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BOOK REVIEW:

The Good Black: A True Story of Race in America. By Paul M. Barrett. n1
New York: Dutton Press. 1999. Pp. 296. $ 23.95.

NAME: Reviewed by David B. Wilkins n2

SUMMARY:
... In this absorbing book, Paul Barrett chronicles Lawrence Mungin's transformation from a promising Harvard Law School graduate, intent on overcoming race and poverty by working hard and playing by the rules, to an embittered plaintiff who unsuccessfully sues his law firm for race discrimination. ... After only two years, with his chances for partnership evaporated, Mungin sued Katten Muchin for race discrimination. ... Given this possibility, a rational jury might have concluded that Sergi failed to "nominate" Mungin for partnership to avoid this kind of potentially embarrassing examination. ... Moreover, given that many discrimination cases are brought in large, urban jurisdictions, many of the jurors engaged in this common sense decisionmaking will be black or members of other minority groups. ... The preceding year, Elaine Williams, a black income partner in the firm's Chicago office, had sued Katten Muchin for race discrimination (pp. 55-58). ... Surely, he had a right to expect that his Harvard Law School education would give him the information that he needed to succeed in his career. ...

TEXT:
[*1924]

In this absorbing book, Paul Barrett chronicles Lawrence Mungin's transformation from a promising Harvard Law School graduate, intent on overcoming race and poverty by working hard and playing by the rules, to an embittered plaintiff who unsuccessfully sues his law firm for race discrimination. Barrett presents Mungin's story as a morality play on the ambiguous meaning of race in contemporary American society. Although Barrett's sympathies are clearly with Mungin, who is both his subject and his friend, he intends the book, in the words of the dust jacket, to "challenge[ ] us to make up our own minds about [the] case" and about "the deeper, far-reaching implications of racial discrimination in our time." Mungin's story therefore becomes a "racial Rorschach test" in which Barrett claims blacks and whites will see what they already expect to see. n3 For "some blacks," Barrett speculates, Mungin's tale will provide "all the proof they need that white racism is increasing" (p. 282). For "many whites," however, the same account will reinforce their view that Mungin "and others like him in the black middle class ... embrace victimhood [and] lack ... gratitude for what they have" (p. 282). The end result, according to Barrett, is that "each side's emotion fuels the other's resentment" (p. 282).

True to this prediction, nearly everyone has found something to identify with in this American tragedy. Indeed, the first thing that the reader is likely to notice is the surprising diversity of public figures who provided "advance praise" on the book's rear cover. Both Ellis Cose, whose books argue that America is far from being a "colorblind" society for black Americans, n4 and Abigail Thernstrom, co-author of a recent book arguing that proponents of affirmative action are largely responsible for the extent to which America is not a nation "indivisi [*1925] ble" by race, n5 find themselves in rare agreement about the book's merit and importance (outside back cover). Thernstrom's praise is, in turn, followed by Nicholas Lemann's, whose critical review of Thernstrom's book underscores how little the two authors agree when it comes to matters of race (outside back cover). n6

Editorial reaction since the book's publication further demonstrates its appeal to commentators from across the political spectrum. Liberals have tended to accept Barrett's bottom line judgment that Mungin's story illustrates the danger of "tokenism" or, as Barrett calls it, "reckless, indifferent affirmative action" (p. 280). n7 Conservatives, by contrast, see Mungin as exemplifying the true cost of affirmative action - a policy that they believe harms its intended beneficiaries by stigmatizing them as inferior. n8 Similarly, some black professionals see themselves in the portrait of a "double Harvard" who still could not succeed, while others see a brother who "sold out" only to be slapped in the face by the cold, hard reality of racism. n9 Finally, those with experience in large law firms can see the book's portrayal of Katten Muchin & Zavis, the law firm Mungin sued, as either highlighting what it takes to succeed in the supercompetitive world of modern law practice or as exemplifying everything that is wrong with contemporary elite firms. n10 A good deal of this diverse reaction is undoubtedly [*1926] the result of the inherent complexity of the subject matter and of Barrett's nuanced and balanced presentation of the arguments on both sides. His refusal to paint the case in - as no one can resist saying n11 - black and white terms, however, also allows readers to appropriate whatever piece of this complex story that best suits their particular agenda.

Barrett's decision to highlight the ambiguities of Mungin's story accounts for much of the book's power and success. Barrett is a skillful writer and a knowledgeable observer of large law firm practices. After twelve years of legal reporting for the Wall Street Journal, he knows that racial issues in large law firms and other elite sectors of American society rarely take the form of outright exclusion or racist epithets. n12 In the absence of direct evidence of discriminatory intent, there will often be a range of explanations - some that de-emphasize race and others that place race at the center - for what happened to someone like Mungin. The book deftly captures these competing explanations and underscores that, as with many other issues about race and the legal system, opinion on these explanations will often break down along racial lines. n13 Moreover, as Mungin's friend and former law school roommate, Barrett was in a unique position to highlight Mungin's own complexity. Through conversations and recollections gleaned both before and after Barrett decided to write the book, the reader learns about Mungin's childhood (pp. 22-34), his attitudes about race (pp. 24, 34, 66, 76), and his emerging connection with his estranged father and his relatives in South Carolina (pp. 251-58). By weaving Mungin's personal saga into the legal tale, Barrett rightly insists that Mungin's unique beliefs and choices are an important part of understanding and evaluating his story.

Nevertheless, Barrett's decision to present Mungin's story as a racial Rorschach test is ultimately unsatisfactory. By emphasizing how Mungin's case will inevitably generate conflicting opinions - opinions that are likely to break down along racial lines - Barrett reinforces the common but false notion that contemporary race relations are entirely a matter of differing perceptions and opinions. Moreover, by appearing to stand above the fray (at least until the final chapter), Barrett fails to acknowledge the manner in which his own opinions and preconceptions have shaped the frame in which he presents Mungin's story. This frame ironically helps to perpetuate the very kind of [*1927] simplistic understandings about race that Barrett seeks to avoid. Thus, the book invites readers to decide whether Mungin was, quoting the dust jacket again, either "a victim of racial discrimination" or just another casualty of "business-as-usual mismanagement." More subtly, Barrett's framework suggests that the central lesson of Mungin's tale, this time paraphrasing the book's catchy title, is that black lawyers must choose between being either good or black.

In this review, I want to move beyond this binary framing by examining the complex ways in which "business-as-usual mismanagement" in and of itself can disproportionately disadvantage black lawyers, and how racial identification by black lawyers can promote (as well as undermine) good lawyering. My argument proceeds in six parts. Part I briefly summarizes the book in terms of Barrett's framework. For Barrett, the central tragedy of Mungin's story is that despite Mungin's willingness to play by the rules and downplay his racial identity, race nevertheless prevented him from realizing his dream of becoming a law firm partner. This framework, in turn, invites the question that has preoccupied most of those who have read the book: Was Mungin the victim of intentional discrimination, or is his story simply another example of the kind of "equal opportunity mismanagement" that occurs in many large law firms? n14 Part II answers the first half of this question by examining the legal merits of Mungin's antidiscrimination law claims. It concludes that under current law, Mungin presented a weak case of intentional discrimination, although not as weak as the court of appeal's dismissive opinion reversing Mungin's victory in the trial court would lead one to believe. This conclusion, however, simply highlights why antidiscrimination law is far too blunt an instrument to remedy the difficulties that black lawyers face in contemporary elite firms. Part III addresses the second half of the question suggested by Barrett's framework by locating Mungin's experience in the wider context of associate life in contemporary elite firms. Viewed from this perspective, Mungin's problems at Katten Muchin are symptomatic of the difficulties that many associates face in trying to build successful careers in large law firms. Given these structural realities - realities that further undermine the effectiveness of Title VII in this context - Barrett's framing suggests that the proper conclusion to draw from Mungin's story is that race had nothing to do with his inability to succeed at the firm. Those who [*1928] follow this framing will likely chalk up Barrett's contrary conclusion to sympathy for a friend.

Part IV argues that Barrett nevertheless correctly insists that race played an important role in Mungin's downfall at Katten Muchin. To see why, however, one must reject the binary choice between "race" and "mismanagement" that Barrett's own framing presents. Only by examining the complex intersection between race and the incentive structures of large law firms can one begin to understand that even in the absence of discriminatory intent, white lawyers will sometimes take actions that ultimately hurt the careers of their black colleagues, just as ambitious and intelligent black lawyers will sometimes adopt career strategies that paradoxically reduce their overall chances for success. Moreover, as long as both white and black lawyers assume, as Barrett's framing suggests, that African American lawyers must choose between being either good or black, we will all fail to understand that both colorblind and color-conscious actions and strategies contribute to the reality (not merely the perception) that black lawyers have a more difficult time succeeding in large firms than their white peers.

Part V argues that one important reason why we understand so little about how race affects the careers of black lawyers is the failure of legal education to pay any serious attention to careers at all. Law schools neither give students a systematic introduction to the profession they are about to enter nor provide them with the tools that they will need to manage their careers. Moreover, despite all of the talk about identity politics, the dominant understandings of both professionalism and race taught in law school offer little guidance about how to integrate one's identity with one's professional role in a manner that honors the legitimate moral claims of each. Part VI concludes by offering some tentative suggestions about what lawmakers, law firms, law schools, and the black bar can do to prevent future Lawrence Mungins from ending up as plaintiffs rather than partners.

Before proceeding, a word of caution is in order. Like most other readers, my knowledge of Lawrence Mungin comes primarily from Barrett's portrayal. n15 Although the two are friends and Mungin cooperated (albeit reluctantly) n16 in the writing of the book, press accounts [*1929] suggest that Mungin disagrees with various aspects of how he and his case have been presented. n17 Such disagreements, of course, are to be expected in a book of this kind. Given the sensitivity of many of the issues that I will be discussing, however, it is important to make explicit that the Lawrence Mungin I am examining is the one that Paul Barrett presented. The same is true of Katten Muchin. Not surprisingly, the law firm disputes many aspects of Barrett's account. n18 All of this simply reinforces the need to understand Barrett's framework. n19

I. A Mother's Love and the American Dream

Barrett frames Mungin's story in terms of two maxims that Mungin learned from his mother early in his life. The first emphasizes the fundamental fairness of the American system: "If you get your education and play by the rules, the system will treat you right" (p. 26). The second de-emphasizes the importance of racial identity: "You are a human being first, ... an American second, a black third" (p. 24). Together, these two statements sum up the classic American Dream: "If you work hard and play by the rules you should be given a chance to go as far as your God-given ability will take you." n20 As Jennifer Hochschild states, this cornerstone of the American creed contains four discrete tenets about the people to whom the dream applies, what it promises, how it operates, and why it is one of this nation's deepest commitments:

> The answer to "who" in the standard ideology is "everyone, regardless of ascriptive traits, family background, or personal history." The answer to "what" is "the reasonable anticipation, though not the promise, of success, however it is defined." The answer to "how" is "through actions and traits [*1930] under one's own control." The answer to "why" is "true success is associated with virtue." n21

Barrett depicts Mungin as living his life according to this credo. As a young man growing up in a poor New York City neighborhood, Mungin sidestepped the problems of inner city life by studying hard and avoiding contact with peers who might bring him down (pp. 26-30). He earned top grades in the integrated high school that his mother made sure he and his siblings attended, and became its first black senior class president, all while working twenty hours a week (pp. 31-34). When it came time to apply to college, Mungin was predictably besieged with offers. He narrowed his choices down to Princeton and Harvard (pp. 33-34). Mungin's experiences while visiting each school epitomized his understanding of where he was coming from and where he wanted to go. When he visited Princeton, Mungin was shown around by a black undergraduate guide who made a point of taking him to an all-black dorm and a black-run radio station. When he visited Harvard, there was no "racial[ ] orientation" and the recruiter assured Mungin that "if you go to Harvard, you will never have to worry about money again for your whole life" (p. 34). For Mungin, the juxtaposition of these two incidents made his choice clear. The Princeton recruiter's efforts underscored exactly what Mungin did not want - he "wanted to get out of the ghetto" (p. 34). The Harvard recruiter, by contrast, "was speaking [his] language" (p. 34). Not surprisingly, Mungin chose Harvard.

True to his commitment to "get out of the ghetto," Mungin had little contact with black students either at Harvard College or during his subsequent years at Harvard Law School. He joined no black groups (pp. 66, 75). He had no black friends (p. 66). He did not sit at what Barrett dubs the "soul tables" (p. 66). n22 He also ridiculed blacks who spent time (again in Barrett's words) "haranguing" school officials over issues Mungin "considered marginal, like how many minority professors had gotten tenure" (p. 76). For Barrett, who met Mungin in college and became his roommate in law school, his friend's attitude about race left him both "impressed" and "relieved" that he was never made to feel guilty "with talk of "systemic racism"' (p. 76). Barrett describes Mungin as having no interest in "playing militant" (p. 76).

Instead, Mungin intended to become a partner in a corporate law firm - not for the purpose of being a role model for other blacks, but for his own sake (p. 77).

[*1931] Whereas Mungin shunned the black world, Harvard's white world often shunned him. Mungin made few friends in college and law school (pp. 66-67). When he did, these associations were often tinged with sadness when these friends or those around them interjected race - and sometimes outright racism - into the relationship (pp. 66-69). n23 In a pattern that would come to characterize his response to racial incidents, Mungin suffered these slights and humiliations in silence. He neither spoke of them to Barrett nor confronted his tormentors. n24 Instead, consistent with the second part of his mother's credo, he chose to ignore how race intruded into his life in the hope that in turning away, others would ignore race as well and treat him as a human being.

Mungin also remained committed to succeeding by "playing by the rules" during his years at Harvard, albeit at a somewhat reduced pace. After struggling academically in his first few years in college, Mungin decided to join the Navy to shake himself out of his malaise (pp. 70-71). The experience proved energizing. He returned to Harvard fluent in Russian and more confident in his own abilities. He also returned with a new understanding of the "rules," an understanding that he carried with him to Harvard Law School. Instead of shooting for the top of the class, Mungin figured that he only needed to do well enough academically to reach his goal of landing a job with a corporate law firm. At Harvard Law School, this meant getting Bs and "keep[ing] a low profile" (p. 82). The strategy worked, and in the fall of 1986 Mungin joined an up-and-coming Houston law firm that was looking to hire Harvard graduates (p. 83).

Mungin's eight-year odyssey from eager associate to embittered plaintiff winds through three cities and four law firms. He stayed at his first firm for only one year, following another associate to the Houston office of New York's Weil, Gotshal & Manges, one of the country's premiere bankruptcy firms (p. 84). Although Mungin received a steady diet of sophisticated bankruptcy work at Weil Gotshal, he never found the motivation to put in the long hours that were required to be a serious partnership candidate at such a highly prestigious firm (p. 85). After receiving a performance review that complimented him on his work but suggested that he was "coasting," Mungin decided to jump ship (p. 85). Through a headhunter, Mungin secured a job with Powell, Goldstein, Frazer & Murphy in Atlanta (p. 92). After a brief time in Atlanta, Mungin moved, at the firm's request, to [*1932] Powell Goldstein's Washington, D.C. office to work on bankruptcy matters for the Federal Deposit Insurance Corporation (FDIC) (p. 93). Shortly thereafter, however, Powell Goldstein froze associate salaries and even began laying off attorneys (p. 94). Fearing for his security, Mungin, once again acting through a headhunter, interviewed with the D.C. office of Katten Muchin.

Both parties thought the match ideal. Mark Dombroff, head of Katten Muchin's Washington office, promised Mungin that Dombroff's innovative new scheme for combining his booming insurance defense practice with bankruptcy would supply Mungin with a steady diet of sophisticated work (pp. 8-11). In return, the firm would get a seasoned lawyer, trained at one of the top bankruptcy firms in the country, with the added benefit, as Dombroff explicitly acknowledged, of being a minority (p. 9). After negotiating a one thousand dollar increase in salary and obtaining Dombroff's commitment that he could be "considered" for partnership the following year, Mungin accepted the firm's offer to join Katten Muchin as a sixth year associate (pp. 11-13). Unfortunately, the high hopes that both the firm and Mungin had for their new relationship were quickly vanquished. After only two years, with his chances for partnership evaporated, Mungin sued Katten Muchin for race discrimination.

