Showcasing: The Positive Spin

What do companies signal when they showcase female and minority members of their corporate boards? Not necessarily more, say Patrick Shin and Mitu Gulati, than that they understand that diversity is a socially significant issue, and that they can attract members of the showcased individual’s minority group against whom they are then probably disinclined to discriminate.¹ These are not insignificant matters to showcase, but Shin’s and Gulati’s emphasis is not on how much is reliably signaled by the showcasing of women and minority appointments, but on how little. Thus, they argue that showcasing is not a reliable signal that the company has achieved diversity, or even that it has a commitment to achieving it. Showcasing does not support these stronger messages because it is too cheap and easy, in relation to the more genuine, hard-to-pin-down condition of diversity and nondiscrimination. Since token board appointments can mimic a deeper commitment to diversity, Shin and Gulati conclude that they predict little about whether a company has made that commitment.²

Showcasing may not warrant as much credit to the companies who engage in it as they may hope for, but does it do any harm? Yes, say Shin and Gulati. Showcasing women and minorities for their value as signals treats them “prized troph[ies]” or “passive emblems.”³ This treatment is dehumanizing and “corrosive to their status in the

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¹ Patrick Shin & Mitu Gulati, Showcasing Diversity, __ N.C. L. Rev. ___ (2010) [p. 27 of July 1 draft]
² Id. at [pp. 7-8, 23].
³ Id. at [p. 29].
It also reinforces stereotypes that women and minorities lack merit for top-level corporate positions.  

Shin and Gulati are careful to say that their concerns are not about showcasing per se, but rather about showcasing for the purpose of signaling a commitment to diversity, which they believe “implies a morally offensive way of thinking about the value of diversity-oriented hiring or promotional practices.” Accordingly, I will restrict my comments to this single, limited matter: whether it is acceptable or appropriate for companies to showcase female and minority board appointments for signaling purposes. In doing so, I will focus on the shinier side of the showcasing coin. My more optimistic spin derives from the potential for showcasing to strengthen a positive societal view of diversity. Companies seek to let others know about its diversity achievements because they believe that others view diversity favorably and thus will think well of them as a result. I suggest that showcasing not only exploits this favorable view of diversity, but also helps to perpetuate it.

The positive case for showcasing recognizes that diversity is valued, in very significant part, for its expressive function. While some researchers have concluded that race and gender make a difference in how groups perform and others have argued that the presence of women and minorities can help “debias” the workplace and provide role

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4 Id.
5 Id. at [p. 30].
6 Id. at [pp. 5, 28-2-9, 31-32, 41].
7 Id. at [p. 32].
9 Jolls and Sunstein; Kang
models for other women and minorities, research on the effects of women and minority appointments to corporate boards has been inconclusive, as some of the papers for this symposium note. At the same time, as Patrick Shin has discussed in prior work, there remains a broad social consensus that diversity is a good thing, at least in particular contexts such as employment, education and corporate governance. This consensus is reflected at this symposium on corporate board diversity, where the question is not whether appointment of women and minorities to corporate boards is justified, but rather on what grounds the case for board diversity can be most credibly based. Since people’s attachment to diversity appears to transcend the instrumental justifications for diversity, Shin has suggested that people value diversity for non-instrumental reasons. Among the most compelling of these reasons is that diversity is constitutive of “certain ideal of human interaction and society.” This ideal encompasses a “commitment to social equality and justice.” For those holding this ideal, diversity in high-level positions fits the political or emotional vision of the kind of society in which they want to

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Role model cite

See, e.g., Lissa Broome, Kimberly Krawiec, John Conley, __ N.C. L. Rev. ___ (2010) (reviewing the studies and concluding that the impact of women and minorities on corporate boards has not been determined); Tom R. Tyler & Jennifer K. Brooke, Board Diversity and Corporate Performance, __ N.C. L. Rev. ___ (2010)[p. 3] (reporting studies that have found positive links between diversity and business outcomes, and studies that don’t, and highlighting the importance of institutional context); John Darley, James Fanto, and Larry Solan, Board Diversity, __ N.C. L. Rev. ___ (2010 (empirical studies to date have not supported the case for board diversity on shareholder value grounds); Frank Dobbin & Jiwook Jung, Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?, __ N.C. L. Rev. ___ 2010) (finding that corporate board gender diversity does not affect firm profitability, but does positively affect stock value, probably because of institutional investor pro-gender bias). See also Lisa M. Fairfax, Board Diversity Revisited: New Rationale, Same Old Story?, __ N.C. L. Rev. ___ (2010) (there are instances in which board diversity and financial performance are linked, and others in which they are not – p. 2 of original draft); Broome, Krawiec & Conley, supra (interviews of 45 board members failed to yield many examples of women and minorities bringing different considerations to bear on board deliberation, or otherwise making a difference).


Shin, supra note __, at 1200.

Id. See also Shin & Gulati, supra note __, at [pp. 4-5].
live. To mark progress toward this vision, people crave proof that women and minorities can succeed in this society. Seeing proof of that progress, in turn, helps them to continue to believe in its possibility and thus be more committed to it.

As many others have observed, this visible “proof” of the success of some women and minorities can be self-deluding, obscuring the deeper, less diverse reality of a society stratified by race and gender. We are not likely to achieve race and gender equality if we fool ourselves into thinking we already have it. And yet, as we think pragmatically about how to achieve a more genuinely diverse and inclusive society, it is not clear either that showcasing for signaling purposes is the risk factor that Shin and Gulati say it is, or that an alternative, more negative view of showcasing is any better. Showcasing acknowledges that diversity has value, and helps to build the will to continue to value it. In contrast, a cynical view about showcasing may weaken people’s sense that diversity is valuable and worth striving toward. This comment underlines the positive side of showcasing for signaling purposes, and why the positive matters.

