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Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Tournament

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Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Promotion Tournament

Donald C. Langevoort*

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I. Interdisciplinary Prospects

The dominant strains of corporate governance theory are far removed from the scholarship in employment and discrimination law. The two fields occupy distant workspaces and almost never talk to each other. The principal reason is that most corporate legal scholars have deliberately defined their field so that it addresses only a single, if crucial, subject: the allocation of control over firms between managers and suppliers of capital—investors.[1] So

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* Copyright 2004, Donald C. Langevoort, Thomas Aquinas Reynolds Professor of Law, Georgetown University Law Center. This work was supported by the Georgetown-Sloan Project on Business Institutions. Thanks to Carrie Menkel-Meadow, Kathy Stone, Margaret Blair, Mitu Gulati, Kim Krawiec, participants of the Washington & Lee Symposium on Critical Race Theory, the NYU Conference on Behavioral Analyses of Workplace Discrimination, and faculty workshops at Georgetown and the University of North Carolina for their encouragement and suggestions.

1. For the most recent celebration of this perspective, see Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001) ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.").

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restricted, the field leaves to others the task of thinking about the legal relationships between the firm and other stakeholders, including those who supply its labor.

Some corporate scholars chafe under this restricted vision and seek to redefine the boundaries of corporate law so as to encourage[2]—or in some cases even require[3]—the board of directors to take into account the interests of employees, bringing employment law and corporate law into closer contact. But their project has yet to gain anything close to the upper hand. Some of the resistance is no doubt ideological—there is a strong conservative streak within the community of corporate scholars, and many of the critics of the narrow vision of corporate law have an openly progressive agenda. I suspect, though, that others fear that the field will lose its intellectual specialty if it expands too far in the direction of open-ended constructs like "team production"[4] or "connected contracts."[5] Yet regardless of the eventual scholarly consensus on whether corporate *law* should shift away from exclusive attention to investor interests, the corporate *theory* informing that inquiry uses a much wider-angled lens. Economists, whose ideas orthodox corporate law scholars habitually borrow, certainly have no similar self-imposed limits on their interests. "Theory of the firm" work translates into a strong interest in employment contracts and structural relationships, resulting in a melding of economics and human resources.[6] Economists studying the principal-agent problem have long

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2. *See* LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 118–19 (2001) (suggesting that the legal duties owed to shareholders by the board of directors should be relaxed to allow for greater concern for the corporation's other stakeholders).

3. *See* Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 607–08 (2002) (broadening fiduciary duties to include a duty to employees); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 950–53 (1993) (discussing actions taken by courts and legislatures that have allowed a board of directors to consider the interests of other stakeholders when important strategic decisions are made). An older strand of this thinking with European roots advocates the placement of labor representatives on corporate boards of directors. *E.g.*, Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 158–59 (1988) (discussing the presence of a labor representative on the board of directors as a possible way to protect labor's interests).

4. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249 (1999).

5. G. Mitu Gulati et al., *Connected Contracts*, 47 UCLA L. REV. 887, 894 (2000).

6. *See generally* JAMES N. BARON & DAVID M. KREPS, STRATEGIC HUMAN RESOURCES: FRAMEWORKS FOR GENERAL MANAGERS (1999); PAUL MILGROM & JOHN ROBERTS, ECONOMICS, ORGANIZATION AND MANAGEMENT (1992). The "principal-agent" problem is one of the organizing ideas of this literature with an immense influence on the study of corporate

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been interested in institutional arrangements that optimize the efficiency and productivity of the firm, something hardly limited to the resolution of conflicts between managers and investors.

Since the early 1970s, work in corporate law has closely followed the interests of the economists, and it continues to follow in this direction.[7] Having gained some fluency with more expansive ideas about how firms are organized, scholars who think of themselves as "corporate" are seeing connections to other legal disciplines and are applying their skills and insights to problems in the borderland. I suspect that this expansion of interests will gradually transform "scholarship of the firm." Following the lead of corporate scholars like Margaret Blair, more attention will be paid to institutional arrangements—both contract and legal design—that facilitate productivity through more sophisticated approaches to human resources within organizations.[8] We already see some signs of this increased attention in work on "virtual corporations"[9] and in David Millon's exploration of employment security inside the firm.[10] Stephen Bainbridge's writing on the connections between corporate decisionmaking and participatory workgroup

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governance law. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308–10 (1976) (describing the agency costs associated with the separation of ownership and management inherent in corporations as legal entities).

7. One benefit from this movement is as an antidote to the myopia that comes from too much focus on the manager-investor connection. Simply by way of illustration, securities law scholarship looks at the matter of corporate discourse solely through the lens of management-investor communications. Most corporate communications, however, have audiences other than investors that have not really been taken into account by securities regulation. *See* Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN. L. REV. 87, 103–04 (1999) (describing different types of corporate communications that are addressed to audiences other than the corporation's shareholders).

8. *See, e.g.*, Margaret M. Blair, *Firm-Specific Human Capital and Theories of the Firm*, *in* EMPLOYEES AND CORPORATE GOVERNANCE 74–80 (Margaret Blair & Mark Roe eds., 1999) (addressing various institutional arrangements designed to retain employees in an effort to retain firm-specific human capital). For a perspective outside the corporate perspective, see Katherine Van Wezel Stone, *Policing Employment Contracts Within the Nexus-of-Contracts Firm*, 43 U. TORONTO L.J. 353, 376 (1993) (suggesting that unions be allowed to participate in strategic-level corporate decisions so as to put labor on an "equal footing with all other contenders for power within the concern"); Katherine V. W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 568–72 (2001) (describing the new psychological contract as general training, market-based pay, and networking opportunities instead of job security and internal promotions).

9. *See generally* Claire Moore Dickerson, *Spinning Out of Control: The Virtual Organization and Conflicting Governance Vectors*, 59 U. PITT. L. REV. 759 (1998).

10. *See generally* David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975 (1998).

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arrangements[11] is another nice inquiry into this type of issue, as is—in a very different direction—research by Stewart Schwab and Randall Thomas on the exercise of shareholder voting rights by labor unions and pension plans.[12]

This Article follows in that spirit. Once we open the corporate governance/human resources nexus to deeper inquiry, mutual scholarly interest in diversity and discrimination follows naturally.[13] Firms have complex motives to take nondiscrimination and the promotion of diversity seriously. First, at least certain forms of discrimination are both unlawful and socially illegitimate and hence present threats of potential liability and injury to reputation. Second, human resources demands are such that attracting and motivating a diverse workforce is a competitive imperative. At the same time, however, offsetting economic forces may exist that favor subtle forms of discrimination and hostility to diversity, even if intentional and overt racial or gender-based bias is mostly outdated.[14] In sum, the process of promoting

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11. Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 680–84 (1996) (finding that participatory management improves corporate decisionmaking by efficiently channeling information obtained from low-level employees to the proper decisionmaker).

12. *See generally* Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018 (1998). My suspicion is that a similar blending will occur along the boundaries between corporate law and intellectual property law, creating something of a triangulation of interests.

13. I do not suggest that this particular nexus is entirely unexplored—scholarship is emerging on a number of dimensions relating to corporate law. *E.g.*, Steven Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption*, 77 ST. JOHN'S L. REV. 837, 837–40 (2003) (suggesting that boards of directors with diverse memberships are more likely to scrutinize the business because the members have fewer shared common characteristics); Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389, 413–16 (2002) (advocating that unadjudicated and adjudicated discriminatory conduct be disclosed to investors). The economics literature on discrimination is extensive. *See generally* Joseph G. Altonji & Rebecca M. Blank, *Race and Gender in the Labor Markets*, *in* 3C HANDBOOK OF LABOR ECONOMICS 3143 (Orley Ashenfelter & Richard Layard eds., 1999); Brian L. Goff et al., *Racial Integration as an Innovation: Empirical Evidence from Sports Leagues*, 92 AM. ECON. REV. 16 (2002) (finding that sports teams with racially integrated teams performed better than nonintegrated teams); Paul Milgrom & Sharon Oster, *Job Discrimination, Market Forces and the Invisibility Hypothesis*, 102 Q.J. ECON. 453 (1987) (finding that racial discrimination is caused in part by the lack of visibility of minorities in the labor market).

14. *See* Frances J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 ACAD. MGMT. REV. 402, 420 (1996) (stating that "groups and organizations will act systematically to drive out individuals who are different from the majority, unless this tendency to drive out diversity is managed"); *see also* Altonji & Blank, *supra* note 13, at 3168–76 (examining different models that explain statistical data suggesting the presence of ongoing discrimination in labor markets for women and blacks).

