

# HUMAN CAPITAL DISCRIMINATION, LAW FIRM INEQUALITY, AND THE LIMITS OF TITLE VII

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*This Article advances the legal scholarship on workplace inequality through use of evidence derived from interviews of a sample of black attorneys who have worked in large, predominantly white law firms. It does so by calling attention to the manner in which these firms operate as sites of human capital discrimination—patterns of mistreatment that deprive many black associates of access to the substantive work opportunities crucial to their professional development and career advancement. This Article identifies the specific arrangements and practices within these firms that facilitate human capital discrimination and describes the varied, often subtle harms and burdens that they tend to inflict upon black attorneys.*

*The incidence of human capital discrimination and its deleterious effects are obscured by the informal and fluid personnel arrangements that are prevalent in large law firms. As a result, human capital discrimination falls almost entirely outside of the coverage of Title VII, the restrictions of which are currently limited by the adverse employment action doctrine. In recognition of this, this Article endorses two sets of doctrinal reforms that would afford black attorneys greater protections under Title VII and proposes a series of organizational reforms that law firms committed to the pursuit of workplace equality should undertake, notwithstanding the limits of employment discrimination law.*

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## INTRODUCTION

Persisting racial disparities in America’s largest law firms have generated a rich body of legal scholarship that has resulted in illuminating insights concerning the difficulties of minority law associates in predominantly white firms.<sup>1</sup> Notwithstanding its important contributions, this scholarship has devoted little empirical attention to the day-to-day experiences and career trajectories of actual minority associates within these firms.<sup>2</sup> This lack of empiricism leaves

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<sup>1</sup> See, e.g., Tiffani N. Darden, *The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory & the Institutional Analyses of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85 (2009); Luis J. Diaz & Patrick C. Dunican Jr., *Ending the Revolving Door Syndrome in Law*, 41 SETON HALL L. REV. 947 (2011); Veronica Root, *Retaining Color*, 47 U. MICH. J.L. REFORM 575 (2014); Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755 (2006); Eli Wald, *Biglaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509 (2015); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998) [hereinafter Wilkins & Gulati, *Reconceiving the Tournament*]; David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996) [hereinafter Wilkins & Gulati, *Why Are There So Few Black Lawyers*]; David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924 (1999) (book review).

<sup>2</sup> But see Kevin Woodson, *Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms*, 83 FORDHAM L. REV. 2557 (2015) [hereinafter Woodson, *Race and Rapport*] (using interview data from attorney interviews in the context of discussing homophily); Darden, *supra*

much of our current understanding of their experiences largely speculative.

This Article addresses this gap in the literature by drawing evidence from interviews of seventy-five black attorneys who have worked as associates at major law firms around the country.<sup>3</sup> Through an assessment of the first-hand experiences of these attorneys,<sup>4</sup> this Article identifies certain processes, behaviors, and organizational arrangements that derail the careers of many black attorneys, thereby sustaining and perpetuating racial inequality throughout the industry. Specifically, this Article calls attention to the salience and impact of “human capital discrimination,” racially disparate access to high-quality work opportunities crucial for associates’ professional development and career advancement. This deprivation of human capital—the accumulated career experiences, knowledge, and skills that determine associates’ future career prospects—constitutes a pernicious form of institutional discrimination.<sup>5</sup>

Human capital discrimination is informal, incremental, and inchoate in nature. It flows from the subtle mechanisms of employment disadvantage emphasized in the recent “‘structural turn’ in antidiscrimination scholarship.”<sup>6</sup> It is consistent with a large body of scholarship on implicit and other forms of racial bias,<sup>7</sup> and sociological

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note 1 (interviewing very small sample of law firm attorneys concerning issues of racial diversity).

<sup>3</sup> For information about the methodological approaches used in developing this sample and conducting these interviews, see *infra* Section II.A.

<sup>4</sup> Although this Article focuses specifically on the experiences of black law firm associates, the concept of human capital discrimination of course affects members of other marginalized groups in various occupational contexts as well.

<sup>5</sup> While human capital discrimination can occur because of racial biases, it also reflects the tendency of socially similar people to gravitate toward and one another. See Woodson, *Race and Rapport*, *supra* note 2 (discussing cultural homophily-based behavior as a source of disadvantage for black law firm associates).

<sup>6</sup> Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2 (2006) (discussing this body of work as “[the] ‘structural turn’ in antidiscrimination scholarship”). The past two decades have seen an important conceptual shift in antidiscrimination scholarship away from the traditional forms of employment acts and harms toward a focus on more nuanced and complicated processes that drive racial and gender inequality in contemporary occupational settings. See, e.g., Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (discussing how “manifestations of workplace bias are structural, relational, and situational”).

<sup>7</sup> See, e.g., John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002); Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH U. L. REV. 325 (2014); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006) (offering an overview of the experimental research); Anthony G. Greenwald et al., *Understanding and Using the*

research on the tendencies of individuals to favor others who share certain social backgrounds and cultural interests.<sup>8</sup> Human capital discrimination does not occur through formal personnel decisions with immediately tangible career harms, but rather through more subtle, quotidian forms of disadvantage. Compared to the more obvious forms of discrimination common in other labor markets,<sup>9</sup> the actions and incidents that produce patterns of human capital discrimination can seem rather mundane. And yet these seemingly minor disparities can cumulatively produce substantial disadvantages. Though a single decision to provide a high-quality assignment to one junior associate instead of her counterparts may not carry immediately observable career consequences, if left unaddressed, such disparate treatment over time can impact an associate's career decisively. Associate careers are highly path-dependent in that associates' earliest experiences in these firms structure their later access to the opportunities and support necessary to thrive long-term. Given this path dependency in the intensely competitive career ladders of large firms, even relatively minor inequalities in access to early opportunities to develop human capital can snowball into insurmountable deficits, contributing to broader patterns of marginalization and exclusion. Such early discrepancies can lead to greater job dissatisfaction for black associates, who get choice assignments less often than their white counterparts,<sup>10</sup> as well as racial disparities in objective employment outcomes such as promotions and attrition. Understanding law firm inequality therefore requires a reconceptualization of employment discrimination as a cumulative process—a trajectory of inequality—rather than as a result of any one discrete act. In calling attention to the problem of human capital discrimination, this Article seeks to clarify the stakes involved in how employers and courts address relatively minor forms of unequal employment treatment.

This Article's discussion of human capital discrimination underscores the limitations of Title VII in addressing systematic forms

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*Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995). See generally IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012) (examining the potential role of implicit bias in contributing to racial inequality and unjust legal outcomes in a number of doctrinal areas).

<sup>8</sup> See LAUREN A. RIVERA, PEDIGREE: HOW ELITE STUDENTS GET ELITE JOBS (2015); Woodson, *Race and Rapport*, *supra* note 2; Kevin Woodson, *Derivative Racial Discrimination*, 12 STAN. J. C.R. & C.L. 335 (2016) [hereinafter Woodson, *Derivative Racial Discrimination*].

<sup>9</sup> See generally Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 187 (2008) (describing a multitude of studies that found that black workers were subjected to substantial hiring discrimination).

<sup>10</sup> See *infra* note 44 and accompanying text.

of racially disparate treatment that occur in large firms and other employment settings. Human capital discrimination can derail associates' careers long before it has any impact on the formal terms and conditions of their employment.<sup>11</sup> Within law firms, dissatisfied black associates voluntarily leave their firms before the effects of their limited access to high-quality assignments have fully ripened.<sup>12</sup> As such, most forms of human capital discrimination fall outside the parameters that federal courts require before imposing employer liability under Title VII. Due to the adverse employment action doctrine,<sup>13</sup> Title VII liability primarily extends to employment acts that directly affect the tangible terms and conditions of a worker's employment.<sup>14</sup> Despite their disastrous career consequences for black attorneys, incidents of human capital discrimination are frustratingly difficult to identify, let alone trace, to tangible outcomes. Therefore, though differences in access to substantive work responsibilities and on-the-job training can make or break careers, they seldom are cognizable bases for Title VII claims. These difficulties point to the need for ambitious doctrinal and organizational reforms, on the part of courts and employers respectively.

This Article proceeds in four Parts. Part I provides a brief history of the experiences of black attorneys in large, predominantly white law firms to demonstrate the systemic, stubborn racial disparities that persist in these firms despite the profound progress of recent decades. Part II examines the problem of human capital discrimination through qualitative empirical evidence from interviews of a sample of black attorneys. The first-hand reports of these interviewees add texture and clarity to existing accounts of law firm inequality by describing the causes, mechanisms, and consequences of human capital discrimination. Part III provides an overview of the adverse employment action doctrine of the existing Title VII case law and explains how it excludes most instances of human capital discrimination from coverage under the statute.<sup>15</sup> It then considers how organizational

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<sup>11</sup> See *infra* note 122 and accompanying text.

<sup>12</sup> See *infra* note 127 and accompanying text.

<sup>13</sup> See *infra* Part III.

<sup>14</sup> See *infra* Part III. A notable exception is the hostile work environment doctrine, which extends to workplace conduct that cumulatively renders workplace environments hostile or abusive. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (cause of action requires "severe or pervasive enough [conduct] to create an objectively hostile or abusive work environment").

<sup>15</sup> This Article focuses specifically on disparate treatment theories of liability under Title VII. Though associates can, in theory, challenge the practices that give rise to human capital discrimination under disparate impact causes of action, this approach is beset by numerous, formidable challenges. To pursue disparate impact claims, plaintiffs must prove that a specific challenged employment practice has a disproportionate negative effect on the members of their racial group. See *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 1001-02 ("[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific

features that are prevalent in large law firms render human capital discrimination virtually impossible to address under the existing jurisprudential framework. Part IV considers whether and how courts and employers might more effectively address racial disparities in associates' opportunities to develop human capital. It argues for a more expansive notion of material adversity and even more comprehensive doctrinal reforms, while acknowledging that legitimate practical considerations limit their potential effectiveness. This Article concludes by arguing that true progress can be achieved only through employers, clients, and other interested industry constituents working collaboratively to more effectively prevent and address human capital discrimination, the formal legal process notwithstanding.

## I. BLACK ATTORNEYS IN LARGE LAW FIRMS

### A. *From Complete Exclusion to Partial Inclusion*

For more than 150 years after the founding of the first American law firms,<sup>16</sup> black attorneys faced uniform discrimination and near complete exclusion from the profession. Through the early twentieth century, very few black Americans were licensed to practice law.<sup>17</sup> Those who were licensed faced severely limited employment options and were generally confined to working on matters representing other black Americans.<sup>18</sup> Black students were conspicuously absent from the highly

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employment practice remains with the plaintiff at all times.” (citation omitted)). As an initial matter, due to the small number of black attorneys employed by these firms, plaintiffs attempting to sue law firms would struggle to amass the statistical evidence that courts prefer as proof of disparate impact or to identify the specific employment practices responsible. See generally Elizabeth Tippett, *Robbing a Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 443–44 (2012) (discussing burdensome “evidentiary rigors of a disparate impact claim”). Though plaintiffs can challenge employers’ discriminatory use of subjective practices in general, such claims face considerable practical and evidentiary difficulties, and are seldom successful. See Michael Selmi, Response to Professor Wax, *Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1236 n.8 (1999) (“Although it is theoretically possible to establish a disparate impact claim based on subjective employment practices, such cases are both difficult and rare.”). These and other difficulties limit the plausibility of disparate impact theory as a means of addressing human capital discrimination.

<sup>16</sup> See Charles Delafuente, *The Old One: Philly Firm’s History Dates Back to Ben Franklin*, A.B.A. J., Feb. 2014 (the first American law firms were founded in the 1780s).

<sup>17</sup> See Charles H. Houston, *The Need for Negro Lawyers*, 4 J. NEGRO EDUC. 49 (1935).

<sup>18</sup> Harry T. Edwards, *A New Role for the Black Law Graduate: A Reality or an Illusion?*, 69 MICH. L. REV. 1407 (1971); Ernest Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L.J. 1069, 1070 (1968) (“White law firms, government, business and bar associations were closed to the Negro. The Negro lawyer had to operate on the fringe of the profession.”); William H. Hale, *The Negro Lawyer and His Clients*, 13 PHYLON 57 (1952); Vernon E. Jordan, Jr., *Black Lawyers Cannot Be Relegated to a Professional Ghetto*, 7 NAT’L BLACK L.J. 57 (1981); William C. Kidder,

selective law schools where the largest, most elite law firms focused their associate hiring efforts. The few black law students who were able to attend these schools were still denied employment in these firms, no matter how impressive their credentials and accomplishments.<sup>19</sup>

The initial fissures in this occupational apartheid emerged in the 1960s, reflecting the profound social and policy evolutions of the Civil Rights Era. Law schools around the country began admitting unprecedented numbers of black students—the number of newly minted black attorneys doubled by the decade’s end.<sup>20</sup> During this period, elite law schools launched ambitious affirmative action admissions programs,<sup>21</sup> thereby substantially increasing the population of black attorneys with the prestigious credentials that America’s largest law firms coveted.<sup>22</sup>

This new supply of highly credentialed black attorneys arrived at a favorable historical moment. With liberalized racial norms, skyrocketing hiring needs,<sup>23</sup> and the rise of black political power,<sup>24</sup> law

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*The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1 (2003) (through the mid-1960s, black students accounted for only approximately one percent of law school students).

<sup>19</sup> For example, even William Coleman, who graduated first in his class at Harvard Law School in 1946 before clerking for Supreme Court Justice Felix Frankfurter, was rejected by firms in Philadelphia, Boston, and New York before finally being hired by Paul Weiss. See WILLIAM COLEMAN, COUNSEL FOR THE SITUATION: SHAPING THE LAW TO REALIZE AMERICA’S PROMISE (2010); Tamara Loomis, *Practicing What They Preach*, MINORITY L.J., Spring 2004.

<sup>20</sup> Between 1965 and 1967, the number of black law school graduates roughly doubled, from around 200 to approximately 400 per year. Gellhorn, *supra* note 18, at 1080.

<sup>21</sup> See, e.g., Macklin Fleming & Louis Pollak, *The Black Quota at Yale Law School*, PUB. INT., Spring 1970, at 44, 44–45 (describing Yale Law School’s aggressive new affirmative action admissions practices); Peter Winograd et al., *The Disadvantaged Student and Preparation for Legal Education: The New York University Experience*, 2 U. TOL. L. REV. 701 (1970). Compare Lino A. Graglia, *Special Admission of the “Culturally Deprived” to Law School*, 119 U. PA. L. REV. 351, 352 (1971) (contending that the growing use of special admissions standards for black law school applicants will “disserve the cause of Negro equality, impair educational quality, and result in deviation of the schools from their educational function”), with Derrick A. Bell, Jr., *In Defense of Minority Admissions Programs: A Response to Professor Graglia*, 3 NAT’L BLACK L.J. 241, 243 (1973) (arguing that affirmative action admissions standards used at Yale and other law schools “are not violative but in furtherance of sound educational policies.”).

<sup>22</sup> See Edwards, *supra* note 18; Gellhorn, *supra* note 18, at 1077–85. At Harvard Law School, one of the primary feeder schools to the nation’s elite law firms, the number of black law students in the entering classes increased from a mere three in 1963 to sixty-five in 1971. Kidder, *supra* note 18, at 10. By 1970, black students also constituted ten percent or more of the entering classes at several other elite law schools, including the University of Michigan and UCLA. See *id.*

<sup>23</sup> This increase in the supply of black attorneys came about just as law firms began to rapidly expand their workforces and increase associate hiring. See MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991); ROBERT L. NELSON, PARTNERS WITH POWER: SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988).

