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THE ELASTIC TOURNAMENT: A SECOND TRANSFORMATION OF THE BIG LAW FIRM

Marc Galanter* and William Henderson**

In 1991, Galanter and Palay published Tournament of Lawyers: The Transformation of the Big Law Firm*, which documented the regular and relentless growth of large U.S. law firms. The book advanced several structural and historical factors to explain these patterns, centering on the adoption of the promotion-to-partnership tournament. Systemic changes in the marketplace for corporate legal services in the intervening years suggest the need for an updated account of the modern large law firm.*

Using Tournament of Lawyers *as a starting point, we propose to fill this void in the literature. Marching through a wide array of empirical evidence covering the last twenty to thirty years, our findings corroborate some of the core theoretical insights of* Tournament of Lawyers*. For example, the continuous upward growth of the partnership based on the tournament is clearly evidenced by a "smooth" upward trajectory in the partnership ranks while associate hiring hews more closely to the underlying business cycle. On the other hand, the widening ranks of permanent "off track" attorneys and non-equity partners, including the prevalence of de-equitizations, suggest the emergence of a more complex and elongated tournament structure that applies to both partners and associates.*

Under a new model, which we dub the "elastic tournament," the equity core is primarily reserved for partners who control access to key clients. This structure reduces cross-subsidies between lawyers with differential value to the firm, thus reducing the potential for large-scale lateral defections. Yet, this reduced sharing of risks and benefits simultaneously creates an environment in which it becomes more costly—at the individual lawyer level—to faithfully adhere to professional and ethics principles that are in tension with client objectives. Arguably, these dynamics have made zealous advocacy the touchstone of ethical lawyering. The diminution in sharing also reduces the time horizons of individual lawyers and decreases their willingness to invest in firmwide initiatives that do not simultaneously optimize their own practice. Amidst this widening collective action problem, the "firm" itself has remarkably little autonomy to pursue non-economic objectives, such as racial and gender diversity or the training and mentoring of the next generation of lawyers.

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Further, except in some exceptional cases, the influence of firm culture, which may have moderated lawyer self-interest in an earlier era, is weakened by the sheer size and geographic dispersion of the modern big law firm.

Although this model is fundamentally "stable" in the economic sense, it raises several philosophical and practical issues regarding lawyer independence and the long-term viability of professional self-regulation.

INTRODUCTION

Periodically law students, faculty, and practitioners come together to reflect on the issues and problems affecting the legal profession. We welcome the opportunity to take part in this discussion under the auspices of the Stanford Center on Ethics. One way to organize this discussion is to focus on lawyers' practice settings. According to the most recent edition of *The Lawyer Statistical Report*,[1] which contains data for the year 2000, 672,901 lawyers (74%) work in

1. See CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 6, tbl.6 (2004). This is a serial publication of the American Bar Foundation, which compiles the data on a regular five-year cycle. The following table summarizes lawyers by practice setting:

All Lawyers in U.S. (2000)			U.S. Lawyers in Private Practice (2000)		
Practice Setting	*#*	*%*	*Firm Size*	*#*	*%*
Private Practice	672,901	74.0%	Solo Practitioners	324,903	48.3%
Federal Gov't	31,780	3.5%	2 to 5 Lawyers	99,235	14.7%
State & Local	60,953	6.7%	6 to 10 Lawyers	45,549	6.8%
Priv Indus or NonProfit	81,673	9.0%	11 to 20 Lawyers	40,108	6.0%
Leg Aid or Pub Def	9,057	1.0%	21 to 50 Lawyers	40,936	6.1%
Education	9,041	1.0%	51 to 100 Lawyers	26,279	3.9%
Retired/Inactive	43,614	4.8%	101+ Lawyers	95,892	14.3%
Total	*909,021*	*100.0%*	*Total*	*672,902*	*100.0%*

Source: Calculated from *The Lawyer Statistical Report* (2004), tbls.8 & 11 private practice. Of these lawyers, slightly less than half (324,903) work as solo practitioners (but there is clear evidence that this portion is shrinking).[2]Among the remaining 347,998 private practice lawyers in the U.S., slightly more than a quarter (95,892) work in law firms with 101 or more attorneys. In total, large law firm lawyers comprise 10.5% of the U.S. legal profession. Yet this is the fastest-growing, most prosperous, and most dynamic sector of the profession. If the recent past is a reliable guide, the institution of the large law firm—its power, influence, and prestige—will once again be a dominant theme in this discussion.[3]

More than in earlier times, however, this emphasis may be especially justified. Over the last three decades, an increasing proportion of law school graduates are beginning their careers in large law firms.[4] Based on the size of the 2007 summer associate classes, *The American Lawyer* magazine estimates that the nation's two hundred largest law firms (based on revenue) are set to hire ten thousand entering associates during the fall of 2008.[5] "That astonishing number," observes editor-in-chief Aric Press, "equals about one-quarter of all the students who will graduate from U.S. law schools next year. To put it another way, the top 20 law schools will only produce about 6,500 graduates."[6] Because virtually all large law firms still aspire to some variant of the original "Cravath system," in which the firm establishes its brand by hiring only the best students from the best law schools and providing them with the best

2. See *id*. at 7, tbl.7 (showing the proportion of attorneys in solo private practice declining from 64% in 1960 to 48% in 2000). In urban areas, the decline in solo practice is even more pronounced. *See* JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW STRUCTURE OF THE BAR 100-01 & fig.5.1 (2005) (reviewing evidence that the proportion of solo practitioners in Chicago diminished from 21 to 15% between 1975 and 1995).

3. *See, e.g.*, *Conference on the Commercialization of the Legal Profession*, 45 S.C. L. REV. 875 (1994) (Two of four articles focus on large law firms.); *Empirical Studies of the Legal Profession: What Do We Know About Lawyers Lives?*, 84 N.C. L. REV. 1415 (2006) (Six out of eight articles focus on large law firms.); Symposium, *The Future of the Legal Profession*, 44 CASE W. RES. L. REV. 333 (1994) (All seven articles focus on large corporate firms or using them as a point of contrast.). Recognizing their disproportionate influence (and, presumably, their appeal to aspiring lawyers), many symposia specifically focus on large law firms. *See, e.g.*, Symposium, *Attorney Well-Being in Large Firms: Choices Facing Young Lawyers*, 52 VAND. L. REV. 869 (1999); *Stein Center Conference: Professional Challenges in Large Law Firm Practices*, 33 FORDHAM URB. L.J. 1 (2005); *Symposium on the Corporate Law Firm*, 37 STAN. L. REV. 271 (1985); Symposium, *The Growth of Large Law Firms and Its Effect on the Legal Profession and Legal Education*, 64 IND. L.J. 421 (1989); *cf.* RICHARD L. ABEL, AMERICAN LAWYERS 182 (1989) (reporting that as of 1980, only 9.2% of lawyers worked in law firms with more than twenty lawyers, yet "such firms have become the most conspicuous feature in the American legal landscape").

4. *See, e.g.*, HEINZ ET AL., *supra* note 2, at 144, fig.6.2 (reporting that in 1975, 5% of Chicago lawyers commenced their careers at a firm of one hundred or more lawyers, compared to 19% in 1995); RONIT DINOVITZER ET AL., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 25-27 & tbl.3.1 (2004) (reporting that 28% of recent law school graduates works in large firms (>100) compared to 8% of all lawyers).

5. Aric Press, *The New Reality*, AM. LAW., Aug. 2007, at 91.

6. *Id*.

training,[7] the laws of supply and demand dictate that thousands of entry-level associates now command the princely sum of $160,000 per year.[8] By extension, elite and semi-elite law schools are able to take a proportionate share through ever-higher tuition (and corresponding debt loads), without "billing" any additional hours or changing the way they (we) teach.[9]

The partner-owners of large law firms have also benefited, at least financially. A persistent multi-decade surge in demand for corporate legal services,[10] has given partners in large law firms dramatic gains in their compensation, especially in comparison to their counterparts in small and solo practice.[11] Nonetheless, because of the relentless pace of modern large law firm practice, there are few (if any) partners who regard the present as a golden era of professional felicity. In a recent column in the alumni magazine, Larry Kramer, the dean of Stanford Law School, reviewed the many changes in large law firm practice, including soaring billable hour expectations, the resistance of clients to paying for associate training, the explosion of lateral hiring, unprecedented associate attrition, and a diminution in the sense of firm culture and community.[12] Kramer then queries, "Does anyone actually want this? The

7. See MILTON C. REGAN JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER 22-23 (2005) (discussing how recruitment and training of Cravath associates was an "attempt[ ] to establish a distinctive brand in the legal services marketplace" and thus set it "apart from its potential competitors"); Lawrence J. Fox, *The End of Partnership*, 33 FORDHAM URB. L. J. 245, 245 (2005) (The author, a law firm partner, notes that large firms perpetuate the myth that they only interview at "the very best schools and seek to recruit the very best law students.").

8. Press, *supra* note 5, at 91.

9. William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L.J. 163, 195 (2005) (discussing how higher salaries accompanying higher debt loads at elite schools results in "an effective transfer [of wealth] from the large firms (and so from their clients) to elite and semi-elite law schools"); *see also* Randolph N. Jonakait, *The Two Hemispheres of Legal Education and the Rise and Fall of Local Law Schools*, 51 N.Y.L. SCH. L. REV. 863, 864-65 (2007) (discussing deleterious consequences of local law schools trying to emulate elite counterparts without lifeblood of large firm jobs).

10. *See* HEINZ ET AL., *supra* note 2, at 287 (attributing large law firm size to greater corporate demand and positing several likely explanations); John P. Heinz, Robert L. Nelson & Edward O. Laumann, *The Scales of Justice: Observations on the Transformation of Urban Law Practice*, 27 ANNU. REV. SOCIOL. 337, 342 (2001) (same); Randall S. Thomas, Stewart J. Schwab & Robert G. Hansen, *Megafirms*, 80 N.C. L. REV. 115, 136-52 (2001) (same). *See also* Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users,* 53 BUFF. L. REV. 1369 (2006) (noting increasing share of corporations as consumers of legal services).

11. *See, e.g.*, HEINZ ET AL., *supra* note 2, at 166-67 & fig. 7.2 (reporting declines, from 1975 to 1995, in real income for equity partners in firms of two to one hundred lawyers but a 44% rise within firms of 101 to 299 lawyers and "the highest incomes of all" among partners in largest firms); William D. Henderson, Financial and Billing Survey of ISBA Lawyers, Presentation to Indiana State Bar Association Solo & Small Firm Conference (June 1, 2007) (on file with author) (reporting linear relationship between firm size and growth in real income over the last five years)

12. Larry Kramer, *From the Dean*, STAN. LAW., Fall 2007, at 1.

lawyers, managing partners, and general counsels I meet are deeply concerned about what's happening. Yet they feel unable to stop it, powerless to resist the stifling market forces that drive their decisions."[13]

In light of the disproportionate sway and influence of large law firms—and a widespread perception among law students, faculty, and practitioners that we are being pulled into new and uncharted territory—the time is ripe for an updated and more contemporary account of the modern large law firm. Drawing up recent empirical evidence, we observe that the well-known "promotion-to-partner tournament" remains a core feature of large U.S. law firms.[14] However, the new model, which we dub the "elastic tournament," involves a different set of ground rules and ultimately includes a much larger (and mostly older) set of players in more roles. Moreover, until a large law firm lawyer renounces any interest in prerogatives of ownership (e.g., a claim on residual profits, a voice in firm management), the duration of the tournament can now be expected to last one's entire career. In short, the only finish line is death or retirement.

These changes are driven by a confluence of factors, including firm size, geographic dispersion, client demands, lower information costs via technology, and shifting generational tastes.[15] Yet, the fundamental economic reality that underlies this transformation is the inability of large law firms to underwrite a prize of partnership that includes both long-term financial security and eventual repose.[16] At the same time that large law firms have grown to truly behemoth

13. *Id.* One Stanford Law alumnus referred to Kramer's observations as "nonsense on stilts." *See* Adam Smith, Esq., *www.bmacewen.com/blog/* (Oct. 31, 2007, 11:57 EDT). However, the alumnus works as management consultant to law firms.

14. *See* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 99-102 (1991). During the last fifteen years, the promotion-to-partner tournament has provoked a lively and provocative literature. *See, e.g.*, Marc Galanter & Thomas Palay, *A Little Jousting About the Big Law Firm Tournament*, 84 VA. L. REV. 1683 (1998); Frederick W. Lambert, *An Academic Visit to the Modern Law Firm: Considering a Theory of Promotion-Driven Growth*, 90 MICH. L. REV. 1719 (1992) (book review); Bruce M. Price, *How Green Was My Valley? An Examination of Tournament Theory as a Governance Mechanism in Silicon Valley Law Firms*, 37 L. & SOC'Y REV. 731 (2003); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Market of Elite Law Firms,* 84 VA. L. REV. 1581 (1998); Kevin A. Kordana, Note, *Law Firms and Associate Careers: Tournament Theory Versus the Production-Imperative Model*, 104 YALE L.J. 1907, 1923-33 (1995).

15. *See* Part II, *infra*.

16. Drawing upon the framework developed by Gilson and Mnookin, this outcome has occurred because of the erosion of "firm-specific" capital. In earlier years, clients were strong wedded to specific law firms, due in part to high switching costs for clients and to professional norms that discouraged mobility. As a result, corporate law firms could credibly offer entry-level associates the prospect of lifetime employment. *See* Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 353-71 (1985) (discussing advantages and sources of firm-specific capital).

proportions, aided in part by a large cadre of professional lawyer-managers, the locus of firm control has shifted to an inner core of "partners with power"[17] who may or may not be strongly wedded to the firm.[18] Large law firms that refuse to privilege these partners inevitably run the risk of large scale defection and implosion.[19]

This Article is organized in three parts. In Part I, we discuss the key features of the new "elastic" tournament model. In Part II, we assess the accuracy of the elastic tournament model by reviewing the empirical evidence. In the process, we note the emergence of a separating dynamic in which large general service law firms without an optimal mix of lucrative practice specialties will soon be vanquished in the salary wars.[20] We speculate that these less-endowed firms may form the basis for new and distinct second tier of large law firms that will compete on the basis of specialized service and price rather than elite lawyer credentials. Finally, in Part III, we consider three implications of our model: (a) with reduced risk-sharing among partners, large law firm lawyers will be less independent of their clients and thus less reliable exemplars of professional ethics; (b) the atomistic ethos of modern large firm practice is likely to hinder the profession's aspiration to gender and racial parity at the partnership level; and (c) the new generation of "millennial" lawyers will get their wish of greater work-life balance[21] in exchange for an expanded array of "off track" career options. Nonetheless, similar to earlier generations,[22] we suspect that a large number of the best and brightest will continued to be draw into the tournament by the money and allure that come with making partner.

17. ROBERT L. NELSON, PARTNERS WITH POWER: SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 5 (1988) (observing that "the organizational rationalization of the firm will be controlled by the partners with power," which is "inextricably tied to 'control of clients'").

18. *Cf.* REGAN, *supra* note 7, at 37 (noting "the irony: large firms a generation ago were loosely organized but tightly integrated, while today's firms are more formally organized but only loosely integrated").

19. *See* William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691, 1742-44 & nn.188-89 (2006) (discussing instability of firms that permit cross-subsidies between productive and nonproductive partners).

20. Press, *supra* note 5, at 91 ("There is a price point [for associate salaries] that not all Am Law 200 firms will be willing to match. We're confident that that number begins with a 2.").

21. *See, e.g.*, Marisa McQuilken, *Students Seek a More Reasonable Law Firm Life—Before They Even Start*, LEGALL TIMES, Sept. 24, 1997, at 26 (discussing how several Stanford Law students organized "Law Students Building a Better Legal Profession" in reaction to a "law firm culture bereft of work-life balance").

22. For example, in the late 1960s and early 1970s, law students pressed corporate law firms for progressive reforms remarkably similar to the current generation. See Ralph Nader, *Law School and Law Firms*, 54 MINN. L. REV. 493, 497-500 (1970) (discussing how students "have considerable leverage" and that "[w]hatever the outcome, the big firms will never be the same").

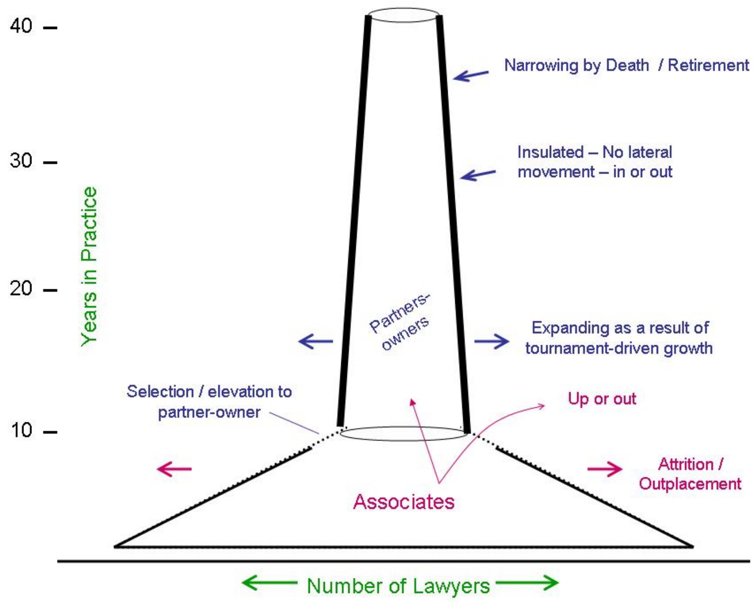
I. AN UPDATED TOURNAMENT: A NEW MODEL OF LARGE LAW FIRM GROWTH

The promotion-to-partner tournament has been a defining feature of large corporate law firms since their emergence on the legal scene in the late nineteenth century.[23] The basic scheme of the tournament was that lawyers blessed with more work than they could personally handle would recruit highly qualified but inexperienced young graduates of the newly flourishing law schools, which were displacing "reading law" as the preferred entryway to the profession. The partners would hire these young lawyers to work on the cases of the firm, a manifestation of the human capital of the seniors lawyers, under the supervision of those seniors. After an extended probationary period marked by increasing responsibility, the most proficient of these associates (as they came to be called in the early 20th century) would, be taken into the partnership. Under the "up or out" principle, the others departed and were replaced by new recruits. Promotion marked the point at which the young lawyer had accumulated more human capital than could be combined with his own labor. So when an associate was taken into the partnership, the firm needed not only to replace him but to add sufficient labor power to utilize the additional increment of human capital.

In this scheme the partnerships of successful firms, consisting of those who won the tournament, would grow gradually over time. Growth was internal, generated by the tournament. Apart from the departure of associates who did not become partners, there was virtually no lateral movement in or out of the firm. Partners enjoyed a kind of tenure and remained with their firms for the course of their working lives. The successful tournament firm can be schematically represented as an inverted funnel.

23. *See generally* GALANTER & PALAY, *supra* note 14. Of course, the definition of "large" has continuously changed as the size of the largest units has grown. One recent story asserted that midsized firms "range from 180 to 500 attorneys firmwide." Lynne Marek, *Chicago's Midsize Firms Look to Stay Independent*, NAT'L L. J., July 9, 2007, at 10. Applying this definition to the 2007 NLJ 250, 84 U.S.-based law firms are large (i.e., > 500 lawyers), 151 are midsized (180 to 500), and 15 are small.

Figure 1. Inverted Funnel: The Early (Classical) Tournament Firm



With minor variations, this was the shape of virtually all large American law firms providing legal services for organizational clients over the course of the last century. These firms grew over time; their style of work became the industry standard for provision of complex and continuing legal services. [24] The tournament firm successfully adapted to changes in technology, to great increase in scale, and to diversification of its personnel.[25] And after World War II, and especially toward the end of the century, it became a model adopted in many countries around the world.[26] It is widely viewed as a successful and stable form.[27] For most of its inhabitants and spectators it has been naturalized;

24. *See, e.g.*, Peter D. Sherer, *Leveraging Human Assets in Law Firms: Human Capital Structures and Organizational Capabilities*, 48 INDUS. & LAB. REL. REV. 671, 672-75 (1995) (discussing the evolution and success of the large law firm and attributing core features to the widespread adoption of the "Cravath Model").

25. *See generally* GALANTER & PALAY, *supra* note 14, ch. 4 (reviewing how the tournament structure adapted to a wide range of systemic changes affecting that legal profession).

26. *See, e.g.*, Marc Galanter & Simon Roberts, *From Kinship to Magic Circle: The London Commercial Firm in the Twentieth Century* (unpublished manuscript) (chronicling the adoption of the U.S. tournament model by British solicitors in the middle decades of the twentieth century).

27. *See, e.g.*, Bryant G. Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems,* 64 IND. L.J. 433, 433 (1989) ("Large law firms are the most successful institutional component of the American legal profession according to the criteria of economic prosperity, proximity to the corridors of economic and political power, and the influence exerted on the legal profession generally."); Gilson & Mnookin, *supra* note 16, at

it is the unsurprising and expected form of organizing legal work.