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diversity and ending discrimination, whether to avoid liability or simply to remain competitive, is a difficult challenge faced by many firms.[15] It demands a close look at the efficacy of the internal decisionmaking and authority structures of the firm.

Two recent papers piqued my interest in the connection between corporate governance and diversity initiatives. One, by Devon Carbado and Mitu Gulati, claims that critical race theory has much to gain from taking account of the managerial literature on the connections between efficiency and homogeneity inside the firm, and that law and economics, in turn, should take more seriously the dynamic social construction of race inside the workplace.[16] In other words, both genres would benefit from constructive dialogue. The other is Susan Sturm's thoughtful article on "second-generation" discrimination in organizational settings.[17] At the risk of oversimplification, her point is that more subtle forms of employment discrimination cannot be eradicated successfully using old-style legal commands and controls.[18] Rather, courts and others wanting to promote diversity have to tweak organizational structures, setting in motion intrafirm processes that spot and solve problems creatively and cooperatively. She points to experiences at companies such as Deloitte & Touche, Intel, and Home Depot as positive examples.[19]

Carbado and Gulati are pessimistic about countering the subtle pressures toward homogeneity except by fairly aggressive and vocal means.[20] By contrast, Sturm's article strikes an optimistic note about possible ways of

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15. *See* Milliken & Martins, *supra* note 14, at 414–20 (finding not only that diversity increases the quality of group decisions but also that groups tend to become less diverse over time).

16. *See* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1761–64 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., Temple University Press 2002)) (discussing the potential value of collaborative efforts between law and economics and critical race theory disciplines).

17. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

18. *Id.* at 460–62.

19. *Id.* at 491–519.

20. They accept that firms are currently pressured to achieve some diversity but will respond by preferring minority group members who effectively deny their diversity and preserve the prevailing homogeneity. For a further exploration along these lines dealing with law firms, see David B. Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1567 (2004) (stating that black lawyers were allowed into large corporate law firms so long as they "were functionally indistinguishable from the white lawyers that these institutions had always hired").

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addressing second-generation discrimination.[21] While I hope Sturm is right, my intuition is that we need to understand the likely points of resistance to diversity initiatives more fully before making any confident judgment about what may or may not work in a larger universe of firms.[22] Knowledge of organizational behavior should be useful here because, although some grounds for resistance will have distinct racial or gender overtones, others may fall into the more generic categories familiar to those who study how firms seek to promote any form of change or redirection among its employees. And the tone of much of the research about "top-down" efforts to change the embedded practices and directions within an organization is far from optimistic.[23] We have to understand the nature of the foreseeable organizational resistance before we can deal with it. Through their darker lens, Carbado and Gulati explore some of these barriers but do not go far enough in playing out the likely consequences in terms of either the social or the political dynamics inside the firm. Unfortunately, the existing social science research does not tell us enough to be highly confident in assessing this problem. Hence, my contribution, also drawing from the melding of conventional and behavioral economics with the study of organizational behavior along the lines of much of the new institutional economics,[24] is speculative.

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21. *See generally* Sturm, *supra* note 17.

22. *See* Parshotam Dass & Barbara Parker, *Strategies for Managing Human Resource Diversity: From Resistance to Learning*, 13 ACAD. MGMT. EXECUTIVE 68, 72 (1999) (finding that successful implementation of diversity initiatives depends on the intensity of the external pressures for promoting diversity and the extent to which management has made diversity a priority).

23. *See, e.g.*, CHRIS ARGYRIS, OVERCOMING ORGANIZATIONAL DEFENSES: FORMULATING ORGANIZATIONAL LEARNING 2–3 (1990) (reporting a study that showed that board members often believe that they have inadequate power to effectively carry out their responsibilities and address potential management problems); Harvey Leibenstein & Shlomo Maital, *The Organizational Foundations of X-Inefficiency: A Game-Theoretic Interpretation of Argyris' Model of Organizational Learning*, 23 J. ECON. BEHAV. & ORG. 251, 257 (1994) (finding that defensive behavior in management is responsible for suboptimal organizational performance); Nelson P. Repenning & John D. Sterman, *Capability Traps and Self-Confirming Attribution Errors in the Dynamics of Process Improvement*, 47 ADMIN. SCI. Q. 265, 284–92 (2002) (arguing that attributing low productivity to flaws in the workforce rather than in the work processes causes potentially valuable process improvements to be overlooked). For a fascinating case study of a top-performing group's defense mechanisms and subsequent failure, see generally Paul Levy, *The Nut Island Effect: When Good Teams Go Wrong*, HARV. BUS. REV., Mar. 2001, at 51.

24. For a good overview, see Oliver E. Williamson, *Introduction* to ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 3, 9 (Oliver Williamson ed., 1990) (stating that economics and organizational theory are beginning to blend together).

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A conversation between governance and discrimination scholars about what happens inside the firm will be productive only if there is an acceptable common rhetoric. Much of orthodox corporate law work is dominated by the metaphor of the firm as a "nexus of contracts."[25] While that may be understandable as economists broadly understand the word "contract," it is jarring—and perhaps disturbing—when it takes on a normative connotation that assumes both legal enforceability and strong contractual "freedom."[26] A more inclusive description, from which much of what follows proceeds, is a "nexus of negotiations": The work among people within corporations is a series of negotiations that constantly redefine the situation in which the participants find themselves (negotiations of reality) and how they should respond (negotiations of power, authority, and action).[27] Because reality changes constantly, any understandings are inevitably temporary, yet they plainly influence all the construals and choices that follow. One virtue of this metaphor is that it captures the firm's cognitive and cultural dimensions—something that by all accounts is crucial to any deep understanding—whereas the contract metaphor does not.[28]

In turn, that metaphor also hints at how to be constructive. If the dominating image within the firm is the complex set of ongoing negotiations, then the central task of any lawyer, manager, or anyone else who wants to have an influence is to combine the roles of negotiator and mediator, rather than acting as an authority figure. Sometimes such a person can bargain for his or her own version of reality and power. But effective influence will come more often from being able to intervene in the negotiations among others in the firm in a way that facilitates a better outcome. Fortunately, much work in

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25. *See generally* Symposium, *Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989).

26. Hence, the endless debate among corporate scholars as to whether to allow contractual "opt-outs" of fiduciary responsibilities. Lucian Arye Bebchuk, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1365, 1396–97 (1989).

27. The classic texts in organizational behavior take this perspective almost as a given. *See generally* JAMES MARCH, DECISIONS AND ORGANIZATIONS (1988); JEFFREY PFEIFFER, MANAGING WITH POWER (1992); KARL E. WEICK, SENSEMAKING IN ORGANIZATIONS (1995). For my effort to integrate this concept into a legal theory of why corporations commit fraud, see generally Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Others)*, 146 U. PA. L. REV. 101 (1997).

28. On the influence of firm culture from the standpoint of transaction cost economics, see generally David M. Kreps, *Corporate Culture and Economic Theory*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90 (James E. Alt & Kenneth A. Shepsle eds., 1990); David M. Kreps, *The Interaction Between Norms and Economic Incentives: Intrinsic Motivation and Extrinsic Incentives*, 87 AM. ECON. REV. 359 (1997) (discussing the rationale for adhesion to norms by individuals).

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psychology and economics teaches how to negotiate and mediate better,[29] skills that would be useful in promoting organizational compliance with the law and with aspirations in promoting diversity and nondiscrimination.

II. Diversity and the Corporate Promotion Tournament

Discrimination can be found at any level of business organization, from the hiring of blue-collar workers to the high-level decisions on the composition of the senior executive team. Here, the focus will be on the middle and upper levels of the organization. The study of middle managers, especially, is a neglected subject in corporate governance and the "legal" theory of the firm.[30] By all accounts, much of the real work of the organization occurs there. Just as important, senior managers ascend, at least initially, based on their performance as middle managers. A better understanding of this world is essential for both corporate academics and those interested in the fairness of patterns of hiring and promotion within corporations.[31]

From an economics perspective, the standard question in studying diversity and discrimination in the firm is whether discrimination is, on average, efficient or inefficient in terms of productivity or profitability. If it is inefficient, as conservative critics of affirmative action habitually point out,[32] then there is the rosy possibility that patterns of discrimination should whither away as competition forces its elimination. But this will not occur if either of two conditions is present individually, much less simultaneously. One condition is insufficient competition, so that the residual rents can continue to

29. *See generally* BARRIERS TO CONFLICT RESOLUTION (Kenneth J. Arrow et al. eds. 1995); Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEG. L. REV. 97 (2001) (discussing an improved legal problem solving model which includes symbolic and logical thinking as well as "legal creativity").

