

Symposium: New and Critical Approaches to Law and Economics (Part I)
The Economics of Race and Gender

CONVERSATIONS AT WORK

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Prologue: Faculty Talk

Consider a law school faculty seminar. The subject of the paper is Justice Scalia's opinion in *Whren v. United States*. [\[FN1\]](#) In *Whren*, plainclothes officers in an unmarked car observed a Pathfinder at a stop sign in a "high drug area." [\[FN2\]](#) Several facts aroused the officers' suspicion: the car had temporary license plates, the occupants were young, and the driver seemed to be looking into the lap of the passenger. [\[FN3\]](#)

According to the officers, after remaining at the stop sign for an "unusually long time," the Pathfinder drove off in excess of the speed limit. [\[FN4\]](#) The officers followed the vehicle, which came to a stop at a red light. The officers approached the Pathfinder and identified themselves. The officers claimed that race (the occupants *104 of the vehicle were African American) played no role in their decision to investigate.

Upon approaching the vehicle, one of the officers observed that the passenger, Mr. Whren, was holding two plastic bags of a white, powdery substance. Believing the substance to be crack cocaine, the officers arrested both men. [\[FN5\]](#)

According to Justice Scalia, the officers' conduct did not violate the Fourth Amendment. He reasoned that, fundamentally, the Fourth Amendment is concerned with objective reasonableness. He claimed that the officers' investigation was objectively reasonable; they had probable cause to believe that the occupants of the car committed a traffic infraction and that justified the "seizure." To the extent that the seizure was justified, the discovery of the drugs was not the fruit of an illegal stop. In reaching this conclusion, Justice Scalia explicitly rejected Whren's argument that the Fourth Amendment should be interpreted to regulate race-motivated, or pretextual stops. According to Justice Scalia, ulterior motives cannot invalidate objectively reasonable police behavior. [\[FN6\]](#)

The speaker at the seminar argues that Justice Scalia failed to consider the incentives the "objectively reasonable" standard creates for police officers. The speaker's claim is that, to the extent there is no inquiry into motivation, police are essentially allowed carte blanche in terms of practicing racial profiling. [\[FN7\]](#) The *105 speaker explains that, given how easy it is to commit a traffic infraction, everyone is vulnerable to being stopped by the police. However, the police have neither the interest nor the resources to stop everyone. They will exercise discretion. According to the speaker, if there is no inquiry into motivation, police discretion to conduct traffic stops will be unbridled. The speaker concludes by asserting that the Court's standard essentially "guts" the Fourth Amendment. [\[FN8\]](#)

The floor is opened up for questions. A junior faculty member who specializes in international business law raises her hand. She is up for tenure in a few months, and has not had much of a presence at faculty seminars. She knows that this is the last faculty seminar of the year.

Junior Faculty Member: "I know you didn't get to present your entire paper, but as I understand it, the basic thrust of your argument is X."

The Speaker nods his head to agree.

Junior Faculty Member thinks: I hope my senior colleagues realize that I've read the paper.

Senior Faculty Member thinks: A nice, crisp question. I always thought she was quick on her feet.

Junior Faculty Member continues: "It seems to me that your project is less about the Fourth Amendment, and more about how legal formalism functions to deny the realities of race. We see this all the time, for example, in Fourteenth Amendment jurisprudence where the Court's ideological commitment to race neutrality or color blindness obscures the realities of race." [\[FN9\]](#)

*106 The Speaker nods his head again.

Junior Faculty Member thinks: They probably didn't know that I could think outside of my intellectual box. I imagine they hadn't perceived me to be theoretical. I can see it in their eyes; some of them think of me as a boring business type.

Senior Faculty Member thinks: Where does she get the time to stay on top of literature outside of her field? Obviously she's read some of that crit stuff!

Junior Faculty Member: "Now even as I agree with your account of what Whren does and doesn't do, you haven't provided us with any indication as to how courts can actually manage this problem. You don't use this term in your paper, but lots of people refer to the phenomenon you describe as DWB--Driving While Black. [\[FN10\]](#) Again, I think this is a real problem. Parenthetically, I think that white people are stopped pretextually as well, and you might want to think about how that social reality affects your analysis. But that might just be a quibble. My larger point is that it is unclear as to how, in practical terms, courts should deal with this problem. Isn't that, after all, the real question?" [\[FN11\]](#)

The Speaker, taken aback by this barrage, looks crestfallen. He reaches for his bottle of Evian.

Junior Faculty Member thinks: How about that, colleagues? I'm real-world oriented, solution-driven, nuanced, racially sensitive--*107 but not too sensitive (pretextual stops are a problem for white people as well). What's more, I crushed the speaker with that last question.

Senior Faculty Member thinks: She is truly engaged. This reflects well on our institution. If only we could find more female candidates like her to hire. If only my other female colleagues were more like her.

The scenario is, of course, exaggerated. But, the point is to suggest that in "low visibility" settings (such as a large law school faculty), where faculty members teach and do research largely in isolation from each other, what one says during the few moments of "high visibility" (such as seminars or faculty meetings) takes on extra importance. More generally, the scenario illustrates a conversational dynamic between employee and employer. In this dynamic, the employee uses her speaking opportunities to "signal" that she has certain characteristics that the employer values. The employer, in turn, "screens" the employee's statements in order to evaluate whether the employee in fact has those characteristics.

This Article explores the workplace implications of this dynamic for outsider employees (for example, white women and racial minorities) who are likely to be subject to negative stereotypes. [\[FN12\]](#)

I Introduction: Difficult Conversations

Every time we speak, there is the risk that the person to whom we are communicating will misinterpret what we say. We can couch and qualify our language to mitigate this risk. But there is a limit to how much couching and qualifying any given conversation will sustain. Explicit caveats can help. However, they too are susceptible to misinterpretation. The bottom line is that communicating can be difficult and potentially costly. How we perceive this difficulty and cost informs whether and how we express ourselves as well as what we ultimately say. [\[FN13\]](#)

***108** Consider a recently engaged couple. Privately each party is contemplating a prenuptial agreement. Both are thirty-something professionals. Given the statistic for marriages ending in divorce (over fifty percent), both think prenuptial agreements make sense. Yet, neither knows how to bring the matter up. Each fears that, should she/he even mention the term "prenuptial agreement," the other will misinterpret the conversation: "She/he must not really be committed to the marriage" or "she/he already envisions problems in the marriage." [FN14] Consequently, neither brings up the issue.

This dynamic, the risk of misinterpretation chilling conversations, occurs in the workplace as well. Take the example of a junior associate in a New York law firm. She is asked by a partner whether she would like to take on a due diligence assignment. The assignment involves reviewing documents in a warehouse in rural Oklahoma for a month. The junior associate would like to say, "Of course not; I would rather stick needles in my eye." Chances are, this will not be her response. Nor is the associate likely to just say no. She may believe that if she declines the assignment the partner will categorize her as a slacker or a non-team player. That, in turn, may result in the partner not offering her an assignment the next time around. Thus, the junior associate's response is, "Sure, I will take the assignment; fill me in on the details."

These examples illustrate an obvious point: conversations matter. More particularly, conversations matter in the workplace. Because of stereotypes, employers will often make assumptions about an employee's type (whether, for example, the employee is likely to be industrious, collegial, hard working, or creative). From an institutional perspective, sorting employees based on stereotypes is efficient. This is because the characteristics ***109** the firm values will not always be easily or readily available. In two significant respects, an employee's workplace conversations facilitate this sorting practice. First, an employee's conversations at work can be negative stereotype-disconfirming. To the extent that this is the case, the likelihood that the employee will succeed within a given workplace culture increases. Second, an employee's workplace conversations can be negative stereotype-confirming. When this occurs, the likelihood that the employee will have a successful career within that workplace decreases. [FN15] This negative stereotype-confirming/negative stereotype-disconfirming conversational dynamic is the sense in which conversations at work perform work.

This Article examines the relationship among workplace conversations, workplace identity, and workplace discrimination. [FN16] The analysis begins with the notion that employees in the workplace are differently situated with respect to what they think they can say at work. For example, some employees will feel freer than others to engage the employer in critical conversations about the employer's institutional policies. More specifically an employee's sense of constraint vis-a-vis her workplace conversations is likely to be a function of the stereotypes she perceives as applying to her. Thus, other things being equal, a Latino employee in a white, male-dominated workplace who perceives that there exists a stereotype of Latinos as hostile and disloyal is likely to be more cautious in criticizing institutional policies than a white male counterpart would be. The latter would be less concerned (if at all) about producing stereotype-confirming conversations.

At least three consequences flow from the claim that workplace stereotypes impose constraints on the conversations of outsiders. The first relates to the fact that our workplace conversations are formative and reflective of our workplace ***110** identities. That is to say, who we are and who we are perceived to be at work is a function of what we say at work. This is especially true in environments where employees largely work on their own and only have limited interactions with their colleagues. Consider an academic setting. A professor's reputation as smart, collegial, rigorous, witty, charming, etc., will be based, to some meaningful extent, on statements made during seminars and faculty meetings. The nexus between workplace identity and workplace communications creates an incentive for employees at work to put their conversations to work. [FN17] To the extent that an employee's conversations are constrained because of her perception that she is subject to negative stereotypes, her ability to use her conversations positively to construct her workplace identity is circumscribed.

A second consequence of the relationship between stereotypes and workplace communications is that an employee's ability or inability to have certain conversations can influence the kind of work the employee ends up doing. For example, an employee's perception that she is subject to stereotypes will impact whether she accepts or declines a particular assignment. Concretely, if an employee perceives that, because of stereotypes, the employer thinks that she (the employee) is likely to be lazy, the employee is likely to say yes to the employer's request that the employee take on additional projects, even when she is already busy. To put the point a little differently, the

existence of stereotypes diminishes an employee's workplace bargaining power, and thus, her ability to negotiate workload.

A third way in which the interaction between stereotypes and an employee's conversations at work affect that employee is that employers may be aware that, because of stereotypes, some employees are likely to be disinclined to engage in certain kinds of workplace conversations. To the extent that the employer has this awareness, there is an incentive--a rational economic reason--for the employer to exploit the employee's vulnerability. [FN18] This exploitation is especially likely in workplace cultures where employees are requested to perform assignments, but have some *111 power to say no to the employer's requests. Other things being equal, the easier it is for the employer to "get to yes" with a particular employee, the more likely the employer is to ask that employee to take on certain undesirable assignments. [FN19]

This dynamic can come about even if the employer does not intend to exploit the vulnerability of its outsider employees. [FN20] In other words, even if the employer's engagement with such employees is not consciously based on the realization of unequal bargaining power, the employer may still end up over-allocating work to outsiders. [FN21] Moreover, so long as the outsider perceives *112 there to be stereotypes, she is likely to accept--without complaint--more of the less desirable assignments than she otherwise would. The more she accepts assignments, the stronger the employer's impression that she (the employee) does not mind (or might even enjoy) doing the work.