<sup>24</sup> See Frederick F. Smith Jr., *Are America’s Law Firms Willing to Make Blacks Partners?*, 15 BLACK ENTERPRISE, Nov. 1984, at 63, 66 (the ascent of black Americans to leadership positions

firms demonstrated an unprecedented willingness to take on black attorneys.<sup>25</sup> In 1968, Law professor Ernest Gellhorn observed that “Wall Street-type firms that would not have considered hiring Negroes ten years ago now actively recruit them.”<sup>26</sup> Some of the most prestigious firms in the leading legal markets of New York, Washington, D.C., Chicago, and Philadelphia began hiring small numbers of black attorneys; several even named their first black partners.<sup>27</sup> Large firms in other parts of the country soon followed suit.<sup>28</sup>

Though these developments evidenced an extraordinary breakthrough on the part of black attorneys, the pace of racial progress over the next forty years proved to be slow and unsteady. By 1979, only twelve (<1%) of the 3,700 partners at the fifty largest law firms in the country were black.<sup>29</sup> By 1990, the twenty-five largest law firms in New York City had a total of only twenty-one black partners,<sup>30</sup> and only 157

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in some of the nation’s largest municipal governments created greater opportunities for black professionals working in elite professional service firms).

<sup>25</sup> A small number of early outliers had each hired a single black attorney by the early 1960s. See PAUL HOFFMAN, *LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS* (1973); RICHARD L. ZWEIGENHAFT & G. WILLIAM DOMHOFF, *BLACKS IN THE WHITE ELITE: WILL THE PROGRESS CONTINUE?* (2003).

<sup>26</sup> Gellhorn, *supra* note 18, at 1071.

<sup>27</sup> See *Atty. Julian Wilkins, 57, Dies After Lengthy Illness*, JET, July 23, 1984, at 12 (Julian Wilkins became the first black partner of a major Chicago firm at Jenner and Block in 1972); Trevor Jensen, *Charles E. Lomax, 1924-2009: Longtime Lawyer for Don King*, CHI. TRIB., (Sept. 25, 2009), [http://articles.chicagotribune.com/2009-09-25/news/0909240874\\_1\\_sidley-austin-don-king-productions-mr-lomax](http://articles.chicagotribune.com/2009-09-25/news/0909240874_1_sidley-austin-don-king-productions-mr-lomax) (Lomax became one of the first black partners at any large Chicago law firm when he joined Sidley Austin in 1975); *Selected Profiles of Massachusetts Judges and Lawyers: Attorney Harry T. Daniels*, MASS. HIST. SOC’Y, <http://www.masshist.org/longroad/03participation/profiles/daniels.htm> (last visited July 22, 2016) (Harry T. Daniels became the first black partner at a major Boston firm in 1978); *Philadelphia Lawyer and Retired Judge to Receive Lifetime Achievement Award at PBA Minority Attorney Conference*, PA. B. ASS’N (Jan. 26, 2010), <https://www.pabar.org/public/news%20releases/pr012610.asp> (James Giles became one of the first black partners at a major Philadelphia law firm in 1974). Conrad Harper became one of the first black partners at a major New York law firm in 1974. See *C. Harper Becomes First Black to Head N.Y. Bar*, JET, June 11, 1990, at 18.

<sup>28</sup> Firms in the largest southern legal markets named their first black partners in the late 1970s and 1980s. See Tamara Loomis, *Hunton’s Change of Heart: How an Old-Line Southern Law Firm Learned to Embrace Diversity*, NAT’L L.J., May, 9 2006 (describing Hunton and Williams’ decisions to hire and promote John Charles Thomas as one of the first black firm attorneys in the south); Kevin King, *‘Texas Super Lawyer’ Rufus Cormier Looks Back at His Rise to the Top*, EXAMINER (Feb. 26, 2016, 1:00 AM), <http://theexaminer.com/stories/news/%E2%80%98texas-super-lawyer%E2%80%99-rufus-cormier-looks-back-his-rise-top> (Rufus Cormier became the first black partner at a major Texas firm in 1981); Press Release, State Bar of Georgia, *Celebration of Civil Rights Milestones* (June 3, 2015), [http://www.gabar.org/newsandpublications/pressrelease/upload/Program\\_civil\\_rights\\_2015.pdf](http://www.gabar.org/newsandpublications/pressrelease/upload/Program_civil_rights_2015.pdf) (noting that Charles Johnson III became the first black partner at a major Atlanta law firm in 1979).

<sup>29</sup> Laura A. Kiernan, *Survey Finds Only 12 Blacks as Partners in Nation’s 50 Biggest Firms*, WASH. POST, July 16, 1979. In 1983, 2.1% of the total attorneys at the top 100 law firms in the country were black. Smith Jr., *supra* note 24, at 64.

<sup>30</sup> Steven Beschloss & Robert McNatt, *A Broken Trust: Many Black Professionals Are Turning Their Backs on Corporate New York and Changing the Rules of Gain*, CRANE’S N.Y.



(2.4%) of the 6,673 associates at these firms were black.<sup>31</sup> Decades after the first black attorneys set foot in the hallowed halls of these firms, fewer than fifty of the nation's 250 largest law firms had named more than one black partner.<sup>32</sup>

### B. Present Inequalities

Though the absolute numbers of black attorneys in elite firms have risen substantially over the past generation, their relative representation, particularly in the partnership ranks, have increased only modestly. As of 2014, only 3% of all attorneys<sup>33</sup> and fewer than 2% of partners<sup>34</sup> at major law firms were black, a statistic possibly inflated by the inclusion of black junior and other non-equity partners.<sup>35</sup> Despite the extraordinary resources that these firms devote toward better recruiting and retaining attorneys of color,<sup>36</sup> and their relative success in hiring diverse first-year cohorts of junior associates, these firms by and large have failed to ensure that black associates receive equal treatment and access to work opportunities.

The failure of these firms to retain and promote black attorneys has captured the attention of a varied array of outside interests and observers, including the large corporations who hire them,<sup>37</sup> bar

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BUS., Oct. 30 1989, at 31; Michael King, *Ambition on Trial*, BLACK ENTERPRISE, Feb. 1990, at 132.

<sup>31</sup> Beschloss & McNatt, *supra* note 30; King, *supra* note 30.

<sup>32</sup> Joel Glenn Brenner, *Minority Lawyers Missed Out on Hiring Boom; Study Shows Underrepresentation in Largest Firms Despite Expansion of Last Decade*, WASH. POST, Feb. 13, 1990.

<sup>33</sup> Debra Cassens Weiss, *Only 3 Percent of Lawyers in BigLaw Are Black, and Numbers Are Falling*, A.B.A. J. (May 30, 2014), [http://www.abajournal.com/news/article/only\\_3\\_percent\\_of\\_lawyers\\_in\\_biglaw\\_are\\_black\\_which\\_firms\\_were\\_most\\_diverse](http://www.abajournal.com/news/article/only_3_percent_of_lawyers_in_biglaw_are_black_which_firms_were_most_diverse); see *Methodology: How We Measure Diversity*, AM. LAW. (May 29, 2014), <http://www.americanlawyer.com/id=1202656370271/Methodology-How-We-Measure-Diversity?slreturn=20160706010754> (noting that black attorneys were “the only minority group to lose ground over the past five years”).

<sup>34</sup> See Elizabeth Olson, *Many Black Lawyers Navigate a Rocky, Lonely Road to Partner*, N.Y. TIMES, Aug. 18, 2015, at B1.

<sup>35</sup> See Shannon Henson, *Law Firms Take Heat for ‘Juicing’ Partner Stats*, LAW360 (Mar. 15, 2010, 4:43 PM), <http://www.law360.com/articles/153118/law-firms-take-heat-for-juicing-partner-stats> (noting allegations that a disproportionate percentage of non-equity partners are women and minorities). See generally William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691 (2006) (noting that many of the nation's 200 largest law firms have transitioned to dual-track partnership ranks).

<sup>36</sup> See Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1, 5 (2009) (discussing a survey finding that participating Am Law 200 firms allocated an average of \$513,500 for their diversity managers' offices); Root, *supra* note 1, at 598–601 (discussing diversity efforts undertaken by various law firms in response to client pressure).

<sup>37</sup> Corporate clients have played a leading role in efforts to induce large firms to secure greater racial diversity. See generally *If the Client Insists They Be Given a Chance*, *Minority*

associations,<sup>38</sup> and industry organizations.<sup>39</sup> Despite significant inducements and pressure from corporate clients<sup>40</sup> and a proliferation

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*Lawyers at Large Law Firms Do Succeed*, METROPOLITAN CORP. COUNS., Mar. 2007, at 57 (discussing the efforts of several corporations in promoting greater diversity in the law firms that service them); Melissa Maleske, *Designing Diversity: Law Departments Share Their Strategies to Drive Inclusion Programs*, INSIDE COUNS., June 2009, at 48, 50 (many of the nation's largest corporations now regularly survey and request information about diversity statistics and procedures from the law firms interested in competing for their business).

<sup>38</sup> The ABA, which had once firmly resisted the entrance of racial minorities into the upper realms of the profession, formally excluding black attorneys until 1943, eventually came to embrace the push for greater racial diversity as a top organizational goal, releasing numerous reports and public statements on the topic. See, e.g., AM. BAR ASS'N, TASK FORCE ON MINORITIES IN THE LEGAL PROFESSION: REPORT WITH RECOMMENDATIONS (1986) (detailing the persisting segregation in the industry and finding that minorities were still deprived of equal opportunity); AM. BAR ASS'N, AMERICAN BAR ASSOCIATION RESOURCE GUIDE: PROGRAMS TO ADVANCE RACIAL AND ETHNIC DIVERSITY IN THE LEGAL PROFESSION (2000) (embracing goals of increasing the number of black law students and improving the recruitment, training, retention and promotion of black attorneys at law firms); Terry Carter, *Diversity and Surprises: Departing President Archer Saw Minorities Advance, Handled Unexpected Issues*, A.B.A. J., Oct. 28, 2004, at 72 (discussing ABA president Dennis Archer's efforts to renew the organization's focus on diversity by convening conferences and panels throughout the country).

<sup>39</sup> For example, the National Association for Law Placement (NALP), a non-profit legal industry organization, gathers extensive data about individual law firms. See, e.g., *Women and Minorities Maintain Representation Among Equity Partners, Broad Disparities Remain*, NALP: NALP BULL. (Mar. 2016), <http://www.nalp.org/0316research>. Industry periodicals use similar data to develop rankings and reports that are publicly disseminated; see also *Law Firms Make Slow Progress on Diversity*, AM. LAW. (June 21, 2016), <http://www.americanlawyer.com/id=1202758333171/Law-Firms-Make-Slow-Progress-on-Diversity>. Stanford University's "Building a Better Legal Profession" also actively tracks and rates law firms' diversity. See Adam Liptak, *In Students' Eyes, Look-Alike Lawyers Don't Make the Grade*, N.Y. TIMES, Oct. 29, 2007, at A10.

<sup>40</sup> Some corporate clients began pushing for greater diversity many years ago. See *ABA President Dennis Archer: His Goals—And Dedication To Diversity*, METROPOLITAN CORP. COUNS., Feb. 2004, at 37, 38 (in 1988, Harry Pearce, then Vice President and General Counsel of General Motors, became the first attorney of a major corporation to formally request that his law firms develop more diverse workforces); Karen Donovan, *Pushed by Clients, Law Firms Step Up Diversity Efforts*, N.Y. TIMES, July 21, 2006, at C6 (DuPont began considering diversity as a criterion for selecting law firms in the 1990s). This issue did not rise to the national spotlight though until 1999, when Charles Morgan, General Counsel of BellSouth, got representatives of nearly 500 corporations to sign his proposal, "Diversity in the Workplace, A Statement of Principle." See Anjali Chavan, Current Development, *The "Charles Morgan Letter" and Beyond: The Impact of Diversity Initiatives on Big Law*, 23 GEO. J. LEGAL ETHICS 521, 522–23 (2010); see also Donovan, *supra*, at C6 (In 2004, Roderick A. Palmore, then General Counsel at Sara Lee, authored a more strongly-worded follow-up statement, "The Call to Action" which insisted that law firms take more proactive measures in improving diversity).

In the past decade, Wal-Mart has received national recognition for its comprehensive, and at times aggressive, efforts to monitor the diversity of its law firms and to push them to achieve greater diversity. See, e.g., Donovan, *supra* (explaining that Wal-Mart terminated two of its law firms solely because of their lack of progress in meeting diversity objectives); Alana Roberts, *Corporate Push for Law Firm Diversity Enters a New Phase*, CORP. COUNS. (July 11, 2008), <http://www.corpcounsel.com/id=1202422926103/Corporate-Push-for-Law-Firm-Diversity-Enters-a-New-Phase> (Wal-Mart developed special software to monitor the diversity of its outside counsel, and, within the first several years of its efforts, the company had awarded more than \$60 million worth of its legal business to firms with minority or female relationship

of best practices from bar associations and diversity consultants,<sup>41</sup> black attorneys at these firms continue to experience systemic racially disparate treatment.

Survey data from the “After the JD” study,<sup>42</sup> the best available statistical data on the career experiences and outlooks of law firm associates,<sup>43</sup> reveals some of the racial disparities in treatment from senior attorneys that black associates encounter in these firms. Compared to their white counterparts, black associates receive lower quality assignments,<sup>44</sup> have less social contact with partners at their firms,<sup>45</sup> and receive less satisfactory mentorship.<sup>46</sup> These racial disparities culminate in black associates leaving their firms significantly

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partners); Kellie Schmitt, *Corporate Diversity Demands Put Pressure on Outside Counsel*, CORP. COUNS. (Dec. 28, 2006), <http://www.corpcounsel.com/id=900005470357/Corporate-Diversity-Demands-Put-Pressure-on-Outside-Counsel> (Wal-Mart has asked that its law firms supply it with the names of women or minority attorneys who may potentially serve as their primary contacts on their cases).

<sup>41</sup> See, e.g., AM. BAR ASS'N, *DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS* 26–30 (2010); NAT'L ASS'N FOR LAW PLACEMENT, *DIVERSITY BEST PRACTICES GUIDE* (2016); ARIN N. REEVES, AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, *FROM VISIBLE INVISIBILITY TO VISIBLY SUCCESSFUL: SUCCESS STRATEGIES FOR LAW FIRMS AND WOMEN OF COLOR IN LAW FIRMS* (2008).

<sup>42</sup> See *After the JD*, AM. B. FOUND., <http://www.americanbarfoundation.org/publications/afterthejd.html> (last visited Sept. 6, 2016).

<sup>43</sup> See *id.* (describing *After the JD* as “the first and most ambitious effort to gather systematic, detailed data about the careers and experiences of a national cross-section of law graduates”). Though it represents an impressive undertaking, the *After the JD* study is not without its limitations. Most notably, the sample includes only a relatively modest number of black associates with jobs at large law firms and suffers from significant nonresponse and attrition rates. See *id.* Therefore, though the survey is nationally representative by design, these data issues may compromise its effectiveness in providing precise generalizable insights about black law firm associates.

