, by managing a practice group or serving on the firm's executive or compensation committee, or informally, through their implicit threat to leave the firm with their clients in tow if they become unhappy with firm policy.⁵

Once again, these distinctions among partners threaten the overall goal of achieving true integration in America's elite firms. As I argue below, there is growing evidence that minority partners are concentrated in the lower partnership tiers—income rather than equity, at the bottom of the "point" scale in those firms with a unified partnership—and they hold few meaningful leadership positions. As a result, minority partners are in danger of becoming—to play on Robert Nelson's memorable char-

4. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 30-32 (1991) (listing these changes as part of the overall transformation of the large law firm from the golden age of the 1960s to the competitive environment of the 1980s).

5. See ROBERT NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 224-228 (1987) (noting that lawyers with access to important clients exercise disproportionate control over firm management).

acterization of elite firm lawyers⁶—partners *without* power in their own institutions.

Not surprisingly, this second problem—that minority partners are located at the bottom end of the partnership pecking order—is related to the first, *i.e.*, the recent exodus of minority partners. Because they have less seniority and clout than their white peers, minority partners are more likely to look for other employment opportunities and to consider those opportunities more attractive than would partners who see themselves as playing a central role in the firm and who are being compensated accordingly. At the same time, minority partners live in constant fear of the kind of demotion or even outright expulsion that happens to partners who have neither the financial nor the political resources to protect their interests inside the firm. The combination of the “pull” of the marketplace and the “push” caused by their diminished status in the workplace generates a powerful centrifugal force that spins minority partners out of elite firms. This exodus is doubly wounding to a firm’s diversity efforts since there is substantial evidence that the presence of minority partners improves a firm’s ability to recruit and retain minority associates.⁷

In order to reverse this process, or at least slow it down, firms must begin to understand why minority lawyers tend to become partners without power. In the remainder of this essay, I offer some tentative explanations for this phenomenon. I base these preliminary conclusions on my prior work on large firms and on research for a forthcoming book on black lawyers in the corporate “hemisphere” of law practice.⁸ As part of this research, I have interviewed more than one hundred fifty lawyers, many of whom are, or have been, partners in large firms. Based on these interviews and other information I have collected, I have begun to see certain patterns regarding the ability of black partners to compete effec-

6. *Id.*

7. See Robert Schmidt, *Minority Lawyers and the D.C. Firm: Race, Culture, and Sexism Make Integration Difficult at Law Offices*, LEGAL TIMES, Sept. 26, 1994, at 42, 46 (“observers agree, however, that no matter how aggressively a firm recruits minority lawyers, if it doesn’t have a ‘critical mass’ of minority partners, minority law students or lateral associates will likely look elsewhere.”).

8. See, *e.g.*, David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 U. VA. L. REV. 1581 (1998) [hereinafter, *Reconceiving the Tournament*]; David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. OF LEGAL ETHICS 855 (1998); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis* 84 CAL. L. REV. 493 (1996) [hereinafter, *Black Lawyers*]. For a discussion of how lawyers are divided into two “hemispheres” depending upon whether they represent corporations or individuals, see JOHN HEINZ & EDWARD LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982).

tively in the three interrelated markets that determine power and economic rewards inside elite firms: the *external* market for new business, the *internal* market for work from existing clients, and the *labor* market for associates (particularly senior associates). Black partners face structural barriers that impede their ability to succeed in each of these markets. Moreover, these disadvantages persist even though black lawyers who become partners often have *higher* formal credentials (*i.e.*, educational credentials and prior experience) than their average white peers. These formal advantages—which often play a key role in helping a black lawyer get a job in an elite firm and to succeed as an associate—frequently do not translate into the kinds of capital that attorneys need to succeed in the quite different markets in which partners compete. Instead, the fact that many black partners have followed a different route to their current positions than their fellow partners tends to reduce their ability to gain access to the kinds of networks and relationships that play a crucial role in gaining the respect and cooperation of clients, peers, and subordinates. Moreover, these structural problems tend to be mutually reinforcing; a black partner's difficulty in one market tends to create additional problems in others. If law firms are to make long-term progress on their diversity goals, they must find ways to help minority partners counteract this interlocking web of disadvantage.

My observations proceed in four parts. Part I briefly sets out the current status of black partners in elite firms.⁹ Part II then examines what it takes to become a powerful partner and describes the role that each of the three markets—external, internal and labor—play in defining a partner's power and status within the firm. In Part III I argue that black partners, notwithstanding their strong credentials, face important obstacles to succeeding in each of these markets. Because my research is ongoing, my tone in this part is speculative, and the evidence I offer in summary form is merely suggestive. Nevertheless, the patterns I identify resonate with what we know about the institutional structures and incen-

9. As in the rest of my work, my primary focus will be on black lawyers. As I have argued elsewhere, I believe that there are differences between the experiences of blacks and those of other minority lawyers that plausibly affect the ability of those in the former group to become, in the terms we are now discussing, partners with power in elite firms. See David B. Wilkins and Mitu Gulati, *Black Lawyers*, *supra* note 8, at 501 note 12. For example, between 1991 and 1996, the number of Asian partners grew at more than double the rate of the increase in black partners during the same period. See Davis, *supra* note 1, at A21 (noting that the number of Asian partners increased by 53% while the number of black partners grew by only 25%). Nevertheless, for reasons relating to both practicality (much of the information on "minority" lawyers is not separately broken down by race) and inclusiveness (some of the problems encountered by black partners are similar to those that face other minority partners, and indeed white women), I will sometimes refer to the more general category of minorities.

tives that characterize contemporary elite firms. Finally, Part IV offers a few brief thoughts about how firms might begin to ameliorate these disadvantages.

I. THE VANISHING BLACK PARTNER

By almost any measure, the number of black partners in large corporate firms remains embarrassingly small. Despite all of the attention focused on diversity issues, partnerships in elite law firms continue to be overwhelmingly white. For example, in the 1996 NATIONAL LAW JOURNAL survey of the nation's 250 largest firms, 97% of all partners were white—down only six-tenths of a percent from the 97.6% total for white partners reported in that journal's 1991 survey.¹⁰ Of the remaining three per cent of all elite firm partners who are non-white, a mere 1.2%, or 351, are black.¹¹

Moreover, these numbers have hardly budged in more than a decade. Contrary to the relatively rapid growth rate for Asian partners, the percentage of black partners in the nation's top 250 law firms in 1996 represented a mere one-tenth of one per cent increase over the percentage reported in 1991,¹² which, in turn, represented only a gain of two-tenths of one per cent over the percentage reported in 1989.¹³ Even if one goes back to 1981 when the NATIONAL LAW JOURNAL first began keeping these statistics, the percentage of black partners in the nation's 250 largest firms has barely doubled, moving from 0.47% to 1.2%.¹⁴ Although this increase undoubtedly represents progress, many would have hoped that during this period of unprecedented expansion in the corporate sector—a period in which many firms were growing exponentially¹⁵—that blacks would have gained greater representation among the ranks of law firm partners, particularly in light of their systematic exclusion in the past.

Given these statistics, it is hardly surprising that diversity advocates have made their principle goal an increase in the number of black (and other minority) partners. But if we turn our attention to those black lawyers who have managed to cross the rubicon to partnership, we see that the reality of law firm integration is even more depressing than the stark

10. See Davis, *supra* note 1, at A21.

11. See *id.*

12. See *id.*

13. See Rita H. Jensen, *Minorities Didn't Share in Firm Growth*, NAT'L L.J., Feb. 19, 1990, at 28 (reporting that in 1989, blacks constituted 0.9% of all partners at the nation's 250 largest firms).

14. See *id.*

15. For evidence that many large firms were growing exponentially in the period between 1970-1985, see GALANTER & PALAY, *supra* note 4.

statistics presented above would lead one to believe. For on each of the two dimensions identified above—retention and status—there is evidence that life after partnership is nothing like the promised land for many black lawyers.