1. The Case for Showcasing

Shin and Gulati offer a plausible account: showcasing is misleading as a signal of a genuine commitment to diversity, and has hidden costs to members of the very groups that appear to be benefitted. The account does not do justice, however, to the intangible, positive benefits of showcasing. It not only leaves out important, affirmative aspects of the practice, but it also reflects a cynicism that has the potential to weaken the diversity

16 Patrick Shin develops this point, as well. See id.
17 See, e.g., Ralph Richard Banks & Richard Thompson Ford, (How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality, 58 Emory L.J. 1053 (2009) (opposing focus on unconscious bias because it deludes people into thinking that conscious racism has disappeared, which it has not); Charles Lawrence, __.
ideal it seeks to uphold. Shin and Gulati criticize showcasing motivated by a desire to signal because it “undercuts the basic premise that animates the evidential view of the value of diversity.”18 Ironically, their thesis that signaling is corrupting has a self-prophesizing quality to it that may have the more serious negative effect.

This section examines the positive benefits neglected in the Shin/Gulati account. I argue that expression matters. The expression of positive views about a subject has the potential to reinforce those positive views both among those who express these views and their audience. Showcasing expresses a pro-diversity point of view, and thereby, under the right conditions, reinforces a pro-diversity view. Showcasing is also an action that also presumes the principles upon it is based, thereby further reinforcing those same principles.

a. Expression Matters. On one level, Shin and Gulati concern appear to be concerned that some people will mistakenly overread the signal sent by companies when they showcase women and minority board appointments, and thereby attribute more credit for it to those companies than they deserve. One could hardly expect otherwise. By definition, showcasing is an advertising or public relations function, through which companies portray themselves or their products in as good a light as they reasonably can in order to establish their brand and enhance their reputation. Like other forms of advertising, “puffing” is tolerated, particularly with respect to matters that are highly subjective and not disprovable. Shin and Gulati point out that the concept of diversity is indeterminate, contextual, and subjective. For this reason, a company that makes diversity appointments perceives itself to be committed to diversity, according to its own (probably vague and indeterminate) understanding of that term. Moreover, if diversity is

18 Shin & Gulati, supra note _, at [p. 30].
as indefinable as Shin and Gulati say, there is little meaningful sense in which a company can be said to take more credit than it deserves when it draws attention to its women and minority board members.

The deeper anxiety by Shin and Gulati is that, in using individual diversity appointments to send any message about their diversity commitments – true or false –, companies treat those individuals like “prized trophies”.19 This concern, notably, is as serious when companies are actually committed to diversity (in some meaningful, hard-to-define sense), as when they are not. In either case, the diversity “beneficiaries” are used as things, rather than respected as individuals of value in their own right.

My more positive view of showcasing also does not depend upon the extent of a company’s actual commitment to diversity. This view, too, recognizes that companies may engage in showcasing for its publicity value, and that when they do so, they are likely to exaggerate both their achievements and their commitment to future measures. However, where Shin and Gulati assume that showcasing undermines accomplishment of a deeper or more genuine diversity, I see showcasing as a potentially constructive practice that puts the authority and influence of the company behind a positive, pro-diversity message. A company is understood to act in its own interests, and will showcase only those actions it thinks puts it in a good light. By showing off its diversity appointments, a company aligns the company with, and puts its reputation behind, that positive value. In this way, showcasing can affirm the value of diversity, even when the actual commitment to diversity is less than what is reliably signaled.

The enhancement of people’s positive attitudes and commitment toward diversity is critical to their willingness and ability to avoid the kinds of discrimination that are now

19 Shin & Gulati, supra note __, at [p. 29].
most common in this society. Advancing any societal goal, of course, is made easier by people’s commitment to that goal. Buy-in, however, is more important in some behavioral spheres than in others. The state through its laws and its enforcement powers is moderately successful in deterring most employees from embezzling, most companies from engaging in practices that constrain trade, and most individuals from driving recklessly or stealing from each other, even when the people involved would engage in those behaviors if they could get away with it. In contrast, it is difficult for the state to force adults to be good parents, unless they are otherwise motivated to do so. The state can require the financial support of children and provisions for their education, and it can prohibit the worst forms of child abuse and neglect. But it cannot compel many things that would benefit their children, like good discipline, moral guidance, intellectual stimulation, and the love and nurturing that children require. For these more indefinable, open-ended activities, the state is largely dependent upon community norms and the internal commitment of parents.

Like effective parenting, diversity is difficult ideal to define, monitor, and legally mandate. Its achievement thereby depends upon positive social norms and people’s voluntary and internalized commitment to those norms. Discrimination rarely occurs as explicitly and blatantly as it did in cases litigated in the 1970s.\(^{20}\) Today, it more often takes the form of stereotyped-based processing errors that are not easy to discern, even by those who make those errors. For example, people tend to form initial impressions of others based on unconscious stereotypes about them, and then unconsciously remember, organize, and evaluate subsequent information based on these same biased impressions. They believe their evaluations are objective, even when their unconscious biases have

\(^{20}\) See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); [add other early cases]
infected their evaluative judgments.\textsuperscript{21} Discrimination also takes the form of various types of involuntary behaviors, like lack of eye contact and warmth, tensing of facial muscles, increased blinking, anxious voice tone, and the maintenance of physical distance and formality.\textsuperscript{22} These responses, too, are usually unconscious and unintended by the discriminator, even as they negatively affect the working conditions of members of some groups and their ability to perform their jobs.\textsuperscript{23}

