

# SHOWCASING DIVERSITY\*

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*Diversity initiatives are commonplace in today's corporate America. Large and successful firms frequently tout their commitments to diversity, sometimes appointing women and racial minorities to highly visible posts, including seats on their boards of directors. Why would a profit-minded firm go out of its way to engage in such behavior? One frequently voiced explanation is that by creating such diversity, firms send out a positive signal about their attributes: a firm's willingness to expend resources on diversity shows its commitment to workplace fairness and equality, which makes it more attractive to potential employees, customers, and financiers. This claim has considerable surface appeal not only as an explanatory thesis, but as a rationale that conveniently bridges the normative gap between corporate self-interest and the promotion of social justice. In this Article, we raise some difficulties with the theory of diversity-as-signal in terms of both its explanatory adequacy and its normative implications.*

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## INTRODUCTION

Large firms in the United States today appear to regard increasing the diversity of their workforces as an important goal.<sup>1</sup> Corporations like Verizon, Intel, and Walmart tout their diversity initiatives on their websites.<sup>2</sup> CEOs look to add diversity among senior managers, law firms seek to add diversity in their partnership ranks, and universities seek diverse candidates to install as deans and chancellors. Observers and analysts, meanwhile, stand ready to rank these institutions on these efforts—presumably to meet a marketplace demand for such information.<sup>3</sup> Diversity has become a matter of corporate strategy<sup>4</sup> and even of concern to financial markets.<sup>5</sup> Yet, at

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1. According to a recent survey of Fortune 500 companies, some ninety-five percent of those polled said that senior management viewed increasing workforce diversity as a “major goal.” *National Survey Reveals Workplace Diversity Is Critical in Attracting and Retaining Talent*, CUNA HUMAN RES. / TRAINING & DEV. COUNCIL (Oct. 1, 2009), <http://www.cunahrtdcouncil.org/news/3131.html>.

2. In an April 2010 news release, Verizon boasted that it had been named by *Diversity MBA Magazine* as “among the top companies for board of directors’ diversity” and that “[w]omen and people of color constitute nearly half of Verizon’s Board of Directors, and . . . nearly 60 percent of the company’s workforce.” *Verizon Ranked No. 4 on Diversity MBA Magazine’s List of Best Companies for Diverse Managers*, VERIZON NEWS CENTER (Apr. 20, 2010), <http://newscenter.verizon.com/press-releases/verizon/2010/verizon-ranked-no-4-on.html>. For websites containing similar content, see *Diversity*, WALMARTSTORES.COM, <http://walmartstores.com/diversity/> (last visited Feb. 21, 2011) and *Intel Diversity*, INTEL, <http://www.intel.com/about/companyinfo/diversity/index.htm> (last visited Feb. 21, 2011).

3. See, e.g., Sonia Alleyne & Annya M. Lott, *40 Best Companies for Diversity: They Want You!*, BLACK ENTERPRISE, July 2010, at 92, 94–100, available at <http://www.blackenterprise.com/diversity/2010/06/15/they-want-you/>; Luke Visconti, *The 2010 DiversityInc Top 50 Companies for Diversity*, DIVERSITYINC, June 2010, at 18, 18, available at <http://www.diversityinc-digital.com/diversityincmedia/201006#pg1>. The companies listed in these rankings frequently tout their high position in the rankings on their websites. See, e.g., *Black Enterprise Includes Marriott in Top “40 Best Companies for Diversity,”* MARRIOTT NEWS CENTER (June 29, 2010), <http://news.marriott.com/2010/06/black-enterprise-includes-marriott-in-top-40-best-companies-for-diversity.html>; *Black Enterprise Names MGM Resorts International to List of Nation’s “40 Best Companies for Diversity,”* MGM RESORTS INT’L (July 7, 2010), [http://www.mgmresortsdiversity.com/press\\_releases\\_07\\_17\\_10.asp](http://www.mgmresortsdiversity.com/press_releases_07_17_10.asp); *Burger King Corp. Named One of “40 Best Companies for Diversity” by Black Enterprise Magazine*, BURGER KING INVESTOR REL. (Aug. 27, 2010), [http://investor.bk.com/phoenix.zhtml?c=87140&p=irol-newsArticle&ID=1464427&highlight=](http://investor.bk.com/phoenix.zhtml?c=87140&p=irol-newsArticle&ID=1464427&highlight=;); *Toyota Named Among Best Companies for Diversity by Black Enterprise*, TOYOTA USA NEWSROOM (June 28, 2010), <http://pressroom.toyota.com/pr/tms/toyota-named-among-best-companies-161014.aspx>.

4. See, e.g., Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1590 (2001); Tristin K. Green, *Race and Sex in Organizing Work: “Diversity,” Discrimination, and Integration*, 59 EMORY L.J. 585, 595–97 (2010); Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCI. 960, 972–74 (1998).

the same time, ongoing research in social psychology suggests that negative attitudes toward members of racial minority groups are pervasive, persistent, and often imperceptible to the very individuals who possess them.<sup>6</sup> And looming in the background is uncertainty about the implications of recent developments in employment discrimination law for the legal permissibility of affirmative efforts to enhance workplace diversity.<sup>7</sup> So, what explains the contemporary enthusiasm for diversity?

One of the explanations given by corporate board members themselves is that diversity efforts send a positive message about their institutions—for example, that their companies are headed in the right direction, are socially responsible, or care about egalitarian norms and social justice.<sup>8</sup> Diversity is, according to this rationale, desirable as a *signal* of a socially upstanding corporation.<sup>9</sup>

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5. The Securities and Exchange Commission has recently mandated that companies disclose whether they consider diversity as a factor in selecting their board members. *See* 17 C.F.R. § 229.407(c)(2)(vi) (2010) (requiring as part of Regulation S-K the disclosure of how diversity is considered in the process by which candidates for director are considered for nomination); *see also* Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,343 (Dec. 23, 2009) (noting with approval arguments that “disclosure about board diversity . . . would provide investors with information on corporate culture and governance practices that would enable investors to make more informed voting and investment decisions,” “that there appears to be a meaningful relationship between diverse boards and improved corporate financial performance, and that diverse boards can help companies more effectively recruit talent and retain staff”).

6. *See generally* Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1895–98 (2009) (describing instances of unconscious discrimination); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 952–53 (2006) (describing the Implicit Association Test which suggests that Americans have an implicit or unconscious “attitudinal preference” for Caucasians over African Americans); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1072–75 (2006) (describing studies linking implicit attitudes with discriminatory behavior); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1213–16 (1995) (describing studies that support the conclusion that discrimination results from unconscious cognitive biases).

7. *See* Jessica Bulman-Pozen, Note, *Grutter at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L.J. 1408, 1447–48 (2006) (analyzing *Grutter v. Bollinger* and the use of affirmative action in the workplace); Michael J. Zimmer, *Ricci’s Color-Blind Standard in a Race Conscious Society: A Case of Unintended Consequences?* 35–40 (Dec. 29, 2009) (unpublished draft), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1529438](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1529438) (analyzing *Ricci v. DeStefano* and the implications of the “color blind” standard for discrimination law).

8. *See* Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431, 432 (2008).

9. *E.g.*, Green, *supra* note 4, at 598 (according to the prevailing business narrative, “[r]ace and sex are relevant primarily as means of serving markets and of signaling a

In this Article, we examine this signaling rationale for the pursuit of corporate diversity.<sup>10</sup> After explaining the basic idea behind the signaling thesis, we explore some difficulties with it. By observing a distinction between the condition of diversity and explicit behaviors that signal attitudes about diversity, we propose a modified version of the signaling thesis that more plausibly identifies the explicit behaviors that perform a genuine signaling function in connection with workplace diversity. Finally, we set forth normative and legal objections to the signaling rationale as a justification for diversity hiring and contrast it with other consequentialist grounds of justification. We argue that thinking of diversity in terms of its signaling function potentially undermines the genuine, good reasons that we have for valuing the presence and development of diversity in institutional contexts.

## I. DIVERSITY AS A SIGNAL

### A. *The Value of Diversity*

From the perspective of a philosophical theory of value, there are at least two ways in which we can think of the value of racial diversity in a firm's workforce.<sup>11</sup> First, we might think of its value as primarily instrumental in nature; that is, as a function of its usefulness in the service of further ends, but not as something valuable in itself. Valuing diversity in a workforce because of its expected positive consequences for worker productivity, morale, or responsiveness to customers are examples of valuing diversity in an instrumental way.<sup>12</sup> Second, we can also think of diversity as having noninstrumental value; in other words, as something that is itself worth caring about, regardless of any further consequences that it might tend to produce.<sup>13</sup> For example, we might believe that diversity is constitutive of the good of a community, or that valuing diversity in various

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commitment to diversity and adherence to egalitarian norms and laws”).

10. For skepticism regarding other arguments in favor of focusing resources on achieving racial diversity at the top of an institution rather than at the bottom, see Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1662 (2004) (theorizing that diversity in corporate governance “will neither racially reform the corporation, nor” open doors “for the minorities on the bottom”).

11. See generally Patrick S. Shin, *Diversity v. Colorblindness*, 2009 BYU L. REV. 1175 (comparing the respective value of racial diversity and “colorblindness”).

12. See *id.* at 1191–95.

13. See *id.* at 1183–84.

institutional settings is a necessary concomitant of being committed to a certain ideal of justice or equality.<sup>14</sup>

Most people who care about diversity probably do so for a variety of reasons, both instrumental and noninstrumental. The topic of interest to us here is one particular theory of the value of diversity—the evidential or signaling theory—that is best characterized as an instrumental one.<sup>15</sup> In limiting our discussion to this particular theory, we do not wish to suggest that other approaches to conceptualizing the value of diversity, including noninstrumental ones, are unimportant or, for that matter, immune from criticism.<sup>16</sup> We focus on the signaling theory of the value of diversity because it seems to have explanatory power in the context of the economics of the workplace,<sup>17</sup> yet at the same time is sufficiently underdeveloped as to reward some searching inquiry.

In Parts I.B and I.C, we explain some basic concepts from signaling theory generally, and then describe how that theory might be adapted to help explain why rational actors might attach positive value to the presence of diversity in the workplace.