As firms grew and their surroundings changed, firms underwent a transformation, beginning in the 1970s. Removal of restraints on the flow of information made them more visible to media, public, clients, other firms and themselves. Clients and lawyers became more mobile, as long term retainer relationships with clients gave way and the lifetime commitment of lawyers to firms was threatened by the lateral movement of lawyers. Firms adapted to these new fluidities by becoming more commercial and market-oriented, embracing marketing and professional management. In response to the new world of information and mobility, firms departed from equal shares distribution to discourage or encourage lateral movement.[28]

Developments in the past decade suggest a second and equally dramatic transformation in the character of the tournament and in the shape of the firm that it produces and that surrounds it. This transformation is the most drastic and significant metamorphosis in the large law firm since the invention and spread of the tournament firm in the closing years of the nineteenth century—a transformation that portends major shifts in the way that legal services are produced and delivered. It includes a number of discrete changes of considerable importance:

- Liberalization of the traditional up-or-out principle (by retention of "permanent associates"[29] and appointment of non-equity partners who do not graduate to equity partnership);[30]
- A growing share of non-tournament lawyers, such as of counsel, staff lawyers, staff associates, contract lawyers, and lawyers at outsourced locations, collaborating in the production of corporate legal services.
- Abandoning the equation of seniority with ownership and acceptance of permanent employee status for lawyers. Previously, e power and standing were correlated with age; now they are not—a firm may have a thirty-five-year-old equity partner and a sixty-year old associate, non-equity partner, or of counsel;[31]

313, 386-89 (acknowledging inevitable changes in market for corporate legal services but predicting continued growth and stability for the nation's largest firms); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 545 (1985) ("[T]he large law firm has been hugely successful as an economic enterprise, commanding increasingly larger proportions of the revenues paid for private legal services and growing far more rapidly than the legal profession as a whole.").

28. *See generally* GALANTER & PALAY, *supra* note 14, ch. 4.

29. The lexicon for these non-partner positions is large. *See, e.g.*, George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635, 1641 n.11 (2006) (analyzing the Martindale-Hubbell Law Directory and classifying the following positions as "off-track": attorney, associate counsel, counsel, consultant, of counsel, senior attorney, senior counsel, and special counsel).

30. For a detailed discussion of two-tiered partnerships, see Henderson, supra note 19.

31. As noted by Erwin Smigel in his seminal study of Wall Street law firms, "Custom

- Softening of the commitment of partnership as a permanent achieved status—i.e., tenured—through de-equitization, outplacement,[32] and mandatory retirement;[33]
- Acceptance of lateral inward movement (which depends on client loyalty to lawyers rather than firms).[34] But firms still fear the departure of rainmakers and stars.[35]
- Acceptance of differentials in compensation and control that are not based on seniority or election;[36]
- Management becomes a separate function performed by specialists and there are non-lawyer management auxiliaries like marketing director, public relations, technology, etc.[37]

With these changes we see the inverted-funnel shape of the classic early tournament firm replaced by what we might call the core-mantle model of the firm—a firm in which a core of owner-partners is surrounded by a much larger mantle of employed lawyers that includes not only aspiring associates, but also non-equity partners, permanent associates, of-counsel and de-equitized former partners. We visualize this model two-dimensionally in Figure 2.

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and power have ordained that the senior partners generally have the largest rooms . . . . Courtesy and the recognition that inevitably everyone grows old guarantees that a very old partner, no longer in power, retains his large office, even though he is not currently 'earning' it." ERWIN O. SMIGEL, THE WALL STREET LAW. 209 (1969).

32. *Cf.* Fox, *supra* note 7, at 247 (observing that "elevation to partnership no longer comes with any sense of tenure. . . . [Because of shifting norms,] law firms are now free, with little, if any, guilt to ease out partners who are viewed as less than productive (productive being defined by criteria that were far different from the standards that were applied when these folks were admitted to the partnership[.]").

33. Although most large firms have mandatory retirement policies, a vibrant lateral partner market is increasingly undercutting their intended effect. *See* Elizabeth Goldberg, *Desperately Seeking Seniors*, AM. LAW., Sept. 2007, at 17.

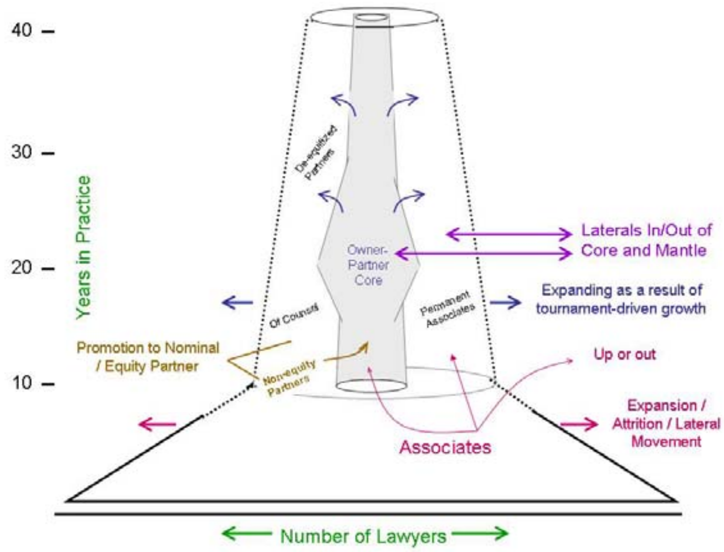
34. *See* REGAN, *supra* note 7, at 34-35 (noting how firms have embraced the lateral market as a way to acquire specialized lawyers or practice groups and that "an increasingly large percentage of law firm partners are not associates who are promoted from within, but arrivals from other firms"); Fox, *supra* note 7, at 248 (observing that a partner's true worth is now determined by the lateral market).

35. *See* JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 227 (2006) (reporting the "decline in law firm stability as 'star' attorneys increasingly practice in a free agent market").

36. *Compare* REGAN, *supra* note 34, at 25 (reporting that promotion to partner formerly denoted "a share of the firm's profits, a voice in the firm's governance, and considerable independence from supervision by other lawyers"), *with* Fox, *supra* note 7, at 248 (noting that "real partners" at any firm are "those whose books of business exceed a very significant number—say a million, two million, or three, depending on the firm and the city").

37. *See, e.g.*, REGAN, *supra* note 7, at 37 (noting that "today's large firm has many more formal organizational controls, such as hierarchical chain of command, more professional managers in positions of authority, distinct practice departments, and detailed financial management and reporting systems," partially because "firms no longer are able to rely on informal social norms to regulate behavior").

Figure 2. The Later "Core and Mantle" Tournament Firm



We call this "later" form the "elastic tournament" since it involves a stretching of the tournament so that it does not end with the promotion to partnership, but instead becomes "perpetual" or unending as partners work longer hours, accept differential rewards, and fear de-equitization or early, forced retirement.[38] The core of owners is thinner compared to the early classical model, and, arguably, its relative size vis-à-vis the rest of the firm is shrinking.[39] Further, there is more competition and tension within the firm. Since the tournament is longer, thinner and more tense, elastic seems a fitting image.

Although large law firms, in the aggregate, continue to grow rapidly, there appears to be a fair amount of volatility at the individual firm level. Of the 236 firms that made the National Law Journal 250 list in both 2006 and 2007, the average number of partners (equity and non-equity) increased by an average of ten partners per firm. Yet, remarkably, 58 firms (24.6%) reported a diminution in the number of partners. The decline might result from one or more of several factors, including a large cohort of retirees,[40] the defection of an entire practice

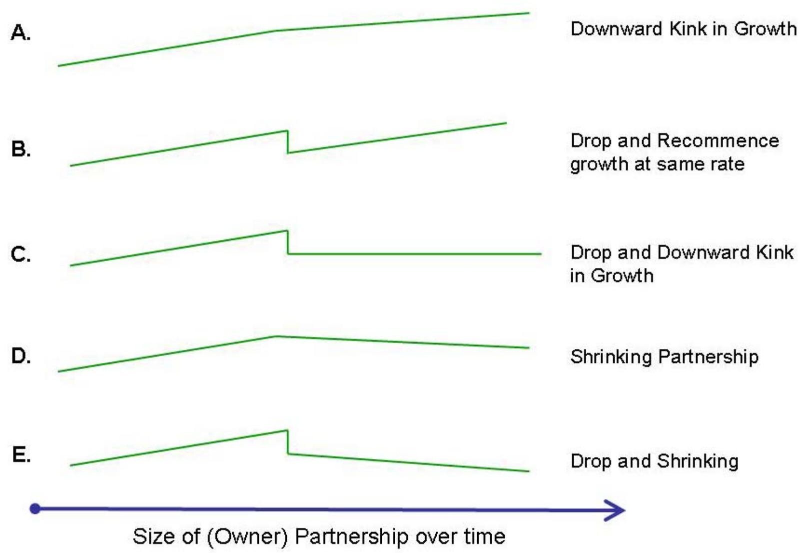
38. *See* Henderson, *supra* note 30, at 1710 (noting empirical evidence of a "perpetual tournament involving both associates *and* partners"); *see also* REGAN, *supra* note 34, at 37 (same).

39. *See infra* notes 85-86 and accompanying text (discussing the rapid growth of non-equity partners as the total number of equity partners leveled off).

40. For a statistical overview of the age-related demographics of the legal profession, including the imminent retirement of a large number of boomer lawyers, see Marc Galanter, "*Old and In the Way": The Coming Demographic Transformation of the Legal Profession and its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1084-86 (presenting statistical evidence that the proportion of older (>50) to younger (<40) lawyers is

group to another firm,[41] or systematic pruning of the partnership ranks. Indeed, large scale demotions or firings of partners have become commonplace.[42] When firm managers resort to this tool, what happens then? Does the partnership recommence growth at the same rate as before? Or at a lower rate? Or does it stay steady or even shrink while the mantle (non-core) grows? Figure 3 suggests some of the possible patterns of partnership size over time.

Figure 3. Models of Transition from Classical to Later Tournament



The transition involves the abandonment or downgrading of several norms that once helped define the world of large law firms and a shift to norms that intensify competition within the firm:

- The decline of the *norm of age-graded equality among lawyers* permits differentiated compensation and hierarchy (such as two-tier partnership) within firm.
- The decline of the *norm of loyalty to the firm and immobility* permits lateral movement. A necessary concomitant is a decline of roughly equal magnitude in client loyalty to the firm, because it is the shift of attachment to individual lawyers that facilities the lateral movement.
- The decline of the *norm of confidentiality, secrecy, and reticence* permits the flow of information that enables inter-lawyer and inter-

increasing over time, with a sharp increase expected after 2005).

41. Drawing upon reports of group movement in a weekly newsletter distributed by Hildebrandt International, Inc., we counted 249 instances of multi-lawyer movement between January 2005 and May 2007, averaging 7.5 lawyers per multi-lawyer movement).

42. *See infra* Part II.A.

firm comparisons, which has been aided by the rise of the legal press.[43] In addition, sophisticated software enabled detailed utilization and realization comparisons on an intra-firm (office-by-office, practice group-by-practice-group, lawyer-by-lawyer) level.

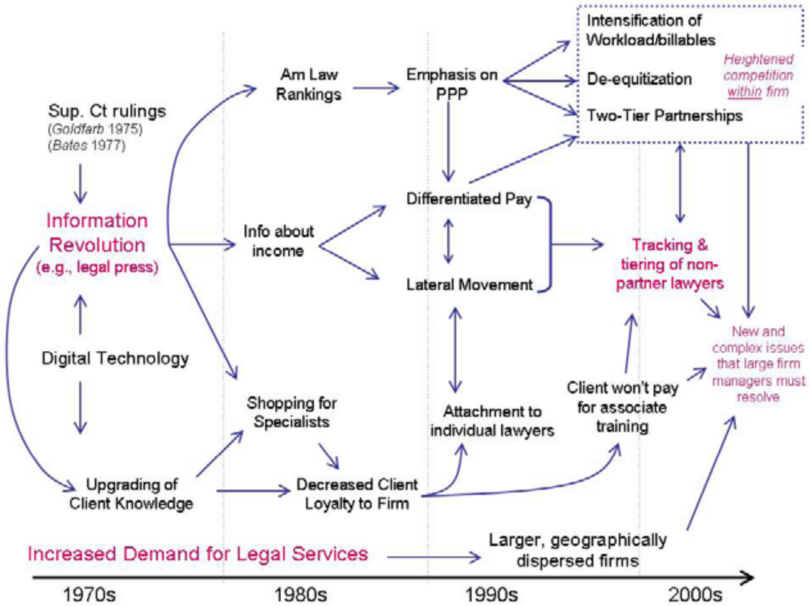
- The decline of the *norm of priority of professional accomplishment* facilitates an emphasis on individual monetary and status rewards and facilitates the measurement of firm standing by Profits Per equity-Partner (PPP).

In positing this shift in the character of the tournament and the shape of firms, we acknowledge that it is not a single abrupt all-at-once transition, but a more or less gradual process punctuated by smaller discrete changes (such as the abandonment of lockstep compensation or the creation of non-equity partnership). Nor do we claim that it holds throughout all tournament-based firms. The observations on which we base our conclusions come from what Heinz and Laumann called the "corporate hemisphere,"[44] and, specifically, only its higher peaks (represented in the AmLaw 200 or NLJ 250). Nor do we think the Late, or "Core and Mantle," Tournament is a destination or terminus in the evolution of the large firm. We cannot identify a regime combining the stability, repose, and gradual change of the sort that was for several generations a feature of the Early Tournament.

43. *See* GALANTER & PALAY, *supra* note 14, at 71 (discussing the birth of the legal press in the aftermath of the Supreme Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

44. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319-33 (1982). We do not know whether there is an analogous change within the personal services hemisphere.

Figure 4. Forces Driving Change Among Large Law Firms



As depicted in Figure 4, several factors continue to shape the size, strategy, and work conditions of the contemporary large law firms. During the 1970s, a "new information order" resulted from the demise of the restraints on information (about prices, salaries, profits, clients, available services, etc.), sparked by judicial release from ethical constraints on communication and, shortly thereafter, the emergence of a new, celebratory legal press.[45] Over the last three decades, this new flow of information has exposed clients to a wider array of lawyers and has exposed lawyers to law firms that could potentially offer them a larger share of profits. This disaggregation of corporate work appears to have taken the shape of a "winner-take-all" market—a dynamic most prevalent in entertainment and sports—in which the highest stakes transactional and litigation work flows to the most capable practitioners.[46] Thus, a relative small number of partners at the top of a hierarchy earn disproportionately large rewards.[47]

45. *See* GALANTER & PALAY, *supra* note 14, at 70-73 (discussing the effect of *Bates* on lawyers' willingness to share information).

46. *The American Lawyer* has contributed to the sweepstakes atmosphere through its monthly *Big Suits, Big Deals* column, which culminates in an annual ranking of elite firms and lawyers.

47. *See generally* ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY (1995) (arguing that high incomes at the top have drawn too many talented people into the legal profession).Longitudinal data from the Chicago Lawyers I and II data provided tentative support for this claim, though primarily among practitioners with the lowest concentrations of business clients. *See* Rebecca L. Sandefur & John P. Heinz, *Winner-Take-*

In their book, *The Winner-Take-All Society*, economists Robert Frank and Phillip Cook argue that a wide array of professions now take this form, primarily due to increased information flows from computer and telecommunications technologies.[48] Law has been the site of spectacular changes of this kind. The Early Tournament firm emerged in an era of new office technologies—the typewriter, the telephone, the filing cabinet, the elevator, and a proliferation of organized printed material—that enabled lawyers to be more productive in servicing the demands of corporate clients.[49] From the emergence of the promotion-to-partnership firm until about 1960, the office, research and communication technology of law practice remained largely unchanged. Then in rapid succession the firm's productivity, scope, and scale were enlarged by photocopying, computers, jet air travel, faxing, the Internet, and the myriad innovations that accompanied them.

Not surprisingly, in a globalized, market-driven world, flooded with information and corresponding ignorance, there is a devouring appetite for heuristics to manage that excess. Among the most popular devices is the proliferation of publicized rank orderings of everything from pizza parlors to brain surgeons. Among large law firms, the arrival of ranking has accentuated and perhaps accelerated a shift in the economy of regard and prestige. The search for honor has shifted from the accumulation of incommensurable professional accomplishments to the currency of ranking in metrics of size, profit, and income that signify importance, success, and power and are, at most, indirectly correlated with achievements measured by avowed professional values. Of course success and power have always played a role in professional regard. But that role has become more prominent in a setting where they are measured with supposed precision and where these rankings are privileged over the less determinate and more recondite professional discourse. We shall see the role of these rankings as both a mechanism and a driving force in the ongoing transformation of the large law firm.

II. REVIEWING THE EVIDENCE OF A SECOND TRANSFORMATION

In Part I of this Article, we styled part of this process (from 1975 to the present) as a story of transition from the "classic" to an "elastic" promotion-to-partnership tournament. Part II chronicles a series of market developments over

All Markets for Legal Services and Lawyers' Job Satisfaction (Am. Bar Found. Working Paper No.9906, 1999). This may be changing, however. Since 1995, when the Chicago Lawyers II data was collected, profits per partner have risen dramatically for large law firms, and fewer lawyers are making it into the equity tier. *See infra* Part II.

48. *See* FRANK & COOK, *supra* note 47, at 47 (asserting that "the most profound changes in the underlying forces that give rise to winner-take-all effects have stemmed from technological developments in two areas—telecommunications and electronic computing").

49. *See* GALANTER & PALAY, *supra* note 14, at 7-8 (reviewing how changes in technology have consistently had large impacts on the organization and functioning of law firms).

the last three decades that corroborate our earlier claims. Section A provides evidence that a confluence of reputational capital, firm strategy, and firm size and dispersion has reshaped the promotion-to-partner tournament so that it takes different forms according to a law firm's competitive position. Section B examines how in almost all law firms two-tier partnerships have emerged as a device to mitigate competitive pressures and preserve the promotion-to-partnership tournament. Section C discusses the factors that have given rise to the age of lawyer mobility. Finally, Section D suggests the emergence of a separating dynamic based on a firm's mix of practice specialties and provides evidence that this separation process is expedited by a linkage between the elastic tournament and the associate salary wars.

A. *Firm Size, Geography, and Competition*

During the last three decades, large law firms have mushroomed in size and geographic dispersion. Although the underlying growth in the total number of lawyers is clearly driven by increases in the demand for legal services, the law firm marketplace has itself undergone a significant structural transformation. In earlier years, large corporate law firms competed primarily on a regional basis and relied upon friendly networks of out-of-town firms to oversee their clients' legal needs in other markets. With the proliferation of branch offices, a large number of national and international law firms are capable of competing for work that originates in a specific regional market. In other words, there is more work for corporate lawyers, but the anti-competitive benefits of a localized guild have, in the process, been destroyed.[50] This Section documents how firms with different levels of reputational capital have adapted (rather than scuttled) the promotion-to-partnership tournament in response to these structural changes.

As discussed earlier,[51] the original promotion-to-partner tournament implied the existence of a nonbinding but credible agreement between partners and associates. By dint of technical skill, judgment, past results (we presume), and the growth of corporate clientele, the owners of the firm had available to them more legal work than they could perform personally. This surplus work was thus offered to associates in exchange for a salary, mentorship, and the prospect of partnership. At the end of some pre-determined time period (usually six to ten years),[52] the prize of partnership was awarded to the associates who

50. *See* Heinz, Nelson & Laumann, *supra* note 10, at 348-49 (arguing that the ascendancy of inside counsel reduced the practice of outside law firms referring cases to friendly out-of-town firms and observing, "Since Chicago firms were then no longer dependent upon the goodwill of New York firms for referrals (and vice versa), there was less reason to refrain from direct competition"); *see also* HEINZ ET AL., *supra* note 2, at 299 (same).

51. *See supra* Part I.

52. *See* GALANTER & PALAY, *supra* note 14, at 100. In recent years, the average time

had performed the best in terms of high quality legal work and the production of additional excess human capital. To entice maximal effort from associates, and thus optimize its own financial interests, the firm committed itself to a routinized and meritocratic promotion process. The nonsequential nature of the agreement was mitigated by its relative transparency. Specifically, by observing the treatment of preceding classes, an associate could verify that the firm was making good on its commitment.[53]

As noted in *Tournament of Lawyers*, because each newly promoted partner requires the hiring of additional associates, the maintenance of the tournament essentially commits the firm to a long-term pattern of perpetual growth. In the years since its publication, this claim has come under heavy scrutiny.[54] Yet, as we step back and review the growth patterns of the nation's 250 largest firms based on the number of lawyers (NLJ 250), in the aggregate the predicted pattern of upward growth appears to hold true. As shown in Chart 1, each year since 1978, when the *National Law Journal* first published the NLJ 250, the average (and total) number of partners per firm has increased at a remarkably steady pace.[55] In contrast, the number of associates appears to coincide with the ebb and flow with the business cycle.

