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# *ESSAY*

## The Rat Race as an Information Forcing Device

Scott Baker<sup>\*</sup>, Stephen J. Choi<sup>\*\*</sup>, and G. Mitu Gulati<sup>\*\*\*</sup>

### ABSTRACT

In any job setting, there will be some promotion criteria that are less amenable to measurement than others. Often, if not always, what is difficult to measure is more important. For example, possessing “good judgment” is likely a more significant predictor of success as a law firm partner than the ability to bill a vast amount of hours. The first puzzle that this essay explores is why, in some promotion settings, organizations focus on less important, but measurable, criteria such as hours billed. The answer, we suggest, lies in the relationship between the objectively measurable criteria, on the one hand, and the subjective and less visible, but more important, attributes on the other hand. Under certain circumstances, a competition over the measurable criteria (such as hours billed or number of deals accomplished) can force the revelation of information on hard-to-measure subjective attributes of the candidate. For example, it is easier to evaluate the judgment of an associate who has amassed a number of deals than one who has not. The process of putting together deals likely generates some information about the associate’s good and bad judgment. In other words, while we may not think that a large number of billable hours alone should determine who makes partner, making billable hours the goal of a tournament can help generate information more relevant to the partner selection decision. Explaining the first puzzle leads to a second puzzle: Why do we see a rejection of tournaments in job settings where decisionmakers could use tournaments effectively to force information? In contexts where decisionmakers value the ability to exercise discretion or power, they may eschew information revelation schemes so as to be able to mask their true motivations behind a promotion. Nominations to the Supreme Court provide an example. There, the desire to push political agendas may lead to the intentional obscuring of the true merits of nominees. Last, the essay considers how objective rankings can force hard-to-obtain information outside the employment context. The focus is the much-debated US News rankings of law schools. We argue that the existence of the US News rankings forces law schools to reveal information that would not otherwise be made available.

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## I. Introduction: The Value of Competition in Internal Job Markets

Since the days of Adam Smith, economists have extolled the virtues of competition. Competition drives down prices, forces inefficient firms from the market, and leads to the production of a diverse array of goods and services. Given this focus, it is unsurprising that economists eventually looked to competition in the design of wage compensation and promotion schemes. The idea, tournament theory, was to use rank-order contests to provide lower level workers with incentives.<sup>1</sup> In its simple form, tournament theory considers two workers and a single prize, usually a large salary or a promotion. At the end of the contest, the employer ranks the two workers based on easily observable criteria and bestows on only one of them the prize. In competing for the prize, both workers expend effort; they avoid shirking. In other words, promotions are not solely about promoting the best person for the job. Instead, the promotion “prize”—and the competition it creates—induces employees to work harder in their current positions.<sup>2</sup>

Legal scholars have applied tournament theory to a wide range of topics. The theory dominates the scholarship about the internal workings of law firms.<sup>3</sup> The theory also figures into

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<sup>1</sup> See Edward P. Lazear & Sherwin Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841 (1981); Jerry R. Green & Nancy L. Stokey, *A Comparison of Tournaments and Contests*, 91 J. POL. ECON. 349 (1983); Barry J. Nalebuff & Joseph E. Stiglitz, *Prizes and Incentives: Towards a General Theory of Compensation and Competition*, 14 BELL J. OF ECON. 21 (1983); James M. Malcolmson, *Work, Incentives, Hierarchy, and Internal Labor Markets*, 92 J. POL. ECON. 486 (1984).

<sup>2</sup> In addition, by comparing two workers, the employer can determine whether a positive outcome (e.g., high sales) is the result of a worker’s additional effort or good fortune. For example, if both workers have high sales, an employer might infer that the market was hot; hence, the high sales did not result from extra effort by either worker. In contrast, if only one worker has high sales, a logical inference is that worker exerted extra effort. In other words, comparison of the two workers enables the employer to uncover the source of high sales. And, as a result, the employer can more effectively tie salary increases to effort levels. See Nalebuff & Stiglitz, *supra* note 1, at 22; Margaret A. Meyer & John Vickers, *Performance Comparisons and Incentives*, 105 J. POL. ECON. 547, 548 (1997).

<sup>3</sup> See, e.g., David B. Wilkins, *From “Separate is Inherently Unequal” to “Diversity is Good For Business”*: *Consumerism, Competition, and Conscience in the Careers of Black Corporate Lawyers*, 117 HARV. L. REV. 1548 (2004); David B. Wilkins, *Doing Well By Doing Good*, 41 HOUS. L. REV. 1 (2004); Bruce Price, *How Green Was My Valley? An Examination of Tournament Theory as a Governance Mechanism in Silicon Valley Firms*, 37 LAW & SOC’Y REV. 731 (2003); Stephen M. Bainbridge, *The Tournament at the Intersection of Business and Legal Ethics*, \_\_ ST. THOMAS L. REV. \_\_ (forthcoming 2004); Leonard M. Baynes, *Falling Through the*

discussions about other internal labor markets, including inquiries into why and when corporate actors misbehave, why U.S. executives are paid the amounts that they are, and how judges should be promoted.<sup>4</sup> Often (although not always) the objective and measurable criteria used in promotions, including billable hours in the law firm context and profits earned in the corporate context, are less indicative of future success than other subjective, but less measurable criteria. While billable hours are important, an associate's judgment and ethical behavior are arguably more important predictors of success as a law firm partner.<sup>5</sup>

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*Cracks: Race and Corporate Law Firms*, 77 ST. JOHN'S L. REV. 785 (2003); Randall Thomas, Stewart J. Schwab, & Robert G. Hansen, *Megafirms*, 80 N.C. L. REV. 115 (2001); Charlotte Chiu, *Why Does Feminization Increase Equality: The Case of Lawyers*, 33 LAW & SOC'Y REV. 557 (1999); Milton C. Regan, Jr., *Law Firms, Competition, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1 (1999); Marc Galanter & Thomas Palay, *Large Law Firm Misery: It's the Tournament, Not the Money*, 84 VA. L. REV. 1581 (1998); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707 (1998); George Rutherglen & Kevin A. Kordana, *A Farewell to Tournaments? The Need for an Alternative Explanation of Law Firm Structure and Growth*, 84 VA. L. REV. 1695 (1998); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998); MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF BIG LAW FIRMS* (1991); Susan S. Samuelson & Lynn J. Jaffe, *A Statistical Analysis of Law Firm Profitability*, 70 B.U. L. REV. 185 (1990).

<sup>4</sup> See, e.g., Marleen A. O'Connor, *The Enron Board: The Perils of Group Think*, 71 U. CIN. L. REV. 1233, 1250-55 (2003); William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 77 TUL. L. REV. 1275 (2002); Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 661 (2002); Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L. J. 797, 808 (2001); Kimberly D. Krawiec, *Accounting for Greed: Unraveling the Rogue Trader Mystery*, 79 OR. L. REV. 301, 311-12 (2000); Susan J. Stabile, *My Executive Makes More Than Your Executive: Rationalizing Executive Pay in a Global Economy*, 14 N.Y. INT'L L. REV. 63, 67 (2001); Eric Kades, *Windfalls*, 108 YALE L. J. 1489, 1553 (1999); Alice G. Abreu & Martin J. McMahon, Jr., *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX REV. 1 (1998); Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004) [hereinafter Choi & Gulati, *Tournament*].

<sup>5</sup> For purposes of this essay, we assume that the objectively measurable criteria at issue are less important than the subjective criteria and that the subjective criteria cannot be measured. Strictly speaking, this is incorrect because even the apparently fuzzy factors such as collegiality and fairness can be "objectified" and measured through personality tests. And, assuming that these measurements are taken with good instruments, there is a large body of empirical scholarship that demonstrates the overwhelming superiority of these "objectified" measures over subjective, impressionistic and gut-feeling judgments about the same attribute. Implicit in those studies, however, is the assumption that most, if not all, of the criteria that need to be factored into the prediction models can be measured by both objective and subjective methods. If so, then the regressions and other more scientific models seem to do a better job in making predictions of future behavior than do personal subjective estimations of the trait at issue (like, say, judgment). The contexts that we are looking at though are somewhat different. We are assuming that it is not possible (or, more precisely, not acceptable) to have the participants in these settings subjected to things like personality tests of the type that would then yield objective scores.

For discussions of the research discussed above, see Russell Smyth, *Do Judges Behave as Homo economicus and, if so, Can We Measure their Performance? An Antipodean Perspective on a Tournament of Judges* \_\_ FLA. ST. U. L. REV. \_\_ (forthcoming 2005) (pointing to the large literature suggesting that criteria such as

In the areas of interest to legal scholars, we suggest that standard tournament theory is incomplete. We argue that there is something more to the use of these “less important” objective criteria than simply inducing hard effort on the part of tournament participants. Competition over objective criteria leads to the revelation of information useful in the promotion process. By inducing a heightened level of competition among promotion candidates, a tournament forces the candidates to reveal information about otherwise difficult to observe, more subjective criteria such as judgment, fairness, collegiality, and integrity.<sup>6</sup>

Recognizing the value of forcing information from workers, organizations often set up “two-round” promotion systems that are quite different from the promotion systems predicted by tournament theory. Easily observable criteria are typically employed as part of a first-round tournament, working to cull the number of candidates down to a smaller subset who will be considered for promotion. The smaller subset of candidates is then pushed into a “second round,” where the organization evaluates hard-to-observe subjective characteristics, such as those mentioned above.<sup>7</sup>

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collegiality and integrity can be measured using relatively objective methods); William M. Grove & Paul Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL. PUB. POL. & L. 293 (1996) (reporting on the dominance of formal prediction procedures over informal ones); John Monahan, *The Scientific Status of Research on Clinical and Actuarial Predictions of Violence*, in MODERN SCIENTIFIC EVIDENCE 423 (D. Faigman et al., eds., 2002) (similar).