The heart of the book, and its principal contribution, is Barrett's nuanced description of Mungin's two years at Katten Muchin. In matter-of-fact tones, Barrett describes Mungin's experience: the unknown opposition of Vincent Sergi, Katten Muchin's lead bankruptcy partner in Chicago and Mungin's ultimate supervisor, to Mungin's hiring on the ground that there was not enough work in the Washington office to support another bankruptcy lawyer (pp. 19-20); Mungin's dismay when Dombroff's insurance/bankruptcy venture ran aground and the "new" work he was promised never materialized (pp. 44-45); Mungin's inability to get work from Sergi and the other bankruptcy partners in Chicago (pp. 114-15); the firm's efforts to "save" Mungin by slashing his hourly rate by thirty percent (pp. 97-98); Mungin's growing anger over what he considered to be professional slights, demeaning comments, and work assignments that were below his status and ability (pp. 46-49, 95, 107, 129); the firm's failure both to evaluate Mungin and to give him a raise at the end of his first full year with the firm (p. 116); Mungin's discovery that some sophisticated bankruptcy work was going to lawyers in Chicago (p. 100); and his fury over not even being "considered" for partnership (p. 120). Throughout this ordeal, Barrett emphasizes, Mungin attempted to hew closely to his two maxims. Determined not to repeat his mistakes at Weil Gotshal, Mungin recommitted himself to succeed by "playing by the rules." He promptly, and by every indication, competently completed each assignment that he was given. He sought advice from Dombroff and Dombroff's assistant, Patricia Gilmore, about how to improve his [*1933] chances for partnership (pp. 50, 94). When they demurred, he sought advice from Sergi (pp. 60-61). When things went wrong at the firm - for example,

when he was stood up for important meetings, asked to do menial tasks, passed over for choice work assignments, or in his view, treated like a token by being asked to play the role of "mentor" to a black associate - Mungin stuck to his pattern of not complaining and hoping that if he ignored how race might be affecting his career, his superiors and peers would focus on his strong legal skills and not on his race (pp. 48, 101, 103).

It was only when he perceived that things had gone terribly wrong - when even though he kept quiet and played by the rules without ever mentioning race, he still received neither the work assignments nor the consideration for partnership that he thought he deserved - that Mungin allowed himself to think that racism might be the cause of his troubles. Once he reached this conclusion, however, Mungin became an ardent advocate of bringing the law firm to justice, likening his cause to that of Thurgood Marshall and other civil rights heroes of the past (pp. 132-33). He therefore rejected the firm's offer to relocate him to another office when Dombroff left Katten Muchin and took most of the firm's insurance lawyers with him (p. 127). Mungin suspected that the offer was not made in good faith even though other lawyers in the firm's D.C. office were being laid off without being given this opportunity. Instead, Mungin sued, alleging that the firm discriminated against him in salary, work assignments, and consideration for partnership (pp. 144-46).

At trial, Katten Muchin defended itself by claiming that what happened to Mungin, although unfortunate, was no different than the kind of mistreatment experienced by many of its associates (p. 180). The predominately black jury (p. 174) disagreed and awarded Mungin $ 2.5 million in compensatory and punitive damages (p. 239). Mungin's victory, however, was short-lived. The Court of Appeals for the D.C. Circuit reversed the verdict (by a two-to-one margin, with the panel's sole black judge in the minority) on the ground that "no reasonable jury" could have concluded that Mungin was the victim of intentional discrimination (pp. 271-74).

Thus, Barrett leaves us with a paradox. Lawrence Mungin, a "poster child for integration" (p. 281), was forced by what he saw as racial discrimination to bring a lawsuit that ensures that he will forever be seen "primarily in terms of race" (p. 283). Unless we find a way to unravel this paradox, Barrett warns, few African Americans will be able to follow in the footsteps of Tiger Woods and Colin Powell and "transcend race" in a way that allows society to see them "not as unblack but as not merely, not primarily, black" (p. 282).

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II. The Limits of Antidiscrimination Law

But was what happened to Mungin race discrimination? Barrett, whose framing of Mungin's story invites this question, never squarely answers it. Instead, he argues that Mungin's claim presented a close case on the merits that should have been upheld on appeal once the jury had decided in Mungin's favor (p. 277). n25 Not surprisingly, some readers are frustrated by Barrett's coyness. n26 Others have used his reluctance as evidence that Mungin's fate either had little to do with race or was the inevitable result of too much affirmative action. n27 Both reactions are predictable given that Barrett suggests that one must choose either "racism" or "business-as-usual mismanagement" as the key for understanding Mungin's story. As I argue in Part IV, Barrett's perceptive observations about the role that race played in Mungin's career correctly lead him to reject Katten Muchin's equal opportunity mismanagement defense. Unfortunately, because the book sets up a dichotomy between the firm's defense and Mungin's claim, Barrett's trenchant observations about race also lead him to softpeddle the legal weaknesses of Mungin's lawsuit. Mungin mustered little evidence that the law firm discriminated against him within prevailing interpretations of Title VII and other applicable statutes, particularly given the legal standard embraced by the court of appeals. The fact that Mungin's legal claim was relatively weak, however, tells us more about the limitations of antidiscrimination law than it does about whether we should accept Katten Muchin's defense that Mungin was simply the victim of "equal opportunity" mismanagement.

Mungin argued that five aspects of his treatment by Katten Muchin amounted to intentional discrimination. n28 First, he asserted that his starting salary was lower than that of any other sixth year associate in the Washington office. n29 Second, he claimed that at the end of his first full year with the firm, he was neither evaluated (as required by firm policy) nor given a raise until he complained. n30 When the firm finally took action, Mungin asserted that his evaluation was perfunctory (p. 120) and his raise still left him below the level that [*1935] other sixth year associates were paid. n31 Third, Mungin claimed that he was only given routine work, whereas white lawyers in Chicago received sophisticated bankruptcy assignments, including some assignments generated from work being done in the Washington office. n32 Fourth, Mungin asserted that he was the only associate in his class who was not even considered for partnership. n33 Finally, Mungin claimed that by failing to live up to its commitments regarding work and partnership, the firm constructively discharged him, forcing him to seek alternative employment. n34

Each of these claims has important weaknesses. As is typical for lateral hires, Mungin negotiated his starting salary, which was more than he was making at Powell Goldstein, albeit less than the base salary of "homegrown" Katten Muchin associates in his class (p. 202). Although the firm had a formal policy of reviewing every associate twice a year (p. 15), like many of its competitors, it often failed to do so. Moreover, the fact that Mungin "fell between the cracks" (p. 119) when it came time for evaluations and raises is not surprising given that he was technically not a member of Dombroff's insurance defense department (even though all of his work was in this area) and that the Chicago department of which he was a member had no basis for evaluating him (p. 120). Similarly, once Dombroff's promised "new" bankruptcy work failed to materialize, the Washington office was left with only the kind of elementary assignments typically given to junior associates. To the extent that Mungin performed these elementary tasks, the firm could not reasonably be expected to bill this work to clients at Mungin's senior associate rates. There was substantial bankruptcy work in Chicago, but Mungin was hired to do work in Washington, not Chicago. Moreover, there was no indication that even if Mungin had been included in the few sophisticated assignments in Washington - along with the Chicago lawyers who had worked on similar matters for the same client before Mungin's arrival - that this work would have been enough to sustain him once the bankruptcy side of Dombroff's practice collapsed. Under these circumstances, there was simply no way that the firm could consider Mungin a plausible partnership candidate. Formally doing so would have been little more than an empty exercise. For the same reason, as both Barrett and the dissenting judge on the court of appeals acknowledge (p. 278), n35 it strains credibility to contend that Katten Muchin constructively discharged Mungin when Dombroff's departure decimated the [*1936] Washington office and the firm offered to relocate Mungin either to Chicago or New York.

If Mungin had lost in the district court - as most discrimination plaintiffs suing law firms do n36 - there would be ample grounds for concluding that this legal ending to his tragic tale was justified. Mungin, however, did not lose at the trial level. Instead, the trial judge, a former partner at a major Washington, D.C. law firm, n37 allowed the case to go to the jury, which returned a substantial judgment in Mungin's favor. The question facing the court of appeals, therefore, was not whether Mungin had a strong or weak case of discrimination, but whether "no reasonable jury" could find in his favor.

As Barrett correctly argues, there are good grounds for believing that the court of appeals misapplied this standard. Reading Judge Randolph's opinion, one cannot help but notice the dismissive tone with which he dispensed with Mungin's claims. Rather than starting by expressly acknowledging the strong presumption in favor of the jury's verdict, Randolph immediately launched into a substantive evaluation of Mungin's claims. n38 This evaluation quickly turned questions that one might expect to be within the jury's province as fact finder into questions of law for the court. For example, in the face of Katten Muchin's admitted failure to follow its own procedures with respect to Mungin's evaluation and raise - an omission that made him the only member of his class that year who did not receive a raise - one might have thought that it was for the jury to decide, based on its assessment of the credibility of witnesses, whether the firm's assertion that such failures were widespread was merely a pretext for discrimination. Judge Randolph, however, brushed this allegation aside, finding that because some white associates either did not receive performance reviews in the past or were evaluated in ways that "amounted to no more than a pat on the back," Katten Muchin's departure from its stated procedures had become "the norm." n39 This conclusion, although reasonable on its face, does not demonstrate that "no reasonable juror" could conclude, regardless of Katten Muchin's "normal" disorganization, that under the circumstances of this case - including the fact that Mungin was constantly asking his supervisors in Washington and Chicago for work and guidance - that the firm's failure either to review him or to give him a raise was, in this instance, based on race and not on disorganization.

[*1937] Similarly, Judge Randolph assumed that just because Mungin's "nomination" for partnership would not have resulted in his actually being made a partner, this reality conclusively demonstrated that the firm's failure to nominate Mungin formally could not be evidence of discrimination. But this conclusion, although once again logical, is not the only reasonable one that a jury could reach. One can easily imagine circumstances in which an employer's failure to consider an employee's application for a promotion that the employee is unlikely to receive results from discriminatory animus. In this case, the jury might have concluded that had the firm nominated Mungin, it would have been forced to consider its own role in Mungin's failure to possess the necessary skills and experience to become a partner. Given that there was ample evidence that Dombroff, Gilmore, Sergi, and others thought of Mungin in racial terms, such an examination might have alerted other partners in the firm to the extent to which Mungin's race might have adversely affected his opportunity to become a partner. Given this possibility, a rational jury might have concluded that Sergi failed to "nominate" Mungin for partnership to avoid this kind of potentially embarrassing examination.

Judge Randolph's tendency to dismiss reasonable inferences that might have saved Mungin's case is even more troubling in light of the assumptions that appear to animate his decision. For example, in describing Katten Muchin's reduction of Mungin's hourly rate from $ 185 to $ 125, Judge Randolph suggests that the former rate "imperfectly reflected the level of responsibility with which [Mungin] was entrusted." n40 By using the word "entrusted," the opinion hints that Mungin was given junior associate work because the firm did not "trust" him to perform more sophisticated tasks. n41 Nowhere does the record support this characterization of the firm's action. Mungin's hourly rate was reduced by Sergi and Gilmore to reflect the level of work Mungin was asked to do. As Gilmore expressly conceded on Mungin's belated performance review, whenever he was given a complex bankruptcy assignment, his work was more than satisfactory (p. 120). Judge Randolph nevertheless seemed to assume that the firm had substantive reasons for confining Mungin to junior associate work.

Judge Randolph's comments at oral argument reinforce this suspicion. According to Barrett, Judge Randolph interrupted counsel for Katten Muchin to ask about Mungin's grades at Harvard Law School (pp. 265-66). As the firm's lawyer conceded, however, Mungin's law [*1938] school record was irrelevant to whether Katten Muchin discriminated against Mungin after hiring him as a lateral senior associate (p. 266). Later on, Judge Randolph demanded to know why Mungin had left Powell Goldstein: "Was he fired?" the judge asked (p. 267). Once again, no one ever suggested that Mungin left his former firm involuntarily. Moreover, had the firm attempted to raise Mungin's prior work history, this information, like Mungin's law school grades, would arguably have been irrelevant because Katten Muchin never suggested that Mungin was not qualified for the job for which he was hired or that the firm had ever questioned the quality of his work. Yet Judge Randolph seemed to assume, as Barrett astutely notes, that lurking behind Mungin's story was "an unqualified ... black lawyer carried along by affirmative action" (p. 268).

Judge Randolph's apparent assumptions about Mungin's qualifications raise legitimate questions about his faithfulness to his limited role as an appellate judge. In one of the more interesting asides in the book, Barrett refers to an editorial that Mungin wrote but never published that accused appellate judges of engaging in "judicial nullification" when they reverse verdicts by black jurors in favor of discrimination plaintiffs (p. 276). Mungin's charge intentionally echoes claims made by those who believe that black jurors in such high profile cases as the prosecutions of O.J. Simpson and Marion Barry nullified the laws against murder and drug possession by refusing to convict black defendants for reasons of racial solidarity. n42 In cases such as his, Mungin asserts, white appellate judges return the favor by refusing to adhere to the decisions of predominately black juries. "Taken at face value," Mungin argues, "the white judges disagreed not only with me, a black male, but also with the predominately black jury, and with the chief judge, who was also black, providing a disturbing result in a race discrimination case" (p. 276).

The concept of judicial nullification is intriguing, particularly given Congress's decision to provide Title VII plaintiffs with the right to trial by jury. Prior to the 1991 amendments, Title VII only provided for bench trials (p. 60). In placing the ultimate factual determination of whether a plaintiff has been the victim of race discrimination in the hands of juries rather than judges, Congress must have known (regardless of whether this was the reason for the change) n43 that it was [*1939] substituting "common sense" decisionmaking (within broad parameters) about what constitutes discrimination for the "expert" determinations of judges. Moreover, given that many discrimination cases are brought in large, urban jurisdictions, many of the jurors engaged in this common sense decisionmaking will be black or members of other minority groups. As Barrett notes, everyone familiar with litigation trends understands that the combination of these two factors - jury trials and the fact that the juries will have many minority members - changes the practical meaning of discrimination in ways likely to produce more plaintiff victories (p. 60).

Predictably, many judges - particularly appellate judges - are unhappy with this prospect. Not only have they grown used to the "expert" determinations of trial judges, but they have also grown used to supervising the development of Title VII law closely through their reviews of the relatively specific "findings of fact and conclusions of law" that are required when trial judges sit without a jury. The reasoning underlying a jury verdict is, by design, much more difficult to discern. One should not be surprised, therefore, if some judges feel that they have to be even more vigilant than before to ensure that discrimination law does not become "tainted" by sympathy or feelings of solidarity. Judges are likely to find this concern particularly weighty in cases involving specialized areas that the judge believes that he or she understands far better than the average lay juror. Elite law firms are obviously one such area.

Finally, one can easily make the case that judges in Washington, D.C. are likely to be especially vigilant in their efforts at jury control. The controversy surrounding a predominately black jury's failure to convict D.C. Mayor Marion Barry of the most serious charges against him convinced many white Washingtonians - including the trial judge in Barry's case - that some black jurors will refuse to convict a black defendant, regardless of the evidence. n44 Two high profile articles with a nexus to Washington - one by a white journalist alleging that a black female juror singlehandedly

caused a mistrial in a case involving a black defendant even though there was no reasonable doubt of his guilt, n45 and one by a prominent black law professor calling on [*1940] black jurors to nullify the convictions of non-violent black defendants n46 - further heightened the judiciary's concern over this issue. At the same time, many black Washingtonians feel that they are under siege from a federal government that has literally put their city into receivership. Under these circumstances, there is a real risk that white appellate court judges will feel entitled (whether consciously or unconsciously) to closely supervise the actions of black jurors.

