

SHOWCASING: THE POSITIVE SPIN*

KATHARINE T. BARTLETT**

This Commentary outlines the positive case for showcasing diversity. Patrick Shin and Mitu Gulati criticize showcasing on the grounds that appointing women and minorities to board directorships is unreliable as a sign of true commitment to diversity and, further, that showcasing is detrimental to women and minorities because it treats them as objects or “prized trophies.” Drawing on social psychology, this Commentary highlights the mechanisms through which showcasing, despite the negative features emphasized by Shin and Gulati, also reinforces diversity values and strengthens the existing societal consensus in favor of diversity.

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INTRODUCTION

What do companies signal when they showcase female and minority members of their corporate boards? Not necessarily more, say Patrick Shin and Mitu Gulati, than that they understand that diversity is a socially significant issue, and that they can attract members of the showcased individual’s minority group, against whom they are then probably disinclined to discriminate.¹ While this may be important information to convey, Shin and Gulati’s focus is on what is *not* reliably signaled by the showcasing of women and minority appointments. Specifically, they argue that showcasing is not a true indication that the company has achieved diversity, or even that it has

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** A. Kenneth Pye Professor of Law, Duke University School of Law.

1. Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1032, 1034–35 (2011).

a commitment to achieving it.² It is not a true indication because showcasing is too cheap and easy in relation to the more difficult work necessary to achieve genuine diversity.³ Thus, while token board appointments can appear to reflect a deeper commitment to diversity, they actually predict little about whether a company has made that commitment.⁴

Showcasing may not warrant as much credit to the companies who engage in it as they may seek, but does it do any harm? Yes, say Shin and Gulati. Showcasing women and minorities for their value as signals treats them as “prized troph[ies]” or “passive emblems.”⁵ This treatment is dehumanizing and “corrosive to their status in the organizational community.”⁶ It also reinforces stereotypes that women and minorities lack merit for top-level corporate positions.⁷

Shin and Gulati are careful to say that their concerns are not about showcasing per se, but rather about showcasing for the purpose of signaling a commitment to diversity,⁸ which they believe “implies a morally offensive way of thinking about the value of diversity-oriented hiring or promotional practices.”⁹ Accordingly, this Commentary responds to that single, limited matter: whether it is acceptable and appropriate for companies to showcase female and minority board appointments *for signaling purposes*. While the response acknowledges the validity of some of Shin and Gulati’s concerns, it focuses on the shinier side of the showcasing coin. In particular, it argues that showcasing has the potential to strengthen a positive societal view of diversity, even when it does not predictably signal a genuine commitment to that diversity.

Part I spells out this positive case for showcasing. This case starts with the assumption that companies who make diversity appointments and then advertise them must believe that others view diversity favorably and thus will think well of them if they engage in it. Showcasing not only exploits this favorable view of diversity, but also furthers people’s internalization of this view and their commitment to act consistently with it.

2. *Id.* at 1032.

3. *Id.* at 1034–35.

4. *Id.* at 1025–26, 1034–35; *see also* Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431, 451–52 (2008) (arguing that board diversity is easy to mimic and thus has little signaling value).

5. Shin & Gulati, *supra* note 1, at 1040–41.

6. *Id.* at 1040.

7. *Id.* at 1041 n.60.

8. *Id.* at 1043.

9. *Id.*

Part II then examines the positive case for the appointment of women and minorities to corporate boards. It begins with a discussion of the two principle rationales typically used to justify identity-conscious appointments: nondiscrimination and diversity. Drawing on how these rationales have functioned to bolster the case for diversity within juries and among judges, Part II briefly explores their benefits and limitations, and notes the mixed empirical evidence that underlies them. It concludes by retrieving a rationale mentioned in passing by Shin and Gulati—that actions to promote diversity serve the purpose of expressing an important societal ideal.¹⁰ The commitment to corporate board diversity (and diversity in other domains) is hard to explain without this expressive rationale, which does not depend upon empirical evidence that diversity achieves other instrumental goals. Part III connects the positive case for showcasing to this expressive function.

I. THE CASE FOR SHOWCASING

Shin and Gulati's thesis is that company showcasing of female and minority board appointments is misleading as a signal of a genuine commitment to diversity and has hidden costs to the women and minorities who are showcased. This two-part account is plausible, as far as it goes, but it does not do justice to the positive potential benefits of showcasing for strengthening nondiscrimination and diversity norms. For one thing, it ignores these possible benefits. For another thing, it reflects a cynicism that has the potential to weaken the diversity ideal it seeks to uphold. Shin and Gulati criticize showcasing motivated by a desire to signal because it "undercuts the basic premise that animates the evidential view of the value of diversity."¹¹ Ironically, their thesis that signaling is corrupting has the quality of a self-fulfilling prophecy, which may itself undercut the commitment that diversity requires.

This Part examines the positive benefits neglected in the Shin and Gulati account. It argues that expression matters. The expression of positive views about a subject has the potential to reinforce those positive views both among the people expressing the views and their audiences. Showcasing diversity appointments expresses a pro-diversity point of view, and thereby, under the right conditions, enhances a pro-diversity norm. Similarly, showcasing is also an action that reinforces the underlying commitments upon which it is based.

10. *Id.* at 1020–21.

11. *Id.* at 1041.

A. *Expression Matters*

In their critique of showcasing as a signal of commitment to diversity, Shin and Gulati are concerned that some people will mistakenly overread the showcasing signal and attribute more credit to a company than its actual commitment warrants. This concern needs to be put in the broader context of business communication, through which all companies seek to portray themselves or their products in as good a light as they reasonably can, often through subliminal messages. Philip Morris advertisements build the Marlboro brand with athletic, sexy, masculine figures in the great, clean outdoors.¹² BP Oil narrates stories of local New Orleans workers to convey the message that it will take care of the damage caused by the Deepwater Horizon explosion (even as it seeks other parties with whom to share responsibility for that damage).¹³ Similarly, when companies draw attention to their “diverse” board appointments, they are hoping to create favorable associations between the company and its commitment to diversity. Like other forms of business promotion and advertising, bringing these appointments to the attention of others plays on people’s subliminal receptivity and gullibility. “Puffery,” however, is generally tolerated in the business world, particularly with respect to claims that are highly subjective and hard to disprove.¹⁴

Shin and Gulati argue that one reason diversity *cannot* be reliably signaled by diversity appointments is that the concept of diversity is indeterminate, contextual, and subjective.¹⁵ But they appear to miss the full implications of this observation. Preliminarily, because of the subjectivity and indeterminacy of diversity, a company that makes diversity appointments could readily perceive itself to be

12. See, e.g., *Marlboro Man*, STANFORD UNIV.: THE BILL LANE CTR. FOR THE AM. W., <http://west.stanford.edu/cgi-bin/pager.php?id=33> (last visited Feb. 21, 2011).

13. See *Gulf of Mexico Response*, BP, <http://www.bp.com/extendedsectiongenericarticle.do?categoryId=40&contentId=7061813> (last visited Feb. 21, 2011).

14. See, e.g., *New Colt Holding Corp. v. RJG Holdings of Fla., Inc.*, 312 F. Supp. 2d 195, 235 (D. Conn. 2004) (holding as puffery a gun manufacturer’s claim that the Model P handgun was the “gun that won the west”); *Thompson Med. Co. v. Ciba-Geigy Corp.*, 643 F. Supp. 1190, 1199–1200 (S.D.N.Y. 1986) (holding that weight-loss pill manufacturer’s representations that the pill would cause you to “Lose Weight Fast” was puffery and not misleading); *In re Dannon Milk Prods., Inc.*, 61 F.T.C. 840, 841 (1962) (holding as meaningless puff Dannon’s claim that its yogurt is “nature’s perfect food”); *Gold v. Univ. of Bridgeport Sch. of Law*, 562 A.2d 570, 572–73 (Conn. App. Ct. 1989) (holding that the law school’s advertising to prospective students of opportunities for “friendly interaction” with faculty was “akin to mere ‘puffing’” and could not support liability for fraudulent misrepresentation).

15. Shin & Gulati, *supra* note 1, at 1027–31.

committed to diversity, according to its own (probably vague, indeterminate, and also self-serving) understanding of that term. In other words, just as there is little objective sense in which it could be said that a company has committed to, or accomplished, diversity, so also there is little meaningful sense in which a company can be said to misrepresent its commitment to diversity when it draws attention to its women and minority board members.