<sup>44</sup> See, e.g., Monique R. Payne–Pikus et al., *Experiencing Discrimination: Race and Retention in America's Largest Law Firms*, 44 L. & SOC'Y REV. 553, 567, 569 (2010) (finding that white associates in large law firms report doing a lesser proportion of routine legal work compared to their black and Hispanic counterparts); Sander, *supra* note 1, at 1800–02 (black attorneys less likely to report handling an entire matter on their own, being involved in formulating strategy on half or more of their matters, or being responsible for keeping their clients updated); *id.* at 1802 (black attorneys were more likely to report spending “100+ Hours Reviewing Discovered Documents/Performing Due Diligence on Prepared Materials.”); Jee-Yeon K. Lehmann, *Job Assignment and Promotion Under Statistical Discrimination: Evidence from the Early Careers of Lawyers* (Aug. 10, 2011) (unpublished manuscript), [https://mpr.ub.uni-muenchen.de/33466/1/MPRA\\_paper\\_33466.pdf](https://mpr.ub.uni-muenchen.de/33466/1/MPRA_paper_33466.pdf).

<sup>45</sup> See Payne–Pikus et al., *supra* note 44, at 567–72 (2010) (discussing difference in black and white law firm associates' social support).

<sup>46</sup> See *id.*; Sander, *supra* note 1, at 1798 (“Nonwhites—especially blacks—exhibit a striking concern over the absence of mentoring and training in their jobs, relative to white men”). Though mentorship is subject to any number of different definitions, each with distinct nuances, the term can generally be understood as describing developmental relationships between individual workers (protégés) and more senior workers (mentors). See George F. Dreher & Taylor H. Cox, Jr., *Race, Gender, and Opportunity: A Study of Compensation Attainment and the Establishment of Mentoring Relationships*, 81 J. APPLIED PSYCHOL. 297, 298 (1996).

more rapidly than white associates,<sup>47</sup> usually well before they are eligible to be considered for partnership.<sup>48</sup>

Although the available statistical evidence demonstrates the existence of these highly concerning black-white differences, our understanding of racial inequality in America's large law firms remains limited by a lack of in-depth qualitative research into the lived experiences of black associates. The following Part will examine more closely the specific challenges and problems that black associates experience during their day-to-day lives in these firms. Using evidence from an empirical study of black attorneys who have worked in large law firms, the following Part will bring into focus the problem of human capital discrimination, the process through which unequal access to quality work assignments limits the careers of black associates and reinforces racial inequality.

## II. HUMAN CAPITAL DISCRIMINATION: EMPIRICAL INSIGHTS

### A. *Empirical Methodology*

This Part presents findings from personal interviews of seventy-five black attorneys who worked as associates at large, predominantly white law firms during the first decade of the twenty-first century.<sup>49</sup> The members of this interview sample all began their legal careers as first-year associates between 1999 and 2009, with most joining their firms between 2003 and 2007. These interviewees were a subsample of a larger sample of interviews that I conducted for my dissertation research on the significance of race for the current generation of young black professionals working in elite firms in a number of high-status industries.<sup>50</sup> I developed this sample through use of chain referral (or "snowball") sampling methods, an approach commonly used to gather

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<sup>47</sup> See Payne-Pikus et al., *supra* note 44, at 559–60; Sander, *supra* note 1, at 1805–07 (black associates more likely than white associates to leave their firms); Liane Jackson, *Minority Women are Disappearing from BigLaw—and Here's Why*, A.B.A. J. (Mar. 1, 2016, 12:15 AM), [http://www.abajournal.com/magazine/article/minority\\_women\\_are\\_disappearing\\_from\\_biglaw\\_and\\_heres\\_why](http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why).

<sup>48</sup> See Payne-Pikus et al., *supra* note 44, at 559–60.

<sup>49</sup> Kevin Woodson, *Fairness and Opportunity in the Twenty-First Century Corporate Workplace: The Perspectives of Young Black Professionals* (Nov. 2011) (unpublished Ph.D. dissertation, Princeton University) (on file with author) [hereinafter Woodson, *Fairness and Opportunity*]. They ranged in age from twenty-six to forty, with most in their late twenties or early thirties. *Id.* at 249. I conducted all of these interviews between 2009 and 2011. The vast majority of these interviews (seventy) were conducted by phone, while five were conducted in person. *Id.* at 251.

<sup>50</sup> *Id.*

participants from not easily accessible populations,<sup>51</sup> including black workers in high-status jobs.<sup>52</sup>

I conducted these interviews in a semi-structured life history format.<sup>53</sup> Participants began their interviews by providing narrative information about their personal backgrounds, childhood experiences, educational trajectories, and work experiences prior to entering the legal profession. The interviews then focused on participants' experiences working at large law firms. Interviewees discussed their overall experiences and impressions of their firms broadly, and also were asked specifically to describe whether and how "race" had affected their career experiences and outcomes, if at all.<sup>54</sup> The interviews were on average between sixty and ninety minutes in length.

These interviewees reported a diverse array of career experiences and shared sharply diverging views about the significance of race for black associates working in their firms. On one hand, approximately a quarter (n=20) of all interviewees reported that they had not experienced or observed any treatment indicating that black associates were disadvantaged by race in their firms.<sup>55</sup> On the other, the remaining interviewees (n=55) perceived that black associates faced career disadvantages in their firms.<sup>56</sup> This latter group articulated a wide array

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<sup>51</sup> See Patrick Biernacki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOC. METHODS & RES. 141, 141 (1981) (explaining that this method is well-suited for research on sensitive topics); Oisín Tansey, *Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling*, 40 POL. SCI. & POL. 765, 770 (2007) (snowball sampling is "particularly suitable when the population of interest is not fully visible").

<sup>52</sup> See, e.g., LOIS BENJAMIN, *THE BLACK ELITE: FACING THE COLOR LINE IN THE TWILIGHT OF THE TWENTIETH CENTURY* (1991); Sharon M. Collins, *Black Mobility in White Corporations: Up the Corporate Ladder but Out on a Limb*, 44 SOC. PROB. 55 (1997).

<sup>53</sup> See generally TOM WENGRAF, *QUALITATIVE RESEARCH INTERVIEWING: BIOGRAPHIC NARRATIVE AND SEMI-STRUCTURED METHODS* 5 (2001). At the beginning of each interview, I asked that they begin by telling me about their personal circumstances and educational experiences during childhood, and I explained that I would ask clarifying and follow-up questions according to their comments. See, e.g., Telephone Interview with Samantha (Jan. 15, 2010). Interviewees were asked to discuss the racial and socioeconomic demographics of their schools and communities, and their encounters with racial mistreatment. *Id.* Interviewees were then asked to discuss their college and professional experiences and to explain what led them to pursue employment in large corporate law firms. *Id.* I asked them to discuss their career experiences at their firms, and to discuss any ways in which they believed that they or other black workers there were affected by race. *Id.*

<sup>54</sup> Woodson, *Fairness and Opportunity*, *supra* note 49, at 250–51. Some of the interviewees volunteered their perceptions concerning the racial fairness of their firms early in their discussions of their experiences at their firms, without any direct prompting.

<sup>55</sup> To be clear, even these attorneys generally allowed for the possibility that race might affect black associates at their firms in ways that were difficult to detect.

<sup>56</sup> See *infra* Sections II.B–C. These interviewees differed in subtle but important ways in their descriptions and explanations of these problems. While approximately half of this group sensed that at least some partners in their firms discriminated against black associates on the basis of race (for example, racial biases and stereotypes), the others sensed that white partners at times provided preferential treatment to white associates on the basis of shared social and cultural common ground that better enabled them to develop rapport with one another.

of anecdotes and examples of racial unfairness in their firms, covering everything from deliberately racially offensive and antagonistic comments by partners, to lack of mentorship and social inclusion, to unfair treatment during their annual performance evaluations. The concern that appeared most salient to the broadest number of interviewees, however, was that black associates in their firms lacked equal access to the type of high-quality work assignments that would enable them to develop human capital and valuable professional skills. This concern was raised by more than a third (n=21) of this latter group of interviewees. Those perceiving human capital discrimination were a diverse group. Some were junior and mid-level associates struggling to succeed in their firms despite these obstacles. Others were counsels and partners who, despite faring well in their firms, resented having to take on extra, unfair burdens en route to achieving career success. And a third cohort had already left their firms in frustration, unable to overcome the debilitating effects of their unequal access to developmental work assignments and mentorship. The remainder of this Part will examine the experiences and perspectives of these attorneys in order to flesh out the workings and consequences of BigLaw's human capital discrimination problem.

### B. *Human Capital: The Essence of Associate Careers*

In the early 1960s, a group of influential economists developed the concept of human capital to emphasize the manner in which workers spend considerable time and energy investing in and cultivating skills and knowledge that enhance their productivity.<sup>57</sup> This formulation of human behavior emphasized that workers do not simply sell their labor power but also invest in it in ways that can benefit them in the future. As economist Theodore Schultz explained, “[l]aborers have become capitalists . . . from the acquisition of knowledge and skill that have economic value. This knowledge and skill are in great part the product of investment.”<sup>58</sup> Scholarship relating to the accrual of human capital has addressed a broad range of productivity inputs, from activities that sustain the physical health of workers,<sup>59</sup> to knowledge- and skill-based investments that enhance worker productivity over longer time horizons, such as formal education,<sup>60</sup> on-the-job training,<sup>61</sup> and

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<sup>57</sup> See Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 J. POL. ECON. 9 (1962); Theodore W. Schultz, *Investment in Human Capital*, 51 AM. ECON. REV. 1 (1961). Economists had long recognized the underlying concept concerning the value of workers' particular skills and talents, dating back to the writings of Adam Smith. See *id.*

<sup>58</sup> Schultz, *supra* note 57, at 3.

<sup>59</sup> *Id.* at 4–5, 9.

<sup>60</sup> *Id.* at 1.

informal leisure-time learning.<sup>62</sup> A critical distinction with respect to human capital is that between firm-specific capital, which only increases a worker's productivity within her current employment context, general human capital provides workers portable skills that thereby increase their value to other employers.<sup>63</sup> For attorneys, the most highly valued forms of human capital tend to be general skills that increase their value to employers throughout the industry.

Though the opportunity to develop general human capital has become an increasingly important implicit condition of employment in a variety of industries and occupations,<sup>64</sup> it is particularly consequential for the career prospects of law firm associates. Access to "training work" assignments—the high-level legal tasks that provide instrumentally valuable skills and experiences<sup>65</sup>—determines whether associates will be able to compete for partnership at their current firms or for desirable positions elsewhere in the profession. Despite having prestigious educational credentials, junior associates at large firms begin their careers with very little training with respect to the actual legal services performed by practicing attorneys. These newly minted attorneys therefore must develop their professional skills and judgment on the job, by handling increasingly sophisticated assignments under the guidance of more senior attorneys.<sup>66</sup> Experience handling skill-enhancing work responsibilities therefore emerges as an especially valuable, if intangible, asset that acts to credential certain associates as more advanced and more proven than their less experienced peers.<sup>67</sup> As law firm partners Luis Diaz and Patrick Dunican Jr. explain, "Over time,

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<sup>61</sup> *Id.* Nobel Laureate Gary Becker called attention in particular to the manner in which workers "increase their productivity by learning new skills and perfecting old ones while on the job." Becker, *supra* note 57, at 11.

<sup>62</sup> See Schultz, *supra* note 57, at 1.

<sup>63</sup> See Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 535 (2001).

<sup>64</sup> In *The New Psychological Contract*, law professor Katherine Stone posits that in abandoning the traditional internal labor market model of employment, in which workers enjoyed long-term job security, employers embraced a new incentive structure in which the opportunity to develop career-enhancing human capital became a principal means of inducing worker loyalty and motivation. *Id.* at 521. This arrangement essentially transformed the promise of long-term employment into a promise of long-term employability, made possible by the valuable, portable skills that workers developed on the job. *Id.* at 570.

<sup>65</sup> See Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 1, at 1608–13. Interviewees used different terms to describe this work, including "good work," "real work," and "getting experience."

<sup>66</sup> See GALANTER & PALAY, *supra* note 23, at 5 ("[A]ssociates . . . are given a prospect of eventual promotion to partnership after an extended probationary period during which they work under the supervision of their seniors, receive training, and exercise increasing responsibility.").

<sup>67</sup> For these reasons, access to these assignments also functions as an informal status marker that designates some associates as being more highly valued and possessing brighter futures in their firms.

the pattern of assignments given to professionals will profoundly influence their professional development, their worth to the firm and clients, and their satisfaction with the firm, and, as a result, their motivation and productivity.”<sup>68</sup>

The value of training work opportunities and its impact on associates’ career prospects was a common point of discussion during these interviews. Interviewees recognized that their law school training had not provided them the specific skills necessary to perform the day-to-day responsibilities of their jobs and understood that, as a result, their career prospects, more so than many of their counterparts in other fields, depended upon their ability to learn on the job. One interviewee, Samantha, a mid-level litigation associate, emphasized this point by contrasting legal and medical careers.<sup>69</sup> She explained that unlike in the medical profession, where new physicians emerge from their residencies with the skills necessary to function as doctors, “when you come out to large law firms, you are still being taught.”<sup>70</sup> Elizabeth, a mid-level transactional associate, suggested that associates who did not receive sufficient access to such work were not “real lawyer[s],”<sup>71</sup> but rather, glorified paralegals<sup>72</sup> or “Due Diligence Queen[s].”<sup>73</sup> She drew a stark contrast between assignments that provided associates experience developing deal strategies and experience managing client relationships and the more mundane, low-value tasks that junior associates (and less fortunate mid-level and senior associates) worked on in her group.<sup>74</sup>

[W]hen you’re a junior associate, you’re doing junior stuff. You’re doing due diligence. But then when you become a mid-level, it becomes very important that you start doing substantive work like drafting, that you start at least observing the negotiations more . . . . As a mid-level, it’s very, very critical that you start getting senior associate type work because otherwise you could end up getting pigeon-holed into the junior responsibilities that you’ll never grow into partner-level experience.<sup>75</sup>

As Elizabeth’s observation implicitly suggests, not all associates receive equal or adequate access to such work opportunities. The law

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<sup>68</sup> Diaz & Dunican, *supra* note 1, at 975.

<sup>69</sup> Telephone Interview with Samantha, *supra* note 53.

<sup>70</sup> *Id.* This Article identifies interviewees through pseudonyms, in order to protect the confidentiality of all study participants.

<sup>71</sup> Telephone Interview with Elizabeth (Aug. 2, 2009).

<sup>72</sup> *Id.* Elizabeth quipped that “a legal assistant” could probably perform the undesirable due diligence assignments handled by many associates in her department. *Id.*

<sup>73</sup> Elizabeth described one of her colleagues, a mid-level associate who had begun to refer to herself as “the Due Diligence Queen” because she received a disproportionate share of low-level work assignments. *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*



firm personnel model, in which associates sit in virtual labor pools and are assigned to assist more senior attorneys as needed, tends to produce surplus supplies of associate labor, enabling partners in some instances to funnel their assignments to their chosen associates while neglecting or avoiding others. Brad, a mid-level associate, contrasted this arrangement with the team-based approach of investment banking, which in his view provided senior professionals far greater incentives to enhance the human capital of their junior colleagues.