### B. *Signaling: Basic Concepts*

The notion of a signal is intuitively familiar. Many decisions in the workplace depend on judgments about characteristics of people and institutions that are difficult to observe or demonstrate directly and cannot reliably be discerned by straightforward inquiry or report. Consider a characteristic as basic as the propensity to work hard. Employers naturally have reason to favor employees who are hard

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14. *See id.* at 1199–1201.

15. *See id.* at 1195–99.

16. *See, e.g.,* Carbado & Gulati, *supra* note 10, at 1662. *See generally* Shin, *supra* note 11, at 1199 (presenting arguments for and against valuing racial diversity in a noninstrumental way).

17. For discussions of the signaling rationale for diversity initiatives from a variety of other perspectives, see generally Carol T. Kulik & Loriann Roberson, *Diversity Initiative Effectiveness: What Organizations Can (and Cannot) Expect from Diversity Recruitment, Diversity Training, and Formal Mentoring Programs*, in *DIVERSITY AT WORK* 265, 274 (Arthur P. Brief ed., 2008) (reviewing the research on diversity and concluding that “presenting diverse employees and pro-diversity statements in recruiting materials sends a signal to the applicant that the organization values diversity”); Toyah Miller & María del Carmen Triana, *Demographic Diversity in the Boardroom: Mediators of the Board Diversity-Firm Performance Relationship*, 46 *J. MGMT. STUD.* 755 (2009) (using signaling theory to understand the relationship between board diversity and firm performance); Valerie Purdie-Vaughns et al., *Social Identity Contingencies: How Diversity Cues Signal Threat or Safety for African Americans in Mainstream Institutions*, 94 *J. PERSONALITY & SOC. PSYCHOL.* 615 (2008) (suggesting that a firm’s diversity can send signals to specific subgroups, such as African Americans).

workers, and employees have reason to convince their employers that they are. But a propensity for hard work is not something that can be directly observed, and any claim by an employee to be a hard worker would be too self-serving to be reliable. Thus, an employee who wants to communicate her propensity for hard work to her employer (maybe she is in a probationary position or is seeking a promotion) will have to figure out ways to send signals—clear, reliable messages—that provide evidence of that characteristic.<sup>18</sup> She might, for example, regularly stay late at the office or show up early (depending on when there are others present to observe these actions). She might send work-related e-mails in the early hours of the morning or produce reports that are voluminous and exhaustive. These are discrete, directly observable behaviors that tend to evidence an underlying general propensity to “work hard,” which is itself a vague, context-dependent concept that resists specification. The visible behaviors, therefore, can serve as signals of the more abstract underlying characteristic.<sup>19</sup>

Not all signals have the same quality or value. There are negative signals as well as positive signals, weak signals as well as strong ones.<sup>20</sup> Context is important. Behavior that is intended to send a particular signal may not always succeed in doing so. For example, sending work-related e-mails late at night to colleagues may simply annoy them, especially if they suspect that there is no substance underlying the attempted signal. Staying late at the office on a consistent basis when the work in question can be completed in a relatively short time might indicate that the employee is slow. Producing unnecessarily voluminous reports might suggest that the employee has bad judgment.<sup>21</sup>

Signals can also perform different functions. Some, which might be called separation signals, are aimed at setting the sender apart

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18. The form of intentional, strategic behavior we are discussing here is a somewhat specialized case of signaling. For a more general discussion of signaling, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* 18–27 (2000). For an analysis of “signaling systems” in nature, see BRIAN SKYRMS, *SIGNALS: EVOLUTION, LEARNING, & INFORMATION* 22–32 (2010) (describing how certain behaviors by vervet monkeys can be understood as signals warning of the presence of various types of predators).

19. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 *CORNELL L. REV.* 1259, 1260–63 (2000).

20. E.g., John G. Riley, *Weak and Strong Signals*, 104 *SCANDINAVIAN J. ECON.* 213, 214 (2002).

21. In other words, the actual informational content of a signaling behavior may be different from what the sender of the signal intends to communicate through that behavior. See SKYRMS, *supra* note 18, at 9, 44–45.

from others.<sup>22</sup> Serving a tennis ball at 100 mph is, for example, a signal that someone has athletic prowess at tennis. Not anyone can do this, and probably no one can do it without significant athletic ability and training. The signal, therefore, when sent early in a game, can communicate that the player will be an especially worthy and formidable opponent. The signal is reliable because only those with a certain level of skill and athletic prowess can send it. Wearing an Armani suit and driving an exotic sports car can similarly serve to set someone apart; one typically cannot perform those actions unless one has money, and lots of it.<sup>23</sup>

Other signals are meant to demonstrate that the sender is similar to others. If almost everyone who works in a certain office goes out for drinks on Friday evenings at a particular bar, a new employee might choose to take part in that ritual to signal that he is collegial and values the others' camaraderie. Or the employee might choose to participate simply to *avoid* sending the opposite signal; that is, a lack of collegiality and possible disaffection.

In economic terms, signals work most effectively when they are relatively cheap to send if one possesses the underlying characteristic and expensive to send if one does not possess the characteristic.<sup>24</sup> Consider again the behavior of staying late at the office on a regular basis as a signal of a propensity to work hard. That is an example of a good signal. A lazy, leisure-loving person will find it painful to stay late at work on a regular basis, so sending the signal would be prohibitively costly for him. The compulsive employee who obsesses over her work, on the other hand, will attach little personal cost (and perhaps will derive pleasure from) arranging to spend extra time at the office, so the opposite would be true for her.

Almost any kind of behavior can function as a signal,<sup>25</sup> but there are at least two features that all effective signaling behaviors share. First, the behavior must be something that is clearly identifiable (e.g., staying at work after hours), compared to the more amorphous underlying characteristic (e.g., the propensity to work hard) that the behavior is supposed to signal. A behavior is worthless as a signal if

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22. See POSNER, *supra* note 18, at 20–22.

23. For discussions of “costly signaling,” see, for example, John G. Riley, *Informational Equilibrium*, 47 *ECONOMETRICA* 331, 331–60 (1979); Stephen Ross, *The Determination of Financial Structure: The Incentive Signaling Approach*, 8 *BELL J. ECON.* 23, 23 (1977).

24. For a discussion of classic signaling, see Michael Spence, *Job Market Signaling*, 87 *Q.J. ECON.* 355, 355 (1973).

25. See SKYRMS, *supra* note 18, at 7 (“Signals are not endowed with any intrinsic meaning.”).

the behavior is obscure or difficult to observe. Second, the signaling behavior must be difficult or costly to exhibit in the absence of the underlying characteristic that it is supposed to evidence.<sup>26</sup> If anyone can engage in the behavior easily, it will not be a reliable indicator of any underlying characteristic in particular.

Although the foregoing discussion focuses on signaling behavior by individuals, institutions and groups can engage in such behavior as well. The same kinds of incentives that drive signaling behavior in the individual context apply in the group context. For example, a company might want to communicate to current and prospective employees that it is a compassionate employer, promotes work-life balance, or is patriotic. An employer could, of course, simply tell observers that it has those characteristics, but again, that kind of self-serving declaration is not likely to be effective: talk is cheap. Thus, an employer who wanted observers to believe that it has those kinds of characteristics might engage in signaling behavior that reliably evidences them. For example, offering to pay funeral expenses when the parent or spouse of an employee has passed away might be an effective signal of compassion. Setting up daycare facilities for employees with young children might effectively signal a belief in work-life balance. Making contributions to a veteran's fund might signal patriotism. And so on.

### C. *The Signaling Rationale for Diversity*

What if an employer wanted observers to perceive it as a company that fosters a workplace governed by progressive norms of equality and nondiscrimination under which everyone has a fair opportunity to succeed, regardless of factors such as race or gender? Projecting such an image might benefit the employer by making it easier to recruit employees and perhaps gain customers and business partners.<sup>27</sup> But "norms" are intangible abstractions, and commitment to a norm is not a state that can be directly perceived by or exhibited to observers. One might hypothesize that a desire to communicate a commitment to socially progressive norms is something that would drive signaling behavior. How, then, might a corporation signal a

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26. See Spence, *supra* note 24, at 358–59.

27. To borrow from Eric Posner, the employer would be signaling that it had a low discount rate for the future; that is, that it was in the game for the long term and, as a result, would play fair. POSNER, *supra* note 18, at 15–21. For an application of this concept in the diversity context, see Laura Nyantung Beny, Diversity Among Elite American Law Firms: A Signal of Quality and Prestige 23–26 (Feb. 24, 2007) (unpublished draft), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=777504](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=777504).



commitment to equality or antidiscrimination norms—that is, that it has a “positive diversity climate,” to borrow a helpful term from Tom Tyler?<sup>28</sup>

Recent literature discussing why corporations are actively pursuing the creation of diversity on their boards of directors posits as a primary reason that the existence of such diversity serves a valuable signaling function.<sup>29</sup> The idea is that corporate board diversity helps differentiate the institutions that have it from those that do not.<sup>30</sup> The signaling thesis is that corporations seek to establish diversity on their boards to demonstrate their commitment to qualities such as fairness, justice, and equality of opportunity.<sup>31</sup> In economic terms, an institution that is willing to spend extra resources to pursue diversity in its upper echelons, including its board, is signaling that it has an ethos of fairness and justice. Conversely, an institution that fails to achieve such diversity might be signaling its disregard of or indifference to such norms.<sup>32</sup>

For diversity to function effectively as a separating or differentiating signal, it must be the case that institutions who care more about fairness and justice will find it cheaper to pursue diversity than those institutions that care less about these characteristics. This argument about differential costs, when unpacked, is questionable.<sup>33</sup> Broome and Krawiec, in a study of the signaling rationale for board diversity, find little indication that board diversity helps to differentiate companies with true commitments to fairness and justice (or some other similar concept) from those with less dedication to

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28. See Jennifer K. Brooke & Tom R. Tyler, *Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. REV. 715, 745 (2011) (characterizing “positive diversity climate” as including “[i]nterpersonal respect, a proactive attitude towards diversity, the promotion of an overarching organizational identity, and respect for subgroup identities”).

