BOOK REVIEW

BIGLAW'S RACE PROBLEM

The Black Ceiling: How Race Still Matters in the Elite Workplace
By Kevin Woodson. Chicago: The University of Chicago Press, 2023.
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Ever since the 1970s when BigLaw firms began to hire Black lawyers into their associate ranks, these firms have wrestled with problems in both recruiting and retaining Black associates. During the ensuing decades, BigLaw firms have minimally increased the low numbers of Black attorneys who have become partners, particularly equity partners, within their organizations. Numerous scholars have explored how racial bias and discrimination, both within BigLaw firms and greater society, have contributed to such failures in the recruitment, retention, and promotion of Black lawyers. In his new book The Black Ceiling: How Race Still Matters in the Elite Workplace*, Professor Kevin Woodson, a Black law professor and sociologist who once worked as an associate at a large, elite law firm, offers his own theory about how "racial discomfort," and specifically "social alienation" and "stigma anxiety" related to race, have functioned together to create and maintain racial disparities in BigLaw attrition and partnership. This Book Review examines Woodson's insights against the backdrop of recent high-profile employment discrimination litigation embroiling BigLaw firms across the*

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country, focusing on one recent case, Cardwell v. Davis Polk & Wardwell LLP*, in which the plaintiff, a Black former associate, alleged he had been fired in retaliation for raising concerns about racial discrimination at his law firm. The Book Review extends Woodson's research by identifying and assessing innovative firm- and industry-wide policies that can mitigate the impact of racial discomfort on Black associates' prospects for thriving in and attaining partnership at BigLaw firms.*

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"Elite firms are not raceless organizations."
— Professor Kevin Woodson.[1]

INTRODUCTION

In 2001, *The American Lawyer* published a devastating critique of large law firms[2] in an article entitled *Losing the Race*.[3] The article chronicled the longstanding failures of large law firms in retaining Black[4] associates and

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1. Kevin Woodson, The Black Ceiling: How Race Still Matters in the Elite Workplace 17 (2023) [hereinafter Woodson, The Black Ceiling].

2. This Book Review uses the terms "large law firms" and "BigLaw firms" interchangeably. "Large law firms" refers to law firms with 100-plus attorneys. "The term 'Big Law' refers to the nation's very large firms, as defined by the number of lawyers, size of revenue and number of offices." Ashley Merryman, What Is 'Big Law?', U.S. News & World Rep. (Sept. 7, 2023), https://law.usnews.com/law-firms/advice/articles/what-is-big-law (on file with the *Columbia Law Review*).

3. Alan Jenkins, Losing the Race, Law.com (Oct. 3, 2001), https://www.law.com/almID/900005523745/ (on file with the *Columbia Law Review*).

4. Throughout this Book Review, the authors capitalize the word "Black" when they use the term in reference to a racialized group. As Professor Kimberlé Crenshaw has explained, using the uppercase "B" reflects the "view that Black[] [people], like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1332 n.2 (1988); see also W. E. Burghardt Du Bois, That Capital "N", 11 The Crisis 184, 184 (1916) (contending that the "N" in the word "Negro" was always capitalized until defenders of slavery began to use the lowercase "n" as a marker of Black people's status as property and as an insult to Black people); cf. Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 Signs 515, 516 (1982) (asserting that "Black" cannot be reduced to "merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity, the meaning of which becomes specifically stigmatic and/or glorious and/or ordinary under specific social conditions"). Additionally, the authors find that "[i]t is more convenient to invoke the terminological differentiation between [B]lack and white than say, between *African-American* and *Northern European-American*, which would be necessary to maintain semantic symmetry between the two typologies." Alex M. Johnson, Jr., Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties, 1992 U. Ill. L. Rev. 1043, 1044 n.4.

Here, as elsewhere, the authors use the words "Black people," rather than the words "African American people," to refer to the entire group of people who identify as being Black in the United States because it is more inclusive. In this Book Review, "African American" specifically refers to direct descendants of enslaved Africans who were forcibly brought to the United States during the slave trade, whereas "Black people" refers to a broader group, including many people and communities without a direct connection to chattel slavery in the United States. See Cydney Adams, Not All Black People Are African American. Here's the Difference., CBS News (June 18, 2020), https://www.cbsnews.com/news/not-all-black-people-are-african-american-what-is-the-difference/ [https://perma.cc/ENS9-MV6A] (describing "the adoption of the term African American as a 'very deliberate move on the part of [B]lack communities to signify our American-ness, but also signify this African heritage'" (quoting Professor Celeste Watkins-Hayes)). These distinctions are important because, at times, there are intersectional,

successfully mentoring them into and through the partnership ranks.[5] The article's author was Alan Jenkins, a Harvard-educated Black attorney who served as a law clerk for both U.S. District Court Judge Robert L. Carter and U.S. Supreme Court Justice Harry Blackmun.[6] Jenkins filtered his critique through an exploration of a cohort of Black associates at one of the nation's most prestigious law firms, Cleary Gottlieb Steen & Hamilton, from 1989 to 1996.[7] Jenkins focused on Cleary precisely because the firm had been a leader in taking the first important step toward addressing the "race problem" in large law firms: hiring a critical mass—meaning more than mere token numbers[8]

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intraracial differences in how these different groups experience racial subordination and discrimination. See Angela Onwuachi-Willig, The Admission of Legacy Blacks, 60 Vand. L. Rev. 1141, 1141–60, 1165–1204 (2007) (detailing some of those differences, with a specific focus on access and admission to elite universities and colleges). That said, the authors consider "Black" to be "a better default" term to use when generally discussing racism or anti-Black racism because use of the term "Black people" recognizes that not every Black person who lives in the United States is a citizen of the United States by birth or naturalization and thus cannot access the benefits of citizenship. See Adams, supra. Additionally, not every Black person in the United States identifies as a descendant from Africa. See id. ("African American technically isn't even what I am . . . . I'm a Jamaican-born [B]lack person but I have taken on this label of African American because of where I live." (internal quotation marks omitted) (quoting Darien LaBeach)).

Several parts of this Book Review discuss the historical presence of Black people prior to the first influx of Black immigrants in the 1960s and 1970s, so the authors will sometimes use the term "African American" when the broader term "Black" is not needed. See Anthony V. Alfieri & Angela Onwuachi-Willig, Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance, 122 Yale L.J. 1484, 1488 n.5 (2013) (book review) ("The year 1965 thus marked the beginning of a much more diverse, far less European immigrant stream into this country." (internal quotation marks omitted) (quoting Kevin R. Johnson, The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium, 49 UCLA L. Rev. 1481, 1484 (2002))). For an argument framing the experience of Black enslaved people—while clearly marked by the forced, vicious, and deadly trafficking from their native lands during the slave trade—as a type of "immigrant[] [experience] in the sense that they arrived from the foreign shores of Africa or the Caribbean, often without knowledge of the language and customs," see Lolita K. Buckner Inniss, Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness, 49 DePaul L. Rev. 85, 90–94 (1999).

5. See Jenkins, supra note 3 (showing that the percentage of Black associates and partners is lower than the percentage of Black law students and exploring potential causes for this discrepancy).

6. Alan Jenkins, Harv. L. Sch., https://hls.harvard.edu/faculty/alan-jenkins [https://perma.cc/PTF2-R3B4] (last visited Oct. 26, 2024).

7. Jenkins, supra note 3.

8. A critical mass is established when an underrepresented group is represented in high enough numbers that its members are less likely to feel isolated within an environment, are more likely to feel comfortable participating in the institution's culture, and do not feel like the sole representative of their race. See Grutter v. Bollinger, 539 U.S. 306, 318–19 (2003) (discussing critical mass in the context of higher education); see also Vinay Harpalani, Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions, 15 U. Pa. J. Const. L. 463, 468 (2012) (noting that "a 'critical mass' of minority students refers not only to numerical representation of racial groups, but also to the diversity

—of Black associates in its New York City office.[9] Cleary's New York office went from employing only one Black associate in 1989, to twenty-three Black associates in 1992, to its then-peak of thirty Black associates in 1996.[10] (Over the same time period, the firm also more than doubled its number of Latinx[11] attorneys from six to fourteen and more than tripled its

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of viewpoints and experiences within each group, which contribute to the educational benefits of diversity articulated in *Grutter*"). The term "token numbers" refers to the numerical representation of a group that is not only miniscule in size and scale but also merely symbolic. One author proclaimed that "tokenism" is "the practice of doing something (such as hiring a person who belongs to a minority group) only to prevent criticism and give the appearance that people are being treated fairly." See Kara Sherrer, What Is Tokenism, and Why Does It Matter in the Workplace?, Vand. Univ. Owen Graduate Sch. of Mgmt. (Feb. 26, 2018), https://business.vanderbilt.edu/news/2018/02/26/tokenism-in-the-workplace [https://perma.cc/FPQ2-ZGVB] (internal quotation marks omitted) (quoting Tokenism, The Brittanica Dictionary, https://www.britannica.com/dictionary/tokenism [https://perma.cc/3Z5E-2LTR] (last visited Jan. 28, 2025)) (misattributed quotation); see also Margaret M. Russell, Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice, 95 Mich. L. Rev. 766, 768–72 (1997) (discussing the costs of being a "token" for Black attorneys).

9. See Jenkins, supra note 3 (describing Cleary's aggressive recruitment strategy and growth, and quoting one of its Black associates during the 1989–1996 period as stating, "There were enough [B]lack associates at Cleary that . . . we didn't even get together that much" (second alteration in original) (internal quotation marks omitted) (quoting Professor Denise Morgan)).

10. Id. The Vault Law Firm Diversity Survey reported that there were twenty-seven Black associates (eight men, nineteen women, and zero nonbinary individuals) at Cleary's U.S. offices in 2023. 2023 Vault Law Diversity Survey, Cleary Gottlieb Stein & Hamilton 4, https://media2.vault.com/14349285/cleary-gottlieb-with-ad.pdf [https://perma.cc/8S6L-LS5X] (last visited Oct. 26, 2024).

11. This Book Review follows the more widespread practice today of using the term "Latinx" to refer to individuals with ancestral or direct heritage in Latin America. For examples of recent scholarship that also use the term Latinx, see, e.g., Kevin R. Johnson, Systemic Racism in the U.S. Immigration Laws, 97 Ind. L.J. 1455, 1470–72 (2022); Ediberto Román & Ernesto Sagás, Rhetoric and the Creation of Hysteria, 107 Cornell L. Rev. Online 188, 216–17 (2022), https://live-cornell-law-review.pantheonsite.io/wp-content/uploads/2022/12/Roman-Sagas-final.pdf [https://perma.cc/BH8K-ZYWR]; Jasmine B. Gonzales Rose, Color-Blind but Not Color-Deaf: Accent Discrimination in Jury Selection, 44 N.Y.U. Rev. L. & Soc. Change 309, 312 n.19 (2020). The authors use the term "Latinx" instead of "Hispanic" because the term "Hispanic" "refer[s] to people from or with a heritage rooted in Spanish-speaking Latin American countries or Spain." Latine vs. Latinx: How and Why They're Used, Dictionary.com (Sept. 26, 2022), https://www.dictionary.com/e/latine-vs-latinx [https://perma.cc/5B59-NWW4]; see also Bos. Univ. Ctr. for Antiracist Rsch., Comment Letter on Notice of Initial Proposals for Updating OMB's Race and Ethnicity Statistical Standards 4 n.15 (Apr. 25, 2023), https://www.bu.edu/antiracism-center/files/2023/04/2023.4.25-BU-CAR-Comment-on-Proposals-for-Updating-Race-and-Ethnicity-Statistical-Standards.pdf (on file with the *Columbia Law Review*) ("'Hispanic' has a colonial history. The term de-emphasizes Latino/a/e connection to the Americas and emphasizes Spanish heritage over Indigenous and African heritage. 'Hispanic' also excludes the population descended from Latin America who do not share Spanish as a heritage language, but who may have similar racialized experiences . . . ."). The authors also prefer to use the term "Latinx" because it is more "inclusive of [people from] countries where Spanish is not the most widely spoken language, such as Brazil." Latine vs. Latinx: How and

number of Asian attorneys from seven to twenty-four.)[12] But by 2001, the firm's number of Black associates had been cut in half to fifteen, with none of those fifteen Black associates having come from the 1989-to-1996 *Losing the Race* cohort.[13]

Not surprisingly, while highlighting Cleary's status as "a leader in diversity" among large law firms, a 2000 issue of the *Vault Guide to the Top 50 Law Firms* registered Black associate attrition and the small number of Black partners as two key problems for the firm.[14] This excerpt read: "[S]ome associates believe that ethnic minorities, particularly African-Americans, leave in disproportionately high numbers. 'I think the firm works very hard on this. I can see, though, why African-American associates find it dismaying that there are no African-American partners.'"[15]

But, nearly twenty years later in 2018, comments on Cleary's diversity efforts in that year's *Vault Guide* showed improvement. For instance, one comment read:

> [Cleary] does a fantastic job at recruiting women and minorities, however at the top level the needle has moved very little, with few women or minorities being promoted. I do believe that this is a genuine issue of concern to many in the partnership, but there is no clear sense of how to fix this issue.[16]

By 2024, Cleary remained steady in its commitment to and upward trajectory in advancing diversity and inclusion for attorneys of color on its teams. This time, comments in the *Vault Guide* stressed the strides that the firm had taken to advance diversity efforts and to communicate the

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Why They're Used, supra. Furthermore, the authors use the term "Latinx" instead of "Latino" and "Latina," which are the masculine and feminine forms of the word, to avoid gendered language when our intention is to be gender-inclusive. See id. Although the term "Latinx" has no Spanish pronunciation and another term growing in favor, "Latine," does, the authors use the term "Latinx" because it is currently the more commonly used term in legal scholarship; thus, it is more readily recognizable as an intentional use of a gender-neutral term. The authors use the term "Latinx" "here with the awareness that [it] may be imperfect." See Bos. Univ. Ctr. for Antiracist Rsch., supra, at 4 n.15.

12. Jenkins, supra note 3. In 1996, of its 513 attorneys, Cleary had 0 Black partners, 30 Black associates, 2 Latinx partners, 12 Latinx associates, 3 Asian partners, and 21 Asian associates. There were no Native American partners or associates. See Ann Davis, Big Jump in Minority Associates, But; Significant Attrition in Their Later Years Has Left Partnership Ranks Almost as White as Five Years Ago, Nat'l L.J. (Apr. 29, 1996) (on file with the *Columbia Law Review*).

13. Jenkins, supra note 3.

14. See Steve Gordon, Hussam Hamadeh, Mark Oldman, Douglas Cantor, Catherine Cugell, Michael Erman, Marcy Lerner & Chris Prior, Vault.com Guide to the Top 50 Law Firms 153 (3d ed. 2000).

15. Id. (quoting one contact at Cleary). Although the quote notes that there were no Black partners at Cleary, this assertion was incorrect. By 2000, there was at least one Black partner at Cleary: Carmen Amalia Corrales. See infra notes 80–84 and accompanying text.

16. Vault Guide to the Top 100 Law Firms: More Than 17,000 Associates Rank the Top Firms 166 (Matthew J. Moody ed., 2018) (internal quotation marks omitted).

importance of diversity to all of its constituents, both internally and externally. For example, one respondent stated:

> The firm offers billable credit for all participation in affinity groups and other firm citizenship committees and events. Participation is encouraged. The firm is open about diversity being a clear goal and is transparent about the processes that they are taking to achieve those goals, as well as how they are measured. While the law as a whole is not particularly diverse, it is clear that the firm cares a great deal about enhancing diversity and doing so intentionally and effectively.[17]

Indeed, one woman of color associate remarked the following in the *Vault Guide*: "I am a minority woman of color and require particular religious accommodation. Cleary is phenomenal at creating a space where I can work and thrive."[18] Critically, Cleary was named a top twenty firm in *The American Lawyer*'s 2024 Diversity Scorecard, with special recognition for being third in LGBTQ+ representation and eighteenth in minority representation.[19]

Still, even Cleary concedes that it must do more work to achieve equity and inclusion for underrepresented attorneys, including attorneys of color, in its practices.[20] The firm's storied battle with Black associate attrition and low Black partnership numbers is not unique among large law firms. A decades-long trail of newspaper headlines reveals the persistent challenges that Black associates and partners encounter in large law firms: "Big Jump in Minority Associates, But; Significant Attrition in Their Later Years Has Left Partnership Ranks Almost as White as Five Years

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17. Cleary Gottlieb Steen & Hamilton LLP Associate Reviews: Inclusion Efforts, Vault, https://vault.com/company-profiles/law/cleary-gottlieb-steen-hamilton-llp [https://perma.cc/SB3U-KT7Y] (last visited Oct. 27, 2024) (internal quotation marks omitted).

18. Id. (internal quotation marks omitted).

19. Cleary Named a Top 20 Firm in 2024 Am Law Diversity Scorecard, Cleary Gottlieb (June 25, 2024), https://www.clearygottlieb.com/news-and-insights/news-listing/cleary-named-a-top-20-firm-in-2024-am-law-diversity-scorecard [https://perma.cc/D7HW-HMN6]; see also The 2024 Diversity Scorecard: Minority Representation, Am. Law. (June 25, 2024), https://www.law.com/americanlawyer/2024/06/25/the-2024-diversity-scorecard/?kw=The%202024%20Diversity%20Scorecard%3A%20Minority%20Representation (on file with the *Columbia Law Review*).

20. See Comm. on Diversity Issues, Cleary Gottlieb, 2011 Annual Report 27, https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/cleary-gottlieb-committee-on-diversity-issues-annual-report.pdf [https://perma.cc/2UNH-EATD] (last visited Nov. 2, 2024) (describing the importance of diversity, offering the firm's mission statement on diversity, detailing its goals "to develop and implement new policies that further promote a diverse workplace," and declaring such work must be done on "a consistent basis throughout each year").

Ago" (1996);[21] "Black Lawyers: Lonely at the Bottom" (1999);[22] "Lawyers Debate Why Blacks Lag at Major Firms" (2006);[23] "Many Black Lawyers Navigate a Rocky, Lonely Road to Partner" (2015);[24] "Why They Left: Black Lawyers on Why Big Law Can't Keep Them Around"(2020);[25] and "Why the Blackout in Philly's Big Law" (2024).[26]

Ultimately, two persistent questions continue to plague large law firms when it comes to racial representation and the partnership successes of attorneys of color. First, what exactly is causing the disproportionate retention rates as well as the low rates of partnership attainment among attorneys of color, specifically Black attorneys, at large law firms? Second, what can be done to stem these critical problems?

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21. Davis, supra note 12 (detailing how the both the numbers and percentages of people of color in partnership ranks at law firms remain low despite growth in the number of people of color at the associate ranks).

22. Michael D. Goldhaber, Black Lawyers: Lonely at the Bottom, Nat'l L.J. (Apr. 12, 1999) (on file with the *Columbia Law Review*) (describing the high attrition rate of Black associates at law firms and the challenges that they face due to partners' disparate treatment of them and the small number of Black associates).

23. Adam Liptak, Lawyers Debate Why Blacks Lag at Major Firms, N.Y. Times (Nov. 29, 2006), http://www.nytimes.com/2006/11/29/us/29diverse.html (on file with the *Columbia Law Review*) (noting that Black associates "remain far less likely to stay at the firms or to make partner than their white counterparts" and detailing a debate over Professor Richard Sander's then-new research, which attributed the disproportionate attrition rate of Black associates to the fact that their law school grades were, on average, lower than those of white associates).

24. Elizabeth Olson, Many Black Lawyers Navigate a Rocky, Lonely Road to Partner, N.Y. Times: Dealbook (Aug. 17, 2015), https://www.nytimes.com/2015/08/18/business/dealbook/many-black-lawyers-navigate-a-rocky-lonely-road-to-partner.html (on file with the *Columbia Law Review*) (detailing how the lack of prior exposure to the corporate world, the lack of mentorship from white partners, and the conscious and unconscious racial bias that Black associates face in law firms, plus other factors, contribute to the low numbers of Black partners in large law firms).

25. Dylan Jackson, Why They Left: Black Lawyers on Why Big Law Can't Keep Them Around, Am. Law. (Aug. 24, 2020), https://www.law.com/americanlawyer/2020/08/24/why-they-left-black-lawyers-on-why-big-law-cant-keep-them-around/ (on file with the *Columbia Law Review*) (highlighting lack of mentorship, cultural isolation, and difficulties in developing and maintaining a book of business as major reasons why Black associates leave their private law firms in droves).

26. Christina Kristofic, Tribune Special Report: Why the Blackout in Philly's Big Law, Phila. Trib. (June 17, 2024), https://www.phillytrib.com/news/local_news/tribune-special-report-why-the-blackout-in-phillys-big-law/article_c1f2f72f-38e1-5fd6-af4a-0688842656d6.html [https://perma.cc/6V85-TRBW] (detailing numerous reasons, including disparate treatment by white partners in assignments and mentorship, loneliness and isolation, lack of access to information, and the imposition of negative racial stereotypes on them, as accountable for the near-absence of Black partners (and associates) in Philadelphia's law firms).

In his important new book, *The Black Ceiling: How Race Still Matters in the Elite Workplace*,[27] Professor Kevin Woodson endeavors to answer these questions as they relate to the experiences of Black associates. To do so, he draws from 110 interviews that he conducted with "high-status" Black workers in "elite" professional service firms, including seventy-five law firm attorneys, to uncover the sources of "Black disadvantage at elite firms" that have contributed "to a nearly impermeable 'Black ceiling'"[28] and to offer an in-depth analysis of the interrelationship between race, racism, firm culture,[29] organizational leadership,[30] and institutional discrimination.[31]

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27. Woodson, The Black Ceiling, supra note 1. For earlier writings laying the groundwork for Woodson's study, see generally Kevin Woodson, Derivative Racial Discrimination, 12 Stan. J. C.R. & C.L. 335 (2016) (introducing the concept of "derivative racial discrimination," explaining its adverse consequences on Black employees at predominantly white firms, and detailing how it might be addressed by Title VII of the 1964 Civil Rights Act); Kevin Woodson, Human Capital Discrimination, Law Firm Inequality, and the Limits of Title VII, 38 Cardozo L. Rev. 183 (2016) (discussing how large, predominantly white law firms operate as sites of "human capital discrimination, [a] process through which unequal access to quality work assignments limits the careers of [B]lack associates and reinforces racial inequality"); Kevin Woodson, Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms, 83 Fordham L. Rev. 2557 (2015) (explaining how cultural homophily, or "the tendency of people to develop rapport and relationships with others on the basis of shared interests and experiences, profoundly and often determinatively disadvantages many [B]lack attorneys in America's largest law firms" (footnote omitted)).