As I have written elsewhere,\textsuperscript{24} laws and employment policies can deter supervisors from blatantly treating women and minorities worse than other employees and they can protect employees from the most egregious forms of harassment based on sex or race. Laws alone, however, are not very effective, however, in curtailing discriminatory behaviors that are not understood as discriminatory by those who engage in them; to the contrary, laws and coercive workplace policies sometimes reinforce the attitudes and processes that cause implicit bias, and thus make it worse. To address these more elusive behaviors, people must seek to be attuned to their own biases, and they must care about not acting on those biases even when they know when won’t get caught if they do.\textsuperscript{25}

\textsuperscript{25} Id.
The appointment of women and minorities to positions of influence facilitates the internalization of these nondiscrimination and diversity values. Research in a variety of settings suggests that the presence of female and minority leadership positions reduces implicit bias.²⁶ It helps dispel the assumption that women and minorities are not sufficiently qualified to take on leadership roles, and it redefines expectations for whom people expect to see in leadership roles. To have this positive effect it is necessary, to be sure, to overcome the force of a phenomenon sometimes referred to as “prototype subgrouping,” whereby people view successful women and minorities as exceptions to the general rule (that white men are more competent than others) rather than as a reason to modify race or gender stereotypes they hold.²⁷ Showcasing, however, helps to bring the kind of positive attention to diversity appointments that addresses this phenomenon constructively – all the more so if the company can demonstrate that the appointees are not singular outliers, but rather part of a broader commitment to a culture in which women and minorities succeed. The higher the position²⁸ and the more examples people

²⁶ For examples of research suggesting this proposition, see Nilanjana Dasgupta & Shaki Asgari, Seeing is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping, 40 J. Experimental Soc. Psychol. 642, 653-54 (2004) (women who attended women’s colleges where they had frequent contact with women faculty showed less automatic bias after one year than those who attended coeducational institutions where the contact with women leaders was relatively less frequent); M. Elizabeth Tidball et al., Taking Women Seriously: Lessons and Legacies for Educating the Majority (1999) (finding a strong link between frequency of counterstereotypic female role models on campus and the students’ commitment to counterstereotypic careers); Nilanjana Dasgupta & Anthony G. Greenwald, On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals, 81 J. Personality & Soc. Psychol. 800 (2001) (exposure to Black leaders resulted in lower scores for implicit bias in comparison with control subjects). One recent study links the rising prominence of now-President Barak Obama during his presidential campaign to a significant decrease in implicit bias against Black.s E. Ashby Plant, The Obama Effect: Decreasing Implicit Prejudice and Stereotyping, 45 J. Experimental Psychol. 961 (2009)

²⁷ Prototype subgrouping is explained in Miles Hewstone, Contact and Categorization: Social Psychological Intervention o Change Intergroup Relations, in Stereotypes and Stereotyping 323, 338-41 (C. Neil Macrae et al. eds. 1996).

²⁸ One study, for example, links the rising prominence of now-President Barak Obama during his presidential campaign with a significant decrease in implicit bias against Blacks. E. Ashby Plant, The Obama Effect: Decreasing Implicit Prejudice and Stereotyping, 45 J. Experimental Psychol. 961 (2009).
can easily retrieve of competent women and minorities in positions of authority – to which, again, showcasing can help draw attention – the more effective these counterstereotypes are likely to be in weakening the stereotypes that such positions are beyond the ability of most women and minorities.

A factor especially important to how people process and internalize information about women and minorities is the perceived norms of others around them. A series of studies from the University of Maryland suggest that subtle cues about peer racial attitudes influence the attitudes of others, who unconsciously come to see those attitudes as their own. This research studied college students, who were influenced in their views about race and gender even by other students they did not know, in contexts in which they were unlikely to meet again. On the basis of these studies, one would expect the beliefs and attitudes of company leaders, including workplace supervisors, officers, and other top-level personnel, to be influential with respect to the norms people absorb and make their own in the workplace. Many studies, in fact, document strong, positive

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30 Direct contact between these women and minorities also, under the right conditions, will help to break down barriers and reduce stereotypes. See Bartlett, supra note __, at 1953-1955 (citing studies); Thomas F. Pettigrew & Linda R. Troop, Allport’s Intergroup Contact Hypothesis: Its History and Influence, in On the Nature of Prejudice: Fifty Years After Allport 265 (John F. Dovidio et al. eds. 2005) (reviewing studies updating Gordon Allport’s “contact hypothesis”); see also Christine Jolls & Cass R. Sunstein, The Law of Implicit Bias, 94 Cal. L. Rev. 969 (2006) (arguing, on the basis of the empirical studies, that implicit bias will be reduced as workers have more contact with people whom previously stereotyped).


associations between successful diversity strategies and support for these strategies by top management. The perceived beliefs of leaders influence the beliefs of those they lead, up and down the corporate ladder. Indeed, there is some evidence that awareness of race and gender issues by the leadership of an organization is a better predictor of diversity success in the organization than a number other possible factors, including the race or sex of the leader.

