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Large Law Firm Misery: It's the Tournament, Not the Money

Marc S. Galanter and Thomas M. Palay***

I. INTRODUCTION

Will young lawyers truly be happier and more fulfilled if they can restrain their appetite for money? Professor Schiltz's wonderful sermon certainly provides a stirring argument in the affirmative. In his eyes, it is greed (or materialism) that has led to the decline of the profession and makes lawyers unhappy. Lawyers' lust for money is at the root of their unhappiness with the profession.[1] This is broken down into two steps: "[m]oney is at the root of virtually everything that lawyers don't like about their profession: the long hours, the commercialization," etc., etc.[2] And their obsession with money leads lawyers to engage in well-paying but unsatisfying work which is the ultimate "source of their unhappiness."[3]

His theme is consistent with his earlier sermon on the errant ways of legal academics. In *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice*

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1. *See* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 903 (1999).
2. *Id.*
3. *Id.* at 881.

Attorney, he argued that just as big-firm lawyers have become obsessed with maximizing income, legal academics have become obsessed with maximizing academic prestige, which is acquired by scholarship.[4] Because of these obsessions, big-firm lawyers neglect everything else and become unhappy, and academics neglect teaching and mentoring. (No claim is made that this makes academics unhappy.) Thus both lawyers and academics have become single-minded in their pursuit of an exclusive goal and as a result have lost variety and richness in their lives. Both are urged by Professor Schiltz to pursue a more balanced life, a course which would produce not only personal satisfaction, but institutional renewal. If a sufficient number of law school graduates were to insist on maintaining balance in their lives, "big firms would be very different places today."[5] And if academics were to restrain their pursuit of prestige through writing, they could instead inspire such virtue in their students.[6]

As members of both of these wayward groups, we were doubly moved by his exhortation and were persuaded momentarily to find greater balance in our lives. But then the indelible skepticism that makes us lawyers, and academic lawyers at that, slowly reasserted itself.

II. SKEPTICISM OF THE PREMISE

First it surfaced as a mild skepticism about the underlying premise. Are lawyers really as unhappy as Professor Schiltz portrays them? He has assembled an impressive array of evidence, but it is far from conclusive. Indeed, Professor Schiltz appears not entirely convinced by it himself. If he believed that *lawyers* were as miserable as he tells us they are, would he be counseling young people to take up law practice? His disapproval is not of all law practice, but of large-firm practice. If lawyers "suffer from depression, anxiety, alcoholism, drug abuse, divorce, and suicide,"[7] are these things disproportionately present among lawyers in large firms? For the most part, the evidence of lawyer unhappiness that he cites does not break out big-firm lawyers from other lawyers. An exception is the University of

4. Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 (1998).

5. Schiltz, *supra* note 1, at 942.

6. *See* Schiltz, *supra* note 4, at 785-87.

7. Schiltz, *supra* note 1, at 881.

Michigan study, showing that compared with lawyers in legal services organizations, corporations, and government, big-firm lawyers are less satisfied with every aspect of their career apart from the money.[8] This is impressive stuff, but it is a report on two classes at a single elite law school five years after graduation. And it speaks to career satisfaction, saying nothing about the various pathologies Professor Schiltz mentions. Other studies of career satisfaction (cited by Professor Schiltz) report that career satisfaction is not significantly related to firm size.[9] Although Professor Schiltz at times allows himself to put a negative spin on ambigious findings,[10] the evidence on career satisfaction is mixed. It is by conflating this with the undifferentiatod assertions about pathology that Professor Schiltz is able te paint large-firm practice in such Boschian tones.

III. SKEPTICISM ABOUT THE EXPLANATION

But even conceding that lawyers, especially big-firm lawyers, are as wretched as Professor Schiltz describes them, we find ourselves unsatisfied with the explanation. If greed accounts for the misery, what accounts for the greed? Why are lawyers more mercenary than other professionals? Professor Schiltz makes little attempt to explain or account for this proclivity. Is it just that the lawyers he describes have lost their way by making bad choices and can be saved if only they hearken to the experience of the wayfarer who has returned from the nether regions? Instead of explanation, Professor Schiltz damns "the system." "The system is obsessed with money, and it wants you to be, too."[11] "The system will have succeeded in replacing your values with the systom's values . . . ."[12] It is an evil "system" against which young lawyers must conduct their struggle for salvation. But of course there is no system that is "obsessed" or "wants" or "succeeds"

8. *See id.* at 939.

