WORKING IDENTITY

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INTRODUCTION

Working within an organization necessarily entails negotiating and performing identity. We can most easily illustrate what we mean by "negotiation" and "performance" with examples. Take a hypothetical organization that values effort and awards promotions to those who demonstrate it. Assume also that the work is such that individual effort is difficult to monitor. In response to this difficulty, the employer sets up an incentive scheme—by, for example, offering attractive promotions to those employees who demonstrate that they are exerting the highest levels of effort—to induce employees to work with a minimal amount of monitoring. Under these conditions, individual employees seeking promotion have an incentive to engage in acts that signal to the employer that they are the ones exerting high amounts of effort.

For example, an employee engaged in casual conversation at the workplace might mention how tired she is as a result of having had to work all through the previous two nights. Or an employee might cultivate a harried and tired look to suggest that she is very busy. Or the employee might leave her jacket in the office and her lights on when she leaves the office early so as to suggest that she was at work later than she was. And when she does work late, she might send an email or phone message to her supervisor before leaving, the subtext of which might be: "I was working until 1:00 a.m." The list of effort-suggestive actions, or "signaling strategies,"[1] goes on. The point is

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   [1]   *See* Devon W. Carbado, *Straight Out of the Closet*, 13 BERKELEY WOMEN'S L.J. (forthcoming 2000) (discussing the employment of signaling strategies in the context of consumer transactions).

that, in contexts in which individual identity characteristics are difficult to observe, employees have an incentive to work their identities[2] in ways that suggest to the employer what otherwise might not be readily apparent.[3]

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2   Fundamental to this Article is the notion that everyone works identity. But what is the "identity" that everyone works? Fortunately, the arguments we develop do not require a rigorous philosophical inquiry into the nature of identity. For a useful discussion of identity formation, see Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW. ENG. L. REV. 1173 (1992). Nevertheless, it may help to draw a distinction between two conceptions of identity: "sense of self" identity (how we define and perceive ourselves) and "attributal" identity (how others define and perceive us). We recognize that this dichotomy is artificial because, among other reasons, people define themselves inter-subjectively. For example, a person's conception of herself as outgoing, creative and witty is necessarily a function of that person's social interactions with other people. Yet, ultimately, people do develop particular conceptions of themselves. Of course, that self-image can change. Thus, who one thinks one is today might not be who one thinks one is tomorrow. Still, most people form socially stable, though certainly not fixed, impressions of themselves. This is what is referred to in the Article as a person's "sense of self." Central to the working identity concept developed in this Article is the notion that, while a person's sense of self may shift over time, at any given moment he or she is likely to have one.

The question becomes, how does one move from one socially stable impression of oneself to another? The answer relates, at least in part, to the "attributal" conception of identity. Assume that Mary has come to think of herself as witty. Once she has developed this sense of self, her subsequent social interactions—more specifically, how she interprets them—likely will have one of three consequences: (1) confirm that she is witty, (2) raise doubts about whether she is witty; or (3) create the impression that she is not witty. To the extent that Mary is invested in a sense of herself as witty, she is likely to find ways to facilitate other peoples' interpretation of her as being witty. She may adopt specific presentational strategies to signal this characteristic. These strategies may or may not work. If they are successful, people will respond to Mary in ways that confirm (to Mary) that she is witty. In other words, they will "attribute" this personal characteristic to Mary. To the extent that this occurs, Mary will have solidified her sense of self.

Mary, however, may not want her sense of self to comport with her attributal identity. Even under this scenario, Mary might attempt to control the social meaning of the latter. To appreciate this point, assume that Mary does not conceive of herself as hardworking. She fancies herself a "quality of life" person (her sense of self). However, Mary's boss promotes only those persons who he thinks *are* hardworking—that is to say, people whose attributal identity is that they are hardworking. Assume that Mary wants desperately to be promoted, but that she also wants to maintain her sense of self as a "quality of life" person. One might say that Mary wants the promotion without doing the work. What might Mary do? Signal: create the impression that she is doing the work. Of course, Mary's self-impression may, over time, change. Indeed, the more successful she is at signaling, the more her co-workers and her employer will respond to her in ways that suggest that she is a hard worker. And the more her colleagues perceive her in this way, the greater the likelihood that Mary's sense of self—that she is "quality of life" person—will change. This Article situates these admittedly narrow conceptions of identity in the context of a broader discussion about the relationship between identity performance and workplace discrimination.

3   For a description of this phenomenon in the context of a large, elite law firm, see David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1594, 1595 & n.53 (1998) (describing the phenomena of overbilling and underbilling in law firms). On the subject more generally, see Alan Day Haight, *Padded Prowess: A Veblenian Interpretation of the Long Hours of Salaried Workers*, 31 J. ECON. ISSUES 29, 35 (1997) ("If the product of a job is difficult to identify, then salaried workers will flaunt their hours .... If

The basic concepts of signaling and identity performance are familiar to most. This Article explores how those incentives and pressures to signal and work one's identity shape the workplace behavior and experiences of outsider groups, such as women and minorities.[4] We argue that, because members of these groups are often likely to perceive themselves as subject to negative stereotypes, they are also likely to feel the need to do significant amounts of "extra" identity work to counter those stereotypes. Depending on the context, that extra work may not only result in significant opportunity costs, but may also entail a high level of risk.

The primary project of this Article is to flesh out the kinds of work outsiders often feel pressured to do because of negative assumptions about their identities. We argue that both the nature of the work and the pressure to do it, the "working identity" phenomenon, is a form of employment discrimination. Heretofore, antidiscrimination law has not identified, let alone addressed, this problem. Absent from antidiscrimination law is the notion that outsiders do not passively accept workplace discrimination and stereotyping; that they employ a variety of strategies to counteract both. These strategies function as coping mechanisms. We categorize them to illustrate the specific ways in which they burden outsider employees.

Central to this Article is the claim that, to fully appreciate workplace discrimination, one has to examine and raise questions about not only the employer's conduct—whether it is legitimate for employers to behave in ways that adversely affect outsider employees—but the employee's conduct as well—whether it is legitimate for employees to be pressured to behave in particular ways to avoid discrimination. Current antidiscrimination regimes focus almost entirely on the employer.[5] Lost in this focus are the costs borne by victims who do identity work to prevent employment discrimination and preempt stereotyping. Further, to the extent that antidiscrimination law ignores identity work, it will not be able to address "racial conduct" discrimination. Racial conduct discrimination derives, not simply from the fact that an employee is, for example, phenotypically Asian Ameri-

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the product of a job is clear, measurable, and enviable, then salaried workers will understate their effort . . . .").

4   Importantly, the focus on employees is not intended to suggest that the workplace is the only location for identity performances. On the contrary, identity performances are reflected in every day social interactions. We situate the analysis in the context of the workplace to illustrate the nexus between identity performance and employment discrimination.

5   *Cf.* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 29 (Kimberlé Crenshaw et al. eds., 1995) (critiquing constitutional antidiscrimination law for adopting the "perpetrator" rather than the "victim" perspective).

can (i.e., her racial status) but also from how she performs her Asian-American identity in the workplace (i.e., her racial conduct).

I
EVERYONE WORKS IDENTITY

A. The Concept

To take the illustration in the first paragraph a step further, suppose that the firm values not only effort, but also more amorphous qualities such as collegiality, team work, and trust. Assume that each of these characteristics is hard to observe. Employees seeking success within this environment have an incentive to adopt strategies to signal that they are hard working, collegial, team oriented, and trust worthy. To signal collegiality, the employee might go out drinking with her colleagnes, attend the firm's social events, or participate on sports teams with others at work.

Of course, the foregoing actions may not be enough or even necessary to demonstrate collegiality.[6] Nor are institutional incentives necessary for employees to be collegial. The point is that, when employers value attributes that are hard to observe, individual employees have an incentive to take actions that suggest that they have those attributes.[7]

B. The Negotiation

The question becomes: What actions will the employee take? That is, if the employee is interested in signaling to the employer that he exhibits a certain characteristic, how will he do so? The answer turns on a negotiation and, more specifically, on how the employee chooses to negotiate his identity at work. Consider a shy and reserved employee who enjoys his job. He is happiest when he goes to work and performs his duties with little or no non-job-related interactions with his co-workers. Moreover, he does not enjoy, and thus would rather not attend, official or unofficial after-work social events. He is aware, however, that his organization values and encourages collegiality. Indeed, he believes that, because many of the people considered for promotion have the same credentials and overall work product, collegiality is an important criterion for promotion.

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6 Actions sufficient to demonstrate collegiality in one institutional setting, like attending faculty meetings, may be insufficient to demonstrate collegiality in another.

7 *Cf.* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 77 (1959) ("[O]ne finds that service personnel, whether in profession, bureaucracy, business, or craft, enliven their manner with movements which express proficiency and integrity, but, whatever this manner conveys about them, often its major purpose is to establish a favorable definition of their service or product.").

If the employee is interested in advancement, he will probably make a decision about how to remain happy at work while maximizing his opportunities for advancement. He is likely to engage in a negotiation.[8] The negotiation is between the employee's sense of self[9] and his sense of the institutional values involved (here, collegiality).[10] The employee may decide that, in the end, he cannot "compromise" his sense of identity, that he needs to be happy at work, and that engaging in office small talk or attending after-work events interfere with that happiness. He may not explore other ways of maximizing his opportunities for advancement.

Alternatively, the employee may decide to "compromise" his sense of identity. That is, he may decide that, while he would rather not socialize with his colleagues, he should nonetheless do so to im-

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8 Even before arriving at the question of workplace identity, one might say that the individual is already engaged in a series of negotiations. As others have observed, identity is formed, or socially constructed, through a series of interpolations (or negotiations). *See, e.g.,* HOMI K. BHABHA, THE LOCATION OF CULTURE (1994); JUDITH BUTLER, BODIES THAT MATTER (1993); BRUCE WILSHIRE, ROLE PLAYING AND IDENTITY (1982); Cheryl I. Harris, *Whiteness as Property,* 106 HARV. L. REV. 1709, 1763-64 (1993); *see also* GOFFMAN, *supra* note 7, at 15 (observing "that when an individual appears before others he will have many motives for trying to control the impression they receive of the situation"); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation,* 43 UCLA L. REV. 263, 287 (1995) (citing Goffman for the proposition that "the creation and maintenance of a person's social identity" is "a process of negotiation between the individual and others"). In other words, a person's identity is a function of her day-to-day interactions with other people—how she perceives and responds to them, and how they perceive and respond to her. *See* Cecilia L. Ridgeway, *Interaction and the Conservation of Gender Inequality: Considering Employment,* 62 AM. SOC. REV. 218, 219 (1997) ("Interaction requires coordinating your behavior with that of another. To act yourself, you need some way of making sense of and anticipating the other's behavior. . . . [T]his requires that you develop at least a minimal definition, some initial beginning of 'who' you and the other are in this situation." (citation omitted)). Our admittedly reductionist discussion in the text is intended to reveal how the structure and norms of a particular institution shape the employee/employer interpolation.

9 We do not suggest that a person has a true or real identity or essence. Nor do we argue that at some moment in a person's life, she can really know who she is. *See* Hutchinson, *supra* note 2, at 1192 (invoking the postmodern suggestion that "that the traditional notion of authenticity–'to thine own self be true'—is an immediate patient for postmodern surgery"). But a person often has a sense of who she is and who she wants to become. A person might engage in acts of generosity to "become" a more generous person. A person might develop a practice of socializing with her co-workers to "become" a more social person. This is not to deny that one's understanding of who they are and who they can become is constrained by the social context. *Cf.* Joan Williams, 32 CONN. L. REV. 249, 270 (1999) (describing social constraints on women's choices). There are "scripts" (social norms) that we (think we must) live by. Yet, people make choices about how to perform these scripts. We argue that those choices can be informed by, among other things, a desire to fit in or do well in a particular institutional culture.

10 It is possible for the employee to either be wrong about the institution's existing values or miscalculate the relative importance of the criteria involved in the institution's values. The key is that the employee's estimation of whether and to what extent an organization values certain characteristics, will among other factors, shape how she performs her identity in that environment.

prove his chances of promotion. Whatever the employee decides, he will take a series of actions to reflect his decision. In this sense, employees are engaged in a continual process of negotiating and performing identity.[11] The choice of how to perform identity is a negotiation to the extent that it reflects a conflict resolution.[12] The

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11 Note, however, that people always are already engaged in a series of performances. Judith Butler makes this argument with respect to gender, and we do not quarrel with that general proposition. *See* BUTLER, *supra* note 8, at 136-39; *see also* Judith Butler, *Imitation and Gender Insubordination, in* INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 13, 19 (Diana Fuss ed., 1991). Still, there is a distinction between a "pure" social constructivist account of gender as a performance (the notion that gender is a performance to the extent that gender is socially constructed) and a strategic/social constructivist account of gender as performance (the notion that gender is a performance to the extent that people make choices, albeit under constraints, about how to perform their socially constructed genders). *See id.* at x-xi. Consider the case of two employees, both of whom are socially constructed as men: everyone who observes these two employees would identify them as men. One might take the position that both are necessarily performing gender because neither man can escape gender categorization. They can gender bend or even gender cross, but cannot exist outside of a political and social culture in which gender matters. Neither man can decide that he does not want to be gendered.

This observation does not imply that we cannot or do not make choices about how we want to be gendered. Certainly, individuals cannot decide *whether* they want to bring gender into being. But they do have some choices about *how* to bring gender into being. After all, more than one way exists to be gendered. More than one way exists of bringing gender into being. Our hypothetical employees may not be able to "take off" gender. However, each has "options" with respect to how to "wear" or give meaning to his gender.

More specifically, both men can take very different actions by engaging in very different performances and still be intelligible as gendered subjects. We are mindful that these choices are exercised under constraints. That is, we recognize that the disciplinary nature of our gender norms coerces us into making particular kinds of choices about how to self-represent: "Men" wear suits and "women" wear dresses. Yet individuals make these choices. There is some agency. People do participate in the social construction of their identities. *See* Kathryn Abrams, *Afterward: Critical Strategy and the Judicial Evasion of Difference*, 85 COR-NELL L. REV. 1426, 1428 (2000) (explaining that "the subjects of inequality are not simply acted upon, but manifest a partial agency").

This observation holds true for employees in the workplace. Our argument is that workplace norms or criteria create incentives for employees to socially construct or perform their identities to comport with those norms or criteria. To be sure, the actions that employees take—the strategic performances in which they engage—to shape how employers interpret their workplace identity do not constitute the whole or even the most important story about identity construction and performance at work. We argue, however, that strategic identity performances remain an important and under-theorized part of the story. For a less stylized account of the relationship between institutional norms and strategic behavior, see generally PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER (1991) (presenting a more ineffable sense of the indefinable in considering how people "fit" into an environment, how well they believe they do so, and how they believe others perceive them to fit in).