There is, though, this catch: for showcasing to reinforce a positive view of diversity requires a positive view of diversity on which to build. If the positive baseline is firm, it is not necessarily weakened by violations of it. When a company that claims attachment to diversity does not appear to live by that commitment, the company itself will likely suffer reputational damage, but so long diversity is perceived as a positive ideal, the damage will serve to reinforce, rather than undermine, the ideal of diversity that the company has violated. If diversity is viewed cynically, however, even positive

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33 See, e.g., Frank Dobbin & Alexandra Kalev, The Architecture of Inclusion: Evidence From Corporate Diversity Programs, 30 Harv. J.L. & Gender 279, 295 (2007) (committed leadership, where women and minorities make it to the top ten executive positions, is clearly important in the corporate world’); David W. Johnson & Roger T. Johnson, The Three Cs of Reducing Prejudice and Discrimination, in Reducing Prejudice and Discrimination 239, 249 (Stuart Oskamp ed., 2000) (without strong leadership, positive effects of contact between members of different groups is negated); Sara Rynes & Benson Rosen, A Field Survey of Factors Affecting the Adoptions and Perceived Success of Diversity Training, 48 Personnel Psychol. 247 (1995); E. Holly Buttner, The Influence of Organizational Diversity Orientation and Leader Attitude on Diversity Activities, 18 J. Managerial Issues 356 (2006); see also Dobbin & Kalev, supra at 294 (concluding that diverse corporate leadership at the top increases diversity through the company).

34 See, e.g., Frank Linnehan et al., The Importance of Ethnic Identity to Attitudes, Norms, and Behavioral Intentions Toward Diversity, 62 Academy of Management Best Papers Proceedings D1 (2002) (racial attitudes predict behavioral intentions and implementation of diversity activities); Alison M. Konrad & Frank Linnehan, Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices? 38 Academy Management J. 787, 809 (1995) (top managers’ attitudes significant predictors of effective equal opportunity efforts); Sara Rynes & Benson, A Field Survey of Factors Affecting the Adoption and Perceived Success of Diversity Training, 48 Personnel Psychol. 247, 263 (1995) (finding data about success or lack thereof of diversity training better explained by importance of the values and beliefs of top managers than by their gender, race, or ethnicity).

35 A recent account of the failure of the Bloomberg administration in New York City to appoint more women and minorities to top administrative positions is typical. The account reports criticisms of Mayor Bloomberg’s latest round of major appointments because all are white and all but one are male, and it also reports a concession by Mayor Bloomberg that his administration has fallen short of achieving its diversity
diversity successes will tend to be processed in a cynical way. Moreover, when diversity is viewed cynically, companies lose their public relations incentive to engage in it. All this is to say that positive expression matters.

**B. Action Also Matters.**

Showcasing is not only an implicit expression of attitude that can influence the attitudes of others, but also an action. Like expressions, actions by company leaders, even symbolic actions undertaken primarily for their public relations value, have the potential to change the attitudes of the leaders themselves and those influenced by them.

There are a number of cognitive processes by which behaviors may change attitudes. First, experimental research in an area known as “biased scanning” suggests that the experience of playing a particular role or advocating a particular position shifts a person’s attitudes toward that role or position. This phenomenon may help to explain how the repetitive participation in religious or patriotic rituals helps to reinforce the belief structure underlying those rituals.

A second, related process is described by self-perception theory. This theory posits that individuals infer their own attitudes and beliefs from the same types of goals. Both the criticisms, and Bloomberg’s response to it, presuppose that diversity is a positive goal, thereby arguably reinforcing that goal. See David W. Chen & Jo Craven McGinty, Despite Vow, Little Diversity in Top Ranks of Bloomberg Administration, N.Y. Times, June 29, 2010, at A25.  

36 See James M. Olson & Jeff Stone, The Influence of Behavior on Attitudes, in The Handbook of Attitudes 223, 224-226 (Dolores Albarracin et al. eds. 2005) (summarizing studies); Anthony G. Greenwald, The Openmindedness of the Counterattitudinal Role Player, 5 J. Exper. Soc. Psychol. 214 (1969) (finding that when study subjects expected to have to argue later for a view contrary to their own, they tended to shift their own attitudes in that direction); Barry R. Schlenker & James V. Trudeau, Impact of Self-presentation of Private Self-Beliefs: Effects of Prior Self-Beliefs and Misattribution, 58 J. Personality & Soc. Psychol. 22 (1990) (analyzing the effect of strategic self-presentation on changes in beliefs).  

behavioral cues as they use in inferring the attitudes and beliefs of others. Self-perception theory predicts that people who have acted in a certain way, even if that action was thoughtless or manipulated, are more likely to act in the future based on the beliefs that are consistent with those actions. To illustrate, in one experiment, people who had been asked to sign a petition about keeping their state beautiful or put a “be a safe driver” sticker in a window of their home were much more likely to agree subsequently to display a large, unattractive “Drive Carefully” sign in their yard than were individual who did not receive the initial, smaller request.38 People not only draw conclusions about their own attitudes based on the actions they take, but their own motives as well. Research has shown, for example, that people who are asked to do a task for money without any reward are more likely thereafter to continue that activity, without a reward, than others whose initial behavior was initially compensated.39

A third process, described in cognitive dissonance theory, views the relation between action and attitudes as potential sources of dissonance that create a discomfort that people seek to alleviate. People can relieve the discomfort by reconciling their actions to conform to their attitudes – say, to stop smoking, driving carelessly, or avoid littering. But they can also change their attitudes to conform to their behaviors.40

39 See Mark R. Lepper et al., Undermining Children’s Interest with Extrinsic Reward: A Test of the “Overjustification” Effect,” 28 J. Personality & Soc. Psychol. 129 (1973) (finding that children who were not rewarded for drawing pictures with magic markers drew more pictures later during free play time than children who were initially rewarded). More generally, see Edward L. Deci, Effects of Externally Mediated Rewards on Intrinsic Motivation, 18 J. Personality & Soc. Psychol. 105 (1971) (finding that when money is used as an external reward, intrinsic motivation diminishes).
40 This is a more complex subject than this, of course. For a comprehensive review of the strategies that people are said to use to relieve cognitive dissonance, see Olson & Stone, supra, at 226-249
Research has demonstrated the existence of this latter phenomenon, even when the behavior influencing their attitudes was initially undertaken for symbolic reasons.41