9. *See, e.g.*, NORTH CAROLINA BAR ASS'N, REPORT OF THE QUALITY OF LIFE TASK FORCE AND RECOMMENDATIONS 5 (1991); YOUNG LAWYERS DIV., AMERICAN BAR ASS'N, THE STATE OF THE LEGAL PROFESSION 1990, at 55 (1991).

10. For example, he recounts a study in which "[a]lmost one third of [large law firm partners] thought that they would probably or definitely not remain at their firms until retirement." Schiltz, *supra* note 1, at 888 (citing Chris Klein, *Big-Firm Partners: Profession Sinking*, NAT'L L.J., May 26, 1997, at A1, A24). But what Klein's report actually says is: "In response te the question 'Do you plan te remain a partner at your firm until retirement?' 70 percent said 'definitely' or 'probably.'" Klein, *supra*, at A1, A24. Even what Klein reports is hard to interpret, since it is based on a mail survey that elicited only a 10% response rate.

11. Schiltz, *supra* note 1, at 912.

12. *Id.* at 918.

or "has values"—the only actors who do these things are individual lawyers. To be sure they are enmeshed in institutions—and the structure of those institutions provides the frame within which they make choices.

We grant Professor Schiltz's premise that the large firms are the dominant force that sets the standards for the profession. But we are reluctant te write them off as creatures of an evil system. It is worth remembering that the large law firm is a twentieth-century success stery: there are more of them, they are bigger, and they command a bigger share of an expanding legal market. Even the downturn of the early 1990s has not substantially damaged their relative standing as suppliers of legal services. Indeed, they may be gaining market share at the expense of the in-house sector. That success, and the reasons behind it, make the large law firm a strong contender to be the predominant organizational form for delivering legal services well into the next century.

As a social form for organizing the delivery of comprehensive, continuous, high-quality legal services, especially to businesses, the large law firm is unsurpassed. In the late ninetoenth-century United States, it appeared that the in-house corporate lawyer would come to dominate the world of business lawyering, but this trend proved short-lived.[13] Like the hospital as a way to practice medicine, the big firm has provided the standard format for delivering complex legal services. Even as the big firm is criticized, features of its style—specialization, teamwork, continuous monitoring on behalf of clients, representation in many forums—have been emulated in other vehicles for delivering legal services. The specialized boutique firm, the public-interest law firm, the corporate law department—all model themselves on a style of practice developed in the large firm. And legal professions around the world have increasingly emulated the American big firm, especially in breadth of legal services.

No other form of legal enterprise has proved as capable of providing as many complex legal services to as demanding a clientele. The large law firm offers clients "one-stop" expertise and an internal,

13. One observer of law firm history has concluded that corporate legal business gravitated to outside firms, not law departments, because "[t]be additional experience and connections that were developed by serving a variety of clients made the value of law firms so high that it was economically infeasible, in a short-run time horizon, for corporatious te 'buy out' corporate law firms, or to establish equivalent in-house legal departments." Thomas Paul Pinansky, *The Emergence of Law Firms in the American Legal Profession*, 9 U. ARK. LITTLE ROCK L.J. 593, 634 (1986-87).

"bonded" referral market. Clients with multifaceted problems are able te address those problems with the help of a single entity.[14]

A larger and larger share of the total amount of legal work is purchased by businesses.[15] These businesses are bigger, so a larger portion of all legal work comes in bigger bundles and thus is fit for capture and sharing by lawyer entrepreneurs. And the large law firm is the dominant provider of legal services for bigger business.

A. Tournaments and Incentives

The large law firm has grown and prospered precisely because it has provided a viable structure of incentives to facilitate delivery of the complex legal services demanded by clients. Students interested in the work and prestige associated with business clients, especially big business clients, cannot avoid the large firm. We would never presume to advise young lawyers to choose the life of large firm practice. We would hope, instead, to help them to understand the implications of making that choice for themselves. If they desire large firm practice, they should understand the implications and the costs.

In the spirit of assisting students to understand the system they are contemplating joining, let us retell our story of the basic transaction that underlies the large law firm. Imagine that you have worked hard to build a manufacturing business. You have invested heavily in a plant, equipment, distribution chain, and reputation for quality products. To date you (and maybe some close family members) have been the sole employees of the enterprise. The restricted labor force has limited your output, left equipment standing idle, and prevented you from meeting the demands of existing and potential customers. In other words, you have more capital than your meager labor force can productively use. If you are going to expand output, you have to hire more labor to work with your capital.