29. See Broome & Krawiec, *supra* note 8, at 447–48.

30. See *id.*

31. See *id.*

32. A recent article in the mainstream press discussed the lack of diversity in high-level posts in New York City Mayor Michael Bloomberg’s administration, stating that

[m]any employers want a workplace . . . that has highly qualified managers who reflect the broader community . . . . So failing to name minority employees to high-level positions, time after time, not only can dampen employee morale, but also send a message that an employer is insensitive or indifferent, according to political analysts and human resources professionals.

David W. Chen & Jo Craven McGinty, *Setting Diversity as Hallmark, Mayor Falls Far Short of a Vow*, N.Y. TIMES, June 29, 2010, at A1.

33. See Broome & Krawiec, *supra* note 8, at 448–52.

those values.<sup>34</sup> Board diversity is easy to mimic, they explain, which means that it likely has little value as a signal of a genuine commitment to fairness and justice.<sup>35</sup>

One response to this difficulty with the signaling thesis is to reframe just what it is that diversity is supposed to signify. One might argue that a diverse board or a diverse workforce is not a separation signal, but rather a signal of social cooperation, a signal that a company is aware of and endorses extant progressive norms of nondiscrimination and fair equality of opportunity. Thus, firms may engage in behaviors promoting diversity not to differentiate themselves from other firms, but simply to signal that they are also one of the “good types,” thereby avoiding any negative inference of a desire to dissociate themselves from those other firms.

We are getting ahead of ourselves. Whether or not the signaling thesis about the corporate interest in diversity can withstand scrutiny, the fact is that it has a great deal of surface plausibility. In the interviews reported in a series of papers by Broome, Conley, and Krawiec, board members themselves frequently give a signaling rationale for why corporations have reason to make their boards of directors more diverse.<sup>36</sup> Broome, Conley, and Krawiec express skepticism about how well this explanation holds up.<sup>37</sup> We are also skeptical, but for different reasons. Specifically, the signaling thesis presupposes that the fact of diversity itself functions as a signal of underlying attributes that observers have reason to care about. But the notion of diversity has an ineffable quality about it; it is a concept that resists specification or bright-line definition. If that is so, is diversity even the sort of thing that can sensibly be thought of as a signal in the sense we have been discussing? An examination of the signaling thesis about corporate diversity should start by examining whether diversity as such is the sort of observable state that can function as a signal in the first place.

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34. *See id.*

35. *See id.* at 451–52.

36. Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 792–93 (2011); John M. Conley, Lissa L. Broome & Kimberly D. Krawiec, *Narratives of Diversity in the Corporate Boardroom: What Corporate Insiders Say About Why Diversity Matters*, in DISCOURSE PERSPECTIVES ON ORGANIZATIONAL COMMUNICATION (forthcoming 2011) (manuscript at 19–20), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1415803](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415803).

37. *See* Broome et al., *supra* note 36, at 804–08; Conley et al., *supra* note 36, at 19–20.

## II. DIVERSITY AS SIGNAL: A CRITIQUE

In the preceding Part, we laid out the hypothesis that employers and observers have reason to care about the existence of diversity in a workforce because that state of affairs signals an employment context characterized by fair equality of opportunity and, more generally, an ethos of justice and equality.<sup>38</sup> In this Part, we consider some difficulties with this hypothesis.

“Diversity” is not a technical term. Everyone understands basically what is meant by the claim that a particular workforce is diverse or has an absence of diversity. The trouble for the signaling thesis, however, is that it is difficult to identify concrete, determinate conditions that would unfailingly cause us to recognize a given population as diverse. We can, to be sure, say some general things about what constitutes diversity. Diversity with respect to a given characteristic is a property of a group of people that describes the group’s heterogeneity with respect to that characteristic. If a group is completely homogeneous, it cannot be diverse. The less homogeneous it is, the more diverse it will be. But the diversity of a group can be itself multifarious, such that a group can be diverse with respect to one characteristic yet not diverse with respect to another. And diversity of course admits of degrees, so a group can be more diverse in a given respect compared to a second group, yet less diverse in that same respect compared to a third.

None of this should seem particularly controversial. But when we try to move from these basic generalities toward more specific definitional conditions, the going gets quite a bit more difficult. One obvious problem is that it is impossible to say what degree of heterogeneity with respect to a characteristic must exist before we can say that a group has diversity in that respect. It is true that sometimes, when we talk about diversity, we are referring just to the presence of *any* level of heterogeneity in a group. Diversity in this minimal descriptive sense, though, could not possibly be regarded as evidence of operative norms of equality and nondiscrimination. So the notion that diversity is a signal of operative norms of fairness and nondiscrimination implicates a more robust concept of diversity. It is that more robust concept that resists determinate specification.

The problem, however, is not just that there is some indeterminacy as a result of vagueness (lack of sharp boundaries) as to the limits of diversity. It is also that judgments about the diversity

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38. See discussion *supra* Part I.

of a group seem dependent on somewhat mercurial details of context. For example, if the workforce of a large company headquartered in an urban locale with a twenty percent black population were ninety-five percent white, we might be inclined to say that the company lacked racial diversity, and we might say that this is so because the proportion of whites to racial minority groups does not reflect the proportion observed in the broader community. Yet, if that same workforce in the same locale were, just to throw out a number, forty percent black, we would probably say that the company had a great deal of racial diversity, even though the proportion of white to black employees still would not match the proportion observed in the broader community.

Once we notice the context-dependent nature of judgments about diversity, similar examples become simple to concoct. Suppose a Fortune 500 company had a predominantly black rank-and-file employee base, with an all-white managerial team and an all-white board of directors. One might not be willing to call such a company racially diverse. Yet, if that same company had a predominantly white rank-and-file with a predominantly black management team and majority black board of directors, we would guess that many would regard that firm as having a significant degree of racial diversity. How would we characterize a workforce that had a sizable number of racial minority employees, if all of those minorities happened to be Asian? Would such a workforce exhibit racial diversity? Even as to sex, where one would think that diversity could simply be defined by reference to a 1:1 ratio, matters seem hardly so straightforward. If thirty percent of the composition of a coal-mining operation were women, we might say of that company that it had an unusually high degree of gender diversity, while that same percentage would probably be thought to reflect low gender diversity on a law school faculty.

We can also imagine some more fanciful cases. Suppose a company happened, by chance, to employ a sizable number of workers, relative to the relevant labor market, who identified themselves as white but due to their skin color, ancestry, and social cues would be regarded by most strangers as black. Would we say that those workers contributed to the company's racial diversity? What about the opposite case, in which those same workers identified themselves as black but would be regarded by most strangers as white? Would we then say of the company that it had racial diversity? It is not immediately apparent how one ought to answer these questions—one's response will depend on how one thinks about the

significance of self-identification in the meaning of race—but what we want to observe is that the question whether this hypothetical company possesses racial diversity is not one that can be answered without some nuanced attention to a number of embedded issues.

Put simply, the meaning of diversity is hard to pin down.<sup>39</sup> It seems quixotic to attempt to identify the truth conditions of claims about whether a group of people is diverse in any particular respect. One might be tempted to say that it is possible to know a diverse workforce when one sees it, but that seems patently false if one takes even a few of our hypothetical snapshots above seriously.

For the theory of diversity as a signal, the difficulty is rather acute. Once we recognize that we cannot say of diversity that “we know it when we see it,” it becomes unclear how a group’s putative diversity could function as an effective signal of any underlying state. If no one can even say exactly what it means for a group of people to exhibit diversity, then how could any putative exhibition of that property be a reliable indicator of anything?

As explained above, a particular trait, characteristic, or behavior has value as a signal of some underlying referent state or characteristic when that characteristic is itself something we care about, the signal is reliably correlated with it, and the signal is both easier to exhibit and to identify than the referent characteristic itself.<sup>40</sup> For example, a student’s grade point average (“GPA”) in college has value as a signal of an underlying set of referent attributes—let us say intelligence, diligence, responsibility, and motivation—because GPA is itself a fact that is much easier to advertise and identify than any of those attributes.<sup>41</sup> It is not at all clear, however, that something similar can be said of the characteristic of race and gender diversity. Whether or not a group is diverse is itself a contestable matter subject to significant disagreement in some or perhaps even most cases.

Part of the difficulty here is that the concept of diversity is not a purely descriptive one, but one that may also have a normative component. One might argue that what “diversity” truly refers to is the kind and degree of heterogeneity that we would expect to see in a

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39. Tellingly, a recent report based on a survey by the Society for Human Resource Management concluded that “[w]hile organizations tend to believe that diversity in the workplace is important, only 30% [of those surveyed] have an agreed definition of ‘diversity.’” *Few Organizations Define Diversity*, HRM GUIDE (Mar. 4, 2008), <http://www.hrmguid.com/diversity/job-market.htm>.

40. See discussion *supra* Part I.B.

41. And because GPA is not something that can easily be “faked,” the risk of GPA being a false signal is low.

group if that group had been created under ideal conditions consistent with justice, fair equality of opportunity, and adherence to antidiscrimination principles.<sup>42</sup> On this normative understanding of the meaning of diversity, the claim that a workforce is racially diverse cannot be verified through simple, direct observation. It implies that the group's composition is roughly in line with what we would predict it to be under certain hypothetical conditions of justice, social equality, and the absence of local discriminatory practices.<sup>43</sup> Those are obviously normatively loaded concepts, and determining those hypothetical conditions requires normative work.

In discussions about the significance and meaning of diversity, we must be careful to avoid slipping in and out of this normative understanding of the concept. This sort of equivocation may explain part of the intuitive plausibility of the signaling thesis about the value of diversity. The thesis, again, is that the diversity of a workforce functions as a signal, and that the referent state being signaled is that the employer does not engage in discrimination and is committed to norms of fairness and equality of opportunity.<sup>44</sup> But if "diversity" is understood in the normative sense just described, then the thesis is nearly tautologous. That is, if diversity by definition refers to the kind and degree of heterogeneity that would be present under ideal conditions of justice and nondiscrimination, then the assertion that diversity is a signal of such conditions becomes just a trivial truth that falls out of its definition—something like saying that a well-balanced baseball team is a "signal" that the team has good offense, defense, and pitching.