[The way] banks work is you're on a team. . . . [E]veryone there at least on your team has a vested interest in you getting better because the better you are, the quicker you get things done. Whereas at law firms, they don't have the same vested interest in training you because if [Brad] can't get it done then screw it, we're just going to give it to [another associate] and overwork her. And so there's more "languish" . . . . [L]aw firms will let you sit there and make money, and not teach you anything. That's one of the key differences in that a law firm can have this benign [neglect] attitude toward you . . . .<sup>76</sup>

Although many law firms have attempted to limit the leeway of individual partners in allocating opportunities to their preferred associates by designating assignment coordinators and developing centralized assignment protocols, these efforts have had limited effectiveness. A number of interviewees explained that the formal assignment processes of their firms generally only provided access to the least desirable work assignments on low-value matters.<sup>77</sup> As a general matter, partners who bring business into their firms are able to staff their matters as they see fit,<sup>78</sup> formal rules notwithstanding. As such, interviewees regarded these formal channels as last resorts only fit for desperate associates unable to find work through their relationships with senior attorneys.

In their foundational article, *Why Are There So Few Black Lawyers in Corporate Law Firms?*, law professors David Wilkins and Mitu Gulati present a stylized model in which law firm associates are placed in one of two internal career "tracks."<sup>79</sup> Under this conceptual model, some associates receive prized developmental assignments while others are

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<sup>76</sup> Telephone Interview with Brad (Feb. 5, 2010). This observation was consistent with some of those offered by investment bankers whom I interviewed for my dissertation. See Woodson, *Fairness and Opportunity*, *supra* note 49.

<sup>77</sup> See, e.g., Telephone Interview with Horace (July 15, 2009) ("If you're working for the managing partner of the firm or . . . the department head, then your rewards are much more plentiful. Rather, if you're working with the assignment pool process, you're probably generally working for lower level partners . . . . You're working for people who . . . don't have as much pull.")

<sup>78</sup> See Diaz & Dunican, *supra* note 1, at 975.

<sup>79</sup> Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 1, at 499.

tasked with less rewarding assignments.<sup>80</sup> Wilkins and Gulati make clear the importance of training work and the human capital that it provides associates for their promotion prospects within their firms.<sup>81</sup> This human capital can be just as critical, however, for the many law firm associates who have no interest in competing in their firms' partnership tournaments.<sup>82</sup> Because of the highly leveraged, pyramid-shaped employment structures of large law firms,<sup>83</sup> virtually none of the junior associates who begin their careers at one of these firms will be able to ascend to its partnership ranks. Instead, most newly hired attorneys ultimately end up seeking employment elsewhere within a few years of joining these firms.<sup>84</sup> Those departing attorneys, particularly those who wish to vie for competitive employment positions elsewhere—including jobs at other large firms and certain in-house counsel and governmental positions—also benefit from developing as much human capital as possible, as early as possible in their law firm careers.

Naomi, a junior litigation associate, explained the value of human capital for all junior associates, whatever their ultimate career ambitions. Though Naomi had never intended to remain at her firm long enough to compete for promotions,<sup>85</sup> she was still cognizant of the risk of being pigeonholed into low-level assignments that would deprive her of the human capital necessary to pursue positions outside the firm. She explained the risk of being swamped with too much “scut work.”<sup>86</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> As several interviewees noted, many attorneys begin their careers at these firms with no real interest in competing for partnership. *See, e.g.*, Telephone Interview with Alexis (Jan. 28, 2010) (“So many people . . . come in not wanting to make partner. . . . A lot of people just use the firm as your holding pattern. It’s a place for you to make a lot of money, pay off your loans, and figure out what do I really want to do.”). Associate positions provide young attorneys opportunities to earn high salaries, enhance their resumes, and develop skills and training that will enable them to lead successful careers upon leaving their firms to pursue other opportunities. *See, e.g., id.*; Telephone Interview with Bruce (Mar. 5, 2010) (explaining that the skills and exposure he gained performing high-level associate work eventually enabled him to attain a position in the legal department of a prestigious corporate client). Interviewees suggested that this might be especially true for black associates, many of whom may arrive with such plans either because they possess alternative career goals and interests or because they suspect that the odds of making partner as a black associate are prohibitively low. *See* Telephone Interview with Harmony (Aug. 5, 2009) (“To be honest, this is my own personal view [but] I don’t think a lot of black people come to law firms wanting to be successful. In the sense that, I think they’re there to make good money and leave after a few years . . .”). For these attorneys, the prospect of promotion to partnership in eight (or more) years is an afterthought to their more immediate and direct professional development goals.

<sup>83</sup> *See* GALANTER & PALAY, *supra* note 23, at 60–64.

<sup>84</sup> *Id.*

<sup>85</sup> Telephone Interview with Naomi (July 29, 2009). Naomi explained during our interview that she had always intended to work at a large firm for only a couple of years. *Id.*

<sup>86</sup> *Id.*

[T]here's a point where you end up where that's all you're doing and you're not really growing or developing. So what happens is there's a point where you find yourself a couple years down the road where you're technically a third-year associate but you don't have the skills that a third year associate should have because you were just getting piled with work that wasn't really teaching you or advancing you. . . . [A]t the end of the day if you leave somewhere after being there for several years and you don't have the experience that [an associate] who's been there for several years should have, wherever you're [seeking employment], they're not going to say "Oh, we understand, someone probably strong-armed you and didn't allow you to do anything substantive"; they're going to be looking for someone who has that [experience].<sup>87</sup>

To avoid such outcomes, Naomi found that it was necessary at times for associates to proactively seek out "substantive work that requires your analytical skills or intellect, that will expose you to new experiences and develop your skill set."<sup>88</sup>

Though associates of all races are at risk of the fates described by Naomi and Elizabeth above, many of the attorneys interviewed for this study perceived that black associates were particularly susceptible to such human capital deprivation.<sup>89</sup> The following section will call attention to the disparate treatment of black and white associates during assignment decisions at large law firms through the first-hand accounts of some of the attorneys who were interviewed for this study.

### C. *Racially Disparate Access to Human Capital*

At its core, human capital discrimination consists of patterned differences in the allocation of work assignments from senior attorneys (partners and senior associates) to more junior attorneys of particular racial or gender groups.<sup>90</sup> The results of this study, and data from previous surveys,<sup>91</sup> suggest that human capital discrimination is a

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See *infra* Section II.C.

<sup>90</sup> Though these discrepancies are primarily qualitative in nature, reflecting disparities in the sophistication and developmental value of the assignments received by individual workers, some interviewees also reported that black associates in their departments occasionally suffered from quantitative differences in the amount of work of any kind made available for them. See, e.g., *infra* notes 93–99 and accompanying text. These disparities can prevent black associates from meeting their firms' billable hour expectations. See, e.g., Telephone Interview with Aja (Sept. 27, 2009) (explaining that she and a black associate classmate each billed a total of fewer than fifty billable hours during a recent two-month period). This Article does not view such disparate treatment as human capital discrimination per se though, as access to such assignments does little to provide associates access to career-enhancing human capital.

<sup>91</sup> See *supra* note 44 and accompanying text.

problem for many black associates in large law firms. Nearly a third of the seventy-five attorneys interviewed for this study reported that they personally had received reduced access to developmental work assignments when compared with their white associate counterparts.<sup>92</sup> In explaining how they came to perceive themselves as victims of human capital discrimination, these interviewees situated their own personal experiences, including incidents involving specific colleagues, within the broader context of systemic racial disparities in the distribution of premium work assignments within their firms or departments.

Many of these interviewees emphasized that human capital discrimination began affecting black workers from the very beginning of their careers. These attorneys discerned immediate, obvious differences in the work opportunities made available for certain newly-arrived white associates, and those that they and their black counterparts received. Clara, an attorney working at a Midwest law firm, observed that a new white associate on her hall at the firm regularly received work opportunities that were not made available to new black associates.

The [white] guy who was in the office across from me . . . had come straight from law school, didn't have any experience or anything, but he would get tons of work. He would just have so much work that he would have to turn down people all the time. . . . I would see people coming in and saying, "Hi, how are you? I've got this new case, do you want to be a part of it?" And when I saw new black associates come in they didn't get that same kind of treatment.<sup>93</sup>

Though Clara recognized soon after joining her firm that she "wasn't getting as much work as some other people,"<sup>94</sup> through discussions with other associates, she eventually learned that many other black associates in her firm also had been receiving far less substantive work than their white counterparts.

[W]e literally had meetings, the associate meetings, where . . . the managing partner . . . would go around and ask people sometimes, "what are you working on?" and you could hear the lists. You could hear the difference in the types of work too. "This is what I'm working on" with some of the white associates who were around the same year versus what the black associates were working on and it was just totally different.<sup>95</sup>

Other interviewees offered similar accounts of gradually recognizing their own difficulties as reflecting broader problems of

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<sup>92</sup> See *supra* Section II.A.

<sup>93</sup> Telephone Interview with Clara (Jan. 14, 2010).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

racially disparate access to work opportunities in their departments. Shortly after joining his firm, Langston, a mid-level bankruptcy associate, began to sense that senior attorneys in his group were offering him fewer and less substantive assignments than his white peers. He gradually grew convinced that his own difficulties were part of a larger pattern of human capital discrimination within the group when he realized that many of the other black associates in his department received similar treatment.

[Y]ou start seeing who's getting what and you look at how [black] people who are senior to you are also getting distributed work and then you start realizing that it's not about me or my capabilities because this person is as good . . . as their counterparts and yet they're not getting what they deserve.<sup>96</sup>

In addition to these group-level patterns, several interviewees also reported specific instances when white senior attorneys in their firms deprived black associates of valuable opportunities by providing them to white associates instead.<sup>97</sup> Langston shared an anecdote concerning a case in which two mid-level associates, a black woman, “who only got on the case because she had to fight and complain about the fact that they weren't giving her work,” and a white male, who had strong informal social ties with the partners running the case,<sup>98</sup> were chosen by partners to “run point” on a case. Early on, the white male associate “complained off of the case” because he was too busy with other assignments. The female associate, who was less busy at the time, ran the case herself. As the matter progressed, however, the partners eventually cast her aside in favor of the white male associate.

[As] soon as this other guy freed up, her responsibility on the case was substantially diminished . . . and it's perceived to be that they were trying to make sure that this person had [his] hours to keep him at the firm, etcetera. Because the female associate should have been . . . running the point for this case.<sup>99</sup>

This sequence of events, which Langston offered as an illustration of the racial disparities in the opportunities to develop human capital at his firm, underscores that much of the disadvantage encountered by black associates may stem from seemingly benevolent actions of senior attorneys working to advance the careers of their protégés and other favored junior colleagues.

In a similar vein, Elizabeth described an incident where a white male senior associate in her department blatantly reallocated work

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<sup>96</sup> Telephone Interview with Langston (Mar. 5, 2010).

<sup>97</sup> See *infra* notes 98–104 and accompanying text.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

responsibilities to provide more human capital development for a specific white male junior associate, at Elizabeth's expense.<sup>100</sup> When Elizabeth asked the junior associate to handle certain low-level document management related tasks on the project, a role typically filled by the most junior associates on deal teams in her department,<sup>101</sup> he went over her head to complain to the senior associate and requested that he be allowed to work on some of the higher level responsibilities that had been designated for Elizabeth initially.<sup>102</sup> Instead of maintaining the agreed-upon division of labor, the senior associate agreed to steer higher quality assignments to the junior associate and told Elizabeth that she should "share the crappy work" despite her relative seniority.<sup>103</sup> During our interview, years after the fact, Elizabeth described this incident as a "fraternity type of situation,"<sup>104</sup> with evident anger. The success of the white male junior associates in securing preferential treatment through informal, *ex parte* communications had a zero sum effect, depriving her of important opportunities to develop valuable human capital.<sup>105</sup>

The racial disparities described by these interviewees do not occur in a vacuum. Human capital discrimination often stems from disparities in the relationships (social capital) that junior associates have with senior colleagues. The instrumental importance of interpersonal relationships in the workplace has been the topic of extensive research and commentary.<sup>106</sup> Workers who have stronger professional relationships enjoy greater access to many important resources, including high-quality work opportunities, advice, support, and generous performance reviews. The rapport and goodwill that colleagues develop through informal relationships with one another renders them more likely to go above and beyond the formal requirements of their work roles in order to help advance their

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<sup>100</sup> Telephone Interview with Elizabeth, *supra* note 71.

<sup>101</sup> *Id.* Elizabeth also indicated during our interview that the senior associate had agreed to this arrangement beforehand. *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* Dissatisfied with the manner in which the senior associate had given some of her substantive responsibilities to the white male junior associate, Elizabeth ultimately left the case entirely. *Id.*

<sup>106</sup> See, e.g., ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 54 (1977) (discussing the known importance of "social connections" for career advancement at a large corporation); Erika Hayes James, *Race-Related Differences in Promotions and Support: Underlying Effects of Human and Social Capital*, 11 ORG. SCI. 493, 503 (2000) (finding that workers who had stronger interpersonal relationships with colleagues received more psychosocial support).

careers.<sup>107</sup> At law firms, mentors often help their protégés develop human capital by steering valuable work opportunities their way.<sup>108</sup>

Black associates tend to possess less workplace social capital than their white counterparts,<sup>109</sup> which renders them more susceptible to human capital discrimination. Many interviewees observed this of black associates at their firms.<sup>110</sup> In this respect, human capital discrimination is consistent with the conceptual framework of “second generation discrimination.”<sup>111</sup> Second generation discrimination, as developed by Susan Sturm, emphasizes the relational and interactional dimensions of employment inequality by positing that group-based exclusion often occurs “as a byproduct of ongoing interactions shaped by the structures of day-to-day decisionmaking and workplace relationships.”<sup>112</sup>

The interviewees who reported patterns of human capital discrimination in their firms emphasized that they did not believe that these discrepancies could be explained by racial differences in merit. Clara, for example, rejected the suggestion that black associates had greater difficulty getting work at her firm for performance-based reasons.

[S]ometimes people try to make it seem like [the problem is that black associates] do a project poorly and then someone just doesn't return [with more work opportunities]. That's not always how it works—there are a lot of people who don't get the initial project at all because some of those, particularly white partners, and a lot of the older ones especially, won't even think to talk to you to begin with. So they don't know what your work product is like. They have no clue because they've never tried to give you any work.<sup>113</sup>

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<sup>107</sup> See Woodson, *Race and Rapport*, *supra* note 2, at 2565–67 (explaining that law firm associates who have higher quality relationships with colleagues may gain access to more desirable work assignments).

<sup>108</sup> See *id.*

<sup>109</sup> See *id.* at 2567–68.

<sup>110</sup> Langston, for example, reported that a predominantly white male social clique shared high quality work assignments with each other to the disadvantage of outsiders, including the group's black associates. Telephone Interview with Langston (Mar. 5, 2010).

<sup>111</sup> See *generally* Sturm, *supra* note 6, at 460 (explaining that second generation discrimination involves “social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups”).

<sup>112</sup> *Id.* at 469.

<sup>113</sup> Telephone Interview with Clara, *supra* note 94. This Article does not assume the truth of Clara's interpretation of the partners' behavior—it is possible, for example, that they criticized her work product because it was not up to par. Nonetheless, her account is important in that it calls attention both to the subjective nature and discretion of performance reviews and the possibility of them being distorted by racial biases.

