

Tenure

Devon W. Carbado and Mitu Gulati

Prologue: The Rogue Senior Colleague

Mark is in his first year of teaching at the University of Ruritania School of Law. As an untenured junior member of the faculty, he has been burning the midnight oil trying both to prepare for classes and to get some research done. Late on a Thursday night, he has just finished preparing for his Friday afternoon class. Fridays are also the day for the weekly faculty workshops, and Mark is looking forward to turning his attention to the workshop paper. His mentor at Harvard once told him that if there was one thing he should do as an untenured faculty member, it was to attend the weekly workshops.

As Mark is about to begin reading, he hears a knock. He thinks about ignoring it, but after more loud knocks in rapid succession he opens the door. A senior colleague, Joe Oldsmith, is in the doorway. “Hi Mark,” says Joe. “I noticed your light on and thought I’d pop in.” Joe has the office across the hall and seems to be a perfectly affable guy. He is in his late fifties and has been at the University of Ruritania for almost twenty years. Mark has had very little conversation with him.

“Come in, come in,” Mark says, and he clears off a chair so that Joe can sit down.

“You’ve been working hard,” says Joe, maneuvering to get around the books piled on the floor.

“I have,” replies Mark, pleased that Joe has noticed. “I love my class, but it takes me almost eight hours to prepare for a single hour of teaching. That doesn’t leave me much time to work on my article. And I do want to get at least one article done by the end of my first year. I started working——”

Joe interrupts: “The first year is always tough. Things will get much better next year. Your prep time for class will go down by fifty percent at least. If you

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This essay is based on a speech that Devon Carbado delivered at the 2002 AALS joint program of the Section on Labor Relations and Employment Law and the Section on Minority Groups. The purpose of the panel at the AALS was to engage in a critical examination of the tenure process in U.S. law schools. This essay builds upon our more general work on discrimination in the workplace: Book Review, *The Law and Economics of Critical Race Theory*, 112 *Yale L.J.* 1757 (2003); *Working Identity*, 85 *Cornell L. Rev.* 1259 (2000); *Conversations at Work*, 79 *Or. L. Rev.* 103 (2001); *The Fifth Black Woman*, 2 *J. Contemp. Legal Probs.* 709 (2002).

like, we can have lunch and maybe I can give you some hints about cutting it down. But the reason I dropped by was to run an idea by you. I have a project this Saturday that I think would be good for you to get involved with. I think you'll have fun."

Mark is wary. Saturdays are his one day a week to spend some time with his partner—who is quite annoyed with him these days, since academia has turned out not to provide the large amounts of free time that Mark had claimed it would. But Joe is a senior colleague and Mark doesn't want to offend him. So he feigns moderate enthusiasm: "This sounds interesting. What is the project?"

Sitting up in his chair, Joe makes his pitch: "I run a workshop for practicing lawyers once a semester. I teach them about the basics of business negotiation and they get CLE credit. Since you're teaching corporations next term, I thought this might be a useful session for you to sit in on. In fact, I could let you run one of the two sessions so that you get some hands-on experience. This would also help me, since I would have to run only one session. What do you say?"

To Mark this sounds horrid. He would rather serve on the Task Force for Law School Community. The last thing he wants to spend his Saturday doing is running some CLE workshop. And that, too, with Joe Oldsmith, who as far as he can tell doesn't have an academic bone in his body. (His last article was published over ten years ago and was a comment on some local Ruritanian corporate law proposal.) But how does he say no? Joe clearly wants his help. And Joe, no matter what his publication record is, has a vote. Further, Joe probably has a lot of friends on the faculty who also have votes. Damn. There goes Saturday.

"That sounds wonderful, Joe. Thanks for giving me the opportunity."

Joe smiles. "I'll bring by the materials for the workshop so you can get ready. If you can, you should spend at least a couple of hours tomorrow preparing. We start promptly at 8 a.m."

* * *

The foregoing encounter is one that almost every junior faculty member experiences, in one form or another. The senior colleague's request may be for a class to be covered when he is off on vacation or for help with organizing some conference. The point is that it is difficult to say no to a senior colleague's request and, in turn, that means that the senior colleague has an incentive to make the request. And this dynamic gets more complicated when the request is from the dean's office and involves a task that is more onerous.

But what if Mark is a young Latino? Does that complicate matters even more? If Mark fears that there is a stereotype of Latino faculty as uncollegial, he may feel extra pressure to say yes to Joe's request so as to be able to negate that stereotype. It is this extra pressure on minority faculty to demonstrate themselves to be good institutional citizens that we explore in this essay.

I. Introduction

The two most important and, therefore, most discussed elements of the tenure decision are the evaluations of scholarship and teaching. Scant attention is paid to service, the third element of most law school tenure decisions. Yet service is important not only as an independent criterion for tenure (the “foreground” function of service) but also as a prism through which teaching and scholarship are evaluated (the “background” function of service). This essay unpacks these functions. We make two claims: (1) the foreground and background functions of service operate as mechanisms through which academic institutions screen “good citizenship,” and (2) this screening process can produce problematic outcomes.