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14. General Motors, for example, ended its attempt to foster price competition among law firms and switched back to using fewer law firms. *See* Ellen Joan Pollock, *GM, in Corporate Trend, Cuts Law Firms*, WALL ST. J., Apr. 23, 1993, at B10.

15. Over the years 1967-1992, there was a dramatic increase in the receipts of the legal services industry (from $5.23 billion to $99.14 billion; in constant dollars this was a growth of 392%). There was an equally dramatic shift in the source of receipts of the legal services industry (the Census' term for all lawyers in private practice who have employees). In 1967, 55% of those receipts came from individuals and 39% from business; in 1992 (the last date for which figures are available), individuals were the source of 40% of those receipts and businesses 51%. For 1992 data, see BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. SC92-S-4, 1992 CENSUS OF SERVICE INDUSTRIES: SOURCES OF RECEIPTS OR REVENUE 4-443 tbl.49 (1996). For 1967, only tetal receipts are available from the U.S. Census; our figures are based on estimations from Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 L. & SOC. INQUIRY 431, 441 tbl.5 (1989).

A similar story can be told for lawyers. Imagine yourself in practice. You too possess capital, though most of yours is human capital consisting of four different types of assets. First, of course, is your pre-law-school endowment of intelligence, skills, general education, and the like. Second, you have invested in a legal education and other experience-dependent skills. You attended law school, perhaps went on to a clerkship, and have participated in continuing legal education programs in order to acquire the basic skills of the profession. Eventually, you may also acquire the experience-dependent skills that distinguish a practicing attorney from a "kid" just out of law school. Third, and perhaps more important, you will invest in your professional reputation, through which you will broadcast information to clients and other attorneys about your qualifications, skills, temperament, legal philosophy, honesty, and integrity. Reputation also acts as an ex ante indicator of the quality of service a client can expect from an attorney. To the extent that you value your reputation, it will act as a surrogate bond for your future conduct. For if you behave contrary to your reputation, you risk tarnishing or forfeiting it. Finally, you will make human-capital investments in developing relationships with your clients. You will need to familiarize yourself with the personnel, procedures, history, finances, and goals of the client. You also must develop cooperative working relationships and elicit the trust of clients in order to service them proficiently. The process of establishing client cooperation and trust often consumes significant time and energy. Such attorney-client relationships also help to attract new clients, retain old ones, and enhance the lawyer's reputation.

Like the manufacturer described above, you may someday find yourself with a surplus of human capital—that is, more capital assets than you can productively use by yourself. You might be in the fortunate position of David Dudley Field, who more than a century ago met the young Thomas Shearman:

> Shearman was then twenty-five, and Field fifty-six; Shearman had just been admitted to the bar . . . and had no clients and nothing to do, while Field was a famous lawyer with more clients, and would-be clients, and more of their business, than he wanted or could possibly have handled.[16]

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16. WALTER K. EARLE, MR. SHEARMAN AND MR. STERLING AND HOW THEY GREW 1 (1963). In 1933, Karl Llewellyn neatly summarized the complementary roles of seniors and juniors in the big firm:

> The young man learns, makes contacts, gets opportunity, hopes for a partnership, and sweats twelve hours a day. . . . The old man, if he has survived the killing

Shearman joined Field and became the progenitor of Shearman and Sterling, which in August, 1997 had 566 lawyers.[17]

Like Field, an attorney may find herself with surplus human capital as a result of the constraints on her personal supply of labor, which is ultimately fixed by the working hours in the day. Once she reaches the limits of her labor, she can only increase her personal output by adding to her capital stock. But eventually, for a fixed quantity of labor, the additional output resulting from another unit of capital will diminish to zero. At this point, she has the potential for "surplus" capital. Her reputation or expertise, for instance, may increase the demand for her services, but she simply does not have the additional hours to accept more work.[18] All attorneys have some human capital. Some have more than they can productively combine with their own labor to produce additional income. We refer to these attorneys as having surplus human capital. When an attorney can share her human capital, she can increase her output of legal services by hiring others te work with her capital.