<sup>6</sup> From the economic literature, this framework resembles the dynamic principal-agent models. See, for example, Jean-John Laffont & Jean Tirole, *The Dynamics of Incentive Contracts*, 56 ECONOMETRICA 1153 (1988); Meyer & Vickers, *supra* note 2. From labor economists, Bentley MacLeod and James Malcomson’s work comes closest to the discussion here. W. Bentley MacLeod & James M. Malcomson, *Reputation and Hierarchy in Dynamic Models of Employment*, 96 J. POL. ECON. 832 (1988). In their model, the employer uses a tournament to promote workers through a job pyramid. Through the competition over the increasingly limited slots in the pyramid, the employer learns about the private attributes of each worker. Our paper extends and builds on MacLeod and Malcomson’s model, considering (1) the precise link between objective and subjective standards and (2) why some employers use tournaments while others do not.

<sup>7</sup> Note that the subjective criteria need not positively correlate with the objective criteria for information-forcing to work. The winner of the first round therefore is not necessarily the winner of the second round. Someone may produce a high value outcome (for example, a large number of billable hours) and, most of the time, this outcome will be a good thing (it generates a lot of income for the firm). But the associate’s desire to bill more hours, including hours where she was so tired that she made mistakes, may reveal bad judgment. And ensuring that its partners have good judgment may be more important to the firm than selecting the associate who is willing to bill

The information-forcing function of two-round tournaments (termed “revelation tournaments”) sheds light on two puzzling aspects of the use of tournament theory to explain internal labor markets. First, contrary to what conventional tournament theory predicts, we see, at least in the law firm and the academic tenure promotion context, that explicit promotion criteria are rarely made clear.<sup>8</sup> In law firms, the final decision is made as a combination of some objectively measurable criteria (such as billed hours and successful deals completed) and some subjective ones (such as judgment, leadership, and collegiality).<sup>9</sup> Similarly, in the promotion of junior faculty to tenure, the decision is a function of first satisfying some minimal standard in terms of number of articles published and scores on teaching evaluations and then a more subjective and fuzzy evaluation of the quality of these performances on scholarship, teaching,

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4,000 hours a year. So, an associate who wins the first round by billing the highest number of hours may have simultaneously also managed to lose the second round by demonstrating bad judgment in billing hours at times when it was not physically possible for her to have been working at peak capacity. And to the extent some of her projects fell through because of demonstrably bad judgment on account of the high number of hours billed, the firm will find it easier to come to the conclusion that although she wins the first round, she loses because she loses the second round.

<sup>8</sup> See Wilkins & Gulati, *supra* note 3, at 1620-24 (describing the selection criteria for promotion at law firms). Although there appears to be very little systematic research on the nature of law school promotion processes, most of the commentary that mentions the process suggests that the criteria from promotion are unclear (other than a general notion that one must produce some combination of scholarship, teaching, and service, where scholarship is more important than the other two). See Devon Carbado & Mitu Gulati, *Tenure*, 53 J. LEGAL EDUC. 157 (2003) (describing, based on anecdote, the vague nature of the process behind most law school promotion decisions); Kenneth Lasson, *Scholarship Amok, Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 935-937 (2001) (describing the vague and subjective nature of the scholarship requirements for legal academics); see also Henry Gabriel, *Juggling Scholarship and Social Commitment: Service to the Community Through Representation of Indigent Criminal Defendants*, 20 N.C. CENT. L.J. 223, 225-27 (discussing the tradeoffs between doing scholarship and pro bono work that are generally not made clear to junior faculty); Melissa Marlow-Shafer, *Student Evaluation of Teacher Performance and the “Legal Writing-Pathology” Diagnosis Confirmed*, 5 N.Y. CITY L. REV. 115, 127 (2002) (noting that eighteen percent of legal writing instructors did not know whether student evaluations affected decisions regarding promotion, tenure, or merit pay increases).

<sup>9</sup> See Wilkins & Gulati, *supra* note 3, at 1658-65 (describing the partnership promotion process in law firms). Wilkins and Gulati describe the partnership promotion process as a “multiround tournament model that includes multiple incentive systems, tracking, seeding, and information control helps to answer these questions.” *Id.* at 1589. Wilkins and Gulati do not mention the information generating aspects of a tournament. Instead, they posit that the multi-round nature of the law firm tournament provides incentives for different types of associates (including those with no intention of making partner) to work hard. See *id.* at 1644-51 (“Through tracking [across multiple tournament rounds], firms strengthen the commitments of associates whom they want to stay while simultaneously giving those not receiving training reason to seek rewards other than winning the tournament. Associates who continue to get good work are more likely to be happy and to stay at the firm. Not only are they satisfying their desire to develop human capital, but they are also receiving a tangible signal from the firm that their chances of winning the tournament are better than the many associates who are only receiving paperwork.”).

and service. Conceptually, this combination of objective and subjective criteria in both contexts can be thought of as the two-round promotion game. At the second round, the vague and fuzzy standard enables the law firm or law faculty to make decisions based on the subjective attributes of the candidate. By forcing information about subjective traits, the first-round competition over the less important objective measure facilitates the second round evaluation.

A second puzzle is why objective criteria are used for some promotions and not others. On this score, consider a few different promotion settings, two of which we have previously mentioned: (1) law firm partnership decisions; (2) academic tenure decisions; and (3) nominations to the United States Supreme Court. In each setting, there is objective evidence available for evaluation. Law firm associates bill hours, litigate cases, and close deals. Junior faculty write articles, which are either cited or not by others in the field. Finally, Supreme Court nominees are typically drawn from current circuit court judges, whose productivity and influence can be measured, roughly, by looking at things like citation count and the number of opinions written.

Partnership decisions and Supreme Court nominations are opposites when it comes to reliance on objective measures. Law firms, as noted above, use revelation tournaments in their promotion decisions.<sup>10</sup> As best we know, no President or Senator has ever made a serious attempt to set out objective criteria on judicial performance and then collect the necessary empirical evidence on the matter.<sup>11</sup> Instead, critics assert that justices should be chosen based on temperament, empathy, and fairness – qualities that they say are unrepresented by an objective evaluation of the nominee’s influence as a circuit court judge.<sup>12</sup>

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<sup>10</sup> See *supra* text accompany notes 8-9.

<sup>11</sup> For an extended discussion of the subject, see Choi & Gulati, *Tournament*, *supra* note 4, at 305.

<sup>12</sup> For examples of articles critiquing the judicial tournament idea because it does not measure intangibles such as collegiality, justice, and fairness, see Stephen Goldberg, *Judicial Promotions and the Heisman Trophy*, \_\_

Academia represents a middle ground. In this setting, reliance on objective criteria varies across disciplines. In tenure decisions, for example, economics departments are more apt than law schools to rely on citation counts and the number of articles published.<sup>13</sup> For some academic promotions, like Supreme Court nominations, people rally against the use, or even the consideration of objective evidence. And many of our law school colleagues would be outraged if we suggested basing an up or down tenure vote solely on citation counts and the number of articles written.<sup>14</sup> Indeed, we have colleagues who are outraged at the suggestion that citation counts should be considered at all.

In every promotion setting where the use of objective evidence is frowned upon or rejected outright, the argument is likely to be some version of the following: The data does not

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FLA. ST. U. L. REV. \_\_ (forthcoming 2005); John V. Orth, Judging the Tournament, (available at <http://jurist.law.pitt.edu/forum/symposium-jc/choi-gulati-orth-taha.php>) (symposium on judicial selection, 2004); William Marshall, *Be Careful What you Wish For: The Problems With Empirical Rankings as a Method to Select Supreme Court Justices*, \_\_ S. CAL. L. REV. \_\_ (forthcoming 2005). For an extensive discussion of what qualities make for a good Supreme Court nominee, see Michael Gerhardt, *Merit versus Ideology*, \_\_ CARDOZO. L. REV. \_\_ (forthcoming 2004).

<sup>13</sup> For a survey of practices in economics departments, Daniel B. Klein & Eric Chiang, *Citation Counts and SSCI in Personnel Decisions: A Survey of Economics Departments*, 1 ECON. J. WATCH 166, 170 (2004) (finding widespread use of citation counts in promotion decisions). Although only at the level of anecdote, we are not aware of any law school that systematically considers citations (or quality of publication) in their promotion processes. One possible reason for this difference not considered in the text is that law journals are student edited. Faculties may be unwilling to factor in the judgments of quality (or citation inclusion) of students in their promotion decisions.