12 A tension or a conflict will not always exist. The employees' sense of identity may on occasion comport with workplace norms. A recent article in the *Harvard Business Review*, however, suggests that these conflicts are both significant and commonplace. The article, by Herminia Ibarra, discusses the need for junior associates at professional service firms, such as investment banks or management consultancies, who are aspiring for promotion to think carefully about constructing "partner" identities. *See* Herminia Ibarra, *Making Partner: A Mentor's Guide to the Psychological Journey*, 78 HARV. BUS. REV. 147 (2000). As Ibarra points out, the process of forging a new identity is not only complex and difficult,

employee seeking advancement has an incentive to resolve the conflict between his sense of his identity and his sense of the identity he needs to project to signal to his employer that he exhibits the characteristics the employer values. Figure 1 describes this negotiation process.

Point one in Figure 1 represents the employee's sense of self. This sense of self allows the employee to distinguish between two kinds of personal conduct: identity-affirming conduct that comports with his sense of identity, and identity-negating conduct that runs afoul of the employee's sense of self. This identity-affirming/identity-negating dichotomy is reflected in common expressions, such as "I sold out," "I compromised my beliefs," and "It was so unlike me to do X."[13]

At point two, the employee forms an impression about the criteria that the institution values: in this case, collegiality, which is measured in part by after-work social interaction. At point three, the employee realizes that a conflict exists between his antisocial identity and the criteria that the institution values, sociability. At point four, the employee engages in a negotiation of points one and two. At point five, the employee decides whether and how he wants to resolve the conflict. He may decide, like Sammy Davis, Jr., that "I've gotta to be me."[14] Or, like Polonius in *Hamlet,* his existential mantra might be: "[T]o thine own self be true."[15] In this case, the employee's performance will reflect this negotiation—he will not engage in after-work socializing. On the other hand, the employee may decide to compromise and socialize after work. This resolution will cause the employee to engage in some after-work socializing. The extent of the employee's performance of socializing will depend on the degree to which he is willing or feels the need to compromise his identity.

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but also painful because associates often feel that they are compromising their "true" selves. *See id.* at 152-53.

[13] One could argue that being is doing or doing is being. Put another way, we are what we do. Our actions are both formative and reflective of identity. We do not quarrel with this. Our argument is about self-perception and self-definition, although expressions like "That's so unlike Susan!" suggest that people form idealized impressions of others as well.

[14] Sammy Davis Jr., *I've Gotta Be Me, on* I've Gotta Be Me: The Best of Sammy Davis Jr. (Reprise Archives 1996).

[15] WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act 1, sc. 3, *l.*78 (Susanne L. Wofford ed., Bedford Books 1994). The everyday cultural meaning of this quote from *Hamlet* is at odds with the meaning that the quote has in the play. In the play, Polonius recites the line to his son Laertes. Shakespeare portrays Polonius as an old fool, whom Hamlet kills by mistake. Neither Polonius nor his words are taken seriously in the play.

FIGURE 1

PERFORMANCE/NEGOTIATION DYNAMIC

(1)   (2)
Employee's Sense of Self   v.   Workplace Criteria
(asocial, noncollegial)   (social, collegial, after-work
                                         employee interaction)

(3)
Conflict

(4)
Negotiation
(between (1) and (2))

(5)
Compromise Identity/Resolve Conflict?

Yes   No

(6)
——— Performance ———

Some Socializing   No Socializing
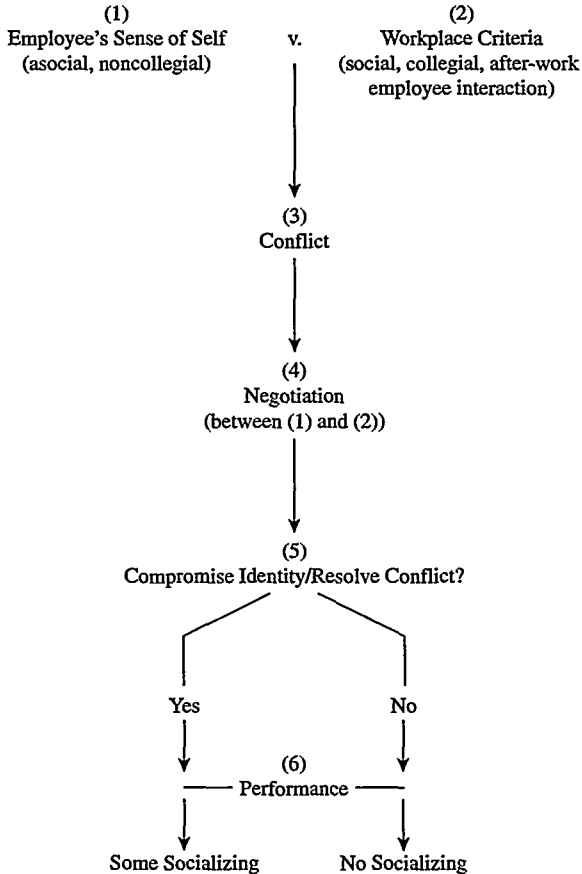
II

OUTSIDERS WORKING IDENTITY

A.   Stereotypes at Work

Part I examined what it means to say that employees work their identities through a series of negotiations. Part II turns to how this general phenomenon is reflected in and reproduced by the workplace experiences of a specific category of employees: members of an outsider group.[16] Imagine a workplace that values effort, collegiality,

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16   For purposes of this Article, insiders are heterosexual white males. A person's status as insider or outsider, of course, is both relative and context dependent. For example, one of us has written about the outsider status of black gays and lesbians in both the mainstream black-civil-rights and gay-rights discourses. *See* Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights: "Comparative Racialization" and "Don't Ask, Don't Tell,"* 47 UCLA L. REV. (forthcoming 2000); *see also* Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics,* 47 BUFF. L. REV. 1 (1999)

team work, leadership abilities, and trust—for example, a large, elite corporate law firm.[17] Informally, the firm has two tracks for its new employees,[18] most of whom it hires straight out of law school or from judicial clerkships. One track is for the employees whom the firm plans to groom for partnership.[19] For this track, the firm wants employees with interpersonal skills, leadership ability, the capacity to inspire trust, and a strong work ethic. The other track is for associates whom the firm expects to employ for between two and six years to work on teams led by partners and by those associates being groomed for partnership. For this second track, which involves much "paperwork," the firm wants employees who will work hard, follow orders, and pay attention to detail.[20]

Assume also that the insider group at this elite law firm consists of heterosexual, white males.[21] The outsiders, therefore, include women, racial minorities, gays, and lesbians. Posit that insiders have certain stereotypes about members of outsider groups.[22] Thus, absent additional information about the individual, a male Korean American who recently graduated from Harvard Law School might be stereo-

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(describing similar marginalization in critical race theory). By the same token, there exist contexts in which heterosexual white men are outsiders. Take, for example, Howard University. That said, the outsider status of the heterosexual white student at Howard is likely to be quite different from that of a black student at a predominantly white university. *Cf.* Carbado, *supra* note 1 (discussing the "normalization" of white male heterosexual identity).

The more complex point is that many individuals do not fall easily into either the insider or outsider boxes, but traverse the space in between. *See* Alice G. Abreu, *Lessons From LatCrit: Insiders and Outsiders, All at the Same Time,* 53 U. MIAMI L. REV. 787, 788 (1999) (making the point that many people are likely to have both insider and outsider aspects of their identity that co-exist). Having both outsider and insider aspects to one's identity, however, does not alter the point that an incentive exists to do work to counter negative stereotypes that might apply to the outsider aspects of that identity.

17   *See, e.g.,* Wilkins & Gulati, *supra* note 3, at 1609 (describing, within the elite-law firm context, the importance of acquiring "relational capital" and demonstrating that one is a team player).

18   *See id.* at 1644-50 (describing the informal multitrack system that exist at many elite law firms).

19   *Cf.* GOFFMAN, *supra* note 7, at 124 ("Employers complete the harmony [of the workplace] by hiring persons with undesirable visual attributes for back region work, placing persons who 'make a good impression' in the front regions.").

20   Wilkins & Gulati, *supra* note 3, 1609-1613.

21   To a large extent, our conceptualization of the insider is static—indeed, essentialistic. We engage in this essentialism to focus on the behavior of outsiders. In a different paper, we focus attention on insiders and address the extent to which insiders can engage in signaling strategies to diminish the workplace burden stereotypes place on outsiders. *See* Devon W. Carbado & Mitu Gulati, *Conversations at Work,* 79 OREGON L. REV. (forthcoming 2000).

22   *See, e.g.,* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit,* 83 CAL. L. REV. 733 (1995); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity,* 47 STAN. L. REV. 1161, 1186-1217 (1995) (discussing psychological studies that show that discrimination against stereotyped groups is ubiquitous).

typed as being good at math and science, unassertive, quiet, hardwork-
ing, uncreative, and impersonal.[23] To get onto the partnership track
at the firm, an employee must be perceived to have leadership abili-
ties, personality, the ability to induce trust in others, and a good work
ethic. Like the other employees, the Korean-American employee has
an incentive to create the impression that he possesses all the requisite
qualities for the partnership track. However, because of the existence
of stereotypes, the Korean-American employee and the insider em-
ployee are differently situated, or have a different workplace standing,
with respect to the institutional criteria that the firm values and the
actions that they (think they) will need to take to demonstrate to the
employer that they have the potential to be successful partners. In
other words, while all the employees in our hypothetical law firm have
an incentive to demonstrate that they have the potential to become
partners, the burden of proof, and thus the precise nature of the in-
centive, varies across identities.

    Recall the assumption that Korean-American Harvard Law School
graduates are generally perceived as quiet, unassertive, good at math
and science (detail-oriented work), and lacking in creativity and per-
sonality. Those assumptions work well for an employee on the non-
partnership track. But they conflict with the qualities that the firm
requires in the employees it plans to groom for partnership. The
stronger this conflict, the harder the employee will have to work to
overcome the negative assumptions by employing stereotype-negating
strategies.[24]

    In the context of this Article, positive and negative stereotypes are
employed to describe the relationship among stereotypes, institu-
tional criteria, and workplace standing. A negative relationship be-
tween a stereotype about an employee's identity and a certain

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    [23]   These stereotypes tend to coalesce into a "model minority" myth about Asian Amer-
icans. *See, e.g.,* Vijay Prashad, *Anti D'Souza: The Ends of Racism and the Asian American,* 24
AMERASIA J. 23, 32-34 (1998) (book review) (describing the contrasting stereotypes of Asian
Americans and African Americans). Asian Americans are labeled "hard working and famil-
ial," while African Americans are stereotyped as lazy and irresponsible, stereotypes used by
writers such as Dinesh D'Souza and Francis Fukuyama. *See id.; see also* Pat K. Chew, *Asian
Americans: The "Reticent" Minority and Their Paradoxes,* 36 WM. & MARY L. REV. 1, 24-45
(1994) (describing the pervasive but fallacious stereotype of Asians as the "model minor-
ity"); Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action,* 15 B.C.
THIRD WORLD L.J. 225, 243-45 (1995) (describing the "reversal" of "the model minority
myth" as creating negative, rather than affirmative, action). For an excellent account of
the specific ways in which Asian Americans have been constructed in law and social policy,
see ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS AND THE NATION STATE (1999).

    [24]   Again, the conflict is between the criteria that the firm values and the stereotypes
that the firm insiders hold about Korean-American employees. The employee might at-
tempt to resolve this conflict by either changing the institutional norms or negating the
stereotype. The employee almost always will be in a better position to do the latter rather
than the former.

institutional criterion diminishes that employee's workplace standing and advancement opportunities within that institution. A positive relationship increases workplace standing and advancement opportunities.[25]

While the focus of this Article is the implications of negative stereotypes, depending on the stereotype and the nature of the workplace norms, an outsider employee may be able to exploit a positive stereotype about her identity. For example, take the assumption of strong stereotypes of Korean-American Harvard Law graduates as hard workers. Given this pre-understanding, it might be pointless and inefficient for such an employee to engage in workplace strategies that signal to her employer what it (thinks) it already knows—that she is a hard worker. Further, if the employee is not interested in becoming a partner, but wants to work at the law firm for a few years to pay off her debts, the stereotypes of hard working, lacking in creativity, and detail-oriented can help her to both get hired and avoid the partnership track.[26]

Admittedly, the definitions of positive and negative stereotypes that we employ are narrow. They are linked to the question of whether particular identity-based stereotypes set against specific institutional norms advantage or disadvantage individual employees. The narrow definitions are used because they help illustrate the point that employees not only work at their work, but also work at performing their identities. How hard they work at the latter task turns on whether a positive or negative relationship exists between a stereotype about their identity and workplace criteria, and on the strength of that relationship. When the environment renders observation of an employee's true characteristics difficult, and employees are competing for promotion to a fixed number of partnership-track slots, the stronger the negative or positive stereotypes are, the more or less an employee is likely to have to work to construct her identity so as to fit the firm's mold and be put on the partnership track.

B. The Incentive System: The General Idea

As the preceding discussion indicates, behavior and stereotypes are not independent. When the stereotype is strong, and the conditions are such that ordinary behavior is not likely to dissipate it, an outsider subject to a strong negative stereotype has an incentive to

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25 Stereotypes, both positive and negative, will differ depending on the outsider group and the insiders' familiarity with that group.

26 An employee might rationally prefer the paperwork track to the partnership track. For example, if being on the partnership track involves a significant amount of socializing with partners and clients, which the employee finds unpleasant, she may prefer to remain in the background and do paperwork for a few years.

FIGURE 2
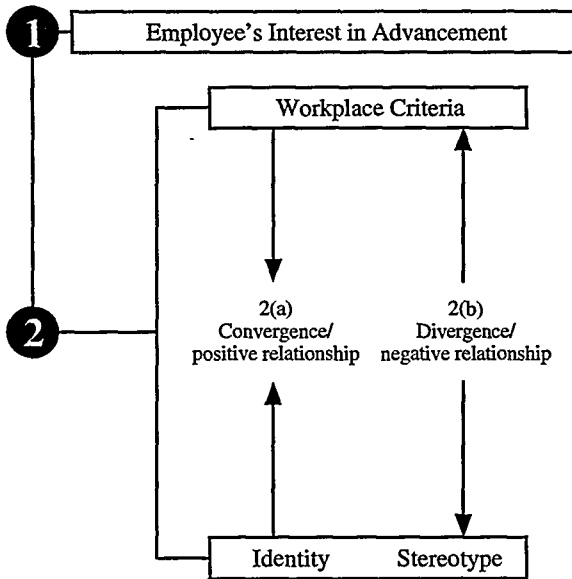
take actions to negate it. On the other hand, someone subject to strong positive stereotypes need not work as hard to achieve the same final evaluation as someone who is subject to negative stereotypes. Further, the stronger the stereotype, the greater the effect is likely to be on the employee's behavior.[27] This dynamic—the dialectical relationship between workplace criteria and stereotypes about the employee's identity—creates the workplace incentive system.