As I have indicated, one can read Judge Randolph's confident dissection of what "really happens" at a large law firm as exemplifying this de facto heightened standard of review. Nevertheless, although I believe that the phenomenon bears watching, one should be cautious about reaching this conclusion. For more than a decade, the Supreme Court has sent strong signals that judges at all levels should increase their surveillance of marginal jury verdicts. n47 Given this legal background, Judge Randolph's opinion, albeit controversial, does not seem lawless. Moreover, just as it is dangerous to blame unpopular jury verdicts like those in the Simpson and Barry cases on racial solidarity, n48 it is equally problematic to reduce the fact that judges are exercising greater control over jury verdicts in discrimination cases to the crude fact that most appellate judges are white. There are plenty of white judges on the D.C. Circuit who would probably have given Mungin's claims a more sympathetic hearing, just as the reaction of some black commentators makes it clear that not every black judge would have agreed with the dissent. n49 More important, to pigeonhole the dissenting judge (Judge Harry Edwards) as "the black judge," as both Mungin and Barrett do (pp. 276, 277), both stereotypes him and deflects attention away from the merits of Mungin's claims.

[*1941] It is not the race of the judges that is responsible for Mungin's defeat in the court of appeals. It is the law. In case after case, the Supreme Court and the courts of appeals have constructed substantial barriers for discrimination plaintiffs. Although the McDonnell Douglas test n50 makes it easy for plaintiffs to establish a prima facie case, to rebut this showing a defendant need only "proffer" - not prove - a legitimate, non-discriminatory reason for the employment decision. n51 Once the defendant has met this burden, the plaintiff must establish by a preponderance of the evidence that the actual reason for the employment decision was discrimination. n52 Moreover, in the absence of racial epithets or other clear evidence of discrimination, courts often require plaintiffs to prove that they were better qualified than comparable whites. n53 These requirements make it difficult for any plaintiff to prove discrimination. Plaintiffs such as Mungin who seek to challenge complex, subjective decisionmaking in high-level jobs are at a particular disadvantage. n54

Mungin v. Katten Muchin & Zavis n55 stands as a powerful testament to the limited usefulness of Title VII as a means of addressing the fate of black professionals. Four aspects of the court's analysis are particularly significant. First, Judge Randolph repeatedly emphasized that employers have "unfettered discretion" to choose among qualified employees for particular benefits and work assignments. n56 Second, as evidenced by Judge Randolph's treatment of Mungin's evaluation, the court concluded that violations of formal policies do not constitute discrimination unless the employee can demonstrate that the employer in [*1942] fact generally follows these policies. n57 Third, in order to prove "constructive discharge," an employee must demonstrate that his or her working conditions were so "intolerable" as to have the effect of driving the employee out. n58 Fourth, and potentially most significant, the court implied (although it did not hold) that "intermediate" decisions, such as changes in assignments or work-related duties, do not ordinarily constitute adverse employment decisions when unaccompanied by a decrease in salary or changes in work hours. n59

Collectively, these four holdings effectively gut Title VII as a meaningful remedy for the kind of problems that black lawyers typically face at large law firms. To see why, we must look more closely than journalists like Barrett, black lawyers like Mungin, or even managing partners like Sergi, typically look at the structure and operation of contemporary elite law firms.

[*1943]

III. The Rules of the Tournament of Lawyers n60

Barrett uses the first part of Mungin's credo - work hard, play by the rules, and you will succeed - as the framework for asking whether Katten Muchin is guilty of discrimination. This implies that if Mungin did indeed follow his mother's advice - if he worked hard and did what he was told - he should have succeeded at the firm. To the extent that he did not succeed, the argument goes, one can imply that something more invidious was at work. Given that Mungin is black, that something might be race.

This framing, however, inevitably invites the response that Katten Muchin used as the centerpiece of its defense in court: in today's fast-paced, competitive elite firms, virtually every associate is treated "unfairly" to some degree. Although believing in the first part of the American Dream - that those who work hard and play by the rules succeed - might be a good strategy in some settings, it is often a prescription for disaster in a large law firm. Barrett portrays Mungin's mother as a fiercely proud, intelligent, and hard-working woman who gave up her own education to work at a series of secretarial and office jobs to support her three children (pp. 24-27). Given her experience, it is not surprising that she taught her children to believe in the American Dream. In the kinds of settings in which she worked, it is often - though, sadly, not always - true, that if one "works hard and plays by the rules" one receives the salary, raises, and promotions that one deserves. However, this "blue collar attitude," as a black partner in a major law firm put it to me, works much less well in elite corporate firms where "simply" doing a good job only makes you a "good average" associate - and "good average" associates rarely win the tournament of lawyers.

Elite firms are structured like pyramids, in which many talented associates are hired, but only a few make it to partnership. n61 Moreover, what separates those who become partners from those who leave is not whether a given lawyer "works hard and plays by the rules." Most of the women and men hired by large law firms satisfy this basic criteria. Instead, those who make it must have two kinds of capital: "human capital," consisting of skills and dispositions built up by doing good work on difficult projects; and "relationship capital," consisting of strong bonds with powerful partners who will give the associate [*1944] good work and, equally important, report the associate's good deeds to other partners. n62 In the absence of either of these forms of capital, an associate has little chance of making partner no matter how hard she works and no matter how diligently she does what she is told.

Mungin's experience at Katten Muchin underscores the importance of both of these goods. Unlike the typical junior associate, Mungin arrived at Katten Muchin with a substantial amount of human capital in the form of knowledge, judgment, and skill in sophisticated bankruptcy practice. This, of course, is exactly why the firm hired him. Nevertheless, Katten Muchin was not going to make Mungin a partner until it had a chance to observe Mungin's skills firsthand and to evaluate whether he had the particular qualities that the firm's leaders predicted would enable an attorney to transition from associate to the quite different job of partner.

Partnership is not, as Barrett's emphasis on Mungin's credo implies, a reward for an associate's good and loyal past service to the firm. Although, as I explain below, lawyers who have not "worked hard" are unlikely to accumulate the kind of human and relationship capital necessary to become serious partnership prospects, the ultimate decision about which associates to promote is essentially a predictive judgment about the future as opposed to a reward for the past. n63 To demonstrate that they have what it takes to be good partners (and not just competent associates), senior associates must get access to the kind of work that partners do - that is, they must assume major responsibility on important matters, supervise junior associates, and most of all, manage and develop client relationships. This work, however, is inherently in short supply because both senior associates and partners need a steady diet of such matters to justify their existence. Competition for these coveted assignments, therefore, is intense.

The senior associates most likely to win this competition have deep and extensive relationships within the firm. As institutions, law firms conduct their affairs in the language of merit, but are ultimately run by politics. The pyramidal structure of elite firms ensures that partners have many more qualified candidates to choose from than there is good work for these young lawyers to do. Moreover, partners have an incentive to continue giving their high quality assignments to the same associates - their associates - associates who can be counted on from past experience to do their work well with relatively little supervision and to be loyal to their benefactor, both now and (for those who [*1945] become partners) in the future. n64 In return, partners have strong incentives to fight for their loyal lieutenants when it comes time to make partnership decisions.

Given these realities, Mungin faced an uphill battle from the moment he walked in the door at Katten Muchin. Mungin came to the firm as a sixth year associate with nothing more than his skills and a desire to work hard. He had neither clients (which might have allowed him to bypass the normal promotion route) nor relationships inside the firm. Instead, all he had was the hope that Dombroff's new venture would be successful and some vague promises about being "integrated" into a practice in Chicago run by partners whom he had never met and who (at least in Sergi's case) disapproved of his hiring. Under these circumstances, it would have been something of a miracle if Mungin had actually succeeded in his goal of becoming a Katten Muchin partner in one year. Instead, it was sadly predictable that he never made partner at all.

By tying his hopes to a firm that he knew almost nothing about in a satellite office that was headed by a managing partner who was himself a new arrival to the firm and whose own fortunes were tied to developing a "new" legal spe-

cialty, Mungin ran afoul of the real "rules" of the modern tournament of lawyers. Specifically, Mungin violated three "rules" of contemporary law practice that render this environment a far cry from the ideal meritocracy contemplated by the American Dream: lateral liabilities, the branch offices blues, and the sidekick problem. I briefly discuss each "rule" in turn. Given these "rules," it is not surprising that few discrimination suits against large law firms are successful.

A. Lateral Liabilities

Prior to the mid-1970s, associates almost never moved laterally from one firm to another. By the time Mungin entered the job market in 1986, however, lateral hiring of associates had become commonplace. Indeed, by the mid-1980s it was common for partners to move laterally (along with their clients) from one firm to the next (pp. 36-37). Associates tend to view the development of an active lateral market for lawyers as an unqualified benefit to their careers. Competition among firms for talent increases an associate's options. It also tends to produce upward pressure on salaries because firms often feel that they have to match raises given by their competitors to prevent their best associates from leaving to join higher-paying firms. Mungin's attitude toward moving laterally was consistent with this general euphoria. When problems arose at Weil Gotshal and Powell [*1946] Goldstein, Mungin, like many of his peers, considered it easier to start afresh in a new situation rather than to stay and try to fix the old one. As he subsequently told Barrett, moving laterally as a senior associate was "routine" (p. 109).

But laterals face certain real dangers. Although firms like laterals with a few years of experience (because they do not have to train them), they also have reasons for preferring their homegrown associates when it comes to work assignments and promotions. Partners have more information about homegrown lawyers and therefore more confidence in their assessments of these associates' abilities. In addition, individual partners have preexisting relationships with homegrown lawyers that have been built up over many years. Finally, to the extent that firms want to use the promise of partnership to encourage associates to work hard with relatively little supervision, favoring homegrown lawyers helps to keep junior associates properly motivated. Katten Muchin's policy of paying homegrown associates more than laterals like Mungin exemplifies how firms attempt to favor their own.

Given these incentives, it is not surprising that Mungin had difficulty getting work from the firm's Chicago bankruptcy partners. These partners undoubtedly had preexisting relationships with associates who were already working under them. Diverting work to Mungin might have destabilized these relationships. Patricia Gilmore's decision to continue giving bankruptcy work to lawyers in Chicago who had successfully completed similar assignments for the same clients (p. 100) is at least partially explainable on this ground.

Additionally, Mungin did not have the kind of insider's knowledge of Katten Muchin's history and culture that might have allowed him to build quickly the relationships that he would have needed to succeed at the firm. Like most laterals, Mungin knew almost nothing about Katten Muchin before joining the firm (p. 15). Instead, he simply assumed that it was like the other firms where he had worked (p. 15). As a result, he never even considered the fact that the courtly stoicism that seemed to serve him well in Houston and Atlanta might not be appropriate in a firm like Katten Muchin, which prided itself on being brash and aggressive (p. 51). He also did not realize (at least not until it was too late) that, unlike the relationship between Weil Gotshal's New York and Houston offices (pp. 84-85), Katten Muchin's Chicago and Washington offices were not well coordinated. Quite the contrary, lawyers in Chicago were practically itching for Dombroff and his renegade practice to fail. This inter-office competition highlights the dangers of being in a branch office.

B. The Branch Office Blues

The risks associated with lateral movement are particularly acute when an associate joins a branch office. Branch offices are frequently [*1947] away from the center of power. This danger is accentuated in cases in which the branch office does not have an independent client base that is capable of supporting the lawyers working in the branch. In addition, the potential always exists for hostility between the lawyers in the home and branch offices, particularly when the lawyers in control of the branch office are themselves lateral acquisitions as opposed to longstanding partners of the lawyers in the home office.

One of the few friends whom Mungin consulted about his possible move to Katten Muchin recognized that the firm's Washington office had all the markings of a risky branch office. In a belated and all too prescient warning, Mungin's friend urged Mungin to consider the fact that the office was less than three years old and was headed by a partner, Dombroff, who had demonstrated a willingness to follow the highest bidder (p. 16). Mungin brushed these concerns aside, mistaking Dombroff's undeniable power in Washington for power in the firm as a whole (p. 16).

Unfortunately for Mungin, all of the concerns his friend had expressed came home to roost with a vengeance. Sergi, a partner with real power in the firm and Mungin's titular supervisor, opposed Mungin's hiring from the start, not primarily because he disapproved of Mungin, but because he disapproved of Dombroff and his plans for a Washington-based insurance/bankruptcy practice outside of Sergi's control (pp. 19-20). Indeed, virtually everyone in the Chicago office hated Dombroff and Gilmore, and they only put up with them because Dombroff's insurance defense practice generated enormous fees (pp. 37-38). However, even with all of his billings, no one in Chicago had any desire to help Dombroff become even more powerful in the firm. Once his vaunted practice began to disintegrate, the last thing any lawyer in Chicago was concerned with was saving Dombroff or anyone with whom he was associated. This conflict between the Chicago office and Dombroff left Mungin with only Dombroff as a potential mentor.

C. The Sidekick Phenomenon

From the beginning, Mungin sought to hitch his wagon to Dombroff's star. He made no real effort to develop relationships with other lawyers in the Washington office (p. 107). When Jeff Sherman, the lone bankruptcy partner in Washington, made efforts to befriend Mungin, Mungin remained standoffish, fearing that building a relationship with Sherman might offend Dombroff, who seemed to have a troubled relationship with the young bankruptcy partner (p. 40). Indeed, Mungin was secretly pleased when Sherman left the firm, taking with him an associate who had become his protege (p. 45). Mungin believed that Sherman's departure would make Mungin even more indispensable to Dombroff because he would have to look to Mungin as [*1948] the only remaining bankruptcy lawyer in Washington who could do Dombroff's work (p. 45).

Tying one's career to a single mentor, however, is a very risky proposition. n65 Even under the best of circumstances, an associate with only one powerful mentor runs the risk of being viewed as little more than a "sidekick" who will never be as good as "the real thing." n66 Barrett's depiction of Patricia Gilmore as a despised toady (pp. 39, 61), whose authority was wholly derived from her connection to Dombroff, is a sharp reminder of what can happen to a lawyer who becomes totally captured by a single powerful mentor. Gilmore's status as a true sidekick whom Dombroff needed to function, however, at least assured her that her powerful mentor would help to protect her from their mutual enemies. Mungin, like most associates who audition for, but do not obtain this dubious role, received none of this protection. He was therefore left with all of the burdens of his association with Dombroff with few, if any, of the benefits. As a result, when Dombroff's star began to fade, Mungin's inevitably did as well.

D. Why the House Almost Always Wins

Given these three "rules" of the modern tournament of lawyers, it is not surprising that law firms rarely lose discrimination suits brought by disgruntled lawyers. Each of the four limitations on the reach of antidiscrimination law endorsed or suggested by the Mungin court - an employer's unfettered discretion to choose among qualified workers, the option of contradicting formal policies with actual practice, the high standard for constructive discharge, and, most controversial, the potential that Title VII does not cover changes in work assignments that are unaccompanied by a decrease in pay - dovetails with one or more pervasive features of the institutional structure of elite firms.

First, allowing law firms to exercise "unfettered discretion" in choosing among qualified candidates makes it virtually impossible (in the absence of direct evidence of discriminatory intent) for a black lawyer to challenge any work assignment decision because there will almost always be many more "qualified" lawyers than work for them to do. Moreover, because blacks constitute less than three percent of the lawyers in these institutions, virtually all of these "qualified" competitors are likely to be white. n67

[*1949] Second, allowing firms to circumvent formal policies with allegations that these policies have been superceded by de facto practices produces similar effects. Although many law firm policies are honored mostly in the breach, associates will often find it difficult to discern which policies partners ignore and when they ignore them. Contrary to the court's implicit assumption, firms do not announce that they no longer intend to follow formally enacted policies. Instead, these policies constantly remain in the background, giving firms the option of either ignoring or invoking them depending upon which course best suits their purposes. Moreover, firms provide associates with little information about how they actually apply their formal policies. This "black box" approach both provides firm leaders with maximum flexibility and gives associates strong incentives to conform their conduct to both the "formal" and the "de facto" rules. n68

The "black box" approach also makes it difficult for a lawyer in Mungin's position to prove that a law firm has treated him differently because of his race. As long as some white associates also do not receive the benefit of the for-

mal rule (in Mungin's case, a semi-annual review and raise), the court can contend that the "de facto" rule of no regular reviews has become the norm. By contrast, when the firm wants to rely on a formally stated policy - for example, the policy of paying lateral hires lower starting salaries than homegrown lawyers - the burden is on the plaintiff to demonstrate that the firm does not generally follow this policy. Moreover, disproving a firm's assertions about the content of a given policy will often be difficult because most important policies, unlike those relating to performance evaluations, are generally not included in a firm's employee manual or in any other published material.