30. *See* Gerard Hertig, *Corporate Governance in the United States As Seen from Europe*, 1998 COLUM. BUS. L. REV. 27, 41 (noting that "[t]he role of middle management as such is largely ignored" in traditional studies of the internal organization of firms, which instead focus on the board and its committees or the CEO and top management). For a discussion of middle managers from the managerial literature, see generally Quy Nguyen Huy, *Emotional Balancing of Organizational Continuity and Radical Change: The Contribution of Middle Managers*, 47 ADMIN. SCI. Q. 31 (2002).

31. *See* Roy Radner, *Hierarchy: The Economics of Managing*, 30 J. ECON. LIT. 1382, 1382–84 (1992) (discussing the importance of managing within the modern firm).

32. *E.g.*, Richard Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1321–25 (1989).

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support a taste or habit for discrimination. The other condition is the persistence of positive efficiencies to discrimination, a possibility explored a few years ago by David Charny and Mitu Gulati[33] and elaborated upon more recently by Gulati and Devon Carbado.[34] They identify reasons why discrimination could be consistent with efficiency, including the possibility that interactions among employees are more productive when the employees share common traits—backgrounds, interests, patterns of speech—associated with a common race or gender.[35] Trust, a crucial element of work within the firm, may develop more easily within a homogenous group. Without in any way doubting that this bias is the product of past discrimination and wholly illegitimate, the possibility that there are efficiencies to the perpetuation of bias calls for a different normative approach. Charny and Gulati, drawing from work by Edward Lazear and Sherwin Rosen, play out this possibility by thinking through its implications when employment patterns in a firm are organized in a tournament fashion—one where employees are matched against each other for eventual selection as one of the small group that becomes the senior management team with extraordinary status and compensation.[36] In this setting, rational employees make investment decisions in their careers with a view toward the rewards associated with the large, but risky, winner's prize.[37]

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33. *See* David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 77–83 (1998) (discussing reasons why an "economically rational" firm may discriminate). For a further extension of this view critiquing antidiscrimination law and finding positive externalities associated with a taste for homogeneity, see generally RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

34. *See* Carbado & Gulati, *supra* note 16, at 1813 (arguing that outsider groups, such as women and minorities, may feel the need to do extra "identity work" at their jobs to counter the stereotypes they perceive themselves subjected to, which may result in lost opportunities and increased burdens).

35. Charny & Gulati, *supra* note 33, at 66–67. Because of this, they suggest, employers might rationally predict a nonminority candidate to outperform a minority one. *See id.* at 66 (noting that the costs of integrating minorities into the workplace might arise from the reluctance of typical workers to cooperate with minority workers because of the different external characteristics of minorities).

36. *See, e.g.*, Edward P. Lazear & Sherwin Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841, 847 (1981) (discussing the relationship between compensation and incentives in relation to output and rank within the firm).

37. In particular, a minority group member might rationally perceive discrimination and fail to invest as much in the skills necessary to win the tournament or else might be inclined to take excessive risk. *See* Rosabeth Moss Kanter, *Differential Access to Opportunity and Power*, *in* DISCRIMINATION IN ORGANIZATIONS: USING SOCIAL INDICATORS TO MANAGE SOCIAL CHANGE 52 (R. Alvarez et al. eds., 1979) (proposing tools to measure whether there is a systematic disadvantage by race or gender within organizations by examining distributions of opportunity

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I want to explore this same terrain but very differently. First, I want to relax the rationality assumption considerably, substituting assumptions drawn from psychology and behavioral economics. Second, I want to drill a bit deeper into the tournament structure of the firm's promotion practices to ask, as I have done in another recent work,[38] a largely ignored question (at least by legal scholars) that is both central from a corporate governance perspective and also has implications for discrimination and diversity: Are there certain *types* of people, in terms of psychological makeup, who are statistically more likely to win the successive rounds of the internal promotion tournament so that the makeup of the final winner's circle—the executive suite—is disproportionately populated by them?

My prediction is that something other than pure-form rationality is likely to be the dominating trait among the survivors.[39] That is, there may be certain "unrealistic" cognitive biases that are adaptive in tournament play and thus rewarded. If this hypothesis is right, we will have a very important corporate governance insight because the central task of governance is to constrain the behavior of those granted the largest amount of managerial discretion. Any special biases within this rarified group need to be understood thoroughly in order to create the right institutional design.[40] The task is to consider what those adaptive biases might be and then to think about the implications in terms not only of governance[41] but also of diversity and discrimination.

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and power).

38. *E.g.*, Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 95 GEO. L.J. (forthcoming 2004) (on file with the Washington and Lee Law Review).

39. Psychologists have long been aware of the economists' predictions and have studied the presence of cognitive bias in "expert" populations. While experts do indeed think differently and generally more effectively than the general population, they are by no means immune from bias.

40. *See* MICHAEL MACCOBY, THE GAMESMAN: THE NEW CORPORATE LEADERS 15 (1976) (noting that the premise of the book is that in order to succeed, any strategy for social change must take into account corporate managers because of their influence on the work and lives of others). Maccoby's more recent prediction—which looks good in light of the recent financial scandals—is that highly narcissistic individuals are likely to become leaders of organizations in unstable market settings because of their ability to communicate a vision and confidence. Michael Maccoby, *Narcissistic Leaders: The Incredible Pros, the Inevitable Cons*, HARV. BUS. REV., Jan.–Feb. 2000, at 69, 69–71. If Maccoby is right, corporate governance experts might want to take into account the propensity of narcissists to deny and hide the truth.

41. Langevoort, *supra* note 38.

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Let us begin by taking a closer look at the structure of the tournament.[42] A naïve account of managerial hiring or promotion is that it is solely skill-oriented. In this account, technical skills in doing a specific job dominate the evaluation process, defining the "merit" on which selection should be based. But the managerial literature emphasizes something very different. Much of the time, middle managers are organized into a work team that must, through the process of ongoing negotiation, solve a sequence of problems in carrying out its responsibilities and then negotiate with others the perception of how well or poorly the team performed.[43] The common practice in most corporations is to rotate middle managers through many different work groups, evaluating each set of performances with a combination of individual and group assessments. Promotions within the organization are based on these evaluations.[44] One author insightfully calls these "probationary crucibles"[45] because they require *iterated* success if the person in question is to survive and thrive.

If that is accurate, then we should observe an interesting tension in the hiring process. On one hand, the firm may want people who are entrepreneurial ("self starters"), who have the kind of ambition, work ethic, and risk tolerance to perform well as individuals. These, after all, are characteristics associated with future leadership. At the same time, however, the firm will also recognize the need to find people who will fit well into the many teams to which they will be assigned. They will also, then, look for traits like loyalty and "being a team player," which are not perfectly consistent with the first group of traits.

Put aside for a moment what kind of person best fits this mix *ex ante*. Hiring is a heuristic step,[46] subject to rigorous, albeit subjective, empirical

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42. For simplicity, I will not discuss the role of selection of outsiders in the tournament structure and assume a contest only among insiders. The selection of outsiders complicates the matter but not in a way that would change the analysis considerably; outsiders are competing in tournaments of their own, presumably with similar structures, and by most accounts there is a bias to insider selection. *E.g.*, William Chan, *External Recruitment Versus Internal Promotion*, 14 J. LABOR ECON. 555, 556 (1996) (discussing the choice between internal promotion and external recruitment).

43. *See generally* Richard A. Guzzo & Marcus W. Dickson, *Teams in Organizations: Recent Research on Performance and Effectiveness*, 47 ANN. REV. PSYCH. 307 (1996) (examining recent research on teams and the factors that influence team effectiveness).

44. For a useful overview, see generally R. D. Avery & K. R. Murphy, *Performance Evaluation in Work Settings*, 49 ANN. REV. PSYCH. 141 (1998).

45. ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS 40 (1988).

46. *See* Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 84 (discussing a method for choosing the most qualified candidate even in the face of embellishment of skills and abilities by the

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testing. That is, the person is put into a team and evaluated periodically. Success means the possibility of promotion and assignment to another team with a higher level of responsibility; failure means scrutiny and a cloud over future prospects, if not immediate termination. There are multiple repetitions of this game-like process, eventually creating a small subset of survivors who succeeded repeatedly in play against many competitors.