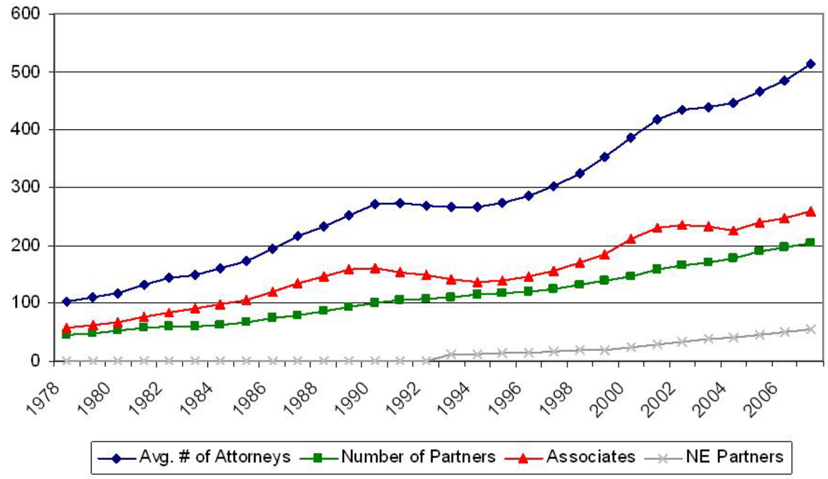
period to promotion has elongated. *See* Baker & Parkin, *supra* note 29, at 1670-72 & tbls.9 & 10 (reporting that between 1998 and 2003, the average time for promotion to partner for all firms in the Martindale-Hubbell Law Directory increased from 9.13 to 9.65 years).

53. *See* Marc Galanter & Thomas Palay, *The Many Futures of the Big Law Firm*, 45 S.C. L. REV. 905, 909-12 (1994) (discussing mutually reinforcing economics that underlie the promotion-to-partnership tournament); *see also* Leonard Bierman & Rafael Gely, *So, You Want to Be a Partner at Sidley & Austin?*, 40 HOUS. L. REV. 969, 978-86 (2003) (applying Internal Labor Market theory to a law firm partnership context and arguing that the promise of longterm security as a partner can induce younger lawyers to make firm-specific investments that benefit the firm).

54. *See, e.g.*, sources cited *supra* note 14; *see also* Robert L. Nelson, *Of Tournaments and Transformations: Explaining the Growth of Large Law Firms*, 1992 WIS. L. REV. 733, 748-49 (book review) (suggesting that tournament theory does not fit all of the empirical data and suggesting the need for other explanations); George Rutherglen & Kevin A. Kordana, *A Farewell to Tournaments? The Need for an Alternative Explanation of Law Firm Structure and Growth*, 84 VA. L. REV. 1695, 1696 (1998) (arguing that the promotion-to-partnership tournament has become "only one factor among many that contribute to the organizational structure of the large law firm").

55. Of course, the proliferation of the non-equity partnership is a significant development, which we address shortly. *See infra* Part II.B.

Figure 5. Growth of Large Law Firms / Persistence of Tournament



Yet, when the data is unpacked at the firm level, there is clearly much more to law firm growth than the expansion required to maintain a viable promotion-to-partner tournament. Among the 129 firms that appeared on the NLJ 250 in both 1979 (the first year of publication) and 2007, the average change in the number of partners ranged from +57% to +1782%. Although all of these large firms continue to maintain a multi-year partnership track[56] and pay high entry-level salaries,[57] they differ on several dimensions, including reputational capital, which in turn affects a firm's ability to attract desirable clientele and recruit lawyers with strong qualifications.[58] Firms with large endowments of reputational capital also have greater latitude in controlling the rate of firm growth or alternatively pursuing a more aggressive long-term strategy.

To examine these dynamics, we generated a scatterplot of profits per equity partner (FY 2005) and the natural log of the percent change in firm partnership

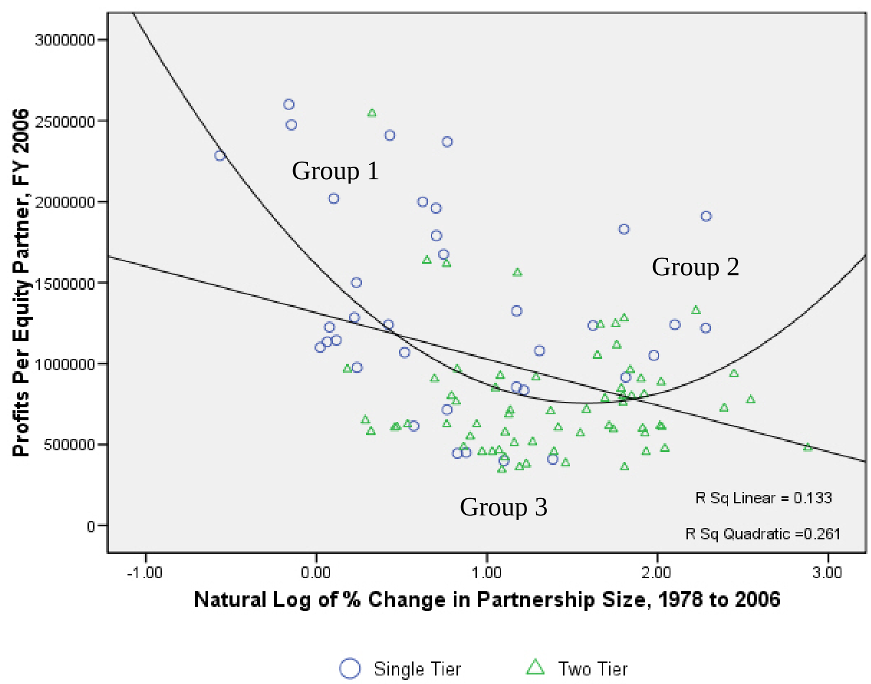
56. *See generally* NALP DIRECTORY OF LEGAL EMPLOYERS 2005-2006 (2005) (providing detailed information on over six-hundred corporate law firms, including the length of the partnership track and whether the firm has a single or multi-tier partnership structure).

57. For fiscal year 2006, the average starting salary in an NLJ 250 firm (weighted by number of associates) was $131,400 with a standard deviation of $14,900.

58. Academic commentators and journalists often discuss large law firms as if they comprise a single unitary category. In fact, different endowments of reputational capital are associated with differences in clients, practice area concentrations, incentives for specialization, recruitment strategies, utilization of non-equity partnership structures, hours worked, and remuneration for associates and partners. *See* William D. Henderson & David Zaring, *Young Associates in Trouble*, 105 MICH. L. REV. 1087, 1096-1102 (2007) (book review) (using multivariate regression and descriptive statistics to explore differences between large firms).

size between 1978 and 2006.[59] As shown by the best fitlines in Figure 6, the relationship between these two variables is best summarized as a quadratic rather than a linear function (R^2 of 0.261 versus 0.133). Following the U-shaped quadratic fit-line, the sample can be divided into three stylized groups: (1) strong reputation/slow growth firms (top left); (2) strong reputation/high growth firms (top right); and (3) medium growth firms with lesser reputational endowments (bottom middle). The firms are also delineated by tier structure because, as an empirical matter, this attribute is strongly correlated with firm prestige.[60]

Figure 6. Scatterplot of 2005 Fiscal Year PPP versus Natural Log of Percentage Change in Partnership Size, 1978-2006



Under this categorization, the first group (strong reputation/slow growth) often occupies a dominant position in capital market specialties, such as mergers and acquisitions or securities offerings. High levels of reputational capital make it mutually advantageous for firm clients and partners to remain

59. We used the natural log of the growth rate based on our assumption that the marginal benefits of growth taper off at higher levels. The comparison group here consists of 117 firms who appeared on the NLJ 250 in 1978 and 2007 (to calculate growth rate of partnerships) and were listed on the Am Law 200 for fiscal year 2005 (to make financial comparisons).

60. *See* Henderson, *supra* note 19, at 1728-29 & tbl.7 (summarizing data).

with the firm.[61] Because aggressive expansion outside this specialty area runs the risk of diluting profits (through the promotion of partners who do less lucrative work), the optimal strategy is to limit the rate of firm growth by running a highly competitive and grueling tournament for a very lucrative prize.[62] Indeed, the ten slowest growth firms appear to fit a distinct profile: (a) all but one are based in New York City; (b) they tend to have fewer branch offices and fewer total attorneys;[63] (c) they are highly profitable, with 2005 profits per equity partner (PPP) ranging from $965,000 (the non-NYC firm)[64] to $2.6 million, which is significantly higher than the $906,000 average PPP for the remaining 107 firms;[65] and (d) they tend to have a much higher ratio of associates to partners (2.59 on average) than their faster growing counterparts (1.39 on average).[66]

Firms that safely fall into the first group include Cravath, Swaine, & Moore,[67] Wachtell Lipton,[68] and Cahill Gordon & Reindel.[69] Yet, in regards to the underlying tournament, over the last thirty years, even these slow-growth firms have expanded their partnership at more than 50%. Assuming the firm partners were managing the firm according to their own financial self-interest, the expansion of the partnership was presumably part of a prudent strategy to

61. *See* Gilson & Mnookin, *supra* note 16, at 356 (opining that partners at firms with high levels of reputational capital are less likely to make higher income elsewhere, thus providing "glue" to hold the partnership together); Henderson, *supra* note 19, at 1703 (same).

62. *Cf*. NELSON, *supra* note 17, at 49 (observing that slow-growth firms tend to be highly prestigious); Heinz, Nelson & Laumann, *supra* note 10, at 352 (theorizing that the slow growth strategy appeals to firms "especially concerned to maintain the quality of their personnel and especially confident of their ability to retain clients").

63. The slower growing partnerships have an average of 399 attorneys at 6.0 branch offices; in contrast, the remaining 107 firms averaged 620 attorneys spread over 9.7 offices.

64. This firm contains a single office and is based in a city that is home to many high-tech companies.

65. Using an independent sample t-test, the PPP for the ten slowest growing partnerships was statistically different from the mean of the rest of the sample at $p < .000$ (t-statistic = 4.364).

66. Using an independent sample t-test, the ratio of associates to partners for the ten slowest growing partnerships was statistically different from the mean of the rest of the sample at $p < .000$ (t-statistic = 4.451).

67. *See* Deborah Graham, *Branch Offices Crucial in Firm's Growth Strategies*, LEGAL TIMES, Sept. 21, 1981, at 29 (reporting how Cravath Swaine & Moore is bucking the trend of adding branch offices and partners and quoting the firm's leader, stating "[we have] a different view as to the structure of the law firm and the role of the partner. . . . [Our] ability to grow is limited by the number of people we can effectively train.").

68. Thomas, Schwab, & Hansen, *supra* note 10, at 144 (describing how Wachtell Lipton has defied the authors' "Megafirm" model through "its dominant market position as the premier defense firm in the mergers and acquisitions business").

69. *The Cahill Way*, AM. LAW., July 2003, at __ (reporting on Cahill Gordon & Reindel's highly lucrative junk bond practice, how it has spurned growth in firm size and partnership, and how it has achieved profitability on par with Wachtell Lipton and Cravath, Swaine & Moore).

maintain the firm's lucrative client base and ensure the steady supply of highly qualified associates.

At the fast growth part of the continuum, the second group (strong reputation/high growth) includes high-prestige firms that have followed a "megafirm" model.[70] For example, during the mid-1980s, Skadden Arps, which currently has 1,915 total lawyers and 541 partners at 18 offices throughout the world, made a strategic decision to diversify beyond its lucrative domestic M&A practice and pursue an aggressive strategy of international expansion.[71] Although many of these foreign offices failed to produce a profit for several years—a fact decried by some of the Skadden partners who opposed the plan yet were nonetheless subsidizing it—basic cost accounting inevitably understated their value to the firm. As described by firm biographer Lincoln Caplan, Skadden's international program "depend[ed] on the amount of work generated by Skadden in the United States as a result of its foreign offices. Skadden called this 'but-for business'—the firm would not have attracted it but for one of its foreign offices."[72]

Since the late 1970s, Skadden Arps partnership ranks have increased nearly ten-fold, often through heavy reliance on lateral hiring.[73] Moreover, its profitability ($1.9 million PPP in 2005) is on par with its slow-growth counterparts. According to Caplan's account, following the downturn of the early 1990s, Skadden Arps continued to run a tournament competition for partnership, though there was a widespread perception among firm associates (and off-the-record acknowledgements by many partners) that the standards had been ratcheted up over time.[74]

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70. Thomas, Schwab, & Hansen, *supra* note 10, at 142-43 (arguing that Skadden Arps "reacted to client demand for more services by first expanding into more domestic practice areas, and then internationally to open offices in other countries" and noting that "many other rival large firms acted (or reacted) in the same way").

71. *See* LINCOLN CAPLAN, SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE 282-86 (1993) (reporting a detailed account of the firm's decision to open offices in several key international cities and quoting managing partner, "This expansion makes sense if we are going to be a major international player, which I strongly believe we should and must be").

72. *Id.* at 295 (noting that same work at Cleary Gottlieb was called "throwaway work" because the process of identifying and quantifying its value was "so difficult that it wasn't done").

73. *See, e.g.*, Edward A. Adams, *No 'Cold Calls,'* NAT'L L.J., Dec. 11, 1989, at 2 ("Skadden is thought to hire the largest number of lateral associates of any firm in the nation."); Alison Frankel, *Who's Going Global*, N.J.L.J., Nov. 6, 2000, at 33 ("Using its own successful national expansion to Chicago and Los Angeles as its guide, Skadden plans to continue to grow overseas . . . by hiring established lateral partners in cities where Skadden's expertise in mergers and acquisitions and capital markets can be exploited."); Michael Orey, *Capitalizing on Structured Finance*, AM. LAW. Apr. 1987, at 12 (noting that Skadden Arps "built its structured-finance practice through aggressive lateral hiring.").

74. CAPLAN, *supra* note 71, at 250-53 (reporting on tightening of partnership promotions and perceptions among associates that "Skadden's [partnership] was far less accessible to them than what the firm's leaders, and its recruiting videotape, had portrayed").

Between the two extremes of high and low growth is a middle ground for firms with lower initial endowments of reputational capital. Among this group, we would expect the tournament to have the greatest effect on partnership growth for the simple reason that a less lucrative partnership prize will nonetheless be competitive with more elite firms if the odds of success are higher (and thus of comparable expected value).[75] Yet, setting aside the heightened importance of tournament growth, which requires (i) steady promotions (to recruit and retain associates) and (ii) yet more hiring to maintain leverage, competition is a separate driver of growth for firms with lesser amounts of reputational capital. The lower reputation (i.e. prestige) firms will often track the geographic growth of their client base in an effort to dissuade clients from hiring rival firms.[76] Thus, the need for geographic coverage, often accomplished by merging with a smaller firm in a new market, is a non-tournament factor that will affect the size of a law firm partnership.

Table 1 lists the Top 20 markets in terms of new NLJ 250 offices over the last two decades. Inspection of this data reveals several significant changes over time. On the domestic front, the increase in the number of large firm competitors has ranged from a 27% in Washington, D.C. (171 to 218 offices)—which, in 1986, was already the nation's most prominent branch office location—to 289% (9 to 35 offices) in San Diego. More significantly, by 2006, the large law firm center of gravity shifted from Washington D.C. (218 offices) to New York City (226). Although foreign expansion appears to be occurring at a much faster rate, with a large number of new offices in key locations in Europe and Asia, the absolute number of NLJ 250 lawyers working in specific locations abroad are generally much lower than large U.S. markets. The one exception is London, which now employs 3,877 lawyers working for NLJ 250 firms; London is now the sixth largest market for all U.S.-based firms. Many of these firms are now in head-to-head competition with the British Magic Circle firms for lucrative international capital markets work.[77]

75. Stated mathematically, if an associate is risk neutral, a 10% chance of a $2 million per year partnership is valued the same as a 40% chance of a $500,000 per year prize—both have an expected value of $200,000 per year.

76. *See* NELSON, *supra* note 17, at 8 (discussing "opening of branch offices as a means of defending [a] client base").

77. *See* D. Daniel Sokol, *Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Further Study*, 14 IND. J. GLOBAL. LEGAL STUD. 5, 11 (2007) (discussing data from Chambers Global Guide and observing, "U.K. firms are under attack by U.S.-based competitors, particularly for high-end deal work that requires medium rather than large resources").

Table 1. Top 20 Markets[78] by Increase in NLJ 250 Offices, 1986 to 2006

	Number of Offices			*Number of Lawyers*		
Market	*1986*	*2006*	*Change*	*1986*	*2006*	*Change*
New York CSA	106	226	120	10,938	23,773	12,835
San Jose-San Francisco CSA	50	127	77	2,642	6,356	3,714
Los Angeles CSA	82	140	58	3,788	7,049	3,261
Washington CSA	171	218	47	5,870	15,035	9,165
Philadelphia-Camden CSA	27	72	45	1,954	3,863	1,909
London, England	38	74	36	195	3,877	3,682
Houston CSA	16	48	32	1,412	2,923	1,511
Brussels, Belgium	6	35	29	68	516	448
Chicago CSA	38	65	27	4,297	7,540	3,243
Atlanta CSA	16	43	27	999	3,741	2,742
San Diego CBSA	9	35	26	283	1,344	1,061
Beijing, China	3	27	24	4	213	209
Frankfurt, Germany	1	24	23	22	660	638
Tokyo, Japan	4	27	23	25	519	494
Boston CSA	20	42	22	1,850	4,296	2,446
Miami CBSA	43	65	22	655	1,923	1,268
Charlotte CBSA	2	22	20	109	981	872
Shanghai, China	2	21	19	2	194	192
Moscow, Russia	0	17	17	0	351	351
Dallas-Fort Worth CSA	29	45	16	1,638	2,954	1,316

Expanding into a new geographic market is often an expensive, money-losing proposition, at least for the first few years,[79] and lawyers at the firms' larger and more established offices often perceive the new satellite operations as dilutive of firm profits.[80] Thus, the need to get the office on solid financial

78 For locations in the U.S., our definition of markets rely upon metropolitan areas rather than municipal boundaries. Under the system adopted by the Census Bureau in 2003, metropolitan areas are delineated by Core-Based Statistical Areas (CBSA). Where more than one CBSA are adjacent to one another and commuting patterns suggest interrelated labor markets, the CBSAs are bundled into a single Consolidated Statistical Area (CSA). If the location fell within a CSA, it was coded accordingly; otherwise, we used the CBSA code. Foreign offices were coded using a scheme we created.

79. *See, e.g.*, Heather Smith, *Branch Office Basics*, AM LAW., Oct. 2003, at 57 (discussing due diligence conducted by many experienced legal insiders before committing to a branch office because "[n]ew offices and practices are expensive to establish, and if they don't become profitable, they can be big drains" on firm); Sherry R. Sontag, *Opening Offices Overseas: Does the Payoff Warrant the Huge Expense?*, NAT'L L.J., Feb. 12, 1990, at 1 (reporting advice of consultants and law firm managers that "many firms opening offices [overseas] can expect to lose money for more than five years" and that profitability time horizon for new U.S. branches is usually "two to three years").

80. Thomas S. Clay, *Branch Economics: The Decision to Open a New Office Should be Based on Hard Data*, LEGAL TIMES, Mar. 18, 2002, at 48 (reporting on how economic

footing inevitably heightens competition within a local market not only for clients but also for lawyers with portable books of business. Although national law firms compete with other national law firms, the battle for partners is stunningly local—between 2000 and 2005, 96.8% of all lateral movement among the Am Law 200 occurred between offices in the same geographic market.[81] Indeed, over the last two decades, the level of competition among corporate law firms has ratcheted up dramatically. Firms may be getter larger, but they are also getting more fragile.

B. *Tier Structure and the Tournament*

In a competitive marketplace in which rainmaking partners have abundant opportunities with cross-town rivals, expanding the partnership runs the risk of diluting profits and prompting the exit of key lawyers. In turn, large scale defections can threaten the survival of the firms.[82] To examine how these heightened competitive pressures affect the promotion-to-partnership tournament, we calculated the proportion of NLJ 250 firms with a partnership that shrank from the prior year. Because the promotion of partners to a non-equity tier has less economic consequences for rainmaking partners, and thus may mitigate the pressure to shrink the partnership, we also calculated the proportion of NLJ 250 partners who were categorized as nonequity. The results for 1984 to 2006 are summarized in Figure 7.[83]

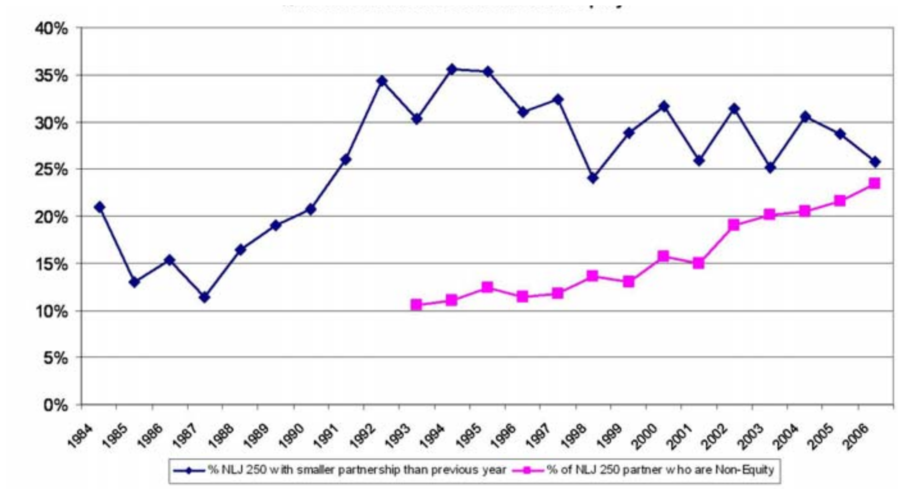
performance of branch offices is a source of discord within large firms).