If it is plausible to posit diversity as evidence of fairness and equality just because we implicitly understand diversity to mean heterogeneity as would exist under conditions of fairness and equality, then the signaling thesis is empirically vacuous. It has the air of truth because of the conceptual connection between diversity and conditions of equality justice, but this conceptual connection also disqualifies the property of diversity as such from serving as a genuinely useful, information-bearing signal (in the stricter sense of that term) of those conditions. Because of diversity's normative component, we cannot even know whether a given group is diverse unless we can first determine what the composition of the group would be under ideal conditions of justice and nondiscrimination.

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42. See PETER SCHUCK, *DIVERSITY IN AMERICA* 20 (2003) (distinguishing between "normative" and "descriptive" definitions of diversity).

43. For a discussion of the definition of "diversity," see generally *id.*

44. See discussion *supra* Part I.C.

Once we realize this, it makes little sense to theorize diversity as such in the role of an evidentially valuable, indirect signal of a state of justice and equality.

In summary, when we reflect on the vagueness of the notion of diversity and its character as a normatively loaded construct, it starts to seem wrongheaded to postulate the putative diversity of a group as an effective, information-bearing signal of some further, less visible state of affairs. The property of diversity seems different from the sort of readily identifiable traits or discrete behaviors that function as signals in classic examples.

### III. AN ALTERNATIVE PROPOSAL

So diversity is a vague, partly normative, abstractly constructed concept that does not admit of easy definition. Whether or not a particular group of people can properly be described as racially or otherwise diverse is sometimes difficult to answer and might be a matter of considerable disagreement. It may be impossible to state with any precision the truth conditions of the assertion that a group is or is not diverse in any given respect.

Yet, despite these conceptual difficulties with the theory of diversity as a signal, it is undeniable that employers engage in practices that seem motivated by a desire to advertise the presence of women and minorities in their workforces, such as appointing an individual to a highly visible post such as the board of directors, or prominently featuring images of minority personnel on the corporate website or in promotional materials.<sup>45</sup> How should these practices be understood? If we are not being careful, we might be tempted to say that these cases are examples of companies making use of diversity to signal something desirable about them as employers, vendors, or business partners; that is, to signal to others that they are one of the “good types.”<sup>46</sup>

In fact, however, the concept of diversity as such is not essential to a description of what it is that these employers are exhibiting or putting on display. The employer who prominently features black employees in its promotional brochures or on its website is in some general sense advertising its diversity, but it would be a mistake to say that the employer was exhibiting diversity directly. Exhibiting an image of an individual who might contribute to the company’s diversity is not equivalent to exhibiting the company’s diversity.

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45. See, e.g., *supra* notes 2–3.

46. POSNER, *supra* note 18, at 18–27.

Similarly, a company who places a racial minority on its board of directors might be motivated by an interest in causing others to form beliefs about the company's diversity, but having such a person on the board neither constitutes diversity nor the exhibition of diversity as such—it is nothing more than the exhibition of an individual member of a minority group associated with the company, which might or might not actually enjoy diversity among its constituents.

This simple observation exposes a significant difficulty for the thesis that diversity functions as a signal of some underlying state. When a company tries to tout its commitment to progressive norms by spotlighting particular individuals who are women or racial minorities, diversity as such is not the characteristic that is spotlighted, and it is far from certain that observers will perceive the spotlighted subject as diversity *per se*. This suggests that thinking of diversity as a signal involves confusion.

To see the confusion, consider an analogy to a signaling system involving a homeowner's display of an American flag on his porch on the Fourth of July. It is straightforward to think of the flag as a signal for some referent set of characteristics of the homeowner, perhaps including patriotism and civic pride. We can quibble about the specifics of what is signaled and how effective that signal is, but a flag is clearly the sort of thing that can function as a signal. Assuming the flag is displayed properly and viewing conditions are satisfactory, there should be no uncertainty about the display that relates to potential disputes about what it is for something to *be* a flag, nor should there be any problem of uptake. Except in unusual cases, whether something is a flag will not be an open question, and everyone who notices the flag will perceive it as a flag.

Notice how different the property of diversity is from this canonical example of the flag-as-signal. Indeed, if we try to map the property of diversity onto the flag example, it makes much more sense to think of the analogue to diversity not as the flag (the signal), but rather as one of the referent attributes, such as patriotism. Patriotism has a level of vagueness and indeterminacy that is similar to diversity. Like the concept of diversity, the value of patriotism might be connected with the value we might place on the underlying traits we associate with it, such as loyalty and pride. But it would be unhelpful to conceive of patriotism as a signal for those traits, because it is too vague and abstract to be the sort of thing that could function as a signal at all. There is no clear way to exhibit it directly, as there is no distinct behavior that, if noticed, will necessarily be perceived as a



display of patriotism as such. Much the same can be said about diversity.

Diversity, inasmuch as it corresponds to something like patriotism in the flag analogy, is not the sort of thing that can function as a signal. This does not mean, however, that the kinds of employment behaviors we tend to associate with “diversity hiring”—such as hiring minority personnel to fill visible posts or placing their images on the corporate website—cannot be explained in terms of a signaling model. The questions for the application of a signaling model to these examples, though, are: what exactly is functioning as the signal (like the flag), and what exactly is the referent state being signified (like patriotism)?

Our proposed answer is that the employer behavior that constitutes the signal is the prominent hiring, placement, or presentation of individuals who are visibly identifiable as women or members of racial minority groups. We will use the term “showcasing” as a shorthand to refer to these practices by which an employer makes its women and minority constituents visible or otherwise salient to observers. Showcasing behavior can take various forms. The practices we have in mind include the featuring of images of minority personnel in the employer’s promotional materials, such as brochures and websites. Another example would be the appointment of a minority to a prominent position in the company, such as an executive post or the board of directors. Showcasing also includes verbal claims about the significance of women and minorities in its company, or the publication of statistics that emphasize the role or presence of such personnel. Our notion of showcasing includes, in short, actions that feature, spotlight, publicize, or otherwise exhibit the presence of individuals who would typically be regarded as increasing a group’s diversity.

If showcasing is the signaling behavior, what state of affairs does that behavior evidence? We propose that the referent state that an employer’s showcasing behavior signals is a certain level of geniality toward members of the showcased individual’s group and a certain kind of sensitivity or attitude about diversity in general.<sup>47</sup> We might

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47. Our claim about what is signaled by showcasing is similar to Brooke & Tyler’s claim that “if a company structures itself to treat all employees fairly and sends social signals [to minority employees] emphasizing fairness . . . research has found increases in performance and ‘organizational commitment,’ and decreases in turnover rates and absenteeism.” Brooke & Tyler, *supra* note 28, at 732–33. Like Brooke and Tyler, we are inclined to take a deflationist view to characterizing what exactly is signaled by an employer’s diversity-oriented practices. The value of diversity in general is surely tied to

say that an employer's showcasing of its minority constituents is in a sense a second-order signal—a signal about its attitude toward diversity, which (where it can be identified as such) might in turn provide evidence that the employer is committed to norms of equality and antidiscrimination. But it is the way in which the employer showcases and presents the role of minority employees, officers, and directors within its workforce that performs the explicit signaling function, not the actual condition of diversity or lack thereof. What the employer's showcasing behavior signals, specifically, is (1) the ability to make itself attractive to individuals who would contribute to diversity, such as members of the showcased individual's minority group; (2) a disinclination to engage in openly discriminatory employment action; and (3) a sensitivity to the significance of diversity.

It would not be unfair to ask us at this point exactly what kind of claim we think we are making here; and if it is an empirical one, whether we have evidence to support it. We do not think we can deny that ultimately, we are indeed making an empirical claim (as opposed, say, to a definitional or purely logical one) about what can be inferred from the behavior we have labeled as showcasing. It is a very limited sort of empirical claim, though, with a distinctly interpretive character. We are not making outright claims about employer intentions or motivations generally. Our claim about the content of the showcasing signal is an attempt to identify the most robust inferences about an organization's attitudes with respect to the value of diversity, equality, among others, that can reliably (i.e., more-or-less inexorably) be drawn from any given observed instance of showcasing behavior. Some might think that we are being too cramped or stingy, maybe even cynical, in the inferences we are prepared to allow. Recall, though, that our underlying objective is to identify what is reliably signaled by a particular corporate behavior. In order to do that, we must necessarily try to imagine the possibility of intentionally disingenuous behavior. Some might also wonder whether our claims are nothing more than appeals to common intuition. But signals by their nature must work through common understandings, so it does not seem to us particularly worrisome that we do indeed rely on our own considered reflections in arriving at possible interpretations of the various kinds of behaviors we are

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the value of justice and equality, but we doubt that an employer's decision to showcase minorities, even at the upper echelons of its workforce, can really be regarded as more than a relatively minimal signal of a certain disinclination to discriminate and mindfulness about diversity issues.

considering. In the end, we fully recognize and accept that the authoritativeness of the empirical, interpretive claims we are articulating will ultimately depend on nothing more—and nothing less—than their being shared by readers after reflection.<sup>48</sup>

Shifting the weight of the signaling function from the fact of diversity to the employer's showcasing behavior does not require denying that diversity may be evidentially valuable as an indicator of a commitment to certain norms of equality. Thus, we fully agree that we have reason to value diversity in the workplace insofar as we care about the conditions and circumstances that are usually required to produce it (and hence are evidenced by it). What we resist is the appeal to the signaling value of diversity as an explanation of employer practices in the nature of showcasing. Our proposal is to turn the notion of diversity-as-signal upside down. The property of diversity has a widely shared significance, and yet is vague, normative, and contestable. Our model thus casts diversity as a value that drives signaling behavior, rather than as a signal itself. What we are calling showcasing is an example of behavior that can function as a signal of the employer's attitudes about diversity. The key move is to distinguish behaviors such as showcasing, which signal diversity and attitudes about diversity, from the conditions that would actually constitute diversity. Teasing apart these concepts allows for a signaling model that more adequately explains employer behavior. As our discussion below will show, these distinctions also create space for a clearer, more critical analysis of the signaling rationale for diversity-related employment practices.