If you hire others to work with your capital, you face two potential problems. On the one hand, like any manufacturer, you must worry that you will not get your capital back or that it might be returned damaged. In particular, following Gilson and Mnookin, we have argued that Partner P risks having her employees—let's call them associates—"grab" her clients and "leave" before P has a chance to recover her expenditures on Associate A's training and capital acquisition, or "shirk" by failing to produce promised levels of output or investment.[19] On the other hand, P must also confront the reality

> apprenticeship, cashes in on his own experience, recorded (the forms in the files!) or trade-secret in his head, on his own good will, and on the young man's labor. He plans. He guides. He worries. He may still slave. He often makes final decisions. He always is responsible. But above all, he is, and he is valued as, a business-*getter*. The measure of him is the business he can summon from the vasty corporation deep. He is to attract more orders for services than he or twenty like him can supply . . . . He cashes in, then, as an enterpriser, putting his own label on the work of others.

Karl N. Llewellyn, *The Bar Specializes—With What Results?*, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 177, 177-78 (1933), *reprinted in* 39 COM. L.J. 336, 336 (1934).

17. *See The Am Law 100*, AM. LAW., July/Aug. 1998 (insert).

18. Of course, if the client's demand for the attorney's work product is perfectly inelastic, the attorney could simply raise her price because no matter the price the client would demand the same level of services. We assume that competition (before specific client relationships develop) and potential competition (even after specific client relationships develop) prevent attorneys from raising their rates above the prevailing market price. A lawyer who does otherwise risks losing the client in the short run and gives other lawyers the long-run opportunity and incentives to develop the client relationships necessary to exert competitive pressure.

19. *See* Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567, 573 (1989) (discussing

that no employee ever fully trusts the boss. P's employees will have substantial concerns which must be set to rest before they will put forward maximum effort. For instance, the associates may fear that P will not compensate them fairly for their contributions to the firm since doing so will cost P money and because they cannot verify P's evaluation of their efforts. Consequently, the associates may be disinclined to provide more than a minimal performance for P regardless of what P promises: that is, they will shirk. To protect her capital, P must, in part, construct an incentive scheme that induces maximum effort from the As.

To provide the necessary assurances and incentives for maximum effort, we argue that the big law firm has typically employed what we call the "promotion-to-partner tournament."[20] The stylized rules of the tournament are simple.[21] Over a fixed period of time, the firm holds a contest in which all the associates in a particular "entering class" compete, with the prize of partnership being awarded to some fixed percentage of the "top" contostants. An associate's final standing in the tournament depends upon the size and quality of his production of two goods: (1) high-quality legal work; and (2) his own human capital, *measured subjectively*, not mechanically. After a specified period of time, the players in a particular class are ranked and those in the top stratum are declared "winners." (This may vary from ten to ninety percent.) The losers are told that they can remain employees but will never become partners; or they may be given consolation prizes, such as severance pay or help finding another job; or they may be unceremoniously dumped. The tournament provides the assurances and incentives required by both parties to the deal. The associates now have an incentive to produce the maximum combination of legal work and human capital because they can rely on the firm to award promotions on the basis of productivity and performance. By conveying through past practice that, on average, a fixed percentage of the associates will be promoted after a period of time, the firm has obligated itself to distribute a fixed amount of compensation to the winners of the tournament. Regardless of who

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opportunistic employee behavior and the prohlems a firm may encounter in assuring it receives the returns after investing in the employee).

20. While deferred compensation partially alleviates problems related to grabbing and leaving, partners still must find some method of motivating associates not to shirk. The firm cannot use sinple productivity-based compensation schemes because associates cannot verify the partners' observations of associato productivity. Therefore, the firm cannot assure the associatos that a maximum effort will extract a maximum reward.

21. A detailed discnssion of the Tournament may be found in MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 87-102 (1991).

wins the tournament, the firm must pay out the same prizes. This is essential because it communicatos to each associato that it is in the firm's own intorest to award the prize of partnership to those who have produced the largest combined bundle of output, quality, and capital. To award the prize on other grounds would saddle the firm with less productive attorneys at no savings in prize money. Moreover, the associato can verify that the firm is paying out the agreed prizes by observing how preceding classes fare. So long as the firm intends to continue recruiting new associatos, current associates are safe in assuming that the firm will continue to adhere to the implicit contract rather than risk the adverse reputational and motivational effects associated with breaching. Associates can be confident that productivity will be rewarded, while shirking will not be, and so long as the expected prize is competitive with the realistic alternatives, associates will exert maximuni effort to win the contost. By inducing maximuni effort from the associates, the tournament also alleviates the partners' fear of shirking.[22]

B. Tournaments and Growth

Admittodly the tournament structure has costs for the participants and for society. Associates experience anxiety and disappointment, and they accumulato firm-specific knowledge that is useless to them if they leave the firm; partners spend unrecoverable time and care in training and mentoriug associatos; the failed (or even successful) run at the partnership prize may divert scarce talent from bettor uses. And the success of the tournament may lead to the transformation of law firms into less collegial, more bureaucratic places that are less fulfilling workplaces. Those costs are hard-to-avoid by-products of an effective incentive structure. And they are generally unrelatod to an insatiable appetito for the material things in life.