81. We calculated this figure using a file of lateral partners maintained by American Lawyer Media. We coded branched offices using the U.S. Census Bureau FIPS codes for metropolitan area. An electronic newsletter published weekly by Hildebrandt International, Inc. corroborates the relationship between new branch offices and heightened local competition. *See supra* note 41 (reporting 249 examples between January 2005 and July 2007 of lateral movement involving two or more lawyers with average of 7.5 lawyers per movement).

82. *See, e.g.,* WILLIAM G. JOHNSTON, INTERNATIONAL, INC., ANATOMY OF LAW FIRM FAILURES 14-16 & exh.A (2004) (concluding that partner defections were catalysts in numerous large firm dissolutions between 1998 and 2004).

83. We begin the analysis with fiscal year 1984 because from that year forward, at least 231 firms in any year also appeared on the NLJ 250 for the prior year. Prior to 1984, the largest number of repeat NLJ 250 firms was 194. In 1994, the NLJ began collecting data on nonequity partners.

Figure 7. % of NLJ 250 Partnership that Shrank from Prior Year, % NLJ 250 Partners who are Non-Equity



Review of this data suggests at least three striking patterns. First, in any given year there are a relatively large number of NLJ 250 law firms—25 to 30% in recent years—with shrinking partnerships. These patterns could be the result of several factors, including law firm demographics, lateral departures, significant de-equitizations, or a weakening commitment to the promotion-to-partnership tournament. Second, shrinking partnerships became much more prevalent between the late 1980s and mid-1990s (when the nation was in a recession and the law firms were struggling)[84] and gradually leveled off at a higher overall level than twenty years earlier. Third, this leveling-off—albeit still at a relatively high 25%—coincides with the significant growth in the proportion of NLJ 250 partners who are non-equity and thus are not true owners of the firm.[85] Between 1993 and 2007, the number of NLJ 250 firms reporting at least one non-equity partner increased from 42.4% to 74.8%.[86] More tellingly, for fiscal year 2005, the number of equity partners in the Am Law 200 was 26,903, a gain of only 148 from the prior year (26,755). In

84. Indeed, Sol Linowitz, one of the leading lawyers of his generation, observed that large firm revenues declined during early 1990s and that in response, "New York's Milbank Tweed and Willkie Farr and Chicago's Winston & Strawn and a number of other firms got rid of partners." SOL M. LINOWITZ, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 185 (1994).

85. *See supra* note 83.

86. Note that this figure probably understates the true magnitude of the shift to non-equity partnerships. Since 1994, approximately two dozen NLJ 250 firms have declined to provide a breakdown between equity and non-equity partners. We suspect this is because it would reveal significant changes in the firm's internal structure toward a larger non-equity tier. *See also* Henderson, *supra* note 19, at 1695 (documenting rapid movement toward two-tier or multi-tier partnerships).

contrast, for the same time period, the number of non-equity partners increased from 10,780 to 12,235—a 13.5% jump.

In many fundamental respects, during the last two decades, the implicit contract underwriting the promotion-to-partnership tournament has been rewritten by law firms attempting to retain their most valuable assets—the human capital of partners and associates. In essence, the prize of equity partnership, which includes the traditional prerogatives of ownership, is increasingly rare. In a recent qualitative empirical study, which interviewed lawyers at ten NLJ 250 law firms, Kimberly Kirkland observed that the threshold question in promotion to equity partner is not necessarily whether the lawyer "finds" or "binds" clients to the firm, but whether failure to promote will cause the person to leave the firm with clients in tow.[87] Further, even if partnership is attained, the prevalence of large scale deequitizations[88] has eroded the expectation that the equity prize includes "lifetime tenure with the firm."[89]

In this more competitive landscape, it is the partners rather than associates who bear the brunt of the changes. According to longitudinal data collected by the Altman Weil consulting firm, between 1985 and 2003, the average billable hours for associates has consistently hovered at the 1,850 level. Yet, during this same period, the billable hours for partners in their 25th to 29th year has steadily climbed from 1538 to levels consistently over 1,700.[90] Perhaps the simplest explanation for these trends is the specter of de-equitization, which causes partners to work harder. Conversely, the plight of partners could be having an effect on associates—why bill more hours when the payoff of partnership is increasingly less attractive?[91]

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87. *See* Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 694 & n.227 (2005) (quoting law firm equity partner, "the first question that is asked [in the partnership decision] is will [the lawyer] leave if we don't make him a[n equity] partner").

88. *See* ROBERT W. HILLMAN, LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNERS WITHDRAWALS AND LAW FIRM BREAK-UPS § 1.2 (1998) (2004 supp.) (reporting that "[d]ownsizing of law firms through dismissal of partners is occurring with a frequency and expeditiousness unknown in the past"); *see also* REGAN, *supra* note 7, at 47 (discussing how de-equitizations at Milbank Tweed in 1987 reflected a sea change in firm's culture); Gina Passarella, *De-Equitization Persists Despite Better Economic Times For Firms*, RECORDER, Oct. 11, 2006, at 2 (reporting on persistence of de-equizations despite strong economy and law firm growth); Gina Passarella, *Jenner & Block Will De-Equitize Partners*, NAT'L L.J., June 7, 2007, at __ (reporting that between 15 and 20 Jenner & Block attorneys would be moved to the non-equity tiers and that Chicago-based competitor Mayer Brown recently de-equitized 45 partners).

89. REGAN, *supra* note 7, at 25 (discussing benefits of Wall Street law partnerships during 50s and 60s).

90. *See* Henderson, *supra* note 19, at 1710 (citing *2004 Altman Weil Survey of Law Firm Economics*).

91. Indeed, at $160,000 per year, a slacking associate can pay off his or her entire legal education before firm management broaches the issue of underperformance. Cf. KERMIT ROOSEVELT, IN THE SHADOW OF THE LAW (2005) (suggesting that large paychecks entice

Despite this fundamental shift in what it means to be partner in a major corporate law firm, there is contemporary empirical evidence that the promotion-to-partnership tournament remains an apt metaphor for describing how large firms recruit and retain high quality associates. Drawing upon a dataset of midlevel associates at Am Law 200 firms, which included detailed information on associates' working conditions and firm financial performance, a recent empirical study (conducted by one of the authors) used multivariate regression analysis to explore several factors that are likely to affect associate attrition.[92] The results display a relatively intuitive and unambiguous set of tradeoffs. A higher likelihood of staying with the firms for two years or longer was associated (at statistically significant levels) with: (a) more interesting work; (b) higher "quality" work, presumably because it enhances an associate's human capital; (c) shorter work weeks; (d) a more family-friendly workplace; (e) a higher ratio of non-equity to equity partners, presumably because it increased the odds of "making partner"; and (f) greater communication regarding partnership prospects.[93] After controlling for all of these factors, combined salary and bonus had no statistical relationship to midlevel associate's desire to remain with the firm. Rather, the economic carrots appear to be partnership, substantively interesting work (which is associated with lower firm profits!),[94] and/or enhancing one's options elsewhere through assignment to higher quality work.

C. *Partner Mobility*

According to Leslie Corwin, the author of the leading treatise on law firm partnership agreements,[95] we are now in "the age of attorney mobility."[96] This new environment, which is widely blamed for many professional ills,[97] is a product of two distinct but interrelated factors: (1) a surge in demand for specialized corporate legal services; and (2) an increased transparency as to the value of those services, both through advanced information systems for firm

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many young lawyers to take large firm jobs with the clear intention of shirking and leaving).

92. *See* Henderson & Zaring, *supra* note 58, at 1102 & tbl.5.

93. *Id.*; *see also* Amy Kolz, *Can You Hear Me Now?*, AM. LAW., Oct. 2005, at 107 (reporting results of annual survey of 3rd, 4th, and 5th year associates and noting that "[a]mong the 12 categories we use to determine our rankings, communicating what it takes to make partner had the lowest average score (2.93 on a scale of 5)").

94. *See* Henderson & Zaring, *supra* note 58, at 1100-01 & tbl. 4 (discussing results of a multivariate analysis of law firm profitability that used same Am Law midlevel associate data).

95. LESLIE D. CORWIN & ARTHUR J. CIAMPI, LAW FIRM PARTNERSHIP AGREEMENTS (1998).

96. Leslie D. Corwin, *Response to Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms*, 55 WASH. & LEE L. REV. 1055, 1056 (1998).

97. *See, e.g.*, ANTHONY T. KRONMAN, THE LOST LAWYER 277 (1993).

management clients, and the aggregation of detailed financial information through the legal press and law firm consultants.[98] Like all markets, the infusion of new and better information inevitably advantages the buyer, thus driving down price to the marginal cost of production. In short, a substantial portion of corporate legal services—but not all—is in the process of being commoditized. After sketching out some of the key milestones in the maturation of the lateral partner market, we present empirical evidence that suggests the emergence of a separating dynamic that hinges on a firm's relative mix of practice specialties.

The age of lawyer mobility is the antithesis of the so-called "Golden Era" of big law firms (circa 1960). During this time period, the prosperity of major firms was primarily the result of close and longstanding ties with major corporate clients.[99] With high profit margins and negligible international competition, corporations had little incentive to forgo the benefits of an established relationship with an outside law firm in search of comparable services at a lower price. As U.S. corporations grew in size and geographic reach, and regulatory compliance and civil litigation became large and perennial expenses, company lawyers were given greater latitude to scrutinize the fees of outside counsel and, if cost-justified, hire additional lawyers to perform the work in-house.[100] With the growing prominence of corporate general counsel, who had company mandates to control costs and the sophistication to assess and prioritize the company's legal needs, hiring outside counsel was increasingly limited to matters requiring expertise.[101] Moreover, when looking for this expertise, the search became more focused on the best lawyer rather than the best firm.[102]

During the 1970s, one of the most sought after specialties was merger and

98. Access to key benchmarking information is not limited to *The American Lawyer* and the *National Law Journal*. For example, the Law Firm Group at Citibank, which often has negotiated access to law firm information systems, conducts a detailed annual benchmarking process for law firms. In the most recent survey, over 90% of Am Law 100 firms participated. *See* Citi Private Bank: The Law Firm Group, *http://www.citibank.com/privatebank/law_firms_9.htm* (last visited Nov. 29, 2007).

99. *See* GALANTER & PALAY, *supra* note 14, at 33-34.

100. LINOWITZ, *supra* note 84, at _ (discussing how higher legal costs cause many large corporations to "build" rather than "buy" necessary legal inputs); Heinz, Nelson, & Laumann, *supra* note 10, at 347-48 (discussing how bureaucratization of in-house lawyer role reduced the role of outside law over corporate decision-making).

101. *See* GALANTER & PALAY, *supra* note 14, at 50 ("In their relationship with outside law firms, today's enlarged corporate legal departments impose budgetary restraints, exert more control over cases, demand periodic reports, and engage in comparison shopping among firms."); Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 856 (1998) (reporting large in-house departments have turned corporations into "unprecedentedly informed consumers of professional services").

102. REGAN, *supra* note 7, at 33 (noting that companies are now "more concerned with retaining individual lawyers than specific firms"); Gilson & Mnookin, *supra* note 16, at 385 ("The catchphrase now is: 'Shop for a lawyer, not a law firm.'").

acquisition counseling for corporations seeking to acquire (or fend off) another company in a hostile takeover bid. Remarkably, the established Wall Street firms were reluctant to either take the work, or alternatively, resort to the highly aggressive tactics that could achieve their clients' objective—typically the acquisition of a grossly undervalued company (often due to complacent management) or the retention of corporate control in ways that pitted corporate officers against the majority of shareholders.[103] As a result, this work flowed to several upstart firms such as Wachtell Lipton and Skadden Arps, which were disproportionately comprised of Jewish lawyers who were shunned by "white shoes" despite their strong Ivy-League credentials.[104] Eventually, Wall Street firms that retained Skadden or Wachtell on behalf of longtime clients noticed the fees piling up and began in earnest to acquire these specialties themselves, thus expediting the erosion of longstanding firm-client relationships.[105] By 1976, when the takeover era entered full swing, *New York* magazine quoted "one top lawyer" as saying, "Joe [Flom has] done the most magnificent thing anyone's ever done in the law business. He's broken the link between the old investment banking firms and blue-chip companies and their Wall Street lawyers."[106]

In 1977, the Supreme Court ruled in *Bates v. State of Arizona*[107] that the traditional state bar restrictions on lawyer advertising were in violation of the First Amendment. Almost immediately, lawyers became more willing to discuss their cases and opinions with the press.[108] The following year, *The American Lawyer* and the *National Law Journal* launched publication and ushered in a completely new era of legal journalism that chronicled the business of law, including lawyer incomes, firm strategy, and other market trends.[109] The first issue of *The American Lawyer* set the tone by focusing on a taboo topic that was rarely discussed in public: how much money lawyers

103. *See* CAPLAN, *supra* note 71, at 63-73 (discussing rise of M&A practice and reluctance of established Wall Street firms to get involved, even when clients were under seize by corporate raiders).

104. On the demise of the barriers against Jewish lawyers in the world of large New York firms, see Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. __ (2008).

105. CAPLAN, *supra* note 71, at 71.

106. *Id.* at 71 (quoting *New York* magazine story).

107. 433 U.S. 350 (1977).

108. *See* GALANTER & PALAY, *supra* note 14, at 71 (noting that "*Bates* liberated lawyers to talk to the press about their practices, for they no longer feared being accused of advertising"); LINOWITZ, *supra* note 84, at __ (former general counsel for Xerox Corporation blaming *Bates* for the erosion of professional values and the excessive focus on law firm finances).

109. *See* Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1254 & n.133 (1995) (reporting on emergence of these publications and collecting sources on their origins).

made.[110] The headline for the feature story read, "Flom Firm Takes over as Top Money Maker in '78,"[111] which reinforced the perception that a strong mergers and acquisitions practice was key to a firm's financial performance.

During this same time period, the *National Law Journal* began its perennial practice of listing the 250 largest firms by the number of lawyers. By the mid-1980s, *The American Lawyer* began its annual ranking of law firms by total revenues, which also included a breakdown by profits per partner.[112] Thus, within a few short years, lawyers gained the ability to evaluate the adequacy of their own pay by comparing it to cross-town rivals. Simultaneously, because of the ascendancy of the in-house general counsel (now commonly referred to as "chief legal officers"),[113] who now assumed a much greater role in controlling costs and achieving desirable legal outcomes for the cost, clients' loyalties were much more likely to run to specific lawyers than specific law firms. Thus, the combination of the shifting client loyalties and better financial information made it possible for many partners to garner the market rate for their services by switching (or threatening to switch) firms.[114] For example, at Skadden Arps, which was highly profitable and anxious to expand, the annual publication of its financials by *The American Lawyer* was viewed as an effective way to attract lateral partners to the firm.[115] As Skadden opened new branch offices, it

110. CAPLAN, *supra* note 71, at 80.

111. *Id.*

112. This list began in 1985 as the Am Law 50. It was expanded to the Am Law 75 in 1986, the Am Law 100 in 1987, and the Am Law 200 in 1999.

113. This systemic change between 1975 and 1995 is observed in the Chicago Lawyers II study. *See* HEINZ ET AL., *supra* note 2, at 297-99 (asserting that a "key factor in weakening the ties between law firms and their clients was the changing role of corporate inside counsel" who by 1995 increasingly "mediate the relationships between outside lawyers and corporate management, monitor and evaluate the performance of outside lawyers, review billings of law firms, and exercise judgment about whether the charges are excessive"); LINOWITZ, *supra* note 84, at 82-83 (asserting that proliferation of legal issues during post-World War II era meant "no single outside lawyer could answer the chief executives' questions about how some piece of law or regulation is going to affect the business" and perceived best solution was to have in-house general counsel "become a mediator between management and the outside lawyers hired by the company to resolve particular problems").

114. *See* HILLMAN, LAWYER MOBILITY, *supra* note 88, at §1.1 & n.12 (2002 supp.) (collecting sources for the proposition that "increased mobility has permitted lawyers with the ability to transport clients and revenues to demand a larger share of firm income").

115. *See* CAPLAN, *supra* note 71, at 99 (reporting on firm's shrewd use of legal press). Further, profiles of successful lawyers at other firms were often used as a means of identifying lateral candidates "for acquisition." Id. (quoting firm managing partner). *See also* Bruce E. Aronson, *Elite Law Firm Mergers And Reputational Competition: Is Bigger Really Better? An International Comparison*, 40 VAND. J. TRANSNATIONAL L. 763, 770 n.11 (2007) ("Changes in the law firms' operating environment and the firms' responses to such changes can be conveniently tracked by the growth and expansion of the legal press. In the early 1980s, the legal press began to provide extensive coverage on what had generally been private matters within firms."); Marc Galanter, *The Legal Malaise; Or, Justice Observed*, 19 L. & SOC'Y REV. 537, 547 (1985) (discussing advent of "*National Law Journal, The*

routinely poached partners from the city's leading law firms.[116]

With the increased sophistication and bureaucratization of corporate legal departments, general counsel became less reliant on law firm referral networks to find capable lawyers in other cities. Thus, increasingly, large corporate law firms based in different U.S. cities became competitors for national work. As a result, the opening of branch offices became an important means of defending a firm's (or powerful partner's) client base. Staffing these new offices has surely accelerated the pace of lateral mobility.[117]

Similarly, the advent of the computer and sophisticated software has profoundly influenced the behavior of the market participants. Increasingly, the financial performance of a firm is tracked internally on an office-by-office, practice-group-by-practice group, lawyer-by-lawyer level.[118] Under the widely acclaimed Du Pont Legal Model[119] for managing a corporation's outside law firms, general counsels are demanding that law firms utilize specific proprietary software so that it can control and share information and work product among other outside firms.[120] With the interconnectivity of business over the Internet, a large proportion of clients are demanding that law firms submit their bills electronically using a standardized format that facilitates firm to firm comparisons on similar matters.[121] Thus, from virtually every

American Lawyer, [and] *Legal Times*" during the late 1970s that provided details of law firms developments and finances that "all but a few insiders or dedicated students could have known a few years back"); PAUL HOFFMAN, LIONS OF THE EIGHTIES: THE INSIDE STORY OF THE POWERHOUSE LAW FIRMS 340 (1982) (author who wrote two journalistic accounts of elite law firms in the early 1970s and 1980s noting the rise of the legal press and commenting, "What a difference a decade makes! In contrast to the author's research for *Lions in the Street*, no law firm slammed the door in his face, no lawyer stonewalled.").

116. *See id.* at 99-100.

117. *See supra* note 81 and accompanying text.

118. *See* Susan Saab Fortney, *Soul For Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 247 & n.40 (2000) (discussing emergence of new software that tracks billable hours, collection rates, and profitability of specific matters); Bruce A. Green, *Professional Challenges in Large Firm Practice*, 33 FORDHAM URB. L.J. 7, 21-22 (2005) (citing comments of law firm partner during conference proceedings).

119. The Du Pont Legal Model is a specific set of guidelines to assist large corporate legal department's in the management of outside counsel. *See* http://www.dupontlegalmodel.com/competitiveedge.asp# (follow "Information Technology—The EDGE" hyperlink) (last visited Nov. 30, 2007) ("The heart of strategic partnering [with outside law firms] at DuPont is knowledge transfer and communication.").

120. *See* Milton C. Regan, Jr., *Law Firms, Competition Penalties, And The Values Of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 53 & nn. 277, 282 (discussing features and influence of Du Pont Model, including adoption of technology to facilitate information sharing).

121. *See* James Evangelista, Teresa Stange, & Kelley Johnston, *Electronic Billing Offers Advantages*, NAT'L L.J., Sept. 29, 2005, at __ (reporting on wide adoption of this technology by Fortune 100 companies and that "the vast majority of the top 200 U.S. law firms are sending electronic invoices to one or more clients"); Rob Thomas, *Managing Outside Counsel, New Survey Reveals Clients Are Imposing More Constraints On Their Law*

perspective, the economic contribution of specific lawyers or law firms has become more measurable and transparent.

Under the emerging elastic tournament model, entry into the inner core of equity partnership requires that a lawyer possess an excess of human capital that can be profitably exploited by the firm. If that human capital is more valuable at a cross-town rival—for example, there is a different mix of practice groups that creates more opportunity for cross-selling, or the firm has more reputational capital, which permits the lawyer to charge higher fees—then the lawyer may switch firms. Alternatively, an equity partner can be forced out of the inner core (de-equitized) if he or she loses an important client or a change in the law wipes out his or her practice specialty.[122] Indeed, firms are likely to take these steps preventively in order to avoid the dilution of profits and the defection of equity partners with much larger books of business.[123] Growing disparities in billing rates due to evolving market rates for specific practice specialties can also create tensions within the inner core, causing some equity partners with large books of business in less lucrative practice areas to depart for a smaller or less elite firm.[124] Although law firm culture may mitigate these economic tensions, its influence inevitably becomes weaker as law firm partnerships become larger and more geographically dispersed.[125]

D. *The Emerging Equilibrium*

If the market for corporate legal services is in the process of becoming

Firms, LEGAL TIMES, Nov. 17, 2003, at 22 (reporting that growing numbers of in-house counsel are requiring electronic billing to obtain "direct access to financial data for each matter and [enable] . . . automated systems to audit bills and compare actual spending with budgets").