Distinguishing behaviors that signal diversity from the condition of diversity itself implies that one can exist without the other. This is of central importance to our signaling model. An employer can engage in signaling behavior with regard to diversity, such as showcasing, whether or not the employer actually has a workforce that enjoys significant diversity. If we are right in arguing that general claims about diversity are normatively loaded and difficult for observers to test, one might think that almost every employer with at least some diversity will have an interest in engaging in showcasing behavior (assuming there is a benefit to be gained by communicating its diversity efforts to outsiders). But if all employers have an interest in showcasing, and if the actual diversity of a workforce is very difficult for an observer to determine independently, the obvious

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48. We are grateful to Tristin Green for pressing us to consider these issues.

question is how showcasing behavior could come to have any value at all as a reliable signal.

The answer is that in our proposed signaling model, the referent state that is evidenced by the showcasing signal is a sufficiently minimal characteristic that the ability to send the signal is indeed a reliable proxy for that characteristic. We are not claiming that showcasing behavior functions as a signal of the existence of robust diversity or even of an employer's genuine interest in achieving diversity. It would be all too easy for an employer to engage in showcasing behavior even in the absence of such conditions.<sup>49</sup> What we claim, to repeat, is that showcasing behavior signals (1) an ability to attract members of the showcased individual's minority group, (2) a certain disinclination to engage in open discrimination against that group, and (3) a sensitivity or concern on the employer's part for its reputation as an institution that supports diversity in respect of that group.

This is not a signal that seems particularly prone to "faking." Not every employer can send the showcasing signal. If an employer has the ability to perform a showcasing signal, it will probably also have the three attributes that we claim are putatively signaled. First, an employer cannot engage in showcasing unless it actually has minority personnel to showcase. This will require that the employer make itself sufficiently attractive to such individuals to induce them to accept a position. If it succeeds, it follows that the employer has the ability to attract such individuals to its workplace community. Relatedly, an employer who expends resources to make itself attractive to, and then to showcase members of a particular minority group is not likely to throw away the benefits gained by those expenditures by turning around and openly discriminating against that same group.<sup>50</sup>

And third, an employer that was not sensitive to its reputation for diversity would be unlikely to understand or take seriously the need to showcase its minority personnel and so probably would not

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49. See Broome & Krawiec, *supra* note 8, at 451.

50. This does not rule out the possibility that the employer would do so in hidden or unintentional ways. A striking example of this unfortunate possibility is the recently publicized Novartis story. See *Novartis Fined \$250 Million in Sex Discrimination Suit*, N.Y. TIMES, May 20, 2010, at B3. Over a long period of time, Novartis built up a reputation of hospitality toward women in its workplace and was recognized as one of the best 100 companies for ten years running by *Working Mother* magazine. *Id.* Yet, in a federal discrimination lawsuit brought by a number of female employees, a jury found that the company had engaged in a pattern and practice of intentional discrimination against women during that same period and awarded the plaintiffs \$3.3 million in compensatory damages and \$250 million in punitive damages. *Id.*

make the effort to do so. Granted, an employer could engage in showcasing without having any genuine interest in diversity, but it is harder to imagine why an employer who had no concern for its reputation regarding diversity would do so. An employer that *opposed* having a positive reputation for diversity would in all likelihood lack sufficient numbers of minority personnel to showcase effectively, would find the notion of showcasing too distasteful to countenance and therefore would not engage in it, or might simply not want to make itself attractive to those who would perceive minority showcasing as a positive signal.

It is possible, to be sure, that an employer might engage in showcasing with respect to a particular minority individual without meaning to advertise the individual's minority status, and without the specific purpose of enhancing its diversity reputation: perhaps the employer is simply proud of the individual being showcased. But it is in the nature of a signal that an employer can engage in signaling behavior without specifically intending to communicate the correlated referent attributes. Whether or not the behavior is an effective signal for those attributes depends only on whether the behavior actually increases the probability that the sender (witting or unwitting) does in fact possess those attributes.<sup>51</sup> So, what about the employer who sends the showcasing signal without having the purpose of drawing attention to the showcased individual's minority status? It seems to us that an employer that truly regards an employee's minority status as merely accidental in that way will be highly unlikely to be the kind of actor that would engage in open discrimination. We are also inclined to believe that our imagined "postracial" employer, even if it did not affirmatively tout diversity ideals, will likely want to avoid developing a reputation of hostility to diversity and so at least to that extent would in fact be sensitive to its reputation in that regard. Thus, even in the case of the postracial employer who "accidentally" engages in showcasing, the signal will still be a reliable predictor of a disinclination to discriminate and a sensitivity to its diversity reputation.

The next question is why observers would care about the showcasing signal as we have described it. If there is no reliable correlation between the showcasing signal and conditions of actual diversity (or even a genuine interest in achieving diversity), why

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51. Cf. SKYRMS, *supra* note 18, at 8, 44–45 (stating that the way to measure "the effectiveness of the sender's use of [a] signal[] to discriminate states . . . is to measure the extent that the use of that particular signal changes probabilities").

would observers value that signal at all? Several possible answers are consistent with our account. One is that it is widely understood that robust levels of diversity are not only difficult to test for but also difficult to actually achieve in many segments of the employment market. Given this systemic reality, observers might come to regard a company's attitudes toward the ideal of diversity, combined with a demonstrated capacity for nondiscrimination, as a better indicator of what kind of employer it is than the actual level of diversity that the company has been able to achieve.

Another reason that observers might care about the showcasing signal, even absent any correlation to genuine diversity, is that for at least some (perhaps many) observers who are considering entering into a relationship or transaction with a company, what matters on the issue of diversity is not whether the company genuinely has it, but whether associating with the company creates risks of being victimized by discrimination or of suffering vicarious reputational harm as a result of that company's misdeeds. What such observers may seek is reliable evidence that the company's orientation on matters of workplace equality is within socially acceptable limits. The showcasing signal provides precisely such comfort, insofar as it assures that the company does not engage in open discrimination and is sensitive to its reputation on diversity matters.

A third, more troubling possibility is that certain kinds of showcasing behaviors, in combination with an obvious lack of meaningful levels of actual diversity in the company's workforce, might signal that while the company is aware of the social significance of diversity and is sensitive to its reputation on that score, the company has not sought to implement meaningful measures or structural reforms that would actually produce robust levels of workplace diversity. It is possible that observers who feel threatened by such affirmative measures and reforms but who wish to avoid a reputation for hostility to diversity ideals would view the showcasing signal in the absence of genuine diversity in a positive light; that is, as an assurance that while the company is aware of social norms recognizing the importance of diversity as an ideal, it still otherwise manages its workforce in a relatively conservative, colorblind fashion.

#### IV. NORMATIVE AND LEGAL IMPLICATIONS

We have argued that diversity as such is not the kind of characteristic that can function effectively as a signal,<sup>52</sup> and we have

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52. See discussion *supra* Part II.

suggested that the putative signaling behavior that is commonly observed in the context of corporate hiring is more accurately characterized as the showcasing of individuals who ostensibly increase the diversity of the organization in some respect.<sup>53</sup> Because this showcasing behavior is not a reliable signal of the actual existence of the sort of diversity that could, in turn, be evidence of an ethos of fairness, nondiscrimination, and equality, we have proposed that such behavior might be understood as a signal of the company's ability to attract and disinclination to discriminate against members of the showcased individual's minority group, and a sensitivity to its reputation on diversity matters.<sup>54</sup>

All of the foregoing discussion has been primarily concerned with trying to explain the corporate interest in increasing or touting its workforce diversity in highly visible ways, such as by placing women or members of minority groups in high-ranking positions like the board of directors. In this last section, we take a more normative turn and apply a critical perspective to the instrumental, showcasing approach to diversity we have been describing. We explore potential criticisms from within the perspective that regards diversity as something that we have reason to value evidentially; that is, as a manifestation of the proper functioning of those institutions that actually have it and then from the perspective of Title VII's prohibition of workplace discrimination.

#### A. *General Normative Considerations*

The claim that a particular behavior provides a signal of some hidden state is primarily a descriptive claim about the informational content of certain social practices,<sup>55</sup> consisting partly in an appeal to shared social understandings of common behaviors, and partly in a quasi-conceptual or interpretive analysis of the more-or-less inexorable implications of those behaviors.<sup>56</sup> The claims that we have made to this point about showcasing have been, in any event, in this vein.<sup>57</sup> Furthermore, the signaling value of showcasing can be, as explained above, independent of an employer's actual reasons for engaging in it.<sup>58</sup> Thus, assigning a signaling function to a particular

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53. See discussion *supra* Part III.

54. See *supra* text accompanying notes 47–49.

55. See, e.g., POSNER, *supra* note 18, at 18–22; Broome & Krawiec, *supra* note 8, at 447–50.

56. See *supra* text accompanying notes 47–48.

57. See *supra* Part III.

58. See *supra* text accompanying note 51 (explaining how even accidental showcasing

behavior does not necessarily imply that sending the signal is the only possible reason for engaging in that behavior. Once the signaling function of a particular behavior in a given context becomes understood, however, it becomes likely that actors will engage in that behavior for the specific purpose of sending the associated signal. Presumably, employers and their various observers recognize the signaling content of showcasing. This opens up the possibility that some employers engage in that behavior for the specific—and perhaps exclusive—purpose of sending the associated signal. When an employer acts in this way—that is, when it seeks to rationalize its showcasing behavior in terms of its signaling function—it is implicitly making a claim that the behavior is justified by that function; that is, that the signaling function provides good reasons for that behavior. That sort of claim is plainly a normative one that warrants critical examination.

Potentially the most serious objection to showcasing for the purpose of signaling is that this way of understanding the action evinces a lack of respect for the individuals who are so showcased. Treating the significance of an employer's relation with such individuals as dependent primarily on their signaling value, their value as instruments of implicit communication, is corrosive to their status in the organizational community.<sup>59</sup> For an employer to regard its reasons for minority hiring, for example, as reducible to the value that such hiring has in signaling the employer's ability to win such hires in a competitive marketplace is to come dangerously close to regarding the worth of a minority hire as something akin to that of a prized trophy: valuable as an emblem of the effort required to win it, but not something that possesses any value in itself. This is an objectionable way of regarding any person. The idea of using persons, by dint of the racial or other social categories to which they belong, as

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might still function as an effective signal of nondiscrimination and reputational concern).