More importantly, Shin and Gulati ignore the potential for the continual redefinition and evolution that the elasticity of diversity allows. Elasticity means opportunity. Those who engage in efforts to achieve diversity, or to advertise those efforts, participate in shaping the meaning of diversity and the attitudes others should have toward it. Thus, when companies signal a commitment to diversity to further their reputation, they also signal that diversity is a positive ideal. People assume that companies exist to make a profit and take actions to serve their own best interests. They therefore also assume that when companies are willing to put their reputations behind diversity appointments, these companies must believe that diversity is an affirmative, worthwhile ideal—a belief that might, in turn, influence their own attitudes about diversity.

The enhancement of people's positive attitudes and commitment toward diversity is critical to their willingness and ability to avoid the kinds of discrimination that are now most common in this society. Advancing any societal goal is made easier by people's commitment to that goal.¹⁶ Buy-in is especially important, however, in spheres of behavior that the state cannot directly measure, monitor, or control.¹⁷ Most people, out of fear of getting caught and paying the price, are likely to refrain from running red lights, stealing from others, and torching property for which they hold under-water mortgages. In contrast, there are important social goals that the state cannot readily enforce—for example, the goal that parents provide to their children

16. See Edward L. Deci & Richard M. Ryan, *The "What" and "Why" of Goal Pursuits: Human Needs and the Self-Determination of Behavior*, 11 *PSYCHOL. INQUIRY* 227, 241 (2000) (citing studies showing that people do better in protecting the environment and overcoming alcohol and drug addiction when they are internally motivated to do so); Richard M. Ryan & Edward L. Deci, *Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being*, 55 *AM. PSYCHOLOGIST* 68, 73 (2000) (citing studies showing that people do better at losing weight, taking medications, and engaging in school or personal relationships when they are internally motivated to do so).

17. On the importance of alternatives to state coercion as a means of obtaining compliance with the law's desired goals, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 22–23 (1990).

good discipline, moral guidance, intellectual stimulation, and love. As to these matters, the state is largely dependent upon other sources of motivation. Social norms reinforced by family, friends, church, and even popular culture are the most likely sources of parenting norms.¹⁸ The state relies on the internalization of these norms when it leaves the important job of raising children up to parents.¹⁹

Because, as Shin and Gulati note, diversity is a difficult ideal to define, legally mandate, and monitor,²⁰ coercion is not likely to accomplish it; as with good parenting, its achievement depends upon positive social norms and people's voluntary and internalized commitment to those norms. Laws and employment policies can deter supervisors from blatantly treating women and minorities worse than other employees, and they can protect employees from the most egregious forms of harassment based on sex or race.²¹ Today, however, discrimination rarely occurs as explicitly and blatantly as it did in the early reported Title VII cases.²² More often, it takes the form of harmful, stereotype-based processing errors that are not easy to discern, even by those who make those errors. For example, people tend to form initial impressions of others based on unconscious stereotypes about them and then unconsciously remember, organize, and evaluate subsequent information based on these same biased impressions.²³ They believe their evaluations are objective, even when their unconscious biases have infected their evaluative judgments.²⁴ Discrimination also takes the form of various types of involuntary

18. For basic works on the importance of social norms as an alternative or supplement to legal norms, see generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603 (2000); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

19. See JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 49–52 (1973) (arguing that the law cannot supervise interpersonal relationships including the parent-child relationship); see also Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 301–02 (1988) (arguing that good parenting depends upon the “capacity [for] moral decision making” and responsibility, which the law undermines when it tries too hard to control parental behavior).

20. See Shin & Gulati, *supra* note 1, at 1027–31.

21. See Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1956 (2009).

22. See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 337–38 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 426–28 (1971).

23. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1167, 1209, 1213 (1995).

24. *Id.* at 1214.

behaviors, like “lack of eye contact and warmth, tensing of facial muscles, increased blinking, anxious voice tone, . . . and [the] maintenance of physical distance and formality.”²⁵ These responses, too, negatively affect the working conditions of members of some groups and their ability to perform their jobs.²⁶ Yet they are also usually unintended and thus difficult for the law itself to curtail.²⁷ To combat these types of behaviors, people must be motivated to self-monitor, pursuant to nondiscrimination norms that they have deeply internalized.²⁸

The appointment of women and minorities to positions of influence is one among an array of social influences that can help facilitate the internalization of nondiscrimination and diversity values. Research in a variety of settings suggests that the presence of female and minority leadership positions operates indirectly to reduce implicit bias.²⁹ Positive role models help to dispel the assumption that

25. Bartlett, *supra* note 21, at 1896–97 (citing sources); Jennifer Crocker et al., *Social Stigma*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 504, 513 (Daniel T. Gilbert et al. eds., 4th ed. 1998); John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 63 (2002); Susan T. Fiske, *What We Know About the Problem of the Century: Lessons from Social Science to the Law, and Back*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 59, 60, 63 (Laura Beth Nielsen & Robert L. Nelson eds., 2005).

26. See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 805–06 (1995) (discussing how subtle cues that remind ethnic minority students of their stigmatized status undermine achievement on academic tests); Carl O. Word, *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. EXPERIMENTAL SOC. PSYCHOL. 109, 119 (1974) (showing how negative nonverbal behaviors produce poorer performance in job interview setting among both whites and blacks).

27. Indeed, as to behaviors grounded in unconscious attitudes, legal coercion may even make the problem worse. See Bartlett, *supra* note 21, at 1936–41.

28. See *id.* at 1931–34.

29. For examples of research suggesting this proposition, see M. ELIZABETH TIDBALL ET AL., TAKING WOMEN SERIOUSLY: LESSONS AND LEGACIES FOR EDUCATING THE MAJORITY 77–78 (1999) (finding a strong link between frequency of counterstereotypic female role models on campus and the students’ commitment to counterstereotypic careers); Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 806–07 (2001) (describing experimental research showing that exposure to admired black figures and disliked white exemplars resulted in lower scores for implicit bias in comparison with control subjects); Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 653–54 (2004) (describing research demonstrating that women who attended women’s colleges where they had frequent contact with women faculty showed less automatic bias after one year than those who attended coeducational institutions where the contact with women leaders was relatively less frequent).

members of some groups are not sufficiently qualified to take on leadership roles, and they redefine expectations of whom people expect to see in leadership roles.³⁰ To have this positive effect it is necessary to overcome the force of a phenomenon sometimes referred to as “prototype subtyping,” whereby people view successful women and minorities as exceptions to the general rule (the rule that white men are more competent than others), rather than as a reason to modify race or gender stereotypes they hold.³¹ But showcasing helps to bring the kind of positive attention to diversity appointments that addresses this phenomenon constructively. The higher the position³² and the more examples people can easily retrieve of competent women and minorities in positions of authority³³—to which, again, showcasing can help draw attention—the more effective these counterstereotypes are likely to be in weakening the stereotypes that such positions are beyond the ability of women and minorities.³⁴

A factor especially important to how people process and internalize information about women and minorities is the perceived

30. See, e.g., Dasgupta & Asgari, *supra* note 29, at 653–54; see also *infra* notes 37–38 (citing studies confirming the importance of organizational leadership committed to diversity).

31. Prototype subtyping is explained in Miles Hewstone, *Contact and Categorization: Social Psychological Interventions to Change Intergroup Relations*, in *STEREOTYPES AND STEREOTYPING* 323, 338–41 (C. Neil Macrae et al. eds., 1996).

32. One study, for example, links the rising prominence of now-President Barack Obama during his presidential campaign with a significant decrease in implicit bias against blacks. See generally E. Ashby Plant et al., *The Obama Effect: Decreasing Implicit Prejudice and Stereotyping*, 45 *J. EXPERIMENTAL SOC. PSYCHOL.* 961 (2009).

33. Repeated exposure increases “construct accessibility,” which enables the counterstereotypes to actually alter stereotypes. See E. Tory Higgins & Gillian King, *Accessibility of Social Constructs: Information-Processing Consequences of Individual and Contextual Variability*, in *PERSONALITY, COGNITION, AND SOCIAL INTERACTION* 69, 71 (Nancy Cantor & John F. Kihlstrom eds., 1981); Thomas K. Srull & Robert S. Wyer, Jr., *Category Accessibility and Social Perception: Some Implications for the Study of Person Memory and Interpersonal Judgments*, 38 *J. PERSONALITY & SOC. PSYCHOL.* 841, 851–52 (1980).