Our specific goal, in developing these claims, is to illustrate some of the dilemmas that minority scholars face in negotiating their service obligations. These dilemmas derive from the incentives for minority faculty to select, and the incentives for academic institutions to select minority candidates for, burdensome service work. Exposing this racial vulnerability serves to highlight some of the informal rules of the tenure game. If minority candidates enter the teaching profession knowing these rules, perhaps they will be better equipped to play the game. We tell the story in terms of racial minorities, but a similar story can be told about white women and other outsiders who start out with negative presumptions.¹

At the outset, we should be clear to point out that overt racial or other animus does not figure prominently in the tenure process we describe. Our argument assumes that law faculties are neither structured by, nor organized around, *intentional* discrimination. Driving our analysis is a *functional* conception of discrimination, a conception that is linked to the operation of stereotypes. The stereotype problem is not simply that nonwhite faculty are vulnerable to being negatively stereotyped by their colleagues. The problem is exacerbated by the institutional context in which the stereotyping occurs—faculty culture, a culture where “good citizenship” is especially important. Because the performance of service is the dominant basis upon which faculties make determinations as to who is—and who is not—a good citizen, nonwhite faculty have to negotiate their institutional identity vis-à-vis service so as to avoid activating negative stereotypes. Put differently, nonwhite faculty, in order to be perceived as good citizens, have to avoid confirming negative stereotypes. This constrains how much service, and what kind, nonwhite faculty are likely to perform, thus altering their trajectory to tenure.

Underlying our arguments are assumptions about structural features of the tenure process. We assume that scholarship, teaching, and service are the three elements of tenure evaluation. We assume as well that while the precise balance among the three elements is unclear, scholarship matters more than teaching and teaching matters more than service. Given these assumptions, we offer a hypothesis as to why ostensibly neutral and “colorblind” tenure

1. One’s outsider status will be a function of context. On some faculties, a law and economics scholar might start out with a presumption of uncollegiality.

processes might operate to disadvantage racial minorities. Although the analysis is situated in the context of a discussion about race and the law school tenure process, the claims can be modified to apply to members of other groups subject to negative stereotypes and to other workplaces where organizational citizenship is a criterion for promotion.

Part II discusses the foreground function of service. The service criterion helps to constitute faculty cultures as “low-powered” environments—that is, environments within which the standard for promotion is ambiguous. This part explicates how service is formally evaluated and explains what is at stake with respect to that evaluation. Part III sets forth the background function of service: to create the stage upon which the tenure case is enacted. We argue that service can perform this role because academic institutions are low-powered environments. Part IV focuses on the “race-neutral” mechanisms that institutions employ to facilitate the performance of service work and demonstrates how these mechanisms produce racially discriminatory outcomes. Part V discusses the implications of our argument and identifies some complications.

II. The Foreground Function of Service

Law school tenure processes are “low-powered” promotion schemes; the criteria for promotion are purposely ambiguous. Candidates have an understanding only of the general contours of the requirements for tenure. They know that they have to produce a significant amount of scholarship (between two and four articles in roughly five years at most schools), be reasonably good teachers, and perform a respectable amount of service. But within these categories the specifics are unclear. With respect to the evaluation of scholarship, for example, in addition to producing the requisite number of articles, the scholar must reach or surpass some qualitative threshold (call this “superior intellectual attainment”). The candidate knows that whether she has met this threshold will depend on a number of factors including: positive reads by the senior faculty members in her field, a good journal placement for the article, lots of citations, and approval from outside readers. What the candidate does *not* have is a clear sense of how much weight each factor will be given. Looking to “precedent”—the faculty’s evaluation of prior cases—is unlikely to add clarity. Consider, for example, journal placement. Sometimes a good law review placement will be taken as a sign of high quality—“I’m really impressed that her first two pieces came out in Cornell and Columbia”—and on other occasions it will be all but ignored or even discounted—“What do *students* know about what’s good scholarship?”

Next there is the problem of the shifting target. That the prior year’s candidates attained tenure with two articles does not mean that the standard won’t be three or four articles for this year’s candidate. Rarely will this shift be articulated as a formal change of a tenure criterion; that would raise the specter of changing the rules in the middle of the game (and law faculties, in particular, like to be seen as adhering to the formal rules). Instead, the notion would be that the *quantity* of articles must exceed two if the *quality* of the two

articles is not indicative of “superior intellectual attainment.” A faculty invested in changing the quantity requirement vis-à-vis a specific tenure case has simply to say that the candidate failed to satisfy the quality requirement, a requirement that at best is vague. In sum, a tenure candidate will have a limited understanding of what she has to do to satisfy the standards for scholarship.

One can tell a similar story with respect to teaching. Once again there are multiple factors, among them student evaluations, peer evaluations, the preparation of new teaching materials, and the number of students taught. And once again the question of which factors will matter more, and under what circumstances, will not be clear to the candidate.

The standards for the evaluation of service, however, are the most ambiguous. It is not even clear what “service” is, let alone how much of it faculty have to perform. The candidate will know that while the criterion of service has to be satisfied, it is less important than scholarship and teaching and is likely insufficient, standing alone, to earn him tenure (which an exceptional record of scholarship might). But the candidate will not know much more than this.