122. Kirkland, *supra* note 87, at 675 (reporting on pressures faced by lawyers who lose important clients and observing that lawyer's standing in firm is contingent on his relationship with his clients).

123. *See* Henderson, *supra* note 19, at 1743 (noting that primary benefit of two-tier partnership is not necessarily higher profits but heightened stability through a structure that privileges rainmakers).

124. Kirkland, *supra* note 87, at 675 (reporting that when rates exceed what a partners' clients are willing to pay, "[t]his partner must either find new clients or resign and take his existing clients to a firm that charges lower rates").

125. HEINZ et al., *supra* note 2, at 304 (observing that norms of cooperation and collegiality require a small number of ties and that law firm growth makes it unlikely that these norms will survive); REGAN, *supra* note 7, at 39 (noting that "sheer size" of modern law firms makes consensus impractical); Suchman, *supra* note 101, at 857 ("As law firms grow and diversify, informal social structures and face-to-face contacts no longer suffice to bind these organizations together, and a new regime of formal hierarchy, record-keeping, and evaluation has begun to emerge."); *see also* Paul C. Saunders, *When Compensation Creates Culture*, 19 GEO. J. LEGAL ETHICS 295, 296-97 (2006) (partner from Cravath Swaine & Moore, which has a relative small partnership that relies upon lockstep compensation, opining that the eat-what-you-kill system undermines "collegiality and partnership" and may even create an unethical culture).

more atomized, with fewer barriers to competition imposed by geography, client loyalties, information asymmetry, or norms of collegiality, it is worth considering the likely contours of the emerging equilibrium. Fortunately, to explore this issue, we have been given access to a unique dataset of lateral partner movement maintained by ALM, Inc.[126]

The sample, which was built primarily from news releases at each lawyer's new firm, includes 14,338 lawyer movements from January 2000 through December 2005. In general, lateral movement appeared to be ramping up during this six-year period, starting with the lowest volume (1,998 movements) in 2000 and ending with highest (2,752) in 2005. The majority of lawyers (the overwhelming majority of whom were partners or members) were joining an Am Law 200 law firm. The total volume breaks down as follows:

- *Moving to Large Law Firm.* 50.2% were leaving a firm (occasionally through acquisition or merger) or a position as an in-house or government lawyer to join an Am Law 200 firm;
- *Intra-Am Law 200.*28.3% were moving within the Am Law 200;
- *Moving from Large to Small or Medium-Sized Firms.* 18.4% were exiting the Am Law 200 for smaller firms;
- *Movement Between Small and Medium-sized Firms*. 3.1% were leaving jobs with government, business, or a small or medium size firm for a firm that was not in the Am Law 200.

If a law firm that was left or joined was in the Am Law 200 during the year that the lateral movement occurred, we were able to match it with corresponding financial and demographic data, such as firm size and profits per partner. In total, 4,056 movements had profitability data for both the firm left and firm joined.

Most cases also included office left and office joined. To ensure that locations track regional labor markets, we recoded each office location based on the Census Bureau FIPS codes for metropolitan area.[127] 55.6% of the total movement was in the five largest U.S. legal markets: New York CSA (2,264), Washington D.C. CSA (2,017), Chicago CSA (947), San Francisco CSA (870), and Los Angeles CSA (684). Foreign locations (10.1%) and the remainder of the U.S. (34.3%) comprised the balance. As noted earlier,[128] 96.8% of all lateral movement is within the same regional labor market.

Finally, most of the observations included the name of the law firm practice group joined, which we sorted into twelve discrete practice areas plus an "other" category for highly specialized niches. Building upon the common perception that corporations now shop for lawyers rather than law firms, we theorized about the possibility of a separating dynamic, in which lawyers in

126. ALM, Inc., is a media conglomerate that publishes *The American Lawyer*, *The National Law Journal*, and several regional and topical publications on the legal profession.

127. For an explanation of metropolitan area coding , see footnote 78, *supra*.

128. *See supra* note 81 and accompanying text.

lucrative, marquee practices that bind the client to a firm, tend to move up to more profitable firms. Conversely, all else equal, other less favored practice areas tend to move to less prestigious or profitable firms.[129] Over time, firms with a less lucrative mix of practice specialties may be less able to characterize themselves as large general service law firms, or at a minimum, keep pace with the top of the market in the associate salary wars.

Table 2. Mean Profits per Partner of Lawyer Partners, by Practice Specialty, 2000 to 2005

PRACTICE AREA	FIRM LEFT	FIRM JOINED	DIFFERENCE	N	% OF TOTAL
White Collar & Securities Enforc.*	$721,837	$1,009,490	$287,653	49	1.2%
M&A, Cap. Mkts., Emerging Bus*	$804,980	$919,644	$114,664	253	6.2%
Intellectual Property*	$693,272	$781,620	$88,348	460	11.3%
Antitrust	$857,089	$944,114	$87,025	79	1.9%
Labor & Employment	$610,426	$665,019	$54,593	270	6.7%
Bankruptcy	$717,895	$734,386	$16,491	114	2.8%
Corporate Securities	$750,831	$766,159	$15,328	686	16.9%
Litigation	$735,033	$738,620	$3,587	598	14.7%
Other	$733,510	$736,464	$2,953	386	9.5%
Business Law	$836,592	$801,757	-$34,835	515	12.7%
Regulatory*	$700,583	$657,222	-$43,361	360	8.9%
Real Estate, Public & Project Finance*	$764,480	$708,100	-$56,380	250	6.2%
Trusts & Estates*	$766,806	$608,889	-$157,917	36	0.9%
Group Total	$742,563	$759,257	$16,694	4056	100%

* Statistically Different from Group Mean at $p < .01$

Table 2 presents a breakdown of practice specialties for the 5,096 lawyers who moved between Am Law 200 law firms during the observation period. The table is ordered by the difference in profits per partner (PPP) between the firm joined and the firm left. For the sample as a whole, there is a movement toward more profitable firms (from $742,563 to $759,257). Yet, when the data is disaggregated, both the magnitude of the gain (or loss) and the relative starting position of the firm left appear to be strongly influenced by practice setting. Consistent with our hypothesis, lateral lawyers with capital market or M&A experience tend to lateral to more lucrative firms. Similarly, in time periods of heightened perceptions of corporate wrongdoing, partners specializing in white

129. We theorized that some practice specialties, particularly those involving the capital markets, tend to be more remunerative and place those lawyers in direct contact with high-level corporate executives. Therefore, they commanded a price premium in the lateral market. Conversely, some practice specialties, such as labor and employment, may be more susceptible to price pressure from in-house counsel, which could generate tensions with partners in firm's marquee practices. *See* Kirkland, *supra* note 87, at 672-75 (discussing how tensions arise between practice groups over conflict checks and differing fee structures).

collar crime or securities enforcement litigation (i.e., involving investigation by the SEC) appear to have been in high demand. Conversely, lawyers in real estate, regulatory practice, and trusts & estates were, on average, moving from firms of above average profitability to those that were below average.

To draw a sharper picture of these dynamics, we specified a linear regression in which the dependent variable was the natural log of the profits per partner of the firm joined (PPP_{joined}). Because relative starting position presumably affects a partner's incentive to pursue a lateral offer (or a decision to de-equitize), we included the natural log of PPP_{left}.[130] To assess the effect of specific practice specialties, we included indicator variables for each practice group, with the exception of litigation, general business, and "other." We deleted these three categories from our specification on the theory that virtually every law firm maintains practitioners in these areas; thus, they would make an appropriate reference group. Finally, to control for the effect of regional labor markets, we included dummy variables for the five largest U.S. legal markets.

Table 3. OLS of Natural Log PPP (firm joined)

VARIABLE	B	STD. ERROR	P-VALUE
(Constant)	-106.968	8.356	0.000
LN_Left	0.256	0.015	0.000
Fiscal Year	0.058	0.004	0.000
Joined DC Firm	0.047	0.017	0.005
Joined NYC Firm	0.138	0.016	0.000
Joined Chicago Firm	-0.016	0.023	0.484
Joined San Francisco Firm	0.191	0.023	0.000
Joined LA Firm	0.132	0.024	0.000
Regulatory	-0.113	0.022	0.000
Antitrust	0.131	0.042	0.002
M&A, Private Equity, Venture Capital	0.166	0.026	0.000
Intellectual Property	0.053	0.019	0.005
Labor & Employment	-0.083	0.024	0.001
Real Estate, Public & Project Finance	-0.071	0.025	0.004
White Collar & Securities Enforcement	0.267	0.051	0.000
Trusts & Estates	-0.153	0.064	0.017
Corporate Securities	0.026	0.017	0.139
Bankruptcy	-0.014	0.035	0.701
N	3,553		
ADJUSTED R^2	26.6%		

The regression results, which are set forth in Table 3, are consistent with our initial hypothesis. Marquee specialties such as M&A, private equity, white

130. We used the natural log transformation for both PPP_{left} and PPP_{joined} to eliminate estimation error associated with nonrandom distribution of errors (i.e., heteroskedacity).

collar crime/securities enforcement, antitrust, and intellectual property are all associated with a substantial premium for lateral movement. In contrast, labor & employment, real estate/public & project finance, trust and estates, and regulatory work are all associated with a price discount. Only bankruptcy had no statistical relationship with profits at the firm being joined.[131]

Table 4. Lateral Movement, Upstream or Downstream, by Practice Area

Practice Areas	Downstream	Upstream	% Upstream
White Collar and Securities Enforcement Litig*	40	145	78.4%
M&A, Capital Markets, Emerging Businesses*	177	620	77.8%
Intellectual Property*	342	1,031	75.1%
Corporate Securities*	599	1,544	72.0%
Antitrust	68	171	71.5%
Litigation	756	1,740	69.7%
Real Estate, Public & Project Finance	298	660	68.9%
Business Law	503	1,065	67.9%
Labor & Employment	234	485	67.5%
Bankruptcy	413	768	65.0%
Regulatory*	101	183	64.4%
Trusts & Estates*	68	95	58.3%
Other*	843	948	52.9%
All Practice Groups	4,442	9,455	68.0%

* Statistically Different from Group Mean at $p < .01$

Finally, to get a picture of the broader corporate law marketplace, which includes movement both in and out of the Am Law 200, we also calculated the proportion of lateral movement by practice area that was (a) to a more profitable firm within the Am Law 200, or (b) from a smaller firm to one in the Am Law 200.[132] These data, which are summarized in Table 4, further corroborate a separation in which lateral lawyers in certain practice specialties are more (or less) likely to join a larger and typically more profitable firm. Similar to our regression results on movement within the Am Law 200, a disproportionate number of laterals who work in M&A, private equity, white collar and securities enforcement litigation, corporate securities, and

131. There is also significant regional variation. Compared with the rest of the sample, lateral movement was associated with large gains in New York, L.A., and San Francisco, and a more modest gain in Washington, D.C. In contrast, in Chicago, there was no price premium associated with lateral movement. This may be the result of the prevalence of two-tier firms in the Chicago market, *see* Cindy Collins, *Anchoring Associates*, OF COUNSEL, Nov. 2, 1998, at 17 (referring to Chicago as the "land of two-tier partnerships" because of its early adoption by many of the city's leading firms), and/or a disproportionate number of de-equitizations, which has prompted substantial downstream movement.

132. Note that the sample includes some small firm lawyers who joined a larger firm as the result of a merger or acquisition.

intellectual property appear to be in demand as evidenced by their disproportionate upward movement. Conversely, lawyers more likely to move downstream include those working in regulatory practices, trusts and estates, or other niche specialties. Presumably, this pattern is a function of greater price sensitivity in these practices areas and/or fewer opportunities to originate additional business for the firm.

For decades, virtually all large law firms have operated under some variant of the "Cravath system," in which the entry level ranks were filled by the best available (and acceptable) graduates from the best schools.[133] The upshot of this practice is a remarkable uniformity of starting salaries across major markets.[134] Yet, the reshuffling of lateral lawyers by practice area concentrations suggests the likelihood that the market for entry level talent will eventually divide into elite and semi-elite sectors. Specifically, as the demand for corporate law firm associates continues to escalate, the most profitable firms are in the best position to recruit a more lucrative mix of practice areas through the lateral market. In turn, the surplus of high margin work enables these same firms to compete more effectively in the associate salary wars. This dynamic is consistent with profitability data from the Am Law 200, which reveals large and growing disparities among large firms. Since 1998 (the first fiscal year for the Am Law 200), the average profits per equity partner among the most profitable quartile of firms (ranked 1-50) has increased 95.3%, from $926,571 to $1,809,935; during the same time, profitability in the bottom quartile has increase only 58.3%, from $287,909 to $455,780.[135]

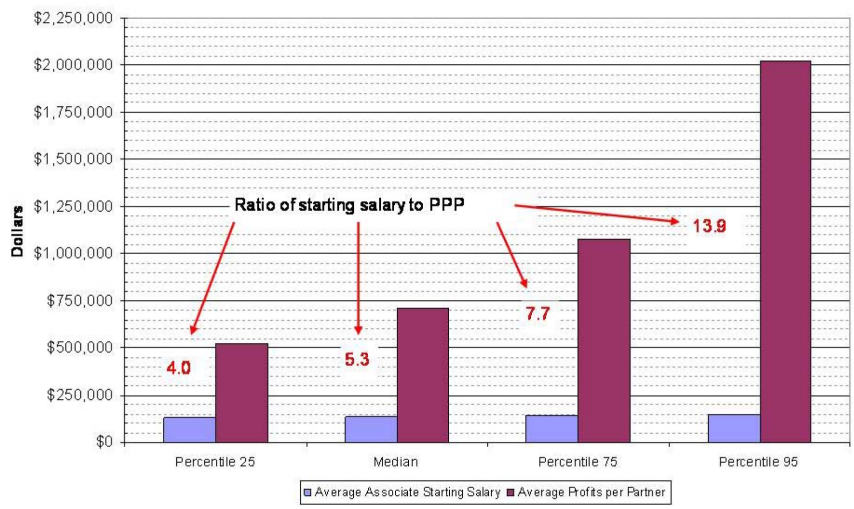
133. *See* notes *supra* 7-8 and accompanying text.

134. *See, e.g.*, Press Release, Nat'l Ass'n for Law Placement (NALP), *Salaries at Largest Firms Continue to Rise Rapidly*, (Sept. 14, 2007), *available at* http://www.nalp.org/press/details.php?id=71 (reporting that "[t]he prevailing salary in the largest firms rose to $145,00 in a number of cities: Boston, Chicago, Los Angeles, the San Francisco Bay and Silicon Valley areas, and Washington, DC. In New York, the prevailing salary was even higher, $160,000.").

135. Weighted average based on the number of equity partners per firm.

Figure 8 compares average associate starting salaries with average PPP by quartile for the 2006 Am Law 200. Although associate pay is remarkably uniform across the 200 firms, there are dramatic differences in profits per partner. Indeed, the ratio of PPP to starting salary varies from 4.0 at the 25th percentile to 13.9 at the 95th percentile.

Figure 8. Avg. Associate Starting Salary & Profits per Partner AmLaw 200 (FY 2005)



There is ample evidence that large law firms at the middle and lower end of the profitability spectrum are rethinking their business models in order to blunt or escape the effects of the salary wars. For example, Howrey LLP, a 630 lawyer firm which focuses primarily on litigation, recently announced that it is matching the $160,000 market rate for starting salaries but thereafter scuttling lockstep compensation for associates in favor of a "merit-based" system.[136] Dechert LLP, a 700-lawyer firm in Philadelphia, introduced a separate pay scale for associates in its prestigious financial services groups, creating a pay differential of $30,000 per year by the eighth year.[137] McDermott, Will & Emery, a 1,000 lawyer firm based in Chicago, recently created a second tier of attorneys that will have "good pedigrees" but will work less, be paid less, bill out at a lower rate, and not be on track for partnership.[138] Thelen Reid, a 600-lawyer firm headquartered in Northern California, implemented a different two-tier model that permits associates to opt-in to the higher market rate in exchange for a 2,000 hour billable hour requirement.[139] Chapman & Cutler, a

136. *See* Zusha Elinson, *Howrey to Ditch Lockstep Compensation for Merit Based Model*, THE RECORDER, June 29, 2007, *available at* http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=1183107981391.

137. *See* David Lat, *Skaddenfreude: Dechert DC's FSG Favoritism?* ABOVE THE LAW, Feb. 12, 2007, *http://www.abovethelaw.com/2007/02/skaddenfreude_dechert_dcs_fsg.php*.

138. *See* Kellie Schmidt, *McDermott Will to Add Lower-Paid Associates*, THE RECORDER, Nov. 2, 2007, *available at* http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=1193907832842 (quoting a general counsel on the move, "I think McDermott is on a good mission: 'Let us find a way to the make the cost more reasonable so you'll continue to hire us.'").

139. *See* Zusha Elinson, *Thelen Reid Responds to Associate Raises with a Two-Tier*

220-lawyer firm in Chicago, matched the recent $160,000 market rate for entry levels, but after the second year, permits associates to opt into a lower pay scale with fewer hours.[140] Finally, as we write this article, there is grumbling among many large firm associates that they are getting "low ball" bonuses this year,[141] breaking the longstanding practice of matching the market leader.[142]

In the years to come, we predict that the law firms with a strong presence in the capital markets area will further raise the stakes in the salary wars and permanently separate themselves from their semi-elite counterpart. As this price differential creates two or more strata of corporate law firms, with different pay scales and a perceived drop-off in elite credentials,[143] the watering down of the Cravath system may open the door to new and innovative business and human capital strategies for lawyers. This may be an opportunity for a new generation of "Millennial" lawyers to infuse the legal profession with a new set of values and work habits.[144] This topic is taken up again in Part III.C.

III. IMPLICATIONS FOR THE LEGAL PROFESSION

The principal claim of this Article is that the large law firm sector has gradually transitioned from the classic promotion-to-partner tournament, which was characterized by a fairly constant and reliable set of rules that limited the options of associates and partners, to the elastic model, which promotes,

Pay Scale, THE RECORDER, June 25, 2007, *available at* _http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=1182762353558 (reporting that "Fenwick & West went to a similar system when it raised salaries in May, letting associates choose between an 1,800-hour or 1,950-hour pay scale.").

140. Lynne Marek, *Chicago Firms Asks Associates to Choose Between Pay Levels*, NAT'L L.J., Oct. 12, 2007, at __ (reporting that firm declined to discuss specifics for "competitive reasons.").

141. *See* David Lat, *Associate Bonus Watch: Open Thread for Firms That Have Nixed Special Bonuses*, ABOVE THE LAW, Dec. 18, 2007, http://*www.abovethelaw.com/2007/12/associate_bonus_watch_open_thr.php* ("We've heard complaints from numerous associates claiming that their law firms are using vague bonus policies to lowball them on bonuses.").

142. *See* Andrew Ross Sorkin, *Lawyers Compete, Except in Bonuses*, N.Y. TIMES, Dec. 2, 2007, at 8 (reporting how other New York "white-shoe" firms feel in line after Cravath, Swaine & Moore announced associates bonuses of $45,000 to $110,000, depending upon seniority, and commenting that this perennial "copycat mode" is "absolutely irrational, economically speaking").

143. Recent data suggests that graduates of elite law schools strongly gravitate toward more elite firms with higher partners per profits and higher midlevel salaries and bonuses despite longer workweeks and less family-friendly work conditions. *See* Henderson & Zaring, *supra* note 58, at 1099 & tbl.3.