Third, the plaintiff's burden of establishing the relationship between formal and de facto firm policies pales in comparison to the difficulty of proving constructive discharge in the elite firm context. Mungin's assertion that Katten Muchin constructively discharged him was the weakest aspect of his generally weak legal claims. Not even the dissent believed that a reasonable juror could have found in Mungin's favor on this issue. n69 Nevertheless, it is hard to imagine what would constitute constructive discharge in a setting in which law firms systematically "construct" the working conditions of a large percentage of their associates to give those who are not being groomed to be partners an incentive to leave. Notwithstanding all of the recent talk about associate retention, law firms depend upon ninety percent of all of the lawyers that they hire to leave the firm without becoming part [*1950] ners. n70 Although firms want a large number of these lawyers to remain long enough to become profitable senior associates - hence the concern about retention - they do not want too many to stick around for the actual partnership decision, when most would have to be fired. Firms therefore employ a variety of mechanisms to prompt certain associates to realize that it is in their best interest to leave.

One of the most common of these strategies is simply to stop giving the associate work. Firms generate an enormous amount of work that can profitably be done by junior associates with relatively little training. As an associate becomes more senior, however, her value comes largely from her ability to take on sophisticated projects that relieve even more senior associates, and eventually partners, of work that they would otherwise have to do themselves. To do this work effectively, however, the associate must have been trained by someone in the firm with the ability to teach her the requisite higher order skills and dispositions that it takes to do this kind of sophisticated work. For reasons that I explore in detail elsewhere, it would be irrational for firms to provide this training to all of their junior associates. n71 As a result, some lawyers will not acquire the necessary skills to perform senior associate work. At the same time, the law firm cannot charge clients senior associate prices for the junior associate work that is typically assigned to attorneys who have not been trained. As a result, these lawyers will gradually find themselves with less and less to do - a clear signal that they should start looking for another job. n72

This, of course, is precisely what happened to Mungin, albeit for somewhat different reasons. Although Mungin had the skills to do senior associate work, the disappearance of Dombroff's bankruptcy work, coupled with Mungin's lack of relationship capital with the partners in Chicago, dramatically reduced his senior associate level assignments. The firm, however, could not bill clients at Mungin's senior associate rates for the junior associate work that he was given instead. Even if some people in the firm wanted to force Mungin out by slashing his billing rate because he was black, Mungin would still have had difficulty establishing that this discriminatory motive drove him out, given the similarity between what happened to him and the firm's "normal" practice of managing the process of associate attrition.

[*1951] Finally, if courts were to hold definitively that Title VII does not apply to intermediate employment decisions (including work assignments) unless these decisions involve an express loss of status or pay, it would be virtually impossible for a lawyer in Mungin's position to mount a successful discrimination claim. As the court of appeals correctly found, by the time Mungin was eligible to be evaluated for partnership, there was no way that he could have been seriously considered. n73 He simply did not have the skills or experience to be eligible for the job. The question, however, is why he did not possess these qualities. Contrary to the meritocratic rhetoric law firms like Katten Muchin typically employ, only those lawyers who have access to training and mentoring opportunities that allow them to do sophisticated work for important clients have a realistic chance of developing the higher-order skills and dispositions that law firms rightly look for when making new partners. Those who fail to gain access to these opportunities rarely lose either formal status or immediate income. A third year associate who is not receiving good work or training will continue to be paid the same salary and, at least for a time, will advance with her class. What she will not do, however, is become a partner. To the extent that Title VII does not cover these training and opportunity decisions, it does not protect against discrimination by elite firms.

Moreover, given the demographics of most large law firms, the majority of the lawyers who fail to get access to what I have elsewhere called the "training track" are bound to be white. n74 As a result, when black lawyers like Mungin find themselves excluded from sophisticated work, they will almost always be able to look around and see that white lawyers like Jeff Sherman are similarly frustrated. For the reasons set out in Part IV below, the percentage of

blacks on the training track is likely to be lower than the percentage of similarly situated whites (at least in the aggregate). n75 Courts, however, generally require plaintiffs in disparate treatment cases such as Mungin's to supplement this statistical evidence with further evidence of discriminatory intent. n76 As Mungin's case highlights, such evidence will often be hard to find.

If one follows Barrett's logic and views Mungin's saga in terms of whether he lived up to his mother's credo of working hard and playing [*1952] by the rules, therefore, one is likely to conclude that while he may very well have been treated "unfairly," race had little or nothing to do with his eventual fate. Not surprisingly, this has been the conclusion of many commentators. n77 Although Mungin may have thought that he was "playing by the rules," he in fact sabotaged his own chances by failing to understand how the tournament of lawyers is actually played. Consequently, although his story stands as a sad commentary on the state of modern law practice, this "business-as-usual mismanagement" is fundamentally not about race.

Barrett himself, however, reaches a different conclusion. For Barrett, Mungin failed to succeed because he was the victim of "reckless, indifferent affirmative action" (p. 280). Given how he has framed the question, Barrett must demonstrate that "reckless, indifferent affirmative action" is somehow distinct from "business-as-usual mismanagement." This distinction, however, is difficult to prove. The way in which Mungin was ignored, underutilized, and exploited is not different in kind from the manner in which many associates of all colors and ethnicities are treated in today's large firms. n78 Consequently, by setting the case up as an either/or dichotomy between "discrimination and mismanagement," Barrett, despite his expressed intentions, encourages readers familiar with the cutthroat reality of contemporary elite law firms to reject his observations about "reckless" affirmative action and instead to conclude that Mungin "got screwed" just like everyone else (p. 45). Indeed, many will conclude that to the extent Mungin was treated differently because of his race, he was treated better than his white peers because the firm at least tried to "save" him in ways that they did not offer other similarly situated associates.

To understand how "reckless" affirmative action and other racial issues adversely affected Mungin's prospects at Katten Muchin, one must move beyond Barrett's binary framing to examine the ways in which "business-as-usual mismanagement" nevertheless disproportion [*1953] ately disadvantages black lawyers. To see this reality, however, one must challenge the second major aspect of Mungin's credo.

IV. Race, Strategy, and a Dream Deferred

Barrett frames his examination of how race affected Mungin's career in terms of the second lesson Mungin received from his mother: "You are a human being first, ... an American second, and black third" (p. 24). Mungin interpreted this admonition to mean that the best way for him to prove that he was indeed first and foremost "a human being" was to cut himself off from anything that might tie him in the eyes of whites to blacks - especially "those blacks" who might offend whites. Consistent with the American Dream's image of colorblindness, Mungin believed that if he ignored his racial identity, others would as well, allowing him to rise or fall solely upon his "God-given ability." n79

Barrett argues that the central tragedy of Mungin's story is that despite Mungin's willingness to live by this American creed, race nevertheless intruded upon his life. Once a "poster child for integration," Barrett laments, Mungin will now forever be known as the black lawyer who sued his law firm for race discrimination (p. 283). n80 To the extent that Mungin has now changed his attitude toward race - to the extent that he now chides himself for spending so much time trying to be a "good black[ ]" - this change, in Barrett's view, has occurred only because Mungin's experience at Katten Muchin has convinced Mungin that this exemplary perspective "hadn't been enough" to insulate him from the firm's racism (p. 6). In the last lines of the book, Barrett implores us to consider that unless we can find a way to allow blacks like Mungin to "transcend" race, there will be few blacks, such as Tiger Woods and Colin Powell, who are widely liked and respected across the color line (p. 283).

It is not surprising that Barrett latches on to Mungin's seeming commitment to colorblindness as the lens through which he understands Mungin's journey from Queens to the courtroom. In a world filled with debates about "multiculturalism," "political correctness," "institutional racism," and "reverse discrimination," many Americans long for the simplicity of the racial landscape of the 1950s and 1960s, [*1954] when the only question seemed to be whether blacks would be allowed to "integrate" into mainstream American society. Barrett's reflection that during their Harvard days, "Mungin never tried to make me feel guilty with talk of "systemic racism,'" places him firmly in this camp (p. 76). So too, it appears, was Mungin's mother. A product of the civil rights struggle, Mrs. Mungin believed passionately in the goal, so eloquently articulated by Martin Luther King, that all men and women "should be judged by the content of their character" and not by the color of their skin. n81 Dr. King's words remain powerful today because they resonate with

our nation's commitment that ascriptive characteristics of individuals, such as race, gender, or sexual orientation, do not affect their legal standing or moral worth.

One can believe in the fundamental legal and moral equality of all human beings, however, without necessarily believing in colorblindness as an operational strategy in contemporary society. Even if one believes that colorblindness is the appropriate moral stance in an ideal society, n82 one can still take the view that some forms of color-consciousness are necessary in a society such as our own in which benefits and burdens continue to be distributed on the basis of race. Colorblindness treats people fairly when racism and other forms of disadvantage based on race no longer affect the lives of citizens. As Amy Gutmann argues, however, when race continues to exert a major influence on the ability of some citizens to participate equally in public and private life, color-consciousness may be the only way to accord these individuals the fair treatment that is their moral due. n83 Fairness, not colorblindness, is therefore the fundamental principle of justice in a non-ideal society. Even as we approach the end of the millennium, the United States - including its elite corporate law firms - is far from an ideal society.

Read against this backdrop, Mungin's attitude about race, and the effect that this attitude had on his career, are both far more complex than Barrett's portrayal would lead one to believe. By arguing that the central tragedy of Mungin's story is that he failed despite his efforts to "transcend" race, Barrett unwittingly reinforces the very dynamic that led Mungin to believe that in order to be seen as "good" by whites, he must make every effort to minimize the extent to which these same people saw him as "black." To see why this color-conscious strategy to encourage colorblindness in others hurt Mungin's career, one must first understand how "business-as-usual mismanagement" [*1955] adversely affects the careers of black lawyers in ways that, although not different in kind from the effects on whites, are nevertheless on average systematically more severe and long-lasting. Turning a blind eye to these problems will not make them go away. To the contrary, ignoring these negative effects is likely to make them worse.

I have written extensively about how race affects the careers of black lawyers. n84 In addition, I have recently interviewed more than 150 corporate lawyers, many of whom are black, about their careers. Based on this experience, I believe that four aspects of Mungin's story are typical of the way in which "business-as-usual mismanagement" in large law firms systematically disadvantages the careers of black lawyers: the affirmative action myth, the problem of patronizing help, the numbers game, and the invisibility paradox. I briefly examine each in turn. Given the nature of these racial penalties, neither branding Katten Muchin and other similar firms as racist nor pretending that race does not exist, as Mungin tried to do, is likely to ameliorate the problems faced by black lawyers.

A. The Affirmative Action Myth

I begin where Barrett ends. Mungin was fully qualified for the job of senior associate at Katten Muchin. n85 Laterals are hired for their training and substantive knowledge. Mungin's six years of sophisticated bankruptcy practice, including a three-year stint at the best bankruptcy firm in the country, more than qualified him for a senior lateral position at a top firm. The fact that he was also a "double Harvard" was merely an additional boost. n86

[*1956] Nevertheless, from the very beginning the firm treated Mungin as an "affirmative action hire" in the worst sense of the term. To be sure, when firm leaders expressly took Mungin's race into account, they almost always did so in an effort to promote diversity in general and to help Mungin in particular. Thus, Dombroff and Sergi (notwithstanding Sergi's reservations about whether the Washington office needed another bankruptcy associate) were pleased with the fact that they were able to hire a talented black lawyer from Harvard. Such a move both served the firm's interest in increasing diversity, and (at least with respect to Sergi) promoted a personal commitment to equality (p. 54). It also, however, made it more difficult for Mungin to succeed at the firm.

Barrett's perceptive analysis of how an attempt at racial preference can turn into "reckless, indifferent affirmative action" is one of the best accounts of this all too common transformation. When Mungin joined Katten Muchin, he cast his lot with Dombroff and his new insurance/bankruptcy practice. The firm's leadership in Chicago, however, knew this was a bad bet. Although no one could have predicted how quickly Dombroff's empire would crumble, the seeds of its destruction were already sown by the time Mungin arrived. This is precisely why Sergi opposed Mungin's hiring in the first place (pp. 19-20). Ultimately, therefore, Mungin's fate at the firm turned on whether anyone in Sergi's department in Chicago would see it as in his or her interest to help Mungin get out of what everybody knew was a bad situation (p. 61). Theoretically, the firm had a strong incentive to do so: Mungin was exactly the kind of senior associate who is valuable to a law firm. Yet no one saw Mungin that way. To the extent that the Chicago office thought about Mungin at all (and they rarely did), they did not see him as an important asset of the firm (pp. 51-53). Instead, notwithstanding all of Mungin's efforts to downplay his racial identity, they saw him as a "black lawyer." Although Sergi and several other

Katten Muchin partners thought (for reasons that I take up below) that having a black lawyer in their Washington office was a plus, there is no indication that any of these lawyers stopped to consider whether Mungin might be an important asset as a lawyer. Having failed to see Mungin as a valuable lawyer, the firm's effort to "save" him was doomed to be ineffective and, as I argue below, counterproductive. Law firms are in the business of providing top quality services for top dollars. From all accounts, Katten Muchin took this bottom line attitude toward law practice even more seriously than most firms (p. 51). In the highly competitive environment in which firms like Katten Muchin operate, it is difficult enough to get busy partners to pay attention to nurturing the associates whom they acknowledge are productive. Getting these same lawyers to invest in the career of someone whom the firm wants to save for reasons other than productivity is virtually impossible.

[*1957] Is it certain that Chicago partners would have taken steps to help Mungin had he been white? Certainly not. Dombroff was sufficiently hated in the home office that it is quite possible that no one would have lifted a finger to help anyone associated with him. A white "double Harvard" who was hired with six years of sophisticated bankruptcy experience, however, would not have had to overcome the presumption that he was not a valuable asset to the firm. n87 To the contrary, he would be presumed competent. In a fast growing firm like Katten Muchin, experienced, competent senior associates are inherently in short supply. Maybe, just maybe, some overworked Chicago partner might have seen it as in her interest to pick up the phone and put the white Mungin on a deal, if only to see whether the new sixth year associate might be an undiscovered jewel. Alternatively, someone might have pulled this hypothetical Mungin aside during one of his trips to Chicago and told him what everyone there surely knew - he should get out of Dombroff's clutches (either by coming to Chicago or, if necessary, by leaving the firm) as quickly as possible. Perhaps busy Chicago partners would have done nothing to save the hypothetical white Mungin. What Sergi and his colleagues surely would not have done, however, is what they did in fact do for the real Mungin: "save" the hypothetical white associate in a manner almost certain to ruin his career.

B. The Problem of Patronizing Help

Sergi's campaign to "save" Mungin consisted of getting Gilmore to funnel him routine bankruptcy work while slashing his hourly rate (pp. 96-99). Sergi justified these draconian measures on the ground that once Dombroff's bankruptcy work dried up, the firm's only alternative was either to keep Mungin busy with routine work (for which the client could only be charged a "routine" rate) or to lay Mungin off (p. 99). Given Sergi's desire to save Mungin, he chose the former alternative.

Even if this plan was instituted in complete good faith (a subject to which I return below), it nevertheless predictably hurt Mungin more than it helped him. If the firm had laid Mungin off when Dombroff's venture failed, Mungin would have had an easily understandable and sympathetic story to tell potential new employers: "I gambled on an exciting, high stakes new practice area," Mungin could say, "but through no fault of my own, the venture did not pan out." As long as the firm gave him a decent interval to find a new job and references attesting to his skill and commitment, Mungin at least would have had [*1958] a chance to parlay this story - along with his impressive resume and considerable bankruptcy experience - into a job at another law firm.

Needless to say, finding a new law firm job and then succeeding there would still have been an uphill battle. When whites evaluate blacks, they frequently attribute negative acts "to personal disposition, while positive acts are discounted as the product of luck or special circumstances." n88 This tendency would undoubtedly have made it more difficult for Mungin to chalk up his Katten Muchin experience as a good bet gone bad. In addition, moving to his fifth law firm would certainly have elongated Mungin's partnership track. Any firm that hired Mungin would want to have a minimum of one or two years of actual work experience before making him a "permanent" n89 member of the institution.