34. Direct contact between these women and minorities also, under the right conditions, will help to break down barriers and reduce stereotypes. See Bartlett, *supra* note 21, at 1953–55 (citing studies that demonstrate how equal status, common goals, interdependence, and positive support in the workplace can cause “people to be less fixed in their own views, and more careful about assessing new information and attitudes”); Thomas F. Pettigrew & Linda R. Tropp, *Allport’s Intergroup Contact Hypothesis: Its History and Influence*, in *ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT* 262, 264–66 (John F. Dovidio et al. eds., 2005) (reviewing studies updating Gordon Allport’s “contact hypothesis”); see also Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 *CALIF. L. REV.* 969, 981 (2006) (arguing, on the basis of empirical studies, that implicit bias will be reduced as workers have more contact with people whom they previously stereotyped).

norms of others around them. A series of studies from the University of Maryland suggest that subtle cues about peer racial attitudes influence the attitudes of others, who unconsciously come to see those attitudes as their own.³⁵ This research involved college students, who were influenced in their views about race and gender by subtle cues from other students they did not know, in contexts in which they were unlikely to meet again.³⁶ On the basis of these studies, one would expect that the perceived beliefs and attitudes of company leaders, including workplace supervisors, officers, and other top-level personnel, would be influential with respect to the norms people absorb and make their own in the workplace. Many studies, in fact, document strong, positive associations between successful diversity strategies and support for these strategies by top management.³⁷ The perceived beliefs of leaders influence the beliefs of those they lead, up and down the corporate ladder. Indeed, there is some evidence that awareness of race and gender issues by the leadership of an organization is a better predictor of diversity success in the organization than a number of other possible factors, including the race or sex of the leader.³⁸

35. This research is reported in Gretchen B. Sechrist & Charles Stangor, *Perceived Consensus Influences Intergroup Behavior and Stereotype Accessibility*, 80 J. PERSONALITY & SOC. PSYCHOL. 645, 649 (2001), and Charles Stangor et al., *Changing Racial Beliefs by Providing Consensus Information*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 486, 493 (2001).

36. Among the relevant studies, see Fletcher A. Blanchard et al., *Condemning and Condoning Racism: A Social Context Approach to Interracial Settings*, 79 J. APPLIED PSYCHOL. 993, 995 (1994); Fletcher A. Blanchard et al., *Reducing the Expression of Racial Prejudice*, 2 PSYCHOL. SCI. 101, 103 (1991); Sechrist & Stangor, *supra* note 35, at 651; Stangor et al., *supra* note 35, at 493.

37. See, e.g., E. Holly Buttner et al., *The Influence of Organizational Diversity Orientation and Leader Attitude on Diversity Activities*, 18 J. MANAGERIAL ISSUES 356, 364, 366 (2006) (citing the importance of diversity awareness and organizational attitudes); Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 HARV. J.L. & GENDER 279, 295 (2007) (“[C]ommitted leadership, where women and minorities make it to the top ten executive positions, is clearly important in the corporate world.”); David W. Johnson & Roger T. Johnson, *The Three Cs of Reducing Prejudice and Discrimination*, in REDUCING PREJUDICE AND DISCRIMINATION 239, 249 (Stuart Oskamp ed., 2000) (arguing that without strong leadership, positive effects of contact between members of different groups is negated); Sara Rynes & Benson Rosen, *A Field Survey of Factors Affecting the Adoptions and Perceived Success of Diversity Training*, 48 PERSONNEL PSYCHOL. 247, 263 (1995) (discussing generally that management’s involvement affects the adoption and perception of diversity training); see also Dobbin & Kalev, *supra*, at 294 (concluding that diverse corporate leadership at the top increases diversity through the company).

38. See, e.g., E. Holly Buttner et al., *Impact of Leader Racial Attitude on Ratings of Causes and Solutions for an Employee of Color Shortage*, 73 J. BUS. ETHICS 129, 140 (2007) (summarizing survey research showing that a leader’s awareness of racial issues is

Positive attitudes strengthen positive attitudes. Conversely, negative attitudes will tend to reinforce negative attitudes,³⁹ although sometimes norm violations draw attention to the norms, and thereby reinforce rather than weaken them. For example, when a company that claims attachment to diversity does not appear to live by that commitment, it may draw criticism that will strengthen the ideal of diversity that the company has violated.⁴⁰ The more diversity is viewed cynically, however, the more likely even diversity successes will be processed in a cynical way. When this happens, not only does the diversity norm take a hit, but companies lose their public relations incentive to engage in the behaviors that might otherwise be worth showcasing.

Shin and Gulati are concerned not just about false signals, but about harm to individuals that comes from showcasing, whether or not a company has a true commitment to diversity. Using individual diversity appointments to signal a diversity commitment, they argue, amounts to treating those individuals like “prized troph[ies] . . . valuable as an emblem of the effort required to win it, but not something that possesses any value in itself.”⁴¹ This, Shin and Gulati rightly point out, “is an objectionable way of regarding any person” and “entails a failure of moral respect for those individuals.”⁴²

The concern about dignitary harm is legitimate. It should be weighed, of course, against the diminution of diversity appointments that would likely result if companies receive no public relations benefit for making such appointments. Moreover, whether dignitary harm occurs, or at least the degree of it, depends in part on the

more strongly associated with commitment to cultural change and minority recruitment than sex or ethnicity of the leader); Alison M. Konrad & Frank Linnehan, *Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices?*, 38 ACAD. MGMT. J. 787, 809 (1995) (finding that top managers’ attitudes are significant predictors of effective equal opportunity efforts); Rynes & Rosen, *supra* note 37, at 263 (finding data about success of diversity training, or lack thereof, better explained by importance of the values and beliefs of top managers than by their gender, race, or ethnicity).

39. See Stangor et al., *supra* note 35, at 493.

40. A recent account of the failure of the Bloomberg administration in New York City to appoint more women and minorities to top administrative positions is typical. The account reports criticisms of Mayor Bloomberg’s latest round of major appointments because all are white and all but one are male, and it also reports a concession by Mayor Bloomberg that his administration has fallen short of achieving its diversity goals. Both the criticisms, and Bloomberg’s response, presuppose that diversity is a positive goal, thereby arguably reinforcing that goal. See David W. Chen & Jo Craven McGinty, *Setting Diversity as Hallmark, Mayor Falls Far Short of a Vow*, N.Y. TIMES, June 29, 2010, at A1.

41. Shin & Gulati, *supra* note 1, at 1040.

42. *Id.* at 1040–41.

normative context. When showcasing occurs in a context in which diversity is seen to be highly valued, dignitary harm should be less than when showcasing is viewed cynically. If so, encouraging companies to tell diversity stories that proudly link minority and female appointments to their reputation would be more fruitful than discouraging showcasing as opportunistic and disrespectful.

B. Action Also Matters

Showcasing is not only an implicit expression of attitude that can influence the attitudes of others, but it is also an action. Action taken influences the commitment to act consistently with that action in the future.⁴³ Thus, like the expression of positive diversity norms, action by company leaders—even symbolic action—has the potential to change the attitudes of the leaders themselves, as well as those of the people who pay attention to these leaders.

Extensive research supports the proposition that a person's actions influence her attitudes. One line of experimental research in an area known as "biased scanning" suggests that the experience of playing a particular role or advocating a particular position shifts a person's attitudes toward that role or position.⁴⁴ For example, students who were asked in an experimental setting to argue for a particular position were more likely later to register more attitude change toward that position than when they simply heard others arguing for it.⁴⁵ The more people are motivated to argue the position or assume an assigned role, the stronger the effect. In one study, children offered prizes to write an essay that went counter to their attitudes about comic book characters were more likely to change these attitudes than those who were not offered prizes.⁴⁶

43. See Bartlett, *supra* note 21, at 1935; see also LEON PETRAZYCKI, LAW AND MORALITY 301 (Hugh W. Babb trans., Harvard Univ. Press 1955) (n.d.) (describing the bilateral process in which action and attitude are coordinated and reinforced).

44. See Anthony G. Greenwald, *The Openmindedness of the Counterattitudinal Role Player*, 5 J. EXPERIMENTAL SOC. PSYCHOL. 375, 375 (1969) (finding that when study subjects expected to have to argue later for a view contrary to their own, they tended to shift their own attitudes in that direction); James M. Olson & Jeff Stone, *The Influence of Behavior on Attitudes*, in THE HANDBOOK OF ATTITUDES 223, 224–26 (Dolores Albarracín et al. eds., 2005) (summarizing studies on biased scanning). See generally Barry R. Schlenker & James V. Trudeau, *Impact of Self-Presentations of Private Self-Beliefs: Effects of Prior Self-Beliefs and Misattribution*, 58 J. PERSONALITY & SOC. PSYCHOL. 22 (1990) (analyzing the effect of strategic self-presentation on changes in beliefs).