The broad claim, then, is that the existence of stereotypes in the workplace affects not only what outsider employees say and do, it also affects, directly and indirectly, what employers say and do vis-a-vis their outsider employees. Because of stereotypes, not only are outsiders more likely to say yes to certain tasks, they are also more likely to be asked to perform certain tasks. As we will show, the cost of taking on too many tasks (especially what we call "lumpy citizenship tasks") undermines an outsider's ability to succeed within the workplace.

The workplace dynamic we describe, stereotypes constraining an employee's workplace conversations and creating incentives for employers to discriminate amongst employees with respect to how to allocate work, is not captured by current anti-discrimination law. Nor is it clear whether and to what extent law can address this pervasive and "normal" workplace problem. We conclude, therefore, that efforts to ameliorate how stereotypes impact outsider employees should be institutionally, and not just legally, focused.

The argument is developed in five parts. Part II expands on the analysis set forth in this Part. It provides a description of how stereotypes constrain an employee's ability to engage in and strategically use her workplace conversations. Part III analyzes Part II's discussion by way of a simple multi-task workplace model. This model applies to high-level jobs in settings such as law firms, consulting firms, investment banks, technical firms, and academia. Part IV looks at insider incentives as a function of *113 outsider vulnerabilities in this setting. Part V concludes with a discussion of possible solutions.

II Putting Conversations to Work

Employees have an incentive to put their conversations at work to work. There are at least two ways an employee might do this. First, to the extent that an employee speaks, she will want her co-workers and her employer to understand her. Part of putting one's conversations to work, then, involves engaging in clear and effective conversations. Second, an employee might use her conversations to signal to the employer that she exhibits personal characteristics that the employer values. The more difficult these characteristics are to observe, and the more important the employee perceives them to be to the employer, the stronger the incentives for the employee to signal. Examples of how an employee might signal abound: an employee might casually mention that she is tired from having pulled multiple all nighters (signaling hard work), or she might send her boss an email at 1:00 a.m. in the hope that he will notice the time at which it was sent (once again, signaling hard work). The goal of this form of conversational work is to facilitate a positive image of the employee. With this strategy, the employee sends a message to the employer about her worth as an employee without being explicit or didactic. This Part explores the ways in which stereotypes create two interrelated barriers to an employee's ability to put her workplace conversations to work: the "literal meaning" barrier and the "negative signaling" barrier.

A. Literal Meaning and Negative Signaling Problems: The General Concept

An employee's interest in putting her conversations to work will often be constrained by "literal meaning" and "negative signaling" problems. Assume that an employee communicates to the employer with the hope that her words will be understood to communicate, without more, X sentiment. The literal meaning problem arises if the employer interprets her communication as evidencing Y sentiment. ^[FN22] The negative signaling problem arises *114 if the employer interprets the employee as conveying X sentiment but signaling Z negative personal quality. In other words, in the negative signaling situation, textually, the employer's interpretation of the employee's communication comports with the employee's understanding of what she is communicating. However, the employer attaches a negative subtext to the communication. To the extent that the employee's communication is filtered through or added to this subtext, the employer might reach an erroneous conclusion with respect to why the employee made the particular communication and/or what the communication conveys about the employee's commitment to both her work and the institution.

Every employee spends some time thinking about literal meaning and signaling problems. The claim here is that the amount of time an employee spends in this regard is a function of the employee's perceived vulnerability to misinterpretation and negative signaling. The greater her perceived vulnerability to misinterpretation and negative signaling, the more energy she is likely to expend on these problems.

The more difficult question is this: Why would some employees more than others feel vulnerable to misinterpretation and negative signaling? The answer relates to stereotypes. The stronger the employee's perception that her employer will negatively stereotype her, the more likely she is to think that her conversations will negatively signal or that her employer will misinterpret them. Further, the more concerned an employee is about negative signaling and misinterpretation, the greater the likelihood that she will feel constrained in her ability to communicate at work.

The analysis below focuses the foregoing observations on a particular category of employees: outsiders. Employing several scenarios, it presents examples of how literal meaning and negative signaling concerns over-determine the extent and nature of an outsider's workplace conversations.

B. Literal Meaning and Workplace Standing

Consider a workplace culture in which professional disagreement with company policy is not merely encouraged, it is expected. *115 However, unprofessional disagreements (disagreements that the employer interprets as self-interested personal politics) are considered improper. As a result, these latter types of disagreements diminish an employee's advancement opportunities. Within this workplace culture, an employee seeking advancement has an incentive to shape her criticisms of institutional policy to maximize the likelihood that the employer will interpret them as professional disagreements. We argue that an employee's ability to shape her criticisms in this way will depend, at least in part, on the employee's reputation at work, that is to say, her "workplace standing."

There are two components to an employee's workplace standing: (1) the employer's estimation of the employee's worth and potential; and (2) the employee's sense as to how the employer perceives her worth and potential. The two components are discussed in turn.

1. The Employer's Perception of the Employee

One way to explain the nexus between the employer's estimation of the employee's workplace reputation and potential and the risk that the employer will misinterpret the employee, is to invoke what every student of rhetoric knows: the identity of the speaker helps to define the content of the speech. To continue the hypothetical, if the employer is unsure whether an employee's public disagreements about company policy are professional, the employer's resolution of this uncertainty will be a function of the image the employer has of the employee. The

stronger the employee's workplace standing, the more likely the employer will be to take the position that the employee's criticisms are professional. Conversely, to the extent that the employee has a weak workplace standing, the employer is more likely to conclude that the employee's criticisms are unprofessional. Put directly, where an employee's conversations at work are ambiguous, susceptible to a positive or a negative interpretation, the employer will resolve the ambiguity by using the preconception the employer has about the employee. [FN23]

***116** Consider a female employee in a male-dominated workplace. Stipulate that, because of stereotypes, the employer, unbeknownst to the employee, perceives that female employees are likely to be hypersensitive about gender-related issues. [FN24] Imagine that this female employee is on the firm's hiring committee and that she has been asked to offer her views on the firm's current hiring practices. Assume that the employee does so; she suggests that the firm's hiring procedures discriminate against women. Given the stereotype that the employer harbors about female employees, the employer may interpret the female employee's criticisms of the existing hiring procedures as knee-jerk political correctness. Alternatively (or additionally), the employer may conclude that the employee's criticism reflects unprofessional, crude, self-interested identity politics. Both interpretations reify the stereotype about the employee (that she is hypersensitive), and will likely cause the employer to disregard the criticism.

2. The Employee's Perception of the Employer's Image of Her

Modify the above hypothetical so that the employee believes that the employer perceives her to be overly sensitive about gender-related issues. Assume again that the employer has asked the employee to comment on the firm's hiring process and that the employee is of the view that the firm's procedures discriminate against women. Under these conditions, the employee is going to be less likely to offer her criticisms of the firm than she would have been otherwise. Stereotypes explain why. She is likely to be concerned that, because of assumptions about women and work, her employer will read her criticisms to reflect oversensitivity and thus ignore them.

To the extent that the employee's speech is chilled, her workplace ***117** identity is undermined in two respects. Not only is she unable to register her concerns about a subject that matters to, and where improvements to the system would benefit her, but she is also unable to show herself as institutionally engaged and concerned.

Let us assume, however, that the female employee does speak, perhaps because she considers diversity a high priority issue and, as such, she is willing to take the risk that the employer will misinterpret and discount her comments. Even if this is the case, her concerns about misinterpretation and negative signaling will not have disappeared. Likely, she will adopt strategies to mitigate the risk of being misinterpreted and discounted. She may expend lots of energy thinking about how to communicate (tone, inflection, body language, etc.) and what ultimately to say. She may perceive that, in order to get her colleagues to listen to her, she has to back her statements up with "objective" research. But, her performance of extra research is no guarantee that her colleagues will take her concerns seriously. Indeed, it may backfire. [FN25] The possibility exists that her colleagues will view her extra work not as good citizenship or institutional commitment, but as a confirmation of her excessive sensitivity about, or deep investment in, gender politics ("see, she did extra work only because of her preoccupation with gender politics"). In other words, her colleagues might perceive her research as political, rather than institutional, work.

The bottom line is this: Where an employer or co-workers interpret an employee's words through the prism of negative stereotypes and/or where an employee perceives that this is taking place, the employee's ability to engage in discussions about important institutional policy is circumscribed by the risk that she will be misinterpreted.

Although literal meaning problems are real and, we think, pervasive, the remainder of the discussion focuses on negative signaling problems. The thinking here is that the latter creates more workplace difficulties for outsider employees than the former. [FN26]

***118** C. Negative Signaling and Workplace Standing

Like the literal meaning phenomenon, negative signaling also affects an employee's workplace standing. Once again, it helps to distinguish between how the employee thinks the employer is interpreting the signal and the

employer's actual interpretation.

1. The Employee's Perception of the Employer's Interpretation of the Signal

Take, for example, an all-too-frequent interaction between a partner and a first-year associate at a law firm. It is 7:30 on a Friday evening and the associate is about to head home to dinner and a movie with her significant other. The senior partner, whom the associate has never met, approaches her by the elevator:

"Hi, you're Susan Johnson, right?"

"Yes," responds Susan.

"I'm Matt Ramond, head of the Real Estate Division." Matt and Susan shake hands. "I understand that you are interested in real estate," Ramond continues. Susan responds with an enthusiastic "yes." "I was a real estate broker for several years before going to law school," she continues.

"Great," responds Matt. "I was wondering whether you might have time to do a quick real estate research assignment for me this evening. It should take no more than a couple of hours, especially for someone with your experience. And please do not hesitate to tell me if you have plans and need to leave, in which case I will shuffle things around."

For the new associate, responding is complicated. Susan could, for example, just say no. Presumably, the partner would understand this no to mean that Susan has declined the assignment. In this sense, such a response would be clear, even though it fails to provide the partner with any indication as to why Susan cannot take the assignment.

Alternatively, Susan could offer a more elaborate response. Susan could thank Matt for the opportunity to work with him on the project, but indicate that she is unable to take the assignment because she has plans and has to leave early. Susan might be perfectly confident that, should she offer this response, Matt will not misinterpret it. That is to say, he will hear the response and *119 understand that she cannot take the assignment because she has other plans.

Yet Susan might still be reluctant to offer this more detailed account. Her reluctance might reflect the concern that such a response could create the impression (negative signal) that she is not hard working enough, or that she does not have her priorities in order, or that she is not loyal to the institution. She may worry that, to the extent that her response does in fact foster these images, the senior partner in her practice area might not offer her a desirable assignment the next time one comes around. Whether, and to what extent, Susan actually perceives this cost will turn on whether Susan believes that Matt will interpret her decision to say no through stereotypical prisms. If, for example, Susan is black and Matt is white, she might believe that declining the assignment would comport with a pervasive stereotype of black women as having a poor work ethic. [FN27] In other words, Susan may believe that her decision to say no would signal laziness and confirm the stereotype. The fact that Matt makes clear that Susan should not hesitate to tell him if she has plans might not be enough to assuage her fears. She may believe that the "exit option" Matt presents is not real, but pro forma.