These processes suggest that when people in the company act as if they are committed to diversity values, the more committed they may actually become to those values. By taking steps – even small ones – that presume that diversity is a positive social goal, a leader can become more committed to that presumption, and more likely to define himself and the company in relation to it. A leader who seeks only good public relations may become more committed to the position he at first only pretended to espouse; indeed, action is especially likely to have an effect on attitudes when the attitudes initially are weak, or ambivalent.42

Shin and Gulati have a “lingering worry”43 that justifying actions based on the attitudes they help further has the unsavory character of “manipulation, as of social-psychological engineering.”44 This concern is misplaced. First, the issue raised by corporate showcasing does not raise the usual concern about social engineering, i.e., engineering by the state. Corporate showcasing is an activity by a company, pursuing what is perceives to be its own interests, as it does when it advertises its product or other company achievements.

More to the point, taking into account the attitudinal effects of an activity is very relevant to judgments about the desirability of that activity. Much of what passes for analysis of what our laws should be – including law and economic analysis – turns on an

41 Get cite.
42 See, e.g., Rob W. Holland et al., On the Nature of Attitude-Behavior Relations: The Strong Guide, the Weak Follow, 32 Eur. J. Soc. Psychol. 869 (2002) (finding that people with weak attitudes toward Greenpeace were more affected by either donating money (affected positively), or declining to donate money (affected negatively), to the organization than people with strong attitudes).
43 S & G at p. 34.
44 Id. at p. 28.
evaluation of the incentives those laws create for people to behave in certain ways.

Consideration of the psychological dimensions of people’s motivations and actions in the diversity context adds significantly to these forms of now-traditional forms of analysis. When it comes to discrimination, indeed, non-economic motivations are likely to be more significant and powerful than economic ones. Not only is it appropriate to take into account these non-economic motivations, but any analysis of what it takes to end discrimination would be incomplete without them.

II. The Case for Diversity

Showcasing diversity board appointments presumes that board diversity is a good thing and a shared value. Probing this presumption provides further support for a more positive view toward showcasing than Shin and Gulati provide.

Two leading arguments in favor of the appointment of women and minorities to corporate boards emerge from the papers for this symposium: the discrimination argument and the diversity argument. The discrimination argument is that women and minorities are largely absent from corporate boards because they are the victims of discrimination, or unequal circumstances that have accumulated over time. The addition of women and minority board members moves to correct the injustice. The discrimination argument presupposes that women and minorities are, aside from the discrimination they have faced, equal to their male and non-minority counterparts, and

46 Shin and Gulati appear to be most influenced by this argument. Thus, for example, they find “not objectionable” certain “instrumental” reasons for showcasing, which include empowering women and minorities to serve as role models for the historically underprivileged and psychological “debiasing.” See Shin & Gulati, supra note __, at 32-33.
that any presupposed differences are based on inaccurate stereotypes. Arguments for the appointment of women and minorities that rely on phenomena that might reduce discrimination, such as role modeling and workplace debiasing, are also rooted in a discrimination framework.

The diversity argument presupposes that women and minorities bring qualities that would improve corporate performance in some measurable way. They may bring talents or competencies that are not otherwise not present. They may bring different life experiences or perspectives that may improve decisionmaking. Additionally, their presence may change the group dynamic in a positive way. Each of these possibilities represents differences between current insiders, and those who would make a corporate board more diverse.

Sometimes the discrimination and diversity arguments are analyzed separately, one found to the valid and the other one, not. The Supreme Court, for example, has often found the discrimination argument persuasive in the employment context, while the diversity argument has tended to be more compelling in cases involving educational opportunity.

In still other contexts, and in the wider discourse about diversity, the discrimination and diversity rationales have merged, as if the arguments are complementary, each filling in the gaps left by the other. The blending of rationales is evident in a series of cases concerning the inclusion of women and minorities on juries.

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

48 [Sommers]

49 [Gruter; but see Parents United]
In *Batson v. Kentucky*, for example, the U.S. Supreme Court held that systematically excluding potential jurors on account of their race implicated both (1) the “evil” of race discrimination [page cite], and (2) the right of a defendant to have a jury of peers with backgrounds representative of his own.51 Discrimination and diversity rationales were also combined in *J.E.B. v. Alabama*, a case in which the Supreme Court held that it was unconstitutional for prosecutors to use their peremptory challenges to systematically exclude women from juries. The plurality opinion written by Justice Blackmun reasoned, on the one hand, that the exclusion of women from juries was based on untrue stereotypes about women’s differences, which the law condemns.52 On the other hand, the opinion also insisted that the “diverse and representative character of the jury” was important to assure a “diffused impartiality,”53 especially “in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity.”54 Borrowing from the *Batson* lines of cases, Justice Blackmun tied these rationales together by situating them within the requirements of a fairly administered system of justice. The avoidance of discrimination and the insurance of a representative jury each are necessary, one to avoid the danger of “cynicism respecting the jury’s neutrality and its obligation to

51 *Batson v. Kentucky*, 476 U.S. 79, 85-87 (1986) (defendant has right to a jury of peers, “that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.”).
52 511 U.S. at 138-139 (noting that “[r]espondent offers virtually no support for the conclusion that gender alone is an accurate predictor of juror’s attitudes”); id. at 140 (reasoning that stereotypes about women “ratify and reinforce prejudicial views about the relative abilities of men and women”); see also id. at 143-45 (women should be judged on their individual characteristics).
53 [p. 134?? Citing other cases?]
54 [cite?]
adhere to the law,” and the other to avoid creating “the impression” that the “deck has been stacked” against one side.