28. Woodson, The Black Ceiling, supra note 1, at 4, 13–14.

29. See Debra Pickett, 5 Ways Traditional Law Firm Culture Burdens Lawyers of Color, Nat'l L. Rev. (Oct. 10, 2019), https://natlawreview.com/article/5-ways-traditional-law-firm-culture-burdens-lawyers-color [https://perma.cc/HG7U-EYKC] (noting, for example, how a law firm's reliance on organic or natural development of mentoring relationships between partners and associates can breed racial inequities between the experiences of Black and white associates).

30. See Amanda Robert, Law Firm Leaders Are Still Mostly White and Male, ABA Diversity Survey Says, ABA J. (May 16, 2022), https://www.abajournal.com/web/article/law-firm-leaders-are-still-mostly-white-and-male-aba-diversity-survey-says [https://perma.cc/33DF-SCK9] (detailing the low percentages of partners of color at large law firms); Noam Scheiber & John Eligon, Elite Law Firm's All-White Partner Class Stirs Debate on Diversity, N.Y. Times (Jan. 17, 2019), https://www.nytimes.com/2019/01/27/us/paul-weiss-partner-diversity-law-firm.html (on file with the *Columbia Law Review*) (stating that there is a "broader pattern across big law: the share of partners who are women and people of color is much smaller than the number reflected in the ranks of associates, or those starting law school, not to mention the general population").

31. See Woodson, The Black Ceiling, supra note 1, at 13–14; see also Leonard M. Baynes, Falling Through the Cracks: Race and Corporate Law Firms, 77 St. John's L. Rev. 785, 796–834 (2003) (examining the challenges to battling racial discrimination against law firm partners given the case-by-case determinations of whether a partner plaintiff is an employee or not under Title VII); Tiffani N. Darden, The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory & the Institutional Analyses of Bias in Corporate Law Firms, 30 Berkeley J. Emp. & Lab. L. 85, 89–90 (2009) (detailing why the associate evaluation process is "an appropriate intervention point for realizing workplace equity in law firms"); Veronica Root, Retaining Color, 47 U. Mich. J.L. Reform 575, 577 (2014) (arguing that the attrition problem among associates of color requires a "change [in] the behavior of white males so that they work to instill more loyalty" to the

In his book, Woodson explains that the obstacles affecting the pathway to partnership for his Black professional subjects all involved one social dynamic that he called *racial discomfort*: "the unease that Black professionals experience in White-dominated workplaces because of the isolation and institutional discrimination they encounter,"[32] which is all encompassed within the "racial conditions" and persistent racial stratification of broader U.S. society. According to Woodson, such racial discomfort, which has cumulative, harmful impacts on the careers of Black attorneys at law firms, can be broken down into two categories: *social alienation* and *stigma anxiety*.[33] The first category, social alienation, includes Black associates' experiences with isolation, marginalization, and reduced access to social capital within their firms due to white partners' unspoken—and even unconscious—preference to work with and mentor associates "who share similar cultural and social tastes, interests, and experiences": in other words, associates who are nearly always other white people.[34] The second category, stigma anxiety, "refers to the uneasiness and trepidation that many Black professionals develop in situations where they recognize that they may be at risk of unfair treatment on the basis of race," a disparate burden that frequently causes Black professionals to engage in what Woodson calls *racial risk management* by adopting "self-protective [but often backfiring] behaviors to insulate themselves from possible mistreatment."[35]

This Book Review explores Woodson's theories and insights against the backdrop of recent high-profile employment discrimination litigation embroiling large law firms.[36] In particular, this Book Review interrogates whether (and how) Woodson's theories regarding social alienation and stigma anxiety are evidenced in the legal documents and proceedings of

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firm among non-white associates and offering ideas on how firms can incentivize white partners to inspire such loyalty); Eli Wald, BigLaw Identity Capital: Pink and Blue, Black and White, 83 Fordham L. Rev. 2509, 2513–14 (2015) (offering a new model for understanding associates' relationships with law firms "as complex transactions in which BigLaw and its lawyers exchange labor and various forms of capital—social, cultural, and identity"); David B. Wilkins & G. Mitu Gulati, Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis, 84 Calif. L. Rev. 493, 501–02 (1996) (arguing that the "underrepresentation [of Black attorneys in large law firms] is due in part to the way in which the structural characteristics of corporate firms shape the strategic choices of [B]lack lawyers").

32. Woodson, The Black Ceiling, supra note 1, at 4.

33. Id. at 5.

34. Id.

35. Id. at 5–6.

36. See, e.g., Judgment, Cardwell v. Davis Polk & Wardwell LLP, No. 1:19-cv-10256-GHW, (S.D.N.Y. Jan. 30, 2024), ECF No. 417 (dismissing the complaint because the jury "returned a verdict in favor of Defendants"); *Cardwell*, No. 1:19-cv-10256-GHW, 2023 WL 2049800 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (granting in part and denying in part defendants' motion for summary judgment on aiding and abetting, discrimination, and retaliation claims).

lawsuits chronicling the narratives told by attorneys who have sued large law firms for race discrimination on behalf of Black firm lawyers and the responses by attorneys who have defended large law firms.[37] The starting point for this examination is the recognition that large law firms' general "race problem" goes beyond incidents of ill intent and individual bias. As Woodson makes clear, the problems of high attrition rates and low partnership rates of Black attorneys at large law firms are much more multifaceted and nuanced than overt acts of explicit bias and harmful actions resulting from implicit bias.[38] Such problems are intertwined with, and fortified by, an unspoken white workplace culture and a baseline that neglects the role that racial comfort plays in career advancement, stagnation, or foundering in white spaces.[39] To top it off, the problems are consistently reinforced by longstanding, persistent and embedded racial narratives[40] about factors like Black incompetence and Black disinterest in

37. See Peter Brooks, Narrative Transactions—Does the Law Need a Narratology?, 18 Yale J.L. & Humans. 1, 11–13 (2006) (demonstrating how differing retellings of the facts among the opinions in a particular case are loaded with "point of view" on the "ways that things 'are supposed to happen'").

38. See Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 Duke L.J. 345, 360–62 (2007) ("[P]eople who display strong implicit biases are often not the same people who demonstrate strong explicit biases."); Nicole E. Negowetti, Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection, 15 Nev. L.J. 930, 936 (2015) ("Implicit biases are unconscious mental processes based on implicit attitudes or . . . stereotypes that are formed by one's life experiences and that lurk beneath the surface of the conscious. They are automatic; 'the characteristic in question . . . operates so quickly . . . that people have no time to deliberate.'" (footnote omitted) (quoting Christine Jolls & Cass R. Sunstein, The Law of Implicit Bias, 94 Calif. L. Rev. 969, 975 (2006))); see also Joan C. Williams, Marina Multhaup, Su Li & Rachel Korn, ABA & Minority Corp. Couns. Ass'n, You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession 7–10 (2018), https://biasinterrupters.org/wp-content/uploads/2024/05/You-Cant-Change-What-You-Cant-See-Executive-Summary.pdf [https://perma.cc/K2XJ-8BDU] (documenting "how implicit gender and racial bias . . . plays out in everyday interactions in legal workplaces and affects basic workplace processes such as hiring and compensation").

39. See Elijah Anderson, "The White Space", 1 Socio. Race & Ethnicity 10, 10 (2015) (describing "the white space" in part as "overwhelmingly white neighborhoods, restaurants, schools, universities, workplaces, churches and other associations, courthouses, and cemeteries . . . that reinforce[] a normative sensibility in settings in which [B]lack people are . . . not expected, or marginalized when present").

40. See Mario L. Barnes, Black Women's Stories and the Criminal Law: Restating the Power of Narrative, 39 U.C. Davis L. Rev. 941, 952 (2006) (asserting that understanding the production of narrative "helps us to understand in a world of competing facts and inferences, whose story is more likely to become officially adopted"); Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411, 2413 (1989) ("Stories, parables, chronicles, and narratives are powerful means for destroying mindset[s]—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place."); Llezlie L. Green, Erasing Race, 73 SMU L. Rev. Forum 63, 67 (2020), https://scholar.smu.edu/cgi/viewcontent.cgi?article=1013&context=smulrforum (on file with the *Columbia Law Review*) (asserting that narratives are "also the source of mindsets" and noting how "[f]act-

corporate work, narratives common to both BigLaw workplaces and BigLaw employment discrimination proceedings.

Despite the "[g]rowing [w]ave"[41] of employment discrimination litigation against large law firms as well as the growing backlash against diversity, equity, and inclusion (DEI)[42] in large law firms, the academic and popular literature on the history, economics, and sociology of law firms has not kept pace. This literature has scarcely considered how the culture of large law firms has shaped the narrative and storytelling strategies used by hiring and promotion committees to rationalize claims of discrimination and anecdotal and empirical evidence of discrimination to internal constituencies (partners and associates) and external observers (courts, clients, law schools, legal services industry peers, and media outlets). Similarly, the academic and popular literature has seldom considered how the narratives used by plaintiff- and defense-side legal teams in pretrial, trial, and appellate practice work to construct identity for the individuals and the groups involved,[43] and how such pretrial, trial,

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finders . . . filter . . . stories through their own narrative understandings of how the world works"); Charles Lawrence III, Listening for Stories in All the Right Places: Narrative and Racial Formation Theory, 46 Law & Soc'y Rev. 247, 250–51 (2012) (highlighting how an individual's "performance [can become a] part of the narrative that constructs race" because that performance is "received against . . . stories and images" that already exist about the individual's racial group).

41. See Carmen D. Caruso, The Growing Wave of Gender Discrimination Lawsuits Against BigLaw, ABA Section of Litig., Diversity & Inclusion, Summer 2017, at 5, https://www.americanbar.org/content/dam/aba/publications/litigation_committees/diversity_inclusion/issues/summer2017.pdf (on file with the Columbia Law Review); Andrew Maloney, Amid Big Law Focus on Performance, Law Firms Hit by Wave of Employment Claims, Am. Law. (Aug. 6, 2024), https://www.law.com/americanlawyer/2024/08/06/amid-big-law-focus-on-performance-law-firms-hit-by-wave-of-employment-claims/ (on file with the *Columbia Law Review*) ("Big Law has been hit with a wave of lawsuits in recent months, with discrimination and compensation claims from both current and former employees front and center.").

42. See Emma Goldberg, Facing Backlash, Some Corporate Leaders Go 'Under the Radar' With D.E.I., N.Y. Times (Jan. 22, 2024), https://www.nytimes.com/2024/01/22/business/diversity-backlash-fortune-500-companies.html (on file with the *Columbia Law Review*) (highlighting that anti-DEI groups have filed suits to challenge a number of diversity programs and stating that, even without a legal decision on diversity programs in the workplace, companies and firms are reevaluating their DEI programs).

43. The ABA Model Rules of Professional Conduct permit the lawyer to construct client, party, and witness identity in court filings and oral communications. See, e.g., Model Rules of Pro. Conduct r. 3.1 (ABA 2023) (permitting a broad scope of lawyer advocacy, accounting for ambiguities and changing limits of procedural and substantive law); id. r. 3.3 cmt. (permitting a lawyer to use "persuasive force" in advocacy within adjudicative proceedings); see also Anthony V. Alfieri, The Ethics of Violence: Necessity, Excess, and Opposition, 94 Colum. L. Rev. 1721, 1725–26 (1994) (book review) (describing the pain experienced by parties when lawyers "act to erase their identities, to silence their narratives, and to suppress their histories during advocacy"). The Model Rules also permit the lawyer to construct client, party, and witness identity in nonadjudicative proceedings, such as arbitration and mediation, as well as in extrajudicial pretrial, trial, and post-trial statements to the public. See Model Rules of Pro. Conduct r. 3.9 cmt. (permitting lawyers to "present

and appellate filings work to reinforce and reinscribe the very social discomfort that results in "Black disadvantage" in large law firms.

To highlight and rectify these omissions, this Book Review analyzes one recent race discrimination case brought against a law firm by a former Black associate as a means of exploring and understanding the narratives that plaintiff-side legal teams representing former law firm employees and defense-side teams representing large law firms tend to tell and retell in arguing their cases. Specifically, this Book Review probes the language that legal teams have used to allege and rebut facts and, likewise, to assert and defend claims in their pleadings, memoranda of law, discovery materials, hearing and trial transcripts, and even press releases. This Book Review then illustrates how such legal language has helped to reinforce and sustain the troubling tropes of racial inferiority, deficiency, and incompetence and the troubling limitations placed on how Black people are expected to perform their racial identity in predominantly white workspaces, limitations that have enabled and nourished racial discomfort and its negative impacts in elite firms and in broader society.[44] The upshot for large law firms is a workplace environment in which whiteness constitutes the background racial norm and maleness constitutes the preferred gender norm for filtering experience, organizing legal representation, and defining professionalism and success.

This Book Review proceeds in four parts. Part I sets the stage for understanding the harms that racial discomfort causes for Black associates in large law firms. In so doing, Part I returns to the story of the 1989-to-1996 cohort from Cleary, New York, highlighting the reasons that many of

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facts, formulate issues and advance argument" in nonadjudicative proceedings before legislative bodies and administrative agencies acting in a rulemaking or policymaking capacity); see also id. r. 3.6 (permitting lawyers to make extrajudicial statements to the public even if there is a likelihood of materially prejudicing an adjudicative proceeding in the matter, provided the likelihood is not "substantial"). For further discussion of nonadjudicative proceedings, see Michael Z. Green, Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters, 70 SMU L. Rev. 639, 651–52 (2017) (indicating that "[B]lack persons, more likely than any other racial group, tend to find themselves pressured to 'cover' or conform to norms that deny their racial identity at work").

44. See Angela Onwuachi-Willig, Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases, 137 Harv. L. Rev. 192, 198 (2023) ("Stories and storytelling play a critical role in the law. . . . In summary, stories are vital to lawyering and the legal profession because 'the ways stories are told, and are judged to be told, make[] a difference in the law.'" (second alteration in original) (footnote omitted) (quoting Peter Brooks, Narrative Transactions—Does the Law Need a Narratology?, 18 Yale J.L. & Humans. 1, 3 (2006))); see also Angela Onwuachi-Willig & Anthony V. Alfieri, (Re)framing Race in Civil Rights Lawyering, 130 Yale L.J. 2052, 2068–108 (2021) (book review) (describing how troubling racial images, stereotypes, and narratives about Black people persist in today's legal cases); David B. Wilkins, On Being Good *and* Black, 112 Harv. L. Rev. 1924, 1954 (1999) (reviewing Paul M. Barrett, The Good Black: A True Story of Race in America (1999)) (noting the sociopsychological "dynamic" that leads some Black associates "to believe that in order to be seen as 'good' by whites" in BigLaw workplaces, they "must make every effort to minimize the extent to which these same people saw [them] as '[B]lack'").

those Black associates asserted for their own departures from the firm and revealing how Woodson's findings in *The Black Ceiling* mirror and contrast those reasons. Part I also provides data regarding the persistence of problems with Black associate recruitment and attrition at large law firms before partnership. Part II details Woodson's key insights about what builds and sustains—or complicates and thwarts—the ability of Black people to thrive in elite law firms.[45]

Part III extends Woodson's analysis about how the problem of racial disadvantage in elite law firms is tied to racial discomfort, specifically social alienation and stigma anxiety, to the contemporary field of employment discrimination. Part III specifically tracks the recent, high-profile case of *Cardwell v. Davis Polk & Wardwell LLP*, filed by Kaloma Cardwell, a former fourth-year Black associate, against the prominent, New York–based law firm, Davis Polk & Wardwell.[46] Informed by relevant pleadings, memoranda of law, discovery materials, hearing and trial transcripts, and press releases, Part III contrasts the racial discomfort stories, and related social alienation and stigma anxiety narratives, crafted by Cardwell's lawyers and other plaintiff-side litigation teams representing Black law firm employees with the competing narratives of character deficiency and professional incompetence presented by Davis Polk's lawyers and other defense-side litigation teams that represent large law firms in employment discrimination cases.

Part IV proposes remedial workplace strategies that law firms may employ to better address the harmful results stemming from racial discomfort. Part IV offers these suggestions against the backdrop of the evolving reconstitution and growing erasure of DEI recruitment, promotion, and retention programs across the country[47] since the

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45. See Woodson, The Black Ceiling, supra note 1, at 2–3.

46. Verified Complaint With Jury Demand at 1–2, Cardwell v. Davis Polk & Wardwell LLP, No. 1:19-cv-10256-GHW, 2019 WL 5860596 (S.D.N.Y. filed Nov. 4, 2019), ECF No. 1 [hereinafter Complaint] (alleging "racial discrimination and retaliation").

47. See Atinuke O. Adediran, Racial Targets, 118 Nw. U. L. Rev. 1455, 1461–68, 1491–94 (2024) (arguing that racial targets, as opposed to quotas, are legally defensible and describing the "conservative backlash" against racial targets, particularly "[o]pen-ended . . . goals and aspirations that do not include a stated year by which the goal would be met"); see also Brenda D. Gibson, Affirmative Reaction: The Blueprint for Diversity and Inclusion in the Legal Profession After *SFFA*, 104 B.U. L. Rev. 123, 171–80 (2024) (proposing how diversity efforts can be reconstituted in legal education and the Bar post-Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023)); Mariana Larson, Diversity on Trial: Navigating Employer Diversity Programs Amidst Shifting Legal Landscapes, 8 Bus. Entrepreneurship & Tax L. Rev. 239, 254 (2024) (making recommendations for promoting DEI after *SFFA* and arguing that "employers should think about focusing and shining a light on their inclusion efforts, rather than diversity"); Nancy B. Rapoport & Joseph R. Tiano, Jr., Walking the Data Walk: Using Time Entries to Advance DEI Initiatives, 79 Bus. Law. 1, 5 (2024) ("To retain associates, each one must get roughly the same types of experience to be able to advance up the law firm ladder. Time entries,

Supreme Court issued *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*).[48] Building on Woodson's research, this evaluation identifies and assesses innovative firm- and industry-wide policies that can mitigate the impact of racial discomfort on Black professionals and may enable Black professionals to avoid or overcome racial disadvantage in elite firms and thus thrive in their careers at large law firms.[49]

I. "LOSING THE RACE"

As many individuals have asserted over the years, associates of all races leave large law firms before partnership consideration at alarming rates.[50] For instance, one study from 2003 found that "an average of 8.4% of entry-level associates left their law firms within sixteen months of their start dates [and] [a]lmost 23% of entry-level hires departed within twenty-eight months, 35.1% departed within forty months, 44.9% left within fifty-two months, and 53.4% left within fifty-five months."[51] Additionally, in 2007, the National Association of Law Placement (NALP) found that approximately 80% of attorneys at large law firms did not work at that firm five years later.[52] Similarly, in 2020, NALP's *Keeping the Keepers IV* study of eight hundred law firms revealed that "[f]or every 20 associates hired by law firms, 15 left."[53] More recently, the NALP Foundation reported

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mined correctly, can make BigLaw a more welcoming place for people of diverse backgrounds.").

48. 143 S. Ct. 2141 (2023).

49. See Woodson, The Black Ceiling, supra note 1, at 125–45 (offering suggestions for addressing the low retention and promotion rates of Black professionals at BigLaw firms). For other recent proposals of what BigLaw firms can do to better recruit and retain attorneys of color, see generally Debo P. Adegbile, Lisa Davis, Damaris Hernández & Ted Wells, Raising the Bar: Diversifying Big Law (Anthony C. Thompson ed., 2019).

50. See, e.g., Joshua Johnson, Associate Attrition and the Tragedy of the Commons, 1 the crit 48, 57–58 (2008) (discussing data showing high rates of associate attrition from 1998 to 2003); Paul Fischer, The Legal Profession Is Not Doing Enough to Fix Its DEI Problem, Fast Co. (Oct. 21, 2022), https://www.fastcompany.com/90797820/the-legal-profession-is-not-doing-enough-to-fix-its-dei-problem (on file with the *Columbia Law Review*) (noting that "the overall attrition rate for law firm associates reached a record high of 26% in 2021").

51. Johnson, supra note 50, at 57–58 (footnotes omitted) (citing Paula A. Patton, NALP Found. for L. Career Rsch. & Educ., Keeping the Keepers II: Mobility & Management of Associates 24 (2003)).

52. Kate Neville, Why Associates Bail Out of Law Firm Life and Why It Matters, Nat'l L.J. (Nov. 15, 2007), https://www.law.com/nationallawjournal/almID/900005496007/ (on file with the *Columbia Law Review*).

53. Debra Cassens Weiss, Law Firms Lost 15 Associates for Every 20 They Hired, NALP Foundation Study Finds, ABA J. (Oct. 1, 2020), https://www.abajournal.com/news/article/law-firms-lost-15-associates-for-every-20-they-hired-study-finds [https://perma.cc/873Q-38J7].

20% and 18% overall average departure rates for associates in 2022 and 2023.[54]

Even compared to the high overall attrition rates for all large law firm associates, the attrition rate for associates of color, particularly Black associates, is even worse.[55] This Part provides greater context for understanding Woodson's insights about the role of racial discomfort—and, specifically, social alienation and stigma anxiety—in such departures by detailing diversity data and anecdotes about Black associates' experiences at large law firms, particularly data and stories related to their reasons for leaving their firms. Section I.A offers a general description of large law firms' racial retention problem over the past few decades, along with the reasons that associates and academics have proffered for this problem. Section I.B then focuses on Woodson's findings regarding Black professionals' experiences in elite firms, comparing and contrasting their explanations for departure or for success or failure in attaining partnership with those described by other Black attorneys in section I.A of this Book Review.

A. *Why and How Large Law Firms Are "Losing the Race"*

Nearly twenty-five years after Jenkins detailed how Cleary, New York, had "lost the race" due to the departure of all Black associates originally in its 1989-to-1996 cohort by 2001,[56] the problem of disproportionate rates of attrition for associates of color persists.[57] For instance, a 2016 Diversity Benchmarking Report regarding legal practice experiences in New York City revealed that "15.6% of minorities and 14.3% of women left signatory firms in 2016—150% and 135% above the 10.6% rate for white men respectively."[58] Similarly, a NALP report from 2021 reported an 8% difference (from 26% to 34%) between the overall attrition rate for

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54. Debra Cassens Weiss, It's a Quick Goodbye for Many Departing Associates, New NALP Foundation Report Finds, ABA J. (Apr. 11, 2024), https://www.abajournal.com/web/article/its-a-quick-goodbye-for-many-departing-associates-new-nalp-foundation-report-finds [https://perma.cc/72U2-U83N].