<sup>14</sup> Given the current citation practices of legal academics, where it is not uncommon for articles to cite hundreds, if not thousands, of sources with seemingly little quality control, it is hard to attach too much value to these counts. That said, we are also unwilling to conclude that a citation count would have *no* predictive value in something like a promotion or hiring decision. For example, we are willing to venture that it is likely that citation counts would outperform some of the other criteria that are sometimes considered such as class rank, law school attended, prestige of judicial clerkship, or gut instinct. Citation counts may also be biased towards certain groups and can be gamed by the various participants (for example, citation clubs can arise where scholars implicitly or explicitly agree to cite each other). Again, assuming equal predictive power of the different criteria, however, the question should be whether these counts are more or less biased than the others and whether those biases can be corrected. The biases inherent in gut instinct based decisions, for example, are likely to be much harder to uncover and correct. On possible bias in citations, see Nancy Levit, *Defining Cutting Edge Scholarship: Feminism and Criteria of Rationality*, 71 CHI-KENT L. REV. 947, 949-52 (1996); Frances Olsen, *Affirmative Action: Necessary, But Not Sufficient*, 71 CHI-KENT L. REV. 937, 937-38 (1996); see also Daniel Klein & Eric Chiang, *The Social Science Citation Index: A Black Box – With Ideological Bias*, 1 ECON. J. WATCH 134, 137-39 (2004) (discussing the bias issue in Social Science Citation Index (SSCI) measures).

capture important aspects of the candidate's performance or suitability for the job-at-issue.<sup>15</sup> But this argument is unpersuasive once the informational flows from competition under a revelation tournament are recognized. The lack of importance of the first-round objective criteria does not matter so long as the competition over these criteria works to reveal hard-to-observe information on the promotion candidates. Armed with the hard-to-observe information, decisionmakers may then make a more informed promotion decision.

To make the point more clear, consider the case of promotions to the Supreme Court. Most, if not all, candidates for elevation to the Supreme Court have had prior judicial experience.<sup>16</sup> Yet, in making promotion decisions, we largely ignore the enormous amount of information that exists about their prior judicial performance; data that could be used to structure a promotion tournament.<sup>17</sup> Why do we ignore this potentially useful information? Even if we do not believe that the judge with the largest number of citations or opinions written should become the next Supreme Court justice, favoring candidates with such attributes in the first round of competition will induce more judges to produce judicial opinions (and strive to write opinions that others will cite). Congress and the general public may use these opinions to get a better sense of the views and judicial decisionmaking capabilities of a particular candidate for the high court.

We contend that a revelation tournament, while forcing information about the more important criteria to the public, would serve also to unmask the potentially illegitimate motives of the political players in the game. Suppose a politician favors a particular judge for ideological

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<sup>15</sup> See, e.g., *supra* note 12 (citing the Goldberg, Orth, and Marshall critiques of using empirical rankings in the promotion of judges).

<sup>16</sup> See Lee Epstein et al., *The Norm of Prior Judicial Experience and its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL L. REV. 903, 909-17 (2003) (noting and then criticizing that most Supreme Court nominees come from the pool of lower circuit court judges)

<sup>17</sup> Stephen Choi & Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judicial Performance*, \_\_ S. CAL. L. REV. \_\_ (forthcoming 2005) [hereinafter, Choi & Gulati, *Choosing*].

views narrowly-held within the general public. The politician may attempt to portray the judge as the “best” available candidate from the perspective of a majority of the public. However, assuming the judge has survived the first-round of a judicial tournament (and thereby has a significant pool of published opinions), the public will have ample evidence on the narrowly-held views of the particular judge. Diverting attention from the lower court performance of judicial candidates for the Supreme Court allows politicians to put forward candidates with less of a track record. The lack of a record, in turn, makes it easier for the politician to portray the judge as the “best” candidate.

We are not suggesting that a revelation tournament is appropriate in all types of employment situations. In some cases, easily observable objective criteria may be the best predictors of future success, even for candidate’s seeking promotion to a new position. Even where harder-to-observe subjective criteria provide more information on the probability of success, running a tournament based on objective criteria may provide little information on the subjective criteria. Last, the cost of implementing a revelation tournament may simply outweigh the benefits. Nonetheless, we contend that our revelation tournament theory can as a positive matter explain the existence of multi-round tournaments in certain situations, such as law firm partnership promotions. We also provide a normative argument that revelation tournaments may prove useful in flushing out the hidden motivations of decisionmakers in certain promotion situations, such as judicial nominations.

In this essay, we develop a revelation tournament model that describes the actual working of many promotion systems. The essay consists of two parts. Part II describes the operation of the revelation tournament. To illustrate the general point, we rely on two examples: law firm partnership decisions and academic tenure decisions. The Part suggests that the revelation

tournament thesis justifies several puzzling and previously unexplained characteristics of these promotion systems. Part III posits why objective criteria are used in some job promotions decisions and not others. We use the example of Supreme Court nominations: There, the lack of objective criteria and a first-round tournament enables political actors to cloak the subjective traits of judicial nominees. Part III concludes with a few remarks on the information-forcing function of objective measures outside the employment context. The discussion centers on the rankings of law schools. While highlighting the important differences between law school rankings and objective measures in employment, we also show how US News forces law schools to reveal information to the market. In particular, because of US News, many schools now report employment figures and the bar passage rate of their graduates, among other things. Further, law schools often respond to a poor ranking performance by flooding the market with alternative, good information about their school.

Before proceeding, a note on methodology: Because the insights in this essay are potentially valuable to two different audiences – legal scholars who use the tournament model to study the internal dynamics of firms and economists who develop these models – the discussion attempts to straddle both audiences. Hence, we focus on explicating the underlying intuition in words and through examples, as opposed to constructing a formal model.

## **II. Revelation Tournaments**

A few definitions and assumptions will clarify the rest of the discussion. We refer to those competing against one another for promotion as “candidates”. Those making the decision to promote a particular candidate in turn are referred to as “decisionmakers”.

The term “objective” refers to promotion criteria that are observable, rankable, and quantifiable. Given the objective criteria and two candidates, A and B, a person can conclude that “A beats B” or vice versa according to that criteria. The interpretation of the data does not hinge on the subjective impressions of the person ranking the candidates. “Subjective” criteria, in contrast, include things like judgment, fairness, temperament, creativity, and the ability to work with others. These criteria are fuzzy. They are hard to observe and we assume initially unknown to those decisionmakers making promotion decisions. Indeed, the players in the tournament (e.g., associates in a law firm, untenured professors, etc.) may not know even their own subjective attributes.<sup>18</sup> A junior professor may believe that she has the capability of generating innovative ideas before she starts a position as an untenured professor but learn through the “trial” assistant professorship period that she does not (or at least has writer’s block).<sup>19</sup>

We assume that in determining performance at a higher level position (the reward for the tournament winner), subjective criteria predict success better than more objective criteria. This does not always have to be the case. Indeed, the empirical literature suggests that objective

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<sup>18</sup> On this information point, we stray from the usual assumption in the economic literature. For years, economists have studied transactions with “private” information; that is, situations where one party knows more than another party. See HAL R. VARIAN, *MICROECONOMIC ANALYSIS* 440 (3d ed. 1992). Here, we consider both cases with private information (where the candidate knows more about her subjective attributes than the decisionmakers) and cases without private information (where the candidate and the decisionmakers are equally ignorant about the candidate’s subjective attributes). On the impact of private information on various markets, see George Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 89 Q. J. ECON. 488, 489-92 (1970) (analyzing the role of private information in the used car market); Michael Rothchild & Joseph Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 Q. J. ECON. 629, 634-38 (discussing “private” information in insurance markets); Brendon O’Flaherty & Aloysius Siow, *Up-or-Out Rules in the Market for Lawyers*, 13 J. LAB. ECON. 709 (exploring private information in the market for associates).

<sup>19</sup> Whether the untenured professor voluntarily reveals this subjective information to the promotion committee, however, is a different question (where the answer is often “no” absent some information revelation tournament).

prediction procedures dramatically outperform subjective ones.<sup>20</sup> But if one stipulates that the most important criteria for promotion are not amenable to objective measurement, then the assumption is plausible. For example, in the law firm context, judgment, loyalty, and collegiality are likely more predictive of success as a partner (from the firm's perspective, that is) than billed hours, transactions completed, or cases won.

We also assume that the easily-measured objective and the more difficult to observe subjective criteria are related. Observing the objective criteria provides clues about the subjective criteria. Where the two types of criteria are not related, as we discuss below, a revelation tournament is unlikely.<sup>21</sup> For example, the process of getting a high-pressure transaction done may throw up information about how an associate deals with her teammates in a high-pressure situation (revealing information about collegiality). We further assume that the precision of these inferences increases as the employer gathers more objective evidence.<sup>22</sup> In concrete terms, eight to ten years of observing an associate work on transactions provides high quality information not only about her willingness to bill long hours and close deals, but also her ability to work with others, her willingness to cut ethical corners, and her loyalty to the firm and individual partners.

Based on the amount of information available on the subjective attributes of a particular candidate, people may disagree over the rankings of two candidates. For now, we assume that decisionmakers share the same uniform criterion for selection. This assumption means that if every decisionmaker was fully informed – that is, they knew everything about the attributes of

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<sup>20</sup> See *supra* note 5 (citing materials). Indeed, objective statistical criteria have been shown to be a better predictor of case outcomes at the Supreme Court compared with the subjective evaluation of legal experts. See Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 Colum. L. Rev. 1150 (2004) (providing evidence that a statistical model based on case characteristics was superior in forecasting the results of cases in the Supreme Court's 2002 Term compared with a set of predictions based on the judgments of 83 legal experts).

<sup>21</sup> See *infra* notes 35-37 and accompanying text.

<sup>22</sup> We relax this assumption *infra* Part II.C.2 and accompanying text.

every candidate – they would agree on the best candidate for promotion.<sup>23</sup> As more information about the subjective attributes becomes available, the closer we get to this ideal and, accordingly, the chance of disagreement among the decisionmakers falls.

With these definitions and assumptions in mind, we now turn to the examples. Note, at the outset, the first puzzle flagged in the introduction: Key promotion criteria often seem unrelated to criteria that most observers would agree are important for the higher-level job.