As we derive in detail elsewhere, if a firm holds a tournament in which a fixed percentage of associates are promoted each year, the firm will grow exponentially as long as the associate-to-partner ratio does not decrease.[23] The firm grows exponentially because, as it pro-

22. The Tournament is a model, not an empirical description of how firms work. For important observations on the contemporary embodiment of the Tournament, see David B. Wilkins and 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).

23. *See* GALANTER & PALAY, *supra* note 21, at 103.

motes a designated percentage of associates, it must replace them and will hire enough new associates to keep the associate-to-partner ratio from falling. This process assures that associates are available to continue utilizing all of the partnership's shareable assets. As long as the number of promotions exceeds the number of departures from the partnership, each promotion to partner will lead to net increases in both the number of partners and the number of associates at the firm. If the promotion percentage is constant and the associate-to-partner ratio is constant or increasing, the firm's percentage growth rate will be constant (exponential) or increasing (faster than exponential).[24] Firms that grow exponentially will eventually exhibit large jumps in membership. As firms adjust to meet this ever-increasing growth, they have been transformed.[25]

C. Discontent with Growth

The regular recurrence over the past century of complaints about commercialization and the loss of professional virtue suggests caution about taking at face value the chorus of contemporary misgivings about the profession's decline.[26] We agree that something is different this time around. The present "crisis," which is well into its

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24. *See id.* at 107.

25. Nothing in our account precludes firms from occasionally changing their growth rates. But firms need to take care that in changing their growth rates they do not unintentionally alter the basic structure of their tournaments. To do so risks impairing their ability to incentivize and motivate their associates. As we discuss at length elsewhere, we believe that a firm will tend to promote only those associates who have at least as much human capital as the average partner and that the firm will set its promotion rates to, on average, meet this target. But there is no reason that associate-to-partner ratios cannot fall, especially in an economic downturn, if the value of the firm's human capital diminishes. Of course, there are costs te reducing associato-to-partner ratios, and firms have borne some of these costs during the recent economic downturn. On one hand, partners may make less money or have to work harder to maintain a given standard of living. On the other hand, a firm might attempt to maintain a constant associate-to-partner ratio and attempt to reduce growth by reducing the percentage of associatos that become partners. A sudden substantial decrease in a firm's promotion rate will change its growth rate. It will also effectively reduce the compensation package that the firm offers its entering class. In an economic downturn in which many firms are similarly affected, the reduced compensation may have minimal impact on the firm's ability to recruit. Even if the firm's compensation package suffers by comparison to its competitors' and it experiences recruitment difficulties, that need not portend a dramatic shift in the structure of the firm, so long as the new promotion rate remains fairly stable. We believe that the firm faces a dramatic transformation if it fails to maintain a constant promotion rate (even at the new, lower levels), for it is then effectively abandoning the tournament.

26. *See* GALANTER & PALAY, *supra* note 21, at 2-3, 11; Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 2-6, 48-51 (1988). *See generally* Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549 (1996) (examining the nostalgia accompanying the notion that the legal profession has reached a "debased condition").

second decade, is the real thing—not in the sense of marking a decisive break from professional ideals, but because the discomfort reflects structural changes that are transforming big firms and their world in fundamental ways. In the past twenty years or so the big firms have undergone a set of striking changes aptly described as the transformation of the big law firm.[27]

In our view, lawyers' discontent derives from the implications of ever-increasing growth, not from inherent avarice, at least not an avarice unique te lawyers. The sense of decline and crisis reflects discontent with the game or at least its by-products, not lust for the prizes. As firms have grown they have had to confront a series of constraints to growth. Big firms either must change in response to these constraints, or face failure. It is the adjustments and their implications, cumulatively, that we have referred to as the transformation of the big law firm.[28]

First, the firm's growth is constrained by its ability to expand revenues at a pace comparable to its expansion of lawyers.[29] If the firm's personnel expands more quickly than its revenues, a "revenue gap" develops.