Notwithstanding these difficulties, however, if Mungin had left Katten Muchin quickly after Dombroff's practice collapsed, he would have had a chance of reaching his goal of landing on his feet at another firm. Indeed, this is exactly what happened to Jeff Sherman, the white bankruptcy partner whom Dombroff recruited to run his new insurance/bankruptcy venture (pp. 211-12). When Dombroff's largest bankruptcy client decided to take its work elsewhere, Dombroff told Sherman that he would be better off leaving the firm (p. 45). Although Barrett and Mungin view Dombroff's decision to "force" Sherman out as a product of the two partners' stormy relationship, subsequent events make it clear that Dombroff actually did Sherman a favor. The firm gave Sherman and Stuart Soberman, Sherman's young white protege, time to find new jobs. By the time Katten Muchin's Washington office finally imploded, the two lawyers were safely employed in another firm.

Mungin's bailout plan, however, was destined to produce a less sanguine result. By giving him junior associate work, the firm undermined any hope that Mungin might have had to move laterally to another elite firm. After a year of doing routine bankruptcy work, Mungin could no longer present himself to potential employers as a sophisticated entrepreneurial bankruptcy associate who simply caught a bad break. Instead, he would have had to explain why he had spent the last year doing work that was appropriate for a first or second year associate. No matter how hard Mungin tried to explain that he was only doing this kind of elementary work to help out his employer, the unspoken understanding of partners at other firms would surely have been the same one Judge Randolph seemed to have made in overturning Mungin's victory: Mungin was doing junior associate work at [*1959] junior associate wages because this is all the firm entrusted him to do. Rather than being a skilled lawyer down on his luck, Mungin would have been seen as nothing more than a mediocre black lawyer who, notwithstanding being "polished up" at Harvard (p. 55), was simply incapable of doing the job.

This left Mungin's partnership chances in the hands of the very Katten Muchin partners who had sat idly by while he languished under Dombroff in the first place. These lawyers, however, were certainly not going to elevate to partnership an associate surviving on mundane work that could be more profitably done by a junior associate whose salary was commensurate with his billing rate. To the extent that the campaign to "save" Mungin was designed to help him build a long-term career in the firm, it was therefore doomed to failure. The most that anyone could have reasonably expected was that the plan would keep Mungin around for some period of time until he finally realized that he had no future with the firm. It is doubtful whether prolonging Mungin's eventual departure in this fashion was in Mungin's best interest. It may, however, have been in the firm's interest.

C. The Numbers Game

In addressing the myth of affirmative action, I suggested that Mungin suffered because no one at Katten Muchin seemed to have thought that he was valuable to the firm because of his abilities as a lawyer. This observation raises a puzzle. If the firm did not view Mungin as a valuable asset for doing its work, then why did it design a bailout plan that had as its sole purpose keeping Mungin on the payroll? One possible answer to this question is the one that Sergi gave at trial: the firm simply wanted to give Mungin every possible chance to stay at the firm (pp. 203, 223). There is, however, another possible explanation that highlights how a black lawyer's race, in and of itself, can sometimes be a valuable asset to a firm.

Notwithstanding their professed commitment to the ideology of colorblindness, law firms are well aware that there are advantages to having at least a small number of black lawyers on their rosters. These advantages come in many forms. The most important of these advantages stems from the recognition on the part of many clients that hiring minority lawyers can be to their advantage. As urban jury pools become more heavily populated by blacks and other minorities, corporate clients are increasingly realizing that it is in their interest to have black lawyers on their trial teams, particularly in racially sensitive cases. n90 Both sides' staffing decisions in Mungin's lawsuit reflect this trend. Thus, in an interesting sidelight that has received relatively [*1960] little attention, both Katten Muchin and Mungin hired black lawyers to represent them before what was certain to be a predominantly black jury (pp. 135-36, 166-67). n91 With respect to bankruptcy lawyers like Mungin, however, this kind of race-matching is relatively unimportant. n92 Instead, for Katten Muchin, Mungin's race was valuable for its aid in the "numbers game" - the battle to assemble minority employment statistics that will favorably impress prospective law student recruits.

Every year, law firms submit information about themselves to be included in an employers directory that is circulated to every law student in the country. One of the facts that firms are asked to reveal is the number of minority associates and partners. The answer to this question can have an important effect on a firm's recruiting efforts. The number of minority lawyers working in a firm represents a visible, rankable signal of the firm's commitment to diversity. n93 This signal is of particular concern to minority lawyers. As every law firm recruiter knows, a firm that has very few minorities will find it difficult to recruit additional minority lawyers. n94 Although some minority students, like Mungin, are willing to take jobs where they will be the only minority in the firm, many more will feel that it is not worth the risk.

The number of minority lawyers at a given firm is also likely to be important to some white law students. In a market in which firms tend to look alike on a number of dimensions - size, structure, start [*1961] ing salary, etc. - law students are constantly searching for ways to distinguish among potential employers. The need to find ways to differentiate firms is especially important for students at elite schools like Harvard who tend to have a large number of potential suitors. These are precisely the students that law firms like Katten Muchin most want to recruit. These same students also tend to be interested in issues of diversity. As a result, law firms have reason to believe that at least some of their

most highly prized recruits will feel uncomfortable about working in a firm that is all, or nearly all, white. Once again, this gives firms a reason to care about not having to fill in "zeros" in the boxes that ask for the number of black, Hispanic, and Asian lawyers working in the organization.

This dynamic helps to explain why Katten Muchin had an interest in keeping Mungin at the firm that was separate from whatever work that he may have been doing. Mungin was the only black lawyer in Katten Muchin's Washington office and one of only a handful in the firm as a whole. While the firm's numbers are not far below average, the small number of blacks magnifies the potential importance of even a single departure. While this might not have been very important in an ordinary year, Katten Muchin, as Barrett aptly notes, was not having an ordinary year when it came to issues of race.

In the fall of 1993, Katten Muchin had reason to be concerned about its "numbers" that went beyond the usual recruiting concerns. The preceding year, Elaine Williams, a black income partner in the firm's Chicago office, had sued Katten Muchin for race discrimination (pp. 55-58). Although firm leaders were confident that they had done nothing wrong, Barrett makes a persuasive case that all of the talk about "saving" Mungin was motivated in part by the firm's desire not to lose another black attorney, particularly one who might leave the firm disgruntled because of his treatment.

This chain of events highlights the complex effects that discrimination suits - whether successful or not - produce in firms. Elaine Williams's lawsuit heightened the firm's sensitivity to issues of race. Although as I indicated above, this heightened sensitivity was not actually sufficient to save Mungin's career, it did, for better or for worse, finally make him visible to the partners in the Chicago office.

D. The Invisibility Paradox

For most of his time at Katten Muchin, Mungin was virtually invisible to the people who mattered most to his career - Sergi and the other bankruptcy partners in Chicago. Mungin "fell between the cracks" when it was time to evaluate associates and hand out raises (p. 119). His name "never came up" when other members of his associate class were being considered for partnership (p. 117). He was not invited to seminars, presentations, or client meetings (pp. 101, 108). He was overlooked when Gilmore staffed the few remaining sophisticated [*1962] bankruptcy assignments that came into the Washington office (p. 100). Even after the Mungin rescue effort was well under way and even after Mungin had angrily complained to Sergi about being left out of important firm events, Mungin was the only associate that the firm "forgot" to invite to a meeting about the future of the Washington office after Dombroff's departure (p. 125).

As I explained in Part III, Mungin's invisibility was partly due to his erroneous decision to join a branch office in which no powerful partner in his specialty area actually practiced. Mungin's race, however, was also a part of the story. Black lawyers frequently complain about being left out of important meetings and opportunities. Consistent with the affirmative action myth discussed above, black lawyers are rarely thought of as important members of the team, even in cases in which their credentials and experience would appear to entitle them to this status. Yet as Mungin's experience demonstrates, the problem goes deeper than merely not being given one's due. In many cases, black lawyers are simply forgotten altogether. Although a number of factors contribute to this phenomenon, one important cause is that black lawyers legitimately fear becoming too "visible" in their firms. As Rosabeth Kanter documented in her classic study, excessive visibility is a serious problem for new entrants to the workplace. n95 Visibility heightens the cost of making a mistake because errors by visible minorities tend to confirm what many white supervisors subconsciously already believe: minorities do not belong in the first place. n96 The problem for blacks is even more complex because the stereotype of the "angry black" stands as a constant threat to the career of black lawyers (particularly men) who are seen as complaining too loudly about their working conditions.

It is, however, a rule of thumb in large law firms that in order to succeed, an associate must both do a good job and be seen as doing a good job on challenging work that is important to the firm. Mungin's invisibility ensured that even on the few assignments in which he had an opportunity to showcase his abilities, no one important was going to notice.

E. Responding to Racialized Disadvantage

In each of these four ways - the firm's assumption that Mungin was an "affirmative action hire" when he was not, its attempt to "save" him in a way that ruined his career, the firm's desire to keep Mungin around to bolster its numbers, and Mungin's invisibility - race con [*1963] tributed to Mungin's unhappy experience at Katten Muchin. In light of this reality, one might be tempted to conclude that Mungin was, after all, a victim of racism, albeit of a subtler (but no less invidious) kind. Thus, in light of their subsequent actions, one can characterize Dombroff's and Sergi's initial enthusiasm about hiring a minority lawyer, or the firm's attempt to "save" Mungin, as at best disingenuous and at worst proof

of racism. This, of course, is the conclusion that Mungin reached. While he does not endorse all of the arguments that Mungin uses to support this contention, it is Barrett's conclusion as well.

The conclusion that because race played a role in Mungin's experience, the firm must be racist is, however, no more logical than the equally false hypothesis, proffered by Katten Muchin's appellate counsel, that it would have been "irrational" for the law firm to have "treated race as a plus in hiring Mungin, but then harmed him because he was black" (p. 264). Both of these arguments assume that people have only one attitude about race: they are either "racist" or "innocent." n97 People's attitudes about race, however, are far more complex and multifaceted than this simple paradigm suggests. Due in large measure to the success of the civil rights movement, the vast majority of Americans believe that blacks and whites should have an equal chance to compete for jobs. n98 Notwithstanding this strong and important consensus, however, old attitudes and beliefs about race have proven hard to shake. As study after study demonstrates, a substantial number of whites continue to hold negative stereotypical views about blacks. n99 These views frequently exist below the level of consciousness and are perfectly consistent with a general disposition to treat blacks fairly or, in the particular person's own eyes, even preferentially. n100

It is possible, of course, to lump all of these attitudes together under the all-encompassing banner of racism. This kind of totalizing [*1964] thinking, however, is both conceptually inaccurate and strategically counterproductive. Conceptually, the claim that all racial attitudes that end up disadvantaging blacks are racist implies that what happened to Mungin is no different in kind than the experience of the black female student from the University of Chicago who was asked during a law firm interview about her high school grade point average and whether she would mind being called a "black bitch" or "nigger" on the job. n101 Because many people will reject the assertion that these two situations are the same, demanding that they be treated as such forces people to deny that they have any racial attitudes at all for fear that they will be branded as racists. The laughable, but nevertheless telling, testimony by Dombroff and another Katten Muchin partner about the race of the lawyers who worked under their supervision illustrates this danger. In each case the lawyer professed not to know how many black lawyers were in his department, responding instead that "I just ... don't focus on it that way" and "I have never inquired into their ethnic background" (p. 164). Despite their obvious evasiveness, these answers highlight a serious problem. When noticing race becomes synonymous with racism, no one will acknowledge noticing race. This makes combating the disproportionate effects of "business-as-usual mismanagement" on the career prospects of black lawyers all the more difficult.

Finally, branding Katten Muchin as racist on the basis of the kind of racial assumptions and preconceptions that disadvantaged Mungin tends to deflect attention from the extent to which Mungin's own attitudes about race affected his career. As Barrett acknowledges, Mungin was not a passive victim in this saga (p. 280). Instead, Mungin consistently made strategic choices that he thought would benefit his career. Some of these choices were about race. Labeling the firm's actions as racist discourages analysis of these strategic decisions.

This result would be unfortunate. Mungin's racial strategy does not in any way excuse Katten Muchin's inability to see him as a competent and productive professional. To the contrary, the most plausible explanation for Mungin's race-specific choices is that they were a response to pervasive negative stereotypes about blacks, such as those that ultimately impeded his progress at Katten Muchin. Nevertheless, if black lawyers are to rebut the charge that, in Barrett's words, we "embrace victimhood" (p. 282), we must acknowledge the extent to which our own strategic choices - including choices about how to "be" black - help to shape the racial world in which we live. Mungin's racial strategy, although understandable, contributed to the problems that he encountered at Katten Muchin. By valorizing this [*1965] strategy, Barrett makes it more likely that others will make the same mistake.

Consistent with his mother's faith in the American Dream, Mungin hoped that if he did not focus on his race, others would ignore it as well. For the reasons outlined above, this hope was illusory. Mungin could not stop by sheer dint of will the myriad ways in which he was perceived in the eyes of his co-workers as a black lawyer, with all of the complex baggage that accompanies that designation. More important, the color-conscious techniques that Mungin utilized to try to bring about this colorblind result often backfired. In order to make whites feel comfortable that he was not one of "those blacks" who constantly complain about racism (p. 134), Mungin believed that he had to remain silent in the face of slights and injuries, whether racial or otherwise, that adversely affected his career. Moreover, as he had throughout his professional life, Mungin made a conscious effort to distance himself from other black lawyers and the black community more generally. He made no effort to contact any other black lawyer at Katten Muchin about his problems until he called Elaine Williams on the eve of his decision to file suit (pp. 102, 106-07). He also did not get involved in the Washington legal community, a community relatively rich in black lawyers working in similar firms.

Mungin had good reason to be concerned about how his white co-workers would perceive his identity. In a world filled with negative stereotypes about blacks, individual blacks know that they are in constant danger of being seen by whites as automatically embodying these negative traits. This danger is particularly acute in settings such as elite law firms where trust and reciprocity are essential to success. As I argued in Part III, to become a partner in a large law firm, a lawyer must have relationship capital in the form of mentors with power, influence, and control in the firm. Given that "partners with power," n102 who are overwhelmingly white, are more likely to mentor associates who remind them of themselves, it is not surprising that Mungin believed that distancing himself as much as possible from anything that marked him as "black" - and therefore "different" - would make whites feel more comfortable with him, thereby increasing his chances of building the kind of relationships that he needed to succeed.

Mungin's experience, however, also demonstrates that this "racial comfort strategy" n103 carries significant risks. For example, Mungin's decision to remain silent in the face of the firm's repeated failure to integrate him into its Chicago practice was based in part on his legiti [*1966] mate fear of being characterized as "an angry black." n104 It also reinforced his invisibility within the firm. Mungin's failure to complain was particularly disastrous at an aggressive firm like Katten Muchin, where lawyers pride themselves on their ability to run roughshod over their competitors and their peers (pp. 51-54). By remaining silent, Mungin sent the unintended signal that no one in the firm need fear taking advantage of him. In Katten Muchin's dog-eat-dog culture, this virtually assured that almost everyone did.

Moreover, Mungin did not have anyone with whom he could discuss his predicament and refine his strategy. Throughout his life, Mungin refused to join black organizations as a way of demonstrating his willingness to fully integrate himself into the white world. By severing his connections to his black peers, however, he also cut himself off from a valuable source of information about how to manage issues of race in a corporate law firm. We hear a lot these days about the dangers of too much group consciousness, for example, blacks who sit at the "soul tables," as Barrett refers to them, and who do not take advantage of the chance to make friends and share experiences across the color line. These concerns are real. Of the black lawyers I have interviewed who confined the bulk of their social and extracurricular interests in college and law school to other black students and black causes, most regret that they did not take advantage of the full range of opportunities provided by the schools that they attended. Mungin's story, however, illustrates that blacks who follow the opposite path also pay a heavy price. The problems that Mungin experienced, as I have indicated, are typical of problems generally experienced by black lawyers in large firms. Perhaps if Mungin had discussed these issues with other blacks, he might have seen these problems coming and developed a better strategy for protecting himself.