### **A. Law Firm Partnership Decisions**

Most elite law firms in the U.S. have some version of an “up or out” promotion system.<sup>24</sup> They hire large numbers of junior associates, put them through a grueling apprenticeship period of eight to ten years, and then promote a small fraction that performs best. In other words, law firms appear to present the perfect example of tournaments.<sup>25</sup> Although intuitively and superficially appealing, scholars have noted that standard tournament theory fails to capture the realities and nuances of most law firm promotion decisions.<sup>26</sup> For example, contrary to what standard tournament theory predicts, law firm promotion standards are not fixed and verifiable when an associate joins the firm. Instead, it is unclear what the associate needs to do to “win” the tournament. The specific promotion criteria for partnership and the relative weights attached to them are left undefined. Indeed, the ultimate promotion decision is often the result of a vote and not directly based on easily observable tournament criteria (such as billable hours).

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<sup>23</sup> We relax this assumption, *infra* Part III.

<sup>24</sup> See Larry E. Ribstein, *Law Partner Expulsion*, 55 BUS. LAW 845, 848 (2000) (“firms traditionally have engaged in promotion ‘tournaments’ in which associates either advance to partnership or leave the firm after a probationary period”). Note, however, that many law firms have moved to a two-tier partnership structure, which consists of equity and non-equity partners.

<sup>25</sup> Making this point most prominently, see GALANTER & PALAY, *supra* note 3.

<sup>26</sup> For critiques of tournament theory, as applied to law firm promotion structures, see Price, *supra* note 3; Wilkins & Gulati, *supra* note 3; and Kordana, *supra* note 3. Cf. Richard Sander & E. Douglas Williams, *A Little Theorizing About the Big Law Firm: Galanter, Palay, and the Economics of Growth*, 17 LAW & SOC. INQUIRY 391 (1992) (critiquing the growth rate predictions that Galanter and Palay draw from the tournament model).

If the tournament were solely about generating billable hours on the part of associates, reliance on a vague and opaque promotion standard is puzzling. With the reward uncertain, each associate will be less inclined to bill hours in the quest for partnership.<sup>27</sup> Uncertainty in the promotion criteria, in other words, diminishes the incentive benefits of the contest. This critique does not mean, however, that the law firm promotion system lacks tournament features. Things like billable hours, cases litigated, and numbers of deals do matter. In fact, some firms go so far as to do things like distribute or post lists that rank the various associates in terms of hours billed in the prior billing cycle.

But this is only part of the story. Contrary to what the standard tournament story would predict, the actual promotion decision at law firms is much more of a black box full of fuzzy and undefined standards.<sup>28</sup> What law firms actually use is a two-round revelation tournament. Easily observable criteria, like billable hours, are evaluated first – reducing the number of associates eligible for partnership consideration. The law firms, then, engage in a second layer of evaluation, where partners look at traits like judgment, creativity, loyalty, and collegiality.<sup>29</sup>

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<sup>27</sup> One might respond that a vague standard generates incentives for candidates to excel in the subjective criteria, like judgment, that law firms really care about, even at the associate level. However, to the extent subjective criteria are hard to observe and importantly, hard to verify, candidates have little assurance that even if they do display such qualities promotion will follow, leading to only a diminished incentive effect. Moreover, to the extent the job at a lower level is not the same as the job at a higher level (compare an associate in a law firm against a partner), incentivizing candidates with subjective criteria for what makes the best person for a higher level position may not generate the best lower level work.

<sup>28</sup> See Wilkins & Gulati, *supra* note 3; Price, *supra* note 3.

<sup>29</sup> To be more clear, under standard tournament theory, we should expect to see tournaments as follows:

*Standard Tournament:* Candidates compete based on less important, objective criteria. The “winner” of such a tournament is the candidate with the highest ranking based on such objective criteria.

In the law firm context, the actual promotion system may be summarized as follows:

*Round One:* Candidates compete based on less important, objective criteria. A group of “winners” of such a tournament are chosen based on objective criteria rankings.

*Round Two:* The winners from round one are evaluated based on subjective criteria of merit.

This system makes sense when one considers the attributes that partners value in fellow partners. If one were to ask most law firm partners what characteristic defines a good lawyer, they would likely say “judgment”.<sup>30</sup> If pressed further, some might explain that this judgment primarily has to do with an intuitive understanding of how to negotiate ambiguities in the law. Others would say that they look for the creative spark that suggests a future ability to create innovative solutions. And, last but not least, there will be a few partners who admit attaching value to the ability to schmooze and bring in clients. At the same time that partners extol and promote based on these subjective qualities, associates focus obsessively on objective measure such as billable hours – a measure that seems quite distant from all the criteria listed above.

Why does this disconnect exist? Certainly, partners at law firms care about billable hours and the number of deals closed. These activities provide revenue for the firm.<sup>31</sup> Associates know this and act accordingly. Yet, law firms also care about these same activities because they generate information about the subjective attributes of the associates. An associate who obsesses over billable hours will make it to the second round of the promotion tournament. She is eligible for – but not guaranteed – partnership. Because of the billable requirement and the obsession it induces, however, that same associate will, perhaps inadvertently, demonstrate an affinity or a

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<sup>30</sup> See Therese Maynard, *Teaching Professionalism: The Lawyer as Professional*, 34 GA. L. REV. 895, 927 (2000) (“Good lawyers must have the skills required for professional competence. But this is not enough. They must know how to carry the burdens of other people on their shoulders. They must know of pain, and how to help heal it.”); Leonard M. Baynes, *Falling Through the Cracks: Race and the Corporate Law Firm*, 77 ST. JOHN’S L. REV. 785, 794 (2003) (noting that “the traditional [law firm] hiring criteria often ignore the most important factor of being a good lawyer: judgment”); Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decisionmaking*, 9 CLINICAL L. REV. 731, 734 (2003) (“The good lawyer brings more to bear on a problem than legal knowledge and lawyering skills. She brings creativity, common sense, practical wisdom, and that most precious of all commodities, good judgment.”).

<sup>31</sup> See William J. Wernz, *The Ethics of Large Law Firms -- Responses and Reflections*, 16 GEO. J. LEGAL ETHICS 175, 178-79 (2002) (noting that “broad disparities in profits [among law firms] appear to be principally determined by numbers of billable hours and by leverage, the ratio of associates to partners”); M. Cathleen Kaveny, *Billable Hours in Ordinary Time: A Theological Critique or the Instrumentalization of Time in Professional Life*, 33 LOY. U. CHI. L.J. 173, 175 (2001) (stating that, “[o]ne way large law firms make money is by charging out their associates' time for more than they are paying the associates in salary; the difference (less overhead) is distributed to partners as profits. The longer associates work, the more money partners make”).

lack of affinity for the qualities that matter most to the firm. To put it bluntly, if the associate handles enough cases, the odds are that there will be instances of either dramatic success or abject failure; these extremes can then be plumbed for evidence of judgment.

## B. Tenure Decisions

Like law firm partnership decisions, tenure is an “up or out” promotion system.<sup>32</sup> After a trial period, the junior faculty member is either promoted to associate professor or fired. Law schools and many other faculty departments use a two-round promotion system. Junior faculty must produce a minimal number of articles and generate a minimum score on their teaching evaluations in order to be seriously considered for tenure. Once they have crossed those minimum thresholds though, the evaluation becomes subjective. This is where things like the candidate’s creativity, loyalty, and judgment are evaluated.<sup>33</sup> Of course, some academic departments impose a more stringent first round than others.

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<sup>32</sup> There is a vast literature on the economics of the academic tenure process, see Michael S. McPherson & Gordon C. Winston, *The Economics of Academic Tenure: A Relational Perspective*, 4 J. ECON. BEHAV. & ORG. 163 (1983); Lorne H. Carmichael, *Incentives in Academics: Why is There Tenure?*, 96 J. POL. ECON. 453 (1988); Richard B. McKenzie, *In Defense of Academic Tenure*, 152 J. INST. & THEOR. ECON. 325 (1996); William O. Brown, Jr., *University Governance and Academic Tenure: A Property Rights Explanation*, 153 J. INST & THEOR. ECON. 441 (1997); Michael McPherson & Morton Owen, *Tenure Issues in Higher Education*, 13 J. ECON. PERSP. 85 (1999); Gordon Tullock, *Corruption Theory and Practice*, 14 CONT. ECON. POL’Y 6, 9 (1996); Fritz Machlup, *In Defense of Academic Tenure*, 50 AAUP BUL. 112, 119-20 (1964), *reprinted in* THE CASE FOR TENURE (Matthew W. Finkin ed., 1996). None of these articles, however, makes the subjective information forcing point about the tenure process. In one sentence, McKenzie suggests that he may have been thinking along these lines, saying: “To induce prospective faculty to exert the amount of effort necessary to be *ability-revealing*, universities must offer a “prize” that potential recruits consider worth the effort.” See McKenzie, *supra* at 337 (emphasis added).