Clara also noted that certain favored white associates, including her neighbor, continued to receive high quality opportunities even when they underperformed on their assignments.<sup>114</sup>

I'd hear, "Oh, that person forgot a deadline" or didn't come in for the hearing . . . It could be big things but it was always "Aww, you didn't do it. You have to remember—you have to get your secretary to remind you." [in a lighthearted, forgiving tone] And it's like, oh my god, if I did something like that—that would have been the end probably.<sup>115</sup>

Other interviewees voiced the same insistence that mistakes that brought seemingly no consequences when committed by their white counterparts would have significantly reduced their access to further high-quality work had they been black.<sup>116</sup> Still others reported that even black associates who performed ably on their initial assignments often fell through the cracks and received fewer opportunities to further develop human capital than their white counterparts.<sup>117</sup> Brad, a mid-level associate, reported observing that black associates at his firm were not "getting the same opportunities that I see some of my white peers getting."<sup>118</sup> He explained that even some black associates who got off to promising starts at his firm and performed impressively on their initial assignments never received the social support necessary to thrive long-term. "I see [black associates] who are actually really thorough with their work and no one really cares to extend themselves. And that's something I don't really see with white associates. When they're good, people take note and start training them to be even better."<sup>119</sup>

The accounts of Brad and other interviewees discussed in this section demonstrate the endless opportunities for various forms of human capital discrimination to disadvantage even the most talented black attorneys in large law firms, as everyday actions and decisions cumulatively produce substantial racial inequalities. The following Section will identify some of the various harms that these quotidian forms of institutional discrimination inflict upon black associates.

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<sup>114</sup> *Id.* Although Clara heard people criticize her white neighbor's work performance and professionalism, those criticisms did not prevent them from giving him more work opportunities or chances to correct his mistakes. *See id.*

<sup>115</sup> *Id.*

<sup>116</sup> *See, e.g.*, Interview with Langston, *supra* note 96. Langston, for example, explained that a white male associate in his department had turned in a sloppy, unfinished draft of the filing to his partners very shortly before the filing deadline. *See id.* He was incredulous that the associate was able to maintain his preferred status among partners despite his abysmal performance, stating "that would not have happened to me. A forgivable crime if it happens with other [white] people." *Id.*

<sup>117</sup> *Infra* notes 118–19 and accompanying text.

<sup>118</sup> Telephone Interview with Brad, *supra* note 76.

<sup>119</sup> *Id.*



D. *The Subtle Harms of Human Capital Discrimination*

Human capital discrimination is a subtle phenomenon with intangible harms that are often difficult to identify, let alone measure. Its effects are most evident in the aggregate, when associates come to realize that their failure to develop sufficient human capital has limited their career prospects within the firm and beyond. For example, Dawn, who had left her firm as a mid-level associate after a highly unsatisfying career there, explained that although the partners in her group kept her busy with a heavy workload, most of her tasks consisted of low-level assignments that seldom provided the skills necessary to develop into a proficient attorney. Looking back on her experience in frustration, she stated that “at the end of the day, even with all the work that I did, I had nothing—I had no skill set.”<sup>120</sup>

In the competitive domain of law firm careers, even relatively modest differences in treatment if left unchecked can develop into virtually insurmountable disparities.<sup>121</sup> It is in the self-interest of partners to steer their more challenging work assignments to associates who already have developed the skills to handle them through their experience with similar assignments in the past. One attorney, Samantha, contrasted her experience with that of a white associate in her group who started working at the firm the same day as her. She described in great detail how the unequal access to human capital that she suffered during her first months on the job eventually snowballed into a virtually insurmountable skill gap.

She billed 180 hours the first month; I billed 60. There should not have been that big of a disparity because we were both starting out. You can't say I was doing bad work because I had just started out. That to me illustrates one of the issues that I was having, getting work. Why is she getting three times as much work as me and I haven't messed up? All along, I'm asking for work—I documented it too . . . . During my second month, I asked for work but I only got put on a non-billable project. . . . I only billed 30 hours [the second month]. Now at this point, the discrepancy sets in—she's getting training, she's learning things so that in July when they ask who can draft a promissory note, she'll be able to say “yeah,” and I'll have to say that it would be my first time. So then there's a perception of one of us being more qualified than the other.<sup>122</sup>

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<sup>120</sup> Telephone Interview with Dawn (July 17, 2009).

<sup>121</sup> See generally Catherine L. Fisk, *Knowledge Work: New Metaphors for the New Economy*, 80 CHI.-KENT L. REV. 839, 854 (2005) (“[I]t is the nominally small opportunities that matter in determining which employees have the chance to compete in later rounds.”).

<sup>122</sup> Telephone Interview with Samantha, *supra* note 53.

Though Samantha's initial problems were perhaps atypically dire, her experience underscores the cumulative nature of human capital deprivation and its potential long-term consequences.

Similarly, Elizabeth, who already had fallen behind her white male classmates by the end of her second year, explained how this early deficit perpetuated itself for the remainder of her career at the firm, as she requested in vain that the partners in her group provide her with opportunities to work on more substantive work assignments.

[M]ost partners want to get the work done. . . . [T]hey're not really in this to train you. They don't want to work with someone who's never done it before. . . . it was one of those "chicken and the egg" scenarios [where t]hey only really wanted to work with you if you had that experience. But how am I going to get that experience unless you work with me?<sup>123</sup>

Elizabeth explained that her efforts to seek out new work were for naught and possibly self-defeating, as she was outing herself as less qualified to handle high-level assignments than her more experienced peers.<sup>124</sup> Her difficulties underscore the extent to which initial inequalities compound over time. Without the help of mentors and sponsors personally invested in their career development, associates in Elizabeth's position may struggle to overcome early skills deficits.<sup>125</sup> Though they generally have the same salaries and nominal job titles as the members of their associate classes who have handled more substantive assignments, they can fall further and further behind their more fortunate classmates in career development and reputational standing.<sup>126</sup>

This human capital deprivation plays a key role in prompting many black associates to leave their firms voluntarily, before they have been fired or subject to any formal reprimands. In fact, one interviewee, Brad, reported that partners in his firm seemed to intentionally deprive certain workers of access to substantive work opportunities for the very purpose of inducing them to leave.

[T]here are certain ways that the firm appears to push you out without actually doing it. You get this bad review from someone in

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<sup>123</sup> Telephone Interview with Elizabeth, *supra* note 71.

<sup>124</sup> *Id.* (describing her decision to inform partners that she had not received the same quality of opportunities as her classmates as "probably the *worst* thing you can do").

<sup>125</sup> See generally Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 1, at 568 ("In order to get on the training track, an associate has to have mentors among the firm's partners or senior associates who can provide the Royal Jelly of good training.").

<sup>126</sup> See, e.g., Interview with Dawn, *supra* note 120 (explaining that although she had been earning a six-figure salary at her firm, she left after a few years because she was not receiving the types of substantive assignments necessary to develop the professional skills necessary given her career goals).

your group and all of a sudden that person is powerful enough to convince other people to not work with you, and you find yourself sitting there four weeks without work and then when you ask for work they give you something shitty that someone two or three years beneath you could do. That's their way of saying, "Hey, we're not going to give you anything complex anymore so you need to start looking for a new gig." . . . [T]here's a freeze-out. There's a kind of taking you off the project without telling you why. And then you're just wondering what the heck happened.<sup>127</sup>

As discussed later,<sup>128</sup> when black associates are nudged to leave their firms in this manner, without having been formally terminated or demoted, it effectively forecloses any possible recourse to the protections of Title VII.

Though the effects of human capital discrimination become most evident after the careers of black associates who have failed to gain access to sufficient work opportunities have come to an end, significant but subtler harms are inflicted upon many black associates well before then. Human capital discrimination not only deprives black associates of valuable skills, it also imposes psychological harms that can undermine their self-confidence and career aspirations. Agnes, a mid-level associate, described the damaging effects that being denied high-quality opportunities early on had in weakening her self-esteem and causing her to abandon any plans of pursuing a long-term career at her firm.

[W]hen we just started, this guy next to me . . . would get work . . . My mentor was asking him to be on trials with him. Whenever I was asked to do something with my mentor it was, "can you come with me to the [local government agency]" where I would be a black face basically. And of course I harbored resentment for that . . . Psychologically it affected me . . . You start feeling like . . . they don't have faith in me, and it almost transferred into me going, "Well, can I do this?"<sup>129</sup>

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<sup>127</sup> Telephone Interview with Brad, *supra* note 76. This subtle process also prevents associates from challenging other more determinative forms of discrimination, as human capital discrimination cumulatively creates actual racial differences in worker qualifications and performance that can be used to justify later adverse promotion and termination decisions. To the extent that racial disparities in promotion and termination decisions reflect these differences, courts will not likely find that they reflect mistreatment on the basis of race. *See, e.g., Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1556–57 (D.C. Cir. 1997) (finding law firm's decision not to consider a black associate for partnership justified by the black associate's lack of sophisticated work experience, even though the associate had alleged that the firm's failure to provide him high-level work was racially discriminatory).

<sup>128</sup> *Infra* Part III.

<sup>129</sup> Telephone Interview with Agnes (July 29, 2009).

Attempting to overcome such limited access to human capital-building assignments comes with a number of additional dignitary, psychological, and other costs. Several interviewees spoke at length and with evident frustration about their perceived need to put forth additional intra-firm “job search” activities to solicit the types of high-quality assignments that their white peers received as a matter of course.<sup>130</sup> Interviewees grew fatigued and felt demeaned by these unfair self-promotion demands. Interviewees explained that this dynamic contributed to their decisions to voluntarily leave their firms to pursue career opportunities elsewhere. Clara described how the frustration from this manifest unfairness contributed to black associates burning out and leaving her firm.

[T]here’s that extra layer of you have to constantly do more in terms of promoting yourself within the firm . . . . There were times when I had to look for work. There were times when I felt that I was *bugging* people. . . . [It] just becomes uncomfortable and people get tired of begging for work; people get tired of feeling like an outsider. . . . I’ve been out of law school now . . . years . . . and it gets to be *frustrating* when you’re *always* trying to make someone even remember your name . . . I get tired of having to sell myself, and having to tell them “you know I did this project” and “I handled that case and I was successful”—*within the firm*. . . . [T]hat constant trying to promote yourself, it gets tiring.<sup>131</sup>

Clara’s exasperated account of her uphill battle to gain recognition and inclusion at her firm was echoed in the accounts of many other interviewees. Diana, a mid-level associate at another firm, offered a similar narrative of frustration. She explained that she had given up attempting to advance her career at her firm after partners in her group refused to provide her substantive opportunities, despite her active efforts to lobby them. She explained, “I really tried. . . . But I was constantly asking for work, making my rounds, going to partners—this, that and the other—and it still wasn’t working.”<sup>132</sup> Diana’s report of her experiences further highlights the difficulty of linking human capital discrimination to its ultimate career impact. Although the partners in her group did not outwardly hint to Diana that she should seek employment elsewhere, she felt that her consistent inability to access the type of work assignments necessary to develop key professional skills required her to do so in order to save her career.<sup>133</sup>

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<sup>130</sup> See *infra* notes 131–38 and accompanying text.

<sup>131</sup> Telephone Interview with Clara, *supra* note 94. Clara also recalled the experiences of a new Asian associate who only billed eight hours in one of his first months at the firm because he was not assigned sufficient work. *Id.*

<sup>132</sup> Telephone Interview with Diana (Aug. 2, 2009).

<sup>133</sup> *Id.*

Even some of the more successful interviewees reported being unfairly denied equal access to human capital development and described the unfair extra efforts they felt required to undertake to advance their careers. One such interviewee, Earl, a junior partner, emphasized that the work opportunities vital to his success at the firm and development as an attorney had not been as available for him as they had been for his white associate peers.<sup>134</sup> “[T]here were [opportunities that] my peers got that I didn’t get. There were [opportunities] that I thought that I was entitled to get that I did not get.”<sup>135</sup> Earl explained that to overcome this unfair treatment, he had to “work . . . like a dog in exchange for a couple of good opportunities,”<sup>136</sup> billing over 3000 hours for multiple years.<sup>137</sup> Though he was able to advance in his career through these herculean efforts, he resented that many white associates received the opportunities necessary to thrive at the firm without such extra labor.<sup>138</sup> Although he suffered none of the ultimate harms required by current employment discrimination law—he may have even earned higher bonuses because of his billable hours and he ultimately made partner—he did so only because he worked more hours than similarly situated white associates for the same human capital and reputational rewards.

These psychological and dignitary burdens may be especially acute for those black associates who feel the need to perform additional assimilationist identity work to comply with the social and cultural expectations of their firms.<sup>139</sup> These burdens, which minority associates may consider exhausting and demeaning, potentially affect successful and unsuccessful attorneys alike. As the following Part will explain, however, though it unfairly disadvantages many black associates, in some instances completely derailing their law firm careers, human

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<sup>134</sup> Telephone Interview with Earl (Sept. 1, 2009).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> He explained,

I worked a lot harder. . . . [T]here were years I billed over 3000 hours. Some of that was intentional because of the experiences that I chose. I wanted to go to trial, there were certain cases I wanted to have under my belt, there were certain opportunities that were out there.

*Id.*

<sup>138</sup> *Id.* (“[T]here’s a ton of white lawyers around here who don’t have to bill 3000 hours to get those kind of opportunities.”).

<sup>139</sup> For an extended discussion of the potential dignitary harms of such assimilationist demands, see Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 719–20 (2001); see also Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 633 (2005) [hereinafter Green, *Work Culture and Discrimination*] (referencing “harms in time and energy devoted to engaging in appropriate work culture behavior”).

capital discrimination is virtually impossible to address under existing Title VII jurisprudence.

### III. TITLE VII AND THE “IMMATERIALITY” OF HUMAN CAPITAL DISCRIMINATION

The shortcomings of the current jurisprudence for Title VII have been well documented in the existing employment discrimination literature. Although Title VII of the 1964 Civil Rights Act has eliminated much of the more blatant, egregious modes of employment discrimination, it has fallen far short of its overall goal of eliminating employment practices that sustain unnecessary racial hierarchy.<sup>140</sup> In recent years, antidiscrimination scholars have examined this failure at length, addressing various forms of institutional discrimination that continue to produce unfair racial and gender disparities in American employment.<sup>141</sup> This literature has called attention in particular to the incapacity of the existing Title VII doctrine to attend to the subtle, concealed, and potentially subconscious biases that may be responsible for much of the continuing employment discrimination in the modern workplace.<sup>142</sup> These doctrinal defects present a formidable impediment for workers seeking to hold their employers liable for discriminatory misconduct.

This Part calls attention to another aspect of Title VII jurisprudence that further insulates law firms (and other employers) from liability for certain forms of employment discrimination including, especially, human capital discrimination: the adverse employment action doctrine. Even if courts were more willing to accept implicit bias as a pervasive determinant of employment behavior and adjusted plaintiffs' evidentiary burdens accordingly, the material adversity requirement established by federal district and appellate courts would insulate employers from liability for most of the ostensibly minor personnel acts and decisions that constitute human capital discrimination. This Part will provide an overview of this doctrine and

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<sup>140</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971). (“The objective of Congress . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”).

<sup>141</sup> See, e.g., Green, *Work Culture and Discrimination*, *supra* note 139, at 654–58 (discussing several practical and doctrinal barriers that prevent advocates from forming successful Title VII claims).

<sup>142</sup> See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1164 (1995) (“[T]he way in which Title VII jurisprudence constructs discrimination . . . is inadequate to address the subtle, often unconscious forms of bias . . .”).

its impact in excluding most forms of human capital discrimination from the scope of Title VII's coverage.