59. Our point is slightly different from the argument, commonly heard in the affirmative action context, that race-conscious preference can have a “backlash” effect or create a “stigma” for minority groups. *See, e.g.*, Christopher A. Bracey, *The Cul de Sac of Race Preference Discourse*, 79 S. CAL. L. REV. 1231, 1275–93 (2006); Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 582–89 (2002); Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299 *passim* (2008); Kathleen M. Sullivan, *City of Richmond v. J.A. Croson Co.: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609, 1622–24 (1990). The backlash/stigma argument boils down to a claim that preferential treatment can exacerbate negative stereotypes and attitudes toward minorities. *See* Green, *supra* note 4, at 644–45. What we argue is slightly more abstract: that treating an individual as mere signal amounts to a failure to see the individual as a person of respect.



mere emblems or trophies—indeed, as nothing more than living certificates attesting to an employer’s good will and effort—entails a failure of moral respect for those individuals. To rationalize minority hiring as a form of signaling is blatantly to reduce the value of minorities who are hired to their functional status as passive emblems rather than as actively contributing members of the community. The signaling rationale, understood as a putative reason for diversity-oriented employment practices, views minority hires as purely instrumental means to the accomplishment of the employer’s further business objectives rather than as ends in themselves, members of a cooperative enterprise entitled to moral consideration and concern.<sup>60</sup>

An additional, related objection to the justification of minority hiring specifically for the purpose of sending the showcasing signal is that this way of thinking about the value of such hiring is potentially counterproductive to the proper internalization of nondiscriminatory attitudes throughout the workplace.<sup>61</sup> To the extent that the justification of high-profile minority hires in terms of the signal that such actions would send tends to displace justifications in terms of the merits of the individuals hired, one might worry that reliance on the signaling rationale might invite an implicit assumption that those hiring decisions would not have been justified on the substantive merits,<sup>62</sup> which might in turn have negative consequences for the individuals hired<sup>63</sup> and be detrimental to the promotion of genuinely shared, internalized attitudes of mutual respect and equality of concern among all members of the workplace.<sup>64</sup>

Paradoxically, then, to rationalize the practice of diversity hiring as a form of signaling undercuts the basic premise that animates the evidential view of the value of diversity. This view regards the existence of diversity in certain institutional settings as valuable

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60. To be clear, this is an objection to thinking of showcasing behavior, such as the hiring of women or minorities for prominent positions, as justified by its signaling function. The point is not that such behavior is unjustifiable, but that the signaling rationale does not provide good reasons for it.

61. See Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1893–94 (2009).

62. See, e.g., Green, *supra* note 4, at 599.

63. See *id.* (citing David B. Wilkins, *From “Separate is Inherently Equal” to “Diversity is Good for Business”*: *The Rise of Market-Based Diversity Arguments and the Fate of the Black Bar*, 117 HARV. L. REV. 1548, 1597–98 (2004)) (discussing feelings of exploitation that can result when an individual believes he was hired solely for signaling purposes).

64. See Madeline E. Heilman, *Affirmative Action’s Contradictory Consequences*, J. SOC. ISSUES, Winter 1996, at 105, 107–08 (arguing that race- or sex-based preferences in hiring can be deleterious to workplace equality).

because it evidences the operation of a socially progressive ethos of equality, fairness, and nondiscrimination.<sup>65</sup> The signaling rationale for the practice of showcasing diversity, because it embeds a conception of the individuals being showcased as passive instrumental emblems whose value has little to do with their active agency, and because it might be corrosive to the sort of internal attitudes that we should want to promote in the workplace, seems incompatible with that ethos.

We are not denying that the diversity of a population within an institutional setting may be regarded as good partly because it evidences certain good things about the institution. Diversity in certain contexts is surely a state of affairs that is at least to some extent symptomatic of institutional adherence to norms of nondiscrimination and a commitment to fairness and equality of opportunity. This evidential value of diversity, however, does not immunize from criticism every action that tends to bring it about. Diversity may be a symptom of the observance of norms that we value, but it obviously does not follow that those norms justify all, or even any, means of creating that symptomatic state of affairs. A wet nose may be a symptom that a dog is in good health, but it does not follow that concern for a dog's health provides good reason to splash water on its nose. Doing so might make it appear to observers that the dog is healthy, but (for all we know) it might actually harm the dog. Similarly, an institution that hires minority personnel for their showcase value might succeed in signaling that the institution is healthy in certain ways, but the attitudes implicit in that way of thinking about the value of those persons seems morally pernicious.

Given how apparent it is that the signaling rationale for showcasing diversity is objectionable on the grounds that it is inconsistent with moral respect for persons and potentially counterproductive to the internalization of antidiscrimination norms, why is the practice so much in vogue? We suspect that all of us have personal acquaintance with hiring decisions in our own institutions that have at least a flavor of showcasing. We would venture, moreover, that most of us have acquiesced to, facilitated, participated in, and maybe even celebrated those very practices. Is there anything to be said in their defense?

It bears repeating that our objection to the signaling rationale as a justification for what we have been calling showcasing does not entail a general objection to all employment practices that might be

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65. See Shin, *supra* note 11, at 1195–99.

characterized as showcasing. The inadequacy of the signaling function as a reason for appointing a woman or a minority individual to the board of directors obviously does not mean that there are no good reasons. Nor does our rejection of the signaling rationale as justification for such an appointment imply that the candidate's status as a woman or as a minority cannot provide good reason for it. The objection to the signaling rationale is that it implies a morally offensive way of thinking about the value of diversity-oriented hiring or promotional practices. It is not a claim that race- or gender-conscious hiring cannot be justified, and we have no interest in putting forward such a claim.

Consider, for example, the argument that certain race-conscious hiring practices are justified because they are good for the institutions that practice them, or good for society overall.<sup>66</sup> A possible consequence of the appointment of a minority individual to a very visible corporate position such as the board of directors is that it might empower the individual to work as a role model for future generations of historically underprivileged minorities, who might otherwise have abandoned as futile the sort of personal commitment required to achieve that kind of success.<sup>67</sup> The desirability of that consequence might be thought to provide a good reason for appointing a person of color, as opposed to a nonminority, to the position in question, and then showcasing that person to outside observers.

A similar argument is that the appointment of minority personnel to visible positions within the workforce might have certain desirable psychological "debiasing" effects.<sup>68</sup> According to social psychological research highlighted by Jerry Kang and others, increasing the direct exposure and contact that employees have with members of minority groups can have the consequence of reducing the influence of implicit biases on workplace decision making and in the context of other interaction involving members of historically excluded minority groups.<sup>69</sup> Again, the desirability of that sort of consequence might be thought to provide good reasons for various

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66. For a review of such arguments, see Shin, *supra* note 11, at 1191–95.

67. See *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (suggesting that the presence of diversity in elite institutions could create a visible "path to leadership" for underprivileged minorities); see also Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 30–32 (2002) (discussing the "role model" argument for affirmative action). For further discussion of *Grutter*, see *infra* Part IV.B.

68. See, e.g., Kang & Banaji, *supra* note 6, at 1101–02.

69. See *id.*

kinds of diversity hiring practices—the same kinds of practices to which we might tend to attach signaling value.

These consequentialist justifications for showcasing diversity are not objectionable in the same way that the signaling rationale seems to be. They do not involve regarding minority hires as passive emblems whose value is unrelated to their active agency. Regarding someone as a role model implicates pride, respect, and admiration for the individual so cast as a moral agent.<sup>70</sup> Regarding someone as a “debiasing agent” does imply a more overtly instrumentalist perspective, but the notion of debiasing is ultimately about normalizing the way in which members of the workplace relate to each other, presumably including the “debiasing agents” themselves. At least in this way, the debiasing rationale does not regard minority personnel as mere tokens, or passive instruments of transmission, but rather as persons who, by their interactions in the workplace, have a capacity to change the way that others relate to them (and by some process of psychological habituation, to all minorities).

Still, there is little question that these consequentialist justifications for diversity-based hiring practices have a decidedly peculiar character, at least from the perspective of the evidential view of the value of diversity. The basic idea of the debiasing rationale, for example, is that by taking affirmative measures to make itself more diverse, an employer might enjoy, as salubrious side effects, the promotion of nondiscriminatory attitudes in its workplace<sup>71</sup>—the very sort of attitudes that the existence of diversity is supposed to evidence. Whether or not the desired attitudes will in fact result from the diversity that is created is an empirical question on which we do not take any particular position here. There is perhaps a lingering worry that the use of diversity-based hiring in order to bring about desirable attitudes among the workforce has a certain character of manipulation, as of social-psychological engineering. Maybe in the end, the worry is not well founded; it is not as if such practices involve deception or coercion.<sup>72</sup> Perhaps such practices are precisely what are

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70. Cf. Schuck, *supra* note 67, at 30–32 (supporting the role model justification for affirmative action). *But cf.* Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1226–29 (1991) (critiquing the role model justification for affirmative action).

71. See Kang & Banaji, *supra* note 6, at 1101–15 (explaining the “social contact hypothesis,” “countertypical exemplars,” and “debiasing agents”).

72. Indeed, insofar as actors in the workplace freely and reasonably consent to whatever particular instrumental roles they are asked to fulfill (presumably for the ultimate purpose of maximizing the firm’s profits or otherwise advancing its mission), the objection of exploitation or disrespect loses much of its force. The signaling rationale is

necessary to make further progress toward our shared goals of a truly nondiscriminatory workplace and conditions that constitute genuinely fair equality of opportunity. And perhaps the sort of active, visible behavior that we have characterized as showcasing is what will most likely lead actors in all workplaces to fully internalize the norms of nondiscrimination that are necessary to achieving meaningfully robust and durable conditions of diversity.<sup>73</sup> But that too is an empirical question. And, more relevantly to our point, that sort of justification is not objectionable in the same way that the signaling rationale is.