The standard—and doubtless accurate—account of discrimination in this setting is that these evaluations are biased at least in part because those in control (a heavily white male population) construct images over time of what success means simply by reference to historical patterns[47] that, in turn, reflect historical domination. Given the "group" structure of much of the managerial workplace, white males might have a competitive advantage because of their comfort and familiarity with the language and norms of workgroup interaction.[48] Indeed, there is a body of literature that links homogeneity with more efficient small group performance for many kinds of tasks.[49] If this is the case, white males would have a continuing advantage simply because of their primacy in setting the cultural norms and their numerical domination of the status quo.

That by itself is a plausible but relatively mild form of competitive fitness. After all, there is also research that shows the *benefits* of diversity in small workgroups in terms of quality of decisionmaking.[50] Moreover, the supposed benefits of homogeneity gradually erode once a group is established, especially in a setting that values cooperation or otherwise attains a level of

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candidate or third-party "reformers"). *See generally* John Moran & John Morgan, *Employee Recruiting and the Lake Wobegon Effect*, 50 J. ECON. BEHAV. & ORG. 165 (2003).

47. For a recent study on perceptions of men and women on what constitutes a good manager demonstrating this bias, see generally Laurie A. Rudman & Stephen E. Kilianski, *Implicit and Explicit Attitudes Toward Female Authority*, 26 PERS. & SOC. PSYCH. BULL. 1315 (2000).

48. *See generally* Charny & Gulati, *supra* note 33. For a good survey of this literature, see generally Francis Flynn et al., *Getting to Know You: The Influence of Personality on Impressions and Performance of Demographically Different People in Organizations*, 46 ADMIN. SCI. Q. 414 (2001).

49. *See generally* Karen A. Jehn et al., *Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Workgroups*, 44 ADMIN. SCI. Q. 741, 741–42 (1999); Orlando Richard et al., *The Impact of Visible Diversity on Organizational Effectiveness: Disclosing the Contents in Pandora's Black Box*, 8 J. BUS. & MGT. 265, 268–71 (2002); Anne S. Tsui et al., *Being Different: Relational Demography and Organizational Attachment*, 37 ADMIN. SCI. Q. 549, 575 (1992).

50. For an overview of the conflicting strands of research in this area, see generally Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229 (2001).

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interpersonal congruence.[51] White males hardly have a monopoly on cooperative strategies—quite the contrary. In other words, any competitive resistance to diversity on these grounds should be comparatively fragile.

My hypothesis, however, is that there is something deeper and more powerful going on inside the tournament. One crucial question, for instance, has to do with the appetite of executives for risk. Some people argue that the way to the top of an organization is to play it safe and engage in ingratiation and other influence tactics with one's superiors. There is something intuitive about this—but wrong. In highly competitive organizations, the safe strategy should be dominated by that of the "lucky risk-taker." The executive who takes significant risks will succeed repeatedly—simply by good fortune—some percentage of the time. Other times the risk-taking will lead to predictable failures. If we assume a large population in the organization, some small percentage of the risk-seekers will hit a lucky streak that will set them apart from both the risk-seeking losers and the play-it-safers. Association with unusually good outcomes does much for a career and can become a self-fulfilling prophecy as the lucky person is identified as brilliant and given tasks more likely to bring further success.[52]

If so, then we might look for biases or traits associated with an above-average appetite for risk. Research in social cognition suggests that the two traits related to competitive success are a high degree of self-confidence and a higher than normal propensity to take risk. Self-confidence (optimism about personal efficacy) is associated with greater persistence, ability to persuade others, and the like.[53] It also leads to the willingness—perhaps out of blissful ignorance—to be entrepreneurial and risk-seeking. When rewarded with

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51. *See* Jennifer Chatman & Francis Flynn, *The Influence of Demographic Heterogeneity on the Emergence and Consequences of Cooperative Norms in Work Teams*, 44 ACAD. MGT. J. 956, 970–71 (2001) (finding that the negative effects of diversity on group functioning fade over time); *see also* Jeffrey T. Polzer et al., *Capitalizing on Diversity: Interpersonal Congruence in Small Work Groups*, 47 ADMIN. SCI. Q. 296, 316 (2002) (noting that high interpersonal congruence moderates the negative effects of diversity on group functioning).

52. For a theoretical exploration, see generally Roland Benabou & Jean Tirole, *Self-Confidence and Personal Motivation*, 117 Q.J. ECON. 871 (2002). On the dangers of such attributions, see generally Malcolm Gladwell, *The Talent Myth: Are Smart People Overrated?*, NEW YORKER, July 22, 2002, at 28.

53. *See generally* J. EDWARD RUSSO & PAUL SCHOEMAKER, DECISION TRAPS: TEN BARRIERS TO BRILLIANT DECISION-MAKING AND HOW TO OVERCOME THEM (1989); MARTIN E. P. SELIGMAN, LEARNED OPTIMISM (1990); Daniel Kahneman & Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 MGT. SCI. 17, 27–29 (1993); SIMON GERVAIS ET AL., OVERCONFIDENCE, INVESTMENT POLICY, AND EXECUTIVE STOCK (Rodney L. White Center for Fin. Research, Working Paper No. 15–20), *at* http://papers.ssrn.com /sol3/papers.cfm?abstract=361200 (2003) (on file with the Washington and Lee Law Review).

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positive feedback, the optimists' self-confidence increases further, and with both the confidence and the performance, they are given even more attractive opportunities to succeed in future rounds.[54]

That research, in turn, would lead us directly to issues of diversity and discrimination. Both self-confidence and a propensity to take risks, according to psychologists, are unequally distributed along racial, cultural, and gender lines.[55] Whether there are evolutionary or socially constructed explanations for this is controversial but unimportant for the descriptive purpose I have here.[56] One can readily see how and why white males might have higher ratings on each of these "egocentrism" scales. And if these traits are associated with higher payoffs—that is, compensation of higher risk-taking and aggressiveness—we would expect the eventual tournament survivors to fall disproportionately into that profile. As a result, this would reinforce the success stereotypes used in heuristic settings like hiring and early-stage promotion.

Another survivorship trait closely reflects what Carbado and Gulati were after and relates to the type of person who moves fluidly from point to point within the firm. The need for teamwork has led some commentators in the corporate field to predict that firms' internal norms, and presumably hiring and

54. On the spillover from this self-confidence, see generally Mathew L. A. Hayward & Donald C. Hambrick, *Explaining the Premiums Paid for Large Acquisitions: Evidence of CEO Hubris*, 42 ADMIN. SCI. Q. 103 (1997) (finding that indicators of CEO hubris were related to high premiums paid for acquisitions).

55. For evidence regarding gender differences from a financial perspective, see generally Brad M. Barber & Terrence Odean, *Boys Will Be Boys: Gender, Overconfidence and Common Stock Investment*, 116 Q.J. ECON. 261 (2001) (documenting that men trade more aggressively than women); Nancy Ammon Jianakoplos & Alexandra Bernasek, *Are Women More Risk Averse?*, 36 ECON. INQUIRY 620 (1998) (finding that single women were relatively more risk averse than single men). On cultural differences, see generally Elke U. Weber & Christopher Hsee, *Cross-Cultural Differences in Risk Perception, But Cross-Cultural Similarities in Attitudes Toward Perceived Risk*, 44 MGT. SCI. 1205 (1998) (finding cultural differences in risk preferences associated primarily with cultural differences in the perception of risk rather than cultural differences in attitudes toward perceived risk).

56. To be clear, I am by no means telling a story of "natural superiority." The tournament created by the probationary crucibles is plainly a social construct, and the choice to reward competitive success under a highly stylized set of rules of the game is far from inevitable. My point is that once the internal promotion structure of the firm has developed in the way it has (for whatever reason), it will tend to reward risktakers, which have an inflated self-confidence. If those traits are distributed unevenly, the system will be deeply biased, and the bias will be hard to eliminate without very aggressive intervention. Mild tweaking will not work, for reasons beyond conventional stereotypes. To put it another way, the system's largely automatic tilt favoring—both *ex ante* and *ex post*—the psychological traits unevenly distributed to white males creates one of the points of resistance that any effort to promote diversity will struggle to overcome.