A. *The Adverse Employment Action Doctrine*

Most people with a passing understanding of employment discrimination law are likely familiar with the burden-switching framework of *McDonnell Douglas*.<sup>143</sup> To present a triable claim of disparate treatment discrimination under Title VII, a plaintiff must establish a prima facie case of discrimination by demonstrating that “(1) she is a member of a protected class; (2) she was subjected to adverse employment action; (3) her employer treated similarly situated male employees more favorably; and (4) she was qualified to do the job.”<sup>144</sup> When plaintiffs are able to meet these requirements, the burden of production then shifts to employers to articulate a legitimate, non-discriminatory explanation for the employment action being challenged.<sup>145</sup> Plaintiffs then are afforded the opportunity to challenge those nondiscriminatory explanations as pretextual.<sup>146</sup>

Many people, however, would be astonished to learn that this framework, as applied by the federal courts, does not in all instances hold employers liable for discriminating against their employees on the basis of race. Although Title VII bans employment practices that “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,”<sup>147</sup> the adverse employment action doctrine largely limits the reach of Title VII to particular types of discrimination that have direct, tangible effects on employees. Other, lesser forms of discrimination are often deemed immaterial and insufficiently adverse to justify holding employers liable.<sup>148</sup> Though this material adversity requirement is nowhere to be found in the statute itself,<sup>149</sup> it has become a well-established part of

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<sup>143</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>144</sup> *Maniccia v. Brown*, 171 F.3d 1364, 1368 (1999); see also *McDonnell Douglas Corp.*, 411 U.S. at 802–04.

<sup>145</sup> *McDonnell Douglas Corp.*, 411 U.S. at 802.

<sup>146</sup> *Id.* at 804.

<sup>147</sup> 42 U.S.C. § 2000e-2(a)(1) (2012).

<sup>148</sup> See, e.g., *infra* notes 157–71 and accompanying text.

<sup>149</sup> Ernest F. Lidge, III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer's Action Was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333, 335 (1999) (“The statutes banning employment discrimination . . . do not require the plaintiff to prove an adverse or materially adverse or ultimate employment action. The laws require only that the plaintiff show he suffered ‘discrimination,’ or differing treatment in compensation, terms, conditions, or privileges of employment, because of his race, color, religion, sex, national origin, age, or disability.” (footnotes omitted)).

Title VII jurisprudence over the past two decades. This doctrine, which protects the interests of employers by both preserving their traditional autonomy and protecting them from frivolous employee grievances, does so at the expense of mistreated workers.<sup>150</sup> Its impact is profound: with no guidance from the Supreme Court,<sup>151</sup> lower federal courts have developed this doctrine in a manner that substantially limits the potential reach of Title VII, virtually immunizing employers from liability for all but the most extreme instances of human capital discrimination.<sup>152</sup> Though even seemingly minor disparities in access to substantive assignments can produce catastrophic long-term career

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This doctrine is in tension with the Equal Employment Opportunity Commission's (EEOC's) own interpretation of the scope of Title VII liability, as evident in some of the examples of impermissible discrimination included in its Compliance Manual. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, COMPLIANCE MANUAL SECTION 15: RACE & COLOR DISCRIMINATION (2006) [hereinafter EEOC, COMPLIANCE MANUAL SECTION 15]. See generally Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1937 (2006) ("[A]n examination of decisions interpreting Title VII of the Civil Rights Act ('Title VII'), the Age Discrimination in Employment Act ('ADEA'), and the Americans with Disabilities Act ('ADA'), reveals that . . . the EEOC receives remarkably little respect from the Court."). In its Compliance Manual, the EEOC provides an example that illustrates the potential process through which disparities in assignments cumulatively produce insurmountable human capital disparities. EEOC, COMPLIANCE MANUAL SECTION 15, *supra* at 44–45. The document provides a hypothetical example of a black woman, Mary, the only black associate in her cohort at a consulting firm, who receives fewer complex assignments than her counterparts, despite her stellar performance on her initial assignments and her requests for more challenging work. *Id.* As a result, Mary realized that she had lower status than her peers at the firm by the end of her first year and she decided to leave the firm to pursue her career elsewhere. *Id.* To the EEOC, the federal agency tasked with enforcement of Title VII, the deprivation of opportunities to develop human capital is an illustrative example of impermissible discrimination in the terms and conditions of employment. See *id.* However, because Mary voluntarily left her firm before her treatment had produced any tangible employment outcomes, it seems unlikely that courts would hold Mary's employer liable for the treatment that she experienced.

<sup>150</sup> See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006) (characterizing the materiality requirement as reflecting the need to "separate significant from trivial harms"); *Lewis v. Chicago*, 496 F.3d 645, 653 (7th Cir. 2007) (explaining that the purpose of this rule is "to provide a reasonable limiting principle for the type of conduct actionable under the statute," and to eliminate "trivial personnel action[s] brought by 'irritable, chip-on-the-shoulder employee[s]'" (alterations in original) (quoting *Phelan v. Cook County*, 463 F.3d 773, 780 (7th Cir. 2006) and *Herrnreiter v. Chic. Hous. Auth.*, 315 F.3d 742, 745 (7th Cir. 2002))); *Herrnreiter*, 315 F.3d at 745 (7th Cir. 2002) (positing that the EEOC is "staggering under an avalanche of filings too heavy for it to cope with" and that lesser forms of discrimination, such as a trivial personal action, "do not justify trundling out the heavy artillery of federal antidiscrimination law"); *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1556–71 (D.C. Cir. 1997) (suggesting that the adverse employment act doctrine reflects a reluctance by federal courts to engage in "the judicial micromanagement of business practices").

<sup>151</sup> See Autumn George, Comment, "Adverse Employment Action"—How Much Harm Must Be Shown to Sustain a Claim of Discrimination Under Title VII?, 60 *MERCER L. REV.* 1075, 1082 (2009) ("To the extent, however, that the plaintiff's claim alleges neither an employment detriment that entails immediate and obvious economic consequences nor severe and pervasive harassment, the circuit courts are left to reach their own conclusions about how much harm must be shown to satisfy the harm element of § 703.").

<sup>152</sup> See *infra* note 157 and accompanying text.



consequences for minority associates, in most instances such forms of racially disparate treatment will not meet the materiality threshold of the existing case law.

In perhaps the most influential formulation of the adverse employment act doctrine, the Seventh Circuit, in *Crady v. Liberty National Bank & Trust*, explained that a materially adverse employment act “might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.”<sup>153</sup> Although this language on its face has a ring of broad inclusiveness, the voluminous case law demonstrates that courts have applied the doctrine quite narrowly and restrictively.<sup>154</sup> Most successful claims involve one of the first two types of adverse employment actions, terminations or personnel acts that reduce employees’ salaries or other income.<sup>155</sup> The latter two *Crady* examples, significantly diminished responsibilities and “other indices that might be unique to a particular situation,”<sup>156</sup> are potentially broad enough to encompass many forms of assignment-related discrimination. However, courts have been reluctant to deem employment actions that deprive workers of access to human capital and substantive work opportunities materially adverse. As the Eleventh Circuit explained in *Kidd v. Mando American Corp.*, “it’s a rare case where a change in employment responsibilities qualifies as an adverse employment action.”<sup>157</sup>

Some courts have thus far refused to recognize changes in work responsibilities as adverse employment actions in the absence of

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<sup>153</sup> *Crady v. Liberty Nat’l Bank & Tr. Co.*, 993 F.2d 132, 136 (7th Cir. 1993).

<sup>154</sup> There is variation, however, in how courts apply this doctrine, with some circuits more accommodating to plaintiffs than others. In *Hillig v. Rumsfeld*, for example, the Tenth Circuit rejected precedents from other circuits that interpreted the requirement stringently as “inconsistent with our own precedents which require us to ‘liberally construe’ the term ‘adverse employment action,’ and to take ‘a case-by-case approach, examining the unique factors relevant to the situation at hand.’” 381 F.3d 1028, 1035 (10th Cir. 2004) (quoting *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 532 (10th Cir.1998)).

<sup>155</sup> This extends not only to employment acts that directly lower workers’ salaries but also to acts that reduce their commissions, gratuities, and eligibility for bonuses. *See, e.g.*, *Kassner v. Second Ave. Delicatessen, Inc.*, 496 F.3d 229 (2d Cir. 2007) (waitresses assigned to less desirable and profitable shifts and stations potentially suffer adverse employment actions); *Haynes v. Level Three Commc’ns, L.L.C.*, 456 F.3d 1215 (10th Cir. 2006) (repeated removal of an employee’s accounts constituted an adverse employment action because the employee was not given the credit for sales that she deserved).

<sup>156</sup> *Crady*, 993 F.2d at 136.

<sup>157</sup> 731 F.3d 1196, 1204 n.11 (11th Cir. 2013); *see also* *Williams v. U.S. Dep’t of Navy*, 149 F. App’x 264, 269–70 (5th Cir. 2005) (the “loss of some job responsibilities” does not meet the adverse employment action requirement under Fifth Circuit case law); *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1557 (D.C. Cir. 1997) (“[C]hanges in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in salary or work hour changes.”).

tangible economic harms.<sup>158</sup> In *Davis v. Town of Lake Park*,<sup>159</sup> a black police officer alleged that in discriminatorily stripping him of his “OIC [Officer in Charge] designation,”<sup>160</sup> his employers had “diminished his prestige and deprived him of [supervisory] experience which might make him more likely to obtain . . . promotions in the future.”<sup>161</sup> In dismissing his lawsuit for failing to state an adverse employment action, the Eleventh Circuit explained that “[a]lthough the statute does not require proof of direct economic consequences in all cases, the asserted impact cannot be speculative and must at least have a tangible adverse effect on the plaintiff’s employment.”<sup>162</sup> Noting that the changes in the officer’s work assignments did not “cause[] any economic injury,”<sup>163</sup> the court opined that “Congress simply did not intend for Title VII to be implicated where so comparatively little is at stake.”<sup>164</sup>

Other courts have allowed plaintiffs to challenge discriminatory transfers or changes in work responsibilities without proof of tangible economic harms, but only if they can demonstrate that their new positions are “objectively worse” than the former ones.<sup>165</sup> Courts have often applied this standard in an arbitrary and exacting fashion, dismissing complaints about substantial unfavorable changes to work responsibilities as frivolous grievances concerning “mere inconveniences,”<sup>166</sup> matters of subjective preferences,<sup>167</sup> and “bruised egos.”<sup>168</sup> In *Crady*, for example, the Seventh Circuit affirmed the lower court’s holding that a worker who was involuntarily transferred from his position as assistant vice president and branch manager to a loan officer position at a different branch did not experience an actionable adverse employment action.<sup>169</sup> In *Williams v. U.S. Department of the Navy*, the Fifth Circuit found that a worker who suffered a twenty percent

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<sup>158</sup> See *McCoy v. Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007).

<sup>159</sup> 245 F.3d 1232 (11th Cir. 2001).

<sup>160</sup> *Id.* at 1243.

<sup>161</sup> *Id.* at 1240.

<sup>162</sup> *Id.* at 1239.

<sup>163</sup> *Id.* at 1240.

<sup>164</sup> *Id.*

<sup>165</sup> See *Pegram v. Honeywell*, 361 F.3d 272, 283 (5th Cir. 2004) (“[A]n employment transfer may qualify as an adverse employment action if the change makes the job objectively worse.” (internal quotation marks and citation omitted)).

<sup>166</sup> See *Crady v. Liberty Nat’l Bank & Tr. Co.*, 993 F.2d 132, 136 (7th Cir. 1993) (“a mere inconvenience or an alteration of job responsibilities” does not constitute “a materially adverse change in the terms and conditions of employment”).

<sup>167</sup> See *Brennan v. Tractor Supply Co.*, 237 F. App’x 9, 24 (6th Cir. 2007) (“[A]n employee’s subjective impressions as to the desirability of one position over another are not relevant.” (citations omitted)).

<sup>168</sup> See *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994) (“Although the [employment act] may have bruised [plaintiff’s] ego . . . a plaintiff’s perception that a lateral transfer would be personally humiliating is insufficient, absent other evidence, to establish a materially adverse employment action.”).

<sup>169</sup> See *Crady*, 993 F.2d at 136.

reduction in her substantive responsibilities without any effect on her compensation did not allege an adverse employment act.<sup>170</sup>

Courts generally have found personnel decisions that limit workers' access to human capital opportunities without directly altering their tangible terms and conditions of employment actionable under Title VII only in extreme circumstances<sup>171</sup> They have done so, for example, where employers have formally stripped workers of all higher-level responsibilities or so drastically limited or reordered their work responsibilities as to effectively demote them to entirely different occupational positions.<sup>172</sup> Courts have found material adversity, for example, in instances where plaintiffs have been stripped formally of all higher-level responsibilities.<sup>173</sup> In *Czekalski v. Peters*,<sup>174</sup> the D.C. Circuit found that a government employee had alleged a potential<sup>175</sup> adverse employment action when she claimed that her transfer to a new position decreased her supervisory responsibilities from nine-hundred and sixty employees to fewer than ten,<sup>176</sup> diminished her budget responsibilities from \$400 million per year to essentially none,<sup>177</sup> and required her to report to a former peer.<sup>178</sup> In *Thompson v. Waco*,<sup>179</sup> the Fifth Circuit held that a black detective, who was subject to a number of punitive restrictions that prevented him from performing his essential duties as a detective without supervision from other detectives,<sup>180</sup> experienced an adverse employment act equivalent to a demotion, even though his

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<sup>170</sup> 149 F. App'x 264, 269–70 (5th Cir. 2005).

<sup>171</sup> See *Davis v. Lake Park*, 245 F.3d 1232, 1245 (11th Cir. 2001) (“[I]n unusual instances the change [in work assignments] may be so substantial and material that it does indeed alter the ‘terms, conditions, or privileges’ of employment.”).

<sup>172</sup> See, e.g., *Thompson v. City of Waco*, 764 F.3d 500 (5th Cir. 2014), *reh'g denied en banc*, 779 F.3d 343 (5th Cir. 2014); *Czekalski v. Peters*, 475 F.3d 360 (D.C. Cir. 2007).

<sup>173</sup> See, e.g., *Czekalski*, 475 F.3d at 369 (drastically reduced supervision and budgetary responsibilities met adverse employment act requirement).

<sup>174</sup> *Id.*

<sup>175</sup> Reflecting the restrictiveness of the adverse employment action doctrine, this court only found that these substantial downward changes constituted a potential adverse employment action raising a question of triable fact. *Id.*

<sup>176</sup> *Id.* at 364–65.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 365. See also *Schirle v. Sokudo USA, L.L.C.*, 484 F. App'x 893, 898–99 (5th Cir. 2012) (manager stripped of substantial proportion of his sales responsibilities suffered adverse employment action to overcome a granting of summary judgment to employer); *Evans v. District of Columbia*, 754 F. Supp. 2d 30 (D.D.C. 2010) (rejecting motion to dismiss where plaintiff alleged that her employer had drastically reduced her work responsibilities and excluded her from important meetings with supervisors).