Figure 2 illustrates how the incentive system works. Point 1 reflects the employee's interest in advancement. The employee might (a) be indifferent to advancement, (b) be interested in advancement, or (c) have no interest at all in advancement. Other things being equal, the stronger the employee's interest in advancement, the stronger the incentives to perform her identity to comport with the criteria that the institution values. Point 2 captures two possible relationships that might exist between the workplace criteria and the stereotypes about the employee's identity. The stereotypes and the workplace criteria might be (or the employee might perceive them to be) positively related.

Point 2(a)—the workplace-criteria/identity-stereotype convergence—reflects this relationship. Here, the employee's assumption is that the employer's stereotypes about her comport with the criteria that the employer values. As point 2(b) indicates, however, the work-

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27 This proposition assumes that the employee estimates that the benefits of overcoming the stereotype are greater than the costs of overcoming it.

place criteria and the stereotype could diverge. Here, the stereotype and the workplace criteria are (or the employee might perceive them to be) negatively correlated. When this is the case, the employee's assumption is that the employer's stereotypes about her are antithetical to the criteria that the employer values. Points 2(a) and 2(b) illustrate that the more difficult the workplace criteria are to observe,[28] and the more negative the relationship is between the workplace criteria and stereotypes about the employee, the stronger the incentives are for the employee to signal—through performance—that she possesses the criteria that the institution values.

C. The Incentive System in Institutional Context: Law Firms and Law Faculties

This section places the prior discussion within a specific institutional context: a stylized model of law firms and law faculties. Outsiders enter these institutions with some understanding of their structure, function, organization, and culture. Further, insiders within these institutions have various pre-understandings, or stereotypes, of outsiders. The outsiders are aware of the fact that social stereotypes of their identities are a part of their workplace culture. They know that their employers will likely examine their workplace performances and interactions through stereotypical prisms. The outsiders likely believe that, in the absence of other information, firms and law faculties will adopt certain default positions with respect to the outsider's professional standing within the institution. In the context of a law school faculty, for example, one default position might be that a female Asian-American feminist professor candidate will not be an effective teacher, either because of stereotypes of Asian-American women as lacking authority and being quiet and submissive, or because of stereotypes about feminists as not teaching law and rather focusing too much on politics and social policy.

The incentive system described suggests that institutional characteristics and group-specific stereotypes influence the kinds of choices one makes in negotiating identity. This section examines this dynamic in the context of large law firms and law faculties. The basic characteristics of both sets of institutions are similar enough that they

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[28] The degree to which one can manipulate one's identity is a function of how accurately the employer can evaluate employees. In a world of perfect information, the employer knows exactly which employees are, for example, hardworking and collegial. To the extent that employee-specific information is difficult and expensive to collect, the employer will use shortcuts or proxies to determine desirable characteristics. For example, the employer may interpret the fact that an employee shows up early to work and leaves late as a sign the she is hard working. When employees learn that the employer is using this rule of thumb, they will have an incentive to show up early and leave late.

can be reduced to a simple, albeit stylized, model.[29] This model serves as a point of departure to identify the kinds of performative strategies employees within these, and a host of other similarly structured, institutions might make.

1. *The Up-or-Out Structure: The "Carrot" and the "Stick"*

Both law firms and law faculties tend to have up-or-out structures. Novice employees go through a lengthy trial period, between four and ten years, at the end of which senior employees decide whether to promote junior employees to permanent employment. The peculiar feature of this structure is that a person who is denied a promotion typically is not allowed to stay in her prepromotion status. The denial of a promotion also results in the employee being fired; hence, the term "up or out."[30]

The existence of an up-or-out structure suggests room for identity negotiation in these institutions. An up-or-out structure is an incentive mechanism. The "up" is the carrot and the "out," the stick. In combination, the carrot and the stick induce employees to exert high amounts of effort without the employer having to constantly supervise the employees. The fact that institutions adopt this structure suggests that exerting day-to-day control over employees' actions is too expensive or counterproductive for the employer. Instead, setting up an incentive structure that puts the onus on the employees to determine whether they deserve promotion is more efficient. If they fail, they are fired or, at least, are not promoted. The structure, therefore, is explicitly meant to give employees room to demonstrate their worthiness, suggesting that room exists to negotiate identity.

The specific nature of the up-or-out structure suggests the kind of identity an employee would want to negotiate. The reward—the "up"—is promotion to what is typically permanent employment with a large salary, although, as of late, partnership at law firms no longer resembles academic tenure. Given that promotion is to a position of near permanent employment at a high salary, what are the criteria for promotion likely to be?

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29   The discussion that follows in the next two sections, *see* Part II.C.1-2, is drawn from Wilkins & Gulati, *supra* note 3.

30   Although the structural dynamic that we describe in the text serves as a useful starting point for understanding law firms and law faculties and, more importantly, suffices for purposes of the arguments that we are making, it is by no means meant to be an accurate or full description of law firm or law school dynamics. For a discussion of problems with the stylized model, see *id.* at 1674-81.

2. *Tournament Theory: Employees' Eyes on the Prize*

In the basic tournament models that economists first used to understand these up-or-out structures, promotion was thought to be a reward for hard work as an apprentice. In other words, the structure was thought to be aimed to encourage apprentices to exert high levels of effort. However, the reality is that the apprenticeship period often tends to be relatively short compared to the number of years of permanent employment that follow. Therefore, although there is undoubtedly a reward or "prize" element to the promotion decision, the primary element in the promotion decision must be predictive. Granting someone a large salary and job security for practically a lifetime as a reward for a relatively short apprenticeship period does not make sense, especially when the organization needs those who are promoted to continue to work hard. Promotion, therefore, is likely to be based on a future prediction about an employee's continued productivity in spite of job security. The apprenticeship period gives the senior members of the organization an opportunity to collect information about the apprentice on which to base the predictive decision.

Promotion, however, is unlikely to be a function of future productivity alone. In both law firms and law faculties, the decision to promote is typically determined by a vote of the senior members. Future productivity is a criterion, because hiring the most productive employees enhances the quality of the institution in which the senior members are invested. But, senior members also have personal agendas that are not necessarily in synch with maximizing institutional productivity. For example, senior employees are typically also concerned with their own security and advancement, and will, therefore, want to hire juniors who further these agendas. Thus, a senior law faculty member might endorse junior faculty engaged in the type of work that enhances the value of the senior faculty members' work (for example, someone who does work that is derivative and cites the senior members' work). Or senior members worried about young turks who might try to take over the institution and alter the cushy status quo might vote for less threatening and less intellectually capable candidates; for example, a candidate who wants to abolish tenure is unlikely to garner a lot of support.

Similarly, senior partners in law firms are likely to support candidates who will ensure and enhance their status. Partners will promote candidates who improve both the firm's bottom line and partners' individual bottom lines. Senior members whose most productive years are over are unlikely to want a new partner who will lobby for the senior members to be either fired or forced into early retirement because of the senior members' diminished productivity. As a result, junior employees have to demonstrate future productivity in terms of

the institution's bottom line, whether it be in terms of dollars or academic articles, and convince enough seniors that their (the junior's) promotions will also serve their (the senior's) interests. This self-promotion involves persuading senior members not just of their intellectual capabilities and ability to produce high-quality work, but also of their commitment to continued hard work, even after becoming partner or obtaining tenure. In other words, junior employees must demonstrate that they have internalized a norm of hard work. And they must persuade senior members that they will act in ways that are consistent with the individual interests of their senior colleagues.

We have noted four factors thus far: intellectual ability, production skills, likelihood of continued productivity despite job security, and the trust of senior members. Two of those factors, the likelihood of continued productivity and the trust of senior members, are explicitly related to comfort. First, take continued productivity in the face of job security. The senior members have to feel confident that the junior employee has internalized the social norms of the institution. Given that tenure or partnership implies job security, the senior members must be confident that the junior employee will continue to be induced or, to use the *patois* of investment bankers, "incentivized" to work hard through other pressures, like peer social pressures: guilt, shame, and the desire for status within the institution.

The employee has to show that he cares about obtaining these things. During the apprenticeship period, the employee must demonstrate intellectual ability ("candlepower") and skills. Moreover, the employee must convince senior employees that he has internalized the social norms of the institution by showing that he values the existing structure and will respect the social hierarchy.[31] In colloquial terms, the junior employee must indicate that he is a collegial, trustworthy team player. These preconditions enable informal social sanctions to work effectively within a group. The junior employee must credibly show that he will not object to institutional practices very often. Some dissent is likely to be valued, but not to a level that will undermine the institutional structure.

Most people commonly believe that a law firm's or a law school's productivity is measured in terms of hours billed and clients acquired in the law firm context and in terms of scholarship and teaching in the law school context. But both institutions are also likely to have a number of other tasks that are even more difficult to measure and reward: willingness to handle administrative tasks, enthusiastic participation in committee work, and recruiting. Each of the foregoing tasks

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[31]   *Cf.* Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 54-55 (1999) (explaining why it is crucial for law firms to cultivate internal cultures of trust and cooperation).

are necessary for the organization to function effectively, but difficult
to measure and reward. These tasks typically are taken on by "good
citizens." Firms and law faculties, therefore, will want to promote
those who will be highly productive, will not threaten the status quo,
and also those who will be good citizens. The good citizens are those
who will sacrifice for the good of the institution.

D. The Incentive System and Workplace Discrimination: What's
    Performance Got to Do with It?

What does the discussion so far have to do with employment dis-
crimination? As a threshold matter, progress on the civil rights front
over the past few decades has opened a large number of doors for
minority and women employees.[32] That progress, while dissipating
certain strong forms of discrimination against out-group, has not elim-
inated stereotypes.[33] When doors to the workplace are open (or at
least not formally closed), but stereotypes still persist, one must ask
how these stereotypes influence the behavior of those who have been
allowed through the door.[34] We offer three reasons for why it is im-
portant to pursue this question. Each of these reasons helps to ex-
plain the relationship between identity performance and workplace
discrimination.

First, if we are right in arguing that the difficulty of evaluating
certain individual characteristics and workplace criteria creates incen-
tives for employees to project a workplace identity that comports with
these characteristics and criteria, then it follows that outsiders subject
to negative stereotypes have greater than normal incentives to put ef-
fort and thought into constructing that workplace identity.[35] On the

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[32]   *See* Manning Marable, *Staying on the Path to Racial Equality*, *in* THE AFFIRMATIVE AC-
TION DEBATE 3, 11 (George E. Curry ed., 1996) (asserting that affirmative action has
"opened many professional and managerial positions to blacks, Latinos, and women for
the first time"). *But see* Jody David Armour, *Hype and Reality in Affirmative Action*, 68 U.
COLO. L. REV. 1173, 1176-1180 (1997) (arguing that many commentators overstate civil
rights progress and citing numerous studies that indicate that blacks still face discrimina-
tion in housing, law enforcement, and employment).

[33]   *See, e.g.*, Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130 (2000) (citing materials on
the continuing presence of stereotypes and arguing that, when new forms of interactions
emerge, like in cyberspace, the dynamics of behavior and stereotype generation can
change as well).

[34]   *Cf.* 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,
91 (1998) (arguing that a minority's perception skews that minority's strategies for negoti-
ating the workplace); David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924,
1964-69 (1999) (reviewing PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN
AMERICA (1999)) (discussing the strategy choices of Larry Mungin, a black Harvard-edu-
cated lawyer turned down for partnership at a Chicago-based elite law firm).

[35]   For discussions of whether outsiders who work to conform to insider expectations
of proper behavior by mimicking the dominant group's behavior are likely to fare better in
the workplace, see Kevin Lang, *A Language Theory of Discrimination*, 101 Q.J. ECON. 363

flip side, outsiders subject to positive stereotypes have to put less effort into image construction. The language of bargaining power helps to illustrate this point. Other things being equal, an employee would rather not "compromise" her sense of identity or engage in extra signaling and performative work.[36] Her bargaining power to avoid this compromise or extra work is a function of extant negative stereotypes about her identity. The stronger these stereotypes, the weaker her bargaining power. The weaker her bargaining power, the more she may have to compromise her identity and engage in the extra work.[37]

Second, in addition to opportunity costs, psychic and risk costs exist. Psychic costs arise from self-negating and self-denying strategic behavior.[38] Consider the care taken by a lesbian employee who, for strategic reasons such as concerns about workplace harassment or discrimination, decides to remain in the closet. She may even perform a straight identity by, for example, prominently displaying a photograph of a male friend on her desk and describing her relationship with him in ways that suggest heterosexual intimacy. Even heterosexuals engage in strategic performances of their heterosexuality to avoid the suspicion of homosexuality.[39] Her decision to remain closeted or to perform a heterosexual identity may *for her* be functionally self-negating and self-denying; it sends a message to her employer that she is *not* a lesbian.

Strategic behavior is also risky and can backfire. Consider an Asian-American male assistant professor who wants to project a collegial image. Assume that the institution in question is one in which

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(1986) and Amy L. Wax, *Discrimination as Accident,* 74 IND. L.J. 1129, 1199-1206 (1999). As Wax points out in her article, some evidence exists that inadvertent bias is less likely under counterstereotypic conditions. *See* Wax, *supra,* at 1200 n.205 (citing Charles Stangor et al., *An Inhibited Model of Stereotype Inhibition,* in 11 ADVANCES IN SOCIAL COGNITION: STEREOTYPE ACTIVATION AND INHIBITION 193, 202-03 (Robert S. Wyer, Jr. ed., 1998)).

    36 *Cf.* GOFFMAN, *supra* note 7, at 44 (observing that some identity performances will involve "long, tedious hours of lonely labor that will be hidden"); Angela P. Harris, *On Doing the Right Thing: Education Work in the Academy,* 15 VT. L. REV. 125 (1990) (observing that the "work of promoting empathy toward minorities is not strictly legal work" or "necessarily always public work," but that a "good deal of it occurs in private, interpersonal relationships").

    37 Think of a number line that measures work ethic. There are positive and negative values, and zero. Every employee who enters the firm has a value. In other words, based on stereotypes and without any contact with any of the new employees, members of the firm will make judgments about whether particular employees are, or are likely to be, hardworking. Firm members might be neutral with respect to some employees, who are assigned a value of zero. Others may receive a positive value. We think it is highly plausible that black employees will (think they will) be assigned a negative value. In another article, we explore how an employee's bargaining power, which again is weakened by stereotypes, affects the kind of work the employee ends up doing. *See* Carbado & Gulati, *supra* note 21.

    38 Again, we are not advancing an ontological claim about "true" or "authentic" identities. Rather, the point is that people have a sense of whether they are being true to themselves. *See* SHAKESPEARE, supra note 15, act 1, sc. 3, 1.78.