To my knowledge, there are no reliable statistics on attrition rates among black partners. Nevertheless, anecdotal evidence suggests that these rates are high. For example, in the space of one year, eight black partners in the city of Chicago—“more than 20 per cent of the black partnership” in the city—left their prestigious positions for jobs ranging from in-house legal departments to small minority firms specializing in corporate business.¹⁶ Reports from other cities paint a similar picture.¹⁷

The news about the status of those black partners who remain in large firms is equally troubling. Blacks are substantially more likely to be non-equity partners, or, as one of my informants described herself, “artners”—partner without the “p” for profit. Thus, the NATIONAL LAW JOURNAL concluded that among firms with two-tiered partnerships, 46.2% of all minority partners are “income” partners as compared with only 30% of whites, a difference of more than 50%.¹⁸ A study of the Chicago bar reached a similar conclusion, finding that minorities constitute 4.8% of all income partners, but only 2.1% of “share” or equity partnerships.¹⁹ The same study found that there were only 23 black share partners in Chicago firms with more than 20 lawyers; a mere .8% of the total. As a black partner at Chicago’s Katten Mutchin & Zavis reported, these numbers are significant, since “there are huge discrepancies [in salary and clout] between income and equity partners.”²⁰

Finally, most of the black lawyers who have made it into the elite rank of equity partners (either by graduating to equity status or because they work at firms without formal tiers) continue to dwell at the bottom of the firm’s financial and status pecking order. As one black lawyer reported, the real issue for black lawyers is not going from associate to partner, but from “piddling partner to significant partner.”²¹ With a few

16. See Caroline V. Clarke, *The Diversity Dilemma*, AM. LAW., Oct. 1992, at 29 (quoting Linzy Jones, Jr.). See also Steven Keava, *Unequal Partners: It's Tough at the Top for Minority Lawyers*, A.B.A.J., Feb. 1993, at 50 (noting that 14 minority partners left Chicago firms during the period 1991-1993, decreasing the total number of minority partners by one-third).

17. Clarke, *supra* note 16, at 30 (reporting that minority partners from around the country contend that what happened in Chicago was similar to what they observed where they practiced).

18. Davis, *supra* note 1, at A21.

19. Lynne Eckert Gasey, *Retention and Promotion Issues Face Minorities and Women at Firms*, CHICAGO LAWYER, May 1998, at 4.

20. Davis, *supra* note 1, at A21. (quoting the black attorney)

21. Joel Reese, *Five Largest Firms Note Major Gains in Minority Associates*, CHICAGO LAWYER, May 1997, at 20.

notable exceptions, black lawyers do not hold leadership positions in large firms. There are very few black department chairs or members of firm management committees. In addition, although information on partner income is hard to come by, there are indications that many black partners remain clustered near the bottom of the compensation structure.

The fact that black partners appear to be leaving at greater rates than their white counterparts, and have less status and power than the average white partner when they stay, does not in and of itself prove that firms bear any responsibility for this phenomenon. It is possible, for example, that black partners are leaving firms simply because they receive offers that they cannot refuse from other sources. Similarly, the fact that blacks are more likely to be income partners, hold few leadership positions, and are located at the bottom of the compensation structure, may simply be the result of their relatively recent entry into the partnership ranks. Finally, a skeptic might seek to explain both the high attrition and low status of black partners on the ground that these lawyers are nothing more than unqualified beneficiaries of affirmative action who never deserved to be partners in the first place. Not surprisingly, many white partners, including a significant number of firm leaders, endorse one or the other of these explanations.²²

It is easy to see that there is truth in the first two of these explanations. The fact that a black lawyer has been able to win the "tournament of lawyers"²³ and become a partner in a major law firm is a powerful signal to the world that he or she is a person of character and distinction. Not surprisingly, such visible recognition often attracts the attention of other employers, particularly those who are looking to augment their own diversity efforts. The resulting offers that are extended to black partners are often both lucrative and prestigious. Similarly, given that black lawyers were virtually nonexistent in elite law firms prior to the mid-1970s, the average black partner is substantially younger than his or

22. See, e.g. PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* 55 (1999) (quoting a white partner as stating that "there are lots of minorities, African-Americans in particular, who are running around with Harvard and Yale degrees and who are not qualified in any sense" and reporting that this is "not an unusual opinion among white lawyers"); SF INTERIM REPORT, *supra* note 2, at 17 (reporting that most white managing partners blamed problems in minority retention on minorities receiving "'better opportunities' . . . [or] personal commitments which take lawyers elsewhere."); Davis, *supra* note 1, at A21 (suggesting that the overrepresentation of minorities and women among non-equity partners "can be explained in part by the youth of many woman and minority partners.").

23. I borrow the phrase from Galanter and Palay. See GALANTER & PALAY, *supra* note 4. For my own take on how this tournament operates, see Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 8.

her white counterpart. It is, therefore, not surprising that we find more of these newcomers in the junior ranks of elite firm partnerships.

Nevertheless, the implications that many firm leaders draw from these undeniable realities are misguided. Because black partners often leave for attractive opportunities in business or government, managing partners tend to view their departure as largely beyond the firm's ability to control. Similarly, the fact that black partners are more junior than their white peers has led many to conclude that the concentration of black partners in the lower echelons of firm partnerships is a temporary problem that will be solved simply by the passage of time.

Neither conclusion is warranted. To be sure, many black partners leave to pursue other options that these lawyers describe as being exciting and important. The question remains, however, why black lawyers find these offers more attractive than remaining a partner at a prestigious firm? It was not long ago when being a partner at an elite law firm was considered to be the pinnacle of the profession. Needless to say, it is clear that these once privileged positions have lost some of their luster in recent years. But this general degrading of the once vaunted position of law firm partner does not explain why black partners appear to be leaving firms at rates that are above those of their peers.

By the same token, just because one can explain the fact that black partners tend to be located on the bottom rungs of a firm's income and status hierarchy by their relatively recent entry into the partnership ranks does not mean that time alone will remedy this condition. In most firms with two-tiered partnership, promotion from income to equity partner is far from automatic. Instead, promotion is typically tied to the income partner's ability to develop a "book of business" of a designated size and consistency. If a black partner fails to meet this criteria, he will either remain an income partner forever or, in some firms, be asked to leave. To the extent that black partners face special obstacles to developing a lucrative and stable book of business, they will at best continue to dwell on the bottom rungs of the partnership ladder. At worst, they will be forced out.

Moreover, the size and stability of a black lawyer's book of business is likely to play a role in "voluntary" departures as well. The more difficulty a black partner believes that he or she will face in generating and sustaining profitable business, the more attractive other options will look. For example, in-house legal jobs free lawyers from the necessity of generating business. This fact alone might make an in-house position attractive to a black lawyer who is struggling to fulfill her "quota" of new billings. Similarly, the fact that some companies are interested in

giving a small portion of their work to minority law firms—work that is often below the pricing structure of major firms—provides a powerful incentive for a black partner to trade her big firm partnership, where she is likely to have difficulty generating business, for a partnership in a small minority firm catering to corporate clients.²⁴ Needless to say, if a black partner feels marginalized within her firm because of her inability to generate business, these “advantages” of either moving in-house or joining a small minority firm will look especially alluring.

The bottom line is that black partners who are worried about their ability to meet their firm’s bottom line criteria regarding business generation are more likely to leave in search of greener pastures. Those that stay frequently become partners without power; undercompensated, marginalized, and looking for an opportunity to leave.

This dire prediction, of course, assumes that black partners *in fact* have special difficulties generating business. Moreover, even if this is the case, as I indicated above a skeptic might still contend that this failure is solely the result of the fact that most black partners are not qualified for their prestigious positions in the first place. In Part III I address both of these issues directly, arguing that black partners are likely to have difficulty attracting and retaining clients for reasons that have nothing to do with their ability to do the work. In order to see why this is true, however, one must first understand how a newly-minted partner becomes a partner *with* power in today’s corporate law firm.

II. THE MARKETS OF POWER

Classical social theory has long posited that there is a fundamental antagonism between professionalism and bureaucracy.²⁵ In his pioneering study of large law firms, Robert Nelson rejects this standard dichotomy.²⁶ Nelson contends that the current generation of law firm managers has successfully articulated a version of professionalism that is largely compatible with significant amounts of bureaucratic hierarchy. Instead, Nelson argues that the real limitation on a firm’s ability to institute rational and centralized management practices is structural as opposed to ideological. That limitation, he asserts, is the inherent power

24. I discuss the incentives created by corporate programs to give business to minority lawyers in Wilkins and Gulati, *Black Lawyers*, *supra* note 8.

25. See, e.g., Celia Davies, *Professionals in Bureaucracies: The Conflict Thesis Revisited*, in *THE SOCIOLOGY OF THE PROFESSIONS* 177-194 (Robert Dingwall & Phillip Lewis eds. 1983).