45. See Anthony G. Greenwald & Rosita D. Albert, *Acceptance and Recall of Improvised Arguments*, 8 J. PERSONALITY & SOC. PSYCHOL. 31, 33 (1968). This experiment is summarized in Olson & Stone, *supra* note 44, at 224.

46. See Herbert C. Kelman, *Attitude Change as a Function of Response Restriction*, 6

Another body of research supports the hypothesis, known as self-perception theory, that individuals infer their own attitudes and beliefs from the same types of behavioral cues as they use in inferring the attitudes and beliefs of others.⁴⁷ Self-perception theory predicts that people who have acted in a certain way, even if that action was thoughtless or manipulated, are more likely to act in the future based on the beliefs that are consistent with those actions.⁴⁸ To illustrate, in one experiment, people who had been asked to put a “be a safe driver” sticker in a window of their home were much more likely than others to agree subsequently to display a large, unattractive “Drive Carefully” sign in their yard.⁴⁹ People not only draw conclusions about their own attitudes based on the actions they take, but also draw conclusions about their motives. Research has shown, for example, that people who are asked to do a task without any reward are more likely to believe that the activity was a pleasurable one, and thus are more likely to continue that activity thereafter without a reward, than those whose initial behavior was compensated.⁵⁰

Cognitive dissonance theory offers another explanation for how actions can influence attitudes. According to cognitive dissonance theory, when individuals experience a conflict between their actions and attitudes, they seek to alleviate the resulting discomfort.⁵¹ One of the ways they do so⁵² is to change their attitudes to conform to their behaviors.⁵³

HUM. REL. 185, 202 (1953). This experiment is summarized in Olson & Stone, *supra* note 44, at 225.

47. Olson & Stone, *supra* note 44, at 249–50, 253. See generally Mark P. Zanna et al., *Self-Perception and Attitude-Behavior Consistency*, 7 PERSONALITY & SOC. PSYCHOL. BULL. 252 (1981) (describing research showing that giving an individual the opportunity to infer his religious attitudes based on his past participation in religious behaviors increased the consistency between behavior and attitude).

48. Olson & Stone, *supra* note 44, at 249–50.

49. See Jonathan L. Freedman & Scott C. Fraser, *Compliance Without Pressure: The Foot-in-the-Door Technique*, 4 J. PERSONALITY & SOC. PSYCHOL. 195, 199–202 (1966).

50. See Edward L. Deci, *Effects of Externally Mediated Rewards on Intrinsic Motivation*, 18 J. PERSONALITY & SOC. PSYCHOL. 105, 109–10 (1971) (finding that when money is used as an external reward, intrinsic motivation diminishes); Mark R. Lepper et al., *Undermining Children's Interest with Extrinsic Reward: A Test of the "Overjustification" Effect*, 28 J. PERSONALITY & SOC. PSYCHOL. 129, 135 (1973) (finding that children who were not rewarded for drawing pictures with magic markers drew more pictures later during free play time than children who were initially rewarded).

51. Leon Festinger first identified cognitive dissonance theory in 1957. See generally LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957) (setting forth the basic theory of cognitive dissonance). Since then, cognitive dissonance theory has evolved into a number of different sub-theories and models, described in Olson & Stone, *supra* note 44, at 226–49.

52. For other ways, including reconciling their actions to conform to their attitudes, or

These theories suggest the different mechanism by which people may become more committed to diversity values when they act as if they already had that commitment. Just as the repetitive participation in religious or patriotic rituals can reinforce the belief structure associated with those rituals,⁵⁴ so also taking steps—even small, nondeliberate ones—that presume that diversity is a positive social goal can cause people to become more committed to that presumption and more likely to define their world, their company, and themselves in relation to it. This goes for leaders as well as followers. A leader may become more committed to a position he undertook to espouse, even if he took that position initially only for its public relations value. Action is especially likely to have an effect on attitudes when the attitudes initially were relatively unformed, or ambivalent.⁵⁵

Shin and Gulati have a “lingering worry”⁵⁶ that justifying actions based on the attitudes they help further has the unsavory “character of manipulation, as of social-psychological engineering.”⁵⁷ This concern is misplaced. First, the issue raised by corporate showcasing does not raise the usual concern about social engineering, namely, state-imposed requirements designed to force people to conform their attitudes to state-sponsored propaganda.⁵⁸ To the contrary, corporate

staying away from situations or people who trigger the dissonance, see Olson & Stone, *supra* note 44, at 227–28 (citing FESTINGER, *supra* note 51, at 19–22, 24, 31).

53. Olson & Stone, *supra* note 44, at 233, 237.

54. For two essays exploring the positive link between ritual and belief, see generally Stephanie Kaza, *Becoming a Real Person*, 20 BUDDHIST-CHRISTIAN STUD. 45 (2000) (explaining how Buddhist ritual reinforces Buddhist belief); Jay T. Rock, *The Ongoing Creation of Loving Community: Christian Ritual and Ethics*, 20 BUDDHIST-CHRISTIAN STUD. 90 (2000) (stating the same proposition in relation to Christianity).

55. See, e.g., Rob W. Holland et al., *On the Nature of Attitude-Behavior Relations: The Strong Guide, the Weak Follow*, 32 EUR. J. SOC. PSYCHOL. 869, 874–75 (2002) (finding that people with weak attitudes toward Greenpeace were more affected by either donating money (affected positively), or declining to donate money (affected negatively), to the organization than people with strong attitudes).

56. Shin & Gulati, *supra* note 1, at 1044.

57. *Id.*

58. This social engineering concern underlines the opposition of some people to a wide range of government policies, such as a progressive income tax, affirmative action for women and minorities, and restrictions on religious exercise. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (denouncing the Supreme Court’s invalidation of a religious invocation or benediction at a public school graduation as a form of social engineering); Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1318 (1986) (arguing that affirmative action in the electoral process on behalf of racial minorities amounts to inappropriate social engineering); William C. Duncan, *Title IX at Thirty: Unanswered Questions*, 3 MARGINS 211, 228 (2003) (arguing that federal Title IX regulations are aimed at achieving social engineering rather than opening up sports participation opportunities for women); Eric

showcasing is an activity undertaken by a company, pursuing freely what it perceives to be its own interests.

More to the point, the attitudinal effects of an activity are not irrelevant to judgments about the desirability of that activity. Much of what passes for analysis of what our laws should be—including law and economic analysis⁵⁹—turns on an evaluation of the incentives those laws create for people to behave in certain, socially beneficial ways. Consideration of the psychological dimensions of people's motivations and actions in the diversity context adds significantly to these now-traditional forms of analysis.⁶⁰ When it comes to discrimination, indeed, noneconomic motivations are likely to be more significant and powerful than economic ones.⁶¹ Not only is it appropriate to take into account these noneconomic motivations, but any analysis of what it takes to end discrimination would be incomplete without them.

In sum, before dismissing showcasing as a disingenuous gesture that may harm those it purports to benefit, it is necessary to consider its positive potential to reinforce a positive view of diversity. While the empirical basis for predicting or measuring this potential is not fully developed, existing research suggests that such reinforcement can be expected to better facilitate people's internalization of diversity values than more negative, regulatory efforts. Commitment to diversity cannot be effectively commanded; it comes, rather, through the absorption of community norms and expectations. Showcasing corporate board appointments of women and minorities is one activity through which positive community norms and expectations about diversity can be expressed. In aligning the company with diversity goals, showcasing reiterates the positive value of diversity. It also constitutes action, which reinforces the positive view of diversity upon which that action is based.

Gouvin, *Radical Tax Reform, Municipal Finance, and the Conservative Agenda*, 56 RUTGERS L. REV. 409, 415 (2004) (explaining conservative advocacy for a consumption tax to replace a progressive income tax as a way to reduce opportunities for the state to engage in social engineering).

59. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (2007) (showing the important role of economic analysis across a variety of fields).

60. Konrad & Linnehan, *supra* note 38, at 807–08; see also RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 8 (2008) (drawing on psychological principles to identify governmental policies that might facilitate improved decision making by individuals for their own benefit).