To complicate the hypothetical, imagine again that Susan is a first-year associate in an old, traditional, white shoe, male dominated corporate law firm. This time, however, she is a single mother with a four-year-old child. Again, it is 7:30 on a Friday evening. Susan needs to leave work so that she can get home before the baby sitter leaves. Assume that Susan perceives that the partners at her firm (largely male) are concerned that she might not be able to pull her weight because of her commitments to her child. Refusing the partner's assignment becomes difficult. *120 Here again, Susan is unlikely to be worried about being misinterpreted in the literal sense; however, she might be concerned about negative signaling, specifically, whether declining the assignment would confirm some preconceived notion the partners at the firm have about her level of commitment. Indeed, Susan might interpret the assignment as an institutional loyalty test.

Susan may perceive that the male partners hold a somewhat simplistic view about women associates. Specifically, she may believe that the partners sort female associates into one of two broad categories: those who are "committed

to work" and those who are "committed to family." [FN28] Her thinking might be that the partners at the firm know that she has a young son and (should know) that it is unlikely that she will be able to make last minute arrangements for a baby sitter on a Friday evening. Given that, the fact that she is still being requested to stay late might suggest to her that the partner's request is a screening device. Susan might believe that if she says no to the assignment, she faces a high risk of confirming the preconception that she falls into the committed-to-family category. On the other hand, she might think that if she says yes to the assignment, her acceptance may negate the partners' preconception that she is likely to be in the committed-to-family category. In short, Susan's perception as to whether the partner who presents her with the "option" of taking on an assignment is actively screening her puts additional pressure on Susan to accept the assignment. [FN29]

*121 Susan will likely never know whether in fact the partner's engagement with her is a pretext for screening. The point is that the existence of stereotypes about single mothers and Susan's uncertainty about what, given these stereotypes, declining the assignment would negatively signal, creates an incentive for Susan to take the assignment.

2. The Employer's Interpretation of the Signal

Assume now that in both of the foregoing examples, Susan does not perceive that her employer holds negative stereotypes about women. Consequently, to the extent that Susan experiences some pressure to say yes to the partner's request, it is a function of the normal power dynamic between a senior partner and a junior associate.

Stipulate that Susan declines the assignment, perhaps because she perceives that there will be enough opportunities in the future to demonstrate her commitment to the firm, and/or the partner, or because she cannot easily arrange for childcare at such short notice. The fact that Susan's decision to say no to the assignment was not burdened by concerns about negative signaling does not mean that the negative signaling problem disappears. Quite apart from whether Susan feels constrained by stereotypes is the question of whether the partner (unwittingly or wittingly) will employ stereotypes to make sense of Susan's decision to decline the assignment. If he has a stereotype of women as lacking in ambition, likely to prioritize family work over workplace work, and unable to cope with the pressures of a topflight New York law firm, Susan's no might confirm, in his mind, those stereotypes.

In contrast, if Susan were a man and declined the partner's assignment for reasons having to do with familial obligations, it is unlikely that this decision would have the same negative impact. Put differently, the partner probably would not interpret a male *122 associate's isolated decision to decline an assignment because of childcare obligations as an indication that the associate lacked loyalty or commitment to hard work. Indeed, given assumptions about men with respect to family work and career work (men privilege the latter over the former), [FN30] the partner may conclude that the associate must really be in a bind to be invoking family obligations as a reason for declining work.

III The Multi-Task Environment

Part II argued that an employee's perception of stereotypes can circumscribe her conversations at work, including her ability to say no to assignments. This Part explores the implications of the argument for employees who work in "multi-task environments." For heuristic purposes, we employ a simple, stylized model.

A. The Simple Model

In our model, there are two broad categories of tasks: citizenship tasks and advancement tasks. First, we define the nature of each task. Then we discuss how employers use discretion and ambiguity to create an incentive for employees to perform both tasks. The Section concludes by situating the model in the context of law faculty and law firm cultures. Here we show how stereotypes operate in the model to structure the interaction between insider employers and outsider employees in ways that systematically disadvantage the latter.

1. Advancement Tasks

Advancement tasks are directly linked to promotions. An employee has to perform enough of these tasks to advance within the institution. A key feature of advancement tasks is that an employee's performance is relatively easy to measure, compensate, and verify. Take, for example, the publication requirements that most academic institutions impose on their faculty as a precondition for promotion. A scholar's publications can be evaluated by members of the faculty. Those faculty evaluations can be *123 verified by external evaluations conducted by members of other faculties.

2. Citizenship Tasks

Citizenship tasks are those tasks for which measurement and verification are difficult. For example, things such as whether an employee has been loyal, a team player, or collegial, are difficult to measure. Furthermore, even if the employer thinks it can measure those qualities, the evaluations do not lend themselves to easy verification (for example, by a third party evaluator). The problems with measurement and verification, and the resulting room for bias (or, at least, the perception of bias), mean that promotions and pay increases cannot be directly tied to performance on these tasks. [FN31]

3. The Problem of Incentives

For purposes of the model, assume that the institution is one that needs its employees to perform both citizenship tasks (e.g., as members of a team) and advancement tasks (as individual employees). Since advancement tasks are linked directly to promotions and pay, the employer will have little difficulty inducing employees to perform them. In addition, the fact that performance on these tasks can be measured and verified affords the employee some level of external market protection; if the employer does not adequately reward performance, some competitor will step in and lure the employee away. The lack of a direct link to promotions, pay, or external market rewards, however, means that performance on citizenship tasks is likely to be difficult to induce. This creates a problem for institutions in which both sets of tasks have to be performed. These institutions face the challenge of setting up an incentive system to induce employees to perform enough citizenship tasks. Broadly speaking, there are two ways an employer might do this: directly and indirectly.

a. Social Norms: Direct Incentives

One mechanism for inducing performance on citizenship tasks is to create a system of social approval (for the performance of *124 citizenship tasks) and social disapproval (for nonperformance). [FN32] For example, an institution could reward those who are good team players by extending frequent invitations to social events at the homes (or clubs) of the institution's power-brokers. The institution would not extend similar invitations to the employees who are not good team players. This disparate treatment would send a message that team work is expected and rewarded.

Social approval and disapproval mechanisms, however, will not always work. At some point, employees are going to care more about promotions, pay, and their market value, than about whether they are invited to dinner or to play golf. This is likely to be especially true in large organizations where peer monitoring is difficult and social pressures are diffused.

b. From High Powered to Low Powered: Indirect Incentives

To the extent that the institution is one in which social norms are not adequate as a direct incentive mechanism for citizenship tasks, the employer is likely to move to a system of indirect rewards for socially approved behavior. This system renders the process for evaluating advancement tasks "low powered," that is to say, less ostensibly objective. [FN33]

High powered incentive systems are seemingly objective and reasonably transparent, i.e., they are based on performance of advancement tasks. Thus, the employee has a reasonably good sense as to how she will be evaluated. Specifically, the employee will know not only the relevant criteria for promotion, but also how, in making the promotion determination, the employer will weigh each criterion. Further, where the criteria are clear, the internal decision can be verified and corrected by an external *125 third party such as a court or even the market. The problem with this type of system, however, is that it allows the employee to game it. To the extent there are citizenship tasks that the employee needs to perform for purely social approval reasons, the employee has an incentive to do the minimal amount, with the minimal level of enthusiasm, and focus instead on the advancement tasks (remember, performance on the citizenship tasks is neither measurable nor verifiable by the external third party). With high powered incentive systems, therefore, the citizenship tasks are likely to receive short shrift. In crass terms, the fact that the senior partner thinks you are a good sort and invites you to private parties at his home is likely to be of little value. That is, as we explain below, unless that social approval translates into a higher likelihood of a vote at partnership time.

Employers who need to induce their employees to perform a significant number of citizenship tasks, with a high level of enthusiasm and effort, are likely to use low powered incentive systems. These are systems in which there is ambiguity with respect to how the promotion process works. This ambiguity, and the resultant element of subjectivity, keeps the employees on their toes with respect to the extent and nature of their performance of citizenship tasks.

Examples of low powered systems are the promotion mechanisms that many law firms and academic institutions employ. With respect to the basis upon which promotion decisions are made, these systems have two key features. First, the specific weights on the criteria for promotion are kept vague. Second, the final decision is premised on a vote by the senior members of the institution. In theory, the vote is based on an evaluation of the candidate's abilities, skills, and potential for the job in question. However, the fact that it is a vote (sometimes secret) allows for a significant degree of subjectivity. This element of subjectivity is exacerbated to the extent that the senior members are operating with criteria, the importance of which they can decide (within bounds, no doubt) on a case by case basis. While we elaborate further on the importance of this element of ambiguity below, at this point it is enough to understand following. If the senior members are authorized to exercise discretion with respect to hard-to-measure criteria, and if this discretion is exercised via a secret vote, the process becomes sufficiently "low powered" that juniors are likely to be concerned about social *126 disapproval. The subjectivity of the process and the lack of any meaningful check allows seniors to punish--with a negative vote--those juniors the senior members perceive to be slacking on citizenship tasks. The fear of that penalty induces the performance of citizenship tasks. In this way, low powered environments--more specifically, the incentive systems they produce-- provide an indirect link between citizenship task performance and promotions.

There are several ways an employer might create ambiguity. For instance, an employer might simply be silent on the relative importance of each set of tasks. Alternatively, an employer may suggest that each task is important, but add that it is difficult to assess the relative importance of these tasks outside the context of a particular case for promotion. This kind of ambiguity is often reflected in tenure standards. Every junior member of a faculty will likely understand that the criteria for tenure are teaching and scholarship (and in some institutions, service). Every junior faculty member will also understand that in the tenure decision, scholarship will weigh more heavily than teaching and teaching will weigh more heavily than service. [FN34] However, it will often be unclear whether good service can make up for bad teaching and if so, to what extent; whether bad teaching can be overcome by good scholarship, and if so, to what extent; and whether, with respect to each criterion, there is a floor, and if so where it is located. This ambiguity confers four benefits to employers.

First, the ambiguity keeps the employees working hard on individual tasks because they will have some doubt about how much work is enough. Second, and related to the first, employees will work hard on both sets of tasks (although generally harder on the advancement tasks) because they will be unsure whether each task has a floor. Third, the ambiguity allows the employer to move the target as often as it likes. Fourth, the ambiguity constrains the employees' ability to game the system. [FN35]

As noted, two familiar institutions that fall within the contours of the multi-tasking model are law firms and law faculties. This Section illustrates how these institutions fit within this model and identifies some of the consequences of this "fit" for outside employees.

Before proceeding, a couple of caveats are in order. First, law firms and law school faculties are but two examples of multi-tasking environments. As mentioned at the outset, there are a host of other environments, including investment banking, management consulting, and information technology processing, to which the multi-tasking model applies. We focus on law firms and law faculties because they are the institutional settings with which we are most familiar. Second, although our analysis draws out the similarities between the institutional structures of law firms and law faculties, the reality is that there are significant differences between the two environments. Those differences (including, for example, the difference in the levels of competition in the two markets) mean that the experiences of outsiders in the two environments are also likely to be different. We want to reiterate, then, that our model is stylized. We employ it to isolate and magnify a particular aspect of high level jobs in a multi-tasking environment. With those caveats out of the way, we move now to the relevant similarities in the institutional structures.