    39 *See* Carbado, *supra* note 1.

faculty meetings tend to be sites of tension and unpleasant political discussions, such as a discussion on affirmative action or diversity. Assume also that the institution values collegiality and views the tensions that arise over racial issues as disturbing collegiality. If the Asian-American faculty member disagrees with his colleagues about a particular controversial issue, he risks being viewed as uncollegial. Given these conditions, the Asian-American male faculty member might attempt to demonstrate his collegiality by refraining from disagreeing with his colleagues, which may or may not be enough to demonstrate collegiality. If no other stereotypes about Asian-American men existed, the nonintervention/nonparticipation strategy might improve the Asian-American male's overall "faculty standing." But instead, given the multiplicity of stereotypes about Asian-American men, this stereotype-repudiating strategy could end up confirming stereotypes about Asian-American men being docile, timid, and lacking in political and intellectual courage.[40]

These arguments are developed in the next section. First, a caveat. In modeling identity performance as a function of conscious strategic choices, we do not mean to suggest that all identity-related decisions are a product of conscious strategizing. Just as a significant amount of the stereotyping that occurs tends to operate at a subconscious or unconscious level, we expect that a significant portion of the outsider responses to these stereotypes also operates at the subconscious or unconscious level.[41] The conscious-behavior model is a simplifying mechanism to understand what is undoubtedly a more complex phenomenon.[42]

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[40] Further, to the extent that members of other outsider groups on the faculty view the position of Asian Americans on issues of race and diversity with suspicion, this faculty member faces the risk of being perceived as a "sell out" by faculty members belonging to other outsider groups if he fails to make his views in favor of increased racial diversity known.

[41] Unconscious stereotypes and their relevance to discrimination law have been the topic of considerable recent debate. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Michael Selmi, *Response to Professor Wax: Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L. J. 1233 (1999); Wax, *supra* note 35; Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

[42] The story that we tell about the incentives that outsiders have to work their identities to negate stereotypes and persuade employers that they will fit into the workplace culture implicates an argument that Richard Epstein has made for abolishing Title VII. Epstein's argument is premised on the idea that workplace norms matter and that the effective operation of these norms is more likely when the workforce shares a common culture. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 61-67 (1992); *see also* Stephen M. Bainbridge, *Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law*, 43 VILL. L. REV. 741, 798-800 (1998); Finis Welch, *Labor-Market Discrimination: An Interpretation of Income Differences in the Rural South*, 75 J. POL. ECON. 225, 230-31, 238-40 (1967). Having a racially homogeneous workforce is an easy and cheap way to produce a workforce with a common culture. *See* EPSTEIN, *supra*, at 61-67. Epstein argues that Title VII's restriction on race-

III
DOING IDENTITY WORK

A. Performing Identity Is Work

Performing identity consumes resources in the form of time and effort,[43] which is one of the costs of discrimination. The stronger the prejudices and the harder it is to observe true characteristics, the harder an outsider will have to work on managing his identity.[44] This section employs two examples to convey the idea that identity is work, one from each of the institutional contexts described. First, we focus on the law school faculty. We provide an indication of the kind of identity work in which an outsider law professor might engage to repudiate or negate stereotypes about his identity. The second example is situated in the law firm. Here, we show how the pervasiveness of a colorblind institutional norm might shape how an outsider attorney interacts with and performs his identity for insider associates. To the extent that an institution expects its workplace culture to be colorblind, people of color bear the brunt of the burden of maintaining this colorblindness. The reason is that the question of whether the workplace is colorblind will turn primarily on the racial associations that people of color (per)form at work, assuming few, if any, acts of intentional race discrimination will occur.

1. *Black and Male on the Faculty*

Consider the case of a hypothetical black male law professor.[45] The possibility exists that stereotypes about his identity will be at odds

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based hiring, therefore, causes inefficiencies by making it much more expensive for an employer to create a workforce with a common culture. *See id.* at 76-78. The argument is flawed, however, in that it is not the employer, but rather the outsider employees who will incur the cost of acquiring the requisite amounts of cultural capital so as to fit in. *See id.* at 62-63; *see also* Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish,* 84 CORNELL L. REV. 595, 602, 620, 628, 645 (1999) (demonstrating that the costs of cultural differences inevitably fall on members of minority groups). Assuming a scarcity of jobs, the employer will then be able to choose those outsider employees who demonstrate that they will fit into the workplace culture. Title VII, for the most part, does not restrict an employer's ability to define its workplace culture. At the very least, the phenomenon of outsiders working their identity in ways that this Article suggests ameliorates Epstein's concerns about Title VII.

43   Performing identity can even involve direct expenditures of cash. For example, imagine a black man who walks into a fancy clothing store in a hurry because he has a meeting to attend soon. None of the salespeople pay him any attention. In order to get the salespeople's attention, he might be forced to purchase one of the expensive wallets in the display case. Once he attracts the attention of the salespeople with his purchase of the expensive wallet, he is able to get them to help him with the purchase of the suit that he came to purchase.

44   *See* GOFFMAN, *supra* note 7, at 44.

45   *See generally* Cheryl I. Harris, *Law Professors of Color and the Academy: Of Poets and Kings,* 68 CHI.-KENT L. REV. 331 (1992) (discussing the issues that faculty of color can face on predominantly white law faculties).

with stated or unstated criteria that (he thinks) the institution val-
ues.[46] The Figure below attempts to capture the negative relationship
that might exist within a particular law school context between the
stereotypes about the professor's identity, and the professional and
social norms of the faculty.

FIGURE 3

Institutional Values/Employer Expectations	Social Stereotype: Black Male Faculty Member
Race neutrality/colorblindness	"Race man"/color consciousness
Apolitical/non-ideological	Political/ideoligical
Work ethic/willingness to excert effort	Weak work ethic
Intellectually-oriented/ "candle power"	Anti-intellectual, politically-oriented/intellectually "soft"
Qualified	Unqualified
Status-quo oriented	Anti-institutional
Good citizen, cooperative, community builder/collegial	Bad citizen, uncooperative, complainer/uncollegial
Institutional team orientation, institution loyal	Racial group orientation/ racial loyalty
Objectivity	Subjectivity

With the above table in mind,[47] assume that the professor, in his
first year of teaching, has been assigned to teach criminal procedure.

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46 For a general discussion of how stereotypes affect the employment prospects and
experiences of black men, see Floyd D. Weatherspoon, *Remedying Employment Discrimination
Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimina-
tion*, 36 WASHBURN L.J. 23 (1996).

47 According to Kimberlé Crenshaw, "[r]acist ideology replicates [a] pattern [charac-
teristic of Western thought] of arranging oppositional categories in a hierarchical order"
and "historically whites represented the dominant antinomy, while Blacks came to be seen
as separate and subordinate." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment:
Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1373
(1988). Crenshaw captures the concept with the following table:

One of the first cases he is likely to teach is *Terry v. Ohio.*[48] The case establishes the stop-and-frisk doctrine. If a police officer has reasonable suspicion that a person has or is about to engage in criminal conduct, she may stop and detain the suspect for limited questioning.[49] If at any time during the encounter the officer develops reasonable suspicion that the suspect is armed and dangerous, she may subject the suspect to a "frisk"—or a limited search of the suspect's outer clothing, a "patdown."[50] In teaching this case, our black male first-year law professor must at least think about two concerns: whether to employ the Socratic method and how to teach *Terry v. Ohio.*

a. *Employing the Socratic Method*

The Socratic method may not be our hypothetical professor's preferred pedagogical approach. If he were not worried about issues of authority in the classroom—and the extent to which his identity diminishes his professorial standing—he might adopt a less traditional approach. For example, he might break students up into small group sessions, ask them to discuss the material, and then report back to the class.[51] Given the background assumptions about his identity,[52]

Historical Oppositional Dualities	
WHITE IMAGES	BLACK IMAGES
Industrious	Lazy
Intelligent	Unintelligent
Moral	Immoral
Knowledgeable	Ignorant
Enabling Culture	Disabling Culture
Law-Abiding	Criminal
Responsible	Shiftless
Virtuous/Pious	Lascivious

Id.

48   392 U.S. 1 (1968).

49   *See id.* at 30.

50   *See id.*

51   *See* Lani Guinier, *Transcript: Keynote Address by Lani Guinier,* 25 U. TOL. L. REV. 875, 885 (1995) (encouraging law professors to move away from Socratic engagement to a more conversational and less hierarchical approach); John M. Rogers, *Class Participation: Random Calling and Anonymous Grading,* 47 J. LEGAL EDUC. 73 (1997) (suggesting that class participation should play an important part in the delivery of legal education); Stephanie M. Wildman, *The Classroom Climate: Encouraging Student Involvement,* 4 BERKELEY WOMEN'S L.J. 326 (1989) (same).

52   In the context of the classroom, perhaps the most pervasive stereotypes students will have about the professor is that he is not competent. But, even to the extent that students do not hold this negative view, they will likely not assume that the professor is competent. *See* Derrick A. Bell, *Diversity and Academic Freedom,* 43 J. LEGAL EDUC. 371, 377 (1993) (noting the burden of the presumption of incompetence on nonwhite faculty members); Joyce Anne Huges, *Neither a Whisper or a Shout, in* REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS 90, 98 (J. Clay Smith Jr. ed., 1998) (observing that "there is no presumption of competence for Black professors as there is for whites. In fact, there is a presumption of incompetence").

however, such an approach would not necessarily signal creativity. Instead, it could signal unpreparedness, intellectual "softness," and disorganization.[53]

Moreover, employing the Socratic method effectively is difficult. But for racial assumptions about his identity, the professor might also adopt a teaching approach that requires a different kind of (and some might argue less) intellectual work: lecturing.[54] It takes a great deal of work to convey complicated doctrinal ideas through Socratic engagement. A professor must think carefully about the questions, anticipate the responses, and move the conversation in a coherent and accessible way.[55] It might be easier and safer for this professor to teach the material to the students via a lecture. In this way, he remains in control of the conversation.[56]

Further, the professor might also think that problems with the Socratic method exist and that it operates to disproportionately benefit insider students.[57] This suspicion might especially be true of classes with few students of color.[58] However, employing a teaching method other than the Socratic method could result in an image of the professor as nontraditional, illegitimate, intellectually rigid, closed-minded,

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[53] For a discussion of how the employment of nontraditional classroom pedagogy can create (or solidify) the impression of a Black professor's incompetence, see Bell, *supra* note 52, at 377 (describing his teaching experiences at Stanford); *see also* Reginald Leamon Robinson, *Split Personalities: Teaching and Scholarship in Nonstereotypical Areas of Law,* 19 W. NEW ENG. L. REV. 73, 74-77 (1997) (discussing how the author's employment of social theory in the content of his property class engendered student hostility).

[54] *But see* Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority,* 6 WM. & MARYJ. OF WOMEN & L. 53, 162 (1999) (observing that the employment of the Socratic method confirms the image of her as "an aggressive and domineering black woman").

[55] *See, e.g.,* Phillip E. Areeda, *The Socratic Method,* 109 HARV. L. REV. 911, 922 (1996).

[56] Note that the professor might also be worried that the use of the lecture format would result in the impression that he is unreceptive to student ideas. Such an approach might also encourage his colleagues to take the position that he "spoon feeds" or "condescends to" students.

[57] For a discussion of the link between the pedagogical choices law professors make and the experiences of students of color in the classroom, see generally, Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education,* 11 NAT'L BLACK L.J. 1 (1989); *see also* Harris, *supra* note 45, at 342-43 (describing the additional "burdens" and responsibilities of being a black woman law professor). *Cf.* Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School,* 143 U. PA. L. REV. 1, 19-20 & n.63 (1994) (suggesting that men speak more than women in the classroom); Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education,* 48 J. LEGAL EDUC. 1, 45-48 (1998) (same).

[58] For example, to the extent that there are few black students in a particular class, students and sometimes faculty members look to these students for the "black perspective." And even when students and faculty members do not expect black students to provide the black perspective, black students will still carry the burden of "representing" race.

uninterested in student ideas, and unable to think on his feet.[59] The employment of the lecture format, in other words, could be interpreted as the employment of a script.[60]

b. *Teaching* Terry v. Ohio

Terry v. Ohio,[61] decided in 1968, involved black defendants.[62] In teaching the case, one could ignore the political context in which the case was litigated,[63] the racial dynamics of the encounter between the defendants and the police,[64] and the race-based way in which Justice Warren structured the opinion.[65] Alternatively, one could focus on all these factors. During such a discussion, the black professor might even reveal his own encounters with the stop-and-frisk doctrine on the street.[66]

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59 *Cf.* SARA LAWRENCE-LIGHTFOOT, RESPECT 155-69 (1999) (describing Professor David Wilkins' reasons for using the Socratic method when he began teaching Civil Procedure at Harvard Law School).

60 Significantly, the employment of the Socratic method does not mean that the professor escapes any of these criticisms. Clarity can be interpreted as condescension or spoon feeding; a great amount of student engagement can be interpreted as disorganization or unpreparedness; asking lots of questions can be interpreted as providing little guidance. In other words, any pedagogical choice that a faculty member makes will be filtered through stereotypical prisms. At the extreme, this means that good teaching is what white men do in the classroom. What black men do is necessarily not good teaching. *See* Smith, *supra* note 54, at 109 n.205 (observing that "Professor Kingsfield [of The Paper Chase], embodies the prototypical law professor: white, middle aged, and overly-fond of the socratic method"). Consequently, while a white professor is seen to be bold or assertive, a black one is seen to be out of line or aggressive. While a white professor is seen to be a strong leader, a black one is looked on as combative. And while a white professor is said to be skilled at negotiating, a black one is perceived to be unwilling to follow procedure. *See* C. Aisha Blackshire-Belay, *Under Attack: The Status of Minority Faculty Members in the Academy,* ACADEME, July-August 1998, at 30, 32. All of this is to say that there is no strategy that a Black faculty member can take that renders him invulnerable to stereotypes.

61 392 U.S. 1 (1968).

62 The Court's recitation of the facts does not mention the defendant's race. *See id.* at 5. However, the trial court record reveals that John Terry was black.

63 For a discussion of the extent to which this historical context of the 1960s shaped the Court's doctrinal approach in *Terry,* see Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion* 72 ST. JOHN'S L. REV. 1271 (1998).

64 *See* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment,* 74 N.Y.U. L. REV. 956, 962-73 (1999). In many ways, *Terry* can be conceptualized as a case about racial profiling. For a discussion of the problems racial profiling present for Fourth Amendment jurisprudence, see David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment,* 1997 SUP. CT. REV. 271, 312-16.

65 *See* Thompson, *supra* note 64, at 962-73. *But see* Sklansky, *supra* note 64, at 315-16 (arguing that at least the *Terry* opinion "expressly recognized the problem of police harassment, took note that the problem appeared particularly acute from the vantage point of black Americans.").

66 *See* Devon W. Carbado, *E-racing Suspicion,* STAN. L. REV. (forthcoming 2000) (describing his race-based encounters with the police).