61. See Bartlett, *supra* note 21, at 1904–20 (identifying the social and psychological dimensions of race and gender bias).

The further case for showcasing turns on the reasons why diversity might be desirable. Part II explores the possibilities.

II. THE CASE FOR DIVERSITY

Whether showcasing serves the goal of diversity requires further exploration of the purpose of diversity. The two reasons mentioned most frequently in the papers to this conference are: (1) that diversity reduces discrimination, and (2) that diversity makes “business sense,” in terms of improved function and efficiency. This Part examines these two rationales, including the mixed evidence pertaining to the difference race and gender make on juries, among judges, and within corporate boards. It then briefly considers a third alternative mentioned in passing by Shin and Gulati—that diversity is justified by its expressive function, as much as, or perhaps more than, its instrumental rationales.

A. *The Discrimination and Business Rationales*

The discrimination rationale assumes that women and minorities are largely absent from corporate boards because they are the victims of discrimination, or conditions of inequality that have accumulated over time. The addition of women and minority members to corporate boards helps to correct past discrimination.⁶² Women and minorities might also serve as role models or help “debias” boards and the companies they serve through contact, familiarity, and other factors that reduce stereotypes.⁶³ What these possible benefits have in common is the assumption that sex and race distinctions are the product of bias and stereotypes, not real differences.⁶⁴

62. Highlighting the nondiscrimination case for diversity in this conference are Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 885 (2011) (“[D]iversity advocates must create a strategy that effectively incorporates and validates moral and social justifications.”); James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C. L. REV. 901, 921, 935 (2011) (arguing that “nondiscrimination has become a social norm in its own right,” and that diversity “reflects and promotes antidiscriminatory norms”); Jerry Kang, *The Mismatch Critique: Comment on Fanto, Solan, and Darley*, 89 N.C. L. REV. 937, 944 (2011) (“Diversity advocates should frame rhetorically the task as one of basic justice and fairness.”).

63. See Shin & Gulati, *supra* note 1, at 1044; see also Jolls & Sunstein, *supra* note 34, at 980–82 (citing evidence that population diversity reduces implicit bias).

64. See, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 999 (1988) (holding that Title VII provides for the application of disparate impact analysis to subjective job criteria, given the problem of subconscious racial stereotypes and prejudices); *Orr v. Orr*, 440 U.S. 268, 281 (1979) (holding as a matter of constitutional law, in the context of an Alabama alimony statute, that sex cannot be used as a proxy for economic need).

In contrast, the business rationale (or what I also will refer to, interchangeably, as the diversity rationale) assumes that women and minorities bring significant differences to corporate boards that improve corporate performance in some measurable way.⁶⁵ They may bring talents or competencies that are not otherwise present,⁶⁶ or they may bring different life experiences or perspectives that improve decision making or otherwise change the group dynamic in a positive way.⁶⁷ Whatever the differences might be, the business rationale assumes that they are real and not necessarily the product of bias and stereotypes.

Courts sometimes consider nondiscrimination and diversity as distinct justifications; in any particular case, one may be valid while the other is not. In the employment context, for example, the Supreme Court on a number of occasions has held that a Title VII claim requires proof of discrimination and that, without proof of past discrimination, creating or maintaining diversity is an insufficient basis for sex- and race-conscious hiring or promotion decisions.⁶⁸ In

65. For the conference papers that primarily address the business case for diversity, see generally Jennifer K. Brooke & Tom R. Tyler, *Board Diversity and Corporate Performance: A Review of the Psychological Evidence*, 89 N.C. L. REV. 715 (2011); Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759 (2011); Sung Hui Kim, *The Diversity Double Standard*, 89 N.C. L. REV. 945 (2011).

66. See Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 65–66 (2009). This rationale, rather than the equality/justice rationale, is reported to have been the one supporting Norway's 2003 law that the boards of all non-privately owned companies be comprised of at least thirty-three to fifty percent of each gender. See *id.* (quoting a drafter as justifying the new law on competitive grounds, that it would help to ensure appointing the most competent people).

67. See Karen A. Jehn et al., *Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Workgroups*, 44 ADMIN. SCI. Q. 741, 756–60 (1999) (finding that greater informational diversity leads to greater success in workgroups than social category diversity or value diversity); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 608–09 (2006) (considering minority impact on jury deliberations); cf. Katherine Y. Williams & Charles A. O'Reilly, III, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, 20 RES. ORGANIZATIONAL BEHAV. 77, 115–17 (1998) (summarizing evidence showing the negative effects of diversity on group communication, integration, harmony, and efficiency).

68. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 631 (1987) (holding that affirmative action to respond to a “manifest imbalance” in traditionally sex-segregated job categories could be justified in order to eliminate the effects of employment discrimination, not to attain a permanently balanced workforce); *Taxman v. Bd. of Educ. of Piscataway*, 91 F.3d 1547, 1563 (3d Cir. 1996) (en banc) (holding that the layoff of a white teacher of equal seniority to a minority teacher in order to further the school district's interest in maintaining racial diversity in its business education department was unconstitutional), *cert. denied*, 522 U.S. 1010 (1997).

contrast, in the educational context, the diversity argument has tended to be more compelling.⁶⁹

At other times, the discrimination and diversity rationales have been drawn on simultaneously or interchangeably, as if the arguments overlap, each filling in gaps left by the other. This blended approach describes the defense of corporate board diversity offered by the papers to this conference,⁷⁰ and thus warrants closer examination. The approach has been particularly evident in a pair of Supreme Court cases establishing the importance of including minorities and women on juries.

The race case is *Batson v. Kentucky*.⁷¹ In *Batson*, the U.S. Supreme Court held that systematically excluding potential jurors on account of their race implicated both (1) the “evil” of race exclusion that the Fourteenth Amendment was designed to cure,⁷² and (2) the right of a defendant to have a jury of peers with backgrounds representative of his own.⁷³ The former highlights the harm of discrimination; the latter relies on the benefits of diversity.

The gender case is *J.E.B. v. Alabama ex rel. T.B.*⁷⁴ In *J.E.B.*, the Supreme Court also combined discrimination and diversity rationales, there holding that it was unconstitutional for prosecutors to use their peremptory challenges to systematically exclude individuals from juries because of their sex.⁷⁵ Justice Blackmun reasoned that the exclusion of women from juries was based on untrue stereotypes about women’s differences, which the law condemns.⁷⁶ Alongside that reasoning, he also insisted that the “diverse and representative character of the jury” was important to assure “‘a diffused

69. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). But see *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722–25 (2007) (finding that a diversity interest that is accomplished by focusing on race alone is unconstitutional and distinguishing the diversity interests of higher educational institutions).

70. See, e.g., Shin & Gulati, *supra* note 1, at 1020–21, 1024–31 (considering the possibility that diversity is evidence of fairness and equality); *id.* at 1046–47 (considering the possibility that diversity is justified by its “discourse benefits”).

71. 476 U.S. 79 (1986).

72. *Id.* at 85.

73. *Id.* at 86 (holding that a defendant has a right to a jury of peers—“‘that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds’” (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880))).

74. 511 U.S. 127 (1994).

75. *Id.* at 129–31.

76. *Id.* at 138–39 (“Respondent offers virtually no support for the conclusion that gender alone is an accurate predictor of juror’s attitudes”); *id.* at 140 (reasoning that stereotypes about women “ratify and reinforce prejudicial views of the relative abilities of men and women”); see also *id.* at 143–45 (noting that potential jurors who are women should be assessed on their individual characteristics rather than stereotypes).

impartiality,'⁷⁷ especially "in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity."⁷⁸ Thus, even as the Court rejected reliance on stereotypes in jury selection on nondiscrimination grounds, it acknowledged that " 'the two sexes are not fungible' " and that " 'a community made up exclusively of one is different from a community composed of both.' "⁷⁹

The blended rationales in these cases seem to offer consistent and complementary justifications for diverse and inclusive juries. Discrimination is wrong because the perpetuation of invidious group stereotypes may infect the entire proceedings and lead to a loss of confidence in the judicial systems,⁸⁰ while the diversity and representative character of the jury is necessary " 'as assurance of a diffused impartiality and . . . because sharing in the administration of justice is a phase of civic responsibility.' "⁸¹ In short, inclusion of women and minorities is necessary because it is both fair *and* representative.