<sup>33</sup> Most academics agree that creativity is a highly desired characteristic for an academic. See Michael H. Gottesman & Michael R. Seidl, *A Tale of Two Discourses: William Gould's Journey from the Academy to the World of Politics*, 47 STAN. L. REV. 749, 755 (1995) (“Like Socrates, good academics are gadflies. A significant part of their business is to write, speak, and think provocatively. A professor's prospects for publishing in elite journals depends in large part upon writing something new and different. Tenure standards at the top institutions invariably require that scholarship be original and creative.”); William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONT. PROBS 79, 87 (1990) (“A faculty, especially a research faculty, is employed professionally to test and propose revisions in the prevailing wisdom, not to inculcate the prevailing wisdom in others, store it as monks might do, or rewrite it in elegant detail. Its function is primarily one of critical review: to check conventional truth, to reexamine (‘re-search’) what may currently be thought sound but may be more or less unsound.”). In fact, one truly creative and innovative

Like the law firm partnership decision, this initial objective inquiry makes sense when viewed as a method for generating information that is otherwise hard to obtain. The untenured professor who fails to write anything in her first five years on the job might or might not be the most creative member of the faculty. Absent minimal publication requirement, her supporters can claim that she should be promoted because she, unlike her more productive peers, is the truly creative one. If, however, the candidate does produce a number of articles, this body of work then gives the evaluation committee not only the opportunity to count the number of articles and cites to them, but an opportunity to observe the candidate's creativity within the articles as well as the *process* by which those articles were generated. Junior faculty members attempting to write their first few pieces will often consult with other faculty members, bouncing ideas off their colleagues. This process helps provide insights into how a particular junior faculty member comes up with ideas and her potential for new ideas into the future.

Stated differently, imposing a first-round requirement that candidates for tenure must meet some minimum threshold of productivity (or produce more work than some fraction of her peers) provides the necessary incentive for untenured academics to produce the necessary body of work to enable a meaningful second round subjective evaluation of the candidate's academic abilities. Our general insight about revelation tournaments does not reflect a preference for objective over subjective evidence. The argument is not that quantifiable things are the only things that matter. Instead, objective evidence is often important because it facilitates an

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idea is probably valued far more than a dozen little extensions of other people's ideas. See, for example, Ronald H. Coase, Centennial Coase Lecture, April 1, 2003, University of Chicago Law School (describing his academic career as largely consisting of two ideas), at [http://www.law.uchicago.edu/events/coase\\_lecture.html](http://www.law.uchicago.edu/events/coase_lecture.html). But see Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986) (arguing that the trend towards valuing "novelty, surprise, and unconventionality" in economic and legal theory is problematic).

Nonetheless, a preliminary question that is asked at least at the initial stage in almost every tenure decision is not about creativity, but rather quantity: "How many articles has she published?" And this question is asked even though everyone agrees that the sheer quantity of articles is far from being the most important criteria for promotion. See, for example, the University of Minnesota tenure standards statement.

evaluation based on subjective attributes. A law firm or tenure committee would be mistaken to rely solely on the “numbers,” when everyone agrees that the numbers alone do not reflect the skills needed for the higher-level job. Nonetheless, a law firm or tenure committee would be similarly remiss to reject the use of objective criteria, when competition over those criteria has the potential to force the revelation of subjective traits.

### C. Applicability and Extensions of the Basic Model

#### 1. *What Kind of Objective Measure?*

Information revelation does not apply to all tournaments or job promotion situations. A crucial precondition for the application of an information revelation tournament is that a contest over the objective criteria will generate useful information on the harder-to-measure subjective criteria. In some promotion situations, the generation of more objective criteria will not add to the information on subjective criteria.

Consider the debate over the SAT, an objective measure for college admissions.<sup>34</sup> Preparing for and taking the SAT reveals little to a college admission committee about the subjective attributes of the high school student.<sup>35</sup> In other words, exceeding the SAT hurdle – the first round in the tournament for placement at an elite college – does not generate (at least much) useful information about the student’s tendency to work hard, balance life and school, or

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<sup>34</sup> For a sampling of the many perspectives on the SAT and other standardized tests, see Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 970-73 (1996); Lani Guinier, *The Supreme Court, 2002 Term--Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 132 (2003); PETER SACKS, *THE HIGH PRICE OF AMERICA'S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT* 15 (1999). Jacques Steinberg, *Challenge Revives SAT Debate*, N.Y. TIMES, Nov. 19, 2001, at A14; Jacques Steinberg, *Most Colleges Are Expected to Continue to Use the SAT*, N.Y. TIMES, Feb. 24, 2001, at A6.

<sup>35</sup> To give another trivial example, suppose an institution is especially concerned about whether someone has strong political beliefs (say the question is whether this person is a closet Republican). The institution could have people engage in a weed-pulling tournament, seeing who can pull the most weeds in one day. However, such a tournament will not generate any useful information on whether the candidates are Republicans.

her willingness to learn new ideas.<sup>36</sup> Unlike the billable hour requirement, the SAT is not a very good objective measure when it comes to forcing pertinent subjective information on collegiate success.<sup>37</sup>

In contrast, take extracurricular activities. College admissions officers arguably focus first on the number and breadth of such activities on the part of high school students (representing the first round). Participation in such activities may not necessarily determine success in college. Nonetheless, such participation does generate subjective information on a student's interests, dedication, and willingness to experiment with new activities that college admission officers may then obtain indirectly through recommendations from teachers among others (and then use in a second round admissions decision).

## 2. *Quantity Requirements and Diminishing Returns*

Developing objective criteria on a promotion candidate may help shed light on harder-to-measure subjective criteria, but the gains from more objective work product past a certain minimum amount may not be that great. Return to the law firm example. It may be that law

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<sup>36</sup> For the contents of various prestigious college admission criteria see, e.g., [http://www.admissions.college.harvard.edu/faqs/admissions/app\\_pols/](http://www.admissions.college.harvard.edu/faqs/admissions/app_pols/) (stating that, [t]here is no formula for gaining admission to Harvard. Academic accomplishment in high school is important, but the Admissions Committee also considers many other criteria, such as community involvement, leadership and distinction in extracurricular activities, and work experience"); <http://www.yale.edu/admissions/yalecollege.html> (stating that, Yale's "approach to evaluating applicants that is more complex than simply looking for students with the highest GPAs or those who are well-rounded or have specialized talents"); <http://colletheadmissions.uchicago.edu/level3> (stating that Chicago "has no rigid formula for the successful applicant and considers a candidate's entire application—academic and extracurricular records, essays, letters of recommendation, and SAT or ACT scores").

<sup>37</sup> On the other hand, the SAT may serve a useful function in flushing out the political biases of admissions committee members. If a candidate has a very low SAT score, it becomes harder for her proponent on the committee to argue that she is highly qualified, unless she can point to some very strong alternative evidence. The burden, in terms of having to point to alternative evidence will be a lot less, without the SAT. This burden is not necessarily a good thing; that is, unless, one is worried about committee members making arguments for candidates based on illegitimate (or narrowly held) criteria. Note that this explanation for SATs does not depend on the SAT generating new subjective information (and is thus not a revelation tournament). Instead, to the extent the SAT scores directly are informative (at least somewhat) about a student's future college performance, the SAT scores will increase the transparency behind the motivations of admission committee members.

firms select partners at least in part based on subjective criteria such as judgment, character, and loyalty. Moreover, as noted, information based on an associate's performance in handling cases and closing deals may shed light on the subjective criteria. However, suppose that we can learn the subjective criteria from observing an associate's first-year of work alone. In this case, a tournament based on the objective criteria will not add to the information generated (assuming the candidates for promotion would have otherwise generated some minimal, yet fully informative, amount of work product).

That said, the best candidates for an information revelation tournament are those promotion situations where the accuracy of people's observation of the subjective criteria increases significantly with the amount of effort put in by candidates in generating objective work product. A tournament over the objective work product, in such a situation, will help increase the accuracy of the determination of a candidate's subjective qualities. Given the noise inherent in determining whether an associate in fact has good judgment, character, and is loyal, we believe that law firm promotion does in fact fit these criteria (as do most other job promotion decisions). While good performance in an associate's first-year of work may indicate strong subjective characteristics, greater confidence in this assessment is possible only with a greater body of work product.

The same holds true for academic work and tenure. The more a junior professor writes, the easier it becomes to uncover that scholar's creativity, drive, and ability to come up with new insights. For some academics, a single pass-breaking article and one stellar set of teaching evaluations might be all that is needed to discover these qualities. Nonetheless, for the vast majority of academics, a series of papers and evaluations will lead to a more precise estimate of that scholar's potential.

Of course, for every job situation, information on a candidate's subjective qualities increases somewhat with greater objective work product. Imposing a revelation tournament is however not cost-free. At the very least, the revelation tournament diminishes the incentives to work hard compared with a traditional one-stage tournament where the winner is decided solely based on objective criteria. Alternatively, consider where creating incentives to work hard are not as important, such as in academia. In this case, if subjective qualities are indeed the most important criteria for promotion and are readily observable (with minimal work product), then there is no need to keep candidates on the payroll for the extended period of time necessary to run a revelation tournament. Universities could simply tenure professors with demonstrably superior subjective criteria immediately.<sup>38</sup>

### 3. *The Benefits of a Stressful Work Environment*

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<sup>38</sup> Extensions of the two-round revelation tournament are possible. For the last twenty years, economists have considered the design of wage contracts when the employer cannot observe or verify the effort level of the worker. In these models, the employer observes output only. As a result, the employer doesn't know whether a good outcome (for example, high output) is the result of good fortune or worker effort. To induce the worker to exert, say, high effort, the employer places some risk on the worker. The employer pays the worker a high wage when there is a good outcome and a low wage when there is a bad outcome. The worker, however, is averse to risk. Consequently, she demands a higher total wage contract for accepting the "risky" wage contract. On this strand of economic literature see generally JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 35-40 (1988).