Assume that student evaluations play an important role in the tenure and promotion process at this institution.[67] Assume also that the student body is overwhelmingly white. If so, the professor might choose not to focus on—or even ignore—the racial aspects of the case. That approach, from our perspective, would be problematic.[68] Given the professor's fears about what sort of assumptions the students might make if he talks about race,[69] the professor might make the pragmatic choice to avoid race, for fear that talking about it would result in his receiving negative evaluations.[70]

Suppose, however, that the professor does choose to address the racial aspects of the case. He thinks that this is the right thing to do politically, intellectually, and pedagogically. The fact that he makes this choice, however, does not mean that his pragmatic concerns about tenure and promotion have disappeared. Instead, the professor is likely to attempt to negotiate his pragmatic concerns about teaching evaluations and tenure with his political, intellectual, and pedagogical concerns about race. He will have to find ways to meaningfully integrate politics, history, and race into a discussion of the narrow doctrinal questions presented by the *Terry*[71] opinion, while avoiding alienating students or creating the impression that he is partial and obsessed with race. This approach involves work, which is directly related to the background racial assumptions that people make about

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67 We recognize that the importance of teaching evaluations varies from institution to institution. Moreover, even within a specific institution, teaching evaluations may not be as important in all cases.

68 *Cf.* Crenshaw, *supra* note 57, at 2 (discussing the extent to which avoidance of race in the classroom entrenches legal "perspectivelessness"— "an analytical stance that has no specific cultural, political, or class characteristics").

69 For example, he may fear that the students will think that as a black professor he is obsessed with race. *See* Huges, *supra* note 51, at 101 n.61 (observing that "A survival strategy employed by some [people of color] is 'racelessness'").

70 *Cf.* Linda Crane, *Can We Talk?: Reflections of Seven Female African American Law Professors*, NBA MAG., July 1992, at 16, 19 (observing that "the experiences of relatively new law teachers indicate that most of their negative race-related encounters of students seem to have taken the form of unduly harsh written student evaluations"); Elaine Martin, *Power and Authority in the Classroom: Sexist Stereotypes in Teaching Evaluations*, 9 SIGNS: J. WOMEN IN CULTURE & SOC'Y 482, 486-87, 491-92 (1984) (arguing that student revenge "plays a large[ ] part in the evaluations of [woman] faculty who upset students by violating zones of acceptance"); Smith, *supra* note 54, at 137-200 (discussing how stereotypes of race and gender shape how students evaluate professors); Ellen K. Solender, *The Story of a Self-Effacing Feminist Law Professor*, 4 AM. U. J. GENDER & L. 249, 255 (1995) ("Student prejudices continue to pollute student evaluations, especially when a professor of a different race or culture is involved."). For scholarship questioning the "fairness, validity, and perhaps legality of using" student's evaluations to make tenure and academic promotional decisions, see James G. Nimmer & Eugene F. Stone, *Effects of Grading Practices and of Time of Rating on Student Rating of Faculty Performance and Student Learning*, 32 RES. HIGHER EDUC. 195, 212 (1991).

71 Chief Justice Warren characterized the question before the Court as "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest." Terry v. Ohio, 392 U.S. 1, 15 (1968).

the professor's identity.[72] None of the concerns identified in the preceding paragraphs would apply, at least not in the same way, if this professor were a white male.[73]

2. *The Racial Work of Colorblindness*

A more general way to convey this idea relates to the pervasive notion that our society, our workplace culture, and our social interactions ought to be colorblind.[74] Under a colorblind norm, whites can-

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[72]   The extra work that outsiders often do in negotiating identity in the classroom extends beyond the obvious classes like Constitutional Criminal Procedure and Criminal Law, where it is almost impossible to ignore race and gender issues (although we have seen it done). Take, for example, the basic Business Associations or Corporations class. Discussion of the corporate-opportunities doctrine is standard fare for this class. Two of the key cases on the topic are *Energy Resources Corp. v. Porter,* 438 N.E.2d 391 (Mass. App. Ct. 1982) and *Broz v. Cellular Info. Sys., Inc.,* 673 A.2d 148 (Del. 1996); *see also* Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine,* 108 YALE L.J. 277, 303-10 (1998) (discussing the cases in detail).

In each case, the issue is the same: Did the defendant abscond with a corporate opportunity? Both cases involve similar situations in that the defendant officers did not disclose their intentions to their corporations prior to taking the opportunities. Yet, despite the important role that prior disclosure plays in the doctrine, the officer in *Porter* loses while the office in *Broz* wins. *See Broz,* 673 A.2d at 159; *Porter,* 438 N.E.2d at 395. The opinion explicitly mentions that Porter, the defendant who loses, is black, the organization he defects to is associated with Howard University, and the opportunity at issue is a government grant that is part of a minority set-aside program. *See Porter,* 438 N.E.2d at 392-93. In the case where the defendant wins, race is not mentioned. Although a number of plausible explanations exist for why the cases come out differently, *see* Talley, *supra,* at 306-10, race and hostility towards affirmative action may have played a role.

Our hypothetical black male professor must decide whether to discuss the question of whether race played a role. If he does, he risks that his insider students will think: Here is another black man obsessed with race. Unlike with *Terry,* however, he can avoid talking about the race question without raising too many eyebrows because race does not play a role in the standard discussions of the cases. *See id.* at 303-10. The cost to the professor is both the struggle he goes through in terms of deciding how and whether to bring up the race issue (or how to deal with it if a student brings it up) and, assuming he decides to avoid the issue, having compromised what he may view as his sense of self.

[73]   This is not to deny that there are likely to be identity performance pressures on, for example, a white male conservative professor who is trying to negotiate his identity within a liberal educational institution. A white male professor teaching rape, for example, might be worried about the extent to which his status as a (white) man might shape the way students respond to him and the material. *See* James J. Tomkovicz, *On Teaching Rape: Reasons, Risks, and Rewards,* 102 YALE L.J. 481, 501 (1992). Our point is that a white male professor is not likely to have to think about identity negotiations to the same extent as a professor who is not white and male. *Cf.* Linda S. Greene, *Tokens, Role Models, and Pedagogical Politics: Lamentations of an African American Female Law Professor,* 6 BERKELEY WOMEN'S L.J. 81, 82 (1990-91) (observing that the "limited presence [of Black women in the academy] politicizes the past and present by reminding students, faculty, alumni and others of the rationales of our historical and current exclusion . . . . The ubiquitous white male law professor arouses no curiosity or attention based solely on his presence").

[74]   For criticisms of extant notions of colorblindness, see, e.g., Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991); Harris, *supra* note 8, at 1768-77; Gary Peller, *Race Consciousness,* 1990 DUKE L.J. 758; Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity,* 87 MICH. L. REV. 2128 (1989). One could use gender or sexuality blindness as an alternative norm that is desired.

not intentionally discriminate against people of color based on race. They cannot use racial slurs or otherwise engage in overt racial conduct that creates a hostile work environment for people of color. The colorblind idea does not, however, place an affirmative duty on whites to interact with people of color, or a negative duty to dissociate and disidentify themselves from other whites.

Consider, for example, a large law firm's daily lunch rituals. Given how hard law firm associates work and the limited time they have to interact with other lawyers in their firm outside of work assignments, eating lunch together becomes an important way for associates to develop and sustain relationships within the firm. If the firm has a colorblind workplace norm, it would not be problematic for the same group of white male associates in the law firm to lunch together everyday. Such racial associations would not run afoul of a workplace norm of colorblindness. Few white people in the law firm would interpret these white male, daily lunch gatherings as a form of white racial bonding or as evidencing a tendency on the part of the white male associates to form racial cliques. On the contrary, these associations would likely be understood to reflect the collegiality of the individual members of the lunch group.

Now suppose that within this same firm some Latinas/os who develop a practice of going to lunch with each other on the first Monday of every month. This practice may be interpreted as undermining the law firm's colorblind ideal if they went to lunch with each other everyday. Even a monthly lunch gathering of Latina/o associates might be viewed as sufficiently disruptive of workplace norms of racial association to create the impression of racial "cliquishness."[75] These Latinas/os might be perceived as "sticking to their own kind." To the extent that insiders perceive Latinas/os in this way, they (insiders) are also likely to perceive them (outsiders) as uncollegial.[76]

Why do racial associations on the part of whites carry a different social meaning than racial associations on the part of people of color? With reference to the above example, one answer might be that the

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[75]   *See generally* BEVERLY DANIEL TATUM, "WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?" (1997) (discussing racial-identity development).

[76]   Commenting on the relationship between race and collegiality within the context of law faculties, Angela Harris observed:

> Each member of a faculty is judged in part on the basis of whether she or he contributes to collegiality or detracts from it. Collegiality is often a factor in the tenure decision. Yet, the very appearance of new, "diverse" people on faculties signals the loss of an older academic community. Faculty members once took for granted the presence of certain homogeneities of race, gender, sexual orientation, and the rest within their community. Minorities in academia sometimes feel themselves to be a threat to collegiality not only in their actions but in their very existence.

Harris, *supra* note 36, at 128.

white associates did not racially define their association as a white-only association; it just happened that their lunch gatherings were white and male. With respect to the Latinas/os, however, their monthly meetings were organized around the very fact of their racial or ethnic identity.

But this reasoning is unpersuasive. Even a situation involving La-tina/o daily lunches that are not organized intentionally along iden-tity lines will still be perceived as racially "cliquish." The reason is that the social meaning of employee associations—for example, Latina/os going to lunch together—does not depend solely or most significantly on the racial intent behind the association, but on the racial composi-tion of that association.[77]

Why does racial composition matter? Why, in other words, does the social meaning of the group association turn on the racial compo-sition of the group? The answer relates to the one-directional way in which the colorblind norm works. The colorblind norm does not re-quire whites to avoid other whites or to associate with people of color. This norm does, however, require people of color to avoid other peo-ple of color (the negative racial duty) and to associate with whites (the affirmative racial duty). In fact, the colorblind norm operates as a color conscious burden.[78] Colorblindness, therefore, does not actu-ally mean colorblindness.[79] Specifically, it racially regulates the work-place association of people of color, but not those of white people. A colorblind workplace norm requires people of color, but not white

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[77] *Cf.* Frances Olsen, *Affirmative Action: Necessary but Not Sufficient,* 71 CHI.-KENT L. REV. 937, 942 (1996) (describing, within the academic context, how similar information about insiders and outsiders is often interpreted differently). One might object to the argument in the text on the grounds that the interpretive spin that is put on the different lunch associations is a simple matter of probabilities. In other words, in a large workplace that is dominated by white male employees, it is likely that it is a random occurrence that a group of white men are having lunch together. Conversely it is a lot less likely that a group of Latina/os having lunch together at the firm is a random occurrence. But to say that the different interpretive spins are all about probabilities is to miss the point of the story which is that the Latina/os having lunch together is *more* likely to be interpreted at "cliquishness" (because of preconceptions about people of color) than it would be with a simple probabil-istic calculation (of the type of how likely is it that a coin toss will come up either heads or tails). It is a matter of probabilities, but a complex matter.

[78] One can articulate this point more broadly by invoking the notion of "assimilation-ist bias." For a useful discussion of the ways in which equal protection jurisprudence repro-duces assimilationist bias, see generally, Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell",* 108 YALE L.J. 485 (1998).

[79] *See* Kimberlé Crenshaw, *Playing Race Cards: Constructing a Pro-Active Defense of Affirm-ative Action,* 16 NAT'L BLACK L.J. 196, 199-202 (1999) (discussing the subjectivity inherent in the notion of colorblindness); Harris, *supra* note 8, at 1738 (describing how "[w]hiteness as racialized privilege was . . . embraced in legal doctrine as 'objective fact'"); Karst, *supra* note 8, at 281-82 (stating that objective fact-finding maintains social status and subordination).

people, to think and be careful about their racial associations.[80] The question of whether the workplace norm of colorblindness is violated turns on whether people of color associate with each other or with whites. Consequently, white-with-white and white-with-people-of-color associations are perceived as colorblind. People of color-people-of-color associations are not.

B. Additional Costs of Working Identity

1. *Identity Denials*

Identity performances can become a denial of self. As we explain later, identity negotiations often function to make insiders feel comfortable and at ease with the outsider's difference. Beyond a certain point, an outsider's efforts to make insiders feel comfortable can translate into a denial of the outsider's self, or at least the outsider's

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[80] A recent article by Amy Wax suggests that it may be efficient for people of color to bear this type of burden. *See* Wax, *supra* note 35, at 1199. Wax's claim is that, to the extent employers hold unconscious stereotypes about outsiders, those outsiders are likely to be in the best position to do the work of negating those stereotypes, making them the cheapest cost avoiders. *See id.* at 1200-01. While no easy way exists for the employer to correct for the unconscious biases of its decision makers, Wax argues, outsider employees can effectively negate stereotypes by becoming more productive workers. *See id.* at 1202. Greater productivity in turn will increase social welfare. *See id.* at 1202-03.

Wax's article is important in that it is one of the few to explicitly discuss victim responses and agency in the context of unconscious discrimination. But the efficiency claim is problematic on multiple grounds. At the least, it minimizes the costs and risks involved in negating stereotypes. *See id.* at 1203-06. Negating stereotypes is not a simple matter of working harder and faster. Further, the tone of the argument suggests that outsiders *should* do the work of negating stereotypes. This view fails to recognize that outsiders have been attempting to do the work of negating stereotypes ever since they were allowed entry into the workplace and that the results have not been the straightforward increases in productivity that Wax suggests.

To push the point further, we are unpersuaded by Wax's claim that stereotype-negating behavior by outsiders will enhance efficiency. Take the following examples of the type of behavior discussed earlier: acting docile to negate the stereotype that one is likely to be violent; purchasing expensive and formal clothes to negate the stereotype that one is likely to be unprofessional; going drinking with the boys to negate the stereotype that one is unlikely to be a team player; speaking only English with fellow outsiders to not discomfort insiders; and eating hamburgers and listening to top-forty music to persuade others of one's cultural assimilation. The increase in productivity in these actions is difficult to see. Outsiders do extra work, but that work can often be wasteful, risky, and counterproductive. Of course, outsiders will undoubtedly also attempt to do more to enhance bottom-line productivity to negate stereotypes of laziness. But Wax errs in privileging this effect and giving short shrift to the likelihood of inefficient signaling behavior. *See id.* at 1204-05.

As Wax herself recognizes elsewhere in the article, stereotypes and unconscious biases are not problems in those spheres in which cheap and objective measures of productivity exist. *See id.* at 1179. It is in those workplaces, in which qualitative evaluations turn on factors that are difficult to verify and observe (team work, steadiness, dependability, initiative, loyalty), employers are likely to use stereotypes in their decision-making processes. *See* Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, J. ECON. PERSP., Spring 1998, at 91, 96-97; Bradford Cornell & Ivo Welch, *Culture, Information, and Screening Discrimination*, 104 J. POL. ECON. 542, 543 (1996). The negation of precisely these factors is likely to involve the kinds of inefficient signaling on which this Article focuses.

idealized sense of self. This is not to suggest that people have "true" identities or essences. Identity is socially constructed.[81] Rather, the point is that most people have experienced what might be referred to as compromising moments of identity performance—moments in which a person's performance of identity contradicts some political or social image that person has of herself.[82]

a. *Compromising the Sense of Self*

Consider a summer-associate event at a law firm, such as an end-of-the-summer dinner. Five permanent associates are present: four white men and one white woman. The summer associate, Debra, is a black woman, and one of the white male associates informs her that the firm has decided to extend her a permanent offer to join the firm upon graduation from law school. Debra is excited. But her excitement is cautious, for she realizes that if she accepts the offer, she will be one of only two black women and five black people in a firm of two-hundred attorneys.