26. NELSON, *supra* note 5, at 224.

of lawyers who control large blocks of clients to veto any bureaucratic reform that does not serve their particular interests.²⁷

The fact that partners with important client relationships inevitably wield significant veto power over institutional practices that undermine their interests is a direct result of the structural organization of elite firms. Unlike the typical corporation, the most important asset of any law firm is the human capital of its lawyers.²⁸ The most valued part of that human capital is relationships with clients. Clients are the lifeblood that provides the firm with the economic resources that it needs to survive. Regardless of a firm's formal structure, those who control these relationships inevitably wield substantial control over firm decisionmaking. The bottom line, as Nelson concludes, is that "[b]ureaucratization in the law firm will always be subject to the prerogatives of the client-responsible elite."²⁹

Recent changes in the market for legal services have only served to underscore this essential characteristic of law firm organization. During the so-called "golden age," elite firm partners rarely moved from one law firm to another.³⁰ Today, such movement is common. In an age where partners can easily pick up and move across the street to compete with their old colleagues, firm leaders are likely to be even more deferential to the wishes of those with substantial client relationships. Now more than ever, the partners with power in elite law firms are the partners with clients.

This simple and obvious fact has led many of those interested in understanding power dynamics inside law firms to concentrate their attention on "rainmaking"; the process by which partners directly solicit business from potential clients.³¹ Bringing new clients to the firm is a central route to becoming a partner with power. However, it is not the only route. Nor, surprisingly, is it sufficient in and of itself. In addition to competing in the external market for new clients, partners also seek business in the internal market for work from the firm's existing clients, including referrals from partners who receive inquiries about work that is outside the contact lawyer's area of specialization.

Moreover, regardless of where the work comes from, a partner must ultimately ensure that the matter is handled properly. Accomplishing

27. *Id.*

28. See Ronald Gilson and Robert Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry Into the Corporate Law Firm and How Parties Split Profits*, 37 *STAN L. REV.* 313 (1985).

29. NELSON, *supra* note 5, at 224.

30. GALANTER & PALAY, *supra* note 4, at 23-24.

31. See, e.g., Rita Jensen, *The Rainmakers*, *NAT'L L. J.*, Oct. 5, 1987, at 1.

this objective almost always requires putting together a team of associates (and perhaps even other partners).³² The need to work in teams is not simply the product of the size of the typical work done by elite firms. Nor is it solely the result of the fact that firms make money by multiplying the number of time keepers working on any given matter and by billing out associate time at substantially higher rates than even these well-compensated young lawyers are paid. Even if a partner is capable of doing all of his own work and billing it out at rates that are profitable to the firm, he will still want to have at least some of his work done by others so that he can spend part of his time on the activity that ultimately is most important to both him and the firm: generating new revenues from either the external or the internal markets. Thus, in addition to competing for external clients and internal referrals, partners must also compete for the services of other lawyers, chiefly associates, who will do their work.

Partners, therefore, compete in three distinct markets: the *external* market for clients, the *internal* market for referrals, and the market for *labor*. Each of these markets utilizes a different form of currency.

As many have noted, the currency that brings success in the external market is *connections*. The lawyer who is most likely to be successful in bringing in business is the one who can develop and maximize his or her contacts with the kind of people who have the ability to send significant business to the firm. The internal market operates on a different currency. Here, the issue is not so much contacts as it is *reciprocity*. Partners are more likely to refer business from their existing clients to those who can both do the work well without stealing the client relationship and who can return the favor by sending work back to the referring attorney.

Finally, the currency in the labor market is *clout*. Although partners have formal power over associates, the decentralized character of law firm work gives these putatively subordinate lawyers substantial power to select the partners for whom they will—and more important, *will not*—work. This is particularly true for senior associates who are both valued, because of their substantive and managerial expertise, and rare, because of the pyramidal shape of most large firms.³³ These lawyers are in the final stages of the tournament of lawyers and are, therefore,

32. See Milton C. Regan, Jr., *Professional Reputation: Looking for the Good Lawyer*, 39 S. TEX. L. REV. 549, 575 (1998).

33. See Wilkins & Gulati, *Black Lawyers*, *supra* note 8, at 534-537.

focused on maximizing their chances for partnership.³⁴ In a world in which all partners are not created equal, savvy senior associates understand that their best strategy for maximizing their chances of winning the tournament lie in developing working relationships with powerful partners whose views will carry weight at partnership time. Clout, not need or hierarchy, is therefore the best currency with which to “purchase” the services of senior associates.

The partners who are most likely to succeed in the increasingly competitive world of the large law firm are those with significant amounts of each of these three forms of capital. Although it is theoretically possible to succeed by excelling in only one of these arenas—bringing in large amounts of outside business, servicing important institutional clients, or “minding” the business of others through generating superior work product—the growing interdependence of the three spheres makes any single strategy inherently unstable. Despite all of the attention that is paid to rainmaking, most lawyers continue to get most of their business from clients who already have some existing relationship with the firm. Moreover, even lawyers who generate substantial amounts of external business risk alienating their colleagues and, therefore, having less institutional clout, if they are not also important players inside the firm (a role that they get, in part, by participating in the internal market for cross marketing and referrals). Finally, those who are unable to convince senior associates to do their work will quickly find that it is difficult to maintain the high standards necessary to generate business in the first place.

Partners with power are, therefore, those partners with significant reservoirs of connections, reciprocity, and clout. Black partners, unfortunately, face significant barriers to obtaining each of these three forms of capital.

III. WHY THE LAST TYPICALLY REMAIN LAST

The second explanation for why black partners tend to have less power than their white peers highlights an important truth. Black lawyers are newcomers to the world of elite law firms. Indeed, blacks are relative newcomers to virtually every part of the American mainstream. Prior to 1954, blacks were legally excluded from participating in all but the most menial sectors of the American economy. Four decades after *Brown v. Board of Education*, many of the vestiges of this long history

34. I discuss the reasons why senior associates are especially fixated on partnership in Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 8, at 1632-1634.

of exclusion remain.³⁵ As many others have documented, both the legacy of past discrimination and the vestiges of continuing racism impose powerful disadvantages on blacks who try to make it in the corporate world, including the rarefied world of the large law firm.³⁶

Racism, however, whether past or present, cannot provide the full explanation for why black lawyers remain partners without power in many firms. By almost every account, overt racism is on the decline, particularly among highly educated and economically successful whites.³⁷ Moreover, in recent years many elite firms have instituted programs to try to improve the representation of blacks and other minorities among both partners and associates.³⁸

My interviews with black partners confirm the intuition that continuing racism is only a part of the full story. One of the most striking features of these interviews is the reluctance of most black lawyers to attribute negative aspects of their careers to racism. Instead, these lawyers often report that on most occasions when they suspect that race might have been a factor in how they have been treated, they can look around and find a white lawyer who has suffered a similar misfortune.

This observation—that the problems black lawyers encounter are also encountered by some whites—underscores how racial issues are increasingly structured by, and mediated through, institutional practices. The revolutionary transformation of the post-*Brown* era means that middle class blacks are now a part of virtually every American institution. As a result, the dominant forces that shape the working lives of black Americans will be the same institutional policies and practices that structure the experiences of everyone else in the workplace.

Acknowledging that black professionals are subject to the same forces that affect their white coworkers does not mean, as some conservative commentators have suggested, that black professionals have “transcended” race.³⁹ As innumerable studies have shown, white Americans, even those of good will, continue to view black Americans through

35. See ANDREW HACKER, *TWO NATIONS, ONE BLACK ONE WHITE: SEPARATE, HOSTILE AND UNEQUAL* (1992) for a powerful account of these continuing effects.

36. See, e.g., ELLIS COASE, *RAGE OF THE PRIVILEGED CLASS* (1993).

37. See HOWARD SCHUMAN, ET AL. *RACIAL ATTITUDES IN AMERICA* (1985) (reporting that virtually 100% of whites say that blacks and whites should have an equal chance to compete for jobs). Sniderman and Piazza caution, however, that “notwithstanding the role of societal institutions like formal education in reducing the prevalence of negative racial stereotypes, negative stereotypes of blacks’ character are widely diffused through contemporary American society.” PAUL SNEIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 51 (1993).

38. See, e.g., SF INTERIM REPORT, *supra* note 2.

39. See, e.g., DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1995).

the prism of stereotypes and predispositions about intelligence, effort, interest, and values, that subtly, but nevertheless powerfully, disadvantage even the most economically advantaged African Americans.⁴⁰ When placed in the context of the natural predisposition of human beings to favor those who are most like themselves, it is clear that the simple credo of "class not race" fails accurately to account for the role that race plays in the lives of middle class blacks.⁴¹

The continuing presence of racially-charged stereotypes and predispositions also suggests that the skeptical explanation that black partners lack power because, as a result of widespread affirmative action, they lack ability is at best incomplete. As any fair observer will concede, evaluating the cumulative effects of affirmative action is a large and difficult task. I will not attempt a full examination of this complex phenomenon in this brief essay. Nevertheless, there are good reasons to doubt the skeptical explanation for the powerlessness of many black partners.