The revelation tournament provides an alternative to this traditional story about incomplete information in the workplace. As noted, these models assume that effort is never observable or verifiable, making it necessary to tie wages to output. This, however, is costly for the employer because it must pay a higher total wage to compensate the worker for bearing the risk associated with the variable wage contract. The two-round tournament allows the employer to observe the subjective traits of the worker through the first round competition. The second round is, in effect, a wage contract based on the now-revealed set of subjective traits. In contrast to the traditional model, the employer no longer must tie wages to output. Instead, effort is made observable and hence contractable via the initial competition over the objective criteria.

The traditional incomplete information model predicts fairly complicated wage contracts – a prediction at odds with many wage contracts observed in the workplace. See Paul Milgrom & Bengt Holmstrom, *Principal-Agent Problems: Incentive Contracts, Asset Ownership, and Job Design*, 7 J. L. ECON. & ORG. 24, 26-27 (1991) (noting the disconnect between the optimal wage contracts from the principal-agent models and real world wage contracts). In our framework, there is no need for a complicated wage contract because the initial competition over the objective criteria reveals the worker's hidden attributes.

Often a tournament structure (or more colorfully a “rat race”) will put candidates in situations of high stress.<sup>39</sup> Associates, for example, will face decisions about whether to cut corners in their work, juggle different client priorities, and so on under a time crunch. Such decisions involve “high judgment” on the part of associates. As a result, they provide much more information on the subjective characteristics of associates than more mundane, low stress work. Simply put, an associate who routinely over bills a client to pad her hours billed may not have displayed this trait in a work situation without the pressure to compete.

Tournaments reward participants on the basis of their performances relative to each other. Even if everyone does well, only a small fraction will be promoted. This rat race can have effects that we ordinarily think of as negative. For candidates who are worried about winning, and do not see themselves as necessarily ahead of the others, the tournament system can incentivize them to take higher than normal risks and even sabotage each other.<sup>40</sup> If the promotion percentage is small enough (for example, only one in fifty associates gets promoted to partnership) these perverse incentives will be widespread. For institutions, such as law firms, that value team work and want their associates to reduce risks for clients rather than enhance them, it seems strange to have a promotion scheme that encourages precisely the type of

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<sup>39</sup> We take the reference to rat races from papers by Jim Rebitzer and George Akerlof. The general idea here is similar to ours in that these authors see the effect of rat races (a term that is used to connote what otherwise look to be inefficiently high amounts of effort) as producing otherwise hard-to-observe information. See George A. Akerlof, *The Economics of Caste and of the Rat Race and Other Woeful Tales*, 90 Q. J. ECON. 599 (1976) (demonstrating how workers may work long hours in order to signal unobservable productivity); James B. Rebitzer et al., *Rat Race Redux: Adverse Selection in the Determination of Work Hours at Law Firms*, 86 AMER. ECON. REV. 329 (1996) (finding empirical evidence that law firms do use hours billed as a method to select among worker, where the underlying dynamic appears to be an adverse selection type one similar to that suggested by Akerlof). For other articles using the rat race concept to study internal labor markets, see Hajime Miyazaki, *The Rat Race and Internal Labor Markets*, 8 RAND J. ECON. 394 (1977); see also Stuart S. Rosenthal & William C. Strange, *Agglomeration, Hours Worked, and the Urban Rat Race* (working paper, March 2004) (available at [www.rotman.utoronto.cano](http://www.rotman.utoronto.cano)).

<sup>40</sup> See Kong-Pin Chen, *Sabotage in Promotion Tournaments*, 19 J.L. ECON. & ORG. 119, 120 (2003).

behavior that the firm does not want.<sup>41</sup> All this is to say that tournaments involve costs as well as benefits.

An organization will be more apt to bear these costs when the promotion in question involves not simply a pay raise, but an increase in discretion. The reason is that the flipside of more discretion is less monitoring of the worker's activities. And less monitoring means that there is a smaller chance that a worker's mistake in judgment will be caught and corrected before it causes a large negative consequence for the organization.

At the associate level, for example, lawyers are monitored at least to a minimal extent. Once they get promoted to partnership, monitoring drops to near zero (and discretion correspondingly increases). And while it is important to the firm that associates exercise good judgment, it would be a disaster if a partner exercised bad judgment. For example, take the partner who ignores a conflicts problem in order to take on a lucrative representation of a new client. Or take the partner who simply forgets to fill out the final paperwork to be admitted to the bar. In both cases, the partner's bad judgment exposes the firm to huge risks.<sup>42</sup> If possible, the firm would like to eliminate candidates who make these kinds of judgment calls. Despite the costs of a rat race, learning about how associates function under stress (and which associates engage in questionable judgments to get past the first round) may assist law firms in selecting partners better able to function in the best interests of the firm without any monitoring.<sup>43</sup>

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<sup>41</sup> One of us has written, nonetheless, that law firms may reduce the negative impact fierce tournament competition may otherwise have on collegiality through a multi-round tournament. In such a tournament, only a progressively smaller group of winners would continue in active competition. The losers, on the other hand, would remain with the firm (at least for some time), motivated through high salary (among other incentives) to continue to exert effort despite losing a tournament stage. See Wilkins & Gulati, *supra* note 3, at 1650-51.

<sup>42</sup> These are both examples from the real life story of Milbank Tweed partner, John Gallene. See MILTON REGAN, *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (forthcoming, 2004).

<sup>43</sup> Of course, an associate with tendencies to cut ethical corners (or other forms of bad judgment) may hide this tendency as an associate if she realizes that a second-round will occur that will block people with this sort of behavior from making partner. Nonetheless, associates may act to hide their bad judgment even without a first-round tournament over objective measures of productivity. Compared with this baseline, a first-round tournament

### III. Revelation Tournaments and the Motivations of Decisionmakers

Up to now, we have assumed that decisionmakers share the same motivation in making promotion decisions. Not all decisionmakers however may have the same preferences in selecting a candidate for promotion. Revelation tournaments make it more difficult for individual decisionmakers to hide their motivations behind selecting a particular candidate. The desire to hide motivations provides one explanation for the absence of a revelation tournament in areas where such a tournament would generate useful information on the subjective qualities of candidates.

Suppose first that there is agreement on what constitutes the “correct” set of subjective attributes for a promotion candidate. Information is imprecise and errors happen, leading an organization sometimes to promote the best candidate and sometimes not. Assuming that it is possible to identify a set of objective and measurable criteria and that competition over the objective criteria will generate information about the more important subjective criteria, one would expect to see the organization use a revelation tournament to reduce the error rate. Law firms are an example where decisionmakers share a common goal: more profits. Not surprisingly, we observe revelation tournaments in the context of partnership promotion within law firms.

In other contexts, not all hold the same beliefs as to the definition of subjective merit or the purpose of the organization. In these situations, those in charge of the promotion process may affirmatively not want a revelation tournament. From the perspective of this second set of decisionmakers, more information is not necessarily a good thing; it brings the positive and

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will provide added inducement for associates to reveal their true character—doing so may at least get the associate past the first round of the tournament (and allow the associate to remain longer at the firm than otherwise).

negative attributes of the candidate to light. Without information on subjective criteria on each candidate being revealed, those in charge of the promotion process have the opportunity to “spin” the merits of the candidate, often in a non-transparent fashion. Those who support a particular candidate for tenure on a law school faculty, for example, may wax on about the colleague’s creativity and brilliance (when the true motivation of such praise is simply to keep a politically like-minded person on the same faculty). Without a paper trail, it is difficult to argue effectively against this assessment. The point is simple: The more one wants to be able to spin a candidate’s qualifications, the less one will desire an effective revelation tournament.

Suppose that instead of one uniform criterion, decisionmakers instead hold one of two types of internal metrics: widely-held and narrowly-held criteria. For widely-held criteria (such as the desirability of more profits in the context of a law firm or integrity in the context of judicial nominations), we assume that the range of plausible disagreement about a particular candidate diminishes as more information about the candidate becomes available. On the other hand, for narrowly-held criteria, where preferences may diverge among decisionmakers, the provision of more information makes more transparent differences among decisionmaker preferences. Those decisionmakers who are opposed to gun control, for example, will likely notice a string of pro-gun control decisions by a judicial nominee and this will strengthen their resolve to fight the nomination. More information makes it easier to challenge the credibility of self-serving claims on the part of those in favor of gun-control about the subjective attributes of the candidate.

Even in the most profit-focused firm, the private incentives of individual agents can differ from those of the firm. Put differently, politics will likely play a role even in the law firm context. Thus, individual partners may have illegitimate reasons for favoring certain less

qualified candidates over others (for example, specific partners may be homophobic or racist and disfavor gay and minority candidates). To the extent that other partners recognize this proclivity, their suspicions will be heightened if the particular candidates that are favored on account of their supposed “good judgment” have low scores on the objective criteria such as billable hours or cases won. As with the prior information forcing mechanism, this one is not perfect. The point though is that the objective evidence, while not necessarily crucial in and of itself, serves to control or reveal the biases of individual members of the firm.

Within a law firm setting, market forces will push the firm towards devising mechanisms such as revelation tournaments to correct for hidden and narrowly-held motivations that may get in the way of obtaining more profit.<sup>44</sup> In other contexts where decisionmakers hold diverging opinions on what constitutes the “best” candidate, the market may have only little influence. Below we explicate the possible effects of a revelation tournament in one such situation where profits do not matter: the judicial nomination context.