First, in both law faculties and law firms, there are advancement tasks and citizenship tasks. Further, in both institutions, promotions are directly tied to the advancement tasks. For example, in a corporate law firm, the number of big deals that an associate has successfully run is likely to be an important factor in the partners' decision as to whether the associate should be promoted to partnership. In the law faculty context, the number of big articles that a junior faculty member has published in fancy law journals is likely to be an important factor in the faculty's decision as to whether to grant tenure to the junior faculty member. Not only are these factors (the number of deals and the number of articles) important to promotion within the institution, they are important to the employee's ability to move across institutions as well.

Second, within both law faculties and law firms there are hierarchies within the category of advancement tasks. That is to say, some advancement tasks are more connected to promotions and *128 pay increases than others. For example, less important than running big deals and writing big articles are hours billed and teaching. While hours billed and teaching constitute advancement tasks, the former is not as important as running big deals and the latter is not as important as publishing.

Third, both law school faculties and law firms need employees to perform citizenship tasks. Examples in both institutions include committee work, recruiting efforts, and voluntarily helping others out on their projects.

Fourth, both institutions employ internal votes, as opposed to outside third party evaluations, as the primary determining mechanism for promotions. Although academic institutions typically use outside evaluations as a source of information, the crucial determination is almost always made through an internal vote.

Fifth, both institutions are vague when identifying what is required with regard to these different tasks. As noted earlier, these fourth and fifth characteristics, voting and ambiguity in evaluative criteria, provide for a significant amount of subjectivity in the promotion decision. In the sections that follow, we look at the interactional dynamics of task choice and stereotypes in the context of such systems.

1. Making the Right Choice

Within the settings described, an employee seeking promotions and pay increases is likely to focus primarily on performing advancement tasks. Where possible, this employee will also seek to demonstrate good citizenship. She may engage in a variety of institutional actions (such as socializing, answering questions about work that others might have, playing team sports, etc.) to signal to others that she is the "right" sort of employee. These performances comfort others on the amorphous qualities that are often difficult to observe, for example, collegiality, loyalty, and team spiritedness.

Stereotypes complicate this picture. Specifically, the choices employees will make about what combinations of

citizenship tasks and advancement tasks to perform, and how much leisure time they want are likely, in part, to be a function of what employees perceive to be the employer's preconceptions about them. For example, an employee who believes that there is a perception of her as under-committed to the goals of the firm *129 (perhaps, as in our earlier example, because she is a single mother), has an incentive to perform extra citizenship tasks so as to signal institutional loyalty and commitment.

At the same time, this employee will have to take on enough advancement tasks so as to acquire the requisite skill and other capital amounts for promotion. In other words, the extra citizenship tasks an employee may have to perform to negate stereotypes cannot substitute for the advancement tasks the employee must perform to ascend the promotion ladder. For example, when it comes time for a law school to make its tenure decision, being perceived as a good citizen is of little use if one has not published any articles. The same is true for a corporate associate who has not run any major deals.

The question becomes: With the concern about stereotypes in mind, how will an outsider likely negotiate between performing citizenship and advancement tasks? The claim is that such outsiders will protect themselves by first performing the advancement tasks. Not only are these the tasks to which promotions and pay are most directly tied, but there is less room for bias when evaluating a person's performance of these tasks. Further, these tasks provide market protection because they are visible to (and considered valuable by) the external labor market. If it were up to them, the outsiders, given their perception of the presence of negative stereotypes, would probably seek to focus their attention primarily on performing advancement tasks. Of course, the outsiders will try to perform extra citizenship tasks as well, so as to negate stereotypes that might operate to discount evaluations of their advancement tasks. However, the performance of citizenship tasks will be secondary to performing enough of the advancement tasks to assure promotion.

That said, employees tend not to have carte blanche in choosing their individual tasks. Choosing tasks will be a function of interactions with senior decision makers. Below, we provide an indication of how that interaction can result in the over-allocation of work to outsider employees.

2. Lumpy Tasks

Citizenship tasks can take time and effort, both of which can add up. But every employee has a degree of control over deciding whether to perform them. Outsider employees have less control than insider employees, but even outsiders have some *130 control. Thus, it will not always be the case that the performance of citizenship tasks will prevent an employee from performing enough advancement tasks to assure the employee's promotion. Where the employee loses a significant degree of control is when she has to perform "lumpy tasks."

Lumpy tasks are those tasks that take up large amounts of time and effort; time and effort that necessarily comes out of what could have been used for advancement tasks. For example, at a New York law firm, this could be a due diligence or document production task that involves months of tedious work in a warehouse in rural Oklahoma. Alternatively, on a law school faculty, it could be teaching a course that is altogether unrelated to the employee's scholarship (colloquially known as the "service" course). In either case, these citizenship tasks necessarily reduce the employee's ability to advance. [\[FN36\]](#) Even if the employee who is stuck with such a task were to sacrifice all of her leisure time, there would still not be time enough to do enough advancement tasks. Given the nature of lumpy tasks, employees will want to avoid the lumpy tasks. This avoidance strategy is likely to be especially appealing to outsiders who distrust the institution and are seeking to protect their value on the external labor market.

The institution's senior decision makers, however, will be familiar with the instinct to avoid lumpy tasks. Indeed, the decision makers will likely recognize that their own success was, in part, a result of their having been able to avoid too many lumpy tasks. In order to get people to agree to do the lumpy tasks, there has to be a cost to saying no. The decision makers, therefore, are unlikely to send out broad e-mail requests for volunteers to do lumpy tasks. If they do, no one is likely to respond affirmatively. Each individual employee will calculate that the overwhelming majority of his or her colleagues are going to ignore the request for volunteers and that, therefore, the costs to him or her (in terms of being perceived as a bad citizen) are likely to be negligible. As a result, requests for lumpy tasks are typically not made in terms of general solicitations for volunteers. *131 Instead, to the extent broad requests for

volunteers are made, they are for relatively attractive things. Thus, the most common broad solicitations are for volunteers to attend events like basketball games or the symphony for which the organization has extra tickets.

To induce someone to say yes to a lumpy task, the cost of saying no has to be large. This large penalty is created with the personal request; the request where the senior decision maker goes to the junior employee's office and says, "we really need you to do this task." Here, with the personal request (the "human touch"), as opposed to the broad request for volunteers (the "institutional touch"), the costs of saying no become high. This is so because saying no to an individual request (especially a personal one made with the preface, "the institution really needs you for this") presents a high risk of being interpreted as an affirmative anti-citizenship statement.

The question is, how does this dynamic operate with respect to outsiders? As we have said, outsiders who perceive that negative stereotypes apply to them have greater than average incentive to focus on advancement tasks. The problem for the outsider, however, is that these same stereotypes place pressure on the outsider to say yes to lumpy citizenship tasks. [FN37] If she says no to the *132 "we-really-need-you" / "this-is-important-to-the-institution" request, there is a risk that she will have confirmed the anti-citizen stereotype that the outsider believes the senior decision makers already hold. Thus, contrary to the inclination to avoid lumpy citizenship tasks, the outsider is, on average, more likely to agree to perform them than are the insider colleagues. To be sure, insiders who say no to lumpy tasks negatively signal as well. Unlike with outside employees, however, there is no confirmation of a negative stereotype.

What this suggests, at first cut, then, is that outsiders, when asked, are more likely than insiders to say yes to lumpy tasks. However, there is another equally important dynamic: Insiders are more likely than outsiders to request resources--institutional "goodies"--from their employer. We discuss this latter problem in the context of squeaky wheel employment cultures.

3. The Squeaky Wheel System

a. The Nature of the System

A common characteristic of multi-tasking workplaces is that goodies, such as trips to seminars, exemptions from unpleasant work, access to good work, a better secretary, a new computer, or even a bonus, often have to be requested from the employer. The employer gives each employee a basic level of support, but anything above that level is provided on a "who asks" basis. If employees do not ask, they do not receive. The employer only has a limited number of extra goodies and if everyone asked there would not be enough to go around. The system works, however, because everyone does not ask. Presumably, some people do not ask because they do not need or do not want the extra goodies. However, many people who do not ask are deterred by the social cost of asking-- being perceived as greedy, selfish, and uncollegial. After all, in the short term, one person receiving extra goodies generally means that there is less available for the other employees. [FN38] For example, if one employee receives *133 funding for a seminar, there will be less money available for the other employees.

As with the requests on lumpy tasks, the squeaky wheel system works best in a low information environment with risk averse employees. If every employee knows exactly what extra goodies the others are receiving, individual employees are not going to be shy about asking for favors; this is especially true if it is clear to them that they have been receiving less than the others. To continue the example from the preceding paragraph, if an employee knows that all her colleagues have been funded on their seminar trips, she is unlikely to hesitate to ask for a trip for herself. Conversely, she is less likely to ask when she does not know how much funding the others have received. She could ask the others, but she is not sure that they will give her accurate information. Keep in mind that her receiving more means less for them. To the extent that the institution would prefer to under-allocate these extra goodies, the system works best in low information environments where employees do not have a clear picture of how many of these goodies the others are receiving. Risk averse employees are going to err on the side of caution so as not to appear too greedy. And when there are favored employees whom the institution wants to succeed, institutional decision-makers can pull them aside and inform them that there will be no negative consequences if they request certain goodies.

b. Outsiders in the Squeaky Wheel System

Outsiders who perceive there to be negative stereotypes of them are likely to lose out in such a system in two related ways. First, the system works best for those who have inside information about what, and what not, to demand of an institution. If an employee knows what she can ask for without substantial costs (i.e., the kinds of resources that are given away easily, "low cost requests") and the kinds of requests that should not be made (i.e., the resources that, if asked for, create an immediate stigma, "high cost requests"), she is already in a good institutional position. The problem for outsiders is obtaining this information.

Of course, this is a problem for insiders as well. Indeed, any employee who actually seeks information about high cost and low cost requests risks creating the impression that she is a greedy person trying to game the system. But it is likely that insiders are going to have to seek out this information less often *134 than outsiders. Given the identity-based ways in which informal workplace networks get established, [FN39] and the identity demographics of law firms and law faculties, [FN40] junior insiders are more likely than junior outsiders to benefit from an interaction with a senior in which the senior pulls the junior into the senior's office and, without being asked, says something like: "This is how things work here, and X is what you should ask for. And, by the way, whatever you do, don't ask for Y." In the kinds of low information environments we are describing, outsiders, quite typically, have to formally request information about what resources to ask for. The first difficulty for an outside employee in a squeaky wheel system, then, is in obtaining information about low cost and high cost requests.

The second difficulty is in requesting the goodies themselves. With respect to this difficulty, there are two concerns that outsider employees might have. For one thing outsiders might fear that because of stereotypes, the insider employer will interpret the request for extra goodies as a sign of greed or lack of collegiality. To the extent that these resources are productive assets, such as a bonus, much needed leisure time, or a trip to a seminar, not receiving them diminishes the likelihood that the outsider will succeed.