144. *See, e.g.*, Stephanie Francis Ward, *The Ultimate Time-Money Trade-off*, ABA JOURNAL E-REPORT, Feb. 2, 2007, at 2 (quoting Susan C. Robinson, associate dean for career services at Stanford Law School, "[t]he supposed characterization of the millennials is that they are not as willing to compromise life and family for work").

laterally hires, or de-equitizes partners in order to maximize profits for a proportionately smaller equity class. Yet, notwithstanding the protestations of many commentators, who lament the excessive commercialism and business-orientation of large law firms,[145] the shift to the elastic tournament is not the product of unrestrained greed or the loss of the profession's moral compass. Rather, the elastic tournament reflects a wide-scale adaptation to major structural changes in the marketplace, including the globalization of corporate clients, the bureaucratization of corporate legal departments, the lower cost and greater availability of information, and erosion of cohesive firm culture due to sheer size and geographic dispersion.[146]

This sea change is evident in the harried workpace endured by equity partners, who already hold the proverbial brass ring. As alluded to earlier, many of these partners would gladly trade a portion of their earnings for a shorter workweek, greater job security, more interesting work, the opportunity to mentor, do more pro bono work, or take a long, uninterrupted vacation.[147] Yet, these aspirations are virtually impossible to negotiate when rainmaking partners located in multiple offices through the world are free to exit at any time with clients in tow. This outcome is dictated not by an absence of professional ideals but a widening and intractable collective action problem that undermines the requisite conditions for the embodiment of those ideals.[148]

For the vast majority of modern large law firms, economics rather than culture are the glue that holds the firm together. Indeed, the distinguishing feature of the elastic tournament is a constant focus on the real or imagined

145. *See, e.g.*, MARY ANN GLENDON, A NATION UNDER LAWYERS ch. 2 (1994) (discussing transformation of large firm practice since 1960s and how emphasis on profitability has marginalized longstanding ideals of the profession); KRONMAN, *supra* note 97 at 4 (stating that explosive growth of law firms has "created a new, more openly commercial culture in which the lawyer-statesman ideal has only a marginal place"); LINOWITZ, *supra* note 84, at 31 (observing that "Money is, of course, at the heart of the problem. Law as a profession can carry many burdens, but it cannot carry a code of values that ranks money very high among those virtues"); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 37 (2000) (opining that "preoccupation with the bottom line has squeezed out other values that are central to a satisfying professional life.").

146. One large law firm partner has made a similar observation. See MICHAEL H. TROTTER, PROFIT AND THE PRACTICE OF LAW xviii (1997) (concluding that efforts to "revive the lost and lamented professionalism of the bar are doomed to failure, because the change in lawyers' behavior result from fundamental changes in the economics, structure, and functioning of the profession and changes in the business world to which it relates.").

147. *See supra* note 12 and accompanying text.

148. As some commentators have noted, the problems spawned by lawyer mobility are made possible by longstanding ethics rules that forbid non-compete contracts among lawyers. *See, e.g.*, Larry E. Ribstein, *Ethical Rules, Agency Costs,and Law Firm Structure*, 84 VA. L. REV. 1707, 1730-38 (1998) (discussing background of and rationale for the legal profession's ban on noncompete contracts between lawyers, now codified as Rule 5.6 of the Model Rules of Professional Responsibility, and its deleterious effects on firm loyalty and the creation of firm specific capital).

marginal product of each lawyer in the firm—associates, of counsel, sundry off-track attorneys, and non-equity and equity partners. Although this system is remarkably effective at maximizing the financial return on (at least some) human capital, it simultaneously undermines or hinders other values cherished by the profession.

Part III briefly explores how the pervasive incentives of the elastic tournament affect three such values. Section A suggests that the mobility of corporate lawyers and clients has eroded the market power of individual lawyers and law firms, which is a precondition of the alleged independence and superior ethics of large firm lawyers. Section B argues that under the elastic tournament, equity partnership is likely to remain an elusive goal for minority and female lawyers. Finally, Section C asks if and how large law firms can accommodate a new generation of lawyers who are demanding a more flexible and balanced work environment.

A. *Decline of Large Firms as Exemplars of Legal Ethics*

Throughout the twentieth century, the elite corporate bar has perpetuated the lore that its organizations and individual members adhere to strict standards of professionalism rather than the morals of the marketplace.[149] This image is reinforced within the popular culture by the tort reform movement, which casts plaintiffs' lawyers as greedy and unprincipled.[150] Solo and small firm lawyers are also perennially overrepresented in state bar disciplinary proceedings because of higher levels of client complaints and alleged ethics violations.[151]

149. *See, e.g.*, GALANTER & PALAY, *supra* note 14, at __ (discussing efforts of the corporate lawyers in New York and Chicago, who dominated bar organizations, to use the ethics rules to police business-getting practices of ethnic urban solo and small firm lawyers who practiced in areas such as personal injury and criminal law); Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 310-12 (2004) (same).

150. *See, e.g.*, Stephen Daniels & Joanne Martin, *"The Impact that It Has Had Is Between People's Ears:" Tort Reform, Mass Culture, and the Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453, 466-72 (2000) (documenting insurance industry funding of an elaborate public relations campaign since 1970s to shape public opinion on tort reform, often casting the plaintiffs lawyer as the villain); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System,* 40 ARIZ. L. REV. 717, 749 (1998) (quoting president of the United States Chamber of Commerce on launch of a campaign against "class action suits and ambulance chasing trial lawyers, who suck billions of dollars out of consumers and companies. . . ." (citing Thomas J. Donohue, President and CEO, Chamber of Commerce, American Business: The Next Agenda, Address to Nat'l Press Club (Oct. 1, 1997), *in* VITAL SPEECHES OF THE DAY)); *see also* WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004) (marshalling overwhelming evidence that tort cases, litigation rates, and plaintiff success are dramatically exaggerated in the media, thus fomenting support for tort reform).

151. *See* Levin, *supra* note 149, at 312-15 (collecting large array of statistics and sources that document higher incidences of complaints and disciplinary action against solo and small firm lawyers and exploring reasons for disparity, including difference in client

Conversely, as observed by Lisa Lerman, "[s]ome of the wealthiest American lawyers—partners in large firms—have enjoyed a widespread assumption that their ethical standards are impeccable."[152]

In a seminal study on lawyer ethics conducted during the early 1960s, lawyer and sociologist Jerome Carlin provided compelling empirical evidence that that large firm lawyers were much more likely to comport with the bar's formal and informal ethics regime.[153] Drawing upon interviews with lawyers, legal ethics texts, and published opinions of committees on professional ethics, Carlin's research team devised a detailed questionnaire that set forth a wide array of ethical conflicts in contexts involving a lawyer's obligations to clients, colleagues, or the administration of justice.[154] The questionnaire was then administered via interview to a representative sample of 800 lawyers in private practice in the central business core of New York City.[155] One of the major findings of Carlin's study was that large firm lawyers were much more likely to conform to, and internalize, the bar's formal and informal code of ethics.[156]

Yet, as Carlin unpacked his findings, he observed that the different rates of ethical violation and conformity were not the product of firm size per se, but with the presence or absence of ethical stressors that were strongly correlated

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base, ability to detect unethical behavior, and institutional biases). Cf. David B. Wilkins, *Who Should Regulate Lawyers?,* 105 HARV. L. REV. 801, 822-33(1992) (analyzing relative effectiveness of other controls (reputations, malpractice) in dealing with under-serving of clients in corporate sector).

152. Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 1999 GEO. J. LEGAL ETHICS 205, 227; *see also* Magali Sarfatti Larson, *On the Nostalgic View of Lawyers' Role: Comment on Kagan and Rosen's "On the Social Significance of Large Firm Practice*, 37 STAN. L. REV. 445, 456 (1985) (arguing that professional ethics "have their best anchor and support" in large firms because "they can afford to be ethical" and "one of the main services they sell is legitimation"); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 675-77 (1994) (discussing how prestige and power of large law firm practice has become conflated with "moral authority to make judgments about the standards of professional behavior that will bind others" in legal profession and citing studies that correlate large firm practitioners with perceptions of more ethical behavior).

153. *See* JEROME E. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 119-32 (1966).

154. *Id.* at 42-47 (describing construction and content of survey questionnaire). As a preliminary check on the questionnaire's reliability, Carlin's research team asked a group of lawyer-informants to rate ten to twelve colleagues as ethical or unethical. The ethics scenarios were then presented to several dozen of these "rated" lawyers. The questions on the final survey instrument were those in which the lawyer-respondents answers had a reasonable correspondence to the ratings of the lawyer-informants. *Id.*

155. *Id.* at 8-9 (discussing how sample was assembled).

156. Some of the behavior more likely to be deemed unethical by large firm lawyers included acceptance of a commission without telling a client, accepting a referral fee, the sending of Christmas cards to clients (then viewed as form of business solicitation), turning a blind eye to a client's bribe of a government official, agreeing to represent one of two partners he previously represented after a business controversy develops, or disregarding an oral contract with another lawyer on a real estate transaction. Id. at 51-52.

with different clientele and practice settings. In general, lawyers in the largest New York City firms enjoyed the largest incomes, the most stable base of clients, the fewest appearances in state courts (which were the most rife with corruption), less pressure from clients to violate the law, and the time and resources to participate in elite bar associations.[157] Thus, inspecting all the data, Carlin concluded, "Large-firm lawyers . . . have low rates of violation because they are largely insulated from client and court-agency pressures, while small-firm lawyers and individual practitioners have high rates of violation because they are most exposed to these situational inducements to violate."[158]

A lot has changed in the forty years since Carlin published his study. The large firm lawyers studied by Carlin enjoyed enduring client relationships. According to a 1959 Conference Board survey of 286 manufacturing companies, "three fourths of them retain outside counsel on a continuing basis. . . . Companies more frequently report that 'present outside counsel have been with us for many, many years,' or that 'we are satisfied with the performance of our outside counsel and have never given any thought to hiring another.'"[159] Only a few years after the publication of Carlin's study, another commentator on Wall Street law firms observed that the large commercial and investment banks were the "epitome of the locked-in client" because of the vast specialized knowledge that had accumulated within by the firm's large banking departments.[160] One Wall Street partner estimated that client turnover during the 1960s, in dollar volume, was "5 per cent a year, mostly in one-shot litigation."[161]

Ironically, Carlin's descriptions of the pressures surrounding small firm lawyers in the 1960s seem to apply aptly to today's large law firm marketplace.

> The lower the status of the lawyer's clientele, the more precarious and insecure his practice. Lawyers with low-status clients tend to have an unstable clientele; that is, they have a higher rate of [client] turnover . . . . The small businessman is more likely than a large corporation to shop around and switch attorneys: he may be on the lookout for a less expensive, sharper, and more compatible lawyer. This type of client is also more likely to divide his legal business among several lawyers . . . . Lawyers with low-status clients also report more competition from other lawyers in obtaining clients, and that they

157. *Id.* at 119-24.

158. *Id.* at 122. Moreover, Carlin found that the different ethical outlooks and behavior of lawyers from different religious and ethnic backgrounds were entirely a function of being channeled into specific legal contexts and practice setting. Id. at 119-24.

159. Galanter & Palay, *supra* note 14, 32-34 (citing Nat'l Indus. Conference Bd., *Organization of Legal Work*, 16 CONF. BD. BUS. REC. 463, 464 (1959)).

160. PAUL HOFFMAN, LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS 76 (1973) ("[I]t's virtually impossible for a bank—even if it chose—to switch to another firm").

161. *Id.* at 72.

have been hurt by such competition.[162]

John Conley and Scott Baker recently observed, "the Wall Street elite now occupy that circle of hell that Carlin had reserved for the most desperate of solo practitioners." [163]

In Kimberly Kirkland's recent qualitative empirical study of ten large law firms,[164] multiple factors contributed to the climate of insecurity. Partners reported that firms no longer "own" the work they do because a competitor is always working to lure the client away.[165] Because the firm can no longer predictably hand off clients as older partners retire, younger lawyers are less likely to develop strong loyalties to the firm,[166] which further undermines the project of developing firm-specific capital. Firm management evaluates the profitability of partners and practice groups by focusing on hours billed and fees collection (i.e., "realization"),[167] which, in turn, fosters competition *within* the firm for marketing expenditures, equity partnership seats, and new hires.[168] Similarly, the conflict of interest checks are a frequent source of tension because individual lawyers or practice groups could be forced to turn away lucrative business.[169] Even if an individual partner manages to cement a strong business relationship with a corporate general counsel, that security could be disrupted by higher firm-imposed billing rates that the client is unwilling to pay.[170] Further, the specter of de-equitization hangs over all lawyers who are slow to adapt.[171] "Large firms view good lawyers as expendable."[172]

162. CARLIN, *supra* note 153, at 66-67.

163. John M. Conley & Scott Baker, *Fall From Grace of Business as Usual? A Retrospective Look at Lawyers on Wall Street and Main Street*, 30 LAW & SOC. INQUIRY 783, 791 (2005) (applying this characterization to the narrative of REGAN, EAT WHAT YOU KILL, *supra* note 7). *Cf.* REGAN, *supra* note 7, at 36 (discussing the "perpetual instability" experienced by modern day large firm lawyers); TROTTER, *supra* note 146, at 194 ("The number one problem faced by major business practice firm lawyers today is the increased uncertainty about what the future holds . . . .").

164. *See* Kirkland, *supra* note 87.

165. *Id.* at 675.

166. *Id.* at 676 (quoting a former managing partner, "Today, a lawyer needs to build skills. Yesterday, a lawyer needed to build a practice. A lawyer is more of a hired gun, less the owner of a small business.").

167. *Id.* at 669.

168. *Id.* at 678. Kirkland later quotes another large firm lawyer, "The whole system is self-interest driven, but no one talks about it this way. Everyone talks about it as an altruistic system or talks about it in a communal sense. But so much of what lawyers are doing is being done to promote their own value." *Id.* at 702.

169. *Id.* at 672 (observing that when a conflict cannot be waived, "decisions about which client to take and which to turn away are made at the highest levels of the firm").

170. *Id.* at 675 (reporting that partner squeezed by higher billing rates must either find new clients or move to another firm that charges lower rates).

171. *Id.* at 678. Kirkland quoted one equity partner, "[the firm needs to] cut out the dogs. Get rid of the partner whose practice has died. Every two or three years [the firm needs to] look closely and make the hard decisions—look at production versus salary. Nip the thing in the bud and de-equitize the couch potatoes." *Id.*

Several commentators have argued that market power is a necessary precondition of professional values, including adherence to the formal ethical norms of the bar.[173] According to Erwin Smigel's sociological account of large Wall Street law firms of the 1960s, large law firms flourished economically because their clients were paying a premium for expert and autonomous advice.[174] "Independent legal opinion is . . . *the* commodity they offer, and the primary commodity for which they are paid."[175] Even if Smigel accurately described the client-firm relationship of the late 1950s and early 1960s,[176] now there is broad consensus that the vast majority of corporate clients hire outside counsel to obtain a specific, cost-effective result.[177] Not surprisingly, as extensive qualitative field work has revealed, the ethical norm that is most widely embraced by large firm lawyers is the very one that reduces the strains in the lawyer-client relationship: zealous advocacy.[178]

172. *Id.* at 690.

173. *See, e.g.*, Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand-Side Perspective*, 49 MD. L. REV. 869, 916 (1990) ("[A] necessary condition for professionalism is market power."); Regan, *supra* note 120, at 4 (arguing that "some respite from market demands is a necessary, but not sufficient, condition for fostering non-economic values.").

174. SMIGEL, *supra* note 31, at 343.

175. *Id.* (emphasis in original).

176. Some commentators have expressed doubt. *See, e.g.*, HEINZ & LAUMANN, *supra* note 44, at 365-73 (1982) (observing in a large-scale empirical study of Chicago lawyers during mid-1970s that corporate lawyers had less autonomy than their small firm counterparts).

177. *See, e.g.*, GALANTER & PALAY, *supra* note 14, at 50 (reviewing evidence that routine legal work is now done increasingly by in-house lawyers while the relationship with outside counsel has been less exclusive and based on "more task-specific ad hoc arrangements"); GLENDON, *supra* note 145, at 83-84 (opining that in emerging legal ethos, "a lawyer who takes his duties to the court and the legal system seriously will often be at a disadvantage against a less scrupulous adversary. . . . [G]ood ethics may not make for good business sense."); LINOWITZ, *supra* note 84, at 111 (writing in 1994, "[i]f current trends continue, the corporate counsel's job increasingly is going to be the purchase of legal services from what management considers more or less a commodity market of large law firms"); RHODE, *supra* note 145, at 9 (discussing erosion of longstanding and stable client relations, thus making it "risky for counsel to protest unreasonable demands or to deliver unwelcome messages about what legal rules or legal ethics require"); TROTTER, *supra* note 146, at 195 (large firm partner reporting on persistent "danger that the client will hire an ambitious counsel who will want to take more work in-house or to put your part of the company's business up for competitive bidding.").

178. *See* NELSON, *supra* note 17, at 271-72 (concluding at the end of a case study of four large Chicago law firms that retention of clients demands that lawyers "present themselves as zealous advocates"); Robert W. Gordon, *The Ethical World of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 728 (1998) (researcher in American Bar Foundation's Ethics: Beyond the Bar Study acknowledging the primacy of zealous advocacy); Kirkland, *supra* note 87, at 718 (concluding, based on her own field work, that partners have strong incentives "not to act as autonomous counselors who serve as a check on their clients' desires, but as agents of their clients"); Suchman, *supra* note 101, at 854 (researcher in American Bar Foundation's Ethics: Beyond the Bar Study concluding, after extensive interviews with large firm litigators, that zealous advocacy was viewed as "an

Observing the transfer of market power from large law firm lawyers (supply-side) to corporate general counsel (demand-side), Ronald Gilson has argued that the best hope for rekindling the ideal of the profession is to focus on the conduct and obligations of in-house lawyers.[179] Yet, Robert Nelson and Laura Beth Nielsen's empirical work on corporate legal departments suggests the emergence of a bureaucratic structure that favors entrepreneurial lawyers who privilege the company's commercial interests above strict standards of professionalism. Nelson and Nielsen's subjects reported dealing with extremely aggressive executives who were focused on cost-containment, short-term profits, and the minimal amount of legal drag on company transactions.[180] "With a few notable exceptions, the lawyers we interviewed (like their non-lawyer peers) were literally absorbed in a high pressure corporate environment. They appeared far more concerned with pursuing corporate profits than with pursuing the public good."[181]

Under the elastic tournament's regime of mobility, the structural implications for outside counsel are virtually impossible to ignore. In the pages of *The American Lawyer*, one large firm partner, who temporarily served as a client's in-house counsel, offered two golden rules to solidify their client relationships: "[m]ake inside counsel's life easier" and "[m]ake inside counsel look good in front of their clients, colleagues, superiors, and subordinates."[182] In some instances, the outside lawyer is hired to reinforce to company executives the position staked out by the general counsel, and if he or she wants to be hired again, "it behooves him [or her] not to offer a contrary opinion."[183] In this highly atomized economic climate, it is likely that ethical gray zones

affirmative moral obligation, even when it came into conflict with other ethical rules."); *see also* GLENDON, *supra* note 146, at 38 ("The traditional ideal of lawyers that has flourished the most in the new atmosphere is client loyalty with its concomitant duty of zealous representation.").

179. *See* Gilson, *supra* note 173, at 913-15 (applying economic analysis to market for corporate legal service and concluding that "my best (and only) candidate for the next generation of private gatekeepers [is] the insider lawyer.").

180. *See* Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 L. & SOC'Y REV. 457, 487 (2000) (concluding that in-house lawyers have "attempted to craft a new image within the corporation in which lawyers are team players, rather than cops.").

181. *Id.* at 490; *see also* LINOWITZ, *supra* note 84, at 84 ("Increasingly . . . CEOs want their general counsel to have the same exclusive loyalty to the company that they expect from employees who do not have professional responsibilities.").

182. Gary F. Torrell, *How to Work with In-House Counsel*, AM. LAW., July-Aug. 1992, at 32.

183. LINOWITZ, *supra* note 84, at 83 (opining how clients had changed during his sixty year career). Similarly, Harvard law professor Mary Ann Glendon observes, "[m]ost lawyers these days are perfectly decent people who feel like they're trapped in a system that they don't really like, but a system that they don't feel safe trying to buck." According to Glendon, the new rules are simple: "[k]eep your head down, don't ask questions and bill as much as you can." David Segal, *In the Business of Billing? Lawyers Say a Rush for Money Is Shaking Profession's Standards*, WASH. POST, Mar. 22, 1998, at H1 (quoting Glendon).

will get resolved in the client's favor, and insecure lawyers will be less likely to acknowledge any black or white.

Let us be clear, however, that our discussion oversimplifies the history, culture, and governance of a wide array of large firms. In our discussions with lawyers, we have run across examples of large law firms that continue to share risk and inspire investment and sacrifice for the collective enterprise of the firm. Ethical lapses threaten a hallowed firm's reputation and the trust of longtime colleagues. But this ethos becomes harder to maintain (and virtually impossible to create or restore) in larger, geographically dispersed firms that are perpetually competing for clients and entry-level associates.

B. *Challenges for Racial and Gender Diversity*

Drawing upon ample market evidence, we have described a large law firm marketplace in which individual lawyers who hope to obtain, or maintain, partnership status have a strong incentive to maximize their economic value to the firm. Yet, the long term financial interests of associates, partners, and firm management are not necessarily aligned. Partners have an interest in maximizing the value of their client relationships in order to guard their income and obtain leverage over the strategic direction of the firm. Associates have an interest in receiving the training and work assignments necessary to ensure that their skill set keeps pace with their hourly rate, which, in turn, fuels demand for their services or, at a minimum, enhances their outplacement prospects. Firm management is in the unenviable situation of managing a vast, multiple office business in which its most valuable assets "go home at night."[184] Although it would like to develop firm-specific capital that cements the client to the firm rather than powerful (and mobile) lawyers, ethics rules bar lawyers from contracting away their right to exit the firm.[185] Firms cannot credibly engender loyalty through long-term employment agreements because the terms may, over time, become disadvantageous to mobile partners. Further, the sheer size and dispersion of most firms reduces the potential of pervasive firm-wide cultural norms.[186]

Thus, to stave off firm instability, firm management is likely to adopt the relatively modest goal of rewarding the lawyers at their real or perceived marginal product, thus balancing unwanted attrition with effective recruitment. Unfortunately, this pure marginal product ethos reflects incentives at the individual lawyer level that are likely to perpetuate the marginalized status of minority and female lawyers, though the reasons are different for each group.