As revenue gaps have developed, firms have had to change to survive. Some firms have attemptod to stretch existing income to cover more atterneys, with partners either realizimg less income or asking associates to bill more hours with no increase in compensation.[30] Assuming the firm wants to remain competitive in the pursuit of associates, belt-tightening generally requires that partners accept smaller distributions from existing residuals.[31]

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27. *See* GALANTER & PALAY, *supra* note 21, at 45-76.

28. Changes in one firm make changes both easier and more necessary in other firms. Easier, because if firm X stretches out the years to partnership, it becomes easier for firm Y to do so. Necessary, bocause having done so, firm X can now pay its partners more and lure productive attorneys away from a nonresponsive firm Y.

29. A firm's "costs" must include a reasonable return on its partners' investments in human capital. Much of what law firms refer to as "profits" are in fact returns on lawyers' human capital.

30. Associates are being asked to work more hours, but salaries are also increasing. In fact, in constant dollars, associate salaries are increasing faster than partner incomes. *See* Sander & Williams, *supra* note 15, at 474.

31. Evidently some firms have accepted this strategy. While big-firm revenues have increased appreciably in recent years, partners have not necessarily benefited proportionally. Between 1972 and 1987, the receipts of the twenty largest firms quadrupled in coustant dollar terms. *Id.* at 439. But while receipts grew dramatically, por-partner profits over the twenty years from 1967 to 1981 remained quite flat, increasing by only twenty percent, or an average of one percent per year in constant dollars. In contrast, associate incomes rose by over sixty percent, or roughly three percent por year, in constant dollars. *Id.* at 474. This implies a significant redistribution of firm income from partners to associates. While firms might choose

Other firms have confronted revenue gaps by reducing their growth rate to align more accurately with the rate of increase in demand for its services. For any given per capita partnership income, the growth rate of the firm is generally a function of four variables: (1) the ratio of associates to partners, (2) the percentage of associates becoming partners, (3) the length of time between joining the firm as an associate and becoming a partner, and (4) the number of partners leaving the firm.[32] Changing any of these variables results in an adjustment in the growth of the firm. If, for instance, the firm reduces its ratio of associates to partners, then for a fixed number of partners, the absolute number of associates would go down. Even if the firm promoted the usual percentage of associates te partner, it would grow more slowly as a fixed percentage of a smaller base was added te the firm over time. If, alternatively, the firm decided to reduce the histeric percentage of associates declared winners in its tournament, but left all other variables constant, the firm's growth similarly would slow. Promoting fewer associates in a particular year would necessitate the hiring of fewer new lawyers to maintain the constant associate-to-partner ratio.

Adjusting any of the first three variables also implies a change in the underlying structure of the firm—such adjustments, that is, portend the transformation of the practice. In fact, as we have elaborated on in the past,[33] we have witnessed substantial efforts in this area. For instance, the percentage of associates becoming partners seems to be declining in some firms, and the years te partnership have lengthened. In addition, law firms now make wider use of nonequity partnerships, paralegals, "temporary" attorneys, "second-class" associates with no expectation of making partner, and the practice of retaining as permanent associates those passed over for partnership. But each of these adjustments conflicts to some extent with the purposes and goals of the firms' tournaments.

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self-sacrifice as an appropriate short-run strategy, over the long term this approach will lose partners (and human capital) to firms willing to pay for them.

32. For a particular numher of partners in a specific year, the associate-to-partner ratio will determine the absolute number of associates the firm will employ. The percentage of associates promoted to partner will determine how many new associates the firm must hire to replace and support any new partners. The length of time it takes to become a partner will influence when the firm can expect to add the associates necessary to support and replace the newly promoted attorney. The number of partners leaving the firm, assuming they take no associates with them, will determine how many associates the firm can reassign to use the capital of other partners. If, for instance, a firm only promoted a qualified associate to replace a partner who had left, the firm would have no need te grow. The firm would simply replace the promoted associate and reassign the departing partner's former associates to support the new partner.

33. *See* GALANTER & PALAY, *supra* note 21, at 88-98.

Slowing down a firm's growth potential in this manner creates difficulties in the compensation, recruitment, motivation, and retention of productive young associates.