To begin, the charge that black partners are less competent than their white peers is in tension with the first explanation, frequently proffered by managing partners, that firms are losing black partners because these talented lawyers are being wooed away by other employers. Many of those doing the wooing (*e.g.*, corporations and investment banks) are among the most sophisticated employers of legal talent, and the jobs they are seeking to fill (*e.g.*, general counsel or managing director) are among the most important in the organization. It seems unlikely that these repeat players would fill jobs of this importance with lawyers whose competence to do challenging work is reasonably open to challenge.

Second, even those black partners who have not been externally validated by the market, either because they have stayed at their firms or because they left for less prestigious (although not necessarily less lucrative) jobs with minority firms or elsewhere, have nevertheless assembled credentials that cast doubt on the contention that they are nothing more than affirmative action hires who have been "polished up" to look like law firm partners.⁴² Whatever role affirmative action plays in law firm hiring, there is little evidence that these policies have much of an effect on partnership decisions.⁴³ Consider, for example, the case of Lawrence

40. See MICHAEL DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AMERICAN POLITICS* (1994).

41. I explore the relationship between race and class in more detail in David B. Wilkins, *Introduction: Race in Context*, in COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE (A. Appiah & A. Gutmann eds. 1996).

42. BARRETT, *supra* note 22, at 55.

43. See Daniel G. Lugo, *Don't Believe the Hype: Affirmative Action in Large Law Firms*, 11 LAW & INEQ. J. 615, 626 (1993).

Mungin, a black Harvard Law School graduate who sued the law firm of Katten Muchin & Zavis for discriminating against him on the basis of his race.⁴⁴ In support of his claim, Mungin asserted that the firm failed to evaluate him, forced him to do menial work that should have been done by more junior associates, ignored his requests to be included in challenging work assignments, and generally treated him with disrespect. As a result, Mungin asserted, he was not even considered for partnership with the rest of the members of his class. Although the firm disputed some of the specifics of these charges, its general response was that the bad treatment which Mungin admittedly encountered was no different than the way in which the firm mistreated most of its associates.⁴⁵ This "equal opportunity mismanagement" defense is, once again, inconsistent with the claim that firms such as Katten Muchin engage in widespread affirmative action to *favor* black partnership candidates.

Moreover, when firms attempt to treat black lawyers preferentially, they often end up hurting their intended beneficiaries. Mungin's case is again instructive. Katten Muchin hired Mungin as a senior associate in its bankruptcy group. Mungin's six years of sophisticated bankruptcy experience, including a three-year stint at the top bankruptcy firm in the country, more than qualified him for this position. Yet, from the moment he arrived at Katten Muchin, Mungin was viewed by firm leaders as an affirmative action hire. This characterization made it more difficult for Katten Muchin partners to see Mungin as a valuable member of the firm. As a result, Mungin had a difficult time getting good work from partners who knew nothing about him or the quality of his work, but who, nevertheless, assumed that he was less qualified than his peers. Indeed, when partners did take express steps to help Mungin, following a downturn in the firm's bankruptcy practice, the effort consisted of giving Mungin the kind of menial work that was almost certain to reinforce the unjustified impression that he was incapable of handling work befitting his age and experience. Whatever benefits black lawyers receive from affirmative action must be balanced against the harm to their careers when they are subjected to the kind of patronizing help Mungin received.

Finally, black lawyers who become partners have had to overcome obstacles that, although not different in kind from those encountered by their white peers, are nevertheless rendered more difficult because of race. Chief among these obstacles is the problem of finding mentors. In

44. Mungin's story is chronicled in BARRETT, *supra* note 22. For my own take on Mungin's story, see David B. Wilkins, *On Being Good and Black*, HARV. L. REV. (forthcoming June 1999) (reviewing PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA*).

45. BARRETT, *supra* note 22, at 180.

order for any lawyer to win the modern tournament of lawyers, he or she must develop relationships with partners who will give the associate meaningful work, training, and career support. Black lawyers consistently report that they have difficulty finding partners who are willing to enter into these crucial relationships.⁴⁶ These reports are sadly predictable. Studies of cross-racial and cross-gender mentoring relationships in the workplace repeatedly demonstrate that white men feel more comfortable in working relationships with other white men.⁴⁷ This natural affinity, when combined with the prevalence of negative stereotypes about black intellectual inferiority, make it more difficult for blacks to form supportive mentoring relationships. This reality partially accounts for the fact that blacks and other minorities leave large firms in rates that are significantly higher (and significantly sooner) than their white peers.⁴⁸

The blacks who make partner have found a way to surmount this challenge. Some have done so by having superior academic credentials, for example, graduating from an elite law school. Although there is little correlation between what is taught in law school and the skills and dispositions that one needs to become a successful lawyer, an elite school credential often opens important doors and provides a source of common identification that can help a black lawyer gain access to challenging work and mentoring opportunities. Thus, seventy-seven percent of all of the black partners listed in the *Minority Partners Handbook* in 1995 graduated from one of the eleven elite schools from which corporate firms typically recruit, with fully 47% attending either Harvard or Yale law school.⁴⁹ These numbers are substantially higher than the percentage of partners in most firms who have gone to these schools.⁵⁰ Contrary to the skeptic's assertion, therefore, with respect to educational credentials, the average black partner is *better* qualified than his or her white peers.

One can tell a similar story about black partners who have come to their firms as laterals. In order to overcome the problem of not being able to find a mentor, some black lawyers decide to spend time in non law firm settings where they are better able to develop their human capi-

46. See Wilkins & Gulati, *Black Lawyers*, *supra* note 8, at 568-571.

47. See, e.g., David A. Thomas, *Racial Dynamics in Cross-Race Developmental Relationships*, 38 ADMIN. SCI. Q. 169 (1993).

48. See NATIONAL ASSOCIATION OF LAW PLACEMENT FOUNDATION FOR RESEARCH AND EDUCATION, KEEPING THE KEEPERS: STRATEGIES FOR ASSOCIATE RETENTION IN TIMES OF ATTRITION (1998) (reporting that 8% of white male associates leave by the end of their first year, 41.5% leave by year three, and 68.2% are gone by year six, while the comparable numbers for minority lawyers were 11% in year one, 54% in year three, and 75% by the end of year six.)

49. See Wilkins & Gulati, *Black Lawyers*, *supra* note 8, at 563.

50. *Id.* (reporting that average percentage of partners who attended elite schools in five representative firms was 70%, with only 33% being graduates of either Harvard or Yale).

tal. For example, the same sample of black partners discussed above reveals that 37% spent time in government, 28% worked as in-house lawyers, and 11% were full-time academics before becoming partners.⁵¹ This pattern contrasts sharply with the typical white partner who continues to achieve his or her position through the ranks. Once again, on the average black partners have a broader range of experience than their white peers, and this fact is inconsistent with the skeptical account that these lawyers are systematically unqualified.

These last observations, however, merely return us to our original question. If neither racism nor their own lack of ability dooms the careers of black partners, then why are these lawyers, nevertheless, disproportionately represented among the partners without power? The answer to this question lies in the complex intersection among the institutional dynamics of elite firms, race, and the strategies for becoming a partner with power; strategies that are quite different from those that lead to success as an associate. Associates succeed by demonstrating their ability to produce high quality work with relatively little supervision and by being willing to bill large numbers of hours. For the reasons set out in Part II, partners succeed by accumulating the forms of capital that allow them to compete effectively for new business, internal referrals, and senior associates.⁵² The elite credentials and prior experience that many black lawyers bring to their law firms play an important role in helping these lawyers win the first stage of the tournament of lawyers by being promoted to partnership. As I indicated at the outset, however, partnership in most firms is now just the beginning of the real competition.

The credentials that helped black partners to demonstrate that they had the ability to do sophisticated legal work and, therefore, to become partners are likely to be much less effective in producing the forms of capital that will actually give them the opportunity to actually utilize their skills in practice. Like their peers, black partners in elite firms are subject to the same competitive pressures that have made the lives of all law firm partners more difficult and precarious in recent years. However, because they followed different pathways to success than the average partner, most black partners lack the deep network of relationships within the firm that help their white peers to withstand these pressures. Moreover, unlike their peers, black partners must also negotiate these pressures in an environment in which they still face negative stereotypes and preconceptions because of their race. These two sets of pressures—

51. *Id.* at 581.

52. I explore the difference between “associate” work and “partner” work in Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 8, at 1620-1624.

the institutional pressures of the workplace and the environmental pressures of race—are often not simply cumulative but mutually reinforcing. Certain institutional policies and practices exacerbate the negative effects of racial stereotypes, just as the weight of these general attitudes can make even legitimate institutional conditions more difficult to satisfy.