55. See Update on Associate Attrition: Findings From a National Study of Law Firm Associate Hiring and Departures, NALP Found. (Apr. 26, 2022), https://www.nalpfoundation.org/news/nalp-foundation-releases-update-on-associate-attrition-for-calendar-year-2021 [https://perma.cc/D4EC-VAGX] [hereinafter Update on Associate Attrition] (noting that, in 2021, the overall associate attrition rate was 26% compared to 34% for associates of color); see also Fischer, supra note 50 (discussing the disproportionate attrition rates of associates of color from large law firms).

56. See Jenkins, supra note 3.

57. See Fischer, supra note 50 ("Black lawyers are 22 percentage points more likely to leave their firms than white lawyers . . . .").

58. N.Y.C. Bar, Diversity Benchmarking Report 2016, at 2, 14 (2017), https://documents.nycbar.org/files/BenchmarkingReport2016.pdf [https://perma.cc/JHQ5-XCY3].

associates and the attrition rate for associates of color in large law firms.[59] The 2016 Diversity Benchmarking Report even found that large disparities in the attrition rates between white and non-white attorneys existed at the partnership level, with "[v]oluntary attrition . . . rates of 9.8% for women and 9.3% for minorities compared to 3.7% for white men."[60]

Other reports have shown that Black associate attrition rates from large law firms are higher than those for white associates—in some cases by as much as 15% or more.[61] For instance, one study of Harvard Law School from 2000 to 2016 showed that Black alumni left the large law firms where they started their careers "at much higher rates than both white and [B]lack lawyers nationally."[62] Specifically, the study revealed "a whopping 63.0% decrease in the number of [B]lack HLS graduates in private practice compared to their first job post-HLS."[63] This 63% decrease is particularly startling when compared to the 28% decrease for white lawyers, and the 38% decrease for Black lawyers more generally, in the *After the JD* Study.[64]

The reasons offered to explain these disproportionate departure rates between white and Black associates at large law firms are numerous and complex. Over the decades, from the very first hire of a Black associate in BigLaw,[65] with William T. Coleman Jr.'s 1949 entry at Paul, Weiss, Rifkind,

59. See Update on Associate Attrition, supra note 55.

60. N.Y.C. Bar, supra note 58, at 2; see also Abby Yeo, Fight or Flight: Explaining Minority Associate Attrition, Cornell J.L. & Pub. Pol'y Issue Spotter (Mar. 21, 2018), https://live-journal-of-law-and-public-policy.pantheonsite.io/fight-or-flight-explaining-minority-associate-attrition/ [https://perma.cc/GM24-73ZD] ("Minority partners are almost three times as likely to leave their positions compared to white men.").

61. See Johnson, supra note 50; Yeo, supra note 60.

62. David B. Wilkins & Bryon Fong, Harvard L. Sch. Ctr. on the Legal Profession, Report on the State of Black Alumni II, 2000–2016, at 48 (2017), https://clp.law.harvard.edu/wp-content/uploads/2022/10/HLS-Report-on-the-State-of-Black-Alumni-II-2000-2016-High-Res-1.pdf [https://perma.cc/5EWT-FCZ6]; see also Vivia Chen, Black Harvard Law Grads Are Doing Fine (Mostly), Am. Law. (Oct. 13, 2017), https://www.law.com/americanlawyer/almID/1202800445396/ [https://perma.cc/R8R5-SD5X] ("So I leave you with this: If [B]lack alums of Harvard are voicing doubt about the future of [B]lack lawyers in Big Law, where does that leave [B]lack lawyers in the bigger pool?").

63. Wilkins & Fong, supra note 62, at 48. The Harvard Law School study provided data regarding where Black Harvard alumni migrated to once they left their firms. The report indicated that the "largest movement was towards business (practicing law)—from 1.6% initially to 14.9% for current jobs. There was also significant migration into government (7.2% to 17.5%), education (2% to 12.1%), public interest (4.7% to 6.9%), and business (not practicing law) (6.9% to 10%). Legal services (2.4% to 2.2%) remained relatively stable." Id.

64. See id.

65. See supra note 2 (explaining the meanings of "large law firms" and "BigLaw").

Wharton & Garrison LLP;[66] to Conrad Harper's historic election as the first Black partner in a major New York City law firm, Simpson Thacher & Bartlett LLP, in 1974;[67] to today, the reasons for disproportionate Black associate attrition have ranged from explicit racism to a lack of mentorship.[68]

As with many workplaces in the past few decades, large law firms have veered further away from explicit racism and more toward subtle and structural forms of racism.[69] For example, in Jenkins's 2001 article, *Losing the Race*, the Cleary attorneys interviewed—partners of all races as well as Black associates from the 1989-to-1996 cohort—offered a plethora of reasons for why the BigLaw firm had lost "the [r]ace,"[70] meaning all thirty Black associates from the 1989-to-1996 cohort. Critically, almost none of these attorneys highlighted explicit racism as one of the reasons for the racial attrition rate disparities between white and Black associates.[71] Still, racial bias and presumptions undergirded many of the explanations they gave.

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66. Paul, Weiss, Rifkind, Wharton & Garrison LLP, Diversity (2013), https://www.paulweiss.com/media/2089201/diversitybrochure.pdf [https://perma.cc/SN5X-DBRL]. Coleman was also the first Black person to clerk for a United States Supreme Court Justice, Justice Felix Frankfurter. Christine Perkins, Counsel for the Situation: William T. Coleman Jr. '46 (1920–2017), Harv. L. Today (Apr. 4, 2017), https://hls.harvard.edu/today/william-t-coleman-obituary/ [https://perma.cc/W6BJ-MHZT]. Initially, and "[d]espite his clerkships and his academic achievement, he was repeatedly rejected by white-shoe firms in Philadelphia." Id.

67. Conrad Harper, Law.com, https://www.law.com/almID/900005555609/ [https://perma.cc/XF9Z-EF4Q] (last visited Oct. 27, 2024). In 1989, Harper also became the first Black person to serve as President of the Association of the Bar of the City of New York. Id. During his term, he led "the association's efforts to address racial inequality in the legal profession." Id. Prior to his tenure at Simpson Thacher, Harper served as an attorney at NAACP Legal Defense Fund. Simpson Thacher & Bartlett LLP, Conrad Harper 2L Diversity Fellowship, https://www.stblaw.com/docs/default-source/related-link-pdfs/2024-conrad-harper-2l-diversity-fellowship-flyer72c90e0f743d6a02aaf8ff0000765f2c.pdf [https://perma.cc/M8CU-LN93] (last visited Jan. 18, 2025).

68. See, e.g., Vitor M. Dias, Black Lawyers Matter: Enduring Racism in American Law Firms, 55 U. Mich. J.L. Reform 99, 111–20 (2021) (using data from the After the JD Study to detail the various different forms of racism faced by Black attorneys in law firms); Alex M. Johnson, Jr., The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective, 95 Mich. L. Rev. 1005, 1007–26 (1997) (detailing the forms of racism faced by Black attorneys in BigLaw firms).

69. See, e.g., Devon W. Carbado & Mitu Gulati, Acting White? Rethinking Race in Post-Racial America 136–48 (1st ed. 2013) (describing how complex forms of intraracial distinctions and discrimination work based on "identity performance" during the post-Civil Rights era).

70. Jenkins, supra note 3.

71. See id. ("When asked whether the Cleary experience was different for [B]lack associates than for others, very few Cleary alums point to incidents of blatant racism—although there are a few such stories."); see also infra notes 72–86 and accompanying text.

The most obvious explanation was that, between 1989 and 1996, Cleary had simply failed to account for or consider how race and subtle, structural forces of racism, apart from the lack of a "critical mass," would shape the experiences and opportunities of its Black associates.[72] As the late Ned Stiles, a Cleary partner who served as the firm's Managing Partner from 1988 to 1999 and as Chair of the Diversity Committee of the New York City Bar Association from 1997 to 1999, speculated about the disappearing 1989 to 1996 Black associate cohort: "We all went into this naively thinking that if we bring a lot of minorities into the firm, some of them will make partner. . . . Now we see that it's more complicated than that."[73]

Other articulated reasons for the firm's retention failures with Black associates ranged from the "prejudice of low expectations," which too frequently led to second-rate or lousy assignments for Black associates;[74] to wrongful assumptions that Black associates were "interested in pro bono, but not corporate transactions";[75] to the pain of watching white associate peers consistently receive better and more meaningful assignments than Black associates received;[76] to the (nearly all white) partners' unconscious preferences to work with attorneys "who looked like them";[77] to Cleary's then-informal practice group structure and its lack of a centralized system for doling out associate assignments;[78] to the denial of partnership to one senior Black associate who was widely perceived as a superstar and shoo-in for partner by other Black associates.[79] Ironically—or perhaps, not

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72. See Jenkins, supra note 3.

73. Id. (internal quotation marks omitted) (quoting Ned Stiles).

74. See id. (quoting one of the Black associates from the cohort as saying, "You get lousy assignments, then they say that everything you do is wrong[,]" and as recalling "that 'you can't write' was a remark frequently directed toward [B]lack attorneys by white partners and senior associates" (internal quotation marks omitted) (quoting Roslyn Powell)).

75. Id. (internal quotation marks omitted) (quoting an anonymous Black former associate) ("The bottom line is that there is this negative presumption. . . . There's this view that we're not really interested in corporate work." (internal quotation marks omitted) (quoting an anonymous Black former Cleary associate)).

76. See id. (indicating that one lawyer asserted, "White associates were drafting documents and getting meaningful skills" while the "associates of color were doing organizing stuff, way past the time [in their careers] that they should have been" (alteration in original) (internal quotation marks omitted) (quoting an anonymous Black former Cleary lawyer)).

77. Id. ("But a large majority of them say that during their time at Cleary they experienced a subtle, often subconscious tendency by a virtually all-white partnership to favor those who looked like them.").

78. Id. ("Many of the [B]lack lawyers who passed through Cleary feel that this structure, though initially seductive, made for an unpredictable environment in which personal relationships and subjective judgments played an inordinate role. And that was often bad news, they say, for African-American associates.").

79. See id. (noting that the decision to deny partnership to Lynn Dummett "was especially disturbing to several [B]lack lawyers at the firm because they believe that white

ironically—the one Black associate who did make partner from the 1989-to-1996 cohort at Cleary, Carmen Amalia Corrales, was not known to be Black by partners or even other Black associates at the time of her ascension; other Black associates believed that Corrales identified as only Latina—and more specifically, as Cuban.[80] As Jenkins explained, Corrales had never denied being Black during her associate years, but she "did not necessarily publicize her African heritage" before her election to partnership.[81] Corrales told Jenkins, "Inadvertently, I did 'pass,' because when I came up for partner there were people who knew I was [B]lack and others who assumed I identified as Latina as some vague category."[82] Corrales's announcement of her race, followed by the firm's identification of her as a new Black partner on the NALP form, only added to the reasons why Black associates at Cleary later decided to leave the firm.[83] Many Black associates at Cleary were turned off by what they viewed as the firm's opportunistic glorification of its unknowing promotion of a Black woman to partner. As Judge Raymond J. Lohier, Jr., a member of the cohort who now sits on the United States Court of Appeals for the Second Circuit, proclaimed to Jenkins: "Cleary was quick to take advantage of it. . . . They put it on the NALP [National Association for Law Placement] form. Putting it out there."[84] Another Black associate claimed they heard a partner make the following comment after Corrales's election to partner: "Thank God we made Carmen partner, because she fits into every category."[85]

In the end, as one former Cleary associate summed up about Cleary's race problem, "It[] [was] not any one big thing. It[] [was] a million little things that add[ed] up."[86]

Today, associate recruitment and attrition among Black attorneys persist as problems for large law firms.[87] According to the NALP's diversity

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associates with lesser skills had made partner at Cleary both before and since"); id. ("Most [B]lack lawyers at Cleary also felt that Dummett was recruited into the firm as a lateral hire specifically in order to be groomed for partnership, a perception that made her rejection particularly jarring.").

80. See id. (quoting one Black former associate as stating, "When she was coming up for partner she was 'passing'" and that "[n]one of the people who have pigment at Cleary knew that she was [B]lack" (internal quotation marks omitted) (quoting a Black former associate)).

81. Id.

82. Id. (internal quotation marks omitted) (quoting Carmen Amalia Corrales).

83. See id.

84. Id. (alteration in original) (internal quotation marks omitted) (quoting Judge Lohier).

85. Id. (internal quotation marks omitted) (quoting a Black former Cleary associate).

86. Id. (internal quotation marks omitted) (quoting a Black former Cleary attorney).

87. See infra notes 88–91 and accompanying text. This problem is not limited to BigLaw firms in the United States. See Varsha Patel, Rankings Show Which Law Firms Have the Most Black Lawyers, But Retention Is Still a Huge Failing, Law.com (June 29, 2022),

and demographics data for 2023, only 6% of associates at firms with one hundred or more attorneys are Black, which is less than half the percentage of the U.S. Black population, 13.7%,[88] and 1.7% percentage points less than the 7.7% of Black students matriculated at U.S. law schools in 2023.[89] Furthermore, 30.73% of these large law firms have no Black associates at all, and 43.87% of the firms have no Black women associates.[90] For Black partners, the NALP data are even worse. Black partners comprise only 2.47% of large law firm partners, with 50.99% of such firms having no Black partners at all and 69.83% having no Black women partners.[91]

But even now, almost twenty-five years after the publication of *Losing the Race*, Cleary remains a leader on diversity, and specifically Black representation, among large law firms. In 2022, *The American Lawyer* ranked Cleary number five on a list of firms with the best diversity scores.[92] Additionally, a review of the largest law firms in the United Kingdom showed that Cleary was a distinct leader among its peers in terms of Black partner representation, with Black partners comprising 7% of partners in Cleary's United Kingdom office.[93] This percentage was notable when compared against other firms in the United Kingdom's top twenty-five, where the average number of Black attorneys—both partners and associates combined—was 4.1%.[94] But Cleary's attorney diversity across all of its offices globally is not substantially above its competitor firms. For example, in Cleary's coveted New York office, the percentage of Black attorneys, while above average, is still at only 7% of all associates

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https://www.law.com/international-edition/2022/06/29/rankings-show-which-law-firms-have-the-most-black-lawyers-but-retention-is-still-a-huge-failing/ (on file with the *Columbia Law Review*) (surveying large U.K. law firms and noting that "Black lawyers leave more quickly than their white counterparts").

88. QuickFacts: Race and Hispanic Origin, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/US/RHI225223 (on file with the *Columbia Law Review*) (last visited Oct. 26, 2024).

89. James Leipold, Incoming Class of 2023 Is the Most Diverse Ever, But More Work Remains, L. Sch. Admissions Council (Dec. 15, 2023), https://www.lsac.org/blog/incoming-class-2023-most-diverse-ever-more-work-remains [https://perma.cc/3PLP-G4X7]. In 2021 and 2022, 7.9% and 7.8% of matriculated law students nationwide identified as Black. Id.

90. See Women and People of Color in U.S. Law Firms, NALP Bulletin+, tbl.4 (Mar. 2024), https://www.nalp.org/0324research (on file with the *Columbia Law Review*); see also Debra Cassens Weiss, BigLaw Makes Diversity Gains; Which Firms Did Best?, ABA J. (June 1, 2022), https://www.abajournal.com/news/article/biglaw-makes-diversity-gains-which-firms-did-best [https://perma.cc/2XPF-VS93] [hereinafter Weiss, BigLaw Diversity Gains] (noting that American Lawyer's 2022 Diversity Scorecard indicated that Black lawyers constituted 3.9% of *all lawyers*, meaning both Black partners and associates, in large law firms and 2.3% of Black partners in law firms).

91. See Women and People of Color in U.S. Law Firms, supra note 90.

92. See Weiss, BigLaw Diversity Gains, supra note 90.

93. See Patel, supra note 87.

94. See id.

(compared to the 6% national average) and 2.6% of all partners (compared to the 2.47% national average).[95]

These problems of Black associate recruitment, attrition, and promotion in large law firms are further compounded by the fact that the percentage of Black lawyers in the United States has remained virtually the same over the past ten years. While the overall percentage of Asian lawyers has more than doubled in just two years—from 2.5% in 2021 to 6% in 2023—and the percentage of Latinx attorneys has grown by more than one-and-a-half times in the last decade—from 3.7% in 2013 to 6% in 2023 (still less than a third of the Latinx population in the United States (19.5%[96]) and less than the 9.4% of Latinx students who matriculated at U.S. law schools in both 2022 and 2023[97])—the percentage of Black attorneys has been stagnant, increasing by only 0.2%, from 4.8% in 2013 to just 5% in 2023.[98]

That said, large law firms also have a race problem when it comes to the percentages of Asian partners and Latinx associates and partners. While Asian American associates are well represented at large law firms, comprising 12.84% of all associates (when compared to the percentage of Asians in the United States, 6.4%,[99] and the percentage of Asian students in law schools, which was 9.6% in 2023[100]), they are underrepresented at the partnership level, with only 4.87% of all large law firm partners being of Asian descent.[101] Still, 24.16% of these large law firms have no Asian associates.[102] Like Black attorneys, Latinx attorneys are also underrepresented at both the associate and partnership levels in large law firms. Latinx associates comprise only 7.05% of all large law firm associates, with 31.97% of the firms having no Latinx associates and 45.35% having no Latina associates.[103] At the partnership level, the numbers are starker, with large law firms having only 3.01% of their partners identify as Latinx,

95. Cleary Gottlieb Steen & Hamilton LLP, NALP Directory (2024), https://www.nalpdirectory.com/student_login?redirectURL=%2Femployer_profile%3FFormID%3D16598%26QuestionTabID%3D34%26SearchCondJSON%3D (on file with the *Columbia Law Review*).

96. QuickFacts: Race and Hispanic Origin, supra note 88.

97. See Leipold, supra note 89. Nationally, the percentage of enrolled Latinx law students in 2021 was 8.8%. Id.

98. Profile of the Legal Profession 2024: Demographics, ABA, https://www.abalegalprofile.com/demographics.html [https://perma.cc/ZJ8Z-LMDD] (last visited Oct. 26, 2024).

99. Quickfacts: Race and Hispanic Origin, supra note 87.

100. Leipold, supra note 89. Nationally, the percentages of enrolled Asian law students in 2021 and 2022 were 8.1% and 8.9%, respectively. Id.

101. Women and People of Color in U.S. Law Firms, supra note 90.

102. Id.

103. Id.

with 45.32% of firms having no Latinx partners, and with 71.18% of firms having no Latina partners.[104]

B. *Why and How "Racial Discomfort" Makes the Race to the Top Uneven*

Like most of the Black associates interviewed for Jenkins's 2001 *Losing the Race* article in the *American Lawyer*, Woodson's subjects do not point to explicit racism as the reason for the challenges that they and other Black associates encountered on the path to—or away—from partnership at their firms.[105] Instead, they highlight what Woodson refers to as "certain social and cultural dynamics."[106] Woodson explains, "Their reports of their career difficulties generally involve[d] feelings of alienation, frustration, and isolation, rather than outright discrimination. These problems can be difficult to describe because the current terminology used to discuss race does not fully account for them."[107]

Noting that the barriers and hurdles that his Black interviewees identified are varied and numerous, Woodson explicates that the identified obstacles all share one social dynamic in common: a phenomenon he calls racial discomfort, meaning "the unease that Black professionals experience in White-dominated workplaces because of the isolation and institutional discrimination they encounter,"[108] all encompassed within the "racial conditions" and persistent racial stratification of broader U.S. society.

Woodson uncovers that large law firms' attrition and low partnership problems with respect to Black attorneys are not the result of the type of blatant racism that employment discrimination doctrine is narrowly designed to address—meaning "smoking gun," blanket, stereotypical perceptions of all Black people or explicit acts of racial bias.[109] Rather, just as one former Cleary associate asserted in *Losing the Race*, Woodson's Black professional subjects generally attribute the barriers and obstacles to their

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104. Id.

105. See Woodson, The Black Ceiling, supra note 1, at 3 (noting that the Black professionals he interviewed "perceive that Black professionals working at elite firms face unfair hindrances and burdens, but they consider these disadvantages to be distinct from racial bias").

106. Id.

107. Id. at 3–4.

108. Id. at 4.

109. See Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 Mich. L. Rev. 953, 957 (1993) (defining "*transparency* phenomenon" as "the tendency of [white people] not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific" and detailing why proving discrimination, which requires proof of intent, is difficult in a world where the transparency phenomenon prevails).

advancement in elite firms to "a million little things,"[110] including "everyday interactions, decisions, and social activities"; the culture of colorblindness; and the presumed "neutrality" of the professional pathway to partnership that has enabled racial inequities to persist within their firms.[111] Woodson describes this cumulative, daily-recurring experience as racial discomfort. To capture the complexity of racial discomfort and gauge its harmful impact on the careers of Black attorneys in law firms, he puts forward the interrelated concepts of social alienation and stigma anxiety.[112]

Woodson's explanation of social alienation echoes many of the themes that Black associates at Cleary articulated in rationalizing their individual departures and the departures of their peers in *Losing the Race*. On his analysis, the concept of social alienation links Black associates' isolation and marginalization to the corresponding limited access of Black associates to social capital fostered by the unspoken—and often unconscious—social and cultural preferences of white partners. In the workplace, those preferences steer white partners toward working and mentoring relationships with associates of common background "cultural and social tastes, interests, and experiences," typically white associates.[113]

By extension, Woodson's explanation of stigma anxiety discloses the keenly felt "uneasiness and trepidation" that many Black professionals experience in workplace situations where they perceive a looming "risk [or threat] of unfair treatment on the basis of race" rather than performance.[114] On this account, stigma anxiety frequently spurs Black professionals to engage in the workplace-specific practice of racial risk management. Woodson construes the adoption of "self-protective," racial risk management behaviors as notionally insulating from unfair treatment but often harm-inducing to professional competition and standing in the internal markets of law firms.[115]

II. UNDERSTANDING STRUCTURAL RACIAL DISCOMFORT

As Woodson makes clear throughout *The Black Ceiling*, "there is no single 'Black experience' at elite firms,"[116] nor is there a singular outcome

110. See Jenkins, supra note 3 (internal quotation marks omitted) (quoting a former Cleary attorney).

111. See Woodson, The Black Ceiling, supra note 1, at 4–5 (noting that Black attorneys often face "a series of burdens, barriers, and obstacles" throughout their careers).