Despite the seemingly complementary nature of these justifications, there is also a fundamental tension between them. The discrimination argument presupposes that race and gender are irrelevant to juror qualifications and thus do not matter; the diversity argument, in contrast, posits that views and contributions vary based on race and gender, and thus that women and minorities should be represented.⁸²

Whether or not diversity reduces discrimination or improves the functioning of an enterprise is an empirical question, which should be resolvable through empirical research. The research, however, is not clear cut. Some evidence supports the view that diversity helps to reduce bias and stereotyping. Shin and Gulati refer to the utility of exposure to women and minorities in providing positive role models, or in debiasing the workplace.⁸³ Numerous studies conclude that

77. *Id.* at 134 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975)).

78. *Id.* at 140.

79. *Id.* at 133 (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)). *Ballard* held "that women may not be excluded from the venire in federal trials in States where women were eligible for jury service under local law." *Id.*; *Ballard v. United States*, 329 U.S. 187, 193 (1946).

80. See *J.E.B.*, 511 U.S. at 140.

81. *Id.* at 134 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530–31 (1975)).

82. The concurring opinion by Justice O'Connor in *J.E.B.* gives more emphasis to the relevant differences between men and women, in the context of the intrusion of the opinion on the role of peremptory challenges in our jury system. *Id.* at 147–49 (O'Connor, J., concurring).

83. Shin & Gulati, *supra* note 1, at 1042–43.

exposure to blacks and women reduces bias,⁸⁴ that positive role models make a difference,⁸⁵ and that interactions between members of different groups generate more positive attitudes between those groups.⁸⁶ However, these positive effects do not always follow. With respect to intergroup contact, for example, it is important that members of the different groups have equal status, common goals, and support from leadership, and that there be interdependence between the groups.⁸⁷ Positive effects may also be limited by how broadly the effects of an individual encounter can be generalized to the group as a whole. It is the nature of stereotypes that they tend to “repel disproving data,”⁸⁸ often processing information that disprove the stereotype “as an exception to a robust rule of thumb, rather than a reason to modify the stereotype.”⁸⁹ While some researchers have focused on the potential for intergroup contact to replace existing group boundaries and substitute a common group identity, others have concluded that positive attitudes are best generalized to other members of an outsider group when the salience of race or gender is preserved, at least to some extent.⁹⁰

The issue of whether diversity enhances the performance of a group is more contested, and thus will be addressed here in more detail. Researchers have extensively studied the impact of jury diversity on deliberations and verdicts. Research in earlier decades suggested that gender and race might have an impact on jury deliberation⁹¹ and somewhat of an effect on jury verdicts.⁹² More

84. Bartlett, *supra* note 21, at 1947–53 (citing studies).

85. *Id.* at 1947–48.

86. *Id.* at 1953–54.

87. *Id.*

88. *Id.* at 1949.

89. *Id.*

90. *Id.* at 1954–55. For a series of essays exploring research findings relating to the contact hypothesis, and issues still left to be explored, see generally ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT, *supra* note 34.

91. See, e.g., Catherine Kirchmeyer, *Multicultural Task Groups: An Account of the Low Contribution Level of Minorities*, 24 SMALL GROUP RES. 127, 137, 142–43 (1993) (finding that minorities contribute significantly less to decision making in small groups than non-minorities, and that persons scoring low in masculinity traits and high in femininity traits contribute significantly less than those scoring high in masculinity traits and low in femininity traits); Charlan Nemeth et al., *From the '50s to the '70s: Women in Jury Deliberations*, 39 SOCIOMETRY 293, 303 (1976) (finding in a mock jury experiment involving a murder case that male jurors were generally perceived to be more aggressive and confident than their female counterparts, although sex did not appear to be a factor with respect to the verdict or persuasiveness); Fred L. Strodbeck et al., *Social Status in Jury Deliberations*, 22 AM. SOC. REV. 713, 715 (1957) (finding that men speak more frequently than women in mock jury deliberations); see also REID HASTIE ET AL., INSIDE THE JURY 140–42 (1983) (finding in one mock jury study that males initiate about forty

recent research has confirmed some differences between men and women in certain kinds of cases,⁹³ as well as the likelihood that diverse juries will deliberate longer and more thoroughly.⁹⁴ In one study, racially diverse juries spent more time deliberating than did all-white groups and spent their time discussing a wider range of case facts and perspectives.⁹⁵ The study suggested that these effects were not just the product of greater information exchange within members of diverse juries, but also that whites “processed the trial information more systematically” within diverse groups; indeed, knowing that they were going to be deliberating with blacks appeared to cause whites to process the information more carefully even before the deliberations began.⁹⁶

Other jury research, however, has found little or no effect associated with gender or race. One comprehensive study based on jury surveys in 401 actual cases in Los Angeles; the Bronx; Maricopa County, Arizona; and the District of Columbia found no overall difference in participation rates based on gender, and, if anything, higher participatory rates among black jurors than those of other racial or ethnic backgrounds.⁹⁷ Far more significant appear to be

percent more comments than females, but concluding overall that there is no measurable difference based on gender).

92. See, e.g., James H. Davis et al., *Victim Consequences, Sentence Severity, and Decision Processes in Mock Juries*, 18 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 346, 354 (1977) (finding in a mock jury study that women were more inclined toward finding guilt in rape cases than were males); Mary A. Gowan & Raymond A. Zimmermann, *Impact of Ethnicity, Gender, and Previous Experience on Juror Judgments in Sexual Harassment Cases*, 26 J. APPLIED SOC. PSYCHOL. 596, 613 (1996) (finding that women are more likely to vote for the plaintiff in ambiguous sexual harassment cases); Eloise C. Snyder, *Sex Role Differential and Juror Decisions*, 55 SOC. & SOC. RES. 442, 444–45, 446 (1971) (finding that higher status litigants fare better before an all-male jury than a mixed-gender jury, and that mixed-gender juries award lower damages in civil trials); Cookie Stephan, *Sex Prejudice in Jury Simulation*, 88 J. PSYCHOL. 305, 308 (1974) (finding that mock jurors favored defendants of their own sex in judgments of whether a defendant murdered his or her spouse).

93. See, e.g., Jonathan M. Golding et al., *The Impact of Mock Jury Gender Composition on Deliberations and Conviction Rates in a Child Sexual Assault Trial*, 12 CHILD MALTREATMENT 182, 187 (2007) (finding in a mock jury experiment, before jury deliberations in the case of an alleged sexual assault on a child, that men were more pro-defense and women were more pro-prosecution).

94. See, e.g., Sommers, *supra* note 67, at 606.

95. *Id.* at 608.

96. *Id.* at 607.

97. See Erin York Cornwell & Valerie P. Hans, *Contextualizing Jury Participation: Case-, Jury-, and Juror-Level Predictors of Participation in Jury Deliberations* 28–29, 33, 38 (July 30, 2009) (unpublished manuscript), <http://ssrn.com/abstract=1441537> (finding, overall, no difference in participation rates according to gender in a study based on jury surveys in 401 cases in Los Angeles, the Bronx, Arizona’s Maricopa County, and the

factors such as social class⁹⁸ or whether a traditionally underrepresented group was in the majority.⁹⁹

Empirical research evaluating the difference women judges make in the courtroom has produced similarly mixed results.¹⁰⁰ A number of studies have concluded that women judges bring different qualities to the bench and are more likely to decide certain cases, such as child support and sex discrimination, in favor of women.¹⁰¹ Other studies,

District of Columbia, except for in Los Angeles, where gender differences appeared to be influenced by a higher number of Asian-American jurors, and higher participatory rates among black jurors than those of other racial or ethnic backgrounds); *see also* Andrea Hickerson & John Gastil, *Assessing the Difference Critique of Deliberation: Gender, Emotion, and the Jury Experience*, 18 COMM. THEORY 281, 297 (2008) (finding “no clear pattern of difference in the subjective assessment of jury deliberation” with regard to gender); Erin York & Benjamin Cornwell, *Status on Trial: Social Characteristics and Influence in the Jury Room*, 85 SOC. FORCES 455, 464 (2006) (finding that race and gender are not significant indicators of influence in jury deliberations).

98. *See, e.g.*, Cornwell & Hans, *supra* note 97, at 36 (noting that social class “is increasingly the most pervasive status distinction in American society”); York & Cornwell, *supra* note 97, at 464 (finding influence in jury deliberations “is conferred nearly equally among males and females, [and among] whites and non-whites,” but influence is highly correlated with social class).

99. *See* Golding et al., *supra* note 93, at 187 (finding that women were more likely to change their verdict toward the prosecution in a female majority and toward the defense in a male majority mock jury).