The net result is that black partners are in an especially precarious position. They are like birds at the end of a very long branch being blown by a swirling wind; they get blown in the same direction as everyone else on the branch but the amplitude is larger and more severe because they are closer to the edge. As we will see, this intersection of institutional practices and race systematically disadvantages black partners in each of the three critical markets within which all partners compete for business and labor.

A. *The Politics of Rain*

Connections are the currency of the external market for new clients. Given this reality, it should come as no surprise that black partners are at a disadvantage in this market. As one prominent black partner ruefully notes, for black partners the problem with generating new business is that:

We don't sit in the corporate boardrooms, and our mothers and fathers don't sit in the corporate boardrooms. We're not members of the \$40,000-a-head country club and neither are our mothers and our fathers. We're just not naturally networked—because of the history of our country, quite frankly—into the kinds of business opportunities or avenues that our white counterparts are networked into.

To be sure, there are many white partners whose mothers and fathers don't sit on corporate boards either. Unlike the so-called “golden age,” elite firm lawyers are no longer chosen primarily on the basis of their social pedigree.⁵³ Nevertheless, it remains true that blacks are less likely than whites to have the kind of contacts from which important business relationships are developed.

Moreover, even when a black partner has good connections, for example with someone in the corporate counsel's office of a major corporation, it still will be more difficult for that person to send the work to the black partner than to a similarly situated white partner. Corporate

53. For a description of these less than golden practices, see EDWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 37 (noting that in the 1960s, firms wanted “lawyers who are Nordic, have a pleasing personalities, and ‘clean-cut’ appearances, are graduates of the ‘right’ schools, have the ‘right’ social backgrounds and experience in the affairs of the world, and are endowed with tremendous stamina.”).

counsel are under increasing pressure to justify the high amounts that they must spend on legal fees. Since even the most vigilant in-house lawyer will have difficulty assessing the quality of the services that she actually receives, these lawyers have powerful incentives to ensure that if things turn out badly they are protected from the charge that they hired the "wrong lawyer." As a result, corporate counsel have a tendency to hire firms—and, more important, individual lawyers within firms—that have substantial reputations for the specific kind of work in question.⁵⁴ Although there will be some black superstars who will meet this criterion, the average black partner is less likely to be considered the obvious and unassailable choice for receiving sensitive outside work.

Indeed, this dynamic is likely to be at work even in situations where the lawyer in the general counsel's office handing out the work is also black. Minorities and women now make up a significant percentage of the lawyers working in corporate counsel's offices around the country. For example, in its most recent survey of in-house legal positions in Chicago, the CHICAGO LAWYER found that 40.5% of the lawyers working in-house are women and 11.6% are minorities, with black lawyers making up 7% of the total.⁵⁵ There is substantial anecdotal and empirical evidence that women and minority in-house counsel are more likely than their white peers to give legal work to blacks and other minorities.⁵⁶ Nevertheless, even these contacts will often find it difficult to steer business to black lawyers. Black corporate counsel who give work to black lawyers are subject to the charge of favoritism. As a result, they may be even more cautious in giving out significant work to a black lawyer who is not, in the eyes of their superiors, the obvious and unassailable choice for the job.⁵⁷

54. See Keeva, *supra* note 16, at 50 (noting that "[a]fter all, corporate boards tend to be conservative, and no one wants to be blamed for sending business to the wrong attorney.")

55. See Lynne Eckert Gasey, *Corporate Law Departments Top Law Firms in Diversity Hiring*, CHICAGO LAWYER, May 1998, at 20.

56. See, e.g., AMERICAN BAR ASSOCIATION COMMISSION ON OPPORTUNITIES FOR MINORITIES IN THE PROFESSION, SURVIVAL I CORPORATE LAW FIRMS AND LAW DEPARTMENTS IN AN INCREASINGLY COMPETITIVE ENVIRONMENT (Aug. 1995) (describing efforts by minorities in corporate counsel's offices to direct work to minority lawyers); Grace M. Giesel, *The Business Client is a Woman: The Effect of Women as In-House Counsel on Women in Law Firms and the Legal Profession*, 72 NEB. L. REV. 760, 799-800 (1993) (arguing that women in-house lawyers increase women's "rainmaking" potential). Cf. Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669 730-736 (1996) (demonstrating a positive correlation between the demographics of a firm's client base and the degree of law firm integration). My own interviews are replete with statements from black lawyers to the effect that they have gotten their best opportunities from minorities (particularly other blacks) and from women.

57. Once again, several informants have told me that this dynamic has limited their ability to turn their contacts with black in-house lawyers into significant business.

Black partners, therefore, face important obstacles to soliciting business from major corporate clients. Unfortunately, the structural dynamics of large firms also reduce their ability to recruit smaller, start-up clients. With rates ranging from \$100 per hour for junior associates to \$500 per hour and up for senior partners, it is painfully obvious that all but the richest individuals and small businesses will find the services of elite firms well beyond their price range. In and of itself, this pricing structure makes it difficult for black partners to cultivate a potential source of business where they do have contacts: the growing number of minority entrepreneurs and start-up ventures.⁵⁸

The problem for black partners seeking to bring new clients into the firm, however, goes beyond simply finding entities who are prepared to pay the freight. Law firms are not just concerned about the revenues that a particular lawyer generates. Like any other rational economic enterprise, firms—and, more important, individual partners within firms—pay attention to the opportunity costs associated with handling particular legal business. Two kinds of opportunity costs are most salient. First, notwithstanding the Herculean efforts of many elite firm attorneys to bill around the clock, there is a finite limit to the number of hours that any given lawyer can work. Hours spent on one case are hours that cannot be spent on another. Second, even if a firm is working at less than full capacity the conflict rules create the possibility that by taking one case, a firm may subsequently be precluded from taking other cases in the future.⁵⁹

Both of these kinds of opportunity costs can make it more difficult for black lawyers to bring new clients into the firm. In distributing scarce attorney time, it is rational for firm leaders to prefer handling matters for longstanding institutional clients, who are likely to have significant amounts of repeat business, rather than working for a small minority company that, although capable of paying the firms going rates, is less likely to generate long-term repeat business. Moreover, to prefigure the internal market issues discussed below, in cases where the new client's work is outside of the black partner's area of expertise, he or she must convince *another partner* to take on the matter. To the extent that partners with the relevant expertise are busy servicing their own clients (or large institutional clients of the firm), securing their participation will be

58. See Donna Gill, *Lawyers of Color: Encouraging Diversity*, CHICAGO LAWYER, July 1992, at 1 (quoting a black lawyer who recently left a large firm to join a small minority firm complaining that "a lot of my clients are smaller. Some are minority businesses" who couldn't pay the \$250 per hour that his former firm charged for his time).

59. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 and 1.9.

difficult. My interviews suggest that these and other similar opportunity cost considerations substantially inhibit the rainmaking prospects of at least some black lawyers.⁶⁰

Similarly, firms with large rosters of clients who are established leaders in their industries may be hesitant to take on start-up ventures for fear that they may conflict themselves out of more lucrative business in the future. This problem is exacerbated when, as will often be the case with a minority-owned company, the start-up venture seeks to challenge one or more established firms in the field on the ground that their dominance is due in part to improper exclusionary practices; practices that are in part based on race. Once again, at least some black partners view conflict issues—whether “actual” or only “positional”—as a serious obstacle to developing business.⁶¹

There is, however, one area where many black partners have the kind of contacts that produce lucrative business. One of the salient developments in the post civil rights era has been the rise in black political power. Cities such as Atlanta, Cleveland, Chicago, Detroit, and Los Angeles, have, or have had, black Mayors. In several other jurisdictions, black elected officials hold many important political positions, ranging from corporation counsel to chair of the airport authority. Either directly or indirectly, all of these elected officials control substantial amounts of legal business. Following in the great American tradition of using political influence to open the doors of business opportunity, many of these black elected officials have instituted programs, both formal and informal, to channel some of this legal work to members of their own communities and to others who have heretofore been excluded from doing city work. Predictably, many black partners have made cultivating black political contacts a major part of their rainmaking strategy.

This political strategy, however, is a double edge sword. The example of the city of Chicago is illustrative. On the positive side, many black lawyers in Chicago's large firms saw their fortunes rise considerably when Harold Washington was elected Mayor in 1983. Washington

60. For example, a partner in a large New York law firm reports being denied the opportunity to bring in a piece of corporate business for a minority led start-up venture. Although fees from the venture might have amounted to as much as \$50,000, firm leaders felt that the black lawyer's time could be more profitably spent servicing the firm's existing clients. That same partner had to turn away another piece of business when he could not find a partner with the relevant expertise to help produce the work.