### B. *Legal Justifications*

In this final section, we note the unsettled nature of the legality of making decisions to hire minority personnel on the basis of what they would add to the visible diversity of the employer's workforce; that is, their showcase value, and discuss how such practices fit in the legal landscape.<sup>74</sup>

The Supreme Court laid the foundation of its approach to affirmative action under Title VII in *United Steelworkers of America v. Weber*<sup>75</sup> and *Johnson v. Transportation Agency of Santa Clara County*.<sup>76</sup> In those cases, the Court held that it was permissible, under certain limited circumstances,<sup>77</sup> for employers to consider an individual's membership in a minority group as a positive reason in favor of hiring that individual. The concept of diversity as such played

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morally offensive insofar as it implicates a view of the showcased individual—a passive emblem, a mere trophy—that is inconsistent with moral respect and which we could not reasonably ask that individual to accept.

73. Cf. Bartlett, *supra* note 6, at 1936–41 (describing ways in which the law can “thwart the internalization process” of nondiscrimination norms).

74. These observations about the significance of the interest in diversity to Title VII do not specifically apply to appointments to a corporation's board of directors because directors generally are not regarded as employees for purposes of the statute. See generally Ann C. McGinley, *Functionality or Formalism? Partners and Shareholders as “Employees” Under the Anti-Discrimination Laws*, 57 SMU L. REV. 3 (2004) (discussing the legal definition of an employee).

75. 443 U.S. 193 (1979).

76. 480 U.S. 616 (1986).

77. In *Weber* and *Johnson*, the Court held that a voluntary affirmative action plan was permissible under Title VII if it was “designed to eliminate manifest racial imbalances in traditionally segregated job categories,” the plan was consistent with the statutory objective of “[breaking] down old patterns of racial segregation and hierarchy,” did not “unnecessarily trammel the interests” of nonbeneficiaries of the plan nor create “an absolute bar” to their advancement, and was a temporary measure to eliminate “manifest imbalance” rather than a permanent one designed to maintain particular proportions. *Johnson*, 480 U.S. at 628–31 (internal quotation marks omitted) (reciting the elements of the *Weber* test).

no explicit role in the basis of the Court's approval of the affirmative action plans in *Weber* and *Johnson*.<sup>78</sup> The affirmative action plans at issue in those cases were justified as a way for employers to break free from historical patterns in which minorities and women had been actively excluded from, and barred from advancing within, certain segments of the workplace.<sup>79</sup> Race- and gender-conscious decision making was conceptualized as a remedy for gross inequalities of distribution, a direct countermeasure to past practices of denying employment opportunities based on those factors.<sup>80</sup> There was little suggestion in the Court's opinions that increasing the racial and gender balance of the workplace was justified by the value of diversity as such or any indirect benefits that might be thought to derive from diversity.<sup>81</sup> The operative notion was instead that increasing the workplace representation of groups that historically had suffered from exclusion and deprivation could be justified as a direct response to the very same problems of unjust denial of opportunity and distributive inequality that Title VII was meant to address.<sup>82</sup>

The notion that race-conscious decision making could be justified by an interest in diversity, rather than as a brute remedial measure to reverse the effects of historical exclusion, received its first major articulation in Justice Powell's concurrence in *Regents of the University of California v. Bakke*,<sup>83</sup> which was decided a year before *Weber*.<sup>84</sup> In *Bakke*, which involved a constitutional equal protection challenge to race-based affirmative action in a medical school admissions policy, Justice Powell argued that the "attainment of a diverse student body" constituted a compelling interest that could justify the consideration of race as a positive decision-making factor.<sup>85</sup> For Justice Powell, however, the value of diversity in a student body

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78. *See id.* at 628–42; *Weber*, 443 U.S. at 204–07.

79. *See Johnson*, 480 U.S. at 628–42; *Weber*, 443 U.S. at 204–07. *But cf.* Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 10–14 (2005) (proposing a somewhat broader, nonremedial reading of *Weber* and *Johnson*).

80. *See Johnson*, 480 U.S. at 628–42; *Weber*, 443 U.S. at 204–07; Estlund, *supra* note 79, at 10–14.

81. *See Johnson*, 480 U.S. at 628–42; *Weber*, 443 U.S. at 204–07; Estlund, *supra* note 79, at 10–14.

82. *See Johnson*, 480 U.S. at 628–42; *Weber*, 443 U.S. at 204–07; Estlund, *supra* note 79, at 10–14.

83. 438 U.S. 265 (1978).

84. *Id.* at 265 (Powell, J., concurring).

85. *Id.* at 311–14.

was largely derivative of the “discourse benefits”<sup>86</sup> that could be expected from placing individuals with different social and cultural perspectives together in a shared educational environment.<sup>87</sup>

Almost twenty-five years later, the Supreme Court revisited the diversity rationale as a constitutional justification of educational affirmative action<sup>88</sup> in *Grutter v. Bollinger*.<sup>89</sup> There, Justice O’Connor in her majority opinion endorsed Justice Powell’s suggestion in *Bakke* that the academic discourse benefits that flow from a diverse student body could justify the consideration of minority racial membership as a factor in admissions decision making.<sup>90</sup> Justice O’Connor went further, however, by asserting that diversity was valuable not just because of expected discourse benefits, but also because the promotion of diversity in selective educational institutions would help better prepare all students to deal with racial difference in their future careers, help realize ideals of democratic inclusion and equal citizenship, and perhaps most interestingly for our purposes, to create a “path to leadership” and help “cultivate a set of leaders with legitimacy in the eyes of the citizenry.”<sup>91</sup>

Although *Grutter* did not address the permissibility of race-conscious decision making under Title VII, it appeared to open up the theoretical possibility that the Court might one day<sup>92</sup> adapt and extend the diversity rationale to that statutory context.<sup>93</sup> That possibility was somewhat diminished by the Court’s decision in *Parents Involved in Community Schools v. Seattle School District No.*

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86. Thomas H. Lee, *University Dons and Warrior Chieftains: Two Concepts of Diversity*, 72 *FORDHAM L. REV.* 2301, 2305–06 (2004).

87. SCHUCK, *supra* note 42, at 164–65.

88. The Court had, of course, decided a number of constitutional challenges to affirmative action plans, but none of those cases raised the issue of whether the diversity justification for affirmative action was valid. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (suggesting that the Court’s cases since *Bakke* “might be read to suggest that remedying past discrimination is the only permissible justification” for affirmative action).

89. 539 U.S. 306 (2003).

90. *Id.* at 325.

91. *Id.* at 330–32. See generally Patrick S. Shin, *Compelling Interest, Forbidden Aim: The Antinomy of Grutter and Gratz*, 82 *U. DET. MERCY L. REV.* 431 (2005) (analyzing the implications of *Grutter* and *Gratz* for legal understandings of the value of racial diversity).

92. Before *Grutter*, the Court had granted certiorari in a case that would have directly addressed the question of the legality of race-conscious employment decisions based on “nonremedial” rationales such as the interest in diversity, but the parties settled the case before argument. See *Taxman v. Bd. of Educ. of Piscataway*, 91 F.3d 1547, 1549–50 (3d Cir. 1996) (en banc).

93. Cf. Estlund, *supra* note 79, at 35–36 (considering the implications of *Grutter* in the context of employment under Title VII).

1,<sup>94</sup> in which a fractured majority invalidated a school district's race-conscious procedures for assigning children to particular schools within the district.<sup>95</sup> Although five members of the Court reaffirmed *Grutter's* holding that an interest in diversity (in the educational context) could justify race-conscious decision making to the extent necessary to bring it about, Justice Kennedy in his pivotal concurrence argued that the school district's assignment procedures were objectionable because they were too "crude": they "threaten[ed] to reduce children to racial chits valued and traded according to one school's supply and another's demand."<sup>96</sup> Thus, for Justice Kennedy, the value of diversity had to be subordinated to a constitutional requirement of respect for persons, and regarding individuals as nothing more than bankable chits whose value depended on their race violated that requirement.<sup>97</sup>

Finally and most recently, in *Ricci v. DeStefano*,<sup>98</sup> the Supreme Court considered whether it was permissible, under the prong of Title VII that prohibits intentional discrimination (disparate treatment),<sup>99</sup> for a city to scuttle the results of an exam administered to firefighters competing for promotions based on a belief that, due to a disproportionately low number of minority firefighters receiving qualifying scores, the city's certification of the results might result in its exposure to liability under the other prong of Title VII, which prohibits employment practices that create differentially worse outcomes for members of a particular racial group (disparate impact).<sup>100</sup> The *Ricci* case did not involve an affirmative action policy, and its actual holding is about the interrelation between the disparate treatment and disparate impact paradigms of Title VII.<sup>101</sup> The particulars of that holding are not important for our discussion here. What is noteworthy is that the Court, in an opinion by Justice Kennedy, seemed to take for granted that Title VII's prohibition against intentional discrimination requires strict colorblindness in the context of employment decision making.<sup>102</sup> Whether the Court will

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94. 551 U.S. 701 (2007).

95. *See id.* at 707-11.

96. *Id.* at 798 (Kennedy, J., concurring).

97. *Id.* at 797-98.

98. 129 S. Ct. 2658 (2009).

99. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2006).

100. § 2000e-2(k).

101. For general discussion of *Ricci*, see Zimmer, *supra* note 7, at 2-8.

102. *See Ricci*, 129 S. Ct. at 2673. For example, in arguing that the City of New Haven violated the disparate treatment provision of Title VII by taking into account the race of the firefighters who scored highly on the qualifying exam, even though the City did this



take this assumption seriously in a case that squarely raises the issue of affirmative action under Title VII remains to be seen, but *Ricci* should chasten any expectation that the Court will take its next available opportunity to extend the diversity rationale for affirmative action to justify race-conscious employment action under Title VII. Perhaps it will in fact do so, but that result seems far from a foregone conclusion.<sup>103</sup>

At this juncture, then, the legal status of race- or gender-conscious hiring practices under Title VII is at best uncertain. What seems beyond doubt, however, is that diversity initiatives on the part of private employers have expanded over the past few decades.<sup>104</sup> How many of these employer diversity initiatives truly involve affirmative action in the sense of preferential treatment on the basis of a protected characteristic is not clear, but it seems to us just a matter of time before the Court takes up the question of the permissible limits of race- and gender-conscious decision making under Title VII. The question, in any event, seems ripe for decision.