At one time many law schools expected their faculty to be involved in the larger legal community and perform community service. Included in community service were pro bono work, participation in law reform projects, and assisting local community groups. While some junior faculty still manage to perform community service, it is not the norm. Things have changed. The academic standards of law schools have risen, and law professors are expected to produce scholarship of the type produced by scholars in other departments. The result is that there is little time left for community service. It would be rare today to see a tenure candidate criticized for failing to perform the foregoing types of service activities.² Today the primary measure of a person’s service is the extent to which she performs what scholars of business organizations refer to as “organizational citizenship” activities (one might refer to these as “academy service” as opposed to “community service”).³

Citizenship activities are not directly compensated either in the organization’s internal job market or by the external job market, usually because they are hard to measure and verify. Yet these activities are essential to the proper functioning of institutions. In the law school context, they include a willingness to perform committee work, advise student groups, participate in alumni events, speak to groups of prospective students, mentor junior col-

2. The disappearance of community-based legal service as a tenure requirement is due in part to the fact that many young faculty today, entering academia directly from clerkships or graduate school, are not equipped to perform this type of service work.
3. For discussions of the concept of organizational citizenship, see, e.g., John J. Ryan, *Work Values and Organizational Citizenship Behaviors: Values That Work for Employees and Organizations*, 17 *J. Bus. & Psychol.* 123 (2002); John E. Tomer, *Organizational Capital and Joining-Up: Linking the Individual to the Organization and to Society*, 51 *Hum. Rel.* 825 (1998); Philip M. Padsakoff et al., *Organizational Citizenship Behavior and the Quantity and Quality of Work Group Performance*, 82 *J. Applied Psychol.* 262 (1997); Larry J. Williams & Stella E. Anderson, *Job Satisfaction and Organizational Commitment as Predictors of Organizational Citizenship and In-Role Behaviors*, 17 *J. Mgmt.* 601 (1991); Dennis W. Organ, *Organizational Citizenship Behavior: The Good Soldier Syndrome* (Lexington, Mass., 1988).

leagues, give colleagues comments on their drafts, attend and actively participate in faculty workshops, teach big “service courses” that are outside one’s field, supervise student papers, be generally cheerful and help to maintain a norm of collegiality, and be loyal to the institution, particularly when there is an occasion of public exposure. The people who perform an appreciable share of these tasks are considered “good citizens.”

Broadly speaking, there are two reasons, one forward looking, the other backward looking, why institutions are invested in identifying and evaluating service at the tenure stage.

A. The Backward-Looking Reason

The backward-looking reason why academic institutions pay attention to service is transparent. Service is a criterion for tenure, and so the faculty has to decide whether a tenure candidate has performed enough service to warrant tenure. In effect, the faculty is asking itself this: Should tenure be granted as a backward-looking reward for past work done? Asked differently, has the candidate been enough of a good citizen (as measured by her service work) to grant her tenure?

B. The Forward-Looking Reason

The forward-looking reason institutions evaluate service is that the amount of service a person performs is a predictor of whether she has internalized the norms of the institution. The perception that the tenure candidate has become “institutionally normed” signals not simply that she is predisposed to doing service work post tenure but also that she will continue to care about her scholarly productivity and teaching. Academic tenure is unusual in that it is a guarantee of lifetime employment with almost no strings attached. Unless tenured faculty engage in outrageous conduct (e.g., sexual harassment or not showing up to teach class), it is difficult for an institution to fire them. More specifically, it is almost unheard of for a school to terminate a faculty member for substandard performance on the two primary tasks of a legal academic: scholarship and teaching. It is rarer still for a person to be terminated for being a bad citizen. Given this structural feature of academia, tenure determinations are necessarily forward (and not just backward) looking.

The forward-looking question is: Will the candidate continue to produce scholarship, teach effectively, and perform service after she has been tenured? Or will she become institutionally disengaged and be a conspicuous consumer of leisure? For some, the motivation to keep working may be market driven; they may want to move to a job at some other (usually more elite) institution or may want greater visibility to attract consulting business. For others, the motivators will be peer pressure and the internal culture of the institution. In other words, social sanctions can operate to deter slacking. Finally, there will be some who identify with the institution to such an extent that they internalize the goals of the institution as their own. With a tenure decision, it makes sense for the institution to examine carefully whether the candidate is one who will be motivated to work hard by some combination of the three pres-

tures listed above. If one assumes that only a handful of legal academics are likely to be motivated by market pressures (or that, for many, these market motivations do not last beyond a few years, after which they move or realize that they either can't move or don't want to), then the key question is whether the candidate has either internalized the goals of the institution or is susceptible to the institution's social pressures.

Asked directly, and in the parlance of "organizational citizenship": Has the tenure candidate been adequately "socialized" into the institution? Institutions have an incentive to investigate this question rigorously before granting tenure because afterwards the most direct means of motivating faculty—the threat of job loss—is no longer available.⁴ In sum, the predictive evaluation of whether someone is going to be a good citizen is important not just in terms of whether the candidate will continue to do citizenship tasks such as committee work and mentoring junior scholars, but also in terms of whether the candidate will continue to feel pressure to perform the primary tasks of scholarship and teaching.