<sup>179</sup> 764 F.3d 500 (5th Cir. 2014), *reh'g denied en banc*, 779 F.3d 343 (5th Cir. 2014). *Thompson* proved rather controversial, as one judge dissented in the case and four judges later dissented to the Fifth Circuit's denial of a petition to rehear the case *en banc*. *Id.*

<sup>180</sup> The restrictions specified that Thompson could not “(1) search for evidence without supervision; (2) log evidence; (3) work in an undercover capacity; (4) be an affiant in a criminal case; (5) be the evidence officer at a crime scene; and (6) be a lead investigator on an investigation.” *Id.* at 502.

formal title and compensation had not changed.<sup>181</sup> In *Rodriguez v. Board of Education*,<sup>182</sup> the Second Circuit allowed a teacher discriminatorily transferred from high school to elementary school to proceed with her claim on the basis of evidence demonstrating that the two jobs were so “profoundly different” as to render her twenty years of prior experience “useless.”<sup>183</sup> The court agreed that this transfer was “in effect, a demotion that would constitute a serious professional setback and stigma to her career.”<sup>184</sup> Courts also have found that formal transfers to new jobs universally regarded as less prestigious can also constitute demotions and that denial of transfers to more prestigious positions are equivalent to denials of promotions.<sup>185</sup>

Although courts may accept negative performance evaluations as materially adverse when plaintiffs can demonstrate that they have significantly compromised their job security or career prospects,<sup>186</sup>

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<sup>181</sup> *Id.* at 506; *see also* *Lavalais v. Village of Melrose Park*, 734 F.3d 629, 633–35 (holding that the plaintiff successfully pleaded an adverse employment action where facts alleged by plaintiff indicated that his duties were so restricted on the midnight shift that “it is as if he is not a sergeant”).

<sup>182</sup> 620 F.2d 362 (2d Cir. 1980).

<sup>183</sup> *Id.* at 366. *But see* *Galabya v. N.Y.C. Bd. of Educ.*, 202 F.3d 636, 641 (2d Cir. 2000) (teacher assigned to new school did not demonstrate that transfer “was to an assignment that was materially less prestigious, materially less suited to his skills and expertise, or materially less conducive to career advancement”); *Ticali v. Roman Catholic Diocese of Brooklyn*, 41 F. Supp. 2d 249, 265 (E.D.N.Y. 1999) (teacher challenging her transfer from first-grade to pre-kindergarten failed to present sufficient evidence that her reassignment “obliged her to perform tasks that were less appropriate for her skills than her prior position or adverse to her in any other legally cognizable way”).

<sup>184</sup> *Rodriguez*, 620 F.2d at 365.

<sup>185</sup> *See* *Alvarado v. Tex. Rangers*, 492 F. 3d 605 (5th Cir. 2007) (adverse employment act where employer denied Texas state trooper’s requested appointment to the exclusive Texas Rangers division, which was universally regarded as equivalent to a promotion in large part due to its immense prestige). The court also identified the “complexity of the selection process” and intense “level of competition” for the position as evidence that it was equivalent to a promotion. *Id.* at 615; *see also* *de la Cruz v. N.Y.C. Human Res. Admin. Dep’t of Soc. Servs.*, 82 F.3d 16, 21 (2d Cir. 1996). (suggesting that transfer from Adoption Unit to less prestigious Foster Care Unit “quite thin” but potentially an adverse employment action).

<sup>186</sup> *See, e.g.*, *Jackman v. Fifth Judicial Dist. Dep’t of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013) (“An adverse employment action is defined as a tangible change in working conditions that produces a material employment disadvantage, including... changes that affect an employee’s future career prospects...”); *Hillig v. Rumsfeld*, 381 F.3d 1028, 1035 (10th Cir. 2004) (divided panel found adverse employment action where plaintiff presented testimony demonstrating that extremely negative assessments of her performance—including one that described her as a “shitty employee”—“seriously harm[ed]” her future employment prospects, and posed an insurmountable competitive disadvantage to other candidates); *Herrnreiter v. Chic. Hous. Auth.*, 315 F.3d 742, 744 (7th Cir. 2002) (“[B]y preventing [a worker] from using the skills in which he is trained and experienced, so that the skills are likely to atrophy.”); *Thomas v. Eastman Kodak*, 183 F.3d 38, 50–51 (1st Cir. 1999) (explaining that employers can be held liable for “harms stemming from discriminatory evaluations” when they rely upon the evaluation as grounds for terminating an employee). *But see* *Hillig*, 381 F.3d at 1039 (10th Cir. 2004) (O’Brien, J., dissenting) (insisting that such “[s]peculative harm does not constitute

courts routinely dismiss evaluation-based Title VII claims on the grounds that the plaintiffs have failed to convincingly establish such connections.<sup>187</sup> Courts also have used the materiality standard to dismiss discrimination claims against employers who allegedly had failed to provide employees with human capital-enhancing mentorship and on-the-job training.<sup>188</sup> In *Higgins v. Gonzalez*,<sup>189</sup> Sally Higgins, a Native American Assistant United States Attorney, presented evidence that her boss had failed to provide sufficient mentorship and training while offering greater support to one of her white peers.<sup>190</sup> Although Higgins alleged that this treatment had prevented her from developing job-relevant skills in a manner that “set[] her up to fail” in her career as a federal prosecutor,<sup>191</sup> the court rejected Higgins’s claims on the grounds that she had failed to link this lack of mentorship to any tangible adverse career outcomes.<sup>192</sup> Other courts have similarly held that the failure to

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adverse employment action” (quoting *Aquilino v. Univ. of Kan.*, 268 F.3d 930, 936 (10th Cir.2001)).

<sup>187</sup> See, e.g., *Davis v. Town of Lake Park*, 245 F.3d 1232, 1241 (11th Cir. 2001) (analyzing large body of cases from various federal courts and concluding that “criticisms of an employee’s job performance—written or oral—that do not lead to tangible job consequences will rarely form a permissible predicate for a Title VII suit”); *id.* at 1243 (“Any job criticism or negative job review carries with it the possibility that the employee’s future prospects may be prejudiced if that information is disclosed. A negative evaluation . . . will rarely, if ever, become actionable merely because the employee comes forward with evidence that his future prospects have been or will be hindered as a result.”); *Spears v. Mo. Dep’t of Corr. & Human Res.*, 210 F.3d 850, 854 (8th Cir. 2000) (“An unfavorable evaluation is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient’s employment.”); *Smart v. Ball State Univ.*, 89 F.3d 437, 442–43 (7th Cir. 1996) (unfavorable performance reviews are not, by themselves, adverse employment action). Under this doctrinal framework, the obvious intangible consequences of discriminatory performance evaluations—the frustration, discouragement, and demoralization—are irrelevant. See *Baloch v. Kempthorne*, 550 F.3d 1191, 1199 (D.C. Cir.2008) (“[P]erformance reviews typically constitute adverse actions only when attached to financial harms.”); *Tapia v. Albuquerque*, 170 F. App’x 529 (10th Cir. 2006) (reprimand letter not materially adverse).

<sup>188</sup> See, e.g., *Hollimon v. Potter*, 365 F. App’x 546, 549 (5th Cir. 2010); *Higgins v. Gonzalez*, 481 F.3d 578 (8th Cir. 2007). This, too, is contrary to the EEOC’s interpretation of the statute. See EEOC, COMPLIANCE MANUAL SECTION 15, *supra* note 149, at 46. The EEOC provides a hypothetical example of an office in which under-performing white workers receive coaching and support while minority workers receive less feedback and are therefore more likely to continue to make mistakes until they are terminated. *Id.* The EEOC finds this to be evidence of an unlawful termination. *Id.*

<sup>189</sup> 481 F.3d 578 (8th Cir. 2007), *abrogated by* *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011).

<sup>190</sup> *Id.* at 582. Higgins also alleged that her employer had subjected her to various other forms of adverse treatment. See *id.* at 584–88 (holding that plaintiff’s allegations of mistreatment, which included removal from primary job, denial of “supervision, mentoring, and training”; creation of a “shadow file” and “whisper campaign” by a superior; being subjected to vague complaints by a superior; employer’s failure to perform a mid-year evaluation; supervisor’s recommendation of termination; and eventual transfer to a different office, neither individually nor aggregated amounted to an adverse employment action).

<sup>191</sup> *Id.* at 582.

<sup>192</sup> *Id.* at 585.

provide workers equal opportunities to develop human capital through employee training programs only rises to the level of materiality when it affects tangible employment outcomes.<sup>193</sup>

Courts have also required employees to show that they have been subjected to adverse employment acts in First Amendment retaliation claims against government employers.<sup>194</sup> In this line of cases, several courts have found that involuntary job transfers and undesirable changes in responsibilities were sufficiently adverse.<sup>195</sup> Though these cases involve different substantive claims and legal standards than those in the employment discrimination context,<sup>196</sup> the precedents may hold some value for employment discrimination plaintiffs. For example, in *Dahm v. Flynn*, a Title VII case,<sup>197</sup> the Seventh Circuit offered by way of example that “if the duties of an assistant prosecutor were changed from trying cases to sharpening pencils, that change would be materially adverse.”<sup>198</sup>

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<sup>193</sup> See, e.g., *Hollimon*, 365 F. App'x at 549 (“[A] refusal to train is not an adverse employment action under Title VII.” (citation omitted)); *Rossi v. Fulton Cty.*, No. 1:10-CV-4254, 2013 WL 1213205, at \*13 (N.D. Ga. 2013) (“A denial of training that does not result in the loss of some tangible job benefit does not constitute an adverse action.”); *Wheeler v. Chertoff*, No. C 08-1738, 2009 WL 2157548, at \*6 (N.D. Cal. 2009) (refusing to find that denial of training constituted an adverse employment action because plaintiff “made no showing that his inability to attend such training had any material impact on the terms and conditions of his employment”); *Spencer v. AT&T Network Sys.*, No. 94 C7788, 1998 WL 397843, at \*5 (N.D. Ill. 1998) (“[plaintiff] failed to present evidence that the denial of the training opportunities of which she complains had any impact on her inability to retain her . . . position.”).

<sup>194</sup> See *Meyers v. Neb. Health & Human Servs.*, 324 F.3d 655, 659–60 (8th Cir. 2003) (explaining the standard for establishing a First Amendment retaliation violation).

<sup>195</sup> See, e.g., *Meyers*, 324 F.3d at 659–61 (transfer to position with “a considerable downward shift in skill level” was potentially an adverse employment act); *Sharp v. City of Houston*, 164 F.3d 923, 933 (5th Cir. 1999) (“The jury could have viewed transferring from the elite Mounted Patrol to a teaching post at the Police Academy to be, objectively, a demotion.”); *Dahm v. Flynn*, 60 F.3d 253, 257 (7th Cir. 1994) (“[D]ramatic downward shift in skill level required to perform job responsibilities can rise to the level of an adverse employment action . . .”); *id.* at 256–57 (finding that evidence presented by plaintiff that her employer had undermined her supervisory role and reassigned all of her duties presented a triable question of fact); see also *Forsyth v. City of Dall.*, 91 F.3d 769, 774 (5th Cir. 1996) (in applying Texas Whistleblower statute, court found adverse employment action where jobs “were more prestigious, had better working hours, and were more interesting”).

<sup>196</sup> This area of law traditionally has used a more lenient adversity requirement. See Rosalie Berger Levinson, *Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech*, 79 TUL. L. REV. 669, 677–87 (2005).

<sup>197</sup> See *Dahm*, 60 F.3d at 253.

<sup>198</sup> *Id.* at 257 n.2; see also *id.* at 257 (suggesting that the shift from more “intellectually stimulating” job responsibilities to more routine ones could constitute an adverse employment action).

B. *Incompatibility with Law Firm Associate Career Contexts*

Although courts have in some rare instances found adverse employment actions where workers have suffered reduced or unequal opportunities to develop human capital, the plaintiffs who were able to proceed to trial in these cases worked in occupational contexts that differ in critical respects from those of law firm associates. This Section will explain how certain features of law firm associate careers, particularly the variability of associate work and both the prevalence and importance of various informal personnel processes, serve to obscure the existence and consequences of human capital discrimination in ways that render it all but impossible to address under Title VII.

As difficult as it is for plaintiffs to challenge job transfers and reclassifications that formally alter the terms and conditions of their employment, it is even harder to contest the types of informal differences in assignment quality that damage the careers of law firm associates. To understand why this is so, consider the processes through which law firm associates are stripped of, or denied access to, work responsibilities and opportunities. When employers in other industries formally alter their employees' work roles and assign them to new positions—for example, when police officers are formally stripped of critical job duties,<sup>199</sup> managers officially relieved of their supervisory and budgetary responsibilities,<sup>200</sup> or teachers reassigned to new jobs at different schools<sup>201</sup>—there is no ambiguity concerning how the workers' new responsibilities will differ from those of their previous roles or those of their colleagues.

By contrast, the process through which law firm associates are denied access to beneficial developmental assignments or relegated to tasks with less substantive responsibilities generally occurs subtly, incrementally, and with less rigid certainty. As law firm associates are essentially hired into flexible internal labor pools with ad hoc work roles and responsibilities (according to the needs of more senior attorneys),<sup>202</sup> the quality of their work assignments can fluctuate a great deal;<sup>203</sup> their work roles are almost never definitively altered or redefined by any single assignment. Associates are seldom stripped of existing responsibilities; more often, they are denied access to new high-quality

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<sup>199</sup> See *supra* notes 179–81 and accompanying text.

<sup>200</sup> See *supra* notes 174–78 and accompanying text.

<sup>201</sup> See *supra* notes 182–84 and accompanying text.

<sup>202</sup> See generally Diaz & Dunican, *supra* note 1, at 975–76 (describing the informal assignment practices used at many law firms).

<sup>203</sup> Some interviewees, including Naomi, spoke of receiving both substantive and low-quality assignments. Telephone Interview with Naomi, *supra* note 85.

assignments that might offer them more substantive responsibilities. Associates are not barred formally from receiving such assignments, so it often remains possible that any disparities in access to developmental work opportunities are simply a temporary aberration rather than a permanent inequality.<sup>204</sup> As the occupational role of law firm associate encompasses both “training”<sup>205</sup> and “paperwork,”<sup>206</sup> associates may work on assignments involving significantly different levels of sophistication and developmental value from one day to the next. An associate who develops valuable human capital while working on a case in which she files motions, takes depositions, and assists in strategic trial preparations, may end up working on far more mundane document review tasks on another case as soon as her work on the previous matter runs its course.

Associates often only gradually end up on particular career “tracks” at their firms.<sup>207</sup> Those fortunate enough to develop the right relationships or reputations of excellence end up receiving far greater access to more valuable assignments and work responsibilities than their classmates.<sup>208</sup> A select group, who some associates refer to as “tapped”<sup>209</sup> or having received “the golden treatment,”<sup>210</sup> are eventually able to avoid almost all lower-level assignments altogether, as their senior colleagues come to depend on them to assist with higher-level responsibilities.<sup>211</sup> Consistent with the available survey data on law firm racial and gender disparities,<sup>212</sup> interviewees widely reported that these “chosen” associates were disproportionately white males.

Less successful associates find themselves frozen out of these developmental work opportunities, saddled instead with assignment diets consisting entirely of “paperwork” not conducive to their

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<sup>204</sup> See *id.*

<sup>205</sup> See Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 1, at 1608–13 (describing instrumentally valuable “training work”).

<sup>206</sup> See *id.* at 1609–10 (describing low-value “paperwork”).

<sup>207</sup> This is evident, for example, in Brad’s description of the graduate process through which some associates find that they have been relegated to strictly low-level work in their departments. See *supra* note 127 and accompanying text. *But see* Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 1, at 1651–53 (discussing certain associates who are “seeded directly” onto their firm’s “training track”).