For another, outsiders might worry that requesting additional resources creates a bargaining situation in which they are vulnerable *135 to a request from the employer that they (the outsiders) take on extra lumpy citizenship tasks. Concretely, the employer may respond to an outsider's request for resources with an explicit or implicit quid pro quo: "You [outsider employee] need extra goodies; we [the institution] need more people to perform lumpy citizenship tasks." Because of stereotypes, the outsider employee may feel pressured to accept the terms upon which the employer is prepared to grant her request for additional resources. She may worry that, if she responds to the employer's quid pro quo with something like, "forget it," the employer will perceive her as selfish and anti-institutional--a person who wants resources from, but who is unwilling to give resources back to, the institution. An outsider's awareness of this dynamic, and her more general concern about the possibility that squeaking the wheel is potentially negative stereotype- confirming, creates a disincentive for her to ask for additional resources.

Thus far, we have argued that, because of stereotypes, outsider employees are less likely than insider employees to both say no to certain less desirable assignments, and to "squeak the wheel" for valuable resources. This suggests that the presence of stereotypes in the workplace operates as a structural barrier to the success of outsider employees. One question that emerges from this directly implicates the employer. Assuming that employers are aware of the problem described, why would they not alter their workplace cultures and practices to eliminate it? Presumably, rational profit maximizing employers gain from having their outsider employees succeed. Notwithstanding this intuition, we argue in the next Section that rational, profit maximizing employers are likely to exploit, rather than ameliorate, the outsider vulnerabilities we have described.

IV Insider Incentives

Insider employers who perceive outsider vulnerability have an incentive to exploit it. With respect to the allocation of work, for example, insider employers may be more likely to ask outsiders to perform lumpy citizenship tasks because outsiders are more likely to say yes. This saves the decision maker time and resources. Not only does the decision maker have to expend less in terms of search costs, but also the outsider (because of stereotypes) is less likely than an insider to ask for any favors in return *136 for having performed the lumpy task. [FN41] In this

sense, singling out outsiders to perform lumpy tasks is both efficient (outsiders are likely to say yes) and cost-effective (without any quid pro quo).

One may wonder whether the insider incentives to exploit outsider vulnerabilities is as strong as we suggest. A skeptic might point out, from an employee's perspective, that it would be counterproductive and inefficient to undermine one's employee's likelihood of success by, for example, over-allocating lumpy citizenship tasks to that employee. Absent explicit animus, are employers not likely to want their outsider employees to succeed (especially in environments where hiring "qualified" outsiders is said to be difficult)? This argument has a certain amount of intuitive appeal. Yet, there are several reasons to think that employers will exploit an outsider's vulnerabilities (and more particularly, exploit the fact that the employee is likely to say yes to work assignments) and be indifferent to the fact that the employee may not squeak the wheel for valuable resources.

A. Scarcity of Advancement Tasks

In certain institutions, for example big law firms, advancement tasks are scarce. In particular, on-the-job-training of associates by partners is not a widely available resource. [\[FN42\]](#) Further, because the institution needs to promote only a few employees to the next level, it only requires a few employees to do advancement tasks. In such an environment, the insider employer does not lose if a big group of its employees do not perform enough advancement tasks and, therefore, eventually do not get promoted. In fact, this is precisely the result the employer wants.

Scarcity of resources, in a more general sense, also helps to explain why an employer would not be overly concerned about the failure of some employees to squeak the wheel. To the extent that resources are scarce, it is a good thing, from an institutional perspective, that some employees are less likely to ask for them.

However, not all multi-tasking institutions have a scarcity of advancement tasks or utilize promotion processes through which only a small fraction of junior employees get promoted. Indeed, [*137](#) this may be one important way in which academic institutions differ from big law firms. But, even in the settings where there are enough advancement tasks to go around and the majority of employees are promoted, employers still have incentives to exploit outsider vulnerabilities. To appreciate why, assume that an institution's promotion process contains an element of competition (or relative, as opposed to absolute, evaluation) among its employees. Stipulate that the well-being of the institution requires that certain citizenship tasks be performed. Recall that, because citizenship tasks are only indirectly linked to promotions and pay, employees have an incentive to avoid them. Under these circumstances, the insider employer has to decide how and to whom to allocate the lumpy citizenship tasks. To the extent that the employer harbors negative stereotypes about the competence and worth of outsiders (i.e., it expects them to fail), it makes sense for the employer to impose the lumpy tasks on these outsiders. [\[FN43\]](#)

Importantly, this dynamic--the employer burdening the employees it expects to fail--operates in the context of squeaky wheel systems as well. To the extent the people who are less likely to ask for them (and hence are less likely to succeed) are those who the employer perceives to be less likely to succeed, the result is, again, a good one. Presumably, as a general matter, the employer will prefer to allocate institutional resources to employees it believes are most likely to succeed. [\[FN44\]](#) In this sense, the squeaky wheel system provides the employer with an indirect way to funnel resources to "favored" employees.

B. Invisible Outsiders

The possibility exists that even if the employer over-allocates work to an outsider employee, or even if that employee never squeaks the wheel for extra resources, she may still turn out to be a superstar and outperform her insider competition. To the extent that this is the case, the institution ends up with an outsider [*138](#) who it actually wants. Put differently, placing extra burdens on the outsider at the start (or having outsiders work with fewer resources) helps to ensure that the outsiders who win are superstars, and thus, from the employer's perspective, not like other outsiders. [\[FN45\]](#)

Tangible benefits accrue to the employer from having these outsider superstars. Outsider employees are scarce and senior outsider employees are even scarcer. To the extent that there are outsiders who manage to do enough advancement tasks despite having been assigned extra lumpy tasks, their superstardom is likely to be visible inside, rather than outside, the institution. The outside world has little or no ability to evaluate and verify an employee's performance of extra lumpy citizenship tasks. The lack of visibility outside the institution works to the institution's advantage because the senior outsider's relative invisibility protects against raids by other institutions. [\[FN46\]](#)

C. Screening

The final benefit from asking the outsider to perform a lumpy task relates to screening. Recall the assumption that insider employers view outsiders in terms of simplistic categories. Thus, certain employee communications--for example, that the institution's hiring processes are inherently biased--may enable the employer to confidently categorize an outsider employee as either "a bad employee, not worth investing in" or a "good" employee. An insider employee who produces this same communication is less likely to be viewed through this good/bad prism. In this respect the information the employer gains from asking an outsider employee to perform an "optional" lumpy *139 task (i.e., the nature of the employee's response to that request) enables the employer to categorize that employee quickly and easily. If, based on the employee's response, the employer perceives that the employee falls into the "bad" category early, then the employer can focus its resources on developing the other employees. [\[FN47\]](#) Insiders are not vulnerable to this cheap categorization. [\[FN48\]](#)

D. Legal Barriers to Exploitation

Current anti-discrimination law bars intentional discrimination on the part of an employer against members of certain outsider groups. The phenomenon we describe does not fit comfortably within this paradigm. The reasons are straightforward. The extra burden outsiders often take on will appear to have been taken on voluntarily. For example, the requests that the outsiders take on lumpy tasks were probably made with the caveat of "we really need you, but you should feel free to say no." Similarly, the failure of the outsider employees to ask for enough goodies in the squeaky wheel system can be attributed to the fact that the outsiders simply did not ask. The notion would be that if they had asked, perhaps they would have received the goodies.

Accordingly, we are skeptical that a court would pay attention to how stereotypes structure the interactional dynamics of the workplace such that outsiders are likely to say yes to lumpy tasks and not likely to squeak the wheel for extra resources. Nor do *140 we think courts will take note of the employer's incentives to exploit these vulnerabilities. To reiterate, the judge will likely conclude that the outsider chose to take on the extra burden or chose not to ask for goodies. Indeed, to the judge it may appear that: (1) the outsider employee simply exercised bad judgment in taking on more than she was capable of handling; and (2) not asking for help. Ironically, this finding would reinforce stereotypes that she (the outsider) was more likely to fail anyway. Such a scenario is a far cry from the paradigmatic discrimination cases that judges have in mind. The story we have told about stereotypes and conversations at work is not a story about animus. Thus, the threat of sanction under the current anti-discrimination law is unlikely to induce employers to institute structural changes to address the problems we have identified. [\[FN49\]](#)

E. Summary of Implications

First, outsiders who perceive that they are subject to stereotypes are vulnerable to personalized requests from employers that they perform lumpy citizenship tasks and to pressures that they not ask for too many goodies. As a result, they are more likely to say yes to the lumpy tasks and less likely to ask for institutional goodies.

Second, the institution's decision makers who perceive the foregoing vulnerabilities of the outsiders have incentives to affirmatively exploit them. In other words, there is a rational economic reason to expect discrimination. Outsiders are not only more likely to say yes to lumpy citizenship tasks, they are also more likely to be asked. This is likely to be so because: (1) outsiders are more likely to say yes to disconfirm negative stereotypes;

(2) outsiders are susceptible to quick categorization (if they say no, it is easy to put them into the "bad" category); and (3) to the extent that citizenship tasks have to be done by someone, the employer would rather that the outsiders perform them, since the employer may believe that outsiders are less likely to succeed anyway.

Third, as a result of taking on too many lumpy citizenship tasks *141 and/or failing to ask for goodies, outsiders will have a higher rate of failure than insiders. This in turn will serve to confirm stereotypes that insiders are likely to have held at the outset.

Fourth, anti-discrimination law in its current form will not deter such behavior. If judges are unlikely to interpret anti-discrimination to manage the workplace problem described, it makes sense to explore whether and to what extent institutional solutions are available.

F. Possible Solutions

The past few years have seen a veritable explosion in legal scholarship on the subject of social norms. One observation has been that the threat of social sanction can serve as an effective mechanism to shape behavior under certain conditions, most notably in small cohesive group settings. [FN50] Although many workplace environments do not satisfy the "small cohesive group setting" condition, social norms serve as a valuable and supplemental incentive mechanism, even in larger and more heterogeneous settings, to induce employees to perform certain types of tasks.

This observation is not new to labor economists, sociologists, and organizational theorists who have long observed that things like guilt, peer pressure, and the fear of being shamed, play an important role in inducing employees to exert effort in certain workplace settings. [FN51] The story we tell bears this out. The problems identified in this Article are, at root, problems that arise because of the disproportionate effect that incentive systems that are partially or wholly based on social pressures can have on outsiders; specifically, outsiders who perceive that they are subject to negative stereotypes about personal characteristics like loyalty, team spiritedness, and trustworthiness. [FN52] Indeed, we *142 go further and argue that employers have an incentive to exploit the extra vulnerability that outsiders have in workplaces that use, among other things, a social norm based incentive system.

But let us move away from that cynical view of employers. Assume that employers are well-meaning, do not want to systematically disadvantage their outsider employees, and are willing to bear some costs in order to make their workplaces fairer to outsiders. What might these well-meaning employers do to tackle the problems identified?