Beneath the presumed complementarity of the nondiscrimination and diversity rationales is a fundamental tension. The discrimination argument presupposes that race and gender are irrelevant to juror qualifications; the diversity argument, in contrast, posits that views vary based on race and gender, and that a representative jury is one that has race and gender diversity. The first assumes that race and gender do not matter; the second assumes that they do. The tension between these assumptions is particularly evident in J.E.B., reflecting the age-old conundrum between sameness and difference in the gender context. Stereotypes are to be avoided, yet it is recognized that “the two sexes are not fungible” and that “a community made up exclusively of one is different from a community composed of both.”

Whether or not women and minorities make a difference on juries is an empirical question, and efforts to answer the question have not yielded consistent results. Research in earlier decades suggested that gender and race might have an impact on jury deliberation and somewhat of an effect on jury verdicts. Some of the more recent

55 511 U.S. at 140 (citing Powers v. Ohio, 499 U.S. at 412); see also id. at 140-141 (emphasizing the right of individual jurors to nondiscriminatory jury selection).
56 Id. at 140; see also id. at 134 (representative jury is necessary to the impartial administration of justice, citing other cases).
57 The concurring opinion by Justice O’Connor in J.E.B. gives more emphasis to the relevant differences between men and women, in the context of the intrusion of the opinion on the role of peremptory challenges in our jury system. 511 U.S. at 147 (O’Connor, J. concurring).
58 Id. at 133 (citing Ballard v. United States, 329 U.S. 187 (1946), which held that women may not be exclude from the venire in federal trials in states where women were eligible for jury service under local law).
59 See, e.g., Fred L. Strodtbeck et al., Social Status and Jury Deliberations, 22 Amer. Soc. Rev. 713, 715 (1956) (finding that men speak more frequently than women in mock jury deliberations); Reid Hastie et al., Inside the Jury 141-42 (1983) (concluding based on one mock jury study that males initiate about 40 percent more comments than females); Charlan Nemeth et al., From the ‘50s to the ‘70s: Women in Jury Deliberations, 39 Sociometry 293, 303 (1976) (finding in mock jury experiment involving a murder case that male jurors were generally perceived to be more aggressive and confident than their female
research has confirmed some differences between men and women in certain kinds of cases,\(^61\) as well as the likelihood that diverse juries will deliberate longer and more thoroughly.\(^62\) In one study, racially diverse juries spent more time deliberating than did all-White groups and spent their time discussing a wider range of case facts and perspectives. The study suggested that these effects was not just the product of greater information exchange within members of diverse juries, but also that Whites processed the trial information more systematically within diverse groups;\(^63\) indeed, knowing that they were going to be deliberating with Blacks appeared to cause Whites to process the information more carefully even before the deliberations began.\(^64\)

Other jury research, however, has found little or no effect of gender or race. One comprehensive study based on jury surveys in 401 actual cases in Los Angeles, the counterparts, although sex did not appear to be a factor with respect to the verdict or persuasiveness); Catherine Kirchmeyer, Multicultural Task Groups: An Account of the Low Contribution of Minorities, 24 Small Group Research 127, 137, 142-46 (1993) (finding that minorities contribute significantly less to decisionmaking in small groups than non-minorities, and that persons scoring low in masculinity traits and high in femininity traits contribute significantly less than those scoring high in masculinity traits and low in femininity traits).

\(^60\) See, e.g., Hastie et al., supra note __, at 140-41 (summarizing research and concluding that female jurors are somewhat more conviction-prone than male jurors in rape cases, and may award higher damages in some types of cases, although gender does not appear to be a significant factor in jury verdicts); James H. Davis et al., Victim Consequences, Sentence Severity, and Decision Processes in Mock Juries, 18 Organizational Behav. & Hum. Performance 346, 354 (1977) (finding in mock jury study that women were more inclined toward guilt in rape cases than were males); Cookie Stephan, Sex Prejudice in Jury Simulation, 88 J. Psychol. 305, 308 (1974) (finding that mock jurors favored defendants of their own sex in judgments of whether a defendant murdered his or her spouse); Eloise C. Snyder, Sex Role Differential and Juror Decisions, 55 Soc. & Soc. Res. 442, 444, 446 (1971) (finding that higher status defendants do better before an all-male jury than a mixed-gender jury, and that women award higher damages in civil trials to lower-status claimants); Mary A. Gowan & Raymond A. Zimmermann, Impact of Ethnicity, Gender, and Previous Experience on Juror Judgments in Sexual Harassment Cases, 26 J. Applied Soc. Psychol. 596, 613 (1996) (finding that women are more likely to vote for the plaintiff in ambiguous sexual harassment cases).

\(^61\) Jonathan M. Golding et al., The Impact of Mock Jury Gender Composition on Deliberations and Conviction Rates in a Child Sexual Assault Trial, 12 Child Maltreatment 182, 187 (2007) (in mock jury experiment, before jury deliberations in the case of an alleged sexual assault on a 6-year-old child, men were more pro-defense and women were more pro-prosecution).