112. Id. at 5.

113. Id.

114. Id.

115. Id. at 5–6. For a discussion of internal markets and unregulated competition within BigLaw firms, see Mitt Regan & Lisa H. Rohrer, BigLaw: Money and Meaning in the Modern Law Firm 137–45 (2021).

116. Woodson, The Black Ceiling, supra note 1, at 7.

for Black associates at large law firms. Among Woodson's subjects are Black attorneys who thrived in their firms, becoming partners and leaders within their organizations, and Black attorneys who floundered.[117] Regardless of their experiences and outcomes, nearly all of the interviewees in the Woodson study spoke about the dynamics that worked to systemically disadvantage Black associates in large law firms, even if the associates believed that they did not personally experience such dynamics or if they somehow managed to overcome those disadvantages.[118]

This Part details Woodson's findings about the ways in which racial discomfort—specifically social isolation, stigma anxiety, and racial risk management—work together to hinder Black associate progress in law firms. In so doing, it explains the contradictions in narratives about merit, opportunity, and inclusion that facilitate racial discomfort's role as "a mechanism through which White organizational spaces reinforce and reproduce racial inequality."[119]

A. *The Practices of Elite Law Firm Hiring, Promotion, and Retention*

To elucidate how elite law firm practices and workplace conditions produce racial disparities sufficient to create a "Black ceiling"[120] for partners[121]

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117. Id. at 7–10, 13, 34, 104, 138.

118. For example, Sandra, a Black attorney who eventually made partner, qualified her unique experience by noting: "I certainly don't want to come off as saying I think everything in law firms is fine, and if you work hard and pull yourself up by your bootstraps, you're going to make it. That's not what I am saying at all." Id. at 8 (internal quotation marks omitted) (quoting Sandra). Instead, she recognized others had very different experiences, stating: "I really think you could talk to somebody [else], and they would tell you, 'It was terrible. It was racist. No, I didn't feel any type of mentorship at all.'" Id. (alteration in original) (internal quotation marks omitted) (quoting Sandra).

119. Id. at 12.

120. Id. at 4. The Black BigLaw Pipeline notes: "While major law firms have made modest strides in the hiring and promotion of women and certain minority groups, studies have consistently shown that the number of Black attorneys in large law firms has either remained stagnant or declined over the last several years." About Us, The Black BigLaw Pipeline, https://blackbiglawpipeline.com/about [https://perma.cc/B2HS-BS9B] (last visited Oct. 26, 2024).

121. See Debra Cassens Weiss, 16 BigLaw Firms Have No Black Partners, Including Firm Ranked No. 1 For Diversity, ABA J. (May 28, 2021), https://www.abajournal.com/news/article/sixteen-larger-law-firms-have-no-black-partners-including-firm-ranked-no.-1-for-diversity [https://perma.cc/4XNZ-GJBY] ("Many law firms that ranked relatively well on the American Lawyer's 2021 Diversity Scorecard have no Black partners . . . ."); Vivia Chen, The Momentum for Black Lawyers Might Already Be Fading, Bloomberg L. (Jan. 20, 2023), https://news.bloomberglaw.com/business-and-practice/the-momentum-for-black-lawyers-might-already-be-fading (on file with the *Columbia Law Review*) ("[W]hen it comes to partnership, Black lawyers are still in the dumps. Their rate increased by just 0.1% from last year, accounting for a scant 2.3% of all partners, equity and non-equity."); Jackson, supra note 25 ("Black attorneys are—and have always been—significantly underrepresented in

and associates,[122] Woodson scrutinizes "the role of discretionary, subjective, and informal personnel decisions regarding assignments and assessments."[123] Moreover, he evaluates "the impact of the relational dimensions of professional careers" in elite firms, highlighting "the importance of relationships with mentors, sponsors, and peers, in disadvantaging Black professionals" and advantaging their white peers.[124] Those decisions and their relational contours mold the practices of elite law firm hiring, promotion, and retention.

To Woodson, the common, industry-wide practices of elite law firms are "distinctively White in ways that shape the everyday experiences and career trajectories of White and non-White workers alike."[125] By shaping ordinary experiences and career trajectories, the personnel processes operating within these racialized organizations "consistently perpetuate racial inequality."[126] The key to understanding the organizational structures and personnel processes of elite firms, and their claimed commitment to a diverse, equitable, and inclusive workplace ethos,[127] is the notion of racialized space—racialized space that is widely and mistakenly perceived by many white members of the workplace community as colorblind.

According to Woodson, "[e]lite firms are not raceless organizations."[128] Rather, measured in terms of institutional structure and cultural character, they embody racially inequitable and exclusionary

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the legal profession, more so than Latino and Asian American lawyers. Despite comprising more than 13% of the U.S. population, less than 2% of Big Law partners are Black . . . .").

122. See Lauren E. Skerrett, On Being a Black American Biglaw Associate, Above the Law (June 4, 2020), https://abovethelaw.com/2020/06/on-being-a-black-american-biglaw-associate/ [https://perma.cc/VA66-BWBY] ("[B]eing a [B]lack Biglaw associate is uniquely difficult. . . . There's no safe and polite way for the [B]lack junior associate to express frustrations to white leadership.").

123. Woodson, The Black Ceiling, supra note 1, at 14–15.

124. Id. at 15.

125. Id.

126. Id. at 12.

127. See Amanda O'Brien, 'Resources Are a Huge Issue': Law Firms Struggle to Fully Back DEI Goals, Am. Law. (July 10, 2024), https://www.law.com/americanlawyer/2024/07/10/resources-are-a-huge-issue-law-firms-struggle-to-fully-back-dei-goals/ (on file with the *Columbia Law Review*) ("Given the political stressors on DEI efforts at the moment, as well as overall law firm financial priorities, however, pursuing diversity is often easier said than done, with DEI professionals and consultants noting disconnects between law firm resource allocation and the diversity goals firms espouse."). At Davis Polk, the firm's stated commitment to DEI includes the aspiration that its lawyers "reflect the diversity of our communities, our clients and the world" and its pledge to "ensur[e] equity of opportunity within the firm" and to "continually foster a culture of inclusivity." See Diversity, Equity, and Inclusion, Davis Polk, https://www.davispolk.com/dei [https://perma.cc/CN9N-ZZ6T] (last visited Oct. 26, 2024).

128. Woodson, The Black Ceiling, supra note 1, at 17.

"White spaces."[129] Both symbolically and demographically, their workforces are white, especially the senior ranks of equity partners.[130] As a result, the social and cultural character of elite law firm spaces across departments and practice groups "heavily reflect the cultural preferences of White men."[131] These preferences include "seemingly frivolous" social matters like "pop culture references" and "nightlife preferences" that can help to facilitate the type of bonding that can evolve into career-advancing mentor-mentee or sponsor-mentee relationships.[132] Significantly, they also include preferences with even more tangible consequences, such as partialities for cultural familiarity that frequently work to provide white associates "with preferential access to work opportunities."[133] Together, such preferences have cumulative effects that make it difficult for Black associates to ever gain or regain a foothold on the path to partnership. To illustrate such effects, Woodson conveys a story that reveals how disparate assignment opportunities during just the first few weeks of an associate's career can have long-lasting damaging effects. Woodson explains:

> Samantha, an attorney, described suffering from such practices firsthand. She explained that during her first month at her law firm partners gave a new White associate 180 hours of billable work, while only giving her 60. This gap grew over time, quickly creating a significant disparity in the two associates' skills . . . .
>
> Samantha's account reveals just how quickly career-altering discrepancies can emerge. A mere two months after joining the firm, Samantha already had fallen significantly behind her peer. Although the two held the same job title and took home the same pay, because the White associate had received far greater opportunities to develop human capital, Samantha had become

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129. Id. at 18.

130. The National Association for Law Placement reports that "both women and partners of color remain substantially underrepresented within the partnership ranks" of law firms. See Women and People of Color in U.S. Law Firms, supra note 90 ("About 37% of offices reported no Asian partners, 45% had no Latinx partners, and 51% had no Black partners in 2023. Further . . . Black women and Latina women were each found in the partnership ranks of only about three out of ten offices."); Representation of Women and Minority Equity Partners Among Partners Little Changed in Recent Years, NALP Bulletin (Apr. 2019), https://www.nalp.org/0419research (on file with the *Columbia Law Review*) ("Equity partners in multi-tier law firms continue to be disproportionately white men. New figures from NALP show that in 2018, just one in five equity partners were women (19.6%) and only 6.6% were racial/ethnic minorities.").

131. Woodson, The Black Ceiling, supra note 1, at 18.

132. Id. at 73.

133. Id. at 27; see also id. at 71 (describing how the provision of work assignments can be shaped by preferences for shared cultural characteristics, including race, by detailing "the well-known 'airport' or 'airplane' standard of rapport and compatibility": "If I'm stuck in an airport for eight hours, are you someone I want to hang out with?" (internal quotation marks omitted) (quoting Rebecca, a consultant at a BigLaw firm)).

> objectively less qualified than her peer for future assignments . . . . In this way, initial racial disparities can become self-reinforcing.[134]

Furthermore, although alert to gradations and variations in the cultural preferences of professional services firms, Woodson maintains that the "cultural milieus" of elite firms are neither shared by nor "particularly attuned to those of Black professionals."[135] In this respect, he argues, the cultural practices of elite firms "center and 'normalize' certain aspects of White male professionals' experiences,"[136] rendering such experiences conventional and unremarkable. To gain entry and thrive in firm culture, Woodson observes that Black professionals must necessarily "adapt" to white spaces and "everyday situations" that may in sociopsychological effect "impede, exclude, and isolate" them.[137] Citing the racial dimensions of white spaces and the social stress[138] experienced by Black professionals in "seemingly innocuous everyday situations," he explains that this adaptive strategy "heightens both the salience of racial stigma and the disadvantages of racial cultural differences."[139] These disadvantages, in turn, hinder the efforts of Black professionals to compete in intrafirm tournaments for partnership-training tracks and major institutional clients.[140]

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134. Id. at 27.

135. Id. at 18–19.

136. Id. at 19.

137. Id.

138. See, e.g., Joanna M. Hobson, Myles D. Moody, Robert E. Sorge & Burel R. Goodin, The Neurobiology of Social Stress Resulting From Racism: Implications for Pain Disparities Among Racialized Minorities, 12 Neurobiology Pain 100101, Aug. 20, 2022, at 1, 2 (addressing the neurobiological underpinnings linking racism to social threat and linking social threats and physical pain); see also Eric Kyere & Sadaaki Fukui, Structural Racism, Workforce Diversity, and Mental Health Disparities: A Critical Review, 10 J. Racial & Ethnic Health Disparities 1985, 1991 (2023) (discussing "identity verification and non-verification processes" research to point out that "a lack of contextual/setting cues affirming individuals' identities may generate distressing emotions and reduce contextual engagement").

139. Woodson, The Black Ceiling, supra note 1, at 19.

140. On intrafirm tournament competition, see Marc Galanter & Thomas Palay, Tournament of Lawyers: The Transformation of the Big Law Firm 3, 99–102 (1991) (describing the "promotion-to-partner tournament" as the phenomenon in which large U.S. law firms "structure[] attorney compensation and incentives around a promotion contest, which has proven to be a simple device for fostering the efficient sharing of human capital"); Marc Galanter & William Henderson, The Elastic Tournament: A Second Transformation of the Big Law Firm, 60 Stan. L. Rev. 1867, 1877–78 (2008) (describing a new "elastic tournament" model of large law firm growth that "does not end with the promotion to partnership, but instead becomes 'perpetual' or unending as partners work longer hours, accept differential rewards, and fear de-equitization or early, forced retirement," producing "more competition and tension within the firm").

Indeed, Woodson describes several ways in which the defense mechanisms that Black professionals employ in response to racial stress and bias in workplaces can hinder the progress of Black associates. For instance, as Woodson explains, many of the Black professionals he interviewed experienced significant anxiety around attending and participating in work-related or non-work-related social gatherings with white colleagues, events where they could have been, and should have been, developing and furthering the types of personal relationships that often lead to more assignments, better work projects, and more mentors and sponsors. As one example, Woodson highlights how racial stress and worries about racially offensive comments that white colleagues, particularly intoxicated ones, might make at social gatherings have prevented some Black professionals from even attending social work events or have resulted in awkward interactions that do little to increase the chances of social bonding.[141] One interviewee's comments perfectly exemplify these disadvantages. This interviewee explained:

> I've gotten there many times where you walk into a party and nobody looks at you, and your mind is already set on what time am I getting out of here, what excuse am I going to give if anyone asks where I'm going, how am I going to get through this night, what can I make up to talk about. So from the first twenty seconds of some of the events I went to, I was already in defense mode. And that's just debilitating and painful and it just takes you away from the situation.[142]

Overall, as Woodson explicates, the end results of racial stress and discomfort are Black professionals who feel burnt out and drained "cognitively, emotionally, and physically," along with "racially disparate rates of self-elimination, as Black professionals choose to quit these firms in search of fairer work environments."[143]

Woodson also locates racial disadvantages in the "rules and procedures that elite firms have implemented to systematize personnel decisions" in hiring and promotion committees as well as in the "discretionary acts and decisions" of supervisory partners who control "access to valuable career capital."[144] Access of this sort determines the quality of work opportunities, the content of performance assessments, and the extent of social capital (e.g., sponsorship, mentorship, and friendships opportunities) afforded to Black professionals.[145] By detailing recurrent discrepancies—"minor actions, decisions, and omissions"—in the oversight and supervision of Black professionals relative to their white

141. Woodson, The Black Ceiling, supra note 1, at 53–54.

142. Id. at 53 (quoting Pernell, a Black investment banker).

143. Id. at 52–53.

144. Id. at 44.

145. Id.

peers,[146] Woodson exposes the "substantial burdens and obstacles" that encumber Black professionals under entrenched, long-accepted firm management systems.[147] Data show that such unequal burdens and obstacles "limit the careers of Black professionals decisively," and thereby "systemically perpetuate racial inequality" independent of "any acts of racial bias."[148]

Worse, such unequal burdens and obstacles can begin to crush the confidence of the Black associates suffering under them. Consequently, they cause significant psychological harm. As Agnes, one of Woodson's interviewees, described, witnessing the disparity between what she and a white male associate received ultimately "diminished her professional self-confidence."[149] Explaining her thoughts, she asserted, "Psychologically it affected me . . . . You start feeling like I can't do it or whatever. They don't have faith in me. And it almost transferred into me going, 'Well, *can* I do this?'"[150] Generally speaking, once an associate begins to question their ability to do the work, the writing is on the wall. Similarly vexing, as Woodson explains, such doubts can lead to destructive self-protective tactics like what he calls *racial reticence*, "a phenomenon in which Black people choose not to speak up or out because they worry that colleagues will assess them according to anti-Black stereotypes."[151] Racial reticence, in turn, can get interpreted by partners as a lack of interest or engagement in assigned projects, a lack of initiative, or even a lack of ability, which only "render[s] [the associate] more susceptible to being saddled with additional low quality work."[152] Racial reticence can even intensify the discomfort that a white work colleague already has about working with a Black associate, further exacerbating gaps in personal connection, which is essential to forming a sponsor-mentee or mentor-mentee relationship.[153]

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146. Id.; see also Alex B. Long, Employment Discrimination in the Legal Profession: A Question of Ethics?, 2016 U. Ill. L. Rev. 445, 449–52 (2016) ("[M]uch of the discrimination that takes place in today's workplace tends to involve more subtle forms of cognitive or unconscious bias. As Professor Susan Sturm famously postulated, workplace biases now often result from 'patterns of interaction, informal norms, networking, . . . mentoring, and evaluation . . . .'" (second and third alterations in original) (footnote omitted) (quoting Susan Sturm, Second-Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 469 (2001))).

147. Woodson, The Black Ceiling, supra note 1, at 44.

148. Id.

149. Id. at 28.

150. Id. (internal quotation marks omitted) (quoting Agnes, a Black attorney).

151. Id. at 47.

152. Id. at 55–59.

153. See id. at 36–37 ("Without such advocacy, even highly capable professionals can fare poorly.").

B. *The Form and Content of Elite Law Firm Institutional Culture*

Studying the form and content of elite law firm institutional culture illustrates the social dynamic of racial discomfort and the experience of social alienation and stigma anxiety for Black professionals in the workplace. Even when that experience evolves in a subtle and nuanced fashion, its effects prove disadvantaging, and its outcomes evince unfairness. As noted before, elite law firm institutional culture gives rise to the dynamic of racial discomfort, a byproduct of Black disadvantage and workplace inequality.[154] Woodson attributes racial discomfort to "broad social structures and processes, including segregated neighborhoods and schools, and the continued prevalence of racial bias in America."[155] Because of its sociocultural breadth, racial discomfort "can work in conjunction with racial bias, but it can also have an impact separate and apart from it."[156] Discomfort of this kind "occurs when racially disparate access to resources (including social capital) generates disparate outcomes independent of any racist motives."[157] On this sociocultural logic, the workplace conditions that subject Black professionals to the stress of racial discomfort "can produce racial disparities even if their White colleagues do not actually mistreat them on the basis of race."[158]

Here again, Woodson identifies the two types of racial discomfort affecting Black professionals in predominantly white workplaces: social alienation and stigma anxiety.[159] Conceptually, both social alienation and stigma anxiety expose the "subtle social dynamics"[160] and "sources of disadvantage"[161] of work environments in hindering "access to beneficial workplace relationships, premium work assignments, and professional esteem and accolades."[162] Both also illuminate the "racial difficulties" and "nuanced challenges" bound up in the "structural and social conditions" of firms.[163] Woodson sifts numerous accounts from Black professionals of "intense racial discomfort" stemming from "being constantly forced to navigate unfamiliar White-dominated social settings and precarious work situations in which they perceived themselves to be at risk of discrimination."[164] These recurrent accounts of social alienation and

154. See id. at 4–5.
155. Id. at 12–13.
156. Id. at 13.
157. Id.
158. Id.
159. See supra text accompanying notes 33–35.
160. Woodson, The Black Ceiling, supra note 1, at 125.
161. Id. at 13.
162. Id. at 126.
163. Id. at 125.
164. Id.

stigma anxiety convey "the isolation and frustration that many Black professionals experience because their backgrounds and preferences differ from those of their White colleagues."[165] In addition to isolation and frustration, the accounts also express a pervasive sense of "uneasiness and trepidation" associated with the expectation of unfair treatment.[166]

For Woodson, the interplay of social alienation and stigma anxiety within elite law firms marginalizes Black professionals as "outsiders" by impairing their relationships and rapport with white senior colleagues who control discretionary work assignments and subjective performance assessments and, furthermore, by impeding their access to the career capital reservoir of white mentorship and sponsorship.[167] That alienation- and anxiety-inducing interplay, Woodson laments, generates higher rates of attrition among Black professionals relative to their white counterparts and "contributes to inequitable employment outcomes," even if, as he emphasizes, the Black professionals "personally never suffer any acts of racial bias."[168] To grasp the complex workplace dynamics generating these inequitable employment outcomes and to understand how both plaintiff- and defendant-side employment discrimination litigation teams render those dynamics through racial bias and racial discomfort narratives in pleadings and at trial, this Book Review turns next to a close reading of the filings in the recent, high-profile case of *Cardwell v. Davis Polk & Wardwell LLP* in the U.S. District for the Southern District of New York.

III. PATTERNS IN RACIAL BIAS AND RACIAL DISCOMFORT LITIGATION

This Part extends Woodson's analysis of the experience of racial bias and racial discomfort for Black professionals in elite law firms to the contemporary employment discrimination case of *Cardwell v. Davis Polk & Wardwell LLP* filed by Kaloma Cardwell, a Black former fourth-year associate at Davis Polk, in 2019.[169] The *Cardwell* lawsuit is useful as a case study both because it is representative of a noteworthy increase in employment discrimination litigation against U.S. law firms[170] and because it is well-documented both in its pretrial and trial record. Culled from relevant pleadings, discovery materials, hearing and trial transcripts, orders, and even press releases, this applied analysis contrasts the stories

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165. Id. at 126.

166. Id.

167. See id. at 61, 126, 128.

168. Id. at 126–27.

169. Complaint, supra note 46.

170. A recent LexisNexis search for "BigLaw" and "discrimination" performed in the category "U.S. Publications" ("articles from magazines, newspapers, newsletters, transcripts, and wires located in the United States") yielded 176 articles from 2015 to 2019 and 171 articles from 2020 to 2024, compared with 72 articles for the years 2010 to 2014 and 114 articles between 2000 and 2009.

of racial bias and discomfort presented by Cardwell's legal team with the purportedly race-neutral stories of professional and cultural incompetence offered by Davis Polk's legal team, a defense team staffed by litigators from the BigLaw firm Paul, Weiss.[171]

A. *Racial Bias and Racial Discomfort Narratives in Pleadings*

Woodson defines racial bias in terms of "the positive and negative assessments and feelings people have regarding racial groups and their members."[172] At elite firms, he acknowledges, "direct evidence of bias and discrimination is relatively rare."[173] Instead, "[d]iscrimination at these firms tends to be subtle and covert rather than blatant."[174] Often, he recounts, "the evidence of potential unfair treatment is at best highly circumstantial" in part because "White professionals usually hold their biases surreptitiously" and in part because "many may not even be aware of their own" closely-held biases.[175] Despite this causal ambiguity, "other conditions" prevalent at elite firms "convey to Black professionals that they should not expect to be treated fairly there."[176] For Black professionals, the typical conditions from which to draw inferences of bias include statistical, evidence-based racial disparity; public reputation for a toxic culture of racism; and private rumor of discrimination.[177]

Woodson notes that racial bias can manifest itself in terms of both positive and negative orientations toward others, whether individuals or groups. Positive orientations, he explains, rest on commonly shared traits, "such as when White people presume other White people to be more competent and trustworthy than people from other racial groups."[178]

171. Investigating Paul, Weiss's all-white, overwhelmingly male "new partner class" announced in December 2018, the *New York Times* reported: "Paul, Weiss makes a point of recruiting law students of color, who are often attracted by the chance to work alongside [B]lack partners like [Jeh] Johnson and [Theodore] Wells." Noam Schreiber & John Eligon, Elite Law Firm's All-White Partner Class Stirs Debate on Diversity, N.Y. Times (Jan. 27, 2019), https://www.nytimes.com/2019/01/27/us/paul-weiss-partner-diversity-law-firm.html (on file with the *Columbia Law Review*). Yet, reportedly "many of these young lawyers described a complicated reality, in which young minorities are welcomed at the firm and then frequently sidelined." Id. Indeed, "[s]ome complained that people in power held them to different standards than their white male peers, or punished them more severely for mistakes." Id. Wells himself commented: "I fear that African-American partners in big law are becoming an endangered species." Id. (internal quotation marks omitted) (quoting Wells).