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promotion practices, will be heavily skewed to reward cooperators and weed out the selfish.[57] Based both on theory and anecdotal observation, this is unlikely—though not completely off the mark. Remember that on a regular basis managerial groups within the firm are disbanded so that loyalties must shift to an entirely new group, never allowing people's attachments to become too heavily encased in cement. Moreover, there is an important individual element to the tournament; a competitive manager has to be savvy enough to know how and when to defect quietly to impress superiors—that is, allow his or her individualized traits to be observed when that is desirable.[58] In addition, of course, the manager must behave in a highly competitive, potentially aggressive fashion toward any "out-group"—including former colleagues, perhaps—that is perceived to be a rival. In this light, the image of the innate cooperator does not quite describe the person likely to thrive.

Instead, the survivor is likely to be someone who can be *both* loyal and opportunistic, a mix that requires quite a bit of cognitive multitasking.[59] The egoist who simply fakes in-group loyalty is unlikely to survive scrutiny through many iterations in the crucible. There are too many higher-ups who can spot the selfishness and who fear that the quality would eventually pose a danger. Loyalty is a bona fide survival trait. But it is one that has to be moderated in those who want competitive success, and I would venture a guess that the moderation comes in the form of the cluster of traits that psychologists label "High Machiavellianism" or "high-Mach."[60] This kind of person deeply understands the need for mutual support and teamwork and rewards those who cooperate with intense loyalty as long as the cooperation has a positive payoff. On the other hand, he or she will defect without guilt when there is a compelling reason *and* the ability to do so without suffering a costly loss of reputation. To manage this conflict,[61] the high-Mach is unusually adept at

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57. *See, e.g.*, Robert Cooter & Melvin Eisenberg, *Fairness, Character, and Efficiency in Firms*, 149 U. PA. L. REV. 1717, 1719–21 (2001) (noting that diligence and honest performance of agents increases efficiency).

58. *Cf.* Canice Prendergast, *A Theory of "Yes Men"*, 83 AM. ECON. REV. 757, 769 (1993) (concluding that regarding workers on a subjective basis (effort or output) may induce them to distort their work products to reflect what they believe their superiors want to hear, which will result in inefficiencies in the form of less accurate work products as compared with workers who are induced to tell the truth).

59. *See* Martin Kilduff & David V. Day, *Do Chameleons Get Ahead? The Effects of Self-Monitoring on Managerial Careers*, 37 ACAD. MGT. J. 1047, 1055 (1994) (demonstrating that "high self-motivators" are more willing to change employers to get ahead and are more likely to be promoted).

60. Samuel Bowles et al., *The Determinants of Earnings: A Behavioral Approach*, 39 J. ECON. LIT. 1137, 1161–62 (2001).

61. Psychologists tell us that the best actors are the ones who so internalize their roles that

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rationalizing a shift in loyalties, something that both deflects guilt and protects one's reputation. Through the creative use of self-deception and influence techniques, this kind of person can be adaptively flexible and very persuasive to others. Self-interest and justifiable behavior blend seamlessly.[62] Research suggests that high-Machs are disproportionately successful in sales and marketing[63] and probably other highly competitive line and staff positions. They can be very "focused"—another favorite in the human resources playbook—precisely because of their disinclination to worry about relationships, commitments, or ethical distractions when there is good reason to move on. They are adept at emotional distance.

A distinction between "grease" and "grit" captures this style of personality nicely.[64] "Greasy" people are those who are ethically and socially nimble, able to make strong in-group connections—be stars at teamwork—when it serves both their interests and the group's interest, as it so often will. But they can move away without the heavy baggage of regret when the economics dictate. Their skills accelerate the process of ongoing short-term negotiations (perceptual as well as contractual) and are thus favored inside the firm. In contrast, "gritty" people are those with the traits or preferences, whether ethical or social, that make internal negotiations more difficult because of the dissonance they introduce. If they slow things down in a high velocity environment, they will be disfavored. Again, over time, tournament survivors will disproportionately display favored tendencies. Grease wins over grit.[65]

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they have no conscious awareness that they are deceiving anyone in the first place.

62. *See* George Loewenstein, *Behavioral Decision Theory and Business Ethics: Skewed Trade-Offs Between Self and Other*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 214, 221–23 (David Messick & Ann Tenbrunsel eds., 1996) (summarizing research on rationalization and noting the "[i]t is by now well established that people tend to conflate what is personally beneficial with what is fair or moral"). One mediating technique for rationalizing defection is to think of the victims as deserving it because of their own disloyalty to the group's goals. If that story is believed, others will not view the defection as inappropriate because the victims brought it on themselves.

63. *See* Myron Gable & Frank Dangello, *Locus of Control, Machiavellianism, and Managerial Job Performance*, 128 J. PSYCH. 599, 600 (1994) (noting that managers with high-Mach scores should be more effective than those with "lower-Mach" scores).

64. *See* Donald C. Langevoort, *The Organizational Psychology of Hyper–Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 970 (2002) (discussing personality characteristics, such as a high degree of self-confidence and ethical plasticity, associated with advancement up the corporate hierarchy).

65. Obviously, too much grease is dangerous. What I am describing is a more controlled form of plasticity.

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The diversity implications here are a bit more speculative but important. Going back to the point about small group efficiency, there is some reason to believe that the negotiation process is smoother when similar rather than different people are involved; if so, there is a small amount of grit added simply by being different. That certainly is the case if the person in question demands to be authentic in those differences,[66] leading to the prediction that any diversity that is pursued will be women and minorities who mimic white male traits, including negative stereotyping of other women and minorities.[67] The loyalty dimension is more ambiguous. If loyalty or connectedness were all that was at stake, then research would by no means suggest a white male advantage. But if the adaptive trait is something more plastic—strong, quick bonds, but only when delivering a positive payoff, coupled with an ability to be extremely aggressive vis-à-vis out-group members, including former associates—then that advantage might have at least a gender bias, if not a racial one. It is quite possible that white males on average score higher on the grease scale.[68]

If the latter is true, then any survivorship bias derived from the first two traits, overconfidence and a taste for risk, is strengthened. As far as diversity and discrimination are concerned, we can draw a couple of inferences. First, the obvious: We now have further reason to fear that the closer we look at the internal workings of the firm, the more we see why, on average, white male traits might generate positive abnormal returns (at compound interest) the longer the tournament goes on, predicting survivorship quite apart from the effects of stereotyped perception. Moreover, any effort to eradicate this bias will encounter resistance on competitive grounds as a result. Hence, we cannot be overly optimistic about "tweaking" strategies when compared to more aggressive intervention to promote diversity and nondiscrimination. Second, we have a troubling externality as to the personality type most likely to hold the reins of power in a firm. If a bias toward overconfidence, risk-taking, and ethical plasticity—however efficient inside the tournament structure—is socially

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66. *See* Devon W. Carbado & G. Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1263–66 (2000) (discussing the costs associated with asserting individual characteristics that are contrary to the work identity); Wilkins, *supra* note 18, at 1587 (noting that "conflicts and communication issues" impact diverse groups).

67. *See generally* Naomi Ellemers et al., *Sticking Together or Falling Apart: In-Group Identification as a Psychological Determinant of Group Commitment Versus Individual Mobility*, 72 J. PERS. & SOC. PSYCH. 617 (1997).

68. *See* Linda K. Stroh et al., *All the Right Stuff: A Comparison of Female and Male Managers' Career Progression*, 77 J. APP. PSYCH. 251, 257–58 (1992) (noting that women who have equal qualifications and follow similar career paths as men continue to receive lower salaries).

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troublesome because of the externalities associated with the kinds of business decisions the bias generates, then diversity initiatives might have a positive effect by neutralizing some of this bias.

III. Firm-Wide Efficiency

What was suggested above is a form of adaptation *within* the internal promotion structure of the firm. Certain traits lead to survivorship, meaning that there is a positive payoff to the individual who possesses them inside internal labor markets. This conclusion, however, does not necessarily mean that the same structure—favoring those who exhibit excessive optimism, have a relatively high risk-tolerance, and are ethically flexible—has a positive payoff for the company as a whole.[69] Perhaps, as Bob Cooter and Mel Eisenberg argue,[70] firms would prefer internal norms that reflect more stringent habits of character and integrity and thus would seek to counter the biases built into the tournament structure by revising the firm's hiring and promotion practices.