184. MATTHEW PARSON, EFFECTIVE KNOWLEDGE MANAGEMENT FOR LAW FIRMS 4 (2004) (quoting chairman of an international law firm).

185. *See* HILLMAN, *supra* note 88, at § 2.3.4 (reviewing formal strictures and case law on agreements discouraging lawyer competition); Ribstein, *supra* note 148, at 1731 & nn. 108-11 (discussing bar on agreement not to compete and collecting cases).

186. *See supra* note 125 and accompanying text.

These dynamics can be described as follows.

1. *Minority lawyers*

In the modern large law firms, all associates who hope to ascend to the equity partnership (inner core) level, regardless of gender or ethnicity, must acquire the requisite skills and professional experience. This enhancement of human capital occurs within the firm through training, mentoring, and an appropriate array of challenging work assignments. David Wilkins and Mitu Gulati have referred to these valued goods as the "Royal Jelly" of elite large law, which is an analogy to the social structure of bees: "If a bee larvae is fed a rich nutrient (called "Royal Jelly") by the queen, that bee will develop into a queen. If that same bee receives no Royal Jelly, it will develop into a worker bee. Training is the Royal Jelly of elite law firms."[187] Elsewhere, Wilkins and Gulati have cogently argued that the limited supply of coveted work assignments are not distributed equally among entering associates, but according to "tracking and seeding" process that favors associates based on credentials, personal attributes, and performance during the early stages of a "multi-round" tournament.[188] Because training work involves a substantial investment of valuable partner time, Wilkins and Gulati assert that firms have a powerful incentive to allocate it during each round to those associates, albeit based on limited information, with the best long-term prospects of partnership.[189]

Yet, one of the key analytical insights of the elastic tournament is that "the firm" has precious little bargaining leverage with partners who preside over the best training opportunities.[190] Although the uneven distribution of work

187. *See* David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 541 (1996) (attributing the analogy to Ian Aryes).

188. *See* David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament*, *supra* note 14, at 1641-57.

189. *Id.* at 1643 ("Since training work involves a substantial investment of valuable partner time, firms only want to give this work to associates who are likely to have long-term careers with the firm . . . .").

190. Drawing upon her qualitative research in ten large law firms, Kimberley Kirkland aptly describes the dilemma:

> Although a powerful practice group leader may limit the autonomy of many lawyers within the group, profitable partners may be able to purchase a degree of autonomy that others in the group cannot. For instance, while a firm may officially require all partners to prepare a business plan, a practice group leader may ignore the requirement for a very profitable partner, or a highly profitable partner may be able to charge a client a lower hourly rate than other partners would be permitted to charge for a new matter. Lawyers at the highest levels of management identify one of the central tensions in large firms today as whether management is able to control decisions in the areas outlined above, i.e., whether management can decline to follow the wishes of a significant partner and still maintain power.

Kirkland, *supra* note 87, at 673.

assignments may appear to be the result of a tracking and seeding process, the actual outcome (or equilibrium) is primarily the result of an internal labor market in which partners and associates fend for themselves. Because no one's standing in the firm is secure or permanent, powerful partners have strong incentives to hoard associates with the most impressive credentials, the most tireless work ethic, and the most undivided loyalty to the individual partner.[191]

According to one large firm partner quoted in a recent ABA monograph, the scramble for desirable associates begins immediately with each entering class:

> [Through] a kind of implicit tracking system . . . some young lawyers very soon, if not the day after they arrive or the day before they arrive, are identified as superstars and get special assignments and are sought after by all the partners who have a chance to compete for them. I do this. I have a very sexy practice. I dangle it before the people who seem to me to be the best in the associate pool . . . I train the hell out of them because that is part of the bargain . . . The large number are not going to have that happen . . . and they are going to do a lot more routine work.[192]

In another recent ABA monograph, a large firm lawyer emphasized the crucial importance of obtaining a mentor from the "very beginning" to make sure "you don't get stuck on huge document reviews and to make sure that you get good work. People pick their protégés really quickly, and if you are left out it going to be really tough for you."[193]

As an empirical matter, there is substantial evidence that minority associates in large law firms are less likely to get coveted work assignments or develop alliances with powerful partners. For example, in his analysis based on the After the JD Project (AJD), which is a large-scale longitudinal study of young lawyers who took the bar in 2000, Richard Sander found that black, Asian, and Hispanic associates in firms of 100 or more attorneys were much more likely than their white counterparts to want to leave the firm.[194] Some of additional AJD questions suggest some reasons why. Among black associates, where the desire to leave the firm was the strongest, respondents were much

191. *See* Kirkland, *supra* note 87, at 680, 682, 691 (observing that "lawyers who work for other lawyers must understand that their supervisors are their primary 'clients'", that superiors "expect the lawyers who work for them to be responsive to clients needs '24/7'", and that lack of accurate information reinforces the tendency among lawyers to "rely on perceptions [based on paper credentials and limited interactions] to make judgments about one another").

192. ELIZABETH CHAMBLISS, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 79 (ABA 2004) (quoting "a senior partner at a top law firm").

193. JANET E. GANS EPNER, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 12-13 (2006). *See also* Wilkins & Gulati, *supra* note 187, at 566 ("Although managing partners understandably continue to deny that firms track incoming associates, more detached observers, as well as partners in more candid moments, report the contrary." (footnotes omitted)).

194. *See* Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1255, 1796-98 & tbl.16 (2006) (differences significant at the $p < .05$ level).

more likely to express a desire for more/better training and more/better mentoring by senior attorneys.[195] Black associates were also less likely to report working on nine or more matters during the last six months[196] and more likely to have spent over 100 hours on document review or performing due diligence.[197] Similarly, blacks reported a lower likelihood of (a) being responsible for keeping the client updated, (b) being involved in the formulation of strategy, (c) handling an entire matter on their own, (d) joining partners for breakfast or lunch meetings, and (e) spending recreational time with partners.[198] Hispanic and Asian associates often reported only slightly better experiences, yet still below the levels enjoyed by their majority counterparts. Comparing this data with other respondent attributes, Sander points out that these differences in treatment correspond with group differences on law school grades.[199]

A recent ABA Commission of Women study, which focused primarily of large firm lawyers, found that minority respondents were less likely to have developed an informal mentoring relationship—the most effective for career advancement—with a white male lawyer.[200] Among minority attorneys, 67% of females and 52% of the male reported a desire for more and bettering mentoring by senior attorneys and partners, compared to 55% for white females and 32% for white males.[201] Minority lawyers were also more likely to be passed over for desirable work assignments.[202] Similarly, in the 2006 Midlevel

195. *Id.* at tbl.17 (differences significant at the $p < .05$ level).

196. *Id.* at tbl.17 (differences significant at the $p < .05$ level).

197. *Id.* at tbl.19 (statistically significant at the $p < .05$ level).

198. *Id.* at tbls.19 & 20 (statistically significant at the $p < .05$ level).

199. *Id.* at 1758-59 (reporting empirical evidence that minority candidates receive hiring preferences in large firms but "their opportunities to learn and perform once inside the firm are, in some ways, distinctly inferior"). Sander's "Racial Paradox" analysis has attracted a lot of criticism, primarily because of Sander's hypothesis that the disparate work assignments and mentoring between blacks and white are rooted in a skills deficit that arises in law school due to a mismatch of credentials. See, e.g., James E. Coleman, Jr. & Mitu Gulati, *A Response to Professor Sander: Is It Really All About the Grades?*, 84 N.C. L. REV. 1823, 1824-27 (2006) (praising Sander for "document[ing] how the experiences of black associates—in terms of key developmental factors such as mentorship, quality of assignments, and training—are perceived by them to be systematically worse than those of their white colleagues" but strongly disputing his conclusion, triangulated from multiple datasets, that these dynamics are driven by lower ability as allegedly measured by law school grades). Our analysis, however, does not depend upon this interpretation. Rather, the mere perception of lower ability based on stereotype is enough to reduce the flow of coveted work assignments and training opportunities. See, e.g., Wilkins & Gulati, *supra* note 187, at 569-70 (opining that training opportunities meted out by partners "will be made as an initial matter in the same way as it is done at the recruiting stage--based on a few easily observable signals such as law school status, academic honors, and grades. ... Under these circumstances, background prejudices and preconceptions can lead white partners to believe that black associates are more likely to be average or perhaps even unacceptable.")

200. VISIBLE INVISIBILITY, *supra* note 193, at 12-13 & tbl.1.

201. *Id.* at 12.

202. *Id.* at 21. As a group, however, white and minority woman both fared worse than

Associate survey published annually by *The American Lawyer*, black associates report lower satisfaction with level of responsibility, amount of client contact, peer collegiality, partner relations, and fairness in the distribution of work.[203] Not surprisingly, a chorus of diversity managers and consultants advise that a key element of minority retention is ensuring fair allocation of work assignments, better training and feedback, and strong mentoring from partners.[204]

Although most large law firms have responded to calls for greater diversity by aggressively recruiting minority associates,[205] this benefit is evenly spread throughout the firm and thus is unlikely to encounter much resistance. In contrast, law firm partners trying to improve or maintain their standing in the firm have an incentive to favor associates who will benefit their individual practice. Unfortunately, there are a host of factors that could cause a partner to favor a white associate over his or her minority counterpart: (i) lower law school grades, (ii) a high probability that the minority lawyer will leave (a historical reality at most firms), or (iii) a perception that mentorship will be more labor-intensive because of awkward cultural barriers. As many law firm observers have noted, informal training and mentoring in most large law firms are on the wane because partners are reluctant to invest the time beyond what is necessary to optimize their own practices.[206] Hence, powerful partners can

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their male counterparts. *Id.*

203. D.M. Osborne, *Diversity of Opinion*, MINORITY L.J., Nov. 1, 2006, http://www.law.com/jsp/law/PubArticlePrinterFriendly.jsp?id=1166004315371 (breaking out and comparing statistics by race). Similar results were reported for 2007, though the lack of training, mentoring, and quality work was most pronounced for minority females. *See* D.M. Osborne, *Why Are Minority Female Associates Leaving Law Firms?*, MINORITY L.J., Nov. 7, 2007, http://www.law.com/jsp/article.jsp?id=1194343441401.

204. *See, e.g.*, Karen Jackson Vaughn & Cynthia R. White, *Winning the War for Talent*, LEG. INTELLIGENCER, Aug. 24, 2007, at 7 (advising firms seeking to retain minority associates to "provid[e] equal access to quality work assignments" and training in "business development, leadership development and presentation skills"); Joseph W. Hatchett & Danielle T. Shannon, *Firms That Don't Recognize the Value of a Diverse Workplace will Lose Attorneys and Clients*, BROWARD DAL. BUS. REV., June 4, 2007, at 14 (advising firms that want to retain minority associates to "establish a formal mentoring program," "provide professional skills development," and "review work assignments and hours billed to ensure that minority attorneys are not being excluded from key client matters"); Karen Asner, *Best Practices in Implementing Law Firm Diversity Programs*, N.J. L. J., Apr. 30, 2007, at 32 (encouraging firms to "monitor the work assignments of associates, ensuring that work is evenly distributed and that career-making opportunities are afforded to a diverse group of associates"); Edgardo Ramos & Lynn Anne Baronas, *What Works: Ways to Increase Diversity at Law Firms*, NAT'L L. J., Jan. 16, 2006, at 13 (encouraging creation of mentoring programs where mentors "monitor minority associates' hours, as well as the sufficiency and quality of work assignments, to ensure professional growth and fulfillment").

205. *See, e.g.*, Leigh Jones, *Law Firms Digging Deeper On Campus*, NAT'L L.J., Dec. 15, 2005, at 1, 10 (reporting that, in response to client demands, "most big law firms have boosted their efforts to diversify" and citing example of Philadelphia-based Duane Morris, which acknowledged, "We target four or five schools with strong minority enrollments").

206. *See, e.g.*, Green, *supra* note 118, at 14 (reporting consensus among large-firm

internalize a proportionate share of the credit for aggressive minority recruitment yet externalize the actual cost of minority associate development and retention to rival partners or practice groups. Firm management can try to realign the incentive structure,[207] but powerful partners can vote with their feet.[208] This is a strong structural impediment to diverse partnerships. If appeals to moral authority are our primary means of retaining and promoting more minority lawyers in large firms, we should prepare ourselves for disappointment.

2. *Female lawyers*

The economic pressures of the elastic tournament also create significant headwinds for female lawyers, albeit for reasons that only partially overlap with minority lawyers.[209] Specifically, female associates also report a lower likelihood of receiving coveted work assignments and training;[210] but for women, this trend is often attributable to disproportionate family

practitioners that "high-quality-on-the-job training is on the wane" and citing pressure to bill, client expectations for rapid response time, and pressure to keep costs down); Fortney, *supra* note 118, at 281-82 (reporting on economic pressures that cause partners to avoid "adequate mentoring, supervision, and communication" with associates); Wilkins & Gulati, *supra* note 187, at 538 (asserting that "partners will have a preference for associates who need little or no training").

207. At least one West Coast firm has linked partner compensation to diversity goals. *See* Jessie Seyfer, *Color of Money: Diversity Isn't Just a Just a Slogan at Fenwick, It's Partner Pay Dirt*, RECORDER, Dec. 5, 2006, at 1 (reporting that Fenwick & West "closely ties diversity goals to partners' compensation" by asking associates to evaluate partners on diversity efforts). One of the hazards of this approach is that partners can, in effect, pay a higher "tax" to avoid these responsibilities; and if the tax becomes excessive, they can leave. *Cf.* Wilkins & Gulati, *supra* note 187, at 538 ("Associate training is both a public good for the firm and a private good for individual partners.").

208. There is also pressure for law firms to diversify in order to attract and retain lucrative clients. *See, e.g.*, David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1557 (2004) (reviewing evidence and concluding that "the 'business case' for diversity in the large law firms that seek to serve [Fortune 500] corporate clients appears to be compelling indeed"). Yet, in his interviews with large law firm partners, which covered the topic of client pressure to hire a more diverse workforce, John Conley observed that most firms appeared to mollify clients that they are doing their best in recruitment and that no large firm rivals are doing measurably better. Moreover, the partners pointed out that clients had strong incentives not to trade down in firm quality. *See* John M. Conley, *Tales of Diversity: What Lawyers Say About Racial Equity in Private Firms*, 31 L. & SOC. INQUIRY 831, 851 (2006) (citing informants' belief that perceived quality and prestige, often signaled through high billing rates, bound clients to the firm).

209 Obviously, two sets of headwinds apply to female minority lawyers. *See generally* ESPER, VISIBLE INVISIBILITY, *supra* note 193.

210. *See, e.g.*, id. at 21 (reporting that among women, 44% of the minority lawyers and 39% of the white reported unequal distribution of work assignments compared to 25% of the minority men and 2% of the whites).

responsibilities.[211] Within the legal profession, married women with children typically face tradeoffs that limit their ability to live up to the "24/7" demands of full-time large firm practice. For example, in a survey of Indiana University School of Law alumni, women and men married at comparable levels, yet their childcare burdens were dramatically unequal. Only 1% of men five years out of law schools and 2% fifteen years out reported having worked part-time or not worked due to childcare, compared to 24% (five years out) and 40% (fifteen years out) for female graduates.[212] Moreover, female law graduates are more likely to have married spouses with demanding professional careers,[213] which suggests that neither spouse has the ability to privilege work over family. As the authors of the study conclude, "These facts undoubtedly impact the future career paths of our alumni."[214]

A forthcoming study of male and female Michigan Law Alumni—a group well represented in large, elite law firms—reveals strikingly similar childcare and marriage patterns.[215] Yet, the more significant finding is that the total number of hours worked by female Michigan law graduates has been steadily trending down over the last two decades. For graduates surveyed between 1981 and 1991, females fifteen years out of law school worked an average of 173 fewer hours per year (2383 versus 2212); for respondents surveyed between 1996 and 2000, the gap between females and males had widened to 610 hours.[216] Although the typical male Michigan graduate fifteen years out now worked an average of 2,471 (an increase of over 100 hours per year), females had decreased their hours to 1862 hours per year (-350 hours per year).[217] The overall decrease was due primarily to fewer hours worked by women with childcare responsibilities;[218] by 2000, a female Michigan law graduate fifteen years out had taken reduced-pay work for an average of 58 months during her

211. *See, e.g.*, Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 HOFSTRA L. REV. 1001, 1007 (2002) (observing that because of "substantial family commitments," many female attorneys "are not given enough challenging assignments, high visibility assignments, nor are they included in social events that yield professional opportunities"); John P. Heinz, Kathleen E. Hull, & Ava A. Harter, *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 748-49 (1999) (in study of the Chicago bar, finding that women lawyers are much more likely to report that personal or family obligations have affected their career choices or work opportunities).

212. Kenneth G. Dau-Schmidt, et al., *The Pride of Indiana: An Empirical Study of the Law School Experiences and Careers of Indiana University School of Law—Bloomington Alumni*, 81 IND. L. J. 1427, 1448-51 & tbls.9-10 (2006).

213. *Id.* (delineating graduates by the proportion of spouses with "intense jobs").

214. *Id.* at 1451.

215. *See* Kenneth G. Dau-Schmidt, et al., *Gender and the Legal Profession: The Michigan Alumni Data Set 1967-2000* (Sept. 27, 2007), at 19-20 tbls. D1(5) & D1(15), 24-25 tbls.E1(5) & E2(15), *available at* http://ssrn.com/abstract=1017362.

216. *See id.* at 22, 24-25 tbls. E1(5) & E2(15), graphs 7 & 8.

217. *See id.*

218. *See id.* at 26 & graph 9.

career.[219] These decisions, however, came at a price: female Michigan law graduates who had taken time off for children were also less likely to be law firm partners.[220]

Examining the trend of Michigan Law graduates, it seems likely that more women in large law firms are deciding to opt-out of the promotion-to-partnership tournament, possibly in favor of positions as senior associate, of counsel, or permanent non-equity partner—i.e., the outer mantle of the elastic tournament. According to Kimberly Kirkland's qualitative study of large law firms, associates on the "contender" track learn that the price of coveted work assignments is grueling hours and loss of autonomy. In advising associates, one equity partner told Kirkland, "You have to be available. You can't say no."[221] Another partner remarked that "the hours don't get better for partners; partners have more pressure than associates do."[222] According to another of Kirkland's respondents, one of the pressures is building good relations with other partners so that one can forestall de-equitization in the event of a setback in one's practice. Asked how goodwill is built, the partner responded "it is really about not saying no."[223]

At a recent large law firm symposium, one senior partner described his worklife in a way that amply justified his profit share:

> Quite frankly, at sixty-one, I didn't expect to be answering a hundred voice mails a day, two hundred emails a day, and on my way home at night, having my partner, who is in Beijing, call me to discuss some issues, and when I got home, having my wife look at me and say, "You had three or four calls from folks. Such-and-such a client wants you to call back tonight." It has a very significant impact on the quality of life. But the legal profession—it is that slavish mistress. You can either practice a hundred percent or you can stop practicing. It is very hard to practice part-time.[224]

Regarding part-time work, Amelia Uelmen, who formerly worked as a large firm associate, recounted her attempt to negotiate a reduced hours/reduced pay arrangement with her employer. After three years at the firm, "I was simply dropped from all my work, with no questions or discussion. The partners avoided meeting my eyes in the elevator and the halls. It was as if I had fallen of the planet."[225] After begging a partner for work, Uelman was placed on a massive document review project that lasted several months. She then latched on to lateral "of counsel" lawyer for the remainder of her time with

219. *Id.* at 74.

220. *Id.* at 75.

221. Kirkland, *supra* note 87, at 680.

222. *Id.* at 683.

223. *Id.* at 685.

224. Green, *supra* note 118, at 20 n.55 (quoting Kenneth Standard of Esptein, Becker & Green P.C.).

225. *See* Amelia J. Uelmen, *The Evils of "Elasticity": Reflections on the Rhetoric of Professionalism and the Part-Time Paradox in Large Firm Practice*, 33 FORD. URB. L.J. 81, 83 (2005).

the firm.

The stark reality of the elastic tournament is that firm managers lack the leverage to impose a top-down policy for the benefit of female lawyers with children.[226] In an effort to improve its image for recruitment purposes, virtually every firm has a policy that permits part-time work for lawyers.[227] Yet, to build or retain their client base, equity partners are themselves under tremendous pressure. Their lives are made easier by capable associates and junior partners at their constant beck and call. This profile is at odds with a lawyer-parent who has places a higher priority on her family.