172. Woodson, The Black Ceiling, supra note 1, at 2–3.

173. Id. at 48.

174. Id. at 51.

175. Id.

176. Id. at 42.

177. See id. at 51.

178. Id. at 82. Woodson explains: "In employment settings, cultural traits serve as bridges of inclusion for some employees while creating boundaries that exclude others.

Negative orientations, by comparison, hinge on the presence of nonconforming cultural traits.[179] Racial bias arising out of negative orientations, he emphasizes, "can be subtle and need not involve any malicious intent."[180] In this sense, the implicit bias inhering in positive and negative orientations may be "subconscious and almost automatic."[181]

1. *Plaintiffs' Pleading Narratives: Racial Bias and Discrimination.* — In *Cardwell v. Davis Polk*,[182] Kaloma Cardwell and his legal team told a story of "racial discrimination and retaliation"[183] that interwove narratives of both explicit and implicit racial bias. The story unfolded in 2014 when Cardwell joined Davis Polk as one of four Black associates out of 120 total associates at the law firm, notably the firm's only Black male associate in the group.[184] In his initial and amended complaints,[185] Cardwell alleged that Davis Polk and seven of its individually-named partners subjected him to discriminatory treatment over the four-year period (September 2014 through August 2018) during which he worked as a corporate associate in the firm's Credit, Capital Markets, and Mergers & Acquisitions (M&A) practice groups.[186] For purposes of racial discrimination, Cardwell alleged that Davis Polk and its partners ignored his internal complaints of "racially based disparate treatment," limited his "professional development and opportunities by assigning [him] to fewer deals and assignments," and

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Shared cultural traits can provide access to valuable workplace social capital in the form of office friendships and relationships with sponsors and mentors." Id. at 69.

179. See id. at 82 ("Racial bias can also disadvantage individuals from underrepresented racial groups who have nonconforming cultural traits, for example when it leads White employers to discriminate against Black workers who wear distinctively Black hairstyles (e.g., dreadlocks and Afros).").

180. Id.

181. Id. at 82–83; see also Anthony G. Greenwald & Lisa Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 Cal. L. Rev. 945, 951 (2006) ("Implicit biases are discriminatory biases based on implicit attitudes or implicit stereotypes." (emphasis omitted)); Joan C. Williams, Rachel M. Korn & Sky Mihaylo, Beyond Implicit Bias: Litigating Race and Gender Employment Discrimination Using Data From the Workplace Experiences Survey, 72 Hastings L.J. 337, 348 (2020) ("Another basic tenet of the implicit bias consensus is that most bias, or most bias that matters, is unconscious.").

182. Prior to filing his initial complaint, on August 3, 2017, Cardwell filed a Charge of Discrimination with the EEOC against Davis Polk. On August 6, 2019, the EEOC issued Cardwell a Right to Sue letter. Complaint, supra note 46, at 2.

183. Id. at 1.

184. *Cardwell*, No. 1:19-cv-10256-GHW, 2020 WL 6274826, at *2 (S.D.N.Y. Oct. 24, 2020), ECF No. 78 (granting in part and denying in part defendants' second motion to dismiss).

185. Cardwell's initial eighty-six-page complaint was later supplemented by three amended complaints. See, e.g., Third Amended Verified Complaint With Jury Demand, *Cardwell*, No. 1:19-cv-10256-GHW, 2021 WL 4737628 (S.D.N.Y. filed Oct. 4, 2021), ECF No. 200.

186. Complaint, supra note 46, at 2–3. The Davis Polk 2014 associate class numbered more than 120 but contained only 4 Black members; Cardwell was the lone Black male. Id. at 3.

"effectively ceas[ed]" communication with him and, in doing so, deprived him of "billable work" and "mentorship opportunities."[187] Cardwell also alleged that Davis Polk and the seven named partner-defendants retaliated against him when he complained of their discriminatory conduct.[188] Specifically, he alleged that they threatened his employment and career, falsified his performance reviews and other inter-office communications "to distort the quality of [his] job performance and justify his firing," and, finally, terminated his employment.[189] Based on these allegations, Cardwell asserted seven counts of racial discrimination, unlawful retaliation, and harassment[190] under Title VII of the Civil Rights Act of 1964,[191] section 296 of the New York State Human Rights Law,[192] and section 8-107 of the New York City Administrative Code.[193] For relief, he requested compensatory damages, including compensation for emotional harm, psychological harm, and related physical impairments,[194] punitive damages, fees, and costs.[195]

Cardwell's allegations of racial discrimination and retaliation combined narratives of both explicit and implicit racial bias. From the outset, he described "a problem with bias and unconscious bias" at Davis Polk, citing "situations where Davis Polk attorneys were not making eye contact with or speaking to summer associates and junior associates of color in meetings."[196] He also described what he viewed as multiple "discriminatory interactions" and occasions when he was excluded from "email communications and meeting invitations" pertaining to deal team transactions within his practice group.[197] Referencing this "staffing" exclusion in conversation with the Diversity Committee and the Black Attorney Group at Davis Polk, Cardwell clarified that "he wasn't just talking about the *feeling* of being excluded," but addressing the actual, racially disparate exclusion of Black associates.[198] Further, Cardwell described reporting the "interpersonal and institutional discrimination"

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187. Id. at 2.

188. Id.

189. Id.

190. Id. at 80–84.

191. See Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 241, 253–58 (codified at 42 U.S.C. §§ 2000e–2000e-3 (2018)).

192. See N.Y. Exec. Law § 296(1)(a), (h) (McKinney 2025).

193. See N.Y.C., N.Y., Admin. Code § 8-107(1)(a) (2025).

194. In June 2017, Cardwell informed Davis Polk "that he had experienced some health complications as a result of the Firm's treatment" of him. Complaint, supra note 46, at 76.

195. Id. at 84–85.

196. Id. at 15, 17.

197. Id. at 18–19.

198. Id. at 20.

experienced by Black associates to the former Davis Polk managing partner Thomas Reid.[199]

Taken as a whole, Cardwell's complaint-based, factual allegations are replete with detailed examples of partner-attributed, disparate deal team staffing and communication shunning ("radio silence"[200]) that practically "isolated and ignored" him.[201] Cardwell described these cumulative actions as a "constant barrage of direct and indirect forms of harassment and humiliation."[202] Coinciding with his increasing isolation, Cardwell reported that his billable hours declined precipitously in 2016 and 2017, commenting that his "workload continued to be almost completely nonexistent."[203] When the firm's promised institutional efforts, as described by Cardwell, to rectify ("fix[]"[204]) his continuing workload and staffing issues failed to come to fruition in late 2017, he filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission (EEOC) against Davis Polk.[205] In his EEOC complaint, Cardwell asserted that Davis Polk had discriminated and retaliated against him because of his race and because he "actively raised awareness and concerns regarding issues of racial bias and disparate outcomes."[206] On February 8, 2018, two Davis Polk partners informed Cardwell of the firm's decision to terminate him, effective in August 2018.[207]

In November 2019, three months after the EEOC issued a Right to Sue letter, Cardwell filed an employment discrimination complaint against Davis Polk in the U.S. District Court for the Southern District of New York.[208] In an early joint letter to U.S. District Court Judge Gregory H.

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199. Id. at 4, 22.

200. See id. at 75.

201. See id. at 35–52, 55–56 (recounting a series of negative interactions with Davis Polk partners and their failure to staff Cardwell on deals or provide opportunities for billable hours).

202. Id. at 56.

203. Id. at 57.

204. Id. at 67 (internal quotation marks omitted) (quoting Reid).

205. See id. at 2.

206. Id. at 76 (internal quotation marks omitted) (quoting the EEOC filing).

207. Id. at 78–79.

208. Id. at 2. In a series of decisions reached over the course of four years, the district court granted Davis Polk's motions to dismiss and for summary judgment as to Cardwell's discrimination claims. See, e.g., *Cardwell*, No. 1:19-cv-10256-GHW, 2023 WL 2049800, at *41 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (granting in part and denying in part defendants' motion for summary judgment). Subsequently, in January 2024, the district court conducted a jury trial on the surviving retaliation claims. David Thomas, Law Firm Davis Polk Faces Trial in Ex-Lawyer's Retaliation Lawsuit, Reuters (Jan. 8, 2024), https://www.reuters.com/legal/litigation/law-firm-davis-polk-faces-trial-ex-lawyers-retaliation-lawsuit-2024-01-08/ [https://perma.cc/7KUB-BK9A]. After three weeks of trial, on January 29, 2024, the jury returned a verdict in favor of the defendants. See Verdict Sheet, *Cardwell*, 1:19-cv-10256-GHW (S.D.N.Y. filed Jan. 29, 2024), ECF No. 388;

Woods (submitted in advance of a pretrial conference in December 2019), Cardwell's legal team reiterated its allegations that Davis Polk discriminated against Cardwell "on the basis of his race and retaliated against him" for raising "concerns about racial bias and disparate treatment" in "a series of interactions" with firm partners and personnel.[209] In the joint letter, Cardwell's legal team alleged that when Cardwell's "complaints regarding bias escalated," Davis Polk and the seven partners named as defendants in the suit retaliated by:

> engag[ing] in a systematic process of isolating [Cardwell] by depriving him of substantive deal work; reducing his opportunities for advancement by, among other actions, effectively cutting his billable hours to zero for months on end; and assigning him to 'mentors' who (i) refused to communicate with [him] and (ii) were central to the unlawful treatment [he] had experienced and complained about.[210]

In addition, Cardwell's legal team alleged that individual Davis Polk partners "explicitly threatened to alter [Cardwell's] standing and employment if [he] didn't drop his complaints and requests for investigations."[211]

2. *Defendant Firms' Pleading Narratives: Professional and Cultural Incompetence.* — In the same joint letter, the legal team representing Davis Polk and the seven named partners denied "each and every claim" set forth in Cardwell's complaint.[212] The Davis Polk defense team couched this denial in a nondiscrimination story showcasing narratives of Cardwell's professional and cultural incompetence. The story opened with an expression of frustrated institutional altruism and unfulfilled professional aspiration. Davis Polk, the team claimed, hired Cardwell "in the hopes that he would succeed and make the transition from law student to skilled attorney."[213]

Debra Cassens Weiss, Jurors Rule for Davis Polk in Former Associate's Retaliation Suit; Defense Called His Claims a 'Conspiracy Theory', ABA J. (Jan. 29, 2024), https://www.abajournal.com/news/article/jurors-rule-for-davis-polk-in-former-associates-retaliation-suit-defense-called-his-claims-a-conspiracy-theory [https://perma.cc/22LC-2UDL]. On February 28, 2024, Cardwell filed a notice of appeal. Notice of Appeal, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. filed Feb. 28, 2024), ECF No. 419. On October 15, 2024, Cardwell withdrew his appeal. See Patrick Dorrian, Black Ex-Davis Polk Associate Withdraws Appeal in Job Bias Suit, Bloomberg L. (Oct. 16, 2024), https://news.bloomberglaw.com/litigation/black-ex-davis-polk-associate-withdraws-appeal-in-job-bias-suit (on file with the *Columbia Law Review*).

209. Joint Letter to Judge Woods at 2, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. filed Dec. 13, 2019), ECF No. 25.

210. Id.

211. Id.

212. Id. at 2–3.

213. Id. at 2.

Regrettably, the team bemoaned, "[t]hese hopes were disappointed."[214] Weaving a narrative of irreparable professional incompetence and well-intentioned, remedial frustration, the defense team cited "significant efforts by the Firm to assist in [Cardwell's] professional development"—efforts stymied by Cardwell's asserted inability "to perform at the level expected of a Firm associate."[215]

Despite the fact that Cardwell had been vetted during the law school on-campus and call-back interview process, participated in the Davis Polk 2013 summer associate program following his second year of law school, and received a post–law school employment offer to join the firm as a first-year associate,[216] the defense team declared that his "work was notably uneven" from the very "outset."[217] Throughout the litigation, the defense team pressed this point, maintaining that, "by the end of 2016," only Cardwell's "second year at the Firm, senior lawyers in three different practice groups had observed—and documented—troubling problems with [Cardwell]'s performance."[218] Cardwell, according to the defense

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214. Id.

215. Id.; see also Defendants' Memorandum of Law in Support of Their Partial Motion to Dismiss at 2, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. filed Feb. 10, 2020), ECF No. 34 [hereinafter Defendants' Memorandum of Law] ("By the end of 2017, despite repeated efforts by the Firm to help him, [Cardwell]'s performance problems had not been cured, and it was clear that [he]—by then a fourth-year associate in the M&A group—was not performing at the level expected of a mid-level Davis Polk associate.").

216. Jane Wester, Ex-Davis Polk Associate Files Notice of Appeal to Second Circuit in Retaliation Lawsuit, N.Y. L.J. (Feb. 29, 2024), https://www.law.com/newyorklawjournal/2024/02/29/ex-davis-polk-associate-files-notice-of-appeal-to-second-circuit-in-retaliation-lawsuit/ (on file with the Columbia Law Review).

217. Joint Letter to Judge Woods, supra note 209, at 2. Such a remark seems surprising. After all, Davis Polk had evaluated Cardwell's work for over eight weeks during his employment as a summer associate in 2013 and had decided to hire him back for a full-time job as an associate, only to turn around and criticize his work from day one. See supra text accompanying notes 216–217. In many ways, this declaration casts the Davis Polk entry-level associate recruitment program into sharp relief, calling into question both its cultural fit criteria and its skill-based performance benchmarks for hiring. See Careers, Davis Polk & Wardwell LLP, https://www.davispolk.com/careers/overview [https://perma.cc/6CT6-TM93] (last visited Mar. 28, 2025) (advertising Davis Polk's "warm, inclusive culture" and reputation for "exceptional advice and representation" to prospective job applicants); cf. Assessing Law Firms: Culture, Clients, Compensation and Beyond, Yale L. Sch., https://law.yale.edu/student-life/career-development/students/career-pathways/law-firms/assessing-law-firms-culture-clients-compensation-and-beyond [https://perma.cc/FN52-LQPF] (last visited Jan. 17, 2025) (enumerating several criteria law students should consider when applying to law firms, including "the firm's corporate culture and fit," "the types of legal issues you engage in and the types of clients you serve," as well as the firm's ranking and reputation).

218. Joint Letter to Judge Woods, supra note 209, at 2; see also Defendants' Memorandum of Law, supra note 215, at 1–2 ("[Cardwell] failed to complete the work required; he neglected the tasks assigned to him; he failed to meet deadlines; he failed to respond to his supervisors . . . he failed to identify fundamental legal issues and came to

team, "neglected the tasks that were assigned to him," "missed deadlines," and produced "frequently substandard" work "marred by errors."[219] Furthermore, the team claimed, Cardwell "was often unresponsive to inquiries and requests from colleagues" and "made mistakes unacceptable for an associate at even the most junior level."[220] Critically distilled, the team pronounced Cardwell's work "deficient in multiple, serious respects," and his potential wanting, given his allegedly demonstrated inability to improve his performance, even when "repeatedly told by supervising attorneys and in multiple formal reviews that he needed to" do so "substantially."[221]

Amplifying the narrative of professional incompetence, the Davis Polk defense team contended that Cardwell's "shortcomings in performing his work" and "difficulties in consistently meeting the Firm's expectations became increasingly apparent as the tasks he was assigned became more demanding."[222] Unsurprisingly, the team continued, Cardwell's "record of poor performance came to be known within his assigned practice group, and, as a result of those performance shortfalls" and "continuing deficiencies," "the lawyers within that group found it increasingly difficult to staff him on the more challenging matters," in spite of his "more senior" associate status.[223] Poor performance, the team ventured, "explain[ed] [Cardwell's] frustration in not obtaining choice assignments" at the firm.[224]

Crediting Davis Polk senior management leaders and practice group members, the defense team claimed that the firm "told" Cardwell "consistent[ly]" in 2017 and in "prior performance reviews" that "he needed to make significant improvements to his performance."[225] To that end, the team insisted, Davis Polk "devoted significant, senior-level resources to helping [Cardwell] improve his performance" and in fact "offered" him "a variety of resources to address his performance problems, including personal coaching by several partners."[226] To "an extraordinary degree," the team intoned, "senior leadership . . . took an interest in [Cardwell]'s success and expended considerable personal efforts throughout 2017 to improve his professional development."[227]

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incorrect legal conclusions, including . . . introducing changes that . . . [were] adverse to the client's interests.").

219. Joint Letter to Judge Woods, supra note 211, at 2.

220. Id.

221. Id. at 2–3.

222. Id. at 3.

223. Id.

224. Id.

225. Id.

226. Id.

227. Id.

Yet, the defense team complained, Cardwell's "performance deficiencies persisted,"[228] notwithstanding "sustained" firm-wide efforts to give him "another chance to improve his work to the level expected of an associate at his seniority level," repeated "opportunities" and "second chances," and "meaningful real-time feedback" and even "attempted performance coaching."[229] At bottom, the defense team explained, Cardwell's "deficient performance made him unsuitable for the work expected of an associate of his seniority."[230] In this Davis Polk-told counterstory of Cardwell's professional incompetence, "[n]o discrimination or retaliation happened here."[231]

B. *Racial Bias and Racial Discomfort Narratives at Trial*

Long-discerning of the subtle machinations of implicit bias, Woodson nevertheless concedes that many Black professionals working at elite firms like Davis Polk "perceive" the "unfair hindrances," "burdens," and "disadvantages" that they face "to be distinct from racial bias."[232] He reports that their accounts of "career difficulties generally involve feelings of alienation, frustration, and isolation, rather than outright discrimination."[233] He underlines that such "nuanced problems" stand out as "a major source of Black disadvantage at elite firms," an institutionally hardened disadvantage "leading to a nearly impermeable 'Black ceiling.'"[234]

Recall that Woodson ties Black disadvantage and workplace inequality to the social dynamic of racial discomfort.[235] He defines racial discomfort in terms of "the unease that Black professionals experience in White dominated workplaces because of the isolation and institutional discrimination they encounter"—an unease operating "independently of any acts of racial bias."[236] Again, in this analysis, two types of racial discomfort affect Black professionals in the predominantly white workplaces of elite law firms: social alienation and stigma anxiety.

Once again, to Woodson, social alienation describes "the isolation and marginalization that many Black professionals experience because

228. Id.

229. Id.

230. Id.

231. Id.

232. Woodson, The Black Ceiling, supra note 1, at 3.

233. Id.

234. Id. at 4. Woodson also considers how "race-based cultural dynamics operate in conjunction with gender- and class-based variations to further alienate some Black women and Black professionals from lower socioeconomic backgrounds." Id. at 15.

235. See id. at 4–5 (explaining "social alienation and stigma anxiety . . . affect Black professionals in predominantly White workplaces").

236. Id.

their backgrounds and cultural repertoires differ from those of their White colleagues."[237] Indirectly connected to racial bias, social alienation signals limited access to, and scant accumulation of, cultural capital. At elite firms, disparities in "cultural capital shape workplace interactions in ways that advantage many White professionals while excluding and further marginalizing many Black professionals."[238]

Additionally, for Woodson, stigma anxiety captures "the uneasiness and trepidation that many Black professionals develop in situations where they recognize that they may be at risk of unfair treatment on the basis of race."[239] A chief source of stigma anxiety for Black professionals, according to Woodson, derives from the perception of racially skewed performance-assessment procedures and outcomes as well as racial disparities in the quality of work assignments.[240] This perception fuels anxiety among Black professionals that they stand at "heightened risk of unfair treatment"[241] simply on the basis of racial difference. Fear of "stigma-based disapproval and mistreatment,"[242] he observes, engenders strategic, "self-protective behaviors"[243]—for example reticence and self-concealment[244]—as an adaptive kind of "racial risk management."[245] He cautions, however, that defensive, risk-mitigation, or workplace coping strategies may prove "counterproductive and self-limiting" for Black professionals.[246] In effect, such strategies may disadvantage Black professionals by curbing "their access to vital social capital" and reinforcing "their feeling of not belonging."[247] Compounding workplace disadvantage, Woodson explains, is the fact that Black associates' engagement in self-protective defense mechanisms like racial reticence are frequently "misinterpreted" by white

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237. Id. at 5.

238. Id. at 69.

239. Id. at 5.

240. See id. at 29–34 (noting that "[n]egative reviews can doom [Black professionals] to lower-quality assignments and more intense scrutiny and may even lead to their being terminated").

241. Id. at 129.

242. Id. at 46.

243. Id. at 6.

244. Id. at 47. For Black professionals at elite firms, Woodson identifies three particularly disadvantaging effects of stigma anxiety: racial stress, racial reticence, and self-concealment. See id. He defines racial stress as "the psychological burden of constant vigilance against mistreatment." Id. He denotes racial reticence as "a phenomenon in which Black people choose not to speak up or out because they worry that colleagues will assess them according to anti-Black stereotypes." Id. And he defines self-concealment as a tendency among Black professionals to "opt not to share personal details that they believe might increase the salience of their racial identity and discredit them in the eyes of their colleagues." Id.

245. Id. at 5–6 (emphasis omitted).

246. Id. at 45.

247. Id. at 5–7, 45.

partners, senior professionals, and peers as evidence of "personal failings or professional deficiencies of individual Black professionals rather than as reactions to legitimate situational concerns" about workplace bias and discrimination.[248]

Rooted in the seemingly raceless or race-neutral dynamics of white organizational spaces, the experiences of social alienation and stigma anxiety captured by Woodson remain stubbornly "salient for members of underrepresented and stigmatized groups even in the absence of any direct manifestations of discrimination or racial animus."[249] For Woodson, the pervasiveness of these experiences "suggest[s] that racial discomfort accounts for at least some of the difficulties and disparities" that social scientists observe, document, and "typically attribute to racial bias."[250] To better understand the experience of racial discomfort for Black professionals in elite law firm workplaces, and its shifting relationship to racial bias, consider the social alienation and stigma anxiety narratives in *Cardwell v. Davis Polk*.