While there is no hard evidence one way or the other, there is no reason to predict with any confidence that the tournament structure I have described—however troubling from a societal perspective—is maladaptive at the level of the firm. Translating individual personality traits into indicators of firm-wide performance is difficult, of course,[71] but the first two traits described earlier, optimism and high risk-tolerance, are likely to have the same kinds of positive payoffs when embedded in the firm's senior management culture with respect to competition among firms as it does for managers internally.[72] That is, a firm that perseveres, acts aggressively, and takes calculated risks will, on average, be

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69. It is well recognized that organizations have to counteract the cognitive biases of individual employees to some degree. *See, e.g.*, Chip Heath et al., *Cognitive Repairs: How Organizational Practices Can Compensate for Individual Shortcomings*, 20 RES. ON ORG. BEHAV. 1, 6–7 (1993) (noting how individuals often attribute their success to stable, internal factors, while attributing their failures to unstable, environmental factors and discussing the need for organizations to counteract or repair this self-serving bias to ensure that success is not simply due to luck or other external factors).

70. *See* Cooter & Eisenberg, *supra* note 57, at 1726–28 (noting that screening and filtering are more effective methods for assuring good agent character than education or socialization).

71. *See* Barry M. Staw & Robert I. Sutton, *Macro Organizational Psychology*, *in* SOCIAL PSYCHOLOGY IN ORGANIZATIONS: ADVANCES IN THEORY AND RESEARCH 350, 350–51 (J. Keith Murnighan ed., 1993) (noting the lack of research into using psychological theory to understand organizational-level behavior).

72. *See* Langevoort, *supra* note 27, at 152–56 (discussing adaptive biases, particularly the relationship between optimism, risk-taking activity, and success).

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rewarded. While there may not be a tight coupling between internal promotion policies and the establishment of firm-wide habits, one should not bet against it. As to ethical plasticity, the conclusion is much the same. Firms need to be sensitive to external demands for legitimate behavior in setting policy but are more profitable, on average, if they construe what is legitimate with a self-serving bias. Of course, if we are right about whom the survivors of the firm's internal promotion tournament are likely to be, this plasticity will come naturally.

IV. Self-Serving Resistance

Now let us turn to what the foregoing means for nondiscrimination. We cannot, in the name of diversity, claim that these deep biases need to be eradicated simply to gain firm-wide efficiency. We should not dismiss that possibility, but the affirmative case is difficult to demonstrate to anyone not predisposed toward it. The likely payoffs to homogeneity are too strong. Thus, any effort to push diversity must be based on other reasoning. Here we return to the possibilities mentioned earlier. One is because the law demands it—a proposition undermined if the law takes a strong stand only against overt discrimination, as it does today.[73] Another is because diversity makes the company more legitimate in the eyes of key constituents. The third is because diversity may be a business necessity in order to attract the quantity of skilled managers needed to survive or prosper. Initiatives driven by these forces are what Susan Sturm explores so well in her article.[74]

If there is one thing clear in the business literature, it is that senior management errs severely if it assumes that because it is convinced that a certain initiative is good for the firm, employees will see it the same way. Of course, executives realize that employees may resist an initiative because it is not in their self-interest. But they assume that employees are aware of their selfishness, privately at least, and so assume that management has the moral high ground in the ensuing battle and can use guilt as a tactic for overcoming

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73. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1247–48 (1995) (suggesting that many biased employment decisions result from a variety of unintentional categorization-related judgment errors rather than, as legal interpretation of Title VII assumes, a conscious discriminatory purpose, and arguing that, if Title VII is to retain its effectiveness, this legal assumption must change). *See generally* Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, *in* FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 122, 124–25 (John J. Donahue III ed., 1997).

74. *See generally* Sturm, *supra* note 17.

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the employees' resistance. Top-down initiatives often have a preachy quality to them.[75]

Research counsels otherwise. As with many people, resistant managers are likely to convince themselves that what they believe is right and reasonable and denigrate senior management's motives to the extent that they are threatening.[76] Much work on affirmative action falls into this category; people opposed to it both articulate and convince themselves that they have the moral high ground. As Christopher Federico and Jim Sidanius claim,[77] this may be self-deception—the principled objections really do reflect a self-serving desire to maintain dominance—but it is no less convincing to the holder of that viewpoint. Attitude change is unlikely. I suspect that the same would be true of insistence to white or male managerial employees that a diversity-based initiative is a business necessity. That is just as likely to provoke the belief that the initiative is being imposed for illegitimate political reasons or external pressures that will not serve the company's best interests. It will take better advocacy than that to reduce resistance or induce cooperation.[78]

75. As with many corporate governance and management-style activities, these may be easy to promote disingenuously. *See, e.g.*, James D. Westphal & Edward J. Zajac, *The Symbolic Management of Stockholders: Corporate Governance Reforms and Shareholder Reactions*, 43 ADMIN. SCI. Q. 127, 129–35 (1998) (discussing a corporate trend towards announcing long-term incentive plans thought to focus executives on longer-term goals but making either no implementation or only trivial implementation in order to gain favorable market treatment at minimal cost and risk). For a critical exploration of compliance initiatives along these lines, including those in the nondiscrimination area, see generally Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003) (arguing that internal compliance programs and corporate conduct codes may lead to under enforcement and under deterrence).

76. *See supra* notes 60–62 and accompanying text (explaining the self-serving rationalization process that some employees experience in pursuit of success).

77. *See generally* Christopher M. Federico & Jim Sidanius, *Racism, Ideology and Affirmative Action Revisited: The Antecedents and Consequences of "Principled Objections" to Affirmative Action*, 82 J. PERS. & SOC. PSYCH. 488 (2002).

78. In addition, political ideology can come into play in business settings. A disposition to conservatism inclines people to reject psychologically grounded "excuses" for decisions in favor of an inflated vision of merit and just dessert. In other words, conservatives tend to doubt the existence and relevance of cognitive biases. *See* Phillip E. Tetlock, *Cognitive Biases and Organizational Correctives: Do Both Disease and Cure Depend on the Politics of the Beholder?*, 45 ADMIN. SCI. Q. 293, 320–24 (2000) (discussing the correlation between political viewpoint and management style).

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V. Constructive Intervention

Having suggested something about the likely depth of resistance diversity-based initiatives are likely to face in many firms, I now want to return to Sturm's account of the success of "problem-solving" kinds of programs at Deloitte, Intel, and Home Depot. My purpose here is to push harder on the question of what forces might have contributed to the apparent success of these programs and connect some possible answers to broader issues that have emerged at the corporate governance and human resources nexus.

At the risk of clinging too long to the pessimistic side of the story, I will start with an observation made by Sturm's interviewees twice in her account: Corporate executives do not "purchase" diversity-based compliance programs willingly, even when persuaded in the abstract of their value. It takes the threat of a lawsuit or some forceful top-down command to get their attention.[79] The two people quoted both identify "short-term" performance pressure on line managers as the motivating reason to pursue these programs.[80] This concern, of course, goes far beyond diversity-based compliance to an issue at the heart of corporate governance. At the highest levels of the firm, is there a systemic bias toward hitting quarterly earnings and revenues targets that distracts management from longer-term investments? In the empirical literature, this is a matter of some controversy but is at least a possibility.[81]

My sense is that pushing down the responsibility for diversity and nondiscrimination to the more local level exacerbates this possibility. A delegation of this kind would not be surprising; most human resources issues

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79. *See* Sturm, *supra* note 17, at 532–33 (describing a suit brought by African-American employees getting the attention of Southern California Edison).

80. *Id.* at 499 n.145, 543 n.314. Psychologists and economists have uncovered much evidence showing that we are already biased toward the short-term. *See, e.g.*, Shane Frederick et al., *Time Discounting and Time Preference: A Critical Review*, 40 J. ECON. LIT. 351, 366–77, 389–93 (2002) (discussing alternative models to predict economic decisions over time and how various personality traits and life experiences may combine to influence future choices).

81. *See, e.g.*, Jeremy C. Stein, *Efficient Capital Markets, Inefficient Firms: A Model of Myopic Corporate Behavior*, 104 Q.J. ECON. 655, 661–76 (1989) (arguing that greater managerial concern over stock prices leads to a greater tendency to take a short-term myopic approach toward investing corporate funds); Anjan V. Thakor, *Investment "Myopia" and the Internal Organization of Capital Allocation Decisions*, 6 J.L. ECON. & ORG. 129, 143–45 (1990) (arguing that biases toward short-term investments are imposed on corporations by the capital market's preference toward current shareholders). From a legal perspective, see generally Henry T. C. Hu, *Risk, Time and Fiduciary Principles in Corporate Investment*, 38 UCLA L. REV. 277 (1990) (critiquing the presumption of overly risk-averse corporate behavior, advocating policies that encourage corporations to behave to maximize theoretical perfect-market stock value, and eliminating accounting-based biases).