As the evening progresses, there are many celebratory toasts. This firm prides itself on getting summer associates to accept the firm's offers by the end of dinner. Susan, the white female associate, wants to know if Debra has seen the new Star Wars movie. She tells Debra that the firm has lots of tickets and continues: "It's a great movie. Quite entertaining. The effects and the characters are all amazing! Jar Jar Binks was, I thought, very funny." The other associates agree enthusiastically. And they go on at some length about how "truly great" this movie is.

Debra has, in fact, seen Star Wars. She does not think the movie was great. On the contrary, she found the movie to be racially problematic and several of the characters to be walking racial stereotypes. Debra does not express her "true" feelings about the movie, however. Instead, she escapes the conversation by saying: "Thanks, but I've seen the film already. At any rate, I'm not a huge fan of the Star Wars genre."

For Debra, her reaction was a compromising moment of identity performance.[83] To respond otherwise might have resulted in the risk that the associates would consider her racially sensitive, uncollegial, a

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81   *See, e.g.,* Kang, *supra* note 33 (describing the concept of social construction).

82   As explained, the stronger the stereotypes about one's identity, the weaker that person's bargaining power with respect to whether and to what extent he or she should compromise on identity. *See supra* Part I.A-B.

83   It is important to point out that Susan, the white female associate, is also very likely to be engaged in a series of negotiations. Presumably, as a white woman (and thus an outsider), she would also be interested, if not racially invested, in fitting in.

potential troublemaker, a radical, a "Sapphire,"[84] or a "PC-er." Had Debra not been concerned about the (race-based) costs of offering her racial analysis of the film she might have volunteered her perspective.[85] Those background concerns, however, resulted in her performing her identity in a way that was intended to make the white associates feel racially comfortable (or at least not render them racially uncomfortable). Although this racial-comfort strategy diminished (but did not eliminate) the likelihood that certain racial stereotypes about black women would be attributed to Debra, the strategy carried with it another significant cost: the performance of an identity that is at odds with—indeed a negation of—the social and political image that Debra has of herself.

b. *What to Do About Racial Humor*

Consider the case of an insider who tells jokes about a Chinese character. The insider puts on the stereotypical Chinese accent commonly heard in the movies and on television to describe what the Chinese character says. An outsider hearing this joke could laugh, stay silent, or point out that the insider is being racist.

If the outsider laughs, the insiders will probably think that he is a "good guy": someone who can take a joke, a team player who is not obsessed with race, or a racially-neutral person.[86] If, however, the outsider suggests that the caricature is racist and offensive, then: (1) his outsider status will be accentuated, (2) his colleagues might conclude that he cannot take a joke and is obsessed with race, and (3) insiders will question whether he can be trusted and are less likely to think that he is a team player. What does the outsider do under these cir-

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84 *See* Regina Austin, *Sapphire Bound!*, 1989 Wis. L. Rev. 539, 539-40 (stating a "Sapphire" is a stereotype of a black woman as "tough, domineering, emasculating, strident and shrill"). The opposite of the Sapphire image is "Mammy." "Mammy was 'the perfect slave—a loyal, faithful, contented, efficient, conscientious member of the family who always knew her place; and she gave the slaves a *white-approved standard of black* behavior!'" *Id.* at 570 (emphasis added) (citation omitted).

85 Consider Patricia William's experience challenging her friend's anti-semitic comment:

> As we argued, words like "overly sensitive," "academic privilege," and "touchy" began to creep into her description of me . . . . She did not use the word "righteous" but I know that is what she meant. . . .
>
> Eventually I felt our friendship being broken apart. . . . Moreover, I realized that she perceived the very raising of the subject matter as an act of hostility.

Williams, *supra* note 74, at 2147; *see also* Harris, *supra* note 36, at 126 (observing that "[c]hallenging bigotry is always difficult, but it is particularly difficult when it means risking a valued relationship").

86 *Cf.* Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 Temp. L. Rev. 799, 831 (1988) (observing that "[i]f a faculty member doesn't enjoy the little jokes told about women in the faculty lounge [or] if she doesn't drink beer with the boys, . . . she is not collegial").

cumstances? Outsiders are confronted with this sort interactional question on a regular basis.[87] If the outsider's sense of herself is that unconstrained by occupational concerns about promotion, she would be inclined to challenge the race-based humor in our hypothetical above, remaining silent can become not only a denial of that sense of self, but also a legitimation of and acquiescence to the implicit racial terms under which the outsider is expected to work (here, toleration of racial humor).[88]

2. *Identity Performances Can Backfire*

Outsiders' working identities also involve two types of additional risks. First, the risk exists that others will identify the performative element of an outsider's behavior as strategic and manipulative. Suppose an outsider's colleague is attempting a humorous caricature of a fellow employee that the outsider thinks is racist. The outsider does not want to feed her white colleague's stereotype of outsiders as people who are obsessed with race. Therefore, the outsider employee joins the laughter. If insiders perceive that the laughter is halfhearted and fake, it may be worse for the outsider's prospects of success in the workplace than if the outsider had objected to the caricature or refused to laugh. In other words, to the extent that the outsider is perceived as acting strategically, her actions will be discounted and probably resented.[89] Therefore, the outsider not only has to perform, but she has to perform well.[90]

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[87]   Significantly, the outsider's response and the employer's interpretation of that response might be a function of the outsider's identity. Thus, perhaps the employer will expect that black people will participate in jokes about Asian Americans more than Asian Americans will. In other words, an employer may be racially more disappointed with outsider employees who do not participate in identity-based humor about people whose outsider identity is different from that of the employees.

[88]   Working within a group almost by definition, requires an individual to compromise her individual identity to some extent. Outsiders inevitably must make a greater effort to conform than insiders. But at some point, compromise becomes the denial of a person's self. *See generally* Snsan E. Babbitt, *Moral Risk and Dark Waters, in* RACISM AND PHILOSOPHY 235 (Susan E. Babbitt & Sue Campbell eds., 1999) (exploring the morality of identity construction within a system whose social norms and values define one negatively).

[89]   *See* GOFFMAN, *supra* note 7, at 71 ("If a performance is to come off, the witnesses by and large must be able to believe that the performers are sincere.").

[90]   *See id.* at 33 ("Those who have the time and talent to perform a task well may not, because of this, have the time or talent to make it apparent that they are performing well."). Angela Harris made the following point with respect to education work:

> I must consider issues of timing. Is this the right moment to speak up? Do I have enough credibility to make a challenge? I must judge the manner of my challenge. Will anger or soft words be more effective with this person? Finally, I must ask myself whether I have the resources to handle one more confrontation . . .

Harris, *supra* note 36, at 132-33.

Second, when multiple interconnected stereotypes operate simul-
taneously, the risk exists that taking steps to negate one kind of stereo-
type will activate some other negative stereotype. The point is easiest
illustrated with a series of examples. First, take the case of one of the
few female employees in an organization that values assertiveness.
She recognizes that other women before her have failed in the organi-
zation in part because of a stereotype that women are unassertive.
Therefore, she decides to be assertive in her interactions with others;
for example, she asserts herself in meetings and in her dealings with
colleagnes and subordinates. The risk is that the woman's male col-
leagnes will not see the assertiveness as positive, but rather as a sign
that she is "bitchy" and "pushy."[91]

Or imagine that in an organization that values both effort and
intellectual ability, a male African-American employee perceives that
negative stereotypes about him exist on both counts. He works longer
hours than normal to negate the stereotype of a lazy African-American
man. But that strategy creates the risk that working late will be inter-
preted as an inability to get work done as quickly as the others.

Finally, consider a male South-Asian employee who is worried
about the perception of South-Asian men as unusually sexist. In order
to negate that stereotype, he takes up cooking. But instead of negat-
ing the stereotype of the sexist South-Asian man, his decision to take
up cooking triggers the colonial image of the servile South-Asian man.
As these examples show, outsiders are typically subject to not one, but
a number of interconnected stereotypes.[92] And it is entirely possible

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[91] *See, e.g.,* Olsen, *supra* note 77, at 942 (noting that women have a lot of experience
striving to meet ever-changing job requirements).

[92] Katharine Bartlett eloquently makes this point with respect to women:

> A woman [in a traditionally male workplace] can be neither too much like
> a woman nor not enough like one; she must appear competent—and thus
> formal, covered, and neutered—but not too assertive or manly—and thus
> soft, frilly, and ornamental. She must not distract others with her sexiness,
> and thus must be wrapped tight and inaccessible, but she cannot be too
> independent, and thus should be appropriately exposed (legs), painted
> (eyes, lips, cheeks, hair), elevated (high-heeled shoes), and vulnerable
> (clothes that prevent easy movement or escape).

Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community
Norms, and Workplace Equality,* 92 MICH. L. REV. 2541, 2547 (1994).

Elsewhere in the same article, Bartlett writes:

> The "dress-for-success" literature makes chillingly clear the tightrope wo-
> men are expected to walk. Women are cautioned to avoid both the "imita-
> tion man" look and the feminine look, both of which detract from their
> authority. The imitation man look—a shirt and tie, vest, or pinstriped
> suit—causes women to look as if they are dressing up in someone else's
> (their father's?) suit and thus silly or, in some cases, sexy. It is important
> for the individual woman to show—with a skirt, for example—that she is
> not departing in too radical or threatening a way from accepted gender
> identifications. The feminine look causes a woman to be perceived as a
> subjugated object rather than as an authority figure. Thus, women should

that a strategy to repudiate one stereotype, like laziness, will confirm another, like intellectual incompetence.[93]

C.   Identity Negotiation and Performances, and Antidiscrimination Law: Problems and Possibilities

Having articulated some of the costs of identity performances,[94] we turn to a concrete conversation about legal doctrine. With respect to antidiscrimination law, identity negotiations are problematic in at least three senses. First, identity negotiations involve costs that are not captured by current antidiscrimination regimes (the "capture problem"). Second, to the extent that a person engages in certain strategic identity negotiations, she undermines her ability subsequently to bring a discrimination claim (the "evidentiary problem"). Third, antidiscrimination law reflects the problematic presumption that an employer who hires several outsiders, and fails to promote some is not motivated by discriminatory reasons (the "doctrinal problem").[95]

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not wear frilly or lacy blouses, pastel colors, short or long skirts, heavy makeup, low necklines, open-toed shoes, or boots. The irony is striking: women have a greater range of dress and appearance options, but with that freedom a greater possibility of mistake and a narrower range of error than men.

Id. at 2552-53 (footnotes omitted).

[93]   The employee may realize that efforts to repudiate one set of stereotypes risk confirming another set. The employee might understand that her behavior will not only be a function of the signals that the employer looks at—like staying late to signal hard work—but also of how the employer interprets those signals for the specific individual. In other words, the workplace-incentive system for outsiders is often not the same as the workplace-incentive system for insiders. For example, the African-American employee might not leave early, but might also feel the need not to be perceived as staying too late.

[94]   Articles by Katharine Bartlett and Mary Ellen Maatman provide other examples of the costs that outsiders often bear in negotiating insider expectations. Bartlett's article describes the costs that result from the heightened physical-appearance standards to which women are often held. *See* Bartlett, *supra* note 92, at 2547, 2562-65. Bartlett states further that "[t]he medical evidence is overwhelming that women require more body fat as a percentage of their body weight than men do." *Id.* at 2562. Attempting to achieve these heightened standards subjects women to a variety of health risks that men are not exposed to, not to mention the expenditure of money and time. *See id.* at 2562.

Maatman's article describes the controversy in the deaf culture over the choice between American Sign Language and speech (speaking and lip reading) as a means of communication. *See* Mary Ellen Maatman, *Listening to Deaf Culture: A Reconceptualization of Difference Analysis Under Title VII,* 13 HOFSTRA LAB. L.J. 269, 274, 322 (1996). Maatman describes how, despite the clear superiority of sign language over speech as a mechanism of communication for the deaf, with the former being a complete language of its own, the pressures of appearing normal and assimilating have resulted in large investments in speech for the deaf. *See id.* at 328-35. The result is not only a second rate mechanism of communication for the deaf, but also a diversion of resources in both time and money better used for other purposes. *See id.* at 335-37.

[95]   While we suggest that courts are too quick to see evidence of the treatment given to others in the plaintiff's identity group as circumstantial evidence of the validity of the plaintiff's discrimination claim, Clark Freshman's recent article argues that courts are reluctant to look to evidence of the treatment of outsiders not in the plaintiff's identity group. *See* Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories*

This assumption ignores the reality that employers respond not only to outsider identity status, such as the fact that an employee is black, but also to outsider conduct, such as whether the outsider is perceived to be a "good" as opposed to a "bad" black.

1. *The Capture Problem*

Antidiscrimination law is supposed to compensate for the costs and burdens of discrimination. But it fails to capture the costs of discrimination in at least two ways. First, the law does not take into account the ways in which a colorblind norm burdens people of color. The law ignores the extra costs to people of color imposed by implicit workplace expectations that require people of color to associate with white people and disidentify themselves from other people of color in order to "blend in."[96] It is not that an easy doctrinal solution to this problem exists. The costs are difficult to quantify, and allocating blame to any one individual or entity is difficult. Nevertheless, that this issue has largely escaped legal consciousness is problematic.[97]

2. *The Evidentiary Problem*

A second problem with the law as it relates to identity negotiation derives from the negative relationship between an outsider employing racial comfort strategies and her ability to establish an evidentiary basis for a discrimination claim. The more an outsider negotiates her identity to make insiders feel comfortable, the more difficult it is for her to bring a discrimination claim. Suppose, for example, that an African-American associate perceives that others at his largely white and male law firm are wary of African Americans. Other employees

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Identify Discrimination and Promote Coalitions Between "Different" Minorities, 85 CORNELL L. REV. 313 (2000). Evidence of the treatment of other outsiders might suggest the presence of some generalized outgroup hostility. *See id.* at 368-69. However, the lack of hostility toward other outsiders may simply mean that the other outsiders are performing insider identities.

96   *See supra* Part III.A.2.

97   For examples of exceptions in the legal literature, see Bartlett, *supra* note 92, at 2552-53 (detailing the extra work that women have to do to fit the norms of the male-dominated workplace); Cornell & Bratton, *supra* note 42, at 596 (noting that the United States expects immigrants to be willing to do the "hard work" of identity reconstruction so as to assimilate); Margaret E. Montoya, *Mascaras, Trenzas, y Grednas: Un/Masking the Self While Un/braiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1 (1994) (providing a vivid personal account of the costs of adopting the "masks" of the dominant culture); Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1261 (1997) (describing, based on a personal history, how the current "assimilation paradigm fails to consider the true assimilation difficulties faced by Mexican immigrants and persons of Mexican-American ancestry").