C. *Millennial Lawyers and the New Lifestyle Firm*

As discussed earlier, there is empirical evidence that the promotion-to-partnership tournament still serves to bond midlevel associates to the firm.[228] Yet, the model is clearly under stress. The work demands on associates appear to be increasing,[229] thus producing higher levels of attrition.[230] At the same time, the rapidly growing economic rewards of equity partnership are substantially offset by its lack of permanence or the opportunity for repose.[231]

According to many human resource experts, the values and preferences of the next generation of lawyers, dubbed the Millennials, are on collision course with the work norms of large law firms.[232] Millennials are defined as the

226. The commentary that suggests that "firms" adopt more humane policy is simply too voluminous to cite. Here is just one: Deborah Rhode, *Profits and Professionalism*, 33 FORD. URB. L.J. 49, 75 (2005) (suggesting that firms adopt "reasonable billing standards that can accommodate significant family, pro bono service, and other personal commitments," "broad[en] eligibility for alternative schedules, including reduced time, flexible hours, compressed workweeks, and telecommuting", and create "monitoring structures designed to minimize the risks associated with alternative schedules, such as poor quality work assignments, lack of promotion opportunities, and workloads routinely exceeding agreed limits").

227. *See, e.g.*, Press Release, NALP, *Few Lawyers Work Part-Time, Most Who Do Are Women* (Dec. 7, 2007) (reporting that 98% of all law firm employers permit part-time employment, though only 5.4% actually use it).

228. *See supra* notes 92-94 and accompanying text (presenting multivariate regression results in which communication toward partnership and larger non-equity tier were factors reducing the likelihood of midlevel associate departure).

229. *See, e.g.*, Dau-Schmidt et al., *supra* note 215, at 22 (showing that average hours worked per year for Michigan Law graduates five years out has increased 143 hours per year for men and 88 hours per year for women).

230. *See, e.g.*, Fortney, *supra* note 118, at 283-84 (collecting sources that suggest higher associate turnover in recent years, primarily due to higher work demands).

231. *See, e.g.*, Green, *supra* note 118, at 24 ("[B]ecoming a partner has lost some its allure."); Fox, *supra* note 7, at 246-47 (observing that the profession is "being collectively embarrassed by the fact that the career path to 'partnership' today provides neither a path nor anything that resembles real partnership"); Rhode, *Profits and Professionalism*, *supra* note 226, at 72 (observing that in large firms, "full equity partnership, typically promises no reprieve from the punishing schedules that preceded it.").

232. *See, e.g.*, Lynne C. Lancaster, *Bridging the Generational Divide*, THE COMPLETE

generation born after 1980 and thus began graduating high school roughly around the year 2000.[233] According to the standard educational timeline, the first wave began working as summer and entry level associates during the last three to four years. The typical characterization of Millennial lawyers is that they demand a high level of racial and gender diversity within the firm's workforce,[234] are unwilling to sacrifice life and family for work,[235] believe that work should be fun, exciting, and high paying from day one,[236] and are more than willing to frankly express these views to their employer.[237]

Because the demand for corporate legal services continues to rise unabated,[238] the demands made by the Millennials cannot be hastily dismissed. Assuming these easily dynamics actually produce a generational "showdown" between entering associates and partners, it is difficult to predict who will prevail or what a compromise might look like.[239] Nonetheless, we cannot resist the urge to speculate.

An important data point is the recently formed Building a Better Legal Profession (BBLP), a grassroots student organization— formed in 2006 students currently enrolled at Stanford Law School, the host of this conference—that is urging change among the large law firms that its members

LAWYER, vol. 1, no. 5 (2005) online at www.thecompletelawyer.com/volume1/issue3/article.php?artid=21 (defining Millennials as those born after 1982 and discussing generational characteristics often at odds with modern large law firms, such as desire for more feedback, schedule flexibility, and additional training); Marci Krufka, *The Young & the Restless*, LAW PRACTICE, July/Aug. 2004, at 48 (reporting that many partners "are unsure about—even frustrated by—the new brand of associates"); Kathleen J. Wu, *Spoiled or Special, The Overscheduled, Over-Praised Generation Goes to Work at the Firm*, TEX. LAW., May 22, 2006, at 25 (reporting opinions of human resource experts that Millennials are "not so keen on dues-paying and menial tasks – the kind that all associates, at least occasionally, are called upon to perform").

233. Krufka, *supra* note 232, at 49 (defining generational categories).

234. *Id.*

235. *See* note 144.

236. *See* Tricia Kasting, *The "Millennial" Law Student Generation*, N.J. L.J., Oct. 9, 2006, at 21 (suggesting that these impressions are rooted in mass media). At a forum of law firm managers, law firm consultant Bruce MacEwen chronicled how many law firm partners perceive Millennials: "The new generation of lawyers (Millenials, a/k/a Gen Y) are all about 'work/life balance,' or trying to have it all."; they "want constant feedback, a highly structured environment (not "sink or swim") and are intolerant of drudgery"; "[t]hey have far less focus on a long-term career commitment to the firm"; "[b]ut are at least as smart, and far more worldly (study abroad, living abroad, etc.) than previous generations." See Bruce MacEwen, *12th Annual "Law Firm Leaders Forum:" The Word From the Mount,* ADAM SMITH, ESQ., Mar. 15, 2007, online at www.bmacewen.com/blog/archives/2007/03/12th_annual_law_firm_lead.html

237. Krufka, *supra* note 232, at 48-49 (observing that "[t]hese children of the baby boomers have been raised to think independently and to express their beliefs openly," which might be "perceived as discourteous or disrespectful" by law firm partners).

238. *See supra* notes 4-6, and accompanying text.

239 For some historical perspective on similar demands made on corporate law firms by students of the late 1960s and early 70s, see Nader, *supra* note 22, at 497-500.

may one day join.[240] One of BBLP's key strategies is to compile information and rank large law firms on metrics that matter to the group, such as pro bono participation, firm transparency, billable hours, gender composition, diversity of the firm's partnership, and overall firm diversity along the lines of race, gender, and sexual orientation.[241] Because these rankings are broken down at the major city level, students with multiple options will now have the information to make relatively targeted decisions. If the rankings take hold, firms that ignore BBLP's agenda will be at a considerable disadvantage in the market for associate talent. Hence, BBLP's describes its goals as "market-based workplace reforms."

Thus far, the group's success has been mixed, though with recent evidence of substantial forward momentum. In April 2007, BBLP sent a letter to 100 of the nation's largest law firms urging them to adopt the group's recommendations.[242] Although only six firms returned the communication, the group had in-person meetings with the managing partner of national law firm, which in turn lead to a pledge to support an initiative to support a project on attorney attrition.[243] More significantly, after extensive coverage in the mainstream media,[244] the rankings generated enormous internet traffic,[245] presumably from prospective law firm associates and law firm partners worried about how their firms fared. According to the group's founders, there is ample anecdotal evidence that students "crossed off firms from their interviews and callbacks by seeing that they were repeatedly at the bottom of our rankings."[246]

Yet, in assessing the long term prospects of BBLP's program, the key analytical question is whether law firms managers have the power (a separate question from inclination) to accede to these demands. Unfortunately, we are skeptical. For example, one of BBLP's Principles is to replace an "hours culture" with a "quality culture" by scuttling the billable hour in favor of transactional billing and adopting balanced hours policies "that, without stigma,

240. *See* Building a Better Legal Profession (BBLP), online at http://refirmation.wordpress.com/. *See also* McQuilken, *supra* note 21 (discussing the origins of BBLP at Stanford Law and its goals).

241. *See* Our Rankings, Law Students Building a Better Legal Profession, http://refirmation.wordpress.com/our-rankings/ (last visited Feb. 18, 2008).

242. *See* G.M. Fillsko, *Students Aim for BigLaw Change*, ABA J., Dec. 2007, *available at* http://www.abajournal.com/magazine/students_aim_for_biglaw_change/ (last visited Feb. 18, 2008).

243. *See id.* (reporting that after meeting with BBLP founders, Orrick, Herrington & Sutcliffe agreed to become a founding member of the Project for Attorney Retention at UC Hasting School of Law).

244 The group's extensive media coverage, which include the *New Republic*, the *Wall Street Journal*, and the *L.A. Times*, is collected here: http://refirmation.wordpress.com/recent-press/

245 According to a memorandum written by one of BBLP's founders to William Henderson, the group's total page views jumped by over 70,000 during the prime of the fall recruiting season.

246 Memorandum from BBLP online with William Henderson.

allow associates to work 80%, 70%, or 60% of fulltime hours for proportional pay" while keeping them on partnership track.[247] From a purely economic perspective, a lawyer who works 70% of the typical full-time load is unlikely to deliver a pro rata return on his or her time because fixed overhead for office space and support staff is not thereby proportionately reduced. Certainly, the marginal profit is higher for the hours in excess of 2000 versus 1400. From a partner perspective, staffing projects becomes more complicated and time-consuming.[248] More significantly, there is overwhelming evidence that each partner's security in the firm depends upon client relationships in a fiercely competitive marketplace.[249] Why would these folks want to confer partnership rewards on workers whose preferences would intensify that burden? Once again, there is no "firm" that can impose these lifestyle policies so long as it is made up of autonomous partners who can vote with their feet.

If the law firms and the Millennials are going to strike a deal, it is important to understand the associates' bargaining position. A law firm job can be evaluated along a variety of dimensions, including salary and bonus, working conditions, prestige, and value of future career options conferred by the skills and cachet an associate has acquired. Because elite law school graduates enjoy the most options, their career choices reveal information on the relative importance of these attributes. As an empirical matter, these employment patterns suggest that compensation, prestige, and outplacement options weigh more heavily with prospective associates than attributes like

247. *See* Principles for a Renewed Legal Profession, Law Students Building a Better Legal Profession, http://refirmation.wordpress.com/principles-for-a-renewed-legal-profession/ (last visited Feb. 18, 2008). This proposed policy mirrors a recent *ABA Journal* survey of law firm associates. *See* Ward, *Ultimate Time-Money Trade-Off*, *supra* note 144. Among 2,377 respondents, 73.4% reported practicing law five or fewer years, a figure which suggests that Millennials comprise a large proportion of the total sample. The survey found that associates were dissatisfied with their long work weeks. 84.2% indicated that they would be willing to exchange lower pay for lower billable hour requirements. Moreover, the size of the reduction sought was relatively substantial: 59.8% favored a drop of at least 15%. The majority of respondents also reported that they would take a pay cut commensurate with their workload reduction.

248. Some commentators, including BBLP, have argued that associates with balanced lives produce a better work product. *See* Costs to the Profession, http://refirmation.wordpress.com/costs-to-the-profession/ (last visited Feb. 18, 2008) (describing how long hours stifle creativity and promote inefficient work habits); Rhode, *supra* note 226, at 68 (reviewing management literature and concluding that "balanced lives boost bottom lines").

249. *See, e.g.*, *supra* notes 221-225, *supra*, and accompanying text; Fox, *supra* note 7, at 248 (observing that "the future model of the law firm . . . [based on] a now inevitable path is that law firms will include as partner only those whose books of business exceed a very significant number—say a million, two million, of three, depending on the firm and the city"); Green, *supra* note 118, at 20 n.55 (quoting a law firm partner, "You can either practice a hundred percent or you can stop practicing. It is very hard to practice part-time"); Kirkland, *supra* note 87, at 683 (quoting one equity partner, "[T]he hours don't get any better for partners; partners have even more pressure than associates do.").

hours worked or family friendliness.[250] Since better working conditions are already available at less elite firms in the Am Law 200, especially in smaller markets,[251] what BBLP appears to be asking for is very high pay, very high prestige, location in a desirable urban market, excellent career options, reasonable promotion prospects, *and* sensible hours.

This is not necessarily a deal that the prestigious Wall Street firms need to accept. Rather than reducing their hours, which may prompt partner defections, they can rely on higher salaries and their marquee brand—a good that associates routinely trade on to build their resumes—to coax sufficient Millennials to join the firm.[252] If firms at the top of the Vault rankings increase their starting salary another $20,000 and yet make no firm commitment toward BBLP's goals, what percentage of Millennials will go with the highest prestige job?[253] For less profitable firms in the Am Law 200, with ratios of partner profits to associate pay below 4.0,[254] each round of the salary wars prompts extremely difficult decisions. There is a strong perception among law firm partners that it is crucial to match the prevailing rate for associate pay because "otherwise, you are second-rate."[255] Yet, unless the pay raise is self-funded through higher billable hour requirements (an outcome antithetical to BBLP's goals) or higher billing rates (something clients will resist), firms toward the bottom of the Am Law 200 will be more likely to lose key rainmaking partners to upstream rivals. Of course, this only exacerbates the separation dynamic we know is occurring between elite and semi-elite large law firms.[256]

250. Henderson & Zaring, *supra* note 58, at 1099 & tbl.3 (presenting data that graduates of Top 10 law school are much more likely choose a Top 10 firm, with higher pay and prestige, despite significantly longer hours, less family-friendly working conditions, or worse communication toward partnership).

251 See William D. Henderson, *An Empirical Analysis of the Promotion to Partnership Tournament in the Am Law 200,* Presentation at the 2006 Law & Society Annual Meeting, July 2006 (Baltimore, Md) (presenting statistical evidence of a strong negative relationship between hours, family friendliness, and a variety of desirable working conditions versus firm profits and location in a major market).

252. *See supra* Figure 8, (showing that ratio of associate to partner pay at firms at the 95 percentile of profitability was 13.9 to 1). *See also* Aaron S. Haas, *The Rationality of Law Students' Career Choices* (Harvard Law School Students Scholarship Series, Paper 8, 2006) (applying recent behavioral economics theories to explain why elite law school students eventually end up favoring large firm jobs over other options despite a sense that they will be unhappy with the choice).

253 For a persuasive economic analysis of the collective action problems that plague law firm associates, see Renee M. Landers, James B. Rebitzer, & Lowell J. Taylor, *Rat Race Redux: Adverse Selection in the Determination of Work Hours in Law Firms*, 86 AM. ECON. REV. 329 (1996).

254. *See supra* Figure 8.

255. Green, *supra* note 118, at 22 (quoting Stephen Crane, partner at Proskauer Rose LLP and past president of the New York State Bar Association).

256. *See supra* Part II.D.

As we discussed earlier, many large firms are scrambling to meet the market in the salary wars while aggressively seeking out new ways to offset its financial impact.[257] Yet, higher salaries may be counterproductive if Millennial lawyers do, in fact, disproportionately leave large law firms after only a few short years of practice. (Note that Millennials are not monolith; we think that the most elite firms will continue to peal off large numbers of elite law school graduates who are willing to play by the old rules in order to start their careers at the top of the food chain.) Because of the continuing growth of demand for corporate legal services, large firms need capable, experienced lawyers to occupy the outer mantle of the elastic tournament. Excessive attrition harms client service.

We foresee at least two responses by law firms that could fundamentally transform the structure, economics, and norms of large law firm practice. First, large law firms, particularly less elite firms under pressure by the salary wars, can bypass Millennials from elite law schools by slightly reducing their grade cutoffs for interviewing students from less prestigious regional law schools. In essence, these firms would be scuttling the Cravath system, which aimed to hire the best students from the best law schools and give them the best training.[258] Yet, there is empirical evidence that this may be a prudent strategy. According to a recent study by Ronit Dinovitzer and Bryant Garth, which is based on data from the After the JD Project, large law firm associates who graduated from less elite law schools are (a) more satisfied with their careers, and (b) express a lower likelihood of wanting to leave the firm.[259] Because graduates of less elite law schools are less likely to come from a families with professional or advanced backgrounds, Dinovitzer and Garth suggest large law firm employment delivers a much greater sense of accomplishment and mobility than that experienced by their counterparts from elite law schools.[260] One law firm consultant recently reported several firms he has talked with "have been pleasantly surprised by the performance of some experimental new hires from the top of their class at 'lesser' ranked law schools."[261]

257. *See supra* notes 136-141, and accompanying text.

258. *See supra* note 7, and accompanying text.

259. *See* Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 L. & SOC'Y REV. 1, 12-13 & fig.2 (2006).

260. *See id.* at 23 (opining that "for many of the graduates of lower tier law schools, gaining entry to the legal profession is part of the project of upward mobility").

261. Ward Bower, *The War for Talent and Starting Salaries*, ALTMAN WEIL, INC., REPORT TO LEGAL MANAGEMENT, Apr. 2007, at 2, http://*www.altmanweil.com/dir_docs/resource/aa26ed0a-08e1-422b-8605-6e42e944bb92_document.pdf*. Researchers who studied engineers at the world famous Bell Labs during the 1980s also discovered that the organization's most valuable engineers did not have higher measures of cognitive or social ability but several work habits (including intellectual humility) consistently produced the best results for the company. *See* Robert Kelley & Janet Caplan, *How Bell Labs Creates Star Performers*, HARV. BUS. REV., July-Aug. 1993, at 128.

To deal with the exigency of high Millennial lawyer attrition, the second major transformation could be the emergence of a law firm that operates like a corporation, scuttling the promotion-to-partnership tournament and basing its hiring and promotion policies on each lawyer's marginal product. A firm operating on this model—once again, probably a semi-elite firm looking for refuge from the salary wars—would not be "selling" the elite credentials of its lawyers. Rather, it would be developing firm-specific capital by focusing on business processes that deliver high quality legal services at a cost-effective and predictable price.[262] Lawyers would be employees with salaries lower than their elite Wall Street counterparts; but they would also enjoy sensible hours that permit a better work-family balance—a combination of salary, prestige, and hours that is often found in in-house legal departments.[263] Promotions would not be based on a multi-year tournament but on a lawyer's ability to profitably manage client matters, often taken a flat-fee basis or another non-hourly alternative.[264] Demonstrated management and teamwork skills resulting in successful client engagements would carry more weight than Ivy-league credentials. Further, a focus on job performance may be an ideal environment to develop the talents and abilities and women and minority attorneys, [265] who have not fared well in a tracked and seeded promotion-to-partnership tournament.[266]

Although general counsel may favor elite law firms for bet-the-company matters, this new business model could make substantial in-roads for higher volume, price-sensitive corporate work. And if non-lawyers could capitalize and share profits with law firms— an idea that is now a reality in Australia and England—there would be ample funds to experiment with this new model.[267] More importantly, the resulting business process would be firm-specific capital, blunting the damage that could be done through lateral mobility and providing

262 General counsel from elite Fortune 100 corporations are indeed aggressively looking for value propositions that are outside the traditional law firm business model. See, e.g., Mark Chandler, *Cisco General Counsel of State of Technology in the Law*, THE PLATFORM: THE OFFICIAL CISCO BLOG, Jan. 25, 2007, online at http://blogs.cisco.com/news/2007/01/cisco_general_counsel_on_state.html .

263. *See, e.g.*, Dau-Schmidt et al., *Pride of Indiana*, *supra* note 212, at 34 (analyzing lawyer satisfaction data for Indiana Law alumni and noting that "[c]orporate counsel seems to offer a good mix of income, job satisfaction, and satisfaction with work/family balance").

264. Corporate clients are definitely interested in high-quality legal services at a predictable price. *See, e.g.*, Debra Cassen Weiss, *Clients May Help End Billing by the Hour*, ABA J., Jan. 2, 2007, *available at* http://www.abajournal.com/news/clients_may_help_end_billable_hours/ (last visited Feb. 18, 2008).

265. *Cf.* Kelley & Caplan, *Bell Labs*, *supra* note 261, at 137 (discussing how women and minorities posted largest productivity gains as a result of training based on the work habits of the Bell Lab's most productive workers).

266. *See supra* Part III.B.

267. For a thought-provoking exchange on these developments by three veteran law firm observers, see Milton Regan, Larry Ribstein, & Bruce MacEwan, *Law Firms, Ethics, and Equity Capital: A Conversation*, available at *http://ssrn.com/abstract=985351*.

firm management with opportunities to develop secure and valuable niche markets.

CONCLUSION

Under the new "elastic" tournament, a much larger proportion of lawyers will begin and end their careers as employees of the firm, expanding the ranks of permanent associates, senior associates, of counsel, and permanent nonequity partners. Whether this model will be fundamentally "stable" in the economic sense remains to be seen. In the meanwhile, it raises several philosophical and practical issues regarding the character of the legal profession, lawyer independence and the long-term viability of professional self-regulation.

The large law firm as social, cultural, and professional institution has an enormous and disproportionate influence on the legal profession.[268] Until now, it has been regarded as a larger, more complex, perhaps more proficient and exemplary version of the ordinary firm providing legal services—like the others, only more so. But our detailed scrutiny of market trends suggests that large law firms are actually on the brink of becoming something different. As firms give up the ideal of employee-ownership/autonomy for most of their members, the firm becomes paradoxically more 'corporate' (in the sense of control by a bureaucratic hierarchy unaccountable to subordinates) for most of the employee lawyers, but less corporate (in the sense of set apart and unified by loyalty) for the owner partners. Indeed, within the inner core of owners as within the outer mantle of non-equity partners, of counsel and other lawyers, there is an endless competition to improve or protect one's relative standing in the firm. The thinner firm culture produced by sheer firm size and geographic dispersion cannot contain the centripetal dynamic of internal competition supercharged by the constant threat of mobility. So money becomes the primary glue holding the firms together—an outcome that flows from the structural features of the modern legal marketplace and that attenuates the professional ideals of most lawyers.

268. *See supra* note 27.