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are implemented at the middle-management level, with only general statements of direction from above. If middle managers have discretionary responsibility over implementing diversity, then the simple question is whether the way in which we measure their success encourages long-term investments. On a variety of grounds, there is reason to doubt it. Most obviously, if their performance is based on easily generated financial metrics, long-term diversity payoffs are unlikely to be captured as anything but a drag.[82] Some of the managers Sturm interviewed made this point explicitly.[83] What I would add here is the exacerbating effect of the tournament structure I emphasized in the previous sections. If managers are rotated frequently through different assignments, with promotion decisions based on methods that overvalue the most recent experience, then there is an additional reason to expect disinterest in diversity investments. Even if they do pay off eventually, it will become too late to have an effect on the career of the innovator and be easy for the innovator's successor to appropriate as his or her own. If that is the incentive structure, then middle managers will—through rationalization and self-serving inference—attend to other priorities and ignore the generalized direction from above. In other words, the tournament structure contributes to line-level short-termism, encouraging the use of grease and an aversion to grit in local decisions.

In Sturm's descriptions of Intel and Deloitte, in particular, we see different kinds of interventions designed to trump this effect. Deloitte's program, designed to increase the number of women in high-powered consulting positions at the firm, begins by eschewing localism—it was distinctly a top-down initiative managed by the firm's chief executive, albeit with widespread involvement from subordinates in its formulation (a subject explored in more detail below).[84] More importantly, perhaps, it worked toward the development of highly objective benchmarks that line managers were instructed to meet.[85] Though not quotas, I suspect that the benchmarks came close to being that. In sum, this was a very aggressive intervention that worked directly at the incentive level within the firm.

Intel's intervention was different and somewhat softer.[86] Its design was to bypass line managers by creating a separate and powerful locus of

82. *See* Sturm, *supra* note 17, at 543 (discussing corporate tendencies to ignore issues that do not impact the short-term bottom line).

83. *Id.* at 543 n.314.

84. *See id.* at 492–99 (describing Deloitte & Touche CEO Mike Cook's personal involvement in the efforts to increase retention of women).

85. *Id.* at 496 n.126.

86. *See id.* at 499–509 (describing Intel's Human Resources reorganization).

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authority—the human resources and legal staffs—that had the ability to intervene to improve the quality and fairness of work for its increasingly diverse, highly skilled employees. What is noteworthy here is the power. In contrast to monitoring and compliance groups in many other firms,[87] this group could override self-serving line-manager decisions. Interestingly, Intel does not limit this to employment practices; its antitrust compliance program is also unique in its aggressively interventionist tactics.[88]

Both Intel and Deloitte depend on one thing in particular to make these interventions effective: information. Sturm rightly emphasizes the importance of this.[89] If I am right that there is an embedded efficiency bias toward grease rather than grit, which diversity initiatives threaten, then the system's inclination will be to obscure practices that contribute toward discrimination rather than to expose them. Those with power have no incentive to generate hard data but rather will try to rationalize the process with window-dressing symbols of compliance designed to deflect attention away from any embedded problems.[90] Intel and Deloitte used sophisticated management information system (MIS) techniques to monitor outcomes, thereby avoiding reliance on self-serving statements of compliance from below.

This brings us to an important connection between corporate governance and human resources and a promising area for future inquiry. There is a familiar phrase that "you manage what you measure."[91] In a system in which metrics are almost exclusively in the form of conventional financial accounting, the incentives are biased toward meeting and exceeding those accounting benchmarks used for promotion and compensation, in whatever time periods chosen for those measurements. We understand the imprecision or artificiality of many of these measures yet still use them because they are conventionally understood as the best measures available.

87. *See* Langevoort, *supra* note 46, at 101 (describing the optimal strategy within compliance structures of reliance on line supervision monitoring, "backed up by low-powered . . . compliance specialists").

88. *See* David B. Yoffie & Mary Kwak, *Playing By the Rules: How Intel Avoids Antitrust Litigation*, HARV. BUS. REV., June 2001, at 119, 120–21 (describing Intel's antitrust law compliance strategies in which internal standards are designed to avoid both clear violations and legal "gray-areas").

89. *See* Sturm, *supra* note 17, at 519–20 (discussing traits the successful case studies have in common).

90. *See* Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479, 487–92 (1997) (describing the behavior of materialistic corporations).

91. *See* Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1335 (1996) (discussing the effects of financial disclosure on corporate management).

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What accountants, business people, and others interested in corporate governance are now coming to appreciate is that advances in information technology invite a new search for better metrics of corporate performance. By all accounts, conventional accounting and MIS fail to capture the connection between human resources activities within the firm and the firm's productivity and also fail to capture practices that lead to innovation and the creation of intellectual property. But, a good bit of recent work makes these measurements more sophisticated.[92] As these metrics develop, we should see more sunlight shed on human resources practices—including diversity-based ones—that will afford us a greater understanding of their efficiency implications.

This, in turn, will bring human resources practices closer to the orthodox concern of the corporate law scholar, the capital marketplace. Over the last few years, a number of people interested in corporate disclosure have been considering the possibility that, if standardized metrics that capture human resources—and intellectual property—practices within the firm can be developed, they should be made publicly available, just as financial accounting data is today.[93] Thus, investment decisions would be affected by—and reward or punish—either superior or inferior performance on these standards. While I remain skeptical that objective metrics for all corporations will be easy to derive,[94] I have no doubt that the exploration is worthwhile and, if successful, would have a dramatic influence on behavior.

If so, we could indeed learn much about diversity and nondiscrimination. We could find more sensitive correlations between diversity initiatives and measures of productivity. To be sure, this may not bring welcome news; in other areas of corporate governance, studies often failed to support the connection between seemingly desirable organizational changes—like independent boards of directors[95]—and firm profitability. We might, in other

92. *See, e.g.*, Jacques Mairesse & Pierre Mohnen, *Accounting for Innovation and Measuring Innovativeness: An Illustrative Framework and Illustration*, 92 AM. ECON. REV. (PAPERS & PROC.) 226, 226–27 (2002) (proposing an accounting framework for innovation).

93. *See* UNSEEN WEALTH: REPORT OF THE BROOKINGS TASK FORCE ON INTANGIBLES 57–71 (Margaret Blair & Steven Wallman, co-chairs, 2001) (recommending a regulatory framework to expand economic reporting to include intangibles in a regular and regulated manner).

94. As with many corporate governance and management-style activities, these may be easy to promote disingenuously. *See, e.g.*, Westphal & Zajac, *supra* note 75, at 129–35 (discussing a corporate trend toward announcing long-term incentive plans thought to focus executives on longer-term goals but making either no implementation or only trivial implementation in order to gain favorable market treatment at minimal cost and risk).

95. *See, e.g.*, Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921, 944–50 (1999) (finding no positive correlation between an independent board of directors and firm profitability). For a study of

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words, find that grease-laden firms are efficient competitors, so that diversity has to be justified as good for the public rather than good for business.

Whatever the eventual outcome of this public disclosure inquiry, Sturm is right that private data-tracking efforts, which can be customized on a firm-by-firm basis, are the key to any effort to overcome internal resistance to diversity initiatives.[96] Once senior management decides to commit the firm to diversity, objective performance indicators are essential to expose the self-serving rationalizations bound to emerge from below. Information alone, however, is no solution. If there is resistance to the implementation of diversity initiatives, it must be countered. Data provides crucial intelligence, but it takes the exercise of either power or persuasion—skillful negotiating—to obtain good outcomes.

The Deloitte experience exemplifies the deft use of power.[97] The chief executive officer took personal control over the implementation of the firm's diversity task force, which in turn set fairly specific performance benchmarks bolstered by detailed information gathering to monitor compliance. That, I suspect, is a rather rare occurrence. Most CEOs are unwilling to take that sort of risk or devote enough time and attention to the task. They may take symbolic steps along those lines, but without substance. Indeed, if I am right about biases in the promotion tournament that lead to an excess of ethically plastic Machiavellianism in the executive suite, we have no reason to expect a genuine commitment to the effort as opposed to a strategic preference for maintaining as greasy a system as possible consistent with whatever prodiversity needs the firm faces. And, whatever commitment there is might not be long-lived.