#### **A. Applying the Revelation Tournament to Judicial Nominations**

Supreme Court nominations are an area where decisionmakers (politicians in particular) hold widely diverging views on who is the “best” candidate. Under current norms, the pool of possible judicial nominees to the Supreme Court is dominated by sitting judges.<sup>45</sup> Determining a particular candidate’s subjective attributes is however difficult, particularly for nominees without a “paper trail”. Fortunately, objective criteria are possible. To the extent the objective criteria are correlated with the subjective criteria, or alternatively, help generate information on the

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<sup>44</sup> Market forces may not always result in the most efficient selection systems. See, e.g., Tom Ginsburg and Jeffrey A. Wolf, *The Market for Elite Law Firm Associates*, 31 Fla. St. U. L. Rev. 909, 931-48 (2004) (contending that decentralized competition among law firms to hire top law students push firms to make hiring decisions earlier than otherwise, leading to less information on the attributes of the law students).

<sup>45</sup> See Epstein, *supra* note 16, at 909-917.

subjective criteria, a first round focus on objective criteria may assist in the application of subjective criteria.

In earlier work, two of us proposed using three categories of objective criteria for promotion to the Supreme Court: productivity, reputation, and independence.<sup>46</sup> For circuit court judges, the number of published opinions (corrected for intercircuit differences) provides an objective method of ranking judges based on productivity. Objective proxies also exist for reputation among other judges, including the number of times a judge's opinions are cited outside of the judge's circuit and the number of times other judges invoke the judge by name in their opinions. Finally, for independence, one possible objective measure is to track how often a particular judge dissents (or is dissented against) where the opposing judge is a judge associated with another political party (as proxied by the party of the president who appointed the judge).<sup>47</sup>

The three objective categories of merit for Supreme Court nomination are coarse measures of what many consider important in selecting a great Supreme Court justice. They fail to capture important elements of good judging such as judgment, fairness, empathy, temperament, and the ability to forge a consensus.<sup>48</sup> Nonetheless, the very act of writing opinions will generate information on the views of a particular judge. Less widely-held viewpoints will tend to generate more additional information, in the form of dissents as well as both positive and negative citations. Creating a first-selection round for nomination to the high court (culling out most judges who do not score highly on the objective criteria) will give an incentive for judges to create a paper trail useful in assessing the arguably more important subjective qualities.

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<sup>46</sup> See Choi & Gulati, *Tournament*, *supra* note 4, at 305-12 .

<sup>47</sup> See Choi & Gulati, *Choosing*, *supra* note 22, at \_\_.

<sup>48</sup> See Goldberg, *supra* note 12, at \_\_ (asserting the importance of these types of subjective attributes); Marshall, *supra* note 12, at \_\_ (similar); Gerhardt, *supra* note 12, at \_\_ (similar).

Why then don't we see a revelation tournament in the area of Supreme Court nominations? Politicians, whether due to interest group pressures or other reasons, often have strong views about what constitutes a strong judicial candidate. Some views are widely-held, such as the desire for judges who work hard, are competent, and intelligent (call these "merit" related factors). Others are less widely-held, such as views that a judge should support abortion rights or gun-control (call these "ideology"). Our fear is that politicians may praise a candidate for the high court as the most qualified person for the job when, in fact, the true motivation behind this assessment may depend on more ideological preferences (e.g., on abortion rights).

We suspect that politicians tend to reject the use of objective measures that may generate information on a particular candidate to keep subjective information about individual candidates hidden. Rather than select candidates based on a long track record (useful in determining subjective characteristics), politicians may purposefully search out candidates with little to no record. Without a record, merit is relatively unobservable to the public. The nominators can then make the claim of "merit" easily (The elder President Bush famously claimed Clarence Thomas to be the "most qualified candidate" and the younger President Bush has defended that statement<sup>49</sup>).

An alternative explanation for the lack of a judicial nomination tournament may be that a tournament is unnecessary. Even the least productive circuit court judge, for example, may produce enough of a track record during the first year on the bench to assess their subjective judgment and ideological tendencies. We disagree with this assessment of the relationship between judge effort levels (and productivity) and the production of information useful in assessing the subjective criteria important to the selection of a Supreme Court justice. Absent a

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<sup>49</sup> See Richard K. Neumann, Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 405 (2003) (describing President George W. Bush's defense of the Justice Thomas merit claim made by the former president, George H. Bush).

tournament structure, circuit court judges have an incentive, even over a long period of time, to avoid high profile and controversial matters.

In contrast, a tournament creates pressure for judges to generate published opinions, dissents, and citations. Citations are a particularly important aspect of the tournament for judges. The desire to receive more citations will drive judges to seek higher profile, controversial matters. A judge's opinion in a high profile case, in turn, is more likely to reveal subjective information on the judgment, wisdom, and ideology of a particular judge. As a judge accumulates more "high judgment" events, politicians and the general public will have more information with which to assess whether the judge makes judicial decisions in an effective manner. Put differently, the rat race forces people to make judgment calls on *difficult* matters – and that reveals information about key subjective attributes.

Consider how the revelation tournament can place greater emphasis on merit and less on ideology. Our objective measures, at first cut, appear to privilege those who do well on productivity, citation acquisition, and the willingness to write independently. They do, but only in terms of creating the pool of possible candidates. In round two of the revelation tournament, the politicians (and members of the public) will attempt to discern ideology. One may wonder whether in round two a politician will still gravitate to those judges (among those that survive round one) with narrowly-held ideological views similar to those of the politician. Thus, the tournament may weed out a potential Clarence Thomas, assuming that his scores on productivity, quality, and independence for his time on the bench would not have been stellar.<sup>50</sup> Nonetheless

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<sup>50</sup> We use Justice Thomas as an example, because even though the claim of his being the "most qualified" candidate is ridiculed (at least by those on the other side of the political spectrum), there seems to have been minimal inquiry into his performance as a circuit court judge to determine how he performed relative to his judicial colleagues. See Margaret Carlson, *Marching to a Different Drummer*, TIME, July 15, 1991, at 18 (stating that as "Supreme Court nominees go, Thomas had little judicial experience . . . [and was not] the author of numerous opinions"); Mark C. Niles, *Clarence Thomas: The First Ten Years Looking for Consistency*, 10 AM. U. J. GENDER SOC. POL'Y & L. 327, 340 (2002) (saying that no one can credibly claim that Clarence Thomas was the most

some might fear that the tournament might still anoint a highly partisan and highly productive and effective circuit court judge as the next Supreme Court nominee (as some Democrats have told us that would be even worse than another Clarence Thomas from their prospective). If the revelation mechanism works, that fear will not come to fruition.

Just as the tournament's first round provides information useful in determining whether a judge subscribes to any narrowly-held ideological viewpoints to politicians in favor of the same viewpoints, it also provides the information to politicians holding opposing viewpoints as well as to the general public. Assuming the ideological viewpoints in fact are narrowly-held, making clear that a judge is nominated based on these viewpoints will undermine the public's support for the candidate. While a large number of authored opinions would get a judge through the first-stage of a judicial nomination tournament, the body of those same opinions may doom the judge in the second stage if it reveals an overly ideological bent in the judge's opinions (or other flaws from the perspective of the public such as a lack of empathy for the human condition as some have characterized at least one prominent and highly productive circuit court judge). Without the revelation tournament, there is an incentive to hide (for both the candidate and her political sponsors). With the revelation tournament, one is forced to reveal.

## **B. Applying the Revelation Tournament Outside Employment: The Case of Law School Rankings**

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experienced circuit judge). Perhaps Justice Thomas will write a lot of opinions or, more maybe important, his opinions will be among the most cited of all justices. Thus far, the evidence is that he is in the middle of the pack in terms of number of opinions drafted. See *The Supreme Court, 1999 Term: The Statistics*, 114 HARV. L. REV. 390, 395 (2000). A demonstration of performance and productivity from the bench won't answer the question of whether Justice Thomas was the most qualified candidate for the job. But it will shift the burden to his critics to justify their criticisms of his appointment.

Before concluding, we offer a few remarks about how objective measures might force information from institutions, rather than people. The focus is on the always-controversial US News rankings of law schools. Each year, law students, potential law students, deans, professors, and alumni wait in anticipation for the US News law school rankings. This objective measure places each law school in one of four tiers. In the first tier, schools are ranked from one to a hundred. In the lower tiers, US News does not provide an exact ordering. Many law school deans have publicly condemned the ranking. In 1998, for example, John Sexton, then dean of NYU law school, stated: "I hope that U.S. News will think about whether the profits generated by its rankings are purchased at too great a cost to its own journalistic integrity." He went on to call the rankings "misleading and dangerous."<sup>51</sup> The American Association of Law Schools (AALS) has issued statements challenging the US News methodology, its findings, and the very act of ranking law schools.<sup>52</sup> Scholars, who study the ranking methodology, note its many failings: for instance, that the measure is biased in favor of private schools over public schools.<sup>53</sup>

Despite this public protest, condemnation and ridicule, US News sells. Potential law students rely on the rankings in selecting law schools. Law school alumni celebrate upward

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<sup>51</sup> News Release, *Association of American Law Schools Calls On U.S. News & World Report To Stop Ranking Law Schools; Study Challenges Validity of Magazine's System*, available at <http://www.aals.org/ranknews.html>.

<sup>52</sup> In February 1998, the AALS sent a letter sent to 93,000 law-school applicants, entitled "Law School Rankings May be Hazardous To Your Health." Numerous deans endorsed this letter. The thrust of the letter is that rankings are misguided, uninformative, and misleading. For the letter online go to <http://www.lsac.org/LSAC.asp?url=lsac/deans-speak-out-rankings.asp>. The letter stated that "[t]he idea that all law schools can be measured by the same yardstick ignores the qualities that make you and law schools unique, and is unworthy of being an important influence on the choice you are about to make. As the deans of schools that range across the spectrum of several rating systems, we strongly urge you to minimize the influence of rankings on your own judgment." Before it sent the letter, the AALS commissioned a study of the US News rankings. After reviewing the US News methodology, this study concluded that "There are many serious problems with the US News system for evaluating law schools." Stephen P. Klein & Laura Hamilton, *The validity of the US News & World Report rankings of ABA Law Schools*, available at <http://www.aals.org/validity.html>.