III. The Background Function of Service

Recall that a person's status as a good or bad citizen is a function of whether and to what extent that person performs service. The background function of service derives primarily from the role citizenship status plays in setting the stage for the tenure review process. Specifically, a faculty member's status as a good or bad citizen can (a) operate as a prism through which teaching and scholarship are evaluated, and (b) influence the bottom-line vote on tenure. To put this another way, a faculty is less likely to be critical of a person's scholarship and teaching to the extent that the person is perceived to be a good citizen. Further, a faculty is more likely to vote yes on the question of whether a particular person should be promoted to tenure if that person is perceived to be a good citizen.

Both outcomes are possible because academic institutions are low-powered environments: senior faculty have discretion in deciding how to exercise their tenure vote (especially where voting is secret), and tenure standards are subjective and vague. The dual problem of discretion and ambiguity creates an institutional space within which one's status as a good or bad citizen matters—and not simply as a backward-looking reward ("the candidate has performed enough service to be granted tenure") or a forward-looking reward ("the candidate's service suggests that, post tenure, she will be a productive member of the faculty"). Citizenship status can matter in a more informal or background way, influencing how the tenure case is constructed and how individual faculty exercise their tenure vote.

4. On the socialization and acculturation processes that organizations use in order to build good citizens, see, e.g., Edgar H. Schein, *Organizational Socialization and the Profession of Management*, 30 *Sloan Mgmt. Rev.* 53 (1988); Charles O'Reilly, *Corporations, Culture, and Commitment: Motivation and Social Control in Organizations*, 31 *Cal. Mgmt. Rev.* 9 (1989); Jennifer A. Chatman, *Matching People and Organizations: Selection and Socialization in Public Accounting Firms*, 36 *Admin. Sci. Q.* 459, 81 (1991).

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Thus far, the story describes law schools as evaluators of service. We explained why these institutions pay attention to service work. But to say that service work is important to academic institutions is not yet to answer the question of how these institutions enlist faculty to perform the work. We argue that academic institutions structure the service opportunities of their faculty by employing a variety of allocation mechanisms. Explicating the nature of these mechanisms helps illustrate how they can produce racially discriminatory outcomes.

IV. The Mechanics of Requesting and Providing Service

Because service comes in a variety of forms, it is necessary to identify each form as a predicate to discussing the mechanisms that institutions employ to encourage faculty to perform service work. Service work differs in three important ways. First, some types of service are more onerous than others. For example, working on an admissions committee or a faculty appointments committee is a difficult task that takes considerable time and effort—time and effort that most untenured faculty would rather spend on their scholarship and teaching. Socializing with one's colleagues—inside and outside the workplace—and generally exhibiting collegiality is unlikely to be as burdensome.

Second, tasks differ in terms of visibility. Advising and counseling students informally is a low-visibility task: other faculty do not see the performance of the work. Thus, typically, senior faculty are not able to credit the tenure candidate for his commitment to the well-being of students. Speaking at an alumni event or a new-student orientation, in contrast, is likely to be witnessed by many (and, importantly, by the dean and the others who vote on tenure). The candidate is more likely to receive credit for this kind of work.

Finally, service work differs in how it is requested. There is some work that is simply assigned, and those who do not wish to do it have to ask to be excused. For other work, the dean sends out a broad request for volunteers to the entire faculty. For the most onerous tasks, the dean will likely show up at the junior faculty member's office to make a personal request. Finally, there are requests that individual senior faculty might make that serve little or no institutional purpose.

For the candidate, there are tradeoffs between service, scholarship, and teaching. The tradeoffs are relevant not only to the tenure process at the candidate's home institution but also to the external labor market. In the event that the candidate is denied tenure or simply desires to move to a different school, his track record on these three items will again be evaluated. But service, teaching, and scholarship are not equally visible to the external labor market. Scholarship is completely visible, teaching is partially visible, and service is almost invisible. In this sense, the more service work the candidate performs—especially on onerous tasks that take up large amounts of time—the less time he has to perform work that will be visible to the external market.

The pressures to perform service work and the tradeoffs between doing service, on the one hand, and scholarship and teaching, on the other, apply to every candidate. In the discussion that follows, however, we argue that the presence of stereotypes (even if they exist only in the form of perceptions on the part of the minority candidate) complicates matters for racial minorities. We demonstrate how by focusing on the mechanisms that institutions employ to extract service.

A. *Assigned Tasks and Asking to Be Excused: Squeaking the Wheel*

1. Stereotypes and the Likelihood of Seeking Excusal

An important mechanism for allocating service work is assignment. Under this approach, the dean may send out a memorandum at the beginning of the academic year assigning faculty to particular committees. Aspects of one's teaching load (if not the teaching load itself) often are assigned. For example, faculty (especially junior untenured faculty) tend to have limited control over class sizes; typically, a teacher finds out her class size from the registrar at the beginning of the semester.