What, then, can be said about the legality of an employer's practice of hiring minorities to visible positions for the purpose of showcasing its diversity? If the Court decides to move away from *Weber* and *Johnson*, what should it conclude about the permissibility of such a practice under Title VII? If one were to decide the question from first principles,<sup>105</sup> it might make sense to begin by thinking about the basic purposes of Title VII: to make "the workplace . . . an environment free of discrimination, where race is not a barrier to

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only because it thought it was required to do so by the disparate impact provision of Title VII, Justice Kennedy said that the "analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense." *Id.* (emphasis added). Thus, for Justice Kennedy, the mere fact that the City's decision to reject the results of the firefighters' exam involved consideration of the race of the firefighters was sufficient to make that decision prima facie discriminatory, even though that decision was motivated by nothing other than a desire to avoid a racially disparate impact. *Id.* For additional arguments that *Ricci* effectively reads a requirement of colorblindness into Title VII, see Zimmer, *supra* note 7, at 8–24.

103. For an excellent general discussion of the current legal status of nonremedial rationales for race- and sex-conscious decision making in the workplace, see Green, *supra* note 4, at 614–28.

104. *See id.* at 596–97.

105. Note that the relevant statutory text of Title VII does not itself necessarily militate in favor of a requirement of strict colorblindness, Justice Kennedy's assumptions in *Ricci* notwithstanding. The central liability provision states only that it is "an unlawful employment practice" for an employer "to discriminate . . . because of" race, color, sex, and so on; but "discriminate" is not itself defined in the statute, let alone defined in a way that would require regarding all race- or sex-conscious decision making as constituting discrimination. 42 U.S.C. § 2000e-2(a) (2006).

opportunity”;<sup>106</sup> “to promote hiring on the basis of job qualifications, rather than on the basis of race or color”;<sup>107</sup> and to “remov[e] . . . artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”<sup>108</sup> With these statutory goals in view, we can then ask how the Court should evaluate the practice of hiring members of underrepresented groups for their signaling or showcase value.<sup>109</sup>

When one puts the question this way, it becomes clear that the signaling rationale for diversity hiring works no better as a legal justification than as a moral one.<sup>110</sup> If the point of diversity hiring lies in its signaling value, then it becomes quite awkward to argue that such hiring can be justified as a way of advancing the substantive goals of Title VII.<sup>111</sup> The argument is awkward because it seems to muddle correlation with causation. It might very well be true that firms that have more racially and gender-diverse workplaces are likely those that treat their employees fairly, equally, respectfully, and with all due concern for their individual interests. Encouraging the construction of such an environment is surely a central goal of Title VII.<sup>112</sup> But is that goal served when an employer engages in a practice of recruiting high-profile minority or female employees for the purpose of making it appear to observers (inside and outside the firm) that the employer enjoys that kind of environment?<sup>113</sup> Could one not argue that this is nothing more than splashing water on the dog’s nose so as to make others believe that it is healthy?

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106. *Ricci*, 129 S. Ct. at 2674.

107. *Id.* at 2675 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971)).

108. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

109. For a similar but more general inquiry not limited to showcasing behavior, see Green, *supra* note 4, at 614–39.

110. See *supra* Part IV.A.

111. Cf. Green, *supra* note 4, at 621 (arguing that the business interest in “signaling fairness” does not justify race- and sex-conscious decision making under Title VII).

112. See *Ricci*, 129 S. Ct. at 2674–75; *Griggs*, 401 U.S. at 431; see also *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998) (discussing Title VII’s goal of encouraging employers to take affirmative measures to reduce the risk of discrimination); *Faragher v. Boca Raton*, 524 U.S. 775, 805–06 (1998) (describing the primary purpose of Title VII and the responsibilities of both employers and employees).

113. David Wilkins discusses this issue in the law firm context, where he asks “Is the Business Case for Diversity Good for the Diversity of Large Law Firms?” Wilkins, *supra* note 63, at 1591. Wilkins specifically points to the incentive for these big law firms to cook the diversity numbers so as to try to appear more diverse to prospective employees. See *id.* at 1591–99. For firms to spend resources engaging in this kind of window dressing, Wilkins argues, does little to advance the goals of racial justice, which presumably is the end goal. See *id.* at 1599–1611.

From the perspective of the goals of Title VII, as from the more general normative perspective we considered earlier, the signaling rationale seems to undermine the justification of diversity-based hiring, even though it might explain why in fact employers actually engage in it. We should not necessarily conclude, however, that the sort of diversity hiring to which employers attach signaling value cannot be justified in terms of the goals of Title VII. (Employers might be doing the “right” thing albeit for the wrong reasons.) Offhand, it seems tempting to believe that the most robust workplace diversity is the sort of diversity that arises naturally from merits-driven employment decision making by actors who have genuinely internalized a strong commitment to norms of antidiscrimination and equality of opportunity and advancement for all. Diversity on this picture is the product or symptom of a process that works from the inside, out.

The difficulty, however, as the social-psychological literature of the past fifteen years has established, is that this inside-out model of realizing conditions of equality in the workplace may be unrealistic.<sup>114</sup> This model assumes that actors, so long as they have internalized a commitment to nondiscrimination, will tend to make employment decisions that will naturally tend to increase the diversity of the workplace. But this might be false. Implicit biases, unconscious stereotyping beliefs, and other hidden psychological factors might dispose actors to make decisions that tend to limit diversity rather than increase it, even while the actor genuinely professes a commitment to equality and diversity.<sup>115</sup> It might be that the only way to eradicate those persistent, stubborn, and hidden biases is to work from the outside, in. This is what we understand to be the point of the debiasing strategy that scholars like Jerry Kang and Christine Jolls have discussed.<sup>116</sup> On the outside-in model, diversity is a means, a psychologically effective tool for eliminating implicit bias, which in

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114. See Greenwald & Krieger, *supra* note 6, at 962; Kang & Banaji, *supra* note 6, at 1064.

115. See Greenwald & Krieger, *supra* note 6, at 962; see also David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1404–05 (2008) (arguing that people are often unaware of significant factors that influence their motivations).

116. See generally Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 988 (2006) (“In a variety of ways, existing law and policy seek to respond to the problem of implicit bias; imaginable reforms could do far more.”); Kang & Banaji, *supra* note 6, at 1077 (“[R]esponding to discrimination means not only *remedying* present acts of discrimination but also *preventing* discrimination that is likely to occur without some proactive action.”).

turn would be expected to produce fair decision making that would then tend to regenerate that diversity more organically (from the inside, out).<sup>117</sup> Thus, although the signaling rationale for diversity hiring seems unresponsive to the goals of Title VII, it might nevertheless be that the very kind of hiring that carries signaling (showcase) value might be effective in generating, outside in, lasting conditions of fairness and true equality of opportunity in the workplace.

There is also reason to think that if the outside-in model can be borne out as an empirical matter, allowing employers to engage in diversity hiring will in the long run tend to reduce the efficacy of the signaling incentive while improving conditions of equality overall. Employers who want to hire minority personnel for showcasing purposes will end up giving high wages to (or spend more on recruiting) a small group of individuals. To shift a handful of high-profile women and minorities from one employer to another does not do much to raise overall welfare, let alone further social justice, in any meaningful sense. Indeed, a market in which such high-profile individuals are traded back and forth in zero-sum transfers just for their showcasing value exemplifies precisely the sort of attitude that was denounced by Justice Kennedy in *Parents Involved*—treating persons as if they were nothing more than racial “chits” to be collected and traded for purely derivative value.<sup>118</sup> But one can expect that with sufficient demand, more women and minorities will enter the market and be hired by employers who want to mimic their competitors who have made similar appointments. If the elimination of bias and the realization of attitudes of nondiscrimination really can be achieved from the outside in, then this behavior by employers might end up producing socially desirable consequences (even though the employers would have been acting for objectionable reasons). Those consequences include the reduction of implicit bias in employment decision making, which would naturally tend to increase even further the numbers of workers who had traditionally been the victims of such bias. Gradually, the hiring of such a worker would cease to seem remarkable and would no longer carry signaling value. Ironically, it is perhaps that situation more than any other, that is, the state of affairs in which the visible hiring of a minority carried *no*

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117. See Green, *supra* note 4, at 604.

118. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring).

signaling value in particular, that would indicate true progress toward the goals of workplace antidiscrimination laws.

#### CONCLUSION

At bottom, the simple signaling rationale for race- or gender-conscious hiring stands on shaky justificatory ground as a matter of economics, law, and morality. The hiring of minority personnel to visible positions for their showcase value—“trophy hiring,” to put it crassly—may very well be an effective means of signaling an employer’s geniality toward minority groups or women, and its sensitivity to the social significance of diversity. But the more widespread this sort of showcasing becomes over time, the less meaningful the content of the associated signal will be. If most employers are engaging in this behavior, the practice begins to resemble a norm, and a negative reputational cost attaches to a firm’s inability to make a showcase-worthy hire. If everyone is doing it, then showcase hiring becomes little more than a precondition to a firm’s acceptance into polite society. Maybe this describes the state of affairs in which we already find ourselves. On the other hand, maybe we are overestimating the prevalence of these practices. (We are not so sure.)

But what we want to drive home is this: as practitioners and participants in diversity-oriented hiring practices, we cannot be content with justifying those practices in reference to their signaling value, as reflected in the increasingly trite idea that they “send a positive message.” Our reasons for our diversity-promoting practices cannot possibly be so empty, so nonaspirational, and so devoid of respect for our fellow colleagues and candidates. To be sure, it is in the nature of a signal that we do not control how observers will understand our actions. And perhaps it is in our social nature to signal others that we are, and we belong to institutions that are, of the “good type.” But we must not mistake the signaling value of our diversity-hiring practices for reasons that provide adequate justification for them. That mistaken view—the view that our diversity-oriented efforts are justified by the positive message they send about *us*—is corrosive to the values of respect and equality that underlie our concern for diversity in the first place.