For examples of discussions of identity work outside the legal literature, see Elizabeth V. Spelman, *"Race" and the Labor of Identity*, in RACISM AND PHILOSOPHY, *supra* note 88, at 202, 205, 210, 214 (arguing that blacks often are implicitly required to affirm white superiority) and Babbitt, *supra* note 88, at 238 (noting that outsiders who are subject to negative stereotypes often bear an extra "burden of explanation" in their interactions with insiders).

seem ill at ease in their conversations with him and get especially nervous when talking about issues relating to race. In order to put his colleagues at ease—to make them racially comfortable—this associate begins to make jokes containing negative stereotypes of African Americans. The strategy works. Indeed, it opens the door for his colleagues to make similar jokes. If this employee ever brings a race-based discrimination suit, he will unlikely be able to point to these jokes as evidence of a hostile workplace.[98] After all, not only did he start the cycle of jokes, but he laughed at the jokes made by his co-workers. The fact that his strategy to tell race-based jokes was a response to the racial dynamics of his workplace and, more specifically, to the fact that his colleagues were uncomfortable with him because he is black are obscured in all of this.

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98 Courts often find evidence of racist, sexist, or homophobic jokes relevant in discrimination cases. *See, e.g.*, Moore v. KUKA Welding Sys., 171 F.3d 1073, 1079 (6th Cir. 1999); Brown v. Middaugh, 41 F. Supp. 2d 172, 187 (N.D.N.Y. 1999); Odom v. St. Louis Community College, 36 F. Supp. 2d 897, 903 (E.D. Mo. 1999), *aff'd*, 205 F.3d 1347 (8th Cir. 2000). Courts discount such evidence if the plaintiff has participated in creating an environment that fosters such jokes. *See* Brassfield v. Jack McLendon Furniture, Inc., 953 F. Supp. 1438, 1450 (M.D. Ala. 1996).

The context in which such discounting of evidence has been the most obvious has been that of sexual harassment. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69 (1986), the Supreme Court explicitly said that a harassee's performance could be relevant in a sexual harassment claim to address the question of whether the allegedly harassing conduct was "welcomed" by the plaintiff or not. The Court stated:

> While 'voluntariness' in the sense of consent is not a defense to [a sexual harassment] claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome.

Id. Following *Meritor*, there have been multiple occasions on which courts have denied the sexual harassment claims of plaintiffs who were determined to have welcomed the sexual advances of others. *See, e.g.*, Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559, 1563-64 (M.D. Fla. 1990), *aff'd*, 949 F.2d 1162 (11th Cir. 1991); Gan v. Kepro Circuit Sys., Inc., No. 81-268 C(5), 1982 WL 166, *3 (E.D. Mo. Jan. 7, 1982). Perhaps the most aggreious example of the use of this "welcomeness" doctrine was in *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991). Jo Ann Reed, a female civilian jailer, was subject to deplorable harassment—she had a cattle prod with an electrical shock put between her legs, her harassers grabbed her head and shoved it in their laps, and she was handcuffed to a toilet while her harassers pushed her face into the water. *See id.* at 492. Reed explained that she did not complain about the harassment because "it was real important to [me] to be accepted. It was important to me to be a police officer and if that was the only way that I could be accepted, I would just put up with it and kept [sic] my mouth shut." *Id.* Instead of focusing on the harassers' actions, however, the Seventh Circuit panel honed in on the fact that Reed had used offensive language, engaged in "exhibitionistic" behavior, given "suggestive" gifts, and engaged in other sexual conduct. *Id.* at 491. The court rejected the argument that Reed was performing to fit in as an outsider. She had participated in conduct that the court considered inappropriate and sexually provocative and that negated her claim. *Cf.* Christina A. Bull, Comment, *The Implications of Admitting Evidence of a Sexual Harassment Plaintiff's Speech and Dress in the Aftermath of* Meritor Savings Bank v. Vinson, 41 UCLA L. REV. 117, 150 (1993) (stating that "blending into her surroundings" by participating in questionable conduct "is a woman's first defense against sexual harassment").

There is another, more general way to articulate the evidentiary problem. Imagine a predominately white firm in which Johnny, a black associate, engages in racial comfort strategies. If Johnny subsequently brings a discrimination suit, the employer is likely to advance something like the following race-neutral claim:

> We never saw Johnny in racial terms. Just the opposite. Johnny was *one of us.* He *fitted in* really well. He never engaged in *identity politics.* Unlike Toney, another black associate at our firm, Johnny was not at all interested in working on the diversity committee. Nor was he interested in mentoring young black associates. Johnny was a *colorblind kind of guy.* Race really didn't matter to him. It was incidental. He *transcended his race.* To be perfectly honest, and I know this is going to sound silly, *I never thought of Johnny as a black guy.* He was *just a guy.* Everyone as far as I can tell liked him. And certainly no one would have any reason to discriminate against him. The reasons he did not make partner have nothing to do with his race. Johnny simply did not make the kinds of relationships with the partners that one needs in order to make partner. He just *fell through the cracks.* We regret what happened, but it was a function of the nature of today's large law firms and not of his race.[99]

Racial comfort strategies make white people comfortable because the corollary of racial comfort is deracialization.[100] Because he employed racial-comfort strategies, Johnny became "one of us," and "just a guy"; he was "e-raced" or "deracialized."

But Johnny's insider and colorblind status is only illusionary. He can never truly become "one of us" or completely deracialized. Johnny always faces the risk of a moment of racial disruption in which his blackness signifies racial difference. We saw an extreme version of this in the context of the O.J. Simpson murder trial. Simpson's status as an "honorary white" was disrupted by the allegation that he was a

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99   This is a caricature of the narrative of Larry Mungin's discrimination case. *See* Mungin v. Katten Muchin & Zavis, 116 F.3d 1549 (D.C. Cir. 1997); Wilkins, *supra* note 34, at 1935 (exploring the implications of the "just fell through the cracks" excuse in the *Mungin* case). Commenting on the so-called "Queen Bee" syndrome, Marina Angel makes a related point:

> Some of the women who survived the hiring and tenuring processes did so because they adopted a male style or one that was not threatening to male faculty members. These women are on the faculty because they are "one of the boys" or serve as a cheerleader for the boys. The label "Queen Bee" has been used to describe this type of senior woman . . . . Male faculty members often look to this woman for assurance that what they are doing is right, that they are not discriminating against women.

Angel, *supra* note 86, at 831 (footnote omitted).

100   *See* Smith, *supra* note 54, at 213 (arguing that "[b]lack women can choose to stop 'playing small' so that others, be they white students or colleagues, feel more comfortable in their presence. It is only through the sense of racial isolation, retrenchment, and the presumption of incompetence that Black women are perceived as threatening, angry, and unintelligent").

criminal and violent black man who murdered Nicole Brown Simpson, an innocent white woman.[101] However, it would be difficult for a plaintiff to use a theory of racial disruption to prove employment discrimination, especially if she engaged in racial-comfort strategies that enable an employer to tell the colorblind narrative outlined above.[102]

3. *The Doctrinal Problem*

Antidiscrimination law places the following question at the center of any claim of discriminatory treatment: Was there intentional discrimination based on the plaintiff's membership in a protected class, such as race, gender, or disability? It is not intentional discrimination for an employer to dismiss or deny promotion to a minority employee if the reason for the dismissal was not the employee's race or gender, but the employer's dislike of the individual. But how does one distinguish between a dismissal based on pure dislike and a dismissal based on dislike that was animated by race or gender prejudice?

The distinction is obvious if the employer publicly announces "I dislike blacks" or "I will never promote a woman," but few employers are likely to make such statements publicly. In most cases, plaintiffs have to rely on circumstantial evidence of intentional discrimination—evidence of how the other employers treated members of the alleged victim's group. Therefore, courts would probably treat evidence that a law firm has rejected dozens of qualified black associates for partnership, but promoted the majority of qualified white associates, as evidence of racial animus.

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[101]   *See* Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, in BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER 172 (Devon W. Carbado ed., 1999) (discussing how the murder of Nicole Brown Simpson disrupted O.J. Simpson's status as an honorary white). Admittedly, the Simpson case is not necessarily the best case to test the notion of racial disruption because, among other reasons, the case involved a very serious crime, murder. An interesting test case would involve Michael Jordan explicitly identifying himself with traditional black community politics or criticizing Nike's racially targeted advertising. Would either of these political moves cause racial disruption? *See* HAZEL V. CARBY, RACE MEN 2-3 (1998) (suggesting that Michael Jordan represents a depoliticized image of black masculinity which helps to explain his status as an icon).

[102]   A critic might validly ask whether, to the extent the black employee takes pains to conform his behavior to that of the white employees, it will be *easier* for the black employee to argue that his failure to receive the promotion was based on race alone. After all, the black employee did everything as if he were white and still did not receive the promotion. An example illustrates why the answer is no. If the black associate brings a discrimination lawsuit against the firm, the firm will counter by saying that although they liked the associate, things just did not work out. Their promotion process involves sponsorship and a vote by all the current partners, and at the end of the day Johnny simply did not have enough support. Nothing racial occurred because white male associates slip through the cracks all of the time, too. This explanation, as illustrated by the appellate court opinion in the *Mungin* case, works to negate any starting presumption of racism. Instead, the claim is that it was just the system. Thus, the black plaintiff is likely to lose. *See supra* note 98 and accompanying text.

An employer that has a record of promoting black employees is likely to persuade a court that insufficient evidence of racial animus exists. The court assumes that, because the employer thinks that some blacks are "good," the reason the employer thought the plaintiff was "bad" had nothing to do with the plaintiff's race. The court is likely to conclude that the reason for the termination was simply the employer's dislike of the individual, which does not produce an actionable discrimination case.[103]

The flaw in the hypothetical court's analysis is in its narrow conception of what race is or, as some would say, in its "essentializing." If judges understand the protected categories instead as at least partially comprised of performances, they might begin to appreciate the extent to which the subjects of those categories strategically perform their identities in ways that move them closer or farther away from the core understanding or stereotypical version of what those categories are perceived to be about.[104] To make this concrete, if ten black employees are up for promotion, and nine are promoted, a court should still not negate the possibility that the tenth was denied a promotion because of his race: The other nine may have been engaged in racially palatable identity performances.

Strictly speaking, the problem is in the application of the doctrine and not in the doctrine itself. Indeed, Title VII already reflects the notion that it is unlawful for an employer to use race-based stereotypes to disadvantage employees.[105] However, courts, for the most part, have not evidenced an interest or willingness to respond to cases, like our hypothetical, wherein the discrimination may be a function of identity work.[106]

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103 The classic articulation of this position is in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-512 (1993).

104 A vivid description of the importance of performance is contained in Ariela Gross's description of nineteenth-century trials of whiteness, where the question of how the subject behaved on a day-to-day basis was a crucial element of the determination. *See* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 156-77 (1998). *See also* John Tehranion, Note, *Performing Whiteness*, 109 YALE L.J. 817 (2000).

105 *See, e.g.*, Thomas v. Eastman Kodak Co., 183 F.3d 38, 59-60 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 1174 (2000) (describing the doctrinal framework under which the use of sex-or-race based stereotypes to disadvantage an employee constitutes unlawful discrimination under Title VII).

106 There is a set of older gender discrimination cases from the 1970s, in which the courts showed some willingness to tackle the performance issue. However, the reach of the doctrine created in those cases—often referred to as the "sex-plus" cases—has been sharply circumscribed. *See, e.g.*, Maatman, *supra* note 94, at 276-308 (discussing the evolution of the sex-plus doctrine). The cases in this category tended to involve employers who, while otherwise employing substantial numbers of women, discriminated against subcategories of women, such as those with child-care responsibilities or married women. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1194-98 (7th Cir. 1971).

IV

CATEGORIZING PERFORMANCES: A CLOSER LOOK AT STRATEGIES

This Part expands upon the claim that institutional norms can shape employee performances. The starting point is the observation that one cannot precisely predict how an employee interested in advancement will perform her identity. Employees interested in advancement within a particular institution are likely to have multiple performance strategies available to them. More than one way to play with race to achieve the specific bottom line of getting promoted is likely to exist.

The standard defense of the employer to a claim of gender discrimination in such a case was a version of the following: "I employ lots of women and treat them well. Indeed, I employ more women than men and probably treat them better than the men. How can you accuse me of discriminating against women just because I do not hire women with significant child-care responsibilities?" The courts have had little difficulty rejecting this argument, in its various forms, on the ground that the discrimination lies in the fact that a stereotype is being applied to women—women with child-care responsibilities are likely to shirk at the workplace—that is not being applied to men. *See, e.g., Phillips*, 400 U.S. at 544 (holding that Title VII does not permit "one hiring policy for women and another for men"). To articulate this in performance terms, the courts were able to recognize that women who performed in a certain way, such as by having children or by getting married, were being stereotyped.

Little hope exists, however, that the sex-plus category will be extended to cover anything but a narrow range of performances. While courts have been willing to read the sex-plus doctrine as covering cases involving sex plus some other protected category, like race or age, they have been hostile to requests that they extend the doctrine to cover day-to-day performances of identity, like dress, appearance, and language. *See* Bartlett, *supra* note 92, at 2556-57 (describing how courts consistently reject challenges to employers' dress-and-appearance requirements, often on the grounds that these requirements involve "trivial" matters of "personal preference" that the employee can change "at will" (citation omitted) (internal quotation marks omitted)); Maatman, *supra* note 94, at 295-309 (describing the hostility that courts have shown both to grooming-and-dress requirements and to language requirements; *see also* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371 (noting that courts "often accord the greatest deference to [employer-mandated hair and dress] codes that classify individuals on the basis of socially-conditioned rather than biological differences"). Indeed, some courts have explicitly limited the reach of the sex-plus doctrine to cases in which the "plus" involves an immutable characteristic or the exercise of a fundamental right or a policy that only applies to one sex that significantly deprives that sex of employment opportunities. *See* Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 605-06 (9th Cir. 1982); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975); Arnett v. Aspin, 846 F. Supp. 1234, 1239 (E.D. Pa. 1994).

To the extent there is hope, it comes from a subset of the sexual-orientation discrimination cases suggesting that discrimination against someone because he is gay is in effect discrimination based on the identity according to an unacceptable script for a member of his gender. *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259-60 (1st Cir. 1999). *But see* Dillon v. Frank, 952 F.2d 403 (6th Cir. 1992) (unpublished disposition). This, then, raises complicated questions relating to the distinction between status and conduct. Although an adequate discussion of these complexities is beyond the scope of this Article, we are currently working on a fuller treatment of antidiscrimination law and its relationship to identity performance in a separate article.