<sup>53</sup> See Brian Leiter, *Measuring The Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 452 (2000) (listing the flaws in the US News ranking).

movement in the rankings of their school and care, deeply, when the school falls from the top ten, the top fifty, or out of the second tier. Even at top schools, students convene town hall meetings and write op-ed pieces in the student newspapers when the school's ranking slips. Finally, in deciding which, among the hundreds of student journals, to submit an article, many law professors look to the rankings of US News.

This takes us back to the information-forcing thesis. Again, we have an objective measure with problems. It doesn't accurately measure what law students and employers look for – the quality of legal education. And, perhaps, measuring the quality of legal education is impossible. But the fact that the ranking is imperfect, imprecise, or just plain bad is not enough to jettison its use. If the ranking forces otherwise hard to obtain information about the law schools or solves a collective action problem, the objective measure has value. In other words, the question is not whether the US News ranking measures the quality of legal education, but instead whether US News has important information-forcing attributes.<sup>54</sup>

Before US News, most schools did not share information about faculty scholarship and hiring, the bar passage rate and employment status of recent graduates, the number of books in their library, or student-faculty ratios. This information was available only to potential students and others in the academic community who sought it out. For obvious reasons, schools that fared poorly on these measures did not publicize it; schools that anticipated a poor performance

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<sup>54</sup> We are not the first to suggest that law school rankings might be useful, even if they fail to measure educational quality. Russell Korobkin has argued that rankings coordinate high-ability students with employers as well as each other. Russell Korobkin, *In Praise of Law School Rankings: Solution to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403 (1998). To see this, first note that higher-ranked schools tend to be more selective. The argument, then, is that high-ability students select more selective schools to distinguish themselves from low-ability students. Such signaling works -- even the higher-ranked school offers no educational benefit -- so long as low-ability students find it harder to get into higher ranked schools. *Id.* at 409-10. In effect, rankings separate students along the line that employers care about -- natural talent. As a result, the most selective employers recruit at the most selective schools. According to Korobkin, the rankings coordinate employers and students whether they are "based on unimpeachable data or cotton candy." *Id.* at 410. In Korobkin's account, rankings forces information from the law student -- whether she is high or low ability -- to the employer. The low-ability student, because she failed to get into the more selective school, has trouble convincing the most selective employers that she is truly a high-ability student. This, however, is not the only information forcing the rankings provide.

did not bother to collect the data at all. At the other end of the spectrum, for schools that would perform well along a number of different possible measure of school quality, there was a strong social norm in the law school community against bragging prior to the US News ranking.

Because of the social norm against bragging and the reluctance of poorly performing schools to publicize data, much information about law schools remained hidden. The creation of the US News rankings broke the norm. As a result, otherwise hard-to-obtain information and perhaps undiscovered information flowed into the market. Although poorly conceived from a methodological standpoint, the rankings provide each school with an excuse to gather information about their law school and publicize it.<sup>55</sup> Schools that do poorly on the US News rankings today have an incentive now to publicize why they are in fact better than their objective rankings.<sup>56</sup>

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<sup>55</sup> The success of US News generated an important second order effect. It created a space for others to improve on the U.S. News ranking methodology and produce alternate and arguably better rankings. In other words, the combination of imperfect rankings by a first mover and a high demand for these rankings produces a market for alternate rankings. Competitors seek to improve on the first set of rankings by collective better information and analyzing it better. So, in the Business School context, this competition has produced alternate rankings from magazines and newspapers such as Fortune, Business Week, the Wall Street Journal, and the Financial Times. There is a similar vigorous competition in the market for college rankings (even though this predated U.S. News).

The point here is simple: The social value of an imperfect but successful ranking venture by an outsider such as U.S. News is that it produces a competition among different rankers, each of whom now tries to improve on the methodology of the others. In the law school context, we have not seen other periodicals such as the American Lawyer or Legal Affairs take up the U.S. News challenge and produce alternative rankings (and it is an interesting question why not), but we have seen individuals such as Brian Leiter engage in precisely the competitive dynamic that we describe. He has not only unpacked and critiqued the U.S. News methodology, but also has attempted to improve on it while producing his own rankings of the law schools. The Leiter rankings, descriptions of methodology, and critique of the U.S. News's ranking methodology are available at <http://www.utexas.edu/law/faculty/bleiter/rankings/>. There have also been other attempts to rank law schools such as that by Thomas Brennan ("Judging the Law Schools," discussed at <http://www.ilrg.com/rankings/>). More recently, see Adam Chalfin, How Do Current and Prospective Law Students Rank Law Schools (draft available at <http://www.lawschoolnumbers.com/study.pdf>).

<sup>56</sup> Occasionally, after a drop in the rankings, the law school itself will issue a press statement about its true merit. See, e.g., W.H. Knight, The Dean's Column for the University of Washington, available at <http://hr.unc.edu/Data/benefits/tuitionprograms/tuitionwaiver> (noting the positive things about the University of Washington Law School not captured by the US News ranking), Other times, an outsider or alumnus will issue a response. See, e.g., Brian Leiter, The Leiter Reports (April 9, 2004), available at <http://webapp.utexas.edu/blogs/archives/bleiter/001059.html> ("Note this alumni letter complaining *already* about the US News ranking of Berkeley: the alumnus writes to Berkeley to complain (as though Berkeley did something!), instead of writing to U.S. News to complain about the stupidity of their ranking method, which demeans schools like

The US News rankings provide an example of how an imperfect tournament based on objective factors may induce information revelation on the part of participants in the tournament of otherwise hard to observe or obtain information. The rankings also highlight limitations to the usefulness of tournaments in forcing information revelation. Rather than focus on revealing additional, more subjective information to counter misperceptions caused by an inaccurate objective ranking, schools may instead focus on gaming the system to improve their objective standing in the ranking.

To increase their prestige ranking, schools send out glossy flyers and alumni magazines to every law school professor in the country. These mailings detail recent hires and faculty productivity. Before reporting to US News, most schools send a blast email to faculty, asking the whereabouts of recent graduates and whether they are employed. More perniciously, to increase the number of applications and hence the yield rate, some law schools waive the application fee. To increase employment figures, some schools are rumored to hire recent graduates as research assistants.

What factors contribute to an objective (and imperfect) tournament resulting in less information revelation and more tailoring of behavior to maximize performance in the tournament itself? First, the consumers of the rankings – law students, law schools, law professors and so on – do not actively engage in a second round deliberation based on subjective information revealed by law schools. Part of the problem facing such consumers is a collective action problem. No single consumer internalizes the full benefit from assessing any additional information revealed through the tournament.

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Berkeley while inflating the status of others.”); Paul Mattingly, *Keep Rankings in Proper Perspective*, The Observer Online, available at <http://www.nd.edu/~observer/04252001/Viewpoint/7.html> (pointing out the many benefits of a Notre Dame education not reflected in US News).

Second, no coordinating body exists to promote a second-stage information revelation phase of the tournament. Recall in the law firm setting that the partnership may actively encourage a first stage tournament based on easy-to-measure indices of performance as a means to induce information revelation for a more detailed and subjective analysis of potential partnership candidates. A law firm partnership internalizes the benefits from overturning an objective measurement of quality with the results from a more subjective second stage analysis.

US News, however, does not internalize the full benefits from obtaining an accurate ranking of law schools. U.S. News is an external player, an outsider, who sees a gap in the market. That is, there is a potential demand for rankings and no one is producing them. So, US News concocts some rankings. And we know today that even though the rankings may have been highly flawed, there has been a high level of customer demand for the rankings. US News (and other potential providers of objective ranking measures) profit as more consumers focus attention on their rankings even to the exclusion of any potential second stage revelation of subjective information relevant to rankings. To the extent such subjective measures are hard to quantify and include in the US News rankings, US News has no incentive to direct the attention of consumers away from their own objective measures and toward such subjective measures.

#### **IV. Conclusion**

After this brief detour into the world of US News, we conclude with a brief summary of the main insights of the paper.

Competition over objective criteria is useful because it generates information on the workers' unknown subjective traits. To date, scholars have not recognized this benefit of competition. Law firms and at least some academic departments use versions of the two-round

revelation tournament. Supreme Court nominations do not. The question is why, especially now that a strong norm of requiring nominees to have prior judicial experience has developed. This norm of prior judicial experience makes it possible to compare the relative performances of judges, *as judges*. Yet, there has been little attempt on the part of the relevant political actors to collect information on relative performance levels of judges.

We suggest a cynical explanation to the question posed above. Political actors want to keep the public in the dark about the subjective attributes of each judicial candidate – namely, their ideology. In contrast, we argue for a revelation tournament under which objective rankings would be used to select a group of potential nominees. Forcing a competition over these objective criteria, we hope, will not only constrain politicians from making false or unsupportable claims about merit, but will also force out information about subjective characteristics that candidates would otherwise wish to conceal. Decisionmakers may then use these revealed subjective characteristics to select the ultimate nominee. Importantly, market forces, unlike in a law firm setting, will have little ability to persuade politicians to adopt a revelation tournament. Our piece is hopefully a first step in sparking a debate for a more tournament oriented approach toward judicial nominee selection.