In both his administrative EEOC filings and federal litigation papers, Cardwell echoed and enlarged the racial discomfort narratives of social alienation and stigma anxiety described by Woodson. Cardwell's pleadings employed these narratives to illustrate an overall experience of racially disparate access to law firm mentoring and sponsorship resources and their accompanying cultural and social capital, a common experience for Black professionals in white-dominated workplaces. He described painfully awkward circumstances where senior white associates who were "'extremely gregarious' when interacting with white associates, partners, and clients" or who "turned into Leonardo DiCaprio when dealing with partners," failed to even make eye contact with him or other Black associates or to say hello to him when they were in the same room for fifteen minutes or more.[251] Cardwell further alleged, for example, that he was not included on "a congratulatory email concerning a deal on which he had completed substantial work";[252] that he was abruptly removed from deal teams;[253] and, more broadly, that he was "excluded from staffing-related opportunities."[254]

Additionally, Cardwell alleged that firm partners declined to respond to his expressed concerns over racially disparate treatment or even to

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248. Id. at 46.

249. Id. at 3–5.

250. Id. at 129.

251. Cardwell v. Davis Polk & Wardwell LLP, No. 1:19-cv-10256-GHW, 2023 WL 2049800, at *3, *8 (S.D.N.Y. Feb. 16, 2023) (granting in part and denying in part defendants' motion for summary judgment).

252. Id. at *7.

253. See Complaint, supra note 46, at 41–43.

254. Id. at 20.

verbally communicate with him for "four to six months."[255] Overall, Cardwell and his legal team articulated narratives of professional isolation and marginalization, as well as institutionally inflicted unease and stress, that finally culminated in "health complications" for him.[256] In sum, Cardwell and his legal team alleged that "virtually all of Davis Polk's M&A partners isolated and ignored" him, a "routine daily" practice that Cardwell's team described as "a form of harassment and humiliation."[257] At the same time, Cardwell and his team reached beyond racial discomfort narratives of social alienation and stigma anxiety in bluntly alleging that the staffing and mentoring decisions of the all-white Davis Polk partners were "motivated" by race and demonstrated proof of "discriminatory and retaliatory treatment."[258]

Because the social dynamic of racial discomfort is a byproduct of Black disadvantage and workplace inequality and, moreover, attributable to discriminatory social structures and processes, it can work in conjunction with or independent of racial bias. Isolation of this sort increases the real and perceived risk of unfair treatment on the basis of race. For Cardwell, however, the dynamics of social alienation and stigma anxiety he described at Davis Polk appear nowhere subtle. On the contrary, taken as true, those social dynamics seem starkly displayed and highly disadvantaging, as they inhibited his access to beneficial workplace relationships and premium work assignments. Indeed, the workplace dynamics confronting Cardwell appeared to be isolating and frustrating, rather than nuanced in their marginalizing impact.

Furthermore, although Cardwell tried to advocate for himself by requesting that the firm offer training to help address the dynamic of racial discomfort and the pattern of uneven assignments and insufficient mentoring described by his legal team,[259] and although he remained eager for work and receptive to constructive feedback,[260] the responses of white leaders at the firm, however well-intentioned, did not seem to fully grasp

255. Id. at 45, 49–51, 60.

256. See id. at 76–79.

257. Id. at 55, 56, 63.

258. See id. at 18, 60, 65, 72.

259. See *Cardwell*, 2023 WL 2049800, at *3 (S.D.N.Y. Feb. 16, 2023), ECF No. 305. "On May 8, 2015, [Cardwell] emailed the Firm's Executive Director of Personnel regarding . . . an 'inter-office dynamic,' and recommended that the issue be addressed through the Firm's training for third-year associates . . . to 'remind[] our attorneys of the importance of saying hello and introducing themselves to attorneys they do not know.'" Id. (fourth alteration in original).

260. Id. at *10, *11 (describing how Sophia Hudson, a partner, said that Cardwell was "'behind' his class" and "extremely willing to hear the feedback and took it with grace" (quoting Hudson)); id. at *12 (noting that Hudson "commend[ed] Kaloma for his positive attitude . . . even when [she] gave him direct feedback" and that he not only bought a book that she referred to when she corrected him on his grammar in an email but also "bought [her] an updated version" (quoting Hudson)).

the racial dynamics that Cardwell and his team believed to be at play. Gauged by the tenor of their responses to Cardwell, firm leaders did not seem at all eager to allay or disrupt what Woodson has described as the unrecognized and frequently underappreciated burden that Black professionals must endure in adapting "to the[ir] office's [white] cultural milieu" and in having to "'change who they are' in accordance with the preferences and values of White colleagues."[261] Rather, the cumulative import of individual and institutional responses at Davis Polk left Cardwell, the only Black male associate in his associate class of 120 lawyers, to grapple with the racial discomfort by himself. For Davis Polk, the burden of overcoming racial discomfort fell to Cardwell, not the firm or its leadership. Cardwell, the firm's Executive Director of Personnel insisted, should "show[] them," meaning the partners and senior attorneys who did not make eye contact with him and who did not say hello to him even when he worked on a team with them, "how to live in a polite society (!)."[262] Cardwell, the Executive Director declared, should "introduce[]" himself![263] Echoing this facile analysis, Thomas Reid, the former managing partner of Davis Polk and a white man whom Cardwell himself described as well-intentioned in his personal journal, did not seem to consider whether Cardwell's proposed training for lawyers would have been helpful and instead explained to Cardwell that his and another Black associate's experiences with disparate treatment "were likely due to supervising lawyers not having adequate social skills."[264]

1. *Plaintiffs' Trial Narratives: Racial Bias and Discrimination.* — To further illustrate the contested narratives of professional and cultural competence in BigLaw racial bias and racial discomfort litigation, this Book Review briefly considers the stories told by the legal teams in the three-week jury trial of Cardwell's termination-predicated retaliation claims against Davis Polk and three of its seven initially-named individual partners in January 2024.[265] At both pretrial and trial proceedings, for example, Cardwell's attorney, David Jeffries, a solo practitioner, [266]

261. Woodson, The Black Ceiling, supra note 1, at 80.

262. *Cardwell*, 2023 WL 2049800, at *4 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (granting in part and denying in part defendants' motion for summary judgment).

263. Id.

264. See id. at *8.

265. The three-week civil jury trial featured more than *thirty* witnesses, including current and former Davis Polk partners and executives. The ten-person jury reached a verdict after little more than three hours of deliberation. See Jane Wester, Manhattan Jury Finds Davis Polk Not Liable for Retaliation Against Ex-Associate, N.Y. L.J. (Jan. 30, 2024), https://www.law.com/newyorklawjournal/2024/01/29/verdict-jury-finds-davis-polk-not-liable-for-retaliation-against-ex-associate/ (on file with the *Columbia Law Review*) [hereinafter Wester, Jury Finds Davis Polk Not Liable].

266. A former prosecutor from the Queens County District Attorney's Office, Jeffries is a solo practitioner specializing in criminal law and personal injury law. See David Jeffries Attorney At Law, Jeffries Law, https://www.jeffrieslaw.nyc/our-firm/ [https://perma.cc/

presented a story of covert, racial-bias-motivated conspiracy and retaliation.[267] During the initial pretrial conference Jeffries described Cardwell's "firsthand" experiences of "racial discriminatory behavior" within the firm, his repeated attempts to "vocalize" complaints of such racially discriminatory treatment to firm "management," and the ensuing "retaliation" mounted "deliberately and directly" by the firm against him.[268] In addition, during his opening statement at trial, Jeffries stated, "You're going to hear that this firm, these people—they used their knowledge, they used their intelligence to put in place a scheme that is going to be difficult to detect, a scheme that is going to allow them to avoid liability."[269] Recounting a conversation in 2017 between Cardwell and Reid in which Cardwell expressed concerns about the racial bias and discriminatory treatment exhibited by firm partners toward him, Jeffries added: "You're going to learn that he was told that if he didn't drop it, that if he didn't stop asking questions, he's going to be off the field."[270]

Relatedly, in his trial testimony, Cardwell pointed to a 2015 meeting of Davis Polk's Black Affinity Group ("BAG") where he publicly remarked that BAG members "were not being staffed similar to people in our class, similar to white associates."[271] Cardwell testified: "This was not an environment where we were just freely communicating our racial concerns or racial views . . . [BAG] members, including myself, were being very careful about how we were talking about what we had experienced at the firm."[272] He described the firm's "response" offered by Davis Polk's former director of professional development to be:

B8WE-UJZ9] (last visited Oct. 28, 2024). Jeffries graduated from Syracuse University and the Maurice A. Deane School of Law at Hofstra University. See id.

267. See, e.g., infra notes 268–270 and accompanying text.

268. Transcript of Dec. 20, 2019 Pretrial Conference at 4–5, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. Jan. 21, 2020), ECF No. 29.

269. Jane Wester, 'Poor Performance,' Not Retaliation, Led to Davis Polk Associate's Firing, Jeh Johnson Tells Jury, N.Y. L.J. (Jan. 8, 2024), https://www.law.com/newyorklawjournal/2024/01/08/poor-performance-not-retaliation-led-to-davis-polk-associates-firing-jeh-johnson-tells-jury/ (on file with the *Columbia Law Review*) [hereinafter Wester, 'Poor Performance,' Not Retaliation] (internal quotation marks omitted) (quoting Jeffries); see also Trial Transcript for Jan. 8, 2024, at 66, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. Jan. 30, 2024), ECF No. 389.

270. Wester, 'Poor Performance,' Not Retaliation, supra note 269 (internal quotation marks omitted) (quoting Jeffries); Trial Transcript for Jan. 8, 2024, supra note 269, at 72.

271. Jane Wester, Davis Polk Ex-Associate Kaloma Cardwell Recounts His Experience in Retaliation Trial Testimony, N.Y. L.J. (Jan. 22, 2024), https://www.law.com/newyorklawjournal/2024/01/22/davis-polk-ex-associate-kaloma-cardwell-recounts-his-experience-in-retaliation-trial-testimony/ (on file with the *Columbia Law Review*) [hereinafter Wester, Cardwell Recounts His Experience] (internal quotation marks omitted) (quoting Cardwell).

272. Id. (alterations in original) (internal quotation marks omitted) (quoting Cardwell).

> something along the lines of "Well, we understand that people may feel like they are being excluded or are not receiving the same opportunities" and I waited for her to finish speaking and then I said "Just to be clear, I'm not talking about a feeling of being excluded, I'm talking about our career opportunities being hindered."[273]

Cardwell added: "[I]t was very clear that we were talking about our experiences as [B]lack associates at the firm. It was very clear that I was talking about my experiences as a [B]lack associate at the firm."[274]

Cardwell also testified that he had "experienced sitting in an M&A practice group [meeting] for an hour, being one of the only Black attorneys in the room, sitting at a table that had six or seven other attorneys at it and experiencing absolutely no [one] looking at me for the entire hour-long meeting."[275] At the time, he noted, "I thought that what I experienced did not happen to everyone and it was not happening to everyone . . . ."[276]

On cross-examination, Bruce Birenboim, a Paul, Weiss partner and a member of the Davis Polk defense team, asked Cardwell: "Is it your testimony that certain of these Davis Polk partners lied to this jury when they came in and swore these were their *honestly held views of your performance*?"[277] Cardwell replied: "Are you asking me,

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273. Id. (internal quotation marks omitted) (quoting Cardwell).

274. Trial Transcript for Jan. 22, 2024, at 1811, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. Jan. 30, 2024), ECF No. 404 (quoting Cardwell).

275. Wester, Cardwell Recounts His Experience, supra note 271 (alterations in original) (internal quotation marks omitted) (quoting Cardwell). In an email to Cardwell, Davis Polk's former executive director attributed the absence of collegiality (e.g., "eye contact" or a "hello") at firm meetings to "lawyers being more socially awkward than most." Jane Wester, 'Strange . . . '?: Jurors at Davis Polk Retaliation Trial Read Firm's Internal Emails, N.Y. L.J. (Jan. 12, 2024), https://www.law.com/newyorklawjournal/2024/01/12/strange-jurors-at-davis-polk-bias-trial-read-firms-internal-emails/ (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Sharon Crane). She added: "Unfortunately that happens to everyone but it can be most uncomfortable for those who are junior or new or feel different." Id. (internal quotation marks omitted) (quoting Crane).

276. Wester, Cardwell Recounts His Experience, supra note 271 (internal quotation marks omitted) (quoting Cardwell). In testimony, Reid recalled discussing feelings of not being noticed with Cardwell and another Black former Davis Polk associate at a dinner in January 2016. See Trial Transcript for Jan. 18, 2024, at 1532, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. filed Feb. 7, 2022), ECF No. 403. Reid also affirmed that the "purpose of the dinner was to discuss diversity issues." Id. at 1533 (quoting Bruce Birenboim, a member of the Davis Polk defense team).

277. Jane Wester, Were Davis Polk Performance Reviews 'Ginned Up'?: Cardwell Cross-Examined in Retaliation Trial, N.Y. L.J. (Jan. 24, 2024), https://www.law.com/newyorklawjournal/2024/01/24/were-davis-polk-performance-reviews-ginned-up-cardwell-cross-examined-in-retaliation-trial/ (on file with the *Columbia Law Review*) (emphasis added) (internal quotation marks omitted) (quoting Birenboim).

do I believe they were not telling the truth? Absolutely, some of them."[278]

In closing argument, Jeffries asserted that Davis Polk partners terminated Cardwell to avoid "embarrassing" the firm in fending off an accusation of "discrimination" by a Black associate.[279] The goal of the firm, according to Jeffries, was "to get Mr. Cardwell out."[280]

2. *Defendant Firms' Trial Narratives: Professional and Cultural Incompetence.* — By contrast, in his opening statement, Jeh Johnson,[281] a partner at Paul, Weiss and the leader of Davis Polk's legal defense team, invoked standard BigLaw "up or out" narratives of performance-based competence, hard-earned merit, and cultural respectability.[282] At the outset, Johnson stated: "As sinister and as complicated and as conspiratorial as Mr. Jeffries and Mr. Cardwell would like to make it, it's actually pretty simple. The reason Kaloma Cardwell was asked to leave Davis Polk was his *poor job performance*."[283] Specifically referencing Cardwell's performance reviews, he commented: "Over time [Cardwell] could not demonstrate, as he was becoming more senior, that he could be

278. Id. (internal quotation marks omitted) (quoting Cardwell); see also Trial Transcript for Jan. 24, 2024, at 2138, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. Jan. 30, 2024), ECF No. 409.

279. Jane Wester, Jeh Johnson Urges Jury to Reject 'Conspiracy Theory' in Davis Polk Retaliation Case, N.Y. L.J. (Jan. 26, 2024), https://www.law.com/newyorklawjournal/2024/01/26/jeh-johnson-urges-jury-to-reject-conspiracy-theory-in-davis-polk-retaliation-case/ (on file with the *Columbia Law Review*) [hereinafter Wester, Jeh Johnson Urges Jury] (internal quotation marks omitted) (quoting Jeffries).

280. Id. (internal quotation marks omitted) (quoting Jeffries).

281. A partner at Paul, Weiss, Johnson is a former Secretary of the U.S. Department of Homeland Security, General Counsel of the U.S. Department of Defense, General Counsel of the U.S. Air Force, and Assistant United States Attorney for the Southern District of New York. Jeh Charles Johnson, Paul, Weiss, https://www.paulweiss.com/professionals/partners-and-counsel/jeh-charles-johnson [https://perma.cc/9E2N-8TX6] (last visited Oct. 27, 2024). Johnson graduated from Morehouse College and Columbia Law School. Id. For more on the role of Morehouse College in shaping Johnson's generation of Black men, see generally Saida Grundy, Respectable: Politics and Paradox in Making the Morehouse Man (2022) (describing the "rhetoric of leadership and exceptionalism" articulated at Morehouse College and its fervent institutional "belief that Black advancement relies on the exemplary deeds of the race's accomplished men"); Sara Weissman, 'Respectable: Politics and Paradox in Making the Morehouse Man,' Inside Higher Ed (Oct. 16, 2022), https://www.insidehighered.com/news/2022/10/17/author-discusses-recent-book-morehouse-man [https://perma.cc/8JU7-J848] (interviewing Saida Grundy about "her recently published book on how societal ideas about Black masculinity shaped the values instilled in graduates as Morehouse College").

282. See Trial Transcript for Jan. 8, 2024, supra note 271, at 83 (quoting Johnson); see also Wester, 'Poor Performance,' Not Retaliation, supra note 269 (internal quotation marks omitted) (quoting Johnson).

283. Wester, 'Poor Performance,' Not Retaliation, supra note 269 (emphasis added) (internal quotation marks omitted) (quoting Johnson); see also Trial Transcript for Jan. 8, 2024, supra note 271, at 79 (emphasis added) (quoting Johnson).

trusted to handle the more *complex work* of a mid-level and then senior-level associate at the law firm . . . ."[284] Johnson added: "We will not enjoy rolling out the track record of the *poor performance* of a former associate in this public proceeding . . . ."[285]

Similar narratives of professional and cultural incompetence emerged throughout the trial in the testimony of Davis Polk's fact witnesses. To rebut racial bias and retaliation testimony, current and former Davis Polk partners repeated narratives underscoring Cardwell's professional incompetence. Reid, for example, testified that he was "very concerned" by Cardwell's "first set of reviews . . . there were matters being commented on . . . that if not fixed immediately, could be fatal to his career. Lack of responsiveness, lack of attention to detail."[286] Reid observed, "His performance was going down very fast . . . . He wasn't responding to criticisms he'd received before."[287] In his testimony, Reid acknowledged that Cardwell had complained of "being racialized," which Reid apparently understood to mean that Cardwell "was not getting work and being discriminated against because he was Black."[288] Likewise, John Bick, the former leader of the firm's M&A practice, testified that he "was giving Kaloma a lot more attention than anyone else in [his] career advisor program in 2017" but found that staffing him on M&A cases was "increasingly difficult" because "he was 'still operating as a first- or second-year, as a practical matter.'"[289]

Along similar lines, current and former Davis Polk executives reiterated narratives emphasizing Cardwell's cultural incompetence—his naive expectations, his lack of cooperation and teamwork, his cavalier attitude, his inappropriate body language, and his unwillingness to work long hours. For example, Davis Polk's former director of professional

284. Wester, 'Poor Performance,' Not Retaliation, supra note 267 (emphasis added) (internal quotation marks omitted) (quoting Johnson); see also Trial Transcript for Jan. 8, 2024, supra note 271, at 79 (emphasis added) (quoting Johnson).

285. Wester, 'Poor Performance,' Not Retaliation, supra note 267 (emphasis added) (internal quotation marks omitted) (quoting Johnson); see also Trial Transcript for Jan. 8, 2024, supra note 271, at 100 (emphasis added) (quoting Johnson).

286. Jane Wester, 'Going Down Very Fast': Ex-Davis Polk Managing Partner Recounts Cardwell's Career Path in Retaliation Trial, N.Y. L.J. (Jan. 18, 2024), https://www.law.com/newyorklawjournal/2024/01/18/going-down-very-fast-ex-davis-polk-managing-partner-recounts-cardwells-career-path-in-retaliation-trial/ (on file with the *Columbia Law Review*) (second alteration in original) (internal quotation marks omitted) (quoting Reid).

287. Id. (internal quotation marks omitted) (quoting Reid).

288. Id. (internal quotation marks omitted) (quoting Reid).

289. Jane Wester, 'Increasingly Difficult': In Davis Polk Retaliation Trial Ex-M&A Leader Talks About Guiding Plaintiff, N.Y. L.J. (Jan. 16, 2024), https://www.law.com/newyorklawjournal/2024/01/16/increasingly-difficult-in-davis-polk-retaliation-trial-ex-ma-leader-talks-about-guiding-plaintiff/ (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Bick).

development testified, "It really surprised me that a first-year associate would expect to be included in every call and meeting in a large corporate transaction . . . ."[290] Moreover, Davis Polk's former professional development manager testified that Cardwell declined to accept an "assignment" outside of his practice group because "[h]e felt it would take away from his M&A work."[291] When she pressed Cardwell to "accept" the assignment, the manager explained, "He still didn't want to take it, which is when he mentioned something about 'Was I aware African-American men were generally disadvantaged in the law field.'"[292] Throughout the conversation, the manager noted, "Cardwell appeared 'cavalier' . . . and displayed relaxed body language."[293] Reportedly leaning back in the witness chair and raising her arms to demonstrate Cardwell's referenced "body language," she added: "I have never experienced that before . . . . The associates work extremely long hours—70, 80, occasionally 90 hours and everyone's a team. You need your people to be a team . . . . [T]hat is not the traditional response, especially as an associate at a big, very very good law firm."[294]

Recapitulating narratives of professional and cultural incompetence, in his closing argument, Johnson asserted: "It was not, 'Let's manufacture a negative review and drive him out of the firm . . . .'"[295] Instead, he insisted: "It was, 'Keep plugging away with him.'"[296] Johnson characterized Cardwell's claims as "various shifting conspiracy theories," discounting his allegations as "the kind of thing that you hear when there is simply no evidence."[297] Urging the jury to "disregard" the alleged "grand scheme to retaliate," Johnson pointed to a conflicting factual "trail of 3.5 years of evidence, reviews and testimony."[298] He concluded: "[W]e take no

290. Jane Wester, Jurors in Davis Polk & Wardwell Retaliation Trial See Ex-Associate's Early Efforts To 'Flag' Inclusion Issues at Firm, N.Y. L.J. (Jan. 11, 2024), https://www.law.com/newyorklawjournal/2024/01/11/jurors-in-davis-polk-discrimination-trial-see-ex-associates-early-efforts-to-flag-inclusion-issues-at-firm/ (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Renee DeSantis).

291. Jane Wester, 'Not the Traditional Response': Ex-Davis Polk Manager Says Ex-Associate Showed Unusual 'Cavalier' Attitude, N.Y. L.J. (Jan. 9, 2024), https://www.law.com/newyorklawjournal/2024/01/09/not-the-traditional-response-ex-davis-polk-manager-says-ex-associate-showed-unusual-cavalier-attitude/ (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Rocio Clausen).