Moreover, Mungin's racial comfort strategy also paradoxically made it more difficult for him to discuss issues of race with his white peers. Barrett acknowledges that Mungin never told him about any of the racial incidents that had happened to him in college. n105 Barrett attributes this silence to Mungin's pain over the incidents and, admirably, to his own failure to ask. n106 Mungin's strategy, however, is also likely to have played a role. Many whites feel uncomfortable discussing racial issues, particularly when those discussions suggest the continuing presence of white racism. Polling data suggests that a large percentage of whites believe that America has largely overcome its racial problems. n107 Those whites who do not, often, like Barrett, do not [*1967] want to be made to "feel guilty" about the continuing presence of racism or race privilege (p. 76). Given this reality, it would not be surprising if Mungin concluded that the surest way to make whites feel comfortable was to avoid discussing issues of race at all.

In a world in which race continues to matter, however, this strategy was destined to further Mungin's isolation. Not talking to whites about race for fear of how one will be perceived can quickly lead to not talking at all. Barrett suggests that Mungin had few friends of any color and none at Katten Muchin. He kept his professional relationships at a distance, concentrating on producing good work. As I have indicated, however, mentoring relationships must be based on trust. It is difficult to build these relationships if the parties keep important aspects of themselves off limits. Thus, although it is possible to form cross-racial mentoring relationships in which race is never discussed, the ones that have the greatest potential for developing real closeness and longevity involve blacks and whites who trust each other enough to discuss openly how race might be affecting a black protege's career. n108 Mungin's commitment to keeping silent about race made it difficult for him to have these often painful, but frequently empowering, conversations. As a result, when he began to suspect that race was adversely affecting his career, he had neither black nor white friends with whom he could share his troubles and design an appropriate response.

Barrett's framework for presenting Mungin's story not only obscures these problems, it actively contributes to them. Barrett eloquently presents the personal cost to Mungin of always trying to be "the good black" (p. 163). As I suggest below, acknowledging the personal weight of always having to appear acceptable to whites is the key to understanding why Mungin's story, notwithstanding its tragic elements, is ultimately a redemptive one. Nevertheless, the binary lens

with which Barrett frames Mungin's choices encourages exactly those attitudes that make a racial comfort strategy seem desirable. Throughout the book, Barrett characterizes Mungin's decision to downplay race as a vote in favor of inclusion and racial transcendence, and against exclusion and racial solidarity. For example, Barrett suggests that although Mungin "wasn't thrilled" at the prospect of being the only black in Katten Muchin's Washington office, his decision was based on, in Barrett's words, "making partner, not promoting racial solidarity" (p. 13). Similarly, when Barrett describes Mungin as mov [*1968] ing from being a "bargainer" to a "challenger," he equates the former quality with Bill Cosby, who "subscribes "to the American identity, and his subscription confirms his belief in its fair-mindedness'" (pp. 162-63). n109 Challengers, in Barrett's view, are typified by Jesse Jackson and Al Sharpton "when they lend support to the anti-white ravings of a Farrakhan or the conspiracy tales of a Twana Brawley, or they attack the corporate establishment as monolithically racist" (p. 163). Not surprisingly, when Barrett argues that the greatest tragedy of Mungin's story is that there will be fewer blacks who "transcend" race, he cites bargainers such as Colin Powell as an example of those individuals society is likely to lose (pp. 282-83).

By linking racial identification with exclusion and anti-white ravings, Barrett encourages both whites and blacks to ignore the dangers of Mungin's racial comfort strategy. Instead, both groups are encouraged to view any decision by a black person expressly to call attention to race or to associate with blacks - no matter how justified the accusation or how meaningful the association - as "playing the race card." n110 Far from leading our society to transcend race, this demonization of all forms of race consciousness is likely to produce the kind of racialized explosion that consumed Mungin's career and almost consumed him.

Without mentors or friends, Mungin continued to plow headfirst into his hopeless situation at Katten Muchin until he reached the point of no return. Redirecting his anger at the world (and perhaps at himself) for requiring that he deny a part of himself as the cost for claiming his place in the world, Mungin came to see race and racism everywhere (p. 101). He also began to view his role in exaggerated racial terms, equating his quest to bring the firm to justice to Thurgood Marshall's epic struggle against the evils of Jim Crow (pp. 132-33). And his steely determination to rise above his roots was recast as an equally powerful drive to see his lawsuit to its conclusion regardless of the consequences. In the end, having built his life on the American Dream, Mungin reacted as the great poet Langston Hughes predicted that anyone who is left for too long with only a dream deferred would react: n111 he exploded, taking his own career and much of the firm's reputation with him.

[*1969] Given that Mungin's fate was due in part to his own strategic choices, it would be easy to blame him for his predicament. Blaming Mungin, however, would be tragically unfair. Nothing in Mungin's background prepared him for the world he was about to enter. The advice his mother lovingly gave him about the American Dream had worked well for her and for millions of other Americans in the world in which she lived. Her world, however, was not the increasingly competitive and often ambiguous world of the large law firm. To the extent that black students disproportionately come from backgrounds where they have had little or no experience in the corporate world, they are likely to encounter many of the obstacles that derailed Mungin's career. This result is particularly unfair in light of the fact that many of these women and men, like Mungin, have at great personal and economic sacrifice attempted to protect themselves from precisely this possibility. Mungin was, after all, a graduate of a law school that likes to think of itself as the best law school in the world. Surely, he had a right to expect that his Harvard Law School education would give him the information that he needed to succeed in his career. Unfortunately, neither Harvard nor virtually any other law school fulfills this expectation.

V. The Failure of Legal Education

Mungin chose to go to Harvard College because, in the words of the Harvard recruiter, he would "never have to worry about money again" (p. 34). He fully anticipated that going to Harvard Law School would only cement the deal. Unfortunately, in today's climate this common sentiment is simply false. To achieve success in the competitive world of contemporary law practice, one must have more than a fancy pedigree. Going to the "right" law school is still the most important determinant of whether a lawyer will be hired by an elite law firm, and belonging to a network of Harvard or Yale graduates undoubtedly pays life-long dividends. Nevertheless, whether a lawyer actually succeeds in cashing in on these promises by becoming a partner in an elite law firm, let alone a partner with power in such an in [*1970] stitution, ultimately depends upon how well that lawyer learns the real rules of the tournament of lawyers.

Law schools teach their students virtually nothing about this process. n112 Although law schools continue to do a good job teaching a student how to "think like a lawyer," they convey very little information about how one should actually go about being a lawyer. More to the point, law schools teach virtually nothing about how to build a legal career. The legal profession is in the midst of a massive restructuring that began in the 1970s and continues unabated to this

day. This restructuring has destabilized existing career paths and raised the stakes of making the kind of missteps that plagued Mungin's career. In the mid-1980s, when Mungin went to Harvard, law schools paid virtually no attention to these changes. Although the situation is somewhat better today, there is still relatively little teaching and research about careers. Even the best law schools know virtually nothing about what happens to their graduates five, ten, or fifteen years out of law school. Most law schools also do not seriously study the organizational structures and practices of legal institutions such as law firms or general counsels' offices. What little they have learned has not found its way into the curriculum. When one compares this situation with the state of affairs in business schools, for example, it is painfully clear that law students are woefully unprepared to think critically and strategically about building their careers. Instead, students are left to gather information about their potential careers from fellow students, recent law school graduates, the legal press, and, worst of all, law firm recruiters and headhunters.

Indeed, to the extent that law schools convey any information about careers, that information tends to be distorted and misleading. By holding up elite firms as representing the pinnacle of the profession, law schools encourage students to think that these firms are an extension of the academic environment in which associates who do the "best" work automatically rise to the top. Whether this vision was ever an accurate depiction of life in an elite firm, it now has, for the reasons outlined in Part III, relatively little to do with the kinds of institutions in which today's graduates will spend their careers.

Finally, law schools also do not help students deal with the complex issues surrounding identity. Law schools reinforce a binary understanding of the relationship between identity and professional role. The dominant understanding is the traditional colorblind vision of "bleached out professionalism." n113 To be a "good" professional, ac [*1971] cording to this standard view, one must suppress all other aspects of one's identity - such as race, gender, and sexual orientation - when performing one's professional role. To the extent that there is now a dissenting view, it tends to see race as pervading all aspects of life. According to this view, to be a "good" black, one must put one's racial identity before one's professional role. n114

Neither of these polar positions, however, is satisfactory. Bleached out professionalism produces real blindness of the kind that afflicted Mungin. Mungin simply could not see the ways in which race was likely to affect his career because he thought that to see himself as "raced" was to become something less than a full professional. Analyzing everything in terms of race, however, runs the risk of encouraging an uncritical race consciousness that can produce equally problematic results. In its most extreme form, placing racial obligations above all others can dissuade black lawyers from going into fields, such as corporate law or criminal prosecution, in which their professional obligations might be seen as requiring them to be disloyal to their racial commitments. Given the paucity of blacks in these fields and the power wielded by those individuals who occupy these positions, such a result would be unfortunate. n115 Because black lawyers are unlikely to abandon corporate law practice altogether, however, the real danger is that those blacks who go into this area will assume, like Mungin, that corporate firms are "all the same" and therefore fail to pay attention to important differences among these institutions.

What is needed, therefore, is a way of understanding both racial identity and professionalism that allows blacks to integrate identity issues within their real lives as lawyers. This is a large and complex task that I have attempted to tackle on other occasions. n116 Rather than return to this task here, I close with a few observations about how each of the parties implicated in Mungin's story might advance this cause.

[*1972]

VI. Moving Beyond the Dichotomies

If future tragedies of the kind that befell Lawrence Mungin are to be avoided, each of the parties who had a hand in this saga must move beyond the recognition of differing perceptions highlighted by Barrett's framework and take stock of the lessons this case teaches us about the complex intersection among race, institutional structure, and professional role. With respect to the legal questions raised by Mungin's lawsuit, the most important lesson to be learned is that it is in everyone's interest to address the concerns of black lawyers before they ripen into legal disputes. No one was a winner in this tragedy. Certainly not Mungin, who lost both his job and his career. Despite its victory in court, Katten Muchin is a loser as well: in addition to the legal fees and lost time the firm spent fighting Mungin's suit, Katten Muchin will have to spend additional resources to repair its damaged reputation.

As much as all parties should work to avoid litigation, however, it is important that law firms not be insulated from liability under Title VII altogether. Although Mungin's suit will not have the impact of Brown v. Board of Education n117 or any other classic civil rights case, it has focused much needed attention on the problems faced by minority pro-

fessionals. It is true that not all of this attention will advance the cause of diversity. If the rumblings that Barrett hears are correct, some law firms will use Mungin's case as an excuse not to hire black senior associates. This, of course, is simply another example of how blacks continue to be tied together in the minds of many whites. It is important to remember, however, that this negative effect will be offset by the fact that other firms (or other partners within the same firms) will pay closer attention to ensure that the problems that Mungin encountered do not befall the black lawyers in their institutions. It is impossible to tell which of these effects will predominate. What is clear, however, is that if Title VII is to have any force in this area, courts must reject Judge Randolph's suggestion and instead clearly and unambiguously hold that intermediate decisions that do not involve reductions in pay, such as decisions regarding work assignments, are covered by the statute. Either Congress or the courts should ensure that this ambiguity is clarified as soon as possible.

Law firms, however, should not wait for either litigation or legislation to begin to address the problems raised by Mungin's case. The fact that Katten Muchin was forced to defend itself on the ground that it treats all of its associates poorly should alert firms to the fact that they have reasons for caring about what happens to black lawyers that extend beyond any interest in diversity for its own sake. Black lawyers in corporate firms are like birds on the edge of a very long tree [*1973] branch that is blowing in a storm: although they may be the first ones to fall, if the wind keeps blowing, many others will fall as well. Elite firms are beset by a combination of forces that have literally blown these powerful institutions into a new era of global competition. While black lawyers like Mungin may be the initial casualties, many white lawyers are sure to follow. To the extent that firms pay attention to the concerns of black lawyers, they might find ways to reverse (or at least to slow down) these destructive forces.

Consider, for example, the issue of retention. Black lawyers have been complaining about retention issues for years with very little effect. The turnover problems that primarily used to affect blacks, women, and other traditionally marginalized groups, however, have now become a virtual epidemic in the profession as a whole. n118 Although the pyramidal structure of large firms mandates associate attrition, many associates now leave in their first few years, creating a shortage of senior associates. Law firms are now spending millions of dollars to combat this problem. n119 Perhaps, if they had paid attention to the early warning signs involving minority attrition, they would be better prepared to face the current situation.

Mungin's experience at Katten Muchin holds two additional lessons for large law firms. First, these institutions should stop talking about how much affirmative action they practice. This is not and need not be an argument for abandoning affirmative action in law firms. Affirmative action at the hiring stage has undoubtedly opened up opportunities for talented black lawyers who lack traditional credentials to demonstrate that they can be competent and productive associates and partners at elite firms. However, firms need to be clear that not every black person who is hired is in fact the product of affirmative action and that whatever advantages these programs produce tend to be both partial and short-lived. Some black lawyers, like Mungin, are hired on exactly the same criteria as their white peers. Moreover, regardless of the circumstances under which a black lawyer is hired, once that attorney starts work at a firm, he or she typically receives very little in the way of favorable treatment on the basis of race. Katten Muchin's "equal opportunity" mismanagement defense should stand as a constant reminder of this reality. Finally, once we understand that "business-as-usual mismanagement" in fact creates disproportionately higher burdens for black lawyers, the prevailing assumption that black associates receive substantial preferential treat [*1974] ment in their quest for partnership is so misleading that it ought to be abandoned.

Second, firms should encourage black lawyers to take advantage of the information and support that can be derived from intraracial organizations and networks. As with the previous argument, this contention is not a claim that a law firm should abandon its efforts to integrate blacks into all of the firm's formal and informal networks. Firms should not, however, discourage black lawyers from building bridges with their black peers on the ground that race-based organizations and affiliations are inherently inconsistent with professionalism. To the contrary, there is persuasive evidence that intraracial organizations and networks can and do play a powerful role in nurturing and supporting good professional practices. In an important new study of the careers of minority executives who have overcome racial barriers, David Thomas and Jack Gabarro conclude that "identity-based" organizations, in which minorities share information and provide mentoring and career support, have proven to be an important avenue for helping minority managers to develop the kinds of skills and dispositions necessary to become successful executives. n120 Law firms could produce similar results by supporting participation in minority bar associations and other minority networks.

Law schools can also learn important lessons from this insightful book. Indeed, the book itself is a perfect example of what law schools could do to improve their graduates' chances of avoiding some of the problems that bedeviled Mungin. Barrett's rendition of Mungin's story has all of the makings of an effective case study. For all of its many vir-

tues, however, the book also underscores the danger of leaving the development of case studies to journalists, novelists, and moviemakers. Law schools should be writing their own case studies that are based on their own research about the organizations of legal practice and the careers of the lawyers inside them. n121 Only when we have faced up to our responsibilities to provide our students with accurate and accessible information about the world that they are about to enter will we be able to fairly hold graduates like Mungin accountable for the choices that they make.

Yet make choices they must. In the last analysis, it is up to black lawyers to learn their own lessons from Mungin's saga. This will not be done by demonizing Mungin or by distancing ourselves from Mungin's situation. Similarly, the next generation of Lawrence Mungins [*1975] will not learn much by uncritically accepting his claims. Instead, black lawyers must be able to look sympathetically, but nevertheless critically, at Mungin's problems and the strategies he chose for responding to these problems. Only then will black lawyers be able to use his story to find ways to integrate their identities with their roles in ways that deny the reality of neither.

To accomplish this task, however, black lawyers must discard the artificial constraints that Barrett's framing of Mungin's tale imposes. It is not necessary to choose between seeing Mungin as a victim of race discrimination or as simply another casualty of "business-as-usual mismanagement." It is also not necessary to consider oneself either good or black.

Ironically, Mungin himself appears to be well on his way toward accomplishing this goal. In another fascinating subplot in the book, Mungin reunites with his family in South Carolina at the same time his life is beginning to unravel at Katten Muchin (pp. 156-62). By the end of the book, he is planning to move to his ancestral home, to collect the family's land, and to write its history (pp. 286-87). In so doing, Mungin sees himself as laying claim to his whole heritage - race, family, and place - and claiming himself, maybe for the first time, as a whole person. He says he has found himself, and it appears to be the lawsuit - the very thing that Barrett argues robbed him of his ability to claim himself as a person who is "not merely, not primarily black" - that gave him the courage to do so. Lawrence Mungin rightly rejected a life where he was just black. The life he chose instead, however, required Mungin to claim his humanity in spite of being black. Barrett asks us to admire Mungin's old life and to mourn its passing. However, the cost of living a life in which, in Barrett's words, one must "transcend race" in order to be human, is, at least for many blacks, too great to bear. By suing Katten Muchin, whatever the technical merits of his claim, Mungin was finally able to cast off the fear and loneliness that came from trying so hard to be good in spite of being black. As he eloquently states: "When you face your worst fears, miracles happen and you're no longer operating out of desperation." n122 It is only when we are not afraid to be ourselves - to claim a dream of our own making and not one born of the need to please others - that we can truly be our best.