The obvious solution is to remove the use of social norms as an incentive mechanism. The problem with that, however, is that it is difficult to get people to do citizenship tasks without a social norm based enforcement system. The employer could mandate that every employee take on a certain number of these undesirable tasks (and similarly, one could give everyone a fixed number of goodies). In effect, this would render the workplace a "no bargaining" system. [FN53] But getting employees to take on citizenship tasks is only half of the battle; the other half is inducing employees to work hard on them. Without an enforcement mechanism, it is likely that the citizenship tasks will simply not get done or will be poorly performed.

While we may be stuck with workplace incentive systems that use an element of social pressure, they can be structured to ameliorate the problems identified. The largest costs to outsiders are those costs that arise as a result of not being able to say no to certain questions asked by the employer and not being able to ask the employer for certain things (information or other goodies). These costs result from a fear of confirming the employer's pre-existing negative stereotypes. Outsiders may also take affirmative acts in order to create positive impressions. But as behavioral theorists observe, it is the fear of loss that generally has the greatest impact on behavior. [FN54] To the extent that an employer *143 wants to address this problem, it should take steps to soften the negative signal that is sent by the outsider when he or she says no or asks for a goodie. In formal terms, the employer could set up rules that either impair the ability of employees to send signals or tie the employer's own hands in terms of its ability to screen on the basis of employee statements and actions. [FN55] As explained below, this translates to altering the social meaning of employee actions.

How an employer might soften the negative signal sent by the outsider will depend on context. Specifically, the employer's action depends on factors such as the employer's credibility and the cooperation from other employees. But the general idea relates to one that has been put forward by a number of scholars who have observed that law can have expressive value. [FN56] The point is that the government can alter behavior by enacting laws (or even funding advertising campaigns) that change the social meaning of certain acts. For example, making the use of certain drugs illegal adds an extra cost to the person who uses drugs (even if there is no enforcement) in that others will see this person not just as someone who uses drugs, but also as a lawbreaker. By making drugs illegal, the government has altered the social meaning of the act of doing drugs. [FN57] Along these lines, then, it should be possible for the employer to alter the meanings of certain conversations that would ordinarily result in high costs to outsiders. The following examples illustrate the point.

Example 1: Take a workplace with lumpy citizenship tasks that have to be allocated. The employer could provide the employees with information on who has done how many tasks and what their minimal obligation with respect to these tasks is. Thus, the employer could make a general announcement of the following type: "Junior employees are under no obligation to do lumpy tasks. Those tasks are the burden of the senior *144 employees. To the extent a junior employee wishes to take on such a task, that employee must volunteer." To the extent the announcement is credible, junior outsider employees will feel a reduced pressure to say yes (even when explicitly asked whether they would like to volunteer). What would help even more is clear information to all about what other employees are doing so that outsider employees do not fear that they are doing less than the norm.

It bears mention, however, that this norm change would not render insiders and outsiders similarly situated with respect to their perceived bargaining power to decline assignments or to request goodies. Stereotypes will still be at work. Indeed, even within an institution that makes explicit the norm that juniors are not expected to perform citizenship tasks, outsiders, so as to negate stereotypes, may still feel an extra pressure to volunteer. Still, the situation of the outsider is improved to the extent that he or she will not be saying yes out of a fear of confirming the stereotypes.

Example 2: Alternatively, in the lumpy task environment, the employer could set up rules such that there is a maximum amount of time on citizenship tasks that any employee is allowed to perform (for example, during a one month period). Above that number, those who want employees to perform those tasks have to explain why and how these extra tasks are not hurting the employee's ability to perform on advancement tasks and hence the employee's prospects for promotion. So long as the system was enforced rigorously, it would enable outsider employees to say, "I'd absolutely love to work on that project, but I have reached my threshold," without the fear that the statement would result in a negative signal. Once again, there is still the possibility (indeed, it is likely) that outsiders will spend more time on lumpy tasks than their insider colleagues, but at least the problem is ameliorated.

Example 3: Take a workplace where there are a limited number of goodies available (trips to conferences, extra research money, etc.). Instead of obligating employees to go to the employer and ask for these as in the squeaky wheel system, the employer could give every employee a limited pool from which goodies can be drawn. This way, the employees would not fear a negative signal when they asked for something because they would be taking from the resources that had already been allocated *145 to them, as opposed to from the common pool. Alternatively, the employer could provide the employees with clear information about what goodies other employees were receiving and could specify what amounts it was willing to give everyone; additionally, the employer would identify goodies that were "extra" and required special reasons. Outsiders might not ask for the "extra" goodies, but at least the disadvantage with respect to the basic allocation of goodies would be removed.

Example 4: In all of the environments described above, the employer could also set up intermediaries to conduct difficult conversations. Employees could have formal mentors or institutional guardians who would step in and say: "No, Jennifer has done too many lumpy tasks already. I think that it is time for her to do more advancement tasks. Why don't you ask Michael to do this lumpy task?" This way Jennifer would not suffer the negative signal because it is her mentor (or mediator) who is saying no. [FN58] Similarly, the mediator could ask for goodies for her mentee without sending a negative signal. [FN59]

Conclusion

The focus of this Article has been on the extra constraints that outsiders often face in conducting workplace conversations (saying yes or no to assignments; requesting resources) and the deleterious effect those constraints can have. It is our sense, however, that small changes on the part of institutions can substantially ameliorate the problems described. The key is that there be an awareness of the problems and a willingness to tackle them. Certainly, the institutional reforms we have provided are not exhaustive of how employers might address these problems. They are tentative and suggestive. Still, we hope that the examples are sufficiently specific and institutionally manageable to function as a useful starting point. [\[FN60\]](#)

[\[FN1\]](#). Acting professors of Law, University of California at Los Angeles. Please email us any comments and suggestions at either carbado@law.ucla.edu or gulati@law.ucla.edu. We are grateful to Ian Ayres, Richard Banks, Charles Calleras, Ann Carlson, Jody Freeman, Laura Gomez, Cheryl Harris, Tom Joo, Jerry Kang, Hillary Sale, Seana Shiffirin, Giovanna Tringali, Frank Valdez, Leti Volpp, and participants at this symposium, the Cornell Legal Theory and Feminism Workshop, and at a faculty workshop at the University of Iowa Law School for comments and/or communications about this Article. We owe a special debt to Martha Fineman and Kim Krawiec for having provided us with the impetus and encouragement to embark on this project. The essay is part of our broader project on examining the dynamics of workplace identity construction as applied to "outsiders" in high level service sector jobs. In particular, our focus is on the possible effects of stereotypes in altering the everyday strategic choices of outsiders in the workplace. By "outsiders" we mean members of those groups who have traditionally been excluded from high level jobs (at places like investment banks, law firms, management consultancies, and academic institutions) and these groups include women and racial minorities. For a discussion of insider/outsider dynamics within a particular racial group, see Devon W. Carbado, [Black Rights, Gay Rights, Civil Rights](#), 47 *UCLA L. Rev.* 1467 (2000).

[\[FN1\]](#). 517 U.S. 806 (1996).

[\[FN2\]](#). *Id.* at 808.

[\[FN3\]](#). *Id.*

[\[FN4\]](#). *Id.*

[\[FN5\]](#). *Id.* at 808-09.

[\[FN6\]](#). *Id.* at 812-13.

[\[FN7\]](#). For a discussion of how racial profiling is implicated in traffic stops, see Angela J. Davis, [Race, Cops, and Traffic Stops](#), 51 *U. Miami L. Rev.* 425 (1997). Davis refers to studies in New Jersey and Maryland where over 70% of the motorists stopped were black. *Id.* at 431-32. She observes that, in a certain sense, "discriminatory police stops are the first in a chain of racially lopsided decisions by officials in the criminal justice process." *Id.* at 442; see also Anthony C. Thompson, [Stopping the Usual Suspects: Race and the Fourth Amendment](#), 74 *N.Y.U. L. Rev.* 956 (1999) (critiquing with social science research the Supreme Court's decision in *Whren* as a consequence of the Court's analysis of racially motivated seizures in *Terry v. Ohio*, 392 U.S. 1 (1968), and subsequent cases); David A. Sklansky, [Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment](#), 1997 *Sup. Ct. Rev.* 271, 308-23 (arguing that courts have ignored how race affects traffic-stop policing).

For a discussion of racial profiling in other contexts, see Kathryn K. Russell, " [Driving While Black](#)": Corollary Phenomena and Collateral Consequences, 40 *B.C. L. Rev.* 717, 717-26 (1999) (examining how being black in the

United States is widely accepted as a "risk factor" for criminal behavior, justifying police detainment of African Americans in all kinds of everyday activities); Neil Gotanda, Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee, 47 *UCLA L. Rev.* 1689 (2000) (examining the use of racial profiling in the highly publicized espionage investigation against an Asian American scientist); James L. Fennessy, *New Jersey Law and Police Response to the Exclusion of Minority Patrons from Retail Stores Based on the Mere Suspicion of Shoplifting*, 9 *Seton Hall Const. L.J.* 549 (1999) (discussing racial profiling in the context of "retail shoplifting countermeasures").

[FN8]. For a racial critique of the Fourth Amendment, see generally Devon W. Carbado, *E-racing Suspicion*, 53 *Stan. L. Rev.* (forthcoming 2001).

[FN9]. For relevant discussions, see Neil Gotanda, A Critique of "Our Constitution is Color-Blind," 44 *Stan. L. Rev.* 1 (1991) (arguing that a color-blind interpretation of the Constitution legitimates and maintains the social, economic, and political advantages that whites hold over other Americans); Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707 (1993) (examining racial identity as a form of property acknowledged and protected in American law and the distorting effect this has on affirmative action doctrine); Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 *Harv. L. Rev.* 1331 (1988) (arguing that antidiscrimination laws has largely succeeded in eliminating the symbolic manifestations of racial suppression, but has allowed the perpetuation of black Americans' material subordination); Kenneth L. Karst, Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation, 43 *UCLA L. Rev.* 263 (1995) (observing how American judges and officials do not recognize the blurring of identity categories by determining the race or sexual orientation of individuals as issues of "fact," thus both reflecting and reinforcing status-ordering of social groups).

[FN10]. For a discussion of "Driving While Black" and pretextual traffic stops, see Russell, *supra* note 7, at 717-22; David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 *J. Crim. L. & Criminology* 544 (1997). For recent news stories about the "Driving While Black" and other racial profiling problems around the United States, see Jeffrey Goldberg, *The Color of Suspicion*, *N.Y. Times*, June 20, 1999, at 51; Debra Dickerson, *Racial Profiling: Are We Really Equal in the Eyes of the Law?*, *L.A. Times*, July 16, 2000, at M1.