Assume that Susan, an untenured faculty member, has been given what she thinks is a burdensome student load or set of committee assignments. To get the load diminished, Susan has to ask to be excused; she has to be the squeaky wheel. This is not an easy request to make. It is tantamount to asking the dean to assign to some other member of the faculty the service work that he initially assigned to Susan. Urging the reallocation of citizenship tasks from oneself to a colleague can create the impression that one is a bad citizen. There are exceptions—for example, for family emergencies or personal illness. Ordinarily, however, a dean would not look favorably upon a faculty member whose request to be unburdened by service went something like “I don't want to do committee work because it hurts my ability to do scholarship, which, after all, is what really matters for tenure and for my ability to move laterally.” The preceding statement may well be true. But it is not a truth that deans invite or encourage junior faculty to speak.

Asking to be excused is likely more complicated for a minority candidate. Assume that the tenure candidate is Pedro, a Latino. Assume also that (a) the senior faculty consists primarily of white males and (b) Pedro suspects that his senior colleagues view him as an outsider, a person whose primary loyalty is not to the institution but to the community of faculty of color. Should Pedro ask to be excused from service, he faces the risk that his request will solidify the impression that he is insufficiently engaged with, and loyal to, the institution. Such a request could reify Pedro's outsider status—or so Pedro might believe. In this sense, the risk of being perceived as a bad citizen for seeking excusal from service is greater for Pedro than it is for his white male colleagues. While they undoubtedly think hard about whether to request release from service, their analysis will not be complicated by a vulnerability to negative racial stereotyping. Other things equal, the presence of negative stereotypes will

make Pedro less likely than his white male colleagues to ask the dean to diminish his service obligations.⁵

2. Stereotypes and How One Asks to Be Excused

But assume that Pedro does ask the dean to diminish his service obligation. What does he say? This is complicated, because implicit in the request for release from service is the notion that one is being overburdened relative to others. Quite apart from whether one intends to convey that message, one's request can be interpreted in that way. As a racial minority, Pedro has additional reason to worry about the consequences of the dean's so interpreting his request. Such an interpretation not only confirms the stereotype of people of color as always crying foul play, it suggests that Pedro is accusing the institution of racially allocating work. The latter is a serious charge and could engender feelings of betrayal, or at least defensiveness, on the part of the dean and Pedro's colleagues.

In order to mitigate the possibility of his colleagues' reading his request for service release as a statement about the racial allocation of work, Pedro will need information about precisely who on the faculty is doing what kind of service and how much. But most law schools are black boxes in terms of providing access to information about the relative burdens and compensation levels among faculty. One might suggest that Pedro simply ask his colleagues to tell him how much service work they are performing. But Pedro's colleagues could (likely would) perceive such a move as uncollegial. Specifically, to the extent that Pedro goes around the faculty asking his colleagues the nature of their service obligations, he risks sending the message that he does not trust the institution to fairly allocate work and that he believes his colleagues shirk their service obligations.

5. There are two effects at play that map on to the research on stereotypes by psychologists. First, for those subject to negative stereotypes, ambiguous or mild signals are likely to be taken as confirmatory of those stereotypes. Second, in order to disconfirm negative stereotypes, those subject to them have to take actions that send unambiguously disconfirming signals (vague ones will not suffice). For discussions on the subject, see e.g., Myron Rothbart & Robert Mauro, *Social Categories and Decision Making: How Much Differentiation Do We Need?* in *Codes of Conduct: Behavioral Research into Business Ethics*, eds. David M. Messick & Ann E. Tenbrunsel, 143, 150 (New York, 1996) [hereinafter *Codes of Conduct*] (discussing "illusory correlations" that can occur with respect to race); Marilyn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, in *Codes of Conduct*, *supra*, at 160, 166 (discussing the effects of "attributional ambiguity," albeit with respect to in-group favoritism). The two effects described above suggest that minorities subject to negative stereotypes about their potential to be good organizational citizens will have an incentive to exercise greater care and more effort than their white counterparts in order to demonstrate themselves to be worthy of retention.

In turn, research by organizational behavior scholars suggests that racial minorities are more likely than their white counterparts to engage in "impression management" strategies. See, e.g., Nurit Zaidman & Amos Drory, *Upward Impression Management in the Work Place: Cross-Cultural Analysis*, 25 *Int'l J. Intercultural Rel.* 671, 674 (2001) (citing studies). Among the interesting recent research papers in this area is a study showing that while demographically different workers engendered more negative impressions than did similar workers, these impressions were more positive when the demographically different people were either more extroverted or higher self-monitors. See Francis J. Flynn et al., *Getting to Know You: The Influence of Personality on Impressions and Performance of Demographically Different People in Organizations*, 46 *Admin. Sci. Q.* 414 (2001).