61. For example, a black partner in Chicago complained that his efforts to bring new clients into the firm were stymied by more senior partners who feared that these new matters would create conflict problems that might preclude the firm from handling additional matters for their existing clients.

brought sweeping changes to Chicago, one of the most noticeable of which was to expand the number of professional and service firms doing work for the city. In particular, Washington made it clear that any firm wishing to do business with the city of Chicago would have to demonstrate its commitment to diversity, either by expanding opportunity in its own workplace or by joint venturing with a minority firm. Several of the black lawyers I interviewed benefitted directly from these policies.

Unfortunately, there is also a dark side to this political strategy. To begin, not every firm will be interested in pursuing city business. Thus, in one example, a senior black associate working in a Chicago branch office of a large New York firm sought to bring in a substantial piece of municipal bond business that had been referred to her through a friend working in the city attorney's office. The firm, however, refused on the ground that it did not consider itself the kind of firm that did city business. Indeed, my interviews suggest that the large firms in Chicago can usefully be divided into those whose business is closely tied to local or regional interests and those whose business interests are predominately national. Firms in the former category tended to reward black lawyers for cultivating contacts with the Washington administration. Those in the latter category did not, with some expressing outright hostility toward anything that might create the impression that the firm was the type of institution that curries favor with city politicians. Black lawyers working for firms in the latter group gained little or no mileage from pursuing a political strategy for business development.

For those black lawyers lucky enough to work in firms that were interested in city business, however, the strategy still proved risky. To put it bluntly, a political strategy is subject to the whims of politics. This reality became bitterly apparent to many black partners in Chicago when Harold Washington died unexpectedly shortly after his reelection in 1987. In the preceding four years, many black partners had invested heavily in cultivating strong contacts with the Washington administration. When Washington died, and his interim successor (who was also black) was defeated in the general election by Richard M. Daley (who is white) these contacts became considerably less valuable. Indeed, given the tendency of politicians to separate the world into "supporters" and "enemies," the fact that a black lawyer had been close to the Washington administration counted *against* his efforts to get additional city business from the Daley administration.

The repercussions of this new state of affairs for the careers of several black partners in Chicago were both swift and severe. In one particularly graphic example, the day after Washington died, the managing

partner of a large Chicago firm called in the firms only two black partners, both of whom had brought in significant city work, and asked them how they intended to support themselves now that Washington was dead. Although other firms were not quite this direct, the message was, nevertheless, clear. Having ridden in on the coattails of an emerging black political leadership, the expectation was that many of these newly-minted black partners would ride out when that leadership was replaced. Although one can only speculate, the fact that more than twenty per cent of all of the black partners in large Chicago firms left their positions less than two years after Daly's election provides at least some evidence that this prediction has indeed come true.⁶²

Once again, it is important to emphasize that the ever present possibility of backing the wrong candidate makes a political strategy risky for all law firm partners, not just for blacks. Nevertheless, as the analogy to the branch blowing in the storm is meant to suggest, there are good reasons to suspect that the risks for blacks are, on average, greater than they are for whites. Well-connected white lawyers are often able to survive the winds of political change. In Chicago, for example, there are prominent white lawyers in large firms who have continued to do substantial business with the city of Chicago under every administration from the first Mayor Daly to the last. For all of his efforts at redistribution, Harold Washington did not take significant business away from these lawyers who were viewed as being too prominent—and too powerful—to be denied city business. The black lawyers who rose to prominence under Harold Washington, however, were rarely accorded this treatment. With rare exceptions,⁶³ these lawyers were not viewed as being sufficiently prominent, or—in the absence of a black mayor—sufficiently powerful, to garner the status of the “obvious choice” for city work regardless of politics. Instead, their prior experience was often dismissed as little more than patronage.

Even in areas such as the political arena, therefore, black partners still face important barriers to transforming their contacts into significant and stable long-term business relationships. When combined with the fact that blacks are likely to have fewer contacts in the corporate world where elite lawyers typically pray for rain, and the difficulty blacks are likely to face in building a clientele consisting of small start-up and minority firms, it is not surprising that few black partners have become

62. See Clarke, *supra* note 16.

63. The most prominent exception is a black lawyer who, like his white counterparts, can trace his own influence back to the first Mayor Daly.

important rainmakers. Sadly, black partners' experience in the internal market has if anything been even more frustrating.

B. Getting the Franchise—and Keeping It

The problems faced by black partners in the external market are compounded by the difficulties they often encounter in the internal market for allocating work for the firm's existing clients. Recall that the capital in this market is reciprocity, which in turn depends upon trust. Law firms distribute partner work for existing clients in three ways: inheritance, referrals, and cross marketing. Black partners appear to face significant obstacles in each of these arenas.

1. *Inheritance*—Although few like to admit it, many of today's senior partners acquired their most important clients the old fashioned way: they inherited them. The process is as familiar as it is rarely discussed. Senior partners with important client relationships bequeath them to favored junior colleagues. As the term implies, this process is traditionally done when the senior partner is about to retire. It can happen, however, any time that the senior lawyer is no longer willing or able to provide for the client's needs. Typically, the transition happens gradually. Over time, the junior lawyer assumes more and more responsibility for the client's matters until eventually the senior lawyer is brought in only for major decisions or, toward the end, for ceremonial appearances.

Inheritance issues have become increasingly important, and increasingly divisive, in the last several years. In the "golden age" when firms typically had long-term relationships with institutional clients, transitions of this kind were an essential part of maintaining the understanding that clients belonged to the firm and not to particular lawyers. Moreover, since most firms had lockstep compensation systems, the question of which partners would get credit for being a given client's primary lawyer assumed less importance. However, as firms have moved away from the ethos of institutional clients and lockstep compensation questions relating to who gets "credit" for particular client relationships, and how that credit is translated into compensation and power inside the firm, have become bitterly contentious. Senior partners jealously guard "their" clients for fear that if they relinquish these relationships to younger colleagues their compensation will be cut accordingly. At the same time, junior partners who do not have significant business of their own compete fiercely for work from their senior colleagues in order to ensure that even if they don't receive "credit" for the client relationship, their hours (a factor in most compensation schemes) continue to remain high.

The black partners in my study have had little success in the inheritance market. In one of my first interviews, a black partner in a major firm in Chicago challenged me to find one example of a black partner who had either assumed a leading role for one of the firm's important institutional clients or was being groomed to do so in the future. After more than sixty interviews with black lawyers who are either senior associates or partners in Chicago, I have yet to find a single example.

Given what we know about the history and status of the majority of black partners, this result is hardly surprising. As I indicated above, one of the continuing complaints expressed by black lawyers in large firms is that they have difficulty finding mentors.⁶⁴ Although black partners are likely to have found at least one important mentor during their careers (otherwise they probably would not have become partners), the difficulties inherent in cross-racial mentoring relationships ensure that these lawyers will have fewer deep relationships with senior partners than their white peers.⁶⁵ The smaller the number of close mentoring relationships, the less likely it is that a black lawyer will be chosen to take a leading role in servicing one of the firm's important institutional clients. In addition, to the extent that senior partners are worried about losing power by turning over clients, they will most likely choose to entrust these valuable relationships to those of their proteges whom they believe have the clout to protect their interests in the future. In an environment in which black partners are perceived as partners without power, they are unlikely to be seen as capable of fulfilling this role.

Indeed, reports from my interviewees suggest that black lawyers often find themselves being *disinherited* after they make partner. Instead of assuming *greater* responsibility for clients for whom they worked as senior associates, many report being given *less* work by partners with whom they once had close relationships. As senior associates, these black lawyers were a key part of the partner's team, freeing her to pursue other business opportunities while at the same time ensuring that the work was done promptly and efficiently. As partners, however, these same black lawyers became a potential source of competition. Ironically, the more aggressively a black lawyer pursues building a strong relationship with a particular client, the less likely it is that the partner in charge

64. See, e.g. Wilkins and Gulati, *Black Lawyers*, *supra* note 8, at 568 (reporting that in a small survey of black Harvard Law School graduates, less than 40% of those surveyed, and less than 24% of those who graduated before 1986, reported that a partner had taken serious interest in their work). See also SF Interim REPORT, *supra* note 2, at 14 (listing the lack of mentors as one of the principle problems facing black lawyers)

65. See Thomas, *supra* note 47.

will give her a chance to work on the case for fear that she will "steal" the relationship.

Black partners, therefore, find themselves squeezed out of the inheritance market in two ways. On the one hand, their lack of institutional power relative to their peers makes it less likely that they will be given the leading role on an existing client relationship. On the other hand, the fact that they are partners—and therefore potential competitors—often leads to a diminished role in servicing the clients of partners for whom they previously worked. This double squeeze, in turn, limits a black partner's ability to participate in the referral market.