292. Id. (internal quotation marks omitted) (quoting Clausen).

293. Id. (quoting Clausen).

294. Id. (internal quotation marks omitted) (quoting Clausen).

295. Jane Wester, Jury Finds Davis Polk Not Liable, supra note 265 (internal quotation marks omitted) (quoting Johnson).

296. Id. (internal quotations omitted) (quoting Johnson).

297. Wester, Jeh Johnson Urges Jury, supra note 279 (internal quotation marks omitted) (quoting Johnson).

298. Id. (internal quotation marks omitted) (quoting Johnson).

pleasure in outlining the poor performance of Kaloma Cardwell publicly in this courtroom."[299]

Also, in press releases, Davis Polk put forward race-neutral narratives of professional incompetence and fact-based, substandard performance. In an early press release, the firm stated: "Mr. Cardwell's termination had nothing to do with his race . . . . He was terminated for legitimate, non-discriminatory reasons."[300] A subsequent firm press release stated, "Once again, as our filing makes clear, all of the claims in this lawsuit are meritless. . . . If this lawsuit proceeds beyond this point, we will show that the remaining claims . . . are flatly contradicted by the facts and that Davis Polk, its management and partners acted entirely properly."[301] Taken together, the race-neutral narratives of professional and cultural incompetence tailored by Davis Polk's legal team to describe Cardwell's purportedly substandard performance and offered in defense of the firm in pretrial and trial proceedings and in press releases to the legal services industry and the media pose difficult remedial challenges for Woodson and others seeking to advance race-conscious norms of inclusion, equity, and partnership in large law firms and legal education. The next part assesses these challenges and considers strategies to overcome them.

IV. CAN THE RACE BE WON? REMEDIAL STRATEGIES FOR GREATER INCLUSION, EQUITY, AND PARTNERSHIP

This Part evaluates potential remedial strategies for addressing the damaging effects of racial discomfort for Black professionals in large law firms. It does so against the backdrop of new and renewed challenges to law firm DEI programs[302] following the U.S. Supreme Court's 2023

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299. Id. (internal quotation marks omitted) (quoting Johnson).

300. Jack Newsham, Ex-Davis Polk Associate Alleges Discrimination, Says He Was Repeatedly Sidelined, N.Y. L.J. (Nov. 5, 2019), https://www.law.com/newyorklawjournal/2019/11/05/ex-davis-polk-associate-alleges-discrimination-says-he-was-repeatedly-sidelined/ [https://perma.cc/NU69-EH3T] (internal quotation marks omitted) (quoting Davis Polk & Wardwell).

301. David Thomas, Davis Polk Doubles Down Against Ex-Associate in Race Bias Suit, Citing 'Deficient' Performance, N.Y. L.J (May 1, 2020), https://www.law.com/newyorklawjournal/2020/05/01/davis-polk-doubles-down-against-ex-associate-in-race-bias-suit-citing-deficient-performance/ [https://perma.cc/Q8TK-PCHH] (internal quotation marks omitted) (quoting Davis Polk & Wardwell).

302. See Julian Mark & Taylor Telford, Conservative Activist Sues 2 Major Law Firms Over Diversity Fellowships, Wash. Post (Aug. 22, 2023), https://www.washingtonpost.com/business/2023/08/22/diversity-fellowships-lawsuit-affirmative-action-employment/ (on file with the *Columbia Law Review*) ("Since late June, when the Supreme Court [issued *SFFA*], there's been a rush of legal activity aimed at translating the court's race-blind stance to the employment sphere."); Julian Mark & Taylor Telford, Conservatives Are Suing Law Firms Over Diversity Efforts. It's Working., Wash. Post (Dec. 9, 2023), https://www.washingtonpost.com/business/2023/12/09/conservatives-sue-law-firms-dei/ (on file with the *Columbia Law Review*) ("Since August, the conservative American Alliance for Equal

decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*.[303] This evaluation entails the identification and assessment of innovative firm-wide policies that could help to mitigate the impact of racial discomfort on Black professionals and enable Black professionals to avoid (or overcome) racial disadvantage and discomfort in elite white social and institutional spaces and excel in their careers at large law firms.[304]

Section IV.A first details the proposals that Woodson offered for redressing the problems aligned with racial discomfort in *The Black Ceiling: How Race Still Matters in the Elite Workplace.* Section IV.B analyzes the efficacy of Woodson's proposals for structural and cultural change in law firms to

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Rights has sued or sent threatening letters to at least seven law firms, demanding that they shutter diversity fellowship programs, and claiming that they exclude qualified White and Asian students based on race."); John Roemer, Now What? Law Firms Are Getting a Wake-Up Call as Division Over Diversity Roils America's Cultural Debate, ABA J. (Dec. 1, 2023), https://www.abajournal.com/magazine/article/law-firms-are-getting-a-wake-up-call-as-division-over-diversity-roils-americas-cultural-debate (on file with the *Columbia Law Review*) (describing how SFFA has helped conservatives target law firm DEI programs); Taylor Telford, The Growing Battle Over Corporate Diversity Practices, Explained, Wash. Post (Oct. 2, 2023), https://www.washingtonpost.com/business/2023/10/02/corporate-diversity-inclusion-affirmative-action-ruling/ (on file with the *Columbia Law Review*) ("In recent months, a flurry of litigation has aimed to translate the court's race-blind stance on education to corporate diversity and inclusion policies.").

303. 143 S. Ct. 2141, 2175 (2023) (holding that "the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause"). Shortly after the Supreme Court published its decision in *SFFA*, then-ABA President Mary Smith stated:

> In the wake of the Supreme Court decision in Students for Fair Admissions v. Harvard, the legal profession needs to review its programs and identify ways to comply with the law while promoting diversity, inclusion and equity in the legal profession. Now is the time for law firms, law schools and employers to rededicate themselves to creating a more diverse and inclusive environment.

Press Release, ABA, Statement of ABA President Mary Smith RE: Diversity Programs at Law Firms (Aug. 25, 2023), https://www.americanbar.org/news/abanews/aba-news-archives/2023/08/statement-of-aba-president-re-diversity-programs-law-firms/ [https://perma.cc/ER2Y-HDF5]; see also Report and Recommendations of the New York State Bar Association Task Force on Advancing Diversity 4 (2023), https://nysba.org/app/uploads/2023/09/NYSBA-Report-on-Advancing-Diversity-9.20.23-FINAL-with-cover.pdf [https://perma.cc/5TT9-7R6A] (analyzing what steps can lawfully be taken to support DEI after *SFFA*); A Call to Action for DEI Success: An ABA Toolkit for Advancing DEI in the Workplace, ABA, https://www.americanbar.org/groups/diversity/resources/toolkits/dei-success-toolkit/ [https://perma.cc/FW8H-VCYM] (last visited Oct. 27, 2024) ("This Toolkit focuses on the NYSBA Report's recommendations for private employers, which are crucial for fostering inclusive work environments and advancing diversity, equity, and inclusion within the legal profession.").

304. See Woodson, The Black Ceiling, supra note 1, at 125–45 ("Although firms cannot prevent racial discomfort altogether, they can limit its impact. They can do so through a combination of policies that both provide more equitable treatment to all junior professionals and channel career capital opportunities to Black professionals in need of them.").

produce greater racial equity among Black and white associates, detailing the obstacles to implementation. It also offers additional recommendations for large law firms to employ to ameliorate the problems of disproportionate attrition.

A. *Ideas for Lifting the Black Ceiling*

In specifying the solutions to inequities created by racial discomfort, Woodson begins with an important concession: that large law firms alone cannot eradicate racial discomfort and the resulting disadvantages that plague Black associates on the path to partnership.[305] He explains:

> So long as racial segregation and discrimination remain prevalent in America, Black people will likely continue to experience racial discomfort in elite firms and other White institutions. . . . Eradicating racial discomfort would require addressing its root structural causes in societal segregation and inequality, which would entail massive public investments and policy changes of a magnitude that far exceeds the current political will. As a practical matter then, racial discomfort is likely here to stay.[306]

Woodson then proceeds to detail various steps that law firms, white professionals, Black associates and partners, and even universities can take to help minimize the negative effects of racial discomfort on Black professionals' performance within private firms.[307]

Despite his belief in the entrenchment of whiteness in the culture of large law firms and the permanence of racial discomfort for Black associates, Woodson maintains that law firms hold the power to at least limit the detrimental impacts of racial discomfort on Black associates' progress within large law firms.[308] He identifies five means by which large law firms can work to reduce the harms of racial discomfort: "(1) career capital monitoring, (2) enhanced mentorship programs and assignment procedures, (3) racial discomfort training, (4) accountability measures and incentives, and (5) discomfort-conscious programming."[309]

For Woodson, career capital monitoring involves the important step of collecting data, both quantitative and qualitative.[310] He argues that the timely accumulation and detailed charting of real-time information that identifies "emerging deficits and racial disparities in premium assignments and mentorship" may enable firms to reallocate "resources and

305. Id. at 130–31.

306. Id.

307. See id. at 130–43.

308. Id. at 131.

309. Id.

310. See id. at 131–32.

opportunities to individual Black professionals who are at risk of negative career outcomes."[311] Similar risk-assessment and resource-intervention mechanisms, he notes, may be usefully applied by firm committees to track the fairness and sufficiency of "individual senior professionals' assignment, mentorship, and sponsorship actions" directed toward Black junior associates or partners.[312]

Because career capital opportunities are foundational, Woodson encourages firms to strengthen their mentorship programs and augment their assignment procedures.[313] Referencing evidence of continuing racial deficits and disparities in social capital prevalent among elite firms, he recommends the formal, organizational implementation of "targeted mentorship and sponsorship programs that specifically pair Black professionals with particularly supportive and powerful senior colleagues."[314]

To promote and improve vital, interracial mentorship and sponsorship relationships, Woodson urges the introduction of racial discomfort training "to cover social alienation and stigma anxiety."[315] The open embrace and integration of racial discomfort training, he contends, would enhance the cultural competency of white professionals, who would then be better equipped to more accurately interpret, understand, and empathize with the discomfort-driven behavior of Black associates, and therefore better positioned to properly assess the performance of Black associates.[316]

To encourage the shared development and appropriate distribution of social capital among Black and white peers, Woodson also recommends the adoption of more elaborate accountability measures and incentives.[317] Targeting senior white professionals, he endorses tailored financial and nonfinancial incentives to promote the support of Black colleagues by white partners and senior associates.[318] He links these incentives to the expansion of discomfort-conscious programming in the planning of formal firm-related events and informal firm-sponsored outings.[319] He

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311. Id. at 131.

312. Id.

313. See id. at 132–33.

314. Id. at 132.

315. Id. at 134.

316. Id.

317. Id. at 131, 135–36.

318. Id. at 135.

319. Id. at 131, 136–37. Law firms might usefully draw upon the multicultural lawyering, cross-cultural competency, and racial equity practices forged by law school clinics in devising discomfort-conscious programming. See Mable Martin-Scott & Kimberly E. O'Leary, Multicultural Lawyering: Navigating the Cultures of the Law, the Lawyer, and the Client 5–39 (2021) (exploring the importance of multiculturalism in the legal profession); Deborah

asserts that discomfort-conscious programming, coupled with joint white and Black attendance at internal and external affinity group functions, may avoid the "inadvertent exclusionary impact" of some firm events and "appeal to a broader cross-section of firm employees."[320]

Woodson argues that actions by white professionals to voluntarily mentor and sponsor their Black colleagues is indispensable to law firm culture change. He presses for a bundle of "inclusive interactional habits," such as "engaging in more open-ended discussions," "initiating more frequent interactions and in-depth conversations," and "soliciting" more input on substantive and strategic matters.[321]

B. *Can the Black Ceiling Be Broken?*

Numerous challenges, however, await Woodson's proposals for enabling greater racial equity between Black and white associates' experiences in law firms. One such challenge is the broader societal backlash against race-conscious efforts to achieve equitable outcomes.[322] The backlash has been brewing for decades, but it recently picked up steam during the summer of 2023, when the United States Supreme Court issued the *SFFA* decision.[323] Since its release and publication, the *SFFA* decision has been used as a sledgehammer to broadly challenge and attack programs designed to achieve greater diversity, inclusion, and equity in traditionally white spaces, even though *SFFA* applies only to college and university admissions, not recruitment, hiring, DEI programs, or other considerations.[324] For example, *SFFA* has been weaponized to eliminate

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N. Archer, Introduction to the Symposium, 30 Clinical L. Rev. 1, 6 (2023) (encouraging clinicians to "address the intersectional harms and the mingling of public and private discrimination"); Kim Diana Connolly & Elisa Lackey, The Buffalo Model: An Approach to ABA Standard 303(c)'s Exploration of Bias, Cross-Cultural Competency, and Antiracism in Clinical & Experiential Law, 70 Wash. U. J.L. & Pol'y 71, 82 (2023)(discussing training clinical student in "cross-cultural work" and "trauma-informed lawyering").

320. Woodson, The Black Ceiling, supra note 1, at 136–37.

321. Id. at 137–38.

322. See Nino C. Monea, Next on the Chopping Block: The Litigation Campaign Against Race-Conscious Policies Beyond Affirmative Action in University Admissions, 33 B.U. Pub. Int. L.J. 1, 4–6, 10 (documenting the wave of lawsuits that have followed *SFFA*, mostly filed by "conservative and libertarian legal groups," that "challenge nearly every possible manifestation of affirmative action" in public life).

323. See id. at 6 (summarizing landmark Supreme Court cases curtailing the consideration of race college admissions beginning in 1978 and culminating in *SFFA* in 2023).

324. See Shakira D. Pleasant, Data's Demise and the Rhetoric of *SFFA*, 77 SMU L. Rev. 161, 183–84 (2024) ("Since the *SFFA* decision, Blum [president of Students for Fair Admissions] has taken steps vis-à-vis each organization to expand the Supreme Court's holding in *SFFA* into the areas of finance, employment, voting rights, and more institutions of higher learning."); see also Jonathan Feingold, After *SFFA v. Harvard*, Universities Must Hold the Line, Oxford Hum. Rts. Hub (Aug. 10, 2023), https://ohrh.law.ox.ac.uk/after-

DEI offices or change the offices' focus at colleges and universities across the country;[325] to eliminate departments and courses concerning race, gender, sexuality, gender identity, and other individual identity characteristics despite anti-DEI activists' purported desire for increasing and promoting intellectual diversity;[326] and even to abolish a venture capital funding program, which provided no more than twenty thousand dollars to individual Black women entrepreneurs.[327]

In the legal profession, these attacks on DEI have manifested in a number of ways, most notably through assaults on large, private law firms.[328] For example, in August 2023, just one month following the *SFFA* decision, the American Alliance for Equal Rights filed lawsuits challenging

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sffa-v-harvard-universities-must-hold-the-line/ [https://perma.cc/8MRJ-UAS3] ("*SFFA* applies to admissions decisions only.").

325. See, e.g., Katherine Mangan, 'A Slap in the Face': How UT-Austin Axed a DEI Division, Chron. Higher Ed. (June 27, 2024), https://www.chronicle.com/article/a-slap-in-the-face-how-ut-austin-axed-a-dei-division [https://perma.cc/7ML5-KFB7] (noting that forty-nine staffers at UT-Austin were fired when a DEI division was eliminated); see also Alecia Taylor, 3 Ways That Anti-DEI Efforts Are Changing How Colleges Operate, Chron. Higher Ed. (Jan. 18, 2024), https://www.chronicle.com/article/3-ways-that-anti-dei-efforts-are-changing-how-colleges-operate?sra=true [https://perma.cc/7GZT-98U9] ("[R]estrictions on DEI efforts have taken effect in five states; several governors have also issued executive orders that direct colleges to review or reshape diversity efforts. Some institutions have acted without official state directives."). For example, the University of Houston closed its LGBTQ+ Resource Center on August 31, 2023. Id. Now, students seeking support as part of the LGBTQIA+ community are instead referred to places like the counseling center. Id.

326. See, e.g., Emma Pettit, New College of Florida's Board Starts to Dismantle Gender-Studies Program, Chron. Higher Ed. (Aug. 10, 2023), https://www.chronicle.com/article/new-college-of-floridas-board-starts-to-dismantle-gender-studies-program (on file with the *Columbia Law Review*) (noting how the New College of Florida has experienced an institutional overhaul, with Governor Ron DeSantis appointing five new like-minded Trustees to the Board and reporting that the Board voted to begin shutting down the college's gender studies program in August 2023).

327. Jonathan Franklin, A Venture Capital Grant Program for Black Women Officially Ends After Court Ruling, NPR (Sept. 11, 2024), https://www.npr.org/2024/09/11/nx-s1-5108729/fearless-fund-atlanta-grant-program-shut-down-lawsuit [https://perma.cc/XJ4Y-7EQQ]; see also Paula C. Johnson, Education Access & Opportunity: An Introduction, 74 Syracuse L. Rev. 885, 894 n.29 (2024) (stating that "the effect of the *SFFA* decision has far-ranging ramifications beyond the classroom such as the lawsuits against the Fearless Fund, a venture capital fund designated for Black women, who receive an infinitesimal amount of venture capital funding from traditional sources"); Shelby A.D. Moore, Moving Forward While Reaching Back: How Private Law Schools Can Help Public Law Schools Navigate Diversity, Equity, Inclusion, and Access in Challenging Times, 55 U. Tol. L. Rev. 241, 261 n.201 (2024) (discussing the litigation attack against the Fearless Fund).

328. See Tatyana Monnay, Law Firms Embrace Roadmap Against Diversity Program Attacks, Bloomberg L. (Oct. 2, 2023), https://news.bloomberglaw.com/business-and-practice/law-firms-embrace-roadmap-against-diversity-program-attacks (on file with the *Columbia Law Review*) (describing how "five Republican state attorneys general" and U.S. Senator Tom Cotton sent BigLaw firms letters about their DEI programs after *SFFA*).

the diversity hiring programs for Morrison Foerster and Perkins Coie,[329] despite the fact that 56.7% of the associates and 77.3% percent of the partners at Morrison Foerster are white[330] and 62.0% of the associates and 82.1% of partners at Perkins Coie are white.[331] These aggressive litigation tactics by the American Alliance for Equal Rights proved to be successful, as both firms, even after one initially vowed to fight back, ultimately decided to alter their programs.[332] Similarly, a group called Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) recently and anonymously filed a reverse discrimination lawsuit, viciously attacking current and future Black faculty at Northwestern University Pritzker School of Law with misrepresentations and racist stereotypes, as well as misleading statements about the workings of the faculty hiring process.[333] FASORP also followed up its lawsuit with threatening emails to law school deans and faculties, clearly hoping to deter any efforts by law schools to diversify their faculties.[334]

The main challenges to breaking the Black ceiling at law firms, however, relate to the economics of law firms, the lack of financial incentives for firms to insist upon change and for individual attorneys to

329. Id.

330. See 2023 Vault Law Diversity Survey, Morrison & Foerster LLP 4–5, https://media2.vault.com/14349342/morrison-foerster-with-ad.pdf [https://perma.cc/3PQY-WCX2] (last visited Oct. 27, 2024).

331. See 2023 Vault Law Diversity Survey, Perkins Coie LLP 3–4, https://media2.vault.com/14349412/perkins-coie.pdf [https://perma.cc/82P6-RY43] (last visited Oct 27, 2024).

332. See Tatyana Monnay, Gibson Dunn Changes Diversity Award Criteria as Firms Face Suits, Bloomberg L. (Sept. 13, 2023), https://news.bloomberglaw.com/business-and-practice/gibson-dunn-changes-diversity-award-criteria-as-firms-face-suits (on file with the *Columbia Law Review*) (noting that Gibson, Dunn & Crutcher changed the criteria for its diversity and inclusion scholarship to focus on students "who have demonstrated resilience and excellence on their path toward a career in law," removing prior "programming language . . . mentioning historical underrepresentation" (internal quotation marks omitted) (quoting Gibson, Dunn & Crutcher)).

333. See Karen Sloan, Northwestern Law School Sued for Discrimination Against White Men in Faculty Hiring, Reuters (July 3, 2024), https://www.reuters.com/legal/legalindustry/northwestern-law-school-sued-discrimination-against-white-men-faculty-hiring-2024-07-02/ (on file with the *Columbia Law Review*) (alleging that the law school "refuses to even consider hiring white male faculty candidates with stellar credentials, while it eagerly hires candidates with mediocre and undistinguished records who check the proper diversity boxes" (internal quotation marks omitted) (quoting Complaint at 4, Fac., Alumni, & Students Opposed to Racial Preferences (FASORP) v. Nw. Univ., No. 1:24-cv-05558 (N.D. Ill. filed July 2, 2024)).

334. See, e.g., Email from FASORP to Angela Onwuachi-Willig, Dean & Ryan Roth Gallo Professor of L., Bos. Univ. Sch. of L. (July 2, 2024) (on file with the *Columbia Law Review*) (announcing that "FASORP will be suing other universities . . . that deploy these illegal discriminatory practices" and demanding that "every one of your university's faculty members, employees, and students . . . preserve and retain all [relevant] communications, documents, data, and electronically stored information").

alter their behavior, the lack of time for busy partners and senior associates in large corporate law firms to make any and all necessary changes to the firm's culture and practices, and the invisibility of racial advantage to white partners, many of whom, as activist and scholar Peggy McIntosh has taught us, are "'meant' to remain oblivious" to their racial privileges.[335] For example, while Woodson's recommendation that firms provide training on racial discomfort for white partners and senior associates—or frankly for all attorneys in the firm—is a required foundational step for addressing the problem, such training, unless it is regularly provided and comes with true action items and accountability each week, is unlikely to have cross-cultural impact within the firms. Systemic racial disadvantage persists in our society precisely because of the transparency phenomenon,[336] which makes it harder for white individuals, including those who are well-meaning, to understand and see the challenges facing Black associates without a commitment to engaging in serious and intentional reflection and action every single day. Systemic racial disadvantage also persists because of racial privilege, which gives white partners and white senior associates at large law firms the choice to ignore the ways in which racism operates invisibly and structurally against certain groups around them without any seeming harm to the white lawyers and their lives.[337]

Overall, it is not that Woodson's suggestions are unhelpful. They are both helpful and excellent. After all, firm-wide education and training about the racial discomfort (both social alienation and stigma anxiety) that Black associates generally experience in large law firms and about the self-protective defense mechanisms, like racial reticence and concealment, that Black associates frequently employ to guard against racism might have helped to ease the pains that Cardwell endured during his four years at Davis Polk. A review and analysis of the partner reviews used for Cardwell's annual performance evaluations illustrate as much. For instance, although the majority of the partner reviews following Cardwell's first rotation at the firm were neutral, one partner critiqued Cardwell for not being more

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335. Peggy McIntosh, White Privilege: Unpacking the Invisible Knapsack, Peace & Freedom, July/Aug. 1989, at 1, 1, 3, https://psychology.umbc.edu/wp-content/uploads/sites/57/2016/10/White-Privilege_McIntosh-1989.pdf [https://perma.cc/4F2P-PERG] (discussing white people's "obliviousness about white advantage" and describing white privilege as "an invisible package of unearned assets which [they] can count on cashing in each day, but about which [they] [were] 'meant' to remain oblivious").