\(^62\) Sommers


\(^64\) Id. at 607.
Bronx, Maricopa County, Arizona, and the District of Columbia found no overall difference in participation rates based on gender, and, if anything, higher participatory rates among black jurors than those of other racial or ethnic backgrounds.\textsuperscript{65} Far more significant appear to be factors such as social class\textsuperscript{66} or who was in the majority.\textsuperscript{67}

Similar inconsistencies are apparent in the empirical research relating to women judges.\textsuperscript{68} A number of studies have concluded that women judges bring different qualities to the bench and are more likely to decide certain cases, such as child support and sex discrimination, in favor of women.\textsuperscript{69} Other studies, including the most recent, have failed to confirm these observations, or have found to the contrary.\textsuperscript{70}

\textsuperscript{65} See, e.g., Erin York Cromwell & Valerie P. Hans, Contextualizing Jury Participation: Case-, and Juror-Level Predictors of Participation in Jury Deliberations, at 28-29, 33, 38 available at http://ssrn.comabstract=1441537 (in study based on jury surveys in 401 cases in Los Angeles, the Bronx, Maricopa County, Arizona, and the District of Columbia, finding overall no difference in participation rates according to gender, except for Los Angeles where gender differences appeared to be influenced by higher number of Asian-American jurors, and higher participatory rates among black jurors than those of other racial or ethnic backgrounds) York & Benjamin, supra note __ (finding that race and gender are not significant indicators of influence in jury deliberations); Andrea Hickerson & John Gastil, Assessing the Difference Critique of Deliberation: Gender, Emotion, and the Jury Experience, 18 Communication Theory 281, 297-98 (2008) (finding no clear gender pattern in subjective assessment of jury deliberation).

\textsuperscript{66} See, e.g., Erin York & Benjamin Cornwell, Status on Trial: Social Characteristics and Influence in the Jury Room, 85 Social Forces 455, 464 (influence in jury deliberations conferred nearly equally among males and females, and among whites and non-whites, but influence highly correlated with social class); Cromwell & Hans, supra note __, at 36

\textsuperscript{67} See Golding et al., supra note __, at 187 (whether women were in the majority affected whether they were more likely to change their mind in jury deliberations in a child sexual abuse case toward the prosecution (woman majority) or toward the defense (male majority)).

\textsuperscript{68} Although there have been numerous studies comparing the impact of female judges, there do not appear to be comparable studies with respect to the race of judges.

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

Another possible explanation relates to the diversity rationale for women judges. This explanation is that gender matters only when there is a critical mass of women judges; some researchers have concluded that women tend to suppress the effects of their gender unless there is a sufficient number of like-minded individuals – i.e., other

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4 Annu. Rev. Law Soc. Sci. 299, 321 (2008) (reporting that some studies have shown that “female judges are more likely than their male colleagues to reach legal conclusion that favor the interests of women”).

70 See, e.g., Christina Boyd, Lee Epstein & Andrew Martin, Untangling the Causal Effects of Sex on Judging, 54 Am. J. Pol. Sci. (forthcoming 2010) (in large empirical study, finding few cases in which gender of judge seemed to make a difference); Elaine Martin & Barry Pyle, Gender, Race, and Partisanship on the Michigan Supreme Court, 63 Albany L. Rev. 1205 (2000) (gender of judge is insignificant in sex discrimination and sexual harassment cases); Songer, supra (gender is insignificant in obscenity and search and seizure cases); Thomas G. Walker & Deborah J. Barrow, The Diversification of the Federal Bench: Policy and Process Ramifications, 47 J. Polit. 596 (1985) (female judges appointed by Democratic presidents not more likely than male judges appointed by Democratic presidents to rule for the female party in cases involving sex discrimination, sexual harassment, maternity rights, or reproductive freedom); Jennifer A. Segal, Representative Decision Making on the Federal Bench: Clinton’s District Court Appointees, 53 Polit. Res. Q. 137 (2000) (same); Sue Davis, Do Women Judges Speak ‘In a Different Voice”? Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit, 8 Wis. Women’s L.J. 143 (1993) (finding no noticeable differences in the moral reasoning between male and female judges).


women. If this is the case and is also shown with respect to minority judges, one might predict that women and minorities will continue to make little difference to corporate boards until they are present in sufficient numbers to express themselves freely.

Earlier work by Mitu Gulati and Devon Carbado provides further possible explanation for the mixed results of the empirical studies with respect to both gender and race. This work argues that in making diversity hires, majority decisionmakers will tend to chose those female and minority candidates who are most like themselves. Successful women and minorities adapt to this bias by building their resumes to conform to these desired traits. They speak, move, and dress like those who select them. They went to the same schools, joined the same clubs, and share mutual friends. They don’t rock the boat. They know how to make their race and gender invisible. It is the women and minorities who model themselves after their white, male counterparts who are the most likely candidates for judgeships and corporate boards. Thus, even though selection of women and minorities could make a difference, this selection is invisibly biased to minimize the chance that it will do so.

73 See, e.g., Madhavi McCall, Structuring Gender’s Impact: Judicial Voting Across Criminal Justice Cases, 36 Amer. Polit. Res. 264 (2008) (number of women on the courts is a factor in judicial decision making); Christina L. Boyd et al., Untangling the Causal Effects of Sex on Judging (when a woman serves on a panel with men, the men are significantly more likely to rule in favor of the rights litigant); Farhang & Wawro, supra note __; Peresie, supra note __; Stribopoulos & Yahya, supra note __; Gerald S. Gryski et al., Models of State High Court Decision-making in Sex Discrimination Cases, 48 J. Polit. 143 (1986).
76 Selection bias, and female and minority adaptation to this bias, flows from people’s basic psychological drive to identify most closely with, and thus favor, those who are most like themselves. This drive has been extensively documented in the social psychology literature. See, e.g., Samuel L. Gaertner & John F. Dovidio, Reducing Intergroup Bias: The Common Ingroup Identity Model 36-39 (2000); Marilynn B. Brewer, The Psychology of Prejudice: Ingroup Love or Outgroup Hate?, 55 J. Soc. Issues 4429, 430 (1999).
III. The Positive Case for Showcasing