FOOTNOTES:

n1. Mr. Barrett is a reporter for the Wall Street Journal and a 1986 graduate of Harvard Law School.

n2. Kirkland & Ellis Professor of Law and Director, Program on the Legal Profession, Harvard Law School. Devon Carbado, Christine Jolls, Mitu Gulati, Randall Kennedy, and David Thomas all made helpful comments on an earlier draft. Jake Tyler and Dan Markel provided invaluable research and editorial assistance.

n3. Ralph Ranalli, Shades of Gray: Author Finds Not Everything Is Black and White in Story of a Lawyer's Discrimination Suit, Boston Herald, Feb. 8, 1999, at 37.

n4. See, e.g., Ellis Cose, Color-Blind: Seeing Beyond Race in a Race-Obsessed World xxii-xxiii (1997); Ellis Cose, The Rage of a Privileged Class 1-5 (1993).

n5. See Stephen Thernstrom & Abigail Thernstrom, America in Black and White: One Nation, Indivisible 537-40 (1997).

n6. See Nicholas Lemann, Affirmative Action and Reaction, N.Y. Times, Sept. 7, 1997, 7, at 15 (reviewing America in Black and White: One Nation, Indivisible).

n7. See, e.g., David Hinkley, The Afro-Stocracy: Being Rich and Black in Shades of Grey, N.Y. Daily News, Jan. 17, 1999, available in *1999 WL 3422803* (arguing that "on the surface, it's classic tokenism: letting someone in the door for appearances, with no intention of letting him join the party").

n8. See, e.g., Linda Chavez, Who Needs the Stigma of Affirmative Action?, Chi. Trib., Feb. 3, 1999, 1, at 13 ("Don't tell me affirmative action doesn't carry a stigma. And all the well-intentioned motives of liberals in promoting it can't make up for the very real damage it inflicts on the Lawrence Mungins of the world.").

n9. Compare Paul Barrett, Black, White and True: Can I See What He Saw?, Wash. Post, Feb. 7, 1999, at B1 ("In recent weeks, scores of black professionals have filled my answering machine and e-mail with messages that say they have been in the same situation."), and Julie Topping, An Inside Look at What it's Like to be a Minority in the Workplace, Fort Worth Star-Telegram, Feb. 14, 1999, at 6E (reporting that as a black woman, she wonders who the book's target audience is because "African Americans have seen prejudice, heard it, lived it" and will say "of course, Mungin was discriminated against"), with Veronica Chambers, Was He the Good Black?, Newsweek, Jan. 18, 1999, at 56, 56 ("Throughout the first half of the book, Mungin comes off as self-serving and arrogant. It is not until he free-falls professionally that he begins to reach out to the black community.").

n10. Compare James E. Coleman, Jr., Black and White in Shades of Gray, Am. Law., Jan./Feb. 1999, available in Westlaw, 1/ *1999 Am. Law. 94* (criticizing the book for "failing to provide a complete picture of how the careers of associates are made, frustrated, or destroyed in the constantly expanding and contracting entrepreneurial firms of the 1990s"), with David Segal, The Final Lesson of the Mungin Race Case, Wash. Post, Jan. 11, 1999 (Washington Business), at 9 (describing large law firms as "hothouses of discontent" and reporting that partners privately concede that "their firms are brutal on everyone").

n11. See, e.g., Ranalli, supra note 3 ("Mungin's story isn't told - the pun is unavoidable - in black and white.").

n12. Needless to say, overt racism still exists in corporate America. See, e.g., Bari-Ellen Roberts & Jack E. White, Roberts vs. Texaco: A True Story of Race and Corporate America (1998).

n13. See Terry Carter, Divided Justice: White and Black Lawyers May Practice the Same Law, but They Have Decidedly Different Views of How the System Works, A.B.A. J., Feb. 1999, at 42, 42-43 (noting that "there are still two views of the law, one black and one white").

n14. See, e.g., Michael D. Goldhaber, Good Black, Good Lawyer, No Dice, Nat'l L.J., Mar. 1, 1999, at A17 ("Whether he fell because of racism or associate abuse, Mr. Mungin must move on."); Michael Lufrano, Questions of Justice: A Look at Race and Opportunity in a Chicago Law Firm, Chi. Trib., Feb. 7, 1999, 14, at 6 ("The central focus of "The Good Black' is whether Katten allowed Mungin to fall between the cracks ... because he is black. What makes Mungin's case so difficult to judge is that his experience as an associate is similar in many respects to that of young attorneys of all races."); Segal, supra note 10, at 9 ("Mungin's case demonstrates how hard it is to distinguish outright discrimination from the workaday indignities of law firm culture.").

n15. Although Mungin and I did not overlap during my student years at Harvard Law School or during the 13 years that I have been a professor here, I did attend a recent conference of the Harvard Law School Black Law Students Association at which Mungin spoke.

n16. In an interview with the National Law Journal, Mungin claimed that Barrett did not tell him he was writing a book until after Barrett had attended the trial. See Marcia Coyle, Black Lawyer's Life, Suit Told by a White Author: New Book by a WSJ Editor Tells of a Harvard Law Grad Who Sued Katten Muchin, Nat'l L.J., Jan. 11, 1999, at A14. Moreover, when he did tell Mungin of his plans, Barrett presented the decision as a fait accompli; he would write the book regardless of Mungin's wishes or cooperation. See id. Not surprisingly, Mungin, who claims he did not want publicity, viewed Barrett's actions as "a violation of trust" about which he was "very, very angry." Id. He nevertheless decided to cooperate because he believed that it was the only way to ensure that Barrett did not "capitalize on the advantage of knowing me for 13 years and knowing enough about me such that he could speculate about me and my family in a way that could hurt them." Id.

n17. See Ranalli, supra note 3 (reporting that Barrett acknowledges that Mungin is unhappy with how Barrett portrayed some of the "murky" issues in the book). Overall, however, Mungin is pleased with the book and feels that Barrett "did a very good job of stepping into [his] shoes." Coyle, supra note 16, at A15.

n18. See Segal, supra note 10, at 9 (quoting a statement by Katten Muchin that "we are deeply offended by the false characterizations in Mr. Barrett's book of the firm, its people and the entrepreneurial environment in which they work").

n19. Indeed, Barrett's decision to write Mungin's story with or without Mungin's permission raises legitimate questions about the ethics of writing an "unauthorized biography of a friend," to use a phrase suggested to me by Anthony Farley. These questions are particularly acute because, as Barrett acknowledges, Barrett's and Mungin's apparent interracial friendship has played an important role in the book's overall success. See Barrett, supra note 9, at B1. Given that Mungin ultimately decided to cooperate - in both the book's writing and promotion - I leave these interesting questions for others to explore.

n20. Jennifer L. Hochschild, Facing Up to the American Dream: Race, Class, and the Soul of the Nation 18 (1995) (quoting President Clinton).

n21. Id.

n22. As a black person who has been around Harvard for more than 20 years, including as an undergraduate in the early 1970s, I must confess that I have never heard the predominately black tables in the cafeteria, which surely did exist and probably still do, referred to as "soul tables." It is not clear from the book whether this pejorative characterization comes from Mungin or Barrett, as both were Harvard undergraduates. To the extent that the characterization is Barrett's, it is another example of his tendency to equate racial identification with racial exclusion.

n23. Barrett describes two incidents. The first involved a friend of one of Mungin's best friends who used toothpaste to inscribe on the bathroom mirror, "What are you doing with that nigger friend?" (p. 68). The second involved a white female classmate whom Mungin visited in Atlantic City, only to be told after one day that the girl's father could no longer allow the two of them to be seen walking in public together (p. 69).

n24. See Barrett, supra note 9, at B1.

n25. See Goldhaber, supra note 14, at A17 (reporting that Barrett still refuses to state whether the firm violated the civil rights laws: "I haven't had to vote on the jury, and I won't vote now.").

n26. See, e.g., Richard Welling, A Law Career Is Shattered: Was it Race?, Detroit News, Feb. 10, 1999, at A15 (calling Barrett's refusal to take a position on the merits of Mungin's claim "more than a little unsatisfying").

n27. See, e.g., Chavez, supra note 8, 1, at 13 (concluding from Barrett's even-handed portrayal that Mungin's problems stemmed from the prevalence of affirmative action); Coleman, supra note 10 (arguing that Barrett's "tepid" but "objective" portrayal "fails to make a completely compelling case for discrimination").

n28. See *Mungin v. Katten Muchin & Zavis, 116 F.3d 1549, 1554 (D.C. Cir. 1997).*

n29. See id.

n30. See *id. at 1554-55.*

n31. See *id. at 1554.*

n32. See *id. at 1556.*

n33. See *id. at 1557.*

n34. See *id. at 1558.*

n35. See id. (Edwards, J., concurring in part and dissenting in part).

n36. See Ramona L. Paetzold & Rafael Gely, Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?, *31 Hous. L. Rev. 1517, 1528-43 (1995)* (arguing that discrimination suits regarding disparate treatment within a company are extremely difficult to prove).

n37. Before going on the bench, Judge Robertson was a partner at Wilmer, Cutler & Pickering (p. 181).

n38. See *Mungin, 116 F.3d at 1554.*

n39. *Id. at 1556.*

n40. *Id. at 1552* (emphasis added).

n41. The primary meaning of "entrust" is "to give over something to another for care, protection, or performance." The American Heritage Dictionary of the English Language 616 (Anne H. Soukhanov et al. eds., 1992). A secondary meaning, however, is "to give as a trust to (someone)" as in "entrusted his aides with the task." Id. Judge Randolph's usage can fairly be read as invoking the latter meaning.

n42. See, e.g., Jeffrey Rosen, The Bloods and the Crits, The New Republic, Dec. 9, 1996, at 27, 27; William Safire, After the Aftermath: Damage Done, Atlanta J. & Const., Oct. 13, 1995, at A19, available in *1995 WL 6556856* (arguing that Johnny Cochran "blatantly urged jurors to ignore the evidence of murder and to get even for society's past injustices"). See generally Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, *105 Yale L.J. 677 (1995)* (urging black jurors to nullify the convictions of black defendants accused of nonviolent crimes).

n43. Given that the 1991 amendments authorized plaintiffs to seek punitive damages, Congress had no choice but to allow trial by jury. Punitive damages are clearly a remedy "at law," as opposed to reinstatement and back pay, which the courts have interpreted as sounding only in equity. It seems likely, however, that at least some of the bill's supporters were as interested in giving discrimination plaintiffs the ability to try their cases to juries as they were in allowing plaintiffs to seek punitive damages.

n44. See Keith Harriston, Reaction to Verdict Is Another Hung Jury: Regional Response Is Sharply Divided, Wash. Post, Aug. 11, 1990, at A10 (reporting that whites in the D.C. area were disappointed and outraged about the verdict in the Barry case); Tracy Thompson, Barry Trial Judge Silent on Remarks: Action Puts Friday Resentencing in Doubt, Wash. Post, Sept. 24, 1991, at B1 (quoting the judge who presided over the Barry case as saying, "Some people on the jury had their own agendas. They would not convict under any circumstances.").

n45. See Jeffrey Rosen, One Angry Woman: Why Are Hung Juries on the Rise?, New Yorker, Feb. 24, 1997, at 54.

n46. See Butler, supra note 42. Professor Butler teaches at George Washington University School of Law in Washington, D.C.

n47. See, e.g., *Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)* (upholding a defendant's right to obtain summary judgment if, at any time before trial, the plaintiff fails to make a showing sufficient to establish the existence of each and every element essential to the plaintiff's case in the manner prescribed by Rule 56, *Fed. R. Civ. P. 56*); *Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 254 (1986)* (holding that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden").

n48. I have elsewhere argued that there are strong reasons for believing that the Simpson jury did not engage in nullification. See David B. Wilkins, Straightjacketing Professionalism: A Comment on Russell, *95 Mich. L. Rev. 795, 810 n.69 (1997).* Although the claim that the jury engaged in nullification is stronger with respect to Marrion Barry, there was also evidence (in the form of a decade-long campaign by Federal prosecutors to "get" Barry) that might (although not in my mind) justify a reasonable juror in concluding that Barry's prosecution was sufficiently tainted by racism that it was an appropriate candidate for at least partial nullification. See Thomas B. Edsall, Black Officials, Academies Differ on Trial's Legacy: Concern Heard About Trust Between the

Races, Wash. Post, Aug. 12, 1990, at A14 (reporting that some black leaders see the Barry verdict as just in light of the "unprecedented lengths" to which the government went to "entrap" Barry).

n49. See, e.g., Coleman, supra note 10.

n50. See *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)* (holding that a plaintiff can establish a prima facie case by showing that the plaintiff is a member of a protected class, that the plaintiff was rejected for a job for which the plaintiff is qualified, and that the employer continued to seek applicants of similar qualifications).

n51. See *Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 260 (1981)* (holding that a defendant need only "proffer" a legitimate, non-discriminatory reason for the employment decision and that the burden of proving discrimination remains at all times with the plaintiff).

n52. See *St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509-11 (1993).* Indeed, in St. Mary's, the Court held that even if the plaintiff proves that the defendant's proffered non-discriminatory reason is pretextual, the trier of fact may nonetheless conclude that the employment decision was taken for some other non-discriminatory reason, as long as there is evidence to support this finding in the record. See id.

n53. See David Charny & G. Mitu Gulati, Efficiency Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law in High-Level Jobs, *33 Harv. C.R.-C.L. L. Rev. 57, 99 (1998).*

n54. See *id. at 98-101.* For the classic account of why it is difficult to apply Title VII and other similar statutes to "high-level" jobs, see Elizabeth Bartholet, Application of Title VII to Jobs in High Places, *95 Harv. L. Rev. 947 (1982).* For an example of a case in which the court ruled that it would not look behind a law firm's subjective decisionmaking in evaluating partnership candidates in the absence of clear evidence of discrimination, see *Ezold v. Wolff, Block, Schorr & Solis-Cohen, 983 F.2d 509, 547 (3d Cir. 1992).*

n55. *116 F.3d 1549 (D.C. Cir. 1997).*

n56. *Id. at 1556.*

n57. See id.

n58. *Id. at 1558.*

n59. See *id. at 1557.* Although Judge Randolph cited decisions from other circuits for this proposition, a reading of those opinions suggests that a court would not be prepared to dismiss Mungin's work assignment claims on this ground, provided, of course, that the court was persuaded that the firm had failed to give Mungin sophisticated bankruptcy work because of his race. For example, in *Kocsis v. Multi-Care Management, Inc., 97 F.3d 876 (6th Cir. 1996),* the court held that a plaintiff had failed to establish a prima facie case that she suffered a "materially adverse employment action" when she was transferred to a new position in which "she enjoyed the same (or a greater) rate of pay and benefits and her duties were not materially modified." *Id. at 886* (emphasis added). By contrast, the heart of Mungin's claim was that his duties were modified - from senior associate to de

facto junior associate - when the firm failed to give him sophisticated work. Moreover, no one disputes that Mungin's failure to gain access to sophisticated bankruptcy work substantially undermined his prestige at the firm, unlike the plaintiff in Kocsis who failed to prove that "she lost any prestige in her position because of her [new] working conditions," *id. at 886-87.* Given these differences, the argument that Mungin's change in working conditions (assuming, of course, the requisite level of proof) was not covered by Title VII simply because it was not accompanied by a reduction in pay or hours appears to be flatly inconsistent with statutory language that prohibits any change in the "terms, conditions, and privileges of employment" based on race, *42 U.S.C. 2000e-2*(a)(1) (1994). It is possible that the Mungin court's language about "intermediate" employment decisions was intended solely to bolster its conclusion that Mungin did not prove that the firm failed to give him sophisticated bankruptcy work because of his race. Nevertheless, the fact that Judge Randolph left the door open to extending the rule in Kocsis and other similar cases to circumstances like Mungin's is yet another indication of his dismissive hostility toward Mungin's claim. I am grateful to Christine Jolls for helping me decipher the court's reasoning on this issue, although I should add that Professor Jolls does not believe that any court would hold that Mungin's work assignment claim falls outside of the protection of Title VII.