[FN11]. For an examination of the difficulties of litigating racial profiling charges, see Phyllis W. Beck & Patricia A. Daly, State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns, 72 *Temple L. Rev.* 597 (1999). The authors note that supporters of pretextual stops by the police claim the problem should be addressed by the Equal Protection Clause of the Constitution instead of under Fourth Amendment privacy protections. They argue that a racial profiling claim under the Equal Protection Clause is "difficult, if not impossible" to prove because it necessitates obtaining department-wide files like arrest statistics, which are permitted only when the accused has established that the police agency involved has an officially sanctioned or "de facto" policy of selective enforcement against minorities. They also note that the Supreme Court has declined to state what remedy victims of racial profiling should be entitled to receive. Id. at 612; see also David Crump, Evidence, Race, Intent and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases, 27 *Hofstra L. Rev.* 285 (1998); Abraham Abrahamovsky & Jonathan I. Edelman, Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared, 63 *Alb. L. Rev.* 725 (2000).

[FN12]. For an introduction to the basic concepts of signaling and screening, see Douglas G. Baird et al., *Game Theory and the Law* 122-58 (1994).

[FN13]. For recent treatments of the incentives to signal personal characteristics, see Gertrud M. Fremling & Richard A. Posner, *Market Signaling of Personal Characteristics* (University of Chicago, John M. Olin L. & Econ. Working Paper No. 87, 1999) (available at http://papers.ssrn.com/paper.taf?abstract_id=193490); Gertrud M.

Fremling & Richard A. Posner, Status Signaling and the Law, With Particular Application to Sexual Harassment, 147 U. Pa. L. Rev. 1069 (1999).

[FN14]. See Jeffrey Evans Stake, Mandatory Planning for Divorce, 45 Vand. L. Rev. 397, 427 (1992). Lawrence Lessig tells an analogous story of how, in Budapest, a passenger's putting on a seatbelt was often interpreted as an insult to the driver. See Lawrence Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 943, 952 (1995). The result, of course, is that passengers are likely to be more reluctant to put on seatbelts than they would be otherwise. Lessig's article looks at the effects that social meaning can have on action and suggests that government can play an important role in regulating social meaning. Id. at 957. This Article focuses on the point that the social meaning of speech (or action) can be quite different depending on who is performing and who is interpreting.

[FN15]. In game theoretic terms, one would say that conversations are especially important under conditions where one party (typically, the employee) possesses "private, nonverifiable information that neither the other party nor any third party can acquire directly." See Baird et al., *supra* note 12, at 122.

[FN16]. The dynamic relationship between perceptions and behavior has been extensively discussed by, among others, Judith Butler, Erving Goffman, and Timur Kuran. See Judith Butler, *Bodies That Matter* (1993); Erving Goffman, *The Presentation of Self in Everyday Life* (1973); Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification* (1995). Kuran, in particular, provides an extensive discussion of how social pressures can cause individuals to express false preferences.

[FN17]. The general concept is developed more fully in Devon W. Carbado & Mitu Gulati, Working Identity, 85 Cornell L. Rev. 1259 (2000).

[FN18]. See Jon Hanson & Nicholas Kysar, Taking Behavioralism Seriously: The Problem of Market Manipulation, 74 N.Y.U. L. Rev. 630 (1999) (making the point that, in the context of behavioral anomalies, profit maximizing rational actors will seek to exploit the vulnerabilities of others).

[FN19]. Along these lines, Ian Ayres, in a now-classic paper, found that car dealers made white men better (lower) initial offers than minority men and women and were also more willing to bargain with the former group. See Ian Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harv. L. Rev. 817, 827-36 (1991). In a follow-up study to the initial piece, Ayres looked carefully at possible reasons for the disparate treatment and found evidence suggesting that one reason may have been that sellers perceived that the costs of bargaining were higher for women and minorities. See Ian Ayres, Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause, 94 Mich. L. Rev. 109, 124-26 (1995) [hereinafter Ayres, *Further Evidence*]; cf. Carol M. Rose, Bargaining and Gender, 18 Harv. J.L. & Pub. Pol'y 547 (1995) (suggesting that certain pervasive assumptions about women--for example, that women have more of a "taste" for cooperation than men--results in women being systematically disadvantaged in the bargaining process). See also Jerry Kang, *Cyber-Race*, 113 Harv. L. Rev. 1131 (2000) (suggesting that cyberspace should be developed to allow for a variety of commercial transactions in which people would "cloak" their racial identity to avoid the bargaining power problem Ayres identifies).

An element that may be missing from the Ayres story, which is understandable given the nature of audit studies where the white male testers behave in identical fashion to the women and minority testers, is that women and minorities may actually be less willing to bargain. A reason for this may be that the signal that hard and aggressive bargaining sends is different when it comes from a white man (normal behavior) than when it comes from a woman (hostile "bitch") or a minority man (angry minority man). Sending those signals may actually increase the cost of bargaining for the woman or minority man. For example, the dealer may think that the "angry black man" types are less likely to be able to hold on to jobs and are, therefore, higher credit risks.

[FN20]. For a classic critique of the extent to which antidiscrimination law is structured by notions of causation and intentionality, see Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in *Critical Race Theory: The Key Writings that Formed the Movement* 29 (Kimberle Crenshaw et al. eds., 1995).

[FN21]. The problem of "unconscious" racial discrimination has been extensively discussed using various angles. Charles Lawrence notes that the cultural belief system in the United States has made all Americans racist to the extent the system influences individuals, but most are unaware of their racism and so a large part of racial discrimination is influenced by "unconscious racial motivation." See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 322-24 (1987). In another article examining the cognitive mechanisms behind unconscious racial discrimination that decision makers "neither observe nor control," the author notes that this may cause decision makers to "distort the application of neutral and reasonable criteria used to evaluate the employee." For example, a supervisor may unconsciously place more weight on spelling or grammar errors by a Latino clerk than on those by an Anglo clerk. Amy L. Wax, *Discrimination as Accident*, 74 *Ind. L.J.* 1129, 1131 (1999); see also Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *Stan. L. Rev.* 1161 (1995) (arguing that Title VII jurisprudence is inadequate to remedy the subtle, often unconscious form of bias it was intended to remedy); Lynell George, *Facing the Problem: USC Law Professor Jody David Armour Discusses How Yesterday's Blatant Discrimination is Giving Way to "Negrophobia," Today's Subtler Form of Bigotry*, *L.A. Times*, Feb. 27, 2000, at E2.

[FN22]. This might be referred to as the speaking meaning problem, in which the interpreter reads the speaker's comments as suggesting something other than what the speaker means for her comments to say. See generally Simon Blackburn, *Spreading the Word: Groundings in the Philosophy of Language* 110-140 (1984) (discussing linguistic meaning generally and how it relates to speaker meaning); Robert M. Martin, *The Meaning of Language* 65-83 (1994) (same).

[FN23]. Behavioral theorists suggest that employers are likely to go beyond interpreting ambiguous information through the lens of their prior assumptions to reading ambiguous evidence as confirming their prior conceptions. See Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 *N.C. L. Rev.* 707, 752 n.162 (2000) (citing studies). This finding of the behavioralists is, of course, in tension with the standard Bayes rule requirement that one's beliefs remain unchanged after observing an action that conveys no new information. See Baird et al., *supra* note 12, at 131.

[FN24]. This perception has been most closely examined in the sexual harassment context. Studies show that "many men tend to have the attitude that mild forms of sexual harassment such as 'suggestive looks, repeated requests for dates, and sexist jokes, [are] harmless social interactions to which only overly-sensitive women would object.'" J. Tod Hyche, *Comment, The Reasonable Woman Standard in Sexual Harassment Cases. Is it Reasonable?*, 24 *Cumb. L. Rev.* 559, 568 (1993/1994) (quoting Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 *Yale L.J.* 1177, 1207 n.110 (1990)); see also Ehrenreich, *supra*, at 1208; Richard Cohen, *What's Harassment? Ask the Woman*, *Wash. Post*, July 5, 1988, at A19.

[FN25]. See Carbado & Gulati, *supra* note 17, at 1291-93 (discussing the extent to which efforts to repudiate one set of stereotypes can end up confirming another set).

[FN26]. That we subject literal meaning and negative signaling to separate treatment is not intended to suggest that these are separate and independent phenomena. Both will likely be implicated at the same time. For example, the female employee in the above hypothetical may be concerned not only about being misinterpreted ("she is not

engaged in a genuine critique of the institution, but is playing identity politics"), but also about being categorized ("her critique shows that she is one of those hypersensitive women").

[FN27]. See Catherine R. Albiston & Laura Beth Nielsen, Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls, 38 *How. L.J.* 473 (1995). In Albiston and Nielsen's article, the authors explain that black women are caught between two pervasive stereotypes. The first casts them as lazy "Welfare Queens" having more children in order to receive more benefits at the expense of taxpayers. The other frames black women who are the main wage earners in families as "matriarchs" who cause the breakdown of black families by replacing the male figure as head of the household and failing to give their children sufficient attention. *Id.* at 485-86; see also Pamela J. Smith, Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority, 6 *Wm. & Mary J. Women & L.* 53 (1999) (noting stereotypes of black women as either threatening "welfare mother," or "good mother/wife/daughter" types, while at the same time black women are subjected to a presumption that they are incompetent).

[FN28]. For discussion of assumptions and attitudes towards women in the workforce and conflict with traditional notions of the family, see Marion Crain, Feminizing Unions: Challenging the Gendered Structure of Wage Labor, 89 *Mich. L. Rev.* 1155 (1991). The author observes:

Because complete loyalty to the employer and the job is the male norm in the public sphere, attempts by women to accommodate the two spheres are perceived as evidencing a lack of commitment to the work world. Thus, women workers are caught in a catch-22: they are perceived as aggressive and unfeminine if they do not assume primary responsibility for child care and family obligations, and as uninterested in market work if they attempt to juggle both roles.

Id. at 1179 (footnote omitted); see also Joan Williams, Implementing Antiessentialism: How Gender Wars Turn Into Race and Class Conflict, 15 *Harv. BlackLetter J.* 41 (1999) (examining how the work/family conflict often pits women against each other); Kathryn Branch, Note, Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy, 1 *Duke J. Gender L. & Pol'y* 119 (1994); Jerry A. Jacobs & Kathleen Gerson, Rethinking Law in the Twenty-first Century Workplace: Toward a Family-Friendly, Gender-Equitable Work Week, 1 *U. Pa. J. Lab. & Emp. L.* 457 (1998).

[FN29]. For recent treatments of screening in the literature on discrimination, see Drucilla Cornell & William W. Bratton, Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish, 84 *Cornell L. Rev.* 595, 646-53 (1999); Bradford Cornell & Ivo Welch, Culture, Information and Screening Discrimination, 104 *J. Pol. Econ.* 542, 556-58 (1996). The authors of these articles use the concept of screening somewhat differently than we do. They use the concept to make the point that insiders are likely to favor associating with others of their own type because they believe that it is easier to judge people of the same type. However, the underlying premise--that insiders are likely to have a nuanced view of the categories of insiders, but a simplistic and crude view of the categories of outsiders--is the same in both our work and theirs.

[FN30]. The gender gap in the taking on of family responsibilities is described at length in Selmi, *supra* note 23.

[FN31]. See George P. Baker et al., Compensation and Incentives: Practice vs. Theory, XLIII *J. Fin.* 593, 598-99 (1988) (observing that where evaluation of performance would allow for significant amounts of bias, those performances (and evaluations) tend not to be directly tied to compensation and promotion).