Stipulate now that Pedro manages to get a good indication of his colleagues' service obligations. What does he do with that information? What does he say about it? Is it enough for Pedro to inform the associate dean that his teaching burden is higher than that of the average faculty member (or the average junior faculty member)? Probably not. Likely (again because of concerns about negative stereotypes as to institutional loyalty and work ethic) Pedro will not tell the associate dean that he won't teach any more than the average load of the faculty. Chances are, Pedro would feel more comfortable saying that, as an untenured member of the faculty, he should not have to teach the heaviest load on the faculty. If Pedro can buttress his request for service release with a claim that he has the heaviest teaching load, he may be able to mitigate the likelihood that his colleagues will negatively stereotype him.

But the empirical foundation for such a claim may be lacking; while Pedro's teaching load may be above average, it is probably not the heaviest. Assuming that it is not in fact the heaviest, any request on Pedro's part to be excused from what he perceives to be a teaching overload can be sidestepped if the associate dean points out that there are at least some other (white) faculty members who teach just as many students as Pedro (even if those others are themselves teaching a load much higher than the average).

B. Choosing to Attend

A number of less onerous service tasks are not assigned. Instead the tenure candidate "chooses" to perform them. These include such activities as attending social events organized by colleagues, taking the affirmative step of inviting colleagues to socialize, attending and participating at faculty workshops and meetings, attending official receptions for alumni and students, and welcoming new and visiting faculty. Individually, these tasks are small; collectively, they are time-consuming and crucial to the operation of the institution and, in particular, to its cohesiveness. It bears mentioning that, for the most part, legal academics do their research in isolation. Faculties rely on faculty meetings, workshops, and social events to build a collective identity. On faculties where collegiality is a valued trait and a key part of the faculty's institutional identity, junior faculty are likely to be under extra scrutiny for their willingness to engage in "prosocial activities"⁶—that is, activities that help establish community. Minority faculty are particularly vulnerable to this heightened institutional gaze. Because of stereotypes about racial associations, white faculty might presume that their minority junior colleagues are less likely than the white junior faculty to enjoy the company of their white senior colleagues and more likely to feel uncomfortable around them.

The flip side of the foregoing is the presumption that minorities enjoy the company of other minorities more. Assuming the presence of these background assumptions, the minority candidate will likely feel a burden to negate

6. See Arthur P. Brief & Stephan J. Motowidlo, Prosocial Organizational Behaviors, 11 *Acad. Mgmt. Rev.* 710 (1986).

them. Significant in this is that to the extent that the minority person spends time socializing with other minority faculty, this probably will not count as a demonstration of collegiality. Indeed, if her socializing is primarily with other minorities, she may be viewed as uncollegial, as a person who is only interested in identity-based associations. She may be especially vulnerable to being perceived in this way if the minority faculty with whom she associates tend to agitate for such institutional reform as racial diversity in student admissions and faculty hiring.

The foregoing dynamic is a function of (a) the entrenchment of colorblindness as an institutional norm within most law school cultures and (b) the race-based way in which colorblindness regulates racial association. Consider this claim with respect to Pedro. If he wants to spend time socializing with his minority colleagues (a presumptively color-conscious activity), he may feel pressure to spend even more time socializing with his white colleagues (a presumptively colorblind activity). The problem for Pedro is not simply that colorblindness is perceived to support, and color consciousness is perceived to undermine, collegiality. The problem is also that the perception of whether Pedro is violating the norm of colorblindness—and thus the norm of collegiality—turns on whether Pedro is associating with other people of color, or whether instead he is associating with whites. One effect of the norm of collegiality, then, given that this norm is buttressed by a commitment to colorblindness, is to regulate the associations of nonwhite faculty. Because interactions among nonwhite faculty are presumptively race conscious and thus suspect, nonwhite faculty have to be concerned about how, in terms of race, they associate at work. While Pedro's association with his white colleagues is colorblind and perceived to advance collegiality, his associations with his minority colleagues are perceived to be race conscious and a threat to the collegiality norm.

There is a reverse dynamic as well. Pedro might perceive that spending a considerable amount of time with his white colleagues could raise questions about his institutional commitments vis-à-vis his nonwhite colleagues. So he will try to make sure that his efforts to negate assumptions about his loyalty and connection to the faculty as a whole do not compromise his relationship with a subgroup of faculty with whom he may feel connected. In sum, the burdens on the untenured minority faculty member will be considerable.

C. Being Asked: The Personal Touch

1. The Decanal Request

Every faculty member anticipates trouble (read: a serious work assignment) when she observes a personal message from the dean in her inbox. More foreboding is the phone call; worse still is the office visit. Typically, deans reserve assigning work via the personal touch for particularly onerous tasks. If, for example, the dean were to solicit volunteers for something like an ABA review committee by sending a facultywide e-mail requesting volunteers, it is likely that few of the faculty would respond; certainly junior faculty would be unlikely to respond, given their interest in advancing their scholarship. The

e-mail request makes it easy for someone to say no without any institutional cost. She simply does not respond.

Saying no is more difficult if she receives a visit from the dean in the middle of the afternoon and the dean makes the following request: "We're constituting a committee to review the institution. We really need your help. We have an important opportunity to think hard about where we have been and where we should be. Your voice could help us chart that journey." Under these circumstances, it is difficult to say no. Doing so could send the message that she is unwilling to be a good citizen.