100. Although there have been numerous studies comparing the impact of female judges, *see infra* notes 101–02, there do not appear to be comparable studies with respect to the race of judges.

101. *See, e.g.*, David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156, 161 (1993) (stating that female state supreme court justices are more likely to support the woman’s position in cases involving child support, sex discrimination, sexual assault, birth control, and property settlement at divorce); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Courts of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 299 (2004) (finding that female judges impact their male counterparts in appellate panel decisions concerning issues traditionally thought to be important to females); Golding et al., *supra* note 93, at 182 (showing that women were more inclined to convict than men in a mock jury experiment involving the sexual assault of a six year old child); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005) (stating that female judges support female plaintiffs more often than did male judges); Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 436 (1994) (same); Donald R. Songer & Kelly Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750, 759 (2000) (proving that gender matters in obscenity and death penalty cases); James Stribopoulos & Moin Yahya, *Does a Judge’s Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario*, 45 OSGOODE HALL L.J. 315, 319 (2007) (showing in an Ontario study, female judges are more likely to rule in favor of a female party); *see also* Fiona Kay & Elizabeth Gorman, *Women in the Legal Profession*, 4 ANN. REV. L. SOC. SCI. 299, 321 (2008) (reporting that some studies have shown that “female judges are more likely than their male colleagues to reach legal conclusion that favor the interests of women”).

including the most recent ones, have failed to confirm these observations, or have found to the contrary.¹⁰²

In trying to explain the discrepant research results on women judges, some researchers have posited that the differences between female and male judges are declining over time as women face less discrimination in their lives and compete on equal playing fields with their male counterparts.¹⁰³ The decline of discrimination would predict that qualified women and minorities would not only be more plentiful at higher ranks as time goes on, but also, ironically, that their presence would make less difference. Research about the interaction effects of status and power further suggests that as race and gender stereotypes decrease, so will the interaction patterns that are affected by them.¹⁰⁴

Another possible explanation for the conflicting research data is that gender matters only, or mostly, when there is a critical mass of women judges. Some researchers have concluded that women tend to suppress the effects of their gender unless there is a sufficient number of other women involved in the same enterprise. The theory here is

102. See, e.g., Christina Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010) (finding few cases in which the gender of the judge seemed to make a difference); Sue Davis, *Do Women Judges Speak "In a Different Voice?"*: Carol Gilligan, *Feminist Legal Theory, and the Ninth Circuit*, 8 WIS. WOMEN'S L.J. 143, 171 (1993) (finding no noticeable differences in the moral reasoning between male and female judges); Elaine Martin & Barry Pyle, *Gender, Race, and Partisanship on the Michigan Supreme Court*, 63 ALB. L. REV. 1205, 1232 (2000) (showing that the gender of a judge is far less significant than their political affiliation in sex discrimination and sexual harassment cases); Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 147 (2000) (stating that female judges appointed by Democratic presidents are not more likely than male judges appointed by Democratic presidents to "serve the policy interests of their own communities"); Songer et al., *supra* note 101, at 425 (showing that gender is insignificant in obscenity and search and seizure cases); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 607 (1985) (stating that female judges appointed by Democratic presidents are not more likely than male judges appointed by Democratic presidents to rule for the female party in cases involving sex discrimination, sexual harassment, maternity rights, or reproductive freedom).

103. See Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination*, 21 YALE J.L. & FEMINISM 297, 299 (2010); Madhavi McCall & Michael McCall, *How Far Does the Gender Gap Extend?: Decision Making on State Supreme Courts in Fourth Amendment Cases, 1980–2000*, 44 SOC. SCI. J. 67, 67 (2007) (showing that in recent years female justices have been more likely to rule in favor of criminal defendants than male justices, but this was not true prior to 1991).

104. See generally Cecelia L. Ridgeway & Lynn Smith-Lovin, *The Gender System and Interaction*, 25 ANN. REV. SOC. 191 (1999) (demonstrating that research finding gender difference in peer interactions appear to be based on cultural beliefs about the general competence of men and women and of males' higher status).

that women might have differences in perspective that they are not inclined to express without the support of other like-minded people.¹⁰⁵

The research with respect to the effects of diversity in corporate boardrooms is less voluminous than the research on juries and judges, but it is similarly mixed and inconclusive.¹⁰⁶ These mixed results may also be explained by generational shifts in the women and minorities who are appointed to boards, or by factors related to critical mass.

Earlier work by Mitu Gulati and Devon Carbado¹⁰⁷ might also help to explain why the greater presence of women and minorities in

105. See, e.g., Boyd et al., *supra* note 102, at 390 (stating that “when a woman serves on a panel with men, the men are significantly more likely to rule in favor of the rights litigant”); Gerard S. Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 153 (1986) (concluding that having at least one female member is a significant factor in whether a state high court rules in favor of a female claimant in a sex discrimination case); Madhavi McCall, *Structuring Gender’s Impact: Judicial Voting Across Criminal Justice Cases*, 36 AM. POL. RES. 264, 290 (2008) (concluding that the number of women on the courts is a factor in judicial decision making). See generally Farhang & Wawro, *supra* note 101 (exploring whether and how racial minority and women appellate judges make a difference on issues thought to be of particular concern to women and minorities); Peresie, *supra* note 101 (analyzing whether the presence of female judges on three-judge federal appellate panels affects collegial decision making in a subset of gender-coded cases); Stribopoulos & Yahya, *supra* note 101 (analyzing whether a judge’s party of appointment or gender matters to the outcome of cases). The classic work on the difficulties of token women in all-male institutions is ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 206–42 (1977). More recent work on the subject includes DOUGLAS M. BRANSON, *NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM* 109–19 (2007).

106. The other papers in this conference issue address the discrepancy in some detail. See, e.g., Brooke & Tyler, *supra* note 65, at 719–22 (reporting studies that have found positive links between diversity and business outcomes, and studies that do not, and highlighting the importance of institutional context); Broome et al., *supra* note 65, at 765–67 (reviewing the studies and concluding that the impact of women and minorities on corporate boards has not been determined); Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809, 812–13 (2011) (finding that corporate board gender diversity does not affect firm profitability but does positively affect stock value, probably because of institutional investor pro-gender bias); Fanto et al., *supra* note 62, at 902 (“[E]mpirical studies to date have not supported the case for board diversity on shareholder value grounds.”); see also Broome et al., *supra* note 65, at 760–61 (finding that interviews of forty-five corporate insiders failed to yield many examples of women and minorities bringing different considerations to bear on board deliberation, or otherwise making a difference); Fairfax, *supra* note 62, at 858–59 (finding that there are instances in which board diversity and financial performance are linked, and others in which they are not).

107. See generally Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645 (2004) (arguing that minorities who successfully climb the corporate ladder are not likely to racially reform the corporation, nor engage in open-door activities for the minorities at the

corporate boardrooms has not necessarily made a difference to the quality of board performance. This work argues that in making diversity hires, majority decision makers will tend to choose those female and minority candidates who are most like themselves.¹⁰⁸ These successful women and minorities speak, move, and dress like those who select them. They went to the same schools, joined the same clubs, and share mutual friends. They know how to make their race and gender invisible, and thus less threatening. Once on a board, these individuals—so selected—continue to suppress differences in perspective, style, or priorities that otherwise might have made a difference to the board.¹⁰⁹ Thus, while women and minorities might have made a difference to the workplaces and boards they join, these differences tend to be screened out, both before and after the selections occur.

B. *The Expressive Function of Diversity*

Given the mixed picture summarized above, one phenomenon is striking—the broad social consensus that diversity is a good thing. Patrick Shin argues that this consensus extends to the areas of corporate governance, education, and employment.¹¹⁰ Over sixty percent of today's public, including sixty-six percent of people under the age of fifty, says that the increasing racial and ethnic diversity of the United States has been a change for the better.¹¹¹ This consensus

bottom).

108. *Id.* at 1658, 1672–77. Selection bias, and female and minority adaptation to this bias, flows from people's basic psychological drive to identify most closely with, and thus favor, those who are most like themselves. This drive has been extensively documented in the social psychology literature. See, e.g., SAMUEL L. GAERTNER & JOHN F. DOVIDIO, REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL 36–39 (2000); Marilynn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOC. ISSUES 429, 430 (1999).