<sup>208</sup> See generally Diaz & Dunican, *supra* note 1, at 975–78 (describing the importance of relationships in providing access to assignments in both “informal” and “free market” assignment systems).

<sup>209</sup> Telephone Interview with Roger (Nov. 11, 2009).

<sup>210</sup> *Id.*

<sup>211</sup> In certain instances, some end up working as de facto supervisors to some of their cohort members, for example, in supervising document review projects.

<sup>212</sup> See *supra* notes 44–46 and accompanying text.



professional growth.<sup>213</sup> Some minority and female associates have a hard time gaining access to high quality work from the start of their careers at these firms,<sup>214</sup> producing immediate disparities that can eventually harden into insurmountable deficits. To the extent that they do not receive the same presumptions of competence as their white male counterparts, or lack strong informal relationships with the senior attorneys in their groups,<sup>215</sup> minority associates who err on early assignments may find their access to such assignments especially short-lived. In the worst case scenario, these associates are de facto blacklisted and pushed out of their practice groups for shortcomings that would have been handled more constructively—or perhaps overlooked altogether—if committed by certain white male attorneys. Though this de facto blacklisting produces racial disparities in human capital and career outcomes, sometimes at greater levels than formal performance evaluations, these informal personnel acts are exceedingly difficult to identify, let alone challenge, under the existing Title VII framework.<sup>216</sup>

Most associates, however, have at least some possibility of receiving more substantive work opportunities in the future. Variation in work quality is an expected part of associate life. Even highly successful associates who eventually go on to make partner spend significant amounts of time “paying dues” on assignments that offer little direct professional benefit or reward. Associates who find themselves bogged down with an inordinate amount of grunt work in some instances eventually gain access to higher quality assignments and opportunities that provide them with the human and reputational capital to either advance with their colleagues or eventually transition to desirable external positions. This fluidity in their roles makes it difficult to determine whether an individual associate has in fact been deprived of equal access to human capital or functionally relegated to a less desirable

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<sup>213</sup> See, e.g., Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 1, at 1611–13 (discussing the predicament of “paperwork attorneys” who do not substantive work assignments); *supra* notes 71–75 and accompanying text.

<sup>214</sup> See *supra* notes 93–94 and accompanying text.

<sup>215</sup> Several interviewees reported these dynamics as contributing to racial inequality in their firms. See, e.g., Telephone Interview with Brad, *supra* note 76 (alleging that black associates have to work to overcome white partners’ negative biases toward them); Telephone Interview with Langston, *supra* note 96 (reporting that black associates in his group were disadvantaged by their lack of relationships with influential attorneys).

<sup>216</sup> Associates lack access to the informal word-of-mouth between partners concerning themselves or other associates and would have great difficulty directly connecting them to tangible employment outcomes. Even if it were possible to draw such connections, the deference that courts show to employers in positions requiring subjective assessments of performance and career-relevant traits would still present virtually insurmountable hurdles for law firm associates seeking to advance Title VII challenges to their performance assessments. See Nancy Levit, *Lawyers Suing Law Firms: The Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. PITT. L. REV. 65, 79 (2011).

occupational position, and nearly impossible to determine if such actions occurred on the basis of race.

Given these occupational features, and the restrictive adverse employment action requirement of the existing Title VII jurisprudence, black associates will often face great difficulty in attempting to establish that they have been treated more harshly than white counterparts. Making headway against BigLaw's human capital discrimination problem therefore requires ambitious doctrinal innovations and new efforts on the part of law firm employers.

#### IV. POTENTIAL DOCTRINAL AND ORGANIZATIONAL REFORMS

Although the processes of human capital discrimination addressed in this Article largely fall outside the scope of Title VII's coverage, this Part will briefly identify a number of potential collaborative steps that courts, law firms, and other interested parties can take to better protect minority associates from these career-debilitating inequalities.

##### A. Doctrinal Reforms

###### 1. A More Sensible Adverse Employment Action Doctrine

If in the interests of judicial efficiency and fairness to employers<sup>217</sup> courts insist on retaining the adverse employment action doctrine, they must recognize the denial of equal opportunities to develop human capital as a mode of discrimination that materially and adversely alters the terms and conditions of employment for law firm associates. As this Article has demonstrated, the racially inequitable allocation of work assignments within large law firms deprives high-potential black attorneys of valuable professional skills,<sup>218</sup> handicaps them in their efforts to compete for partnership,<sup>219</sup> exacts damaging psychological and

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<sup>217</sup> See *supra* note 150 and accompanying text. It is worth noting though that several scholars have called for the judiciary to dramatically curtail or abandon this doctrine altogether. See, e.g., Lidge, *supra* note 149, at 336 (arguing that the requirement "is not justified by the statutory language, Supreme Court decisions, legislative history, or sound policy"); *id.* at 400-01 (noting that the vagueness of the standard requires courts to use subjective judgment with minimal guidance or standards); Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1151 (1998) (arguing that this entire jurisprudential framework misapplies the language of Title VII's "compensation, terms, conditions, or privileges" requirement, which is "better read as making clear that an employer who discriminates against an employee in a non-job-related context would not run afoul of Title VII, rather than as sheltering employment discrimination that does not significantly disadvantage an employee" (footnote omitted)).

<sup>218</sup> See *supra* Section II.C.

<sup>219</sup> See *supra* Section II.D.

dignitary harms,<sup>220</sup> and presents unfair burdens and obstacles for even some of the most successful black attorneys.<sup>221</sup> In instances where human capital discrimination is not directly or obviously linked to tangible employment outcomes, it remains a critical mechanism of racial inequality that limits and derails the careers of black attorneys. When minority associates receive demonstrably less substantive work opportunities than their white counterparts under conditions that raise the inference of racially disparate treatment,<sup>222</sup> those who are willing to pursue disparate treatment actions against their employers should be deemed to have raised triable questions of fact. Such a doctrinal improvement would potentially provide legal recourse for a far greater number of disadvantaged black associates (and perhaps workers in other human capital intensive occupations) and would provide greater incentives for employers to implement organizational reforms designed to address these problems.

As a practical matter, however, even this important jurisprudential change would likely produce only modest results, for a number of reasons. First, many black associates would still face considerable difficulties in establishing that the white associates who received greater opportunities to develop human capital were in all relevant respects similarly situated to them. In employment contexts such as those of large law firms, where personnel decisions and evaluations are necessarily discretionary and highly subjective, employers should have little difficulty in distinguishing between different workers on performance and other non-racial grounds. Further, even when black associates are able to establish *prima facie* cases of racial discrimination and proceed to trial, most law firms likely would have very little difficulty meeting their burden of production in offering alternative race-neutral explanations for the racial disparities in treatment. Finally, and partly reflecting these challenges, very few black associates are likely to sue their law firm employers for such ambiguous mistreatment. Even black associates with triable claims will likely fear being stigmatized in ways that limit their future employment prospects.

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<sup>220</sup> See *supra* notes 129–39 and accompanying text.

<sup>221</sup> See *supra* notes 135–38 and accompanying text.

<sup>222</sup> Plaintiffs lacking direct evidence of racial intent generally must demonstrate that the white counterparts who were treated better than them were in all respects similarly situated. See *Smith v. Stratus Comput., Inc.*, 40 F.3d 11, 17 (1st Cir. 1994). This is often a difficult burden, and thus constitutes an important limiting requirement that would still prevent every disgruntled minority associate from proceeding to trial with their claims, even if courts were to recognize human capital discrimination as an adverse employment action.

## 2. An Employer Duty of Care Standard

As I have argued elsewhere,<sup>223</sup> effectively addressing the ongoing problems of institutional discrimination in law firms and other contemporary workplaces may require a far more ambitious reconceptualization of Title VII, one that replaces the current individual justice model with a more expansive regulatory model that places an affirmative duty on employers to avoid unnecessarily reproducing racial hierarchy. As articulated by antidiscrimination scholars including, most notably, Richard Thompson Ford,<sup>224</sup> such an approach could require employers to implement best practices approaches approved by researchers, experts, and judges.<sup>225</sup> Under this new jurisprudential framework, employers who fail to meet such standards would face potential liability to minority employees, while those who do meet such standards would be able to avoid liability and potentially costly litigation.<sup>226</sup> Such an expansive reorientation of Title VII would provide a potential avenue of relief for black associates who suffer racially disparate experiences and outcomes that they are unable to link to particular decision-makers and employment acts. Given the difficulty of knowing, let alone proving, whether particular experiences are motivated by impermissible racial intent or materially affect an associate's future career trajectory, this shifting of the burden onto employers could facilitate real progress for the many black associates who would otherwise have no recourse at all.

### B. *Employer Initiatives*

Regardless of whether courts are willing to undertake such an ambitious revision of Title VII, sustained progress for black law firm

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<sup>223</sup> See Woodson, *Derivative Racial Discrimination*, *supra* note 8.

<sup>224</sup> See Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1384 (2014) (arguing that antidiscrimination law should require employers "to meet a duty of care to avoid unnecessarily perpetuating social segregation or hierarchy"); see also Green, *Discrimination in Workplace Dynamics*, *supra* note 6, at 94 (proposing a new Title VII approach that would "place an affirmative obligation on employers to manage diversity within their institutions to minimize the operation of discriminatory bias"); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 900 (1993) (advancing a theory of negligent discrimination in which an employer would be found liable "when the employer fails to take all reasonable steps to prevent discrimination that it knows or should know is occurring, or that it expects or should expect to occur").

<sup>225</sup> See Woodson, *Derivative Racial Discrimination*, *supra* note 8.

<sup>226</sup> Richard Thompson Ford, *Rethinking Rights After the Second Reconstruction*, 123 YALE L.J. 2942, 2959 (2014) ("An employer who fails to meet the duty should be punished in some way . . . . Conversely, an employer who meets the duty should not face liability for otherwise lawful adverse decisions.").

associates will require collaborative efforts between law firms, partners, clients, and other industry constituents interested in racial progress. The qualitative data from my interviews particularly calls attention to the need for earlier interventions and proactive preventative measures designed to ensure that the most junior minority associates are not left behind before their careers even begin. Given the cumulative and often intangible harms brought about by human capital discrimination,<sup>227</sup> there is little reason to believe that later corrective measures will ever effectively undo the professional damage suffered by its victims.

In an earlier Article on racial disadvantage in corporate law firms,<sup>228</sup> I introduced several policies and practices that might help in this respect. To address this problem most directly, firms should consider developing special assignment programs that would ensure that black associates receive access to more equitable shares of premium work opportunities.<sup>229</sup> More generally, employers should strive to implement management cultures that place a greater emphasis on fully developing, properly utilizing, and accurately evaluating the talent of *all* junior workers.<sup>230</sup> Although formal mentorship programs have had mixed results in improving racial diversity,<sup>231</sup> firms should deepen their commitments to such programming in order to further bridge the social capital gap between black and white workers.<sup>232</sup> Mentors can enhance black associates' human capital by providing them with informal training in the form of constructive criticism, useful feedback, and advice concerning their work product. Mentorship relationships provide junior workers guidance that enables them to better meet the

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<sup>227</sup> See *supra* Section II.D.

<sup>228</sup> Woodson, *Race and Rapport*, *supra* note 2.

<sup>229</sup> See *id.* at 2573.

<sup>230</sup> See *id.* at 2571.

<sup>231</sup> Organizational researchers have found that formal programs, where mentees are assigned to individual mentors, may be less effective than mentorship relationships that develop informally. See Belle Rose Ragins & John L. Cotton, *Mentor Functions and Outcomes: A Comparison of Men and Women in Formal and Informal Mentoring Relationships*, 84 J. APPLIED PSYCHOL. 529, 540–44 (1999) (finding that workers perceive organic mentorship to be more effective than formal mentoring relationships). This may not be a fair comparison, however, as the ability of individual workers to develop mentors independently of formal programs may in some instances reflect aptitudes and characteristics relevant to work performance and career success. In other words, this may reflect some selection effect, wherein the individuals who found mentors organically would have outperformed their mentorless colleagues even in the absence of their mentorship relationships. See *id.* at 544 (providing this disclaimer).

<sup>232</sup> See Woodson, *Race and Rapport*, *supra* note 2, at 2572–73 (discussing the potential value of more meaningful, comprehensive mentorship efforts); see also Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 590 (2006) (finding that formal mentorship produced significant career gains for black and white women).

technical demands and informal expectations of their jobs.<sup>233</sup> This type of on-the-job tutoring can prove invaluable in helping associates to maximize their performance on work assignments and thereby positions them for further high-quality assignments in the future. To pursue these strategies effectively, firms will need to put in place the diversity infrastructure necessary to monitor, measure, and investigate employment practices and progress.

One collaborative approach, that employers truly committed to making progress on this front could pursue, entails collecting more fine-grained data concerning the quality of work assignments received by their associates as well as making this data more readily available to clients and various industry observers. This information would be far more useful than the current population statistics used in existing diversity rating systems, and more consistent and comprehensive than the information occasionally sought by particular corporate clients.<sup>234</sup> If sufficiently transparent and available, such record keeping would provide extraordinary incentives for firms to pay far closer attention to, and more proactively attend to, the human capital opportunities of their minority associates.

These reforms will by no means eradicate the problem of human capital discrimination, particularly without a more expansive conceptualization of Title VII. Even the firms most fully committed to racial diversity and fairness will not be able to wholly prevent individual partners and senior associates from treating minority associates with greater scrutiny or interpreting their performance less generously than their white counterparts. These forms of disparate treatment, whether driven by implicit bias or other subtle social tendencies, may function as asymptotic limits to the progress that firms can achieve in this realm. Nonetheless, they represent viable means of securing greater racial equitableness than existing practices currently allow.

#### CONCLUSION

On the basis of empirical insights from interviews of a sample of black law firm associates, this Article has sought to refine the existing understanding of the nature of racial inequality in large law firms by

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<sup>233</sup> See, e.g., Payne-Pikus et al., *supra* note 44 (finding that racial disparities in black and white associates' relationships with partners were associated with racial disparities in various career outcomes); Terri A. Scandura, *Mentorship and Career Mobility: An Empirical Investigation*, 13 J. ORGANIZATIONAL BEHAV. 169 (1992) (finding that mentorship was related to workers' salary and promotions); Scott E. Seibert et al., *A Social Capital Theory of Career Success*, 44 AM. MGMT. J. 219, 232 (2001) (finding that "people with whom one has a strong relationship are likely to provide one with more information and assistance").

<sup>234</sup> See *supra* note 40 and accompanying text.

calling attention to human capital discrimination as a major impediment to the career prospects of black law firm associates, both within their firms and elsewhere. In doing so, it has contributed to an important body of legal scholarship that seeks to illuminate and challenge contemporary forms of institutional discrimination that continue to disadvantage racial minorities and female workers in white male dominated workplaces. Addressing human capital discrimination will require ambitious doctrinal reforms and resource-intensive employer efforts. Although firms already devote significant resources toward improving racial diversity and fairness, further progress toward the important goal of finally providing talented black attorneys greater opportunities of forging successful careers will demand even more commitment on the part of employers, clients, and other industry intermediaries. While this Article has focused specifically on the experiences of black law firm associates, its insights also potentially apply both to law firm associates from other disadvantaged social identity groups and to black workers in other occupational contexts. Future scholarship could further flesh out the nature of human capital discrimination more broadly by attending to the experiences of the members of other such disadvantaged and marginalized groups.