Hiring fewer associates in a given year is an alternative means of slowing growth. But this strategy likely will lead to reduced partner income. Remember, the firm hires new associates to replace and support the newly-promoted partners. Failure to hire enough associates to both replace and support the new partner will mean that either she or her more senior colleagues must forgo income. Professor Schiltz is correct to argue that partners willing to make less money can pursue this strategy. However, while this strategy might work in the short run, it likely will prove unsatisfactory over time unless all firms act similarly. If they do not, particularly productive partners can join firms with higher associate-to-partner ratios, work no harder, and make more money.

A third strategy for addressing a revenue gap calls on the firm to increase the demand for its services. This strategy essentially translates into greater competition for clients, more marketing of services, less inhibition about advertising and soliciting, the movement inte nonlaw businesses, and other methods for expanding the firm's markets. Ever greater numbers of firms seem to prefer this strategy.

Besides its potential for causing a revenue gap, exponential growth poses an additional problem for the large law firm: Where will it find the ever-increasing number of associates it requires? First, the firms can expand the pool of potential recruits. Rather than interviewing only those students in the top quarter of their class, the firms might examine those ranked lower. Alternatively, the firms might hire from less prestigious law schools. A firm that follows either strategy may think that it should anticipate a higher attrition rate among junior associates. To make up for the expected attrition, the firm actually might hire more associates than it would have hired through traditional sources. Thus one might expect to see higher associate-to-partner ratios today than in the past.

Second, the firm might attempt to hire away more experienced associates from other firms. Lateral hires and raiding of this nature, almost unheard of twenty years ago, are now commonplace.

Finally, the firm might attempt to purchase productive associates from other firms. Firms do not trade associates like National Football League teams. Instead, they can accomplish much the same thing by merging with firms that have surplus labor. We suspect that at least some of the observed merger activity between law firms has as its underlying goal the correction of unbalanced capital-to-labor ratios. Firms with unproductive surplus human capital will attempt to merge with firms with excess labor and vice versa. Mergers, then, become a method of capturing labor or capital from other firms.

The firm's capacity to maintain quality output as it grows places a third constraint on growth. That is not to say that the big firm cannot maintain quality control; after all, we base our transformation story on its attempt to do so. But as with increases in scale in any manufacturing operation, the methods of ensuring the requisite caliber of performance change along with the scale of the operation. When a firm has fifty securities lawyers working in one office, no longer can a senior partner personally know and observe them all, as was possible when the firm had but two.

Attempting to monitor and enforce the performance of partners presents especially acute problems. As part of the solution to this monitoring problem, firms require attorneys to post a hostage upon becoming a partner. That is, a new partner must commingle her assets with those of the other partners, thereby subjecting her capital to retaliation if problems arise. In addition, the development of a firm culture[34] through social control[35] and prospective monitoring[36] will play an active role in mitigating opportunistic conduct. Finally, the firm will look for structural solutions as means of mitigating the diseconomies involved in monitoring partners. The division of the firm into functional subgroups—for example, litigation, banking, corporate—and the use of the same tournament-based monitoring scheme employed to control associates represent the principal structural solutions available to the firm. Thus, the firm will have junior partners, senior partners, members of the executive committee, managing partners, and the like. In short, the firm will become increasingly hierarchical and will take on the characteristics of the proverbial "corporato ladder."

The distinction between growth and greed as explanatory variables is significant. Greed, in Professor Schiltz's story, is exogenous,

34. *See* Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 371-80 (1985) (discussing "shirking" and firm culture).

35. Social control refers to "those processes in the social system which tend to counteract the deviant tendencies." TALCOTT PARSONS, THE SOCIAL SYSTEM 297 (2d ed. 1991).

36. Prospective monitoring refers to the initial careful selection of associates so as to reduce the need to monitor actual contract performance. By finding a group of attorneys with a reasonably homogeneous set of characteristics and motivations, the firm can reduce the need for explicit monitoring in the future. These characteristics will have been developed in complex ways through family life, schooling, training, and past employment. It is impossible to specify exactly what qualities a particular partnership should look for.

a vice brought into the law firm by the lawyers and potentially controllable through self-discipline, abstinence, or spiritual guidance. Growth, in our model, is endogenously determined and an inevitable by-product of the fundamental element of the large law firm incentive structure: the promotion-to-partner tournament. Without the promotion-to-partner tournament the large firm cannot exist; without growth the promotion-to-partner game becomes difficult to play.