Here, too, race complicates the story. For minority faculty, the question is not simply whether saying no creates the impression of bad citizenship; the question is whether declining the dean's request confirms an impression that may already be there—that minority faculty are likely to be bad citizens and unlikely to carry their fair share of institutional work. The problem gets more complicated if the dean's request directly invokes the minority person's racial identity. For example, the request that Pedro serve on the appointments committee may come linked to a statement like "We're especially eager to do some additional minority hiring, and we think your presence on the committee would help a great deal." Here the dean is linking the need for Pedro's participation to Pedro's race. If Pedro says no, he creates the risk that the dean will perceive him as a bad citizen not simply in a general sense but in the specific sense of not helping the institution ameliorate its lack of racial diversity. (This may also alienate any white faculty who have supported Pedro's hire on the theory that he would help to hire other minority persons.) Importantly, the foregoing does not meaningfully change if the dean's request is coupled with the caveat "But, of course, we would understand if you think that this will interfere with your scholarship." Faculty of color would likely not experience that representation as a real exit option.⁷

2. The Rogue Request

Requests from the deans are presumably for tasks that are in the institution's interests. There are also, however, requests that senior faculty might make to serve their individual interests. These requests are like lightning: they strike without warning and can cause severe destruction. As in the example we began with, the senior colleague shows up in person to make the request. For the poor junior, each senior colleague is a vote. To annoy a single senior colleague is to risk losing a vote. And assuming that voting is blind (and that collegiality and service are elements of the tenure decision), saying no creates the risk of losing the vote. These requests can come in a variety of forms including requests to teach a class (maybe the senior colleague wants to go away for a week), assist with a weekend project (for example, Oldsmith's CLE program), or—worst—collaborate on a casebook (which would mean updating an old casebook in exchange for a tiny share of the royalties). Each of these requests can drain the junior person's time and energy and is unlikely to

7. Unless the dean is able to credibly demonstrate that negative consequences will not occur.

help him with writing his articles. In addition, there can be especially unpleasant forms of rogue behavior—for example, the lecherous rogue who feels that every junior woman on the faculty is available for flirtation or worse sexual harassment.

Our sense is that, for the most part, seniors recognize the pressures on juniors and avoid inappropriate behavior. And most institutions, we hope, have norms against such behavior. But the danger is from the occasional rogue colleague who cares little about violating the institution's norms and lies in wait for unsuspecting juniors. No junior wants to be *the one*⁸ to whom the senior rogue turns his attention.

Given that rogues are outliers, it is likely that at least some of their requests can be refused with little risk (for example, there may be some of these rogues who don't even show up to meetings to vote, or those who aren't even tenured or on tenure track but are counting on the juniors' not knowing that). Further, there is often an institutional memory of strategies for dealing with the rogue requests. For example, the strategy of the lecher might be to ask every new junior woman on the faculty to lunch in order to "get acquainted," and the optimal avoidance (and tenure survival) strategy might be to politely refuse the lunch invitations.

The danger of the rogue colleague is one that all juniors face. But things are more complicated for the minority junior if she feels under greater pressure to disprove a stereotype of being uncollegial. Plus, if there is no senior colleague to provide her with information as to the identity of the rogues, the nature of their rogue behavior, and the best avoidance strategies, she will be an easy target. Conversely, the rogue who recognizes that his minority junior colleagues are likely to both feel heightened pressures to say yes and not know the effective avoidance strategies has an added incentive to seek out minority juniors as his primary targets.

V. A Few Complications

There are several complications to the general story we have told. Below we articulate them. But first: the basic implication of our argument.

A. *The Basic Implication*

The implication of the foregoing, while distressing, is simple. If minority candidates perceive the existence of negative stereotypes as to their organizational citizenship potential, they will feel a heavier burden to perform citizenship tasks. This dynamic is complicated further if the minority person is simultaneously trying to maintain his ties to the subgroup of minority faculty. The result is that untenured minority faculty likely end up doing more service work than their white male competitors for tenure, and that, in turn, means that they have relatively less time for scholarship and teaching preparation.

8. Apologies to *The Matrix*.

B. *After Saying Yes: The Actual Performance of Service Work*

A complication in the story derives from the fact that the pressure to negate stereotypes does not end when the minority person takes on service obligations. Her performance of service is also going to be shaped by a concern about negative stereotypes. Consider this problem with respect to service work on the appointments committee, for example. How this committee evaluates a candidate will likely reflect ideological commitments about, among other things, merit, diversity, elitism, and curricula. Stipulate that the minority faculty member is interested in creating more opportunities for people of color to be hired at her school. Her interest in pursuing this project is going to be constrained by concerns that questioning merit could signal an interest in unqualified hiring, promoting diversity could signal an interest in identity politics, and challenging elitism could signal an interest in anti-institutional politics. In this sense, whether she is perceived to be a good citizen is a function of *how* she performs service. As with the minority candidate's decision *to take on* service work, her decision as to *how to perform* that work takes place in the shadow of racial stereotypes. Here too she has to worry about the relationship between negative stereotypes and citizenship status.