Even where there is the exercise of top-down power, some unintended consequences are likely. Imagine that we have a CEO who is committed—presumably for competitive reasons—to increasing diversity. As noted earlier, employees threatened by these initiatives are likely to feel no

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trends and fads in managerial behavior, see Mark J. Zbaracki, *The Rhetoric and Reality of Total Quality Management*, 43 ADMIN. SCI. Q. 602, 612–29 (1998) (discussing the adoption of Total Quality Management programs at several institutions). Notwithstanding, managers are often highly evaluated and compensated for being on top of the latest "learning." *See* Barry M. Staw & Lisa D. Epstein, *What Bandwagons Bring: Effects of Popular Management Techniques on Corporate Performance, Reputation, and CEO Pay*, 45 ADMIN. SCI. Q. 523, 542–44 (2000) (discussing positive correlations between implementation of popular business techniques, such as Total Quality Management, and CEO pay, regardless of actual business performance).

96. *See* Sturm, *supra* note 17, at 519–20 (discussing traits the successful case studies cited have in common).

97. *See id.* at 492–93 (describing the Deloitte CEO's personal efforts to address the company's gender problems).

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guilt in their resistance or opposition; they will rationalize their response in principled terms, however self-serving the underlying motivation. Any authoritarian effort to overcome this resistance, although possibly successful in forcing the desired outcome, is likely to lead to a reduction in the motivation and morale of the employees whose will was overborne. This is another reason, I suspect, that top-down initiatives are often more symbolic than real; many executives, especially in highly competitive firms, fear the indirect productivity losses that flow from the winning of the immediate battle. Internal motivation is one of the operational imperatives in many organizations and is not readily put at risk.[98]

The more common technique for implementing a diversity initiative is to delegate it to some combination of legal and human resources specialists, as Intel did. That is dangerous, of course, for it can mean a loss of authority, unless there is some mechanism by which the CEO stands behind this group (which just created an indirect form of what we have just discussed). In many industries, we observe relatively low-powered compliance groups, which are likely to police only for fairly egregious violations that unambiguously threaten the firm's self-interest. Beyond that, their task is to create the appearance of attention to legal norms to protect the firm from charges of wholesale indifference. It is largely window dressing.

Sociologists, however, point out that this kind of impotence by design—though probably common—is not inevitable. In a well-known series of articles, Lauren Edelman and her colleagues studied the implementation of EEOC directives in firms. Because EEOC directives are ambiguous except when directed at conduct that is blatantly discriminatory, firms responding to them have a range of possible responses. One—found fairly often—was symbolic compliance without taking any steps that pose a serious threat to managerial discretion.[99] But their field studies were not entirely pessimistic.

98. *See* Langevoort, *supra* note 46, at 96–99 (describing loss of motivation as an indirect cost imposed by conflict and hostility between employees and compliance officers).

99. *See, e.g.*, Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1538–47 (1992) (arguing that managerial desire to simultaneously avoid the perceived negative impacts of equal employment opportunity law and to appear to be in compliance with the law encourages a strategy of emphasizing procedure over substance and appearance over reality); Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 LAW & POL'Y 73, 90–92 (1991) (analyzing strategies that various affirmative action officers adopt to cope with competing demands from minorities and administrators); Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 445–49 (1999) (discussing how "rational myths" about the law in the employment practices context, as organizations seek the appearance of compliance, can become the economic and legal reality).

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A natural consequence of delegating compliance to a professional group, even if it lacked power initially, was that the group would seek to expand its power. And, in the equal employment opportunity area, at least, such groups have been fairly savvy.

One tactic is message sharpening. Where the law is relatively ambiguous, a professional group can claim exclusive expertise over the interpretive process and choose an interpretation that overstates the law's demands.[100] With that interpretation as a club, the group gains more power simply because of the perception that the firm has no choice but to comply and must rely on the group to manage the compliance process.

Professional groups within the firm also use social networks to their advantage. By making allies with a variety of groups outside the firm (compliance officials in other firms, organizations devoted to promoting compliance, and others), the inside professionals have a couple of advantages. First, they gain support for their construals of the law's demands—professional organizations can endorse aggressive readings of the law, which can then be cited internally as authority. Second, to the extent that other firms have engaged in stronger compliance steps, the professional network can identify and highlight them, creating pressure on others to conform. These professional networks have shown surprising strength in causing what sociologists call "mimetic" responses.[101] And once a few firms mimic the innovator, the pressure on the others increases that much more.

Sturm's account of Deloitte's experience reveals a fairly savvy use of professional networking.[102] Outside organizations devoted to improving the status of women in business firms were involved in the design and monitoring of the Women's Initiative[103]—a classic use of a bonding device designed to increase the threat to the reputation of the company should there be any

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100. *See* Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 57–62, 71–75 (1992) (discussing how the threat to employers from wrongful discharge suits has been exaggerated by misleading data and hyperbolic language, in part to increase demand for lawyers); *see also* Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 392–99 (1997) (predicting that lawyers will often overstate legal risks to clients when giving legal advice because incentives to overstate far outweigh incentives to be accurate).

101. *See* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 150–52 (1983) (describing "mimetic" isomorphism as a result of responses to uncertainty that, along with coercive and normative processes, results in great similarities among institutions).

102. *See* Sturm, *supra* note 17, at 498–99 (describing the use of external professional networking groups at Deloitte).

103. *Id.*

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backsliding. Sturm characterizes these external advisory groups as ones that both "provided a continual source of reflection and protected the process from internal capture."[104] Sturm's description of Home Depot relates a similar bonding effort using outside interest groups, largely a spillover from the class action that led to the reforms.[105]

I suspect that the clever inside group can sometimes even turn window dressing into substance. Imagine, as is probably fairly common, a diversity initiative by senior management designed to counter negative attention or a symbolic lawsuit, creating minimal interference with greasy patterns of bias deep within the company. One strategy would be to declare this program a model and invite close external scrutiny by the press, interest groups, and others. That by itself probably would cause pressure to generate observable results. The risk, of course, is that senior management will consider this to be insubordination and punish the prodiversity group. If senior management is strongly opposed to substantial change, that risk will no doubt deter much experimentation. But this opposition might be softened by a gradual approach and a careful attribution of credit for the initiative to the CEO or board members. This is simple influence utilizing cognitive dissonance.[106] Inducing small steps of commitment by the CEO—bolstered by positive feedback—can provoke an attitude shift that may lead to more substantial support for the initiative.[107]

The point here goes back to my metaphor of the firm as a nexus of negotiations. The promotion of diversity may or may not hold a position of power within the firm. If I am right about the usual efficiency of grease over grit, its power rarely will be great. Simple demands of adherence because of the rightness of the cause are unlikely to provoke a cooperative response among those who disagree on (perhaps self-serving) principled grounds.[108] That is bad negotiation, though a tactic that comes naturally to many lawyers. It leads to reactive devaluation. A good negotiator knows how to leverage the

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104. *Id.* at 499.

105. *Id.* at 516–17.

106. *See, e.g.*, ROBERT CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 17–55 (1993) (discussing reciprocation as a major psychological method used to gain compliance from others).

107. *Id.* at 57–111 (citing the use of the natural desire to be seen as consistent as a tool that can cause changes in self-image and in attitude both in the marketplace and in political philosophy).

108. *See* Kimberly A. Wade-Benzoni et al., *Barriers to Resolution in Ideologically Based Negotiations: The Role of Values and Institutions*, 27 ACAD. MGT. REV. 41, 43–47 (2002) (discussing problems raised in negotiations caused by different initial moral and ideological positions in a personal and institutional context).

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legitimacy of what she is claiming and find ways of reducing, if not eliminating, the coercive message in a demand.

In sum, diversity is something that typically has to be sold to other interest groups within the firm, some of which will be resistant for the reasons discussed. The sales pitch has to be devised so as to minimize the threat of disempowerment. One tried technique, of course, is to characterize diversity as plainly good for productivity, whether or not the empirical reality clearly supports the inference. Holding out the promise that these returns, once they arrive, will be broadly shared—even if invoking something of an illusion—might be the kind of message that would work by increasing the perceived size of the profits pie. The kind of co-optation that can be practiced on senior management might also be effective as applied to potential sources of resistance at lower levels in the organization. Key groups, one small step at a time, could be brought into the planning and implementation of diversity initiatives in such a way that they would be credited for lowering their resistance, and in the process, giving them a psychological stake in the program's success. These techniques are well known in the human resources and organizational behavior literature and presumably taught to professionals in those fields. I will leave their elaboration to others who know them better. My point here is that they also have both a legal compliance and a corporate governance function, once we see both compliance and governance through the wide-angled lens of the theory of the firm. In other words, they illustrate well an area that can be understood much better by merging learning from both corporate governance and human resources.

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