336. See supra note 109 and accompanying text.

337. See Angela Onwuachi-Willig, Moving Beyond Statements and Good Intentions in U.S. Law Schools, 75 Ala. L. Rev. 691, 704 (2024) (arguing "structural racism tends to be invisible to those who benefit from it the most, meaning Whites, and may even be invisible to those who are disadvantaged by it, for example, Blacks, because it is simply a feature of the social, economic, and political systems that we exist in").

proactive in asking questions before he began work on a project.[338] Although the critique appears fair and thoughtful, it also is true that education and training about stigma anxiety, meaning Black associates' apprehensiveness "about the discrimination that might await them,"[339] and "racial reticence, which occurs when Black professionals silence themselves to attempt to limit their exposure to discrimination,"[340] might have helped this specific reviewing partner understand the reasons why Cardwell (or any Black associate) might have made the counterproductive decision to hesitate in asking more questions. These reasons include the "[f]ear of [b]eing [j]udged [i]ncompetent" and, specifically, the fear of confirming stereotypes of Black incompetence, that is, if Cardwell had asked a question perceived to be too simple.[341] With such knowledge, the reviewing partner might have more proactively worked to build a deeper rapport and trust with Cardwell to make him less racially reticent and more comfortable in asking clarifying questions.

Similarly, training on the cumulative impacts of racial discomfort and racial stress might have assisted certain Davis Polk partners in understanding why Cardwell's confidence may not have been very high after a few years at the firm. Following Cardwell's third rotation, one partner offered a supportive review that nevertheless lamented Carwell's alleged lack of confidence. The review read in relevant part:

> Relatedly and I am sure this comes with time[], Kaloma would benefit from focusing on his confidence. There have been a few instances when we were on the phone with a client when I would ask him a question, and he equivocated in his answer, which made me feel like maybe he did not know the answer. In every instance, [h]is initial answer (although with equivocation) was correct. So he had a good handle on the matters that I had delegated to him, but sometimes he did not convey that because I think he lacks confidence at times. I believe that with time and the right training / mentorship, Kaloma can absolutely gain that confidence.[342]

Yet, as Woodson explained in his book, one of the most harmful effects of racial discomfort, assignment disparities, and racial stress at law

338. See Cardwell v. Davis Polk & Wardwell LLP, No. 1:19-cv-10256-GHW, 2023 WL 2049800, at *3 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (noting that "[a]ll six" of Cardwell's initial performance reviews rated him as "performing 'with' his class").

339. Woodson, The Black Ceiling, supra note 1, at 48.

340. Id. at 55.

341. See id. at 49, 55.

342. *Cardwell*, No. 1:19-cv-10256-GHW, 2023 WL 2049800, at *13 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (alterations in original) (internal quotation marks omitted) (quoting one of Cardwell's reviews) (granting in part and denying in part defendants' motion for summary judgment).

firms is their impact on Black professionals' self-confidence and the self-doubt that may emerge and grow as a result of senior colleagues' and partners' treatment, particularly disparate treatment, of them. In the *Cardwell* case, after nearly three years of receiving disparate assignments from white peers, enduring awkward cross-racial interactions, and more, it is not surprising that the end result was Cardwell's diminished confidence even though his instincts and intuition were, as the partner noted, consistently right. With training on racial discomfort, however, rather than seeing such tentativeness as a personal deficiency of Cardwell's, the reviewing partner might have understood why his confidence was diminished and also might have understood that Cardwell's hesitancy was the predictable result of an alienating work environment. With such an understanding, this generally supportive partner might have instead chosen to engage with Cardwell in ways that could have counteracted these institutional effects by bolstering, rather than dampening, his confidence.

Still, Woodson's suggestions for racial discomfort training and greater accountability for mentoring and sponsoring Black associates are unlikely to be a formidable match against the broader forces of structural racism and a persistent culture of colorblindness that routinely results in the neglect and denial of the experiences of people of color. Furthermore, in an environment in which cultural practices and biases are driving inequity and in which attorneys are overworked and striving to bill as many six-minute increments as possible, white partners and senior associates are unlikely to put in the daily intentional effort that is required to overcome decades of lived obliviousness to racial discomfort. Indeed, the economic incentives for firms to even encourage actions to combat the effects of racial discomfort are low given the ease with which partners and whole departments, along with clients, can migrate laterally from one firm to another in today's market.[343] Also, incentives are low for partners to invest in time-intensive mentoring for any associates, but particularly for associates whose unique experiences are unfamiliar to them. In the end, as we have learned from Professor Derrick Bell's interest convergence theory,[344] real changes that benefit people of color in law firms are unlikely to occur unless the interests of people of color align with those of the white decisionmaking elite. In this instance, the interests of equity partners and Black associates must converge, which is an unlikely prospect.

343. See, e.g., Jack Thorlin, Racial Diversity and Law Firm Economics, 76 Ark. L. Rev. 131, 135–39 (2023) (discussing how the "race to the bottom" inhibits increasing racial diversity (internal quotation marks omitted)).

344. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 523–34 (1980) (arguing the Supreme Court's decision in *Brown* resulted from a convergence of the interests of white people who were "able to see the economic and political advances at home and abroad that would follow abandonment of segregation" with people who morally opposed segregation).

Apart from Woodson's suggestions for achieving improved racial climates and better cross-racial partner-associate relationships in law firms, several other proposals are needed to improve Black associates' chances of winning the tournament for partnership. One major proposal includes forming a "Diversity Leadership Committee," as opposed to a Diversity Committee, to "set [a] strategy . . . [that] work[s] with all partners to strengthen and promote . . . excellent conditions for recruiting" and to lay out in the firm's plans precisely how it cannot thrive and succeed without engaging DEI appropriately.[345] BigLaw firm Latham & Watkins took this path several years ago, as a means of "signaling that everyone at the firm has a role to play in advancing diversity" and that diversity is central to the firm's overall strategy.[346] Today, Latham has one of the largest groups of Black partners worldwide.[347]

But the most important action that large law firms can take to address what Woodson identifies as racial discomfort for Black associates is to tackle, head on, the many forms of white racial discomfort[348] that continually work to the disadvantage of Black associates at law firms. One such form of white racial discomfort is the fear that many white partners and senior associates feel about giving constructive feedback to Black associates on their work. The comparatively inferior quality of feedback that Black associates receive from white partners occurs precisely because of white partners' own racial discomfort. Not only are Black associates disadvantaged by explicit and implicit biases in how partners assess their work—as shown by the famous Nextions study on partners' assessments of the same exact brief from a "white" and "African American" associate[349]—

345. See Katrina Dewey, Black Brilliance: How Latham & Watkins Built an Extraordinary Network of Top Black Lawyers, Lawdragon (May 31, 2024), https://www.lawdragon.com/news-features/2024-05-31-black-brilliance-how-lathamwatkins-built-an-extraordinary-network-of-top-black-lawyers [https://perma.cc/5S63-S8C6].

346. See id.

347. Id.

348. For more on the social science of *racist stereotype threat*, one type of white racial discomfort, see Kim Shayo Buchanan & Phillip Atiba Goff, Racist Stereotype Threat in Civil Rights Law, 67 UCLA L. Rev. 316, 325–38 (2020) (defining "racist stereotype threat" as a concern of white people in racially fraught situations that they may be stereotyped as racist, which in turn triggers them to behave in racially disparate ways).

349. See Arin N. Reeves, Nextions, Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills 2–5 (2014), https://nextions.com/wp-content/uploads/2022/06/2014-04-01-14-Written-in-Black-and-White-Yellow-Paper-Series-ANR-Differences-Based-on-Race-Implicit-Bias-Bias-Breakers-Effective-Recruiting-and-Hiring-.pdf [https://perma.cc/LT8T-78SQ]. In this study, researchers gave sixty different law firm partners a memorandum from a fictional third-year litigation associate with purposefully included errors. The memorandum had twenty-two deliberately inserted errors. Specifically, it had seven spelling or grammatical errors, six substantive technical writing errors, five errors in fact, and four errors in the analysis of the facts. All of the partners were asked to participate in a "writing analysis study" concerning the "writing competencies of young attorneys." Id. at 2–3 (internal quotation marks omitted).

but they are also disadvantaged by the fears of white partners and senior associates who fail to provide Black associates with the same level of constructive feedback that they regularly give to white associates precisely because white partners and senior associates fear being viewed as racist or find themselves outside of their comfort zones when interacting with people of color. As Thomas S. Williamson Jr., a former partner at Covington & Burling, once explained, "White partners are generally very uncomfortable critiquing [B]lack lawyers for fear that aggressive criticism will be interpreted as racial animus."[350] Yet, such apprehension and unwillingness to provide the very same level of constructive feedback that allows white associates to grow and advance to Black associates is clear disparate treatment based on race, even though it is not rooted in racial animus. As the experiences of Woodson's interviewees, the *Losing the Race* cohort, and Kaloma Cardwell reveal, firms not only need to make sure that

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The partners all received an identical memorandum. Id. at 2. The only difference was that half of the partners received a memorandum with a cover page that indicated that the author was African American, and the other half received the same memorandum with a cover page that indicated that the author was white. Id.

The email instructions asked each partner, each of whom was provided all the research materials that were used to prepare the memorandum, to "edit the memo for all factual, technical and substantive errors." Id. at 3. The instructions also asked the partner participants to rate the overall quality of the memorandum from one to five, with a score of one indicating an "extremely poorly written" memorandum and a score of five indicating a memorandum that was "extremely well written." Id. With seven weeks to evaluate the memorandum, fifty-three of the sixty partners (88.33%) completed the tasks for the study. Id. Of those fifty-three partners, twenty-four received the memorandum from the fictional African American associate, and twenty-nine received the memorandum from the fictional white associate. Id.

The researchers found unconscious racial confirmation bias from the partners, with the partners finding a greater number of errors in the same brief when the author was African American. Id. Specifically, the partners found an average of 2.9 of the 7 spelling/grammar errors in the white associate's memorandum compared to 5.8 of the 7 spelling/grammar errors in the African American associate's memorandum. Id. Additionally, the overall score on the memorandum was lower for the African American associate than the white associate—3.2 out of 5 compared to 4.1 out of 5. Id.

The researchers also found that the qualitative comments on the fictional white associate's memorandum were more positive. Id. For example, comments for the white associate included feedback like "generally good writer but needs to work on . . . ," "has potential," and "good analytical skills" while comments for the African American associate—the exact same memorandum—included feedback like "needs lots of work," "can't believe he went to NYU," and "average at best." Id. (alteration in original).

Differences even arose in the partners' evaluation of one aspect of the brief that the researchers did not request: formatting. Id. Specifically, forty-one of the fifty-three partners gratuitously offered feedback on formatting. Id. Of those forty-one, eleven partners left comments for the fictional white associate while twenty-nine left comments for the fictional African American associate. Id.

350. Derek Bok & Thomas S. Williamson, Jr., Transcript of the Boston Bar Association Diversity Committee Conference: Recruiting, Hiring and Retaining Lawyers of Color, Bos. Bar J., May/June 2000, at *18, *20 (quoting Williamson).

partners understand the real harms behind their racially-influenced failures to provide comparable feedback to Black associates, but they also must be held accountable when they engage in such a harmful form of disparate treatment discrimination. Specifically, firms need to implement explicit mechanisms for holding partners accountable when they fail to provide feedback to associates and, even more so, when they provide uneven feedback to Black and white associates because of white racial discomfort.[351]

Another form of white racial discomfort is the tendency to react defensively and lash out when Black individuals highlight racial disadvantage or discrimination in the workplace. As Robin DiAngelo has highlighted, for many white people, the worst thing they can imagine being called is a racist; as a result, they angrily lash out when people of color identify any one of their actions or statements as emerging from implicit or explicit racial biases.[352] One Black former BigLaw associate, Lauren E. Skerrett, wrote eloquently about this dynamic in large law firms, noting:

> I think [B]lack attorneys such as myself are in a uniquely challenging position. In addition to being forced to maintain the same semblance of composure and level of productivity as our non-[B]lack counterparts (a level which, for a whole host of reasons, is already difficult to replicate), the potential repercussions for vocalizing our frustrations (about society, about management, about anything, frankly) are often far more subtle than an immediate dismissal. Rather than being viewed as a valued team member offering earnest feedback with the goal of making contributions to enhance your work environment (thereby leading to happier and more productive employees, increased minority retention, and a healthier bottom line for the firm), the overly vocal [B]lack associate is likely viewed as a complainer—judgmental and difficult.[353]

One of the factors that harmed Cardwell the most at Davis Polk was precisely this form of white racial discomfort. Because his white colleagues did not understand either his racial discomfort or their own racial

351. Cf. Cardwell v. Davis Polk & Wardwell LLP, No. 1:19-cv-10256-GHW, 2023 WL 2049800, at *8 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (noting that Cardwell told a partner, Tom Reid, that "many Black associates leave b/c of [the] Firm's cultures" and that they discussed "how attorneys give feedback and that it's often too late, not helpful or racialized" (alterations in original) (quoting Cardwell's Jan. 21, 2016, journal entry)).

352. Robin DiAngelo, White Fragility: Why It's So Hard for White People to Talk About Racism 2 (2018) (noting that white people "perceive any attempt to connect [them] to the system of racism as an unsettling and unfair moral offense" that "triggers a range of defensive responses," including "anger, fear, and guilt," and then conceptualizing this process as "white fragility").

353. Skerrett, supra note 122.

discomfort when he expressed the actions and words that made him feel uncomfortable, underappreciated, and undervalued at work, they chose to do one of two things to him: gaslight[354] him or ignore him, both of which only intensified his feelings of isolation, alienation, and devaluation, and both of which made it impossible for him either to recover from these tensions in their eyes or to overcome his sense of alienation within the firm.[355]

The final proposal is to provide education to partners on the harm they can do in tanking an associate's—any associate's, but particularly a Black associate's—career by denigrating their work and disparaging their professional promise when they make a common or an uncommon mistake.[356] Many white associates can recover from such negative chatter among partners because their work is not generally read and interpreted against existing negative stereotypes and tropes about white incompetence or lack of belonging. In essence, one mistake or even two mistakes do not tend to mark white associates as unworthy associates to work with; due to how racial privilege works, white associates are instead more likely to get the benefit of the doubt and to be given another chance.[357]

On the other hand, Black associates, who will occasionally make mistakes just like all other associates do, are, as some attorneys have attested, rarely given that second chance.[358] As Williamson once observed, "Black lawyers know that if they disappoint the white partner on the first assignment, that partner will anxiously avoid having that lawyer assigned to him again, often, partly for racial reasons."[359] Not only did attorneys from both the *Losing the Race* cohort and Woodson's subject group discuss this problem as emerging in their or other Black associates' experiences, but Cardwell also highlighted this phenomenon at work in his own experience at Davis Polk. Indeed, one can see the damaging effects of word-of-mouth reviews between partners in several of Cardwell's reviews. For instance, one review from a partner who openly asserted that he barely

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354. See Angelique M. Davis & Rose Ernst, Racial Gaslighting, 7 Pol., Grps. & Identities 761, 763 (2019) (defining "racial gaslighting" as "the political, social, economic and cultural process that perpetuates and normalizes a white supremacist reality through pathologizing those who resist" (emphasis omitted)).

355. See *Cardwell*, No. 1:19-cv-10256-GHW, 2023 WL 2049800, at *8–9 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (describing firm leaders' denials of Cardwell's descriptions of what he was experiencing and failure to respond to his concerns).

356. See Woodson, The Black Ceiling, supra note 1, at 30 (asserting that "when the word spreads that a particular junior professional is unreliable, her senior colleagues may entrust her with fewer assignments, regardless of her formal evaluations").

357. See id. at 32–35 (discussing the subjectivity of partners' views and racialized assessment disparities, which are "unjust if White professionals receive greater leniency when they make comparable mistakes").

358. See Woodson, The Black Ceiling, supra note 1, at 49–51 (identifying and discussing "selective punitiveness" as applied to Black professionals).

359. Bok & Williamson, supra note 350, at *20 (quoting Williamson).

worked with Cardwell shared overall impressions that were received fully from third party accounts.[360] This partner wrote:

> I did not have much direct interaction with Kaloma on the . . . transaction. That said, we were very stretched on the transaction, and the impression I got from the team was that they did not have confidence that Kaloma could interact directly with the client (as much as, for instance, some of the other first years could). Also, my understanding was that he was not yet able to take the lead on the diligence report, while another first year could take the lead (and that his due diligence summaries needed quite a bit of work). For this reason, my impression is that Kaloma may be 'behind' in his class, although because my impression is based off of third party accounts, I do not feel totally confident with this determination.[361]

In the end, as Woodson makes clear in his book, "one reason [Black] racial discomfort is as damaging as it is for Black professionals is that it often either goes unrecognized or is misinterpreted as a personal deficiency."[362] For this reason, and because of the transparency phenomenon and the pervasiveness of a colorblind culture in our society, very few proposals for improvement are likely to work broadly across law firm cultures. It is hard for sparsely scheduled programs, trainings, and policies to overcome the invisible racialized norms, unspoken practices, and evaluation methods that presume both whiteness and fairness. To combat the norms that one has been taught not to see and recognize for decades requires intensive daily work if one wants to open up their eyes to acknowledge race and racism and racism's subordinating forces like racial discomfort, both externally and internally, with self-reflection. As Woodson proclaims, accomplishing such feats will be far from easy, but they "are worth pursuing nevertheless."[363]

CONCLUSION

"*As a practical matter then, racial discomfort is likely here to stay.*"
— Professor Kevin Woodson.[364]

360. *Cardwell*, No. 1:19-cv-10256-GHW, 2023 WL 2049800, at *5 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (internal quotation marks omitted) (quoting Buergel Declaration Exhibit 9, at 10) (granting in part and denying in part defendants' motion for summary judgment).

361. Id. (internal quotation marks omitted) (quoting Buergel Declaration Exhibit 9, at 10).

362. Woodson, The Black Ceiling, supra note 1, at 133.

363. Id. at 145.

364. Id. at 131.

Professor Kevin Woodson's perceptive and well-researched new book, *The Black Ceiling: How Race Still Matters in the Elite Workplace*, marks an inflection point for legal education, employment discrimination scholarship, civil rights litigation, and the legal services industry, particularly BigLaw firms. For law schools and large law firms operating in an environment unsettled by the anti-DEI backlash fueled by the U.S. Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,[365] Woodson's research provides new ways of understanding and remediating the racial discomfort and accompanying social alienation and stigma anxiety experienced by Black professionals in both law firm and academic workplaces. For employment discrimination scholars and civil rights practitioners, his research supplies novel approaches to integrating alternative racial discomfort narratives with conventional racial bias and discrimination narratives in both administrative agency and judicial proceedings. Correspondingly, when applied to litigation dockets and lawyer strategies, his research widens ethical sensitivity to race-based identity construction and subordination in the pretrial and trial conduct of both plaintiff- and defendant-side employment litigation teams and, consequently, reinvigorates the debate over the nature and scope of legitimate advocacy in civil rights cases.

In these ways, Woodson furnishes lawyers, judges, and interdisciplinary scholars with new approaches for thinking about the causes and consequences of racial inequality in contemporary U.S. culture and society, particularly in elite corporate workplaces. Indeed, by interweaving theories of discrimination from the fields of cultural sociology, organizational studies, and social psychology, he carves out new pathways to remedy racial inequality within both for-profit and nonprofit organizations. Equally important, he shows that the disadvantages of race and racial discomfort are not only complex and multifaceted but also highly individualized across a broad spectrum of Black professionals where some struggle and others thrive.[366]

For Woodson, segregation in education, housing, and geography remains a "key determinant" in shaping the experience of race and racial discomfort for Black professionals at BigLaw firms and elsewhere.[367] The structural persistence of racial segregation and discrimination, he suggests, likely condemns Black professionals to endure the experience of racial discomfort in BigLaw and other elite firms "no matter how many

365. 143 S. Ct. 2141 (2023).

366. See Woodson, The Black Ceiling, supra note 1, at 13 (asserting that some characteristics of racial inequality in the workplace "render some Black workers especially vulnerable to racial discomfort and others that enable some Black workers to thrive despite these potential challenges").

367. Id. at 130.

resources firm leaders devote to their DEI objectives."[368] In his view, these firms "may very well remain White spaces in perpetuity."[369]

The seemingly entrenched and ineradicable quality of white elite law firm spaces is striking when considered against the backdrop of longstanding critiques of BigLaw, namely, Paul Barrett's *The Good Black*[370] and Alan Jenkins's *Losing the Race*.[371] Reflecting on this critique a quarter century ago, Professor David Wilkins urged legal scholars to study "the complex intersection between race and the incentive structures of large law firms" in order to understand how "even in the absence of discriminatory intent, white lawyers will sometimes take actions that ultimately hurt the careers of their [B]lack colleagues."[372] Some may read the recent federal jury trial in *Cardwell v. Davis Polk* to suggest that Kaloma Cardwell's time at Davis Polk ultimately hurt his fledgling career not because of individual or institutional discriminatory intent but because he failed to satisfy the "basic criteria"[373] of professional and cultural competence.[374] To be sure, this reading is subject to contest. Contested readings notwithstanding, the outcome in *Cardwell v. Davis Polk* requires us to revisit a foundational question for law schools and law firms: *How should we train law students and lawyers not merely to endure but to thrive in the racialized workplaces of BigLaw firms?*

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368. Id. at 131.

369. Id.

370. Paul M. Barrett, The Good Black: A True Story of Race in America (1999) (detailing the story of a Black BigLaw associate who was unfairly treated at his firm and ultimately sued for racial discrimination).

371. Jenkins, supra note 3; see also supra notes 70–86 and accompanying text.

372. Wilkins, supra note 44, at 1928.

373. Id. at 1943. Wilkins further comments:

> [W]hat 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 good work and, equally important, report the associate's good deeds to other partners. 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.

Id. at 1943–44 (footnote omitted).

374. Wilkins contends that "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." Id. at 1928.