Survey studies report that a majority of people would rather live and work in a diverse, representative society rather than a homogeneous one.77 As noted above, diversity fits their best version of themselves. They do not need proof that diversity promotes role models and thus will help end discrimination, or that diversity “debiases” the workplace, or that diversity benefits companies from the different perspectives it contributes. They seek diversity nonetheless, because they can’t be sure about why society does not yet distribute power evenly, and because they feel best about themselves and the society in which they live if opportunity at least appears to have been fairly available to all.78

Yet this persistent preference for diversity in education, employment, and corporate governance is saturated with ambiguity and ambivalence. As suggested above, people hold conflicting views about nondiscrimination and diversity. They eschew stereotypes, but at the same time they believe that race and gender matters. They say that race and gender are irrelevant, and yet seem surprised when greater diversity does not appear to make a difference to jury verdicts or corporate board performance. They abhor discrimination, but ignoring race and gender altogether does not seem to bring about the race and gender proportionality that they would expect if the world were just and equal. They crave diversity, but are offended by the race- and gender-specific measures that

77 See Shin article
78 And they suffer, collectively, when those women and minorities who seemed to represent success, fail. A notable example of both is Tiger Woods. His success was proof that people of mixed race could succeed in America; because of the importance of this reassurance, his reputational hit following disclosures of several extra-marital affairs was arguably out of proportion to the seriousness of those disclosures.
would be necessary to bring it about. They may justify some race- and gender-specific measures, but in so doing their impulse is to replicate themselves insofar as possible.

This brings us back to showcasing. One reason companies showcase is that it feeds people’s desire to have affirmed their individual and collective self-image – the self-image in which race and gender do not matter. There are reasons to be cynical about this. Why make people feel good about superficial achievements that mask continued race and gender privilege? Self-delusion and ignorance are not promising conditions for a genuinely diverse and inclusive society.

At the same time, as I have suggested here, it is worth considering that a self-image that incorporates a positive view toward diversity may be more productive of diversity values than a negative one. I have argued elsewhere that, by and large, affirmative of nondiscrimination norms has greater potential to further the internalization of nondiscrimination than coercion and shame. Affirmation reinforces and perpetuates the positive and allows people to deepen their commitments to those norms freely, in a way that motivates and sustains nondiscriminatory, inclusive behaviors. Coercion and shame, in contrast, tend to create anxiety, distance, and resentment – all emotions that work against the internalization of the desired norms. To be sure, this reinforcement of the positive should not be naïve. Legal norms are necessary as well as social norms, and they must be clear, consistent, enforced, and modeled by respected leaders. That said,

79 Survey studies show that a majority of Americans, including women and people of color, are averse to identity-conscious diversity strategies. See, e.g., Alison M. Konrad & Frank Linnehan, Race and Sex Differences in Line Managers’ Reactions to Equal Employment Opportunity and Affirmative Action Interventions, 20 Group & Organization Management 409, 428 (1995) (conclusions based on interviews of line managers at four large companies). This aversion to identity-based strategies is well-represented on the current Supreme Court. See, e.g., Parents Involved in Cmty. Sch. V. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (Robert, C.J.) (the “way to stop discrimination on the basis of race is to stop discriminating on the basis of race”); Ricci ___. For a full and critical discussion of the various rationales for colorblindness, see Shin, supra note __, at 1215-1218.

80 Bartlett, supra note __.
where actions – like showcasing – are ambiguous, a constructive, positive construction of those actions may better serve the goal of nondiscrimination and diversity than one that is negative or cynical.

Shin and Gulati criticize an “inside-out” approach to diversity – which they associate with my own work – because they say it assumes that change will come from well-intentioned decisionmaking. They contrast this approach to what they believe is a more plausible, “outside-in” approach, whereby diversity comes first, mandated if necessary, and then becomes a means by which implicit bias is eliminated. The dichotomy they propose is a false one. The changes necessary to create a diverse and inclusive workplace are a product of complex interactions between external and internal norms, laws and voluntary action, structural and institutional barriers and informal contact and friendships. The achievement of a diverse and inclusive workplace doesn’t start either from purely voluntary, good intentions, or by legal mandate. It is, instead, the product of an ongoing synthesis of many dynamic influences and processes. Most people hold contradictory ideals, not easily susceptible to either easy reconciliation or rapid, permanent change. Within this complex reality, change doesn’t come solely from within, or from without, but from ongoing, evolving resolutions of people’s conflicting principles.

If this more dialectic model is accurate, company showcasing for the purpose of sending a positive message about the company, despite the potential dangers Shin and Gulati outline, is not necessarily “corrosive” of diversity values. Positive messages are required, along with ongoing reality checks. So are companies, I would think, who are

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81 Shin & Gulati, supra note __, at [p. 41]
82 Id. at [p. 42].
proud to have added more women and minorities to the organization in top places – even if those additions do not always reflect a deep or mature understanding of what genuine diversity requires. It goes without saying that showcasing, in itself, is not enough. Far from it. To achieve diversity, companies need comprehensive, integrated, long-term policies, not single-shot, superficial actions.83 If a company overdoes showcasing, or appears to claim more about their commitment to diversity than a fuller picture demonstrates, they will (and should) be embarrassed. But shaming a company simply because it seeks attention for its diversity appointments is not especially productive, and may even corrode the enthusiasm for diversity upon which its achievement depends.

83 Bartlett, supra note __, at 1960-1971.