C. *Racial Shadow Work*

A second complication is that the pressure minority candidates experience to take on service work is part of a more general pressure minorities feel to demonstrate institutional fit. The fact of minority or outsider status means that, at least in terms of race, one is not a part of the majority—or insider—group. This can engender questions on the part of the majority group about whether the outsider will make her outsider status salient to the institution, thereby causing discomfort to the insiders, or whether, instead, she will “work her identity” to make her insider colleagues feel comfortable—and not simply with her outsider identity but with their insider status.

To engender feelings of racial comfort, an outsider needs to be “peripheralized” in at least two senses. She needs to be on the periphery of her own racial group—for example, by signaling that she is “not really Asian” (i.e., she doesn't fit the stereotype of someone of Asian ancestry)—and on the periphery of the insider racial group—for example, by signaling that she is a “but for Asian,” a person who, but for her phenotypic appearance of Asian ancestry, is like the insiders. Minority faculty need to demonstrate a willingness, and a capacity, to fit in. They may not be perceived as good citizens if they fail to do.⁹

But demonstrating institutional fit and providing racial comfort can be problematic. In addition to compromising one's sense of identity, engaging in this strategy takes time, energy, and effort. This comfort work is on top of the

9. For recent papers examining the dynamics of outsider presence on the periphery of both the insider and outsider groups, see Naomi Ellemers, Individual Upward Mobility and the Perceived Legitimacy of Intergroup Relations. *in* *The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice and Intergroup Relations*, eds. John T. Jost & Brenda Major, 205 (New York, 2001); Stephen C. Wright, Restricted Intergroup Boundaries: Tokenism, Ambiguity, and the Tolerance of Injustice, *in* *The Psychology of Legitimacy*, *supra*, at 223.

extra service work that minority faculty already feel pressured to perform. This is “shadow work.” Because while institutions expect minority candidates to further racial comfort, they do not formally articulate that expectation; nor do they formally acknowledge that anyone is doing this work.

This is not to say that there is no payoff or compensation for shadow work. To the extent that a person of color provides racial comfort, she increases the likelihood that she will be tenured. The point, instead, is that racial comfort work is part of the Ivory Tower’s underground racial economy.

D. The External Market and the Law

Two additional complications deserve mention: the external labor market and the law. The complication with respect to the first is this: typically, candidates make tradeoffs between strategies that will further the goal of attaining tenure at the home institution and the strategies that will further a move to a different institution. To the extent that minority faculty suspect that the senior faculty at their home institution are unfairly biased against them, their incentive may be to do less service work and more scholarship because it is scholarship that is most visible to the external job market. Our argument assumes that the candidate’s goal is to gain tenure at her home institution. But this may not always be the case. And when it is not, the minority person’s incentive to perform service work diminishes.

The reason we do not consider the effect of the external job market is that we assume that external labor market protection is not a realistic hope for most candidates—perhaps especially for minority candidates. Hence, minority faculty are unlikely to be motivated by the theoretical protections that the market affords. Informing this claim is our sense that untenured faculty will have a difficult time attracting the attention of the external market, particularly if they have received a negative tenure vote at their home institution. For the most part, the external market reads a tenure denial as a negative signal about a candidate and does not attempt to investigate that signal. There may be exceptions: for example, when the candidate who was denied tenure is a clear superstar. But such cases are rare. So even if a minority candidate wants to leave her institution, there is a strong incentive for her to achieve tenure before she attempts to do so.

The complication with respect to the law derives from the existence of an antidiscrimination regime. One could argue that to the extent that antidiscrimination laws provide minority candidates with protections against job loss (that their nonwhite competitors do not have), those protections can reduce the incentives of minority candidates to perform service work. Butressing this claim would be the notion that, if minority candidates see their institutional protection as coming from an external body such as a court, they are likely to focus on doing work that is visible to the external body. Scholarship and teaching are more likely to be visible to the external body than service. Hence, the argument might continue, the presence of antidiscrimination laws counteracts the incentives minority faculty have to perform service work.

The reason we do not factor in the potential incentive effects of antidiscrimination laws, however, is that we do not think many minority candidates

see these laws as operating in anything other than an endgame (or after-the-game) scenario. Furthermore, tenure cases are hard to win and costly to litigate. It is our sense, then, that the protective effects of antidiscrimination law do not outweigh the desire to negate stereotypes. Still, this is an empirical question that we hope others will take up.

* * * * *

Recently both of us crossed the tenure threshold. We were fortunate to have senior colleagues and mentors who explained not only the formal terms upon which tenure is granted but also the informal ways in which the tenure standards are operationalized. Given our work on discrimination in organizational contexts, however, it occurred to us that a subtle story about discrimination was implicated. Our aim in this essay was to articulate that story. But the essay is not an “institutional reform” project; there are no proposals here. Instead, and to borrow from feminism, the essay is an act of consciousness raising—for ourselves as well as for others. We hope the discussion will inform the way minority candidates think about negotiating their path to tenure; writing it has helped us reflect on our own.

And yet tenure is not the end of the game. Nor is it the endgame. After tenure, the rules get more complicated, as does one’s institutional identity. But that is another story—and for another paper.