2. *Referrals*—One of the primary benefits of working in a law firm, as opposed to being a solo practitioner, is the potential for internal referrals.⁶⁶ Clients frequently call a lawyer with whom they have a close relationship about a problem outside of that lawyer's areas of expertise. If the lawyer works in a firm that does the kind of work in question, his natural inclination will be to refer the matter to one of his partners. Internal referrals both allow the referring lawyer to capture some portion of the fee (without offending ethical restrictions against fee-splitting) and prevent the client from going to another firm that might try to "steal" all of the client's business. The question remains, however, which of his partners the lawyer will call.

This decision carries important weight for both caller and recipient. For the caller, the future strength of his client relationship will depend upon the quality of the work product of the lawyer to whom he refers the case. In addition, referral calls are an important mechanism for generating future referrals of one's own. For the recipient, such calls both generate immediate income, given that client credit is likely to be shared between the partner initially contacted and the partner doing the work, and serves as a marker of the receiving lawyer's status within the firm. Indeed, as one of my informants put it, one of the most important things that can happen to a partner in a large law firm is to "get the franchise" on a particular kind of work by becoming the principal contact person for internal referrals in a given area. Getting the franchise (or at least some portion of it) is a critical part of becoming a partner with power in today's elite firms.

Once again, black lawyers are less likely than their peers to get all or part of the franchise in a given area. As an initial matter, partners are more likely to refer work to partners with whom they have worked in the past or otherwise have a pre-existing relationship. To the extent that

66. See Gilson and Mnookin, *supra* note 28.

black lawyers have had fewer mentors as associates, and tend to be more isolated as partners, they are less likely to have the kind of cross-cutting relationships throughout the firm that generate significant referral business. This is particularly true for the significant number of black partners who enter their firms laterally (either as senior associates or as partners), and therefore have even fewer longstanding relationships among their peers.⁶⁷

Moreover, given the size of most elite firms, reputation is likely to play as great a role in the internal referral market as personal knowledge. Black partners may not have the reputation for being franchise players even when they are. Consider, for example, the experience of a black partner in a large mid-western firm who took a leave of absence from his firm to take a position in city government overseeing major real estate projects. Firm leaders persuaded the partner to rejoin his old firm by promising him that, in light of his experience, the firm would make him their point person for the firm's growing real estate practice. Within a few months of his return, however, the black partner discovered that other partners in the firm were bypassing him and referring real estate matters to more junior partners in the department. Notwithstanding his prior experience and the endorsement of firm leaders, the black partner was still not perceived by his peers as being the firm's "franchise player" for real estate work.

Finally, to the extent that referring partners seek return business, the barriers black partners face in the external and inheritance markets are likely to impede their chances for referrals as well. Indeed, if white partners perceive that black lawyers are less likely to have access to lucrative business, they may hesitate to make referrals even if these perceptions are inaccurate. Moreover, these perceptions tend to be self-fulfilling because lawyers who are left out of the referral market also will have greater difficulty demonstrating to new clients that they have the expertise to handle their work.

3. *Cross Marketing*—The final mechanism for generating and allocating business from existing clients is cross marketing. As with referrals, the ability to cross market is one of the principle advantages of working in a firm. The essence of cross marketing is simply taking a proactive stance towards referrals. Rather than waiting for the client to call with a new kind of problem, law firms are increasingly approaching

67. For example, of the 87 black partners at elite law firms listed in the ABA's Directory of Minority Partners in Majority firms, more than half joined their firms in which they became partners laterally after spending time in government, private industry, academia, or another firm. See Wilkins and Gulati, *Black Lawyers*, supra note 8, at 581.

existing clients about the possibility of doing work for them in other areas. Firm leaders (or individual entrepreneurs within the firm) will typically put together a team of lawyers to make the initial presentation, including the lawyer with the existing relationship and one or more lawyers from the specialty area that the firm is trying to push. Questions about exactly who will do the work and how credit will be apportioned are typically deferred until after the work comes in.

Several black partners expressed dissatisfaction with cross-marketing efforts in their firms. To begin with, many felt that they were excluded from these marketing initiatives for the same reasons that they were largely left out of the inheritance and referral markets. Rarely are black partners considered by their peers to be the "best" lawyers to convince a client to send additional business to the firm.

When they are invited, black partners frequently complain that they are only there for show, perhaps because the client is concerned about diversity, and are rarely given credit for any work that subsequently comes in. Ensuring that one receives credit for new work generated in these "dog and pony" shows is harder than it might seem. There will often be a long lead-time between the presentation and when the work materializes. When it does, the work will most likely be funneled through the partner with the existing client relationship. Moreover, there is no guarantee that lawyers who participate in the initial presentation will be the ones asked to do the work. Finally, even if a black lawyer learns about the new matter and is asked to participate, successfully convincing firm leaders that he or she deserves significant credit for producing the business depends upon having a substantial amount of institutional clout—exactly what most black partners do not have.

In sum, black partners face significant obstacles to becoming successful participants in each part of the internal market for work from the firm's existing clients. Since most lawyers get most of their work from these sources standing alone, this state of affairs is likely to have a long-term corrosive effect on the income and status of black partners. When one considers the impact of being frozen out of the internal market for clients on a black lawyer's ability to successfully compete in the market for associate labor, however, the cumulative effect is even more severe.

C. Who's the Boss?

In the "golden age," large law firms lured young men (and they were almost all men) to put in the long and arduous hours that it took to become partners by promising that those who achieved this lofty state would lead a life characterized by financial security, prestige, intellectual

excitement, and, not least of all, a sane and manageable approach to the work day. In today's elite firms, many of these promises have been called into question. Although some partners continue to earn substantial incomes, average partner incomes have actually declined in recent years.⁶⁸ Similarly, many partners complain that the prestige and, even more important, the intellectual excitement that used to characterize their practices has been replaced by ministerial work and an insatiable preoccupation with marketing.⁶⁹ Finally, by all accounts partners are working as many (if not more) hours than associates.

In fact, of all of the traditional indicia of partnership, the only one that might seem to be secure in this maddeningly competitive age is the claim that partners are free from the terror and the vagaries of the assignment system. No longer will a lawyer have to live in fear of a Friday afternoon call from the assigning partner demanding that he or she work all weekend to produce a document for the partner to review on Monday morning. Gone will be the days of going from office to office, hat in hand, begging for an interesting project from partners who are under no obligation even to listen to your pleas. Whatever perquisites partnership supplies in the modern law firm, it surely carries with it the power to command the services of those associates that one needs to get one's work done. After all, isn't this the essence of what it means to be an owner and not an employee?

As with the other traditional allures of partnership, the reality of a partner's ability to control the associate assignment process is a good deal more complex today than this simple story would lead one to believe. To be sure, partners have formal power over associates. In theory, the associate assignment system is designed to provide every partner with the associates that each partner needs to complete his or her work promptly and effectively. In addition, associates know that at the end of the day their partnership chances depend upon gathering sufficient support among the firm's existing partners. To the extent that every partner has a formal right to participate in this process, associates have an incentive to trade their cooperation on any given project for the partner's implicit promise to support—or at a minimum, not to oppose—their future promotion prospects.

68. See ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 282 (1993) (reporting that the average partner's income in the nation's top 250 law firms dropped from 1976 to 1986 after adjusting for inflation).

69. See *id.* at 283-291 (reporting that partners have diminished opportunities to counsel their clients and to peruse other activities); 297-300 (discussing the culture of money in large firms).

The problem with these formal powers, however, is that they are often more apparent than real. Although most firms have formal associate assignment systems, these mechanisms rarely supplant the thriving black market for associate labor. Powerful partners routinely "poach" good associates.⁷⁰ Assigning partners, who are typically not partners with power, are often powerless to stop this evasion of the formal work assignment system.⁷¹

In addition, associates are also gaming the system. Savvy associates know that the best way to get good work is not to wait for it to come to you but to aggressively court the partners with whom one wants to work. Although associates care about the inherent interest or subject matter of the work, their primary consideration is whether working on a particular project is likely to advance their careers. This is especially true for senior associates. Unlike their junior colleagues, many of whom have only a weak interest in becoming partners in the firm, senior associates have typically made a commitment to compete in the tournament to the finish.⁷² By this point in their careers, these lawyers know that the most important thing that they can do to increase their chances of being tournament winners is to curry favor with as many powerful partners as possible. Senior associates are well aware that there are hierarchical differences among partners. Therefore, they have strong incentives to work only for those partners whom they believe will be in a position to advance their careers.