[FN32]. See Ann Carlson, Recycling Norms (2000) (unpublished draft, on file with authors) (describing the literature on the different mechanisms of social norm enforcement); see also Robert D. Cooter, Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, 144 *U. Pa. L. Rev.* 1643, 1661-65 (1996) (suggesting that social norms are not effective unless they are internalized as preferences); Richard H. McAdams, The Origin, Development, and Regulation of Norms, 96 *Mich. L. Rev.* 338, 374- 81 (1997)

(emphasizing that, in addition to internal sanctions such as guilt, external sanctions such as shaming are an important inducement mechanism as well); Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 *Law & Soc'y Rev.* 157 (2000) (providing an overview of the literature on social norms).

[FN33]. See Bengt Holmstrom & Paul Milgrom, *The Firm as An Incentive System*, 84 *Am. Econ. Rev.* 972 (1994); Bengt Holmstrom & Paul Milgrom, *Multitask Principal-Agent Analyses: Incentive Contracts, Asset Ownership, and Job Design*, 7 *J.L. Econ. & Org.* 24, 35-38 (1991).

[FN34]. See, e.g., Patrick J. Schlitz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 *Minn. L. Rev.* 705, 706, 751 & n.173 (1998) (describing the importance attached to scholarship in law school faculty promotion decisions).

[FN35]. These characteristics of "information control" are described in David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 *Va. L. Rev.* 1581, 1665-69 (1998).

[FN36]. In addition to taking additional time and effort, lumpy tasks will also often put the employee in unavoidable, high conflict situations. For example, take the hiring committee at a firm. Discussions about credentials, what they mean, and how they should be weighed, are often scenes of conflict. The junior employee stuck on such a committee is almost inevitably going to have disagreements with the others (some of whom will be senior members of the institution) and those disagreements can destroy relationships that could perhaps have otherwise been finessed.

[FN37]. There are a second set of pressures that may operate on outsiders vis-a-vis a particular set of lumpy tasks such as employee recruitment. These are the pressures of being a "token," and come in two forms. First, the employer may have hired the outsider with the expectation that she would perform the role of the "good" outsider who will help the employer fill the need for an outsider presence on things like recruiting committees (or, at least, the outsider employee may perceive that she was hired because she was thought of as being of the good type). Here, to the extent the outsider says no to the lumpy task, she risks sending the message to the employer that she is of the wrong outsider type. Cf. Elizabeth Chambliss & Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter's Legacy*, 25 *Law & Soc. Inquiry* 41, 42-48 (2000) (describing the literature on tokenism that has developed since Rosabeth Moss Kanter's classic case study, *Men and Women of the Corporation* (1977)). Second, the outsider might feel an obligation to her outsider group (or to other outsider groups) to ensure that outsiders are treated fairly in the recruiting and hiring process. The same dynamic may apply in the mentoring of junior outsiders (or outsider students). As a recent article authored by Lila Coleburn and Julia Spring puts it:

The professor who is different in any way--a woman, a minority, disabled, gay--is likely to be particularly anxious about burdens of being conspicuous. How can she do her writing, out-Kingsfield Kingsfield, as she knows she must be respected, and still have time to attend to the special care students will expect of her? Those students who identify with her, those who surround her after class or call her in distress, will be bitterly disappointed if she shields herself from their needs to attend to her own.

Lila A. Coleburn & Julia C. Spring, *Socrates Unbound: Developmental Perspectives on the Law School Experience*, 24 *Law & Psychol. Rev.* 5, 18 (2000).

[FN38]. The pool of goodies is, in effect, a common pool resource. And, as researchers have observed, social norms are often used to regulate the use of common pool resources. See, e.g., Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 *J. Econ. Persp.* 137 (2000).

[FN39]. For a discussion of informal networks within the workplace, often crucial to career advancement, see

generally Cynthia Fuchs Epstein et al., Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession; A Report to the Committee on Women in the Profession, The Association of the Bar of the City of New York, 64 *Fordham L. Rev.* 291 (1995) (exploring problems women have in forming informal networks as law firm associates); Herminia Ibarra, Race, Opportunity, and Diversity of Social Circles in Managerial Networks, *Acad. Mgmt. J.*, June 1995 (examining the barriers minorities face in creating effective social networks for career advancement in the managerial context); Patricia Digh, The Next Challenge: Holding People Accountable; Organizational Commitment Towards Diversity, *HR Mag.*, Oct. 1998, at 63 (discussing how to hold accountable those who exclude those of different cultural backgrounds from social networks).

[FN40]. For self-reported statistics on the percentage of women and minorities among major law firm associates, see <<http://www.infirmation.com/shared/insider/payscale.tcl>>. A recent article referred to statistics from the Association of American Law Schools that found in 1997-98, that 90% of tenured law professors were white, 4.9% were black, 2.5% were Latino, and 1.2% were Asian. Of faculty members hired in 1990 and 1991, 80.6% of white, male law professors and 57.1% of minority law professors won tenure, while 61.3% of women received tenure, compared with 72.4% of men. Nina Willdorf, Female and Minority Law Professors Said to Need Mentors, *Chron. Higher Educ.*, Jan. 21, 2000, at A18.

[FN41]. On the dynamics of reciprocity more generally, see Ernst Fehr & Simon Gächter, Fairness & Retaliation: The Economics of Reciprocity, 14 *J. Econ Persp.* 159 (2000).

[FN42]. See Wilkins & Gulati, *supra* note 35, at 1608-11.

[FN43]. See Paul Milgrom & John Roberts, *Economics, Organizations and Management* 365 (1992).

[FN44]. See *id.* The model underlying the statement in the text is one in which the firm obtains a noisy signal about workers' relative abilities by observing who wins each round in a two round game (at the end of which the better worker is promoted). Here, it is optimal to bias the second round in favor of the first round winner if the firm learns nothing useful from the first round loser winning the second round. For purposes of the discussion in the text, the "first round" is the stereotyping.

[FN45]. Our claim is not that all lumpy citizenship tasks are performed by outsiders. Under those types of conditions, it would be obvious discrimination of a kind that a court (and employees) would likely find problematic. Instead, the claim is that outsider employees are likely to perform more than their share of lumpy citizenship tasks. Further, the dichotomy between citizenship tasks and advancement tasks is nowhere near as simple as we posit. For example, take a task such as membership of a law firm's hiring committee. It may be a burdensome lumpy citizenship task for a junior employee who is attempting to learn how to run deals, but this same task may be an advancement task for a senior employee who is competing against other senior colleagues for status and political power.

[FN46]. See Paul Milgrom & Sharon Oster, Job Discrimination, Market Forces, and the Invisibility Hypothesis, 102 *Q.J. Econ.* 453, 455-58 (1987) (discussing the potential for discriminating against qualified candidates for promotion because an employer can earn excess profits on workers so long as their abilities remain hidden from other potential employers).

[FN47]. One might ask whether or not the information that the employer receives is contaminated by the incentives of the employee to "act good" and say yes, even when her inclinations are to be "bad" and say no. The short answer is that it is. However, there are benefits to the employer nevertheless. First, even if the outsider employee is acting,

the employer succeeds in its primary purpose, which is to get someone to do the unpleasant lumpy task. Second, if the employer perceives that the employee is acting, the employer at least knows that this employee is willing to "act good" (presumably, not all employees will be willing to compromise their identity in this way). See Carbado & Gulati, *Working Identity*, supra note 17, at 1264-65 (discussing the pressures on outsider employees to compromise their identities to fit into the institutional culture of their workplace).

[FN48]. The discussion in the text uses the simplified assumption that a worker's "type" is exogenous and that the employer is attempting to determine that true type. In a more sophisticated model, where type is taken as endogenous, employers might give outsider employees more lumpy tasks so as to "make" them "good" employees. In other words, the notion would be that "acting" good on enough occasions would convert to "being" good. For a recent discussion of the assumptions of endogenous and exogenous preferences, see Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions*, 36 *J. Econ. Lit.* 75 (1998).

[FN49]. Scholars in other contexts have posited that the workplace choices of outsider employees are often a response to organizational constraints not of the employees' own making. See, e.g., Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 *Harv. L. Rev.* 1749, 1815-16 (1990); Selmi, supra note 23, at 739.

[FN50]. See Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991).

[FN51]. See, e.g., Eugene Kandel & Edward P. Lazear, *Peer Pressure and Partnerships*, 100 *J. Pol. Econ.* 801, 811 (1992). For an overview of the "social relations" literature, see Robert Gibbons & Michael Waldman, *Careers in Organizations: Theory and Evidence*, in *Handbook of Labor Economics* 2413-17 (Orley Ashenfelter & David Card eds. 1999).

[FN52]. An even more pernicious use of social norms that we do not explore is where employers foster (or tolerate) cultures of hostility toward outsiders so as to gain the benefit of insiders feeling like they are on the same "team." See J.M. Balkin, *Free Speech and Hostile Environments*, 99 *Colum. L. Rev.* 2295, 2319 (1999). That, in turn, allows the employer the benefit of insider employees doing a lot of "team work," but subjects the outsider employees to high costs. One might imagine, therefore, a highly sexist workplace where what makes the men feel a bond with each other is their common hostility (or contempt) for women colleagues.

[FN53]. At the conclusion of his second "Fair Driving" study, Ayres suggests that one solution to the problem of discrimination by dealers might be for the dealers to move to "no haggle" systems (such as the one used by Saturn). See Ayres, *Further Evidence*, supra note 19, at 871-72.

[FN54]. For a recent discussion of employee loss aversion and how certain employers might take advantage of it (along with other behavioral anomalies) in order to maximize their profits, see Kimberly D. Krawiec, *Accounting For Greed: Unraveling the Rogue Trader Mystery*, 79 *Or. L. Rev.* 301 (2000) (discussing workplace norms that may induce securities traders to take exorbitant risks that serve the particular employer's interests, but may have socially deleterious effects).

[FN55]. See Baird et al., supra note 12, at 135-36.

[FN56]. See, e.g., Robert Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 *Or. L. Rev.* 1 (2000); Richard McAdams, *Legal Symbols and Group Conflict*, 79 *Or. L. Rev.* 339

(2000); Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021, 2022 (1996); Dan M. Kahan, Social Influences, Social Meaning, and Deterrence, 83 Va. L. Rev. 349, 350-51 (1997).

[FN57]. See Richard A. Posner, Social Norms, Social Meaning, and Economic Analysis of Law: A Comment, 27 J. Legal Stud. 553 (1998).

[FN58]. The conversation mediator idea is described in Jennifer Gerarda Brown & Ian Ayres, Economic Rationales for Mediation, 80 Va. L. Rev. 323, 364-65 (1994).

[FN59]. All of these solutions have the side effect of benefiting insiders who, for whatever reason, are more likely to say yes to lumpy tasks and less likely to ask for goodies.

[FN60]. As part of our larger project, we are in the process of setting up and conducting a number of interview based case studies of high level workplaces that investigate the hypotheses set out here and in our prior work.

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