D. Alternatives to Money?

We agree with Professor Schiltz that partners seem to prefer not to decrease income. But this is not the same thing as saying that they are single-mindedly determined to have more cash. They could take rewards in other forms, so why do big-firm lawyers insist on taking the gains of firm growth in the form of more money income rather than sabbaticals, time for child-care, political involvement, or greater work satisfaction? Presumably some lawyers would trade the next increment in cash for an increment of one of these other benefits. Why is this only dimly reflected in the way large firms are organized? Instead, most large firms operate as if everyone were trying to maximize take-home income. Since firms have successfully created internal markets for their human capital, why is it apparently so much more difficult for them to create a companion internal market in amenities?

We believe that there are at least two problems which lead firms to emphasize monetary rewards above all else. First, there is the problem of attempting to value the noumonetary benefits. And as Professor Schiltz recognizes,[37] most big firms are forced to fall back on money as the medium of exchange which can be used as a second-best solution, a summation of the diverse priorities of the members. In addition, the ready availability of lateral movement permits the partner who wants money instead of, say, sabbaticals, te leave if her partners insist on the latter. Those who prefer a greater mix of pecuniary and non-pecuniary rewards, in contrast, are not as mobile since they would have to find new firms that have schedules of rewards that approximate their own desires. Such firms are rare and usually small, and their reward schedules are not readily known. So the transaction costs of such a move for mixed-rewards dissidents are very high.

37. *See* Schiltz, *supra* note 1, at 945 (quoting GALANTER & PALAY, *supra* note 21, at 128).

Second, mixed-compensation firms tend to emphasize monetary rewards because even firms with a significant concentration of lawyers seeking nonmonetary compensation must face the problem of assuring those who receive alternative forms of payment that they are not being exploited. The problem stems in part from the suspicion of those receiving mixed-compensation packages that they are not being fully compensated for the value they add te the firm. Whether true or not, the perception exists. Perhaps the perception originates in the sense that the market for those willing to sell their services for alternative compensation is more limitod than for those willing to work for traditional pay. The concern is that an attorney, once he has declared his preference to receive mixed compensation, is no longer fully mobile and has no less costly alternative than te sell his services to his existing firm. Consequently, he believes that his firm gains monopsonistic[38] power over his services and has the ability te extract a rent from him when he attempts to buy back his time for alternative pursuits or obligations. This leads to feelings of vulnerability, exploitation, and exposure te additional pressures.

IV. SKEPTICISM ABOUT THE IMPLICATIONS

Finally, suppose we were convinced by the evidence that big-firm lawyers are both obsessed with money and more miserable than lawyers in other practice settings. Is this a bad thing? It is bad for the lawyers involved, at least those who are unhappy. Big-firm lawyers, who, in spite of the subtle or not-so-subtle seductions of fortune and fame, have far more opportunity than most people to control their own destinies, are not high on our list of candidates for rescue efforts. Is it a bad thing for the larger society that such misery is a "cost" of practicing this kind of law? Should we be concerned to have happy and fulfilled corporate lawyers? The presence of that cost may prevent the corporate sector from siphoning off even more of the best legal talent and aggravating still further the disparity in the quality of lawyering between individuals and organizations.

Would society be better served if a great spasm of professional revitalization induced lawyers to replace their obsession with money with a craving for professional prestige? That depends, of course, on what it is that confers prestige. The most probing account we have is

38. A monopsonist is the demand-side equivalent to a monopolist. Like the monopolist, who is the single supplier of a particular output, a monopsonist is the only consumer of some good or service.

that of Heinz and Laumann, who asked lawyers to rank some thirty fields of law by their relative prestige within the profession. They report that:

> the top of the prestige ranking is quite clearly dominated by fields that might be characterized as "big business" law. . . . At the other end of the prestige ranking, we find the sorts of legal work that are characteristically done for individuals—general family practice, divorce, personal injury, consumer, and criminal law.[39]

Prestige, they find, is not directly correlated with income. It carries some traces of social origin, but largely it derives from representing "establishment" clients. The more that a field involves working for large entities rather than individuals and the more it serves the values of facilitating business—the bigger the better—the higher its prestige within the profession. Service to the poor and needful detracts from prestige. Clearly, a profession made up of lawyers going all out to maximize professional prestige, as currently allotted, would be far worse than one obsessed by money.

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39. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 92-93 (1982).