The power that senior associates have to manipulate their work load comes from their scarcity in most elite firms. Large firms are having increasing difficulty retaining senior associates.⁷³ Although there are many reasons for this difficulty, most observers agree that one important factor is the declining partnership rates in many large firms.⁷⁴ Since associates also believe that their employment prospects in the lateral

70. See Chambliss, *supra* note 56, at 715 note 174 (quoting a partner as saying "[w]e have a formal [assignment system] but it doesn't work . . . The partners had ignored the stocking partners.")

71. See *id.* (quoting the same partner as reporting that "the assigning partner is pretty low on the totem pole, because those are the people who get that kind of routine administrative responsibility.") For my explanation for why it is rational for firms to give this responsibility to relatively powerless partners, see Wilkins and Gulati, *Black Lawyers*, *supra* note 8, at 591.

72. For a detailed account of why this is true, see Wilkins and Gulati, *Reconceiving the Tournament*, *supra* note 8.

73. See, e.g., Edward A. Adams, *Cravath Raises Current Associates' Pay*, N.Y.L.J., Dec. 20, 1994, at 1 (reporting that Cravath raised senior associate rates by 30% in an effort to retain more of these valuable lawyers); John E. Morris, *Weil, Gotshal's Generation Gap*, AM. LAW., Dec. 1995, at 5 (discussing Weil, Gotshal's problems in retaining senior associates).

74. For example, New York firms such as Cravath and Weil, Gotshal have among the lowest partnership rates in the country.

market diminish the closer they get to the partnership decision, they have strong incentives to leave before their departure can be read as a signal that they weren't "good enough" to make partner.⁷⁵ As a result, firms have many fewer senior associates than they need. While this shortage may not give senior associates the power to refuse assignments from powerless partners outright, such naked defiance is rarely required. Instead, senior associates can count on powerful partners to keep their powerless colleagues at bay.

Partners will work hard to secure the services of one of the firm's rare senior associates. From the partner's perspective, working with senior associates offers two distinct advantages over working with junior associates or other partners. First, senior associates are both well-trained and highly motivated. As a result, partners can trust them to carry a large part of the burden of "minding" the clients for whom they work. At the same time, senior associates are still associates, and therefore pose little threat of stealing the client. Without these able assistants, partners must either do their own work (including supervising their own junior associates) or share this responsibility with other partners who are likely to demand a piece of the resulting income and perhaps try to steal the client altogether. Given the demands on partner time and income, neither of these choices is attractive.

Black partners are more likely than average to find themselves in the unenviable position of being without senior associates. For all of the reasons outlined above, black partners are unlikely to be perceived by senior associates as partners with power; having neither a substantial client base of their own nor significant capital in the internal referral market. Senior associates with their eye on partnership will tend to avoid working for such powerless partners. It comes as no surprise, therefore, that several black partners have reported to me that they frequently have difficulty securing the services of senior associates, even when they are working on projects for clients who are not their own.

Nor are black partners likely to be able to enlist the backing of firm leaders in their efforts to get senior associates to work on their projects. As I indicated in Part II, partners with important client relationships will always have the ability to subvert bureaucratic reforms that do not serve their interests. A formal assignment system that did not allocate scarce senior associate time to the partners with the most important client relationships is exactly the kind of reform likely to be thwarted.

75. This risk is one of the reasons why those associates who do stay past their sixth year are likely to have strong commitments to winning the tournament.

Indeed, even black partners who *have* clients may still have difficulty competing for the services of senior associates. Just because a black partner generates sufficient revenues in the external market to support herself does not mean that she will be a powerful player inside the institution. Black partners with their own book of business often work alone or with a small group of associates. To the extent that they are not active participants in the various aspects of the internal referral market described above, these "rainmakers" are often not perceived as powerful partners by their colleagues and, as a result, by senior associates, even though they bring substantial revenues to the firm. Since senior associates care about clout rather than profits, the fact that a black partner has her own clients is not sufficient to guarantee success in securing the services of these valuable assistants.

As with their disadvantages in the other two markets, the problems black partners encounter in the labor market hurt their chances in other areas. In the external market, the fact that black partners have difficulty getting senior associate help tends to inhibit their ability to attract and maintain clients. It is a basic fact of law firm economics that the way to increase one's client base, and therefore one's profits, is to leverage one's "human capital" by appropriating the labor of junior lawyers.⁷⁶ Without senior associates, this kind of leveraging is extremely difficult. Similarly, a black partner who has difficulty securing the services of good senior associates will have a hard time succeeding in the internal referral market. Not only will the black partner without good help have a more difficult time turning out quality work in a timely manner, but she will also have fewer allies within the partnership, given that senior associates who go on to make partner often become important referral partners in the future. The fact that black partners have fewer proteges who become partners, of course, will only serve to reinforce their relative powerlessness in the labor market because senior associates will perceive that these lawyers are not influential with their peers.

And so the circle continues. Black partners have a harder time getting clients from the outside, which in turn undermines their participation in the internal referral market, which in turn stymies their efforts to secure the services of senior associates, which in turn places added burdens on their efforts to recruit clients and solicit referrals. Given this reality, it is no wonder that many black partners have decided to seek their fortunes in arenas other than the large law firm. I close by offering

76. See GALANTER & PALAY, *supra* note 4 (describing the modern law firm as a bargain between senior lawyers who "rent" their human capital—i.e., knowledge, connections, experience—to junior lawyers in return for extracting a profit on the junior's labor).

a few tentative suggestions about what might be done to reverse this trend.

IV. CONCLUSION: POWER CONCEDES NOTHING WITHOUT A DEMAND

The first and most important step toward addressing the problems of black partners is to acknowledge that these problems exist. Black partners are not simply leaving large firms because they have "better opportunities" elsewhere; these opportunities are "better" in part because of the problems that black lawyers face in competing in the three markets discussed above. Similarly, time in and of itself is unlikely to remedy this situation. Although some black partners will break out of the circle of powerlessness by dint of either their rainmaking talents or their allegiance with powerful mentors, many others will leave before they are dragged down by the poisonous combination of unrealistic rainmaking requirements, low expectations from their peers, and inadequate help from their subordinates.

To reverse this trend, firms must support black partners in their efforts to acquire power in each of the three relevant markets. This will not be easy. The institutional patterns that drive black partners towards powerlessness are deeply ingrained in the fiber of large law firms. Nevertheless, there are some things that firms can do.

Firms must support the rainmaking activities of black partners and make sure those efforts that come to fruition are compensated accordingly. In recent years, firms have awakened to the rainmaking potential of women partners, in part because of the growing number of women corporate counsel. Firms have found a number of ways to support efforts by women partners to capitalize on this potential connection, including "women-only" client receptions and promoting women partners for positions on corporate and community boards. Similar efforts should be made for minority partners.

In addition, firms should support efforts by black partners to develop clients in the burgeoning minority business community. Although these clients may not initially appear significant to the firm's bottom line, there are many examples of small clients who have grown into big ones. In an economy increasingly dependent on small business, firms ignore the growing minority business sector at their peril. Moreover, regardless of whether these clients will ever be of major importance to the firm, they are very significant to the income and status of black partners. Firms that purport to care about the fate of their black partners have good reason to support these efforts.

The key to altering black partners' success in the internal market begins with giving these lawyers access to the inheritance market. Black lawyers must be groomed to assume primary responsibility for major institutional clients. At least one managing partner has promised that he intends to do just that for a black lawyer who recently made partner. The new partner works in the same area as the managing partner, and the senior lawyer has already given his black protégé important responsibility on matters for one of the senior lawyer's most important clients. If the effort succeeds—and if the managing partner is truly committed there is no reason why it should not—the black partner should have little problem parlaying this opportunity into a thriving practice on the referral market.

Finally, firms must send their associates strong signals that they value the presence and the opinions of their black partners. The fact that a senior associate has not worked for a black partner in the associate's area should count as mark against his or her promotion. More important, firms must support the efforts of black partners to mentor junior associates by helping to ensure that these proteges stay at the firm long enough to become senior associates. Black partners have relatively good access to the market for junior associates, but frequently find that their views about the quality of these young lawyers are discounted or ignored. This is particularly true when the junior lawyer is a minority. As a result, there are few minority senior associates and few of the whites who reach this status have had close relationships with black partners during their early years with the firm. Reversing this pattern would begin to build up a reservoir of loyalty between black partners and the firm's senior associates that should help them to compete in this all important market.

Once again, it is important to emphasize that none of these suggestions is a panacea. As Nelson's study amply demonstrates, reversing long-standing institutional patterns is difficult for large firms. Nevertheless, if firms do not begin to address the powerlessness of the average black partner, they are likely to lose these lawyers as fast (or faster) than they are willing to promote them to partnership.