n60. I borrow the phrase from Galanter and Palay's landmark book on the structure of large law firms. See Marc Galanter & Thomas Palay, Tournament of Lawyers: The Transformation of the Big Law Firm (1991). For my own take on this subject, see David B. Wilkins & 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).* Many of the ideas presented below are explored in more detail there.

n61. See David B. Wilkins & Mitu Gulati, Why Are There so Few Black Lawyers in Corporate Law Firms? An Institutional Analysis, *84 Cal. L. Rev. 493, 534 (1996).*

n62. See Wilkins & Gulati, supra note 60, at 1678-80.

n63. See Brendan O'Flaherty & Aloysius Siow, Up-or-Out Rules in the Market for Lawyers, 13 J. Lab. Econ. 709, 709-12 (1995) (reporting that performance as an associate is not highly correlated with performance as a partner); Wilkins & Gulati, supra note 60, at 1620-24.

n64. Dombroff's relationship with Patricia Gilmore, a former secretary in his old firm who went to law school at night, is a perfect case in point. Her fierce loyalty to him is exactly what one would expect given his promotion of her career (p. 39).

n65. See Cynthia Fuchs Epstein, Robert Saute, Bonnie Oglensky & Martha Gever, Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession, *64 Fordham L. Rev. 291, 346-48 (1995)* (discussing the dangers of having only one mentor).

n66. See Monica C. Higgins & Nitin Nohria, The Side-Kick Effect: Mentoring Relationships and the Development of Social Capital, in Corporate Social Capital (R. Leenders & S. Gabbay eds., forthcoming 1999).

n67. See Ann Davis, Big Jump in Minority Associates, But ..., Nat'l L.J., Apr. 29, 1996, at A1 (reporting that black lawyers constituted 2.4% of all lawyers in the nation's 250 largest law firms in 1996).

n68. See Wilkins & Gulati, supra note 60, at 1665-73.

n69. See *Mungin v. Katten Muchin & Zavis, 116 F.3d 1549, 1558 (D.C. Cir. 1997)* (Edwards, J., concurring in part and dissenting in part).

n70. See Galanter & Palay, supra note 60, at 62-65 (reporting that "managing partners at many firms speak openly of their expectations that no more than 10% of any incoming class eventually will make partner" (alteration in original) (quoting Lee Ann Bellon, Southeast Boasts an Expanding Legal Community, Nat'l L.J., Jan. 18, 1988, at 19, 19-20)); see also National Association of Law Placement, Keeping the Keepers: Strategies for Associate Retention in Times of Attrition 56 (1998) (reporting that 77.2% of all associates leave their firms by the end of the eighth year).

n71. See Wilkins & Gulati, supra note 61, at 537-42.

n72. See id. at 540-41 (referring to this phenomenon as "flatlining").

n73. See *Mungin, 116 F.3d at 1557.*

n74. Wilkins & Gulati, supra note 61, at 541.

n75. Although the disproportionately high turnover rates among black lawyers in large law firms provide strong evidence that in the aggregate they are not gaining access to the training track, the small number of blacks at any particular firm makes it difficult to establish this pattern for any specific firm. See generally Ramona L. Paetzold, Problems with Statistical Significance in Employment Discrimination Litigation, *26 New Eng. L. Rev. 395 (1991)* (criticizing hypothesis testing as a statistical tool in employment discrimination).

n76. See *Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-13 (1977).*

n77. See, e.g., Coleman, supra note 10 (arguing that Mungin had "no reasonable basis to expect Katten Muchin to make him a partner" and that the principle lesson of the book is that all associates should "beware of the bargain they make with the Devil"); Lufrano, supra note 14, 14, at 6 (suggesting that Mungin's attempt to succeed by "following the rules" was destined to fail because "the rules about how to make partner ... say hard work alone is not enough" (internal quotation marks omitted)); Richard Willing, The Good Black and the Career That Went Awry, USA Today, Jan. 21, 1999, available in *1999 WL 6832236* (concluding that while Barrett attributes Mungin's problems to "reckless, indifferent affirmative action," others will argue "that Mungin's willingness to shift blame for his problem to his employers is an argument against affirmative-action hiring itself").

n78. Patrick Schiltz has been the most persistent chronicler of the misery of life at contemporary elite law firms. See, e.g., 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);* Patrick J. Schiltz, On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, *52 Vand. L. Rev. 871* (forthcoming 1999).

n79. Hochschild, supra note 20, at 18 (quoting President Clinton).

n80. One cannot help but note a certain irony in Barrett's position. According to Mungin, it was Barrett, not Mungin, who insisted on writing this book. See Coyle, supra note 16, at A15. Although the case itself would surely have made Mungin famous in legal circles for his allegations of race discrimination, the blizzard of publicity that has surrounded the book will undoubtedly do more to link Mungin to his race than simply prosecuting a lawsuit ever could. Moreover, this publicity rebounds almost exclusively to Barrett's benefit because Mungin, according to the book's acknowledgments, received no revenues from the sale of the book. In fairness, however, it should be noted that despite his initial reservations about publicity, Mungin has been an active participant in much of the publicity surrounding the book.

n81. Martin Luther King, Jr., I Have a Dream, in I Have a Dream: Writings and Speeches that Changed the World 101, 104 (James Melvin Washington ed., 1992).

n82. I leave for another day the question whether it is possible to imagine the United States as ever becoming a society in which race (or something that operates like race) is no longer relevant to the life chances of its citizens.

n83. See Amy Gutmann, Responding to Racial Injustice, in Color Conscious: The Political Morality of Race 106, 108-10 (K.A. Appiah & Amy Gutmann eds., 1996).

n84. See, e.g., David B. Wilkins, Do Clients Have Ethical Obligations to Lawyers? Some Lessons From the Diversity Wars, *11 Geo. J. Legal Ethics 855 (1998)* [hereinafter Wilkins, Client Ethics]; David B. Wilkins, Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms, 2 Hofstra Legal Inst. 3401 (forthcoming 1999) [hereinafter Wilkins, Partners Without Power]; Wilkins & Gulati, supra note 61.

n85. Given his law school record, it is possible that Mungin did receive a certain amount of preferential treatment in obtaining his first job. Even this seems doubtful, however, given his solid (if not distinguished) record, his strong personal qualities (including his military service and knowledge of Russian), and the fact that he was going to a relatively small Houston law firm that, in Barrett's words, was "eager" to hire Harvard Law students. More important, how Mungin got his first job is, like his law school grades, irrelevant to the question whether he was qualified for his job at Katten Muchin.

n86. Barrett's careful and detached reporting reveals that Mungin had some blemishes on his post-law school record, most notably "coasting" while at Weil Gotshal (p. 85). However, Katten Muchin was not in a position to know about this relatively minor problem when it hired Mungin. Dombroff, by his own admission, did not even bother to check Mungin's references (p. 13). If he had, he probably would not have learned about Mungin's "coasting." Firms have little incentive to spread negative information about their former associates who one day may turn into potential clients and, in any event, are no longer their problem. Thus, hiring firms must inevitably make lateral decisions on easily observable information, such as where a potential associate hire has worked and what kind of projects he or she has completed. This is one of the reasons that firms tend to pay laterals less money (at least initially) than homegrown associates.

n87. See Donna Gill, Lawyers of Color: Encouraging Diversity, Chi. Law., July 1992, at 1, available in Westlaw, 7/92 Chicago Lawyer 1 (quoting a black partner in a Chicago law firm as stating: "Minorities don't come in with [a] presumption of competence... They come in having to prove themselves.").

n88. Michael Selmi, Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate, *42 UCLA L. Rev. 1251, 1285 (1995).*

n89. The scare quotes are appropriate because partners - even equity partners - in elite firms no longer have the security of tenure.

n90. See generally Wilkins, Client Ethics, supra note 84 (discussing this issue at some length).

n91. Indeed, in presenting how Abbey Hairston and Michelle Roberts, the black lawyers who represented Mungin and the firm respectively, coped with their roles in the case both during and after the trial, the book provides a fascinating perspective on how black lawyers navigate the complex intersection between their racial identity and their professional role in situations in which their race will necessarily be a part of the case. My own take on this important and complex topic is presented elsewhere. See David B. Wilkins, Beyond "Bleached Out" Professionalism: Defining Professional Responsibility for Real Professionals, in Ethics in Practice (Deborah H. Rhode ed., forthcoming 1999) [hereinafter Wilkins, Beyond "Bleached Out" Professionalism]; David B. Wilkins, Identities and Roles: Race, Recognition, and Professional Responsibility, *57 Md. L. Rev. 1502 (1998)* [hereinafter Wilkins, Identities and Roles]; David B. Wilkins, Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?, *63 Geo. Wash. L. Rev. 1030 (1995).* I return to Mungin's approach to integrating identity and role below.

n92. Barrett alludes to an incident that suggests that client concerns may have made Mungin's race a valuable asset earlier in his career. As Barrett indicates, Powell Goldstein brought Mungin to Washington to do FDIC work (p. 93). What Barrett does not mention is that this move was probably made in response to that agency's (and its successor's) statutory mandate to hire minority lawyers. See Jose O. Seda, Hiring of Women and Minority Lawyers for Bank and Thrift Bailout Work Is the Law, Bank & Thrift L. Bull., Aug. 1992, at 1, cited in Wilkins & Gulati, supra note 61, at 597-98 n.400.

n93. For an explanation of the importance of visible, rankable signals, see Wilkins & Gulati, supra note 61, at 552-54.

n94. See Robert Schmidt, Minority Lawyers and the D.C. Firm: Race, Culture, and Sexism Make Integration Difficult at Law Offices, Legal Times, Sept. 26, 1994, at S42 ("Observers agree, however, that no matter how aggressively a firm recruits minority attorneys, if it doesn't have a "critical mass' of minority partners, minority law students or lateral associates will likely look elsewhere.").

n95. See Rosabeth Moss Kanter, Men and Women of the Corporation 210, 212 (1977).

n96. See Eric Herman, Committee Targets Retention of Minorities at Big Law Firms, Chi. Law., May 1995, at 13 (quoting a minority associate as observing that when whites "make a mistake, the reviewing attorney might have said, "Well, maybe my instructions weren't clear enough[,' b]ut with a minority ... "suddenly that person is incompetent"').

n97. Barrett adopts Shelby Steele's terminology to describe Mungin as a "bargainer" who seeks acceptance from whites by confirming their "racial innocence," as opposed to a "challenger" who requires whites to "prove" that they are innocent (p. 163). I return to Barrett's treatment of this distinction below. See infra pp. 1967-68.

n98. See Howard Schuman, Charlotte Steeh & Lawrence Bobo, Racial Attitudes in America 74 (1985) (reporting that virtually 100% of whites agree that blacks and whites should be able to compete for jobs equally).

n99. See, e.g., Paul M. Sniderman & Thomas Piazza, The Scar of Race 64-65 (1993) (reporting that "racial stereotyping [is] widely diffused, and ... far from uncommon"); Ronald B. Mincy, The Urban Institute Audit Studies: Their Research and Policy Context, in Clear and Convincing Evidence: Measurement of Discrimination in America 165, 171-75 (Michael Fix & Raymond J. Struyk eds., 1993) (documenting instances in which employers treat blacks differently than similarly situated whites); see also Clark Nardinelli & Curtis Simon, Customer Racial Discrimination in the Market for Memorabilia: The Case of Baseball, 105 Q.J. Econ. 575 (1990) (documenting a race-based premium for baseball cards of white players).

n100. See Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, *39 Stan. L. Rev. 317, 339-44 (1987)* (offering examples of unconscious racism).

n101. Daniel G. Lugo, Don't Believe the Hype: Affirmative Action in Large Law Firms, *11 Law & Ineq. J. 615, 626 n.48 (1993)* (describing the incident, which occurred in the mid-1980s).

n102. I explore the distinction between "partners" and "partners with power," in Wilkins, Partners Without Power, supra note 84.

n103. I am grateful to Devon Carbado and Mitu Gulati for suggesting this way of characterizing Mungin's strategy.

n104. Coyle, supra note 16, at A15.

n105. See Barrett, supra note 9, at B1.

n106. See id.

n107. See Hochschild, supra note 20, at 60-63 (documenting that whites increasingly believe that blacks rarely experience discrimination).

n108. See David A. Thomas, Racial Dynamics in Cross-race Developmental Relationships, 38 Admin. Sci. Q. 169, 189-90 (1993) (reporting that whites and blacks who openly discuss racial issues are better able to help blacks cope with racial issues in the workplace, and that such behavior may be more consistent with the "natural" progression of blacks from an assimilationist perspective to one that puts a positive value on their racial identity, than cross racial mentoring relationships where race is suppressed).

n109. Here Barrett is quoting Shelby Steele.

n110. See, e.g., Eugene Kane, "Good Black' Puts Race Card on Table, Mil. J. Sentinel, Jan. 31, 1999, available in *1999 WL 7656585* (describing Mungin as a "man who never played the race card until becoming con-

vinced it was the only game left in town"); Topping, supra note 9, at 6E-7E (reporting that "race was never an issue in Mungin's life[, and his] family was not one that played the race card").

n111. See Langston Hughes, Harlem, in The Norton Anthology of Poetry 1069 (Alexander W. Allison et al. eds., 3d ed. 1983).

What happens to a dream deferred?

Does it dry up

like a raisin in the sun?

Or fester like a sore -

And then run?

Does it stink like rotten meat?

Or crust and sugar over -

like a syrupy sweet?

Maybe it just sags

like a heavy load.

Or does it explode?

Id.

n112. For a more detailed development of this critique, see David B. Wilkins, The Professional Responsibility of Professional Schools is to Study and Teach About the Profession, J. Legal Educ. (forthcoming 1999).

n113. See Sanford Levinson, Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity, *14 Cardozo L. Rev. 1577, 1578-79 (1993)* (defining "bleached out" professionalism as creating "purely fungible" lawyers in which "such apparent aspects of the self as one's race, gender, religion, or ethnic background would become irrelevant to defining one's capacities as a lawyer"). For a discussion of the importance of bleached-out professionalism in the prevailing ideology of legal practice, see Wilkins, Identities and Roles, supra note 91, at 1511-17.

n114. As Elijah Anderson warns, if the black lawyer puts his professional role first, he "risks his status as an authentic black man - and in the race man ideology, to be an authentic black man is to put the black race first." Elijah Anderson, The Precarious Balance: Race Man or Sellout?, in The Darden Dilemma 114, 128 (Ellis Cose ed., 1997).

n115. I discuss the reasons why it is important to have black lawyers in corporate law firms in David B. Wilkins, Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers, *45 Stan. L. Rev. 1981 (1993).*

n116. See, e.g., Wilkins, Beyond "Bleached Out" Professionalism, supra note 91; Wilkins, Identities and Roles, supra note 91.

n117. *347 U.S. 483 (1954).*

n118. See National Association of Law Placement, supra note 70, at 56 (reporting that almost ten percent of all associates leave their firms within the first year, and over 40 percent leave by the end of the third year).

n119. For example, Shearman & Sterling has just agreed to pay associates a $ 50,000 bonus if they agree to stay through their fourth year. See Richard B. Schmitt, From Cash to Travel, New Lures for Burned Out Lawyers, Wall St. J., Feb. 2, 1999, at B1.

n120. See generally David A. Thomas & John J. Gabarro, Breaking Through: The Making of Minority Executives in Corporate America chs. 8, 10 (forthcoming 1999) (describing the role of formalized minority networks and minority mentors in the professional development of minority executives).

n121. For an example of what can be accomplished with case studies that is significant for both its excellence and its uniqueness, see Philip B. Heymann & Lance Liebman, The Social Responsibilities of Lawyers: Case Studies (1988).

n122. Coyle, supra note 16, at A14 (quoting Lawrence Mungin) (internal quotation marks omitted).