109. See Carbado & Gulati, *supra* note 107, at 1677–90.

110. Patrick S. Shin, *Diversity v. Colorblindness*, 2009 BYU L. REV. 1175, 1190; see also Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1609–15 (2001) (tracing the rise of pro-diversity rhetoric in organizational management literature and education from the mid-1980s to mid-1990s); Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCIENTIST 960, 966–71 (1998) (documenting growth in corporate diversity strategies, even in periods when equal opportunity laws were not vigorously enforced); Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management at UC-Berkeley, UT-Austin, and UW-Madison*, 32 LAW & SOC. INQUIRY 985, 1020 (2007) (documenting consensus of administrators at three elite universities in favor of race-based affirmative action, despite some legal resistance).

111. News Release, The Pew Research Ctr. for the People & the Press, Current Decade Rated as Worst in 50 Years: Internet, Cell Phones are Changes for the Better 9

is reflected at this conference on corporate board diversity, where the question is not *whether* appointment of women and minorities to corporate boards is justified, but rather on *what grounds* the case for board diversity can be most credibly based.¹¹²

This preference for diversity, however, is characterized by some ambiguity and ambivalence. Just as the Supreme Court's defense of diversity on juries hedges between the relevance and irrelevance of race and gender, people support diversity based on a blend of nondiscrimination and diversity rationales that rest on contradictory premises. They reject stereotype-based discrimination, while also valuing diversity based on generalizations that amount to stereotypes. Even as they prefer diversity, people are often offended by the race- and gender-specific measures that would be necessary to bring it about.¹¹³ When they do engage in race- and gender-specific measures, the impulse is to replicate themselves insofar as possible, rather than risk stepping outside their own comfort zones.¹¹⁴

Shin and Gulati mention, although they do not rely upon, an understanding of diversity that helps to transcend these contradictory impulses. This understanding is that diversity is "constitutive of the good of a community" and expresses the commitment toward "a certain ideal of justice or equality."¹¹⁵ Within this view, diversity is a political and emotional vision of the kind of society in which people want to live. This vision rests on a societal ideal of heterogeneity. It posits and affirms a collective and individual identity in which women

(Dec. 21, 2009), <http://people-press.org/reports/pdf/573.pdf>; see also Broome et al., *supra* note 65, at 805 ("[A]ll of our interview subjects . . . agree with the abstract proposition that board diversity is a good thing.").

112. See, e.g., Fairfax, *supra* note 62, at 858–59 (highlighting that economic- and market-based rationales for board diversity are not enough and that "moral and social justifications" must still be taken into account); Fanto et al., *supra* note 62, at 906 (arguing that "diversity advocates should continue to offer different normative frameworks other than finance-based shareholder value to justify board diversity").

113. Survey studies show that a majority of Americans, including women and people of color, are averse to identity-conscious diversity strategies. See, e.g., Alison M. Konrad & Frank Linnehan, *Race and Sex Differences in Line Managers' Reactions to Equal Employment Opportunity and Affirmative Action Interventions*, 20 GROUP & ORG. MGMT. 409, 428 (1995) (drawing conclusions based on interviews of line managers at four large companies). This aversion to identity-based strategies is well-represented on the current Supreme Court. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). For a full and critical discussion of the various rationales for colorblindness, see Shin, *supra* note 110, at 1215–18.

114. See Carbado & Gulati, *supra* note 107, at 1658.

115. Shin & Gulati, *supra* note 1, at 1020–21. For further exploration of this rationale, see Shin, *supra* note 110, at 1190.

and minorities can and do succeed.¹¹⁶ Because this understanding attaches to the norm rather than to an instrumental goal, it does not depend upon empirical evidence showing that it accomplishes a given purpose. Indeed, it is relatively indifferent to whether diversity is required to end discrimination, or to provide a full range of perspectives to a group and thus greater productivity. Either is possible, but neither is necessary. For people to feel best about themselves and the society in which they live, it is enough that opportunity appears, at least, to have been fairly distributed.

Part III sketches the implications of this expressive rationale for the showcasing debate.

III. THE POSITIVE CASE FOR SHOWCASING

If the real rationale for diversity appointments is the aspiration it expresses, showcasing serves the function of feeding people's desire to be affirmed in this aspiration. Showcasing reflects their individual and collective self-image of a fair and diverse society. Seeing proof of progress toward that ideal helps people to continue to believe in its possibility and thus be more committed to it.

There are reasons to be cynical. As others have observed, highlighting the visible "proof" of the success of some women and minorities can be self-deluding, obscuring the deeper, less diverse reality of a society stratified by race and gender.¹¹⁷ We are not likely to achieve race and gender equality if we fool ourselves into thinking we already have it. Why make people feel good about superficial achievements that mask continued race and gender privilege? Self-delusion and ignorance are not promising conditions for a genuinely diverse and inclusive society.

116. And they suffer, collectively, when those women and minorities who seemed to represent success, fail. A notable example of both is Tiger Woods. His success was proof that people of mixed race could succeed in America; because of the importance of this reassurance, his reputational hit following disclosures of several extramarital affairs was arguably out of proportion to the seriousness of those disclosures. See *Tiger Woods Scandal: \$12 Billion Fallout?*, HUFFINGTON POST (Dec. 28, 2009), http://www.huffingtonpost.com/2009/12/28/tiger-woods-scandal-12-bi_n_405228.html.

117. See, e.g., Ralph Richard Banks & Richard Thompson Ford, (*How*) *Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1053–54 (2009) (opposing focus on unconscious bias because it deludes people into thinking that conscious racism has disappeared, which it has not); Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 942 (2008) (arguing that attention needs to focus on the ideology and material structures of white supremacy).

And yet, as we think pragmatically about how to achieve a more genuinely diverse and inclusive society, the positive affirmation of the value of diversity seems more productive than the cynical view of it. Affirmation reinforces and perpetuates the positive, and allows people to deepen their commitments to those norms freely, in a way that motivates and sustains nondiscriminatory, inclusive behaviors.¹¹⁸ In contrast, coercion and shame tend to create anxiety, distance, and resentment—all emotions that work against the internalization of the desired norms.¹¹⁹ This is not to say that law should be abandoned; legal norms about nondiscrimination are necessary and should be clear, consistent, enforced, and modeled by respected leaders.¹²⁰ That said, where actions—like showcasing—are ambiguous, a positive construction of those actions may better serve the goal of nondiscrimination and diversity than one that assumes the worst.

Shin and Gulati criticize an “inside-out” approach to diversity because they say it assumes that change will come from well-intentioned decision making.¹²¹ They contrast this approach to what they believe is a more plausible, “outside-in” approach, whereby diversity comes first, mandated if necessary, and then becomes a means by which implicit bias is eliminated.¹²²

The dichotomy they propose is a false one. The changes necessary to create a diverse and inclusive workplace are a product of complex interactions between external and internal norms, laws and voluntary action, structural and institutional barriers, and informal contact and friendships.¹²³ The achievement of a diverse and inclusive workplace does not start either from purely voluntary, good intentions, or by legal mandate. It is, instead, the product of an ongoing synthesis of many dynamic influences and processes.¹²⁴ Most people hold contradictory ideals, not easily susceptible to either easy reconciliation or rapid, permanent change. Within this complex reality, change does not come solely from within, or from without, but from ongoing, evolving resolutions of people’s conflicting principles.

If this more dialectic model is accurate, company showcasing for the purpose of sending a positive message about the company is not

118. See Bartlett, *supra* note 21, at 1901, 1960–67, 1970–71.

119. *Id.* at 1966–67.

120. *Id.* at 1970.

121. Shin & Gulati, *supra* note 1, at 1051.

122. *Id.* at 1051–53.

123. See generally Bartlett, *supra* note 21 (arguing that positive affirmation of the values of diversity is a more productive way to instill a strong commitment to nondiscriminatory norms than strengthening the antidiscrimination laws).

124. *Id.* at 1941–56.

necessarily “corrosive” of diversity values, despite the potential dangers Shin and Gulati outline. Positive messages must be in the mix, along with ongoing reality checks. So are companies who are proud to have added more women and minorities to the organization in top places—even if those additions do not always reflect a deep or mature understanding of what a true commitment to diversity requires.

It goes without saying that showcasing, in itself, is not enough. Far from it. To achieve diversity, companies need comprehensive, integrated, long-term policies, not single-shot, superficial actions.¹²⁵ But showcasing is one piece of a larger network of practices that can positively affect attitudes and expectations. Shin and Gulati do not give us good enough reasons to stamp it out.

125. *Id.* at 1960–71.