Some individuals will face more constraints on the number of roles they can take on than others face, depending on their race and the institutional context involved. Even for the highly constrained, however, broad categories of behavior are likely available to employees who are interested in advancement. By delineating the contours of each category, we hope to reveal just how pervasive and complicated identity-performance strategies can be.[107]

Two caveats are in order. First, performing well—to the extent that "well" is defined as success in an insider environment, such as an elite law firm—is difficult. Performing one's outsider status in a way that satisfies insiders requires care. As with acting, the ability to negotiate different institutional cultures takes skill. The individual must acquire that skill or cultural capital.[108] That easy ways to acquire or learn that skill exist is by no means clear.

Second, generalizing about the kinds of strategies outsiders will adopt in the face of prejudice is not easy. The strategies outsiders employ will depend on context—factors such as the norms of the institution in question, the specific characteristics of that outsider, and the prejudices he or she is subject to. Nevertheless, setting out the basic categories of strategies that outsiders might adopt to combat prejudice is useful. All these strategies fall along a continuum. The individual and institutional context will determine which strategy, if any, the outsider in question chooses.

A. Strategic Passing

Passing refers to the phenomenon of fooling insiders into believing that an outsider is one of them. Passing is a 100%-comfort strategy because the outsider pretends to be an insider.[109] For example, a light-skinned African American may pass for white, a homosexual may pass as a heterosexual, a Hindu may pass as a Muslim, a Jew may pass as a gentile, or a man may pass as a woman. An interesting question is when individuals choose to "pass" in order to gain entry into, or success within, the workplace. But the 100%-passing strategy applies only to a small subset of outsiders, because most outsiders cannot totally

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107   For an alternative delineation of outsider identity strategies (or "stances toward identity"), see Peter Margulies, *The Identity Question, Madeline Albright's Past, and Me: Insights from Jewish and African American Law and Literature*, 17 Loy. L.A. Ent. L.J. 595, 599-601 (1997) (describing three outsider stances towards identity—"shame, acknowledgment, and engagement").

108   The skill necessary to negotiate a cultural context is a productive asset for the individual and therefore is described as a form of "cultural capital." The term "cultural capital" appears to originate with Pierre Bourdieu, who used it to refer to forms of cultural knowledge, competencies or dispositions. Randal Johnson, *Editor's Introduction* to Pierre Bourdieu, The Field of Cultural Production 7 (Randal Johnson ed., 1993).

109   This, in turn, leads to the complex question of when a person begins to internalize the role he is playing to such an extent that the role takes over his identity.

fool insiders. Moreover, the feedback effects are minimal because insiders see only another insider. They do not see an outsider whose behavior either confirms, rejects, or modifies their prejudgments about that category of outsiders. Our focus, therefore, will be on partial passing strategies, where the outsider's status is known, but he or she can take actions to modify the social meaning of or stereotypical assumptions about that status.

B. Comforting

Outsiders perform comforting acts to make insiders comfortable with their outsider status.[110] Unlike the total passing context, it is clear that the person performing comforting acts is an outsider.[111] But the outsider has some room to work her identity to make the in-

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[110] *See* Freshman, *supra* note 95, at 400 (describing literature on how outsiders often seek to comfort insiders about their difference). Some commentators have suggested that insider employers may expect this comfort. In this sense, the performance of racial-comfort strategies can be understood as an unstated racial term of employment, "shadow work." Spelman, *supra* note 97, at 209-10 (employing the concept of "shadow work" to comment on the invisibility of the work blacks often have to do to confirm "innate white superiority"); *cf.* GOFFMAN, *supra* note 7, at 109 ("It is understood in many establishments that not only will workers be required to produce a certain amount after a certain length of time but also that they will be ready, when called upon, to give the impression that they are working hard at the moment."). Goffman goes on to argue: "Make-work, along with other aspects of decorum in work places, is usually seen as the particular burden of those of low estate." *Id.* at 110.

[111] Even if the insider expects to be comforted, he may not want that comfort to be achieved by any means necessary. He may prefer that the outsider not "*trespass*" or totally pass. Cheryl Harris describes her grandmother's passing in 1930s America as a kind of trespass:

> Her fair skin, straight hair, and aquiline features had not spared her from the life of sharecropping into which she had been born in anywhere/nowhere, Mississippi—the outskirts of Yazoo City. But in the burgeoning landscape of urban America, anonymity was possible for a Black person with "white" features. She was transgressing boundaries, crossing borders, spinning on margins, traveling between dualities of Manichean space, rigidly bifurcated into light/dark, good/bad, white/Black. No longer immediately identifiable as "Lula's daughter," she could thus enter the white world, albeit on a false passport, not merely passing, but *trespassing.*

Harris, *supra* note 8, at 1710-11. Insiders expect that their racial comfort will be produced by social interactions within which markers of status difference are clearly identifiable. *Cf.* GOFFMAN, *supra* note 7, at 59 ("Sometimes when we ask whether a fostered impression is true or false we really mean to ask whether or not the performer is authorized to give the performance in question."). The comfort that insiders derive from partial passing is based not just on the fact that, for example, a black person is being "racially good" but also from the fact that the person being "racially good" is identifiably black. *Cf.* Anthony Paul Farley, *The Black Body as Fetish Object,* 76 OR. L. REV. 457, 464 (1997) (observing that white people derive race pleasure from black subordination); Smith, *supra* note 54, at 124 n.272 (observing "[a]s whites often expect Blacks to smile, when blacks instead 'display a more affectively neutral, dominant expression,' the contradiction between the expectation and the reality may cause whites to interpret 'Blacks' facial expressions as unfriendly'").

sider feel at ease.[112] For example, a perception may exist that Asian-American scientists tend to be conflicted about their loyalty to the United States.[113] Assume that promotion in a scientific laboratory involved in weapons research is a function of success on the most important projects. Junior scientists are picked for these projects not only on the basis of their scientific abilities, but also for their trustworthiness and the ability to work in teams. Assume that the junior Asian-American scientists at the laboratory are thought to be exceptional in terms of scientific ability—an assumption perhaps based on a stereotype—but they are not deemed trustworthy or known as team players. What kinds of strategies might the junior Asian-Americans take in order to comfort (appear less foreign and more "American" to) their seniors?[114]

They could emphasize the fact that they attended American colleges, were members of fraternities, or played stereotypically American team sports like American football and baseball. They could avoid associating with Asian Americans and instead associate only with white mainstream Americans. They could alter their Asian names to more "American sounding" names. They could also announce that they have never visited Asia and do not speak Asian languages. They could make fun of stereotypical Asian accents. They could claim to dislike spicy Asian foods and to prefer hamburgers.[115]

All these actions may serve to comfort insiders and assure them that the outsider is more of an insider (or at least a particular kind of outsider)—hence, the term "partial passing." These are actions that may make the outsider "one of the guys,"[116] despite his outsider sta-

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112   *See* Smith, *supra* note 54, at 118 n.243 (suggesting that the limited identity options for Black women "suggest[s] that many senior Black women have survived and excelled in the legal academia by consciously or subconsciously deciding to manipulate perceptions by becoming more like Mammy").

113   An example is the recent controversy of suspected Chinese nuclear espionage against the United States. *See, e.g.,* Daniel Klaidman, *The Nuclear Spy Case Suffers a Meltdown: Did Investigators Unfairly Single Out a Chinese-American Scientist as a Suspected Agent of Beijing?*, NEWSWEEK, Aug. 30, 1999, at 31. *See also* Neil Gotanda, *Racialization of Asian Americans and African Americans: Racial Profiling and the* Wen Ho Lee *Case*, 47 UCLA L. REV. 6 (forthcoming 2000) (discussing the *Wen Ho Lee* case as a form of racial profiling).

114   *See* Chew, *supra* note 23, at 24-25 (describing the perception of Asian Americans as foreigners); *see also* CHANG, *supra* note 23, at 1-6.

115   One might ask: What about outsider men dating white women? This question is more complicated. Certain actions that mimic insider behavior create comfort because the outsider becomes just like an insider. But certain other mimicking actions—such as outsider men dating white women—may cause discomfort to insiders. *See, e.g.,* Carbado, *supra* note 101, at 172-73 (discussing this in the context of the O.J. Simpson murder case). Once again, the interpretation and level of discomfort will depend on the context (the specific outsider category).

116   *See, e.g.,* Bartlett, *supra* note 92, at 2547 (discussing the self-presentation strategies women employ to fit into male dominated institutions).

tus.[117] According to Goffman, such actions allow the outsider to fit in. Depending on how successful the outsider is at partially passing, he may even become an "honorary" insider.[118]

As noted, a 100%-comfort or-passing strategy does not force an insider to challenge stereotypes that he holds about outsiders, because the insider does not know he is interacting with an outsider. But partial passing strategies are also not very effective in forcing the employer to rethink his assumptions about outsiders. Partial passing strategies provide a political opportunity for insiders to engage in *outsider exceptionalism*. More concretely, these strategies allow insiders to make the following kinds of statements: "We like you despite your being [gay, lesbian, Asian American, Latina/o, etc.]," or "We don't really think of you as [gay, lesbian, Asian American, Latina/o]."[119] Such sentiments, in turn, allow insiders to say things like, "How can you say that I'm being [racist, homophobic, sexist, etc.]?" Another common saying is: "I am best friends with [name of the African-American, lesbian, or heterosexual woman who engages in "passing" that makes insiders comfortable]." An employee's use of partial comforting strategies provides employers with a way to avoid confronting their use of stereotypes. In the face of such strategies, employers might tell themselves that, while the stereotypes they hold about outsiders may not (for the moment)[120] apply to the specific outsider employee, the stereotypes are nevertheless valid. The partially passing outsider employee thus becomes the exception to otherwise valid stereotyping rules.[121]

The discussion of partial passing strategies once again invites consideration of the question of intentionality. With respect to partial passing and intentionality, there are three categories of employees with whom one might be concerned: (1) employees who intend to

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[117]   *Cf.* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 49 (1963). According to Goffman,

> [The] visibility [of stigma] must be distinguished from one of its particular bases, namely, obtrusiveness. When a stigma is immediately perceivable, the issue still remains as to how much it interferes with the flow of interaction. For example, at a business meeting a participant in a wheelchair is certainly seen to be in a wheelchair, but around the conference table his failing can become relatively easy to disattend.

Id. Goffman's suggestion, here, seems to be that there are self-presentational strategies one can employ to "disattend" identity differences or outsider status.

[118]   *See supra* Part III.C.2 (discussing the O.J. Simpson case).

[119]   *See* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, *in* CRITICAL RACE THEORY, *supra* note 5, at 236 (describing instances in which he has received the following compliment: "I don't think of you as a Negro").

[120]   *See supra* notes 101-102 and accompanying text (discussing racial disruption).

[121]   This suggests that the often made claim, "I am not prejudiced against outsider group A because I am best friends with X, Y, & Z, who are all from that group," means something different when X, Y, and Z have engaged in partial passing strategies, than when they have not.

partially pass, (2) employees who engage in certain conduct with an awareness that, but not because, such conduct can be interpreted as partial passing,[122] and (3) employees who have no clue as to how their conduct might be interpreted. We do not intend to attach normative judgment to employees in any of the foregoing categories.[123] The focus thus far has been on the first category, because the employees in this category are probably responding to the incentive system described in Part II.[124] But even if the employee is not responding to a workplace incentive system, and the employee does not *intend to* partially pass, the very fact that insiders may interpret her conduct as partial passing should raise concerns for antidiscrimination proponents. Even without any intentionality on the employees' part, their professional standing within an institution can be enhanced or diminished depending on whether and to what extent their workplace conduct can be interpreted as partial passing.[125]

C. Using Prejudice

Thus far, we have discussed employee actions that operate to negate stereotypes. But, under some circumstances, employees might be able to use stereotypes to their "advantage." Within competitive environments, where advancement is a function of the kinds of projects to which an employee is assigned, insiders inevitably benefit from the negative prejudices against outsiders. Other things being equal, an

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[122] An easy example here is the case of an outsider who plays basketball with the awareness that it makes him "one of the boys." Our point is not to suggest that this employee should not play basketball. A feeling of camaraderie and trust among employees may be efficiency enhancing. Moreover, the employee probably enjoys playing ball. Basketball might be an important part of his social identity.

[123] Different partial passing strategies are unlikely to be the same in terms of the damage they can do to individual and group identity. It is one thing for a person to strategically play basketball to partially pass. Things get more complicated and problematic when it comes to altering one's name, and much more complicated and problematic when one does things like denigrate one's community in order to fit in and distance oneself from identity politics.

[124] *See supra* Part II.B-D.

[125] Kenji Yoshino offers a typology similar to the passing/partial-passing typologies employed in this paper. According to Yoshino:

> [T]here are (at least) three different kinds of assimiliationist bias . . . [:]converting, passing, and covering. Converting bias means that a group s asked to change the trait that defines it. Converting bias is at issue, for example, when gays are forced into pyschotherapy to alter their sexual orientation. Passing means that a group is forced to hide its identity. Passing is at issue, for example, when gays are permitted to serve in the military as long as they do not disclose their orientation. Covering means that a group is permitted both to retain and articulate its identity as long as it mutes the difference between itself and the mainstream. Covering is at issue, for example, when an employer retains "out" gays, but not a lesbian who "flaunts" her homosexuality by entering into a public commitment with her same-sex lover.

Yoshino, *supra* note 78, at 500 (footnotes omitted).

insider with the presumption that he is likely to be collegial, team-oriented and trustworthy is more likely to be selected for a desirable project than an equivalent outsider. But this result is no more than a function of insider privilege.[126] The use of stereotypes by outsiders is more interesting. For example, the Korean American who is stereotyped as being hard-working, technically inclined, uncreative, and lacking in leadership skills might be able to take limited advantage of this otherwise negative image. Take an organization in which work is done in teams and a select few of these employees are later promoted to leadership positions. Teams need leaders as well as followers. Teams need creativity, but they also need someone to do the unpleasant, boring and technical tasks. The Korean American may think that it is best for him to portray himself as technically oriented and lacking in creativity in order to gain an advantage for the nonleader slot.

One cost of this type of behavior is confirming prejudice. The outsider may succeed in obtaining a job or a promotion, but he ends up confirming a stereotype that may have overall negative effects. For example, by confirming the "drone" stereotype, he will hurt other Korean-American employees' chances of competing for a leadership position. In other words, to the extent that the Korean American strategically presents himself as technically oriented, not only does he entrench the drone stereotype, he establishes racial precedent within his workplace culture for the performance.[127] This precedent will burden other Korean-American employees. Still, it is not easy to assess the cost-benefit analysis, even from the community's point of view. After all, attaining economic success also has value for members of a disadvantaged group.[128]

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[126] Increasingly, scholars of discrimination are moving away from animus- or intent-based models to models that focus on privilege. *See, e.g.,* Carbado, *supra* note 1.

[127] *Cf.* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 9-10 (1991). Williams recounts an episode in which her colleague laments the fact that his school had not hired more blacks like her. She writes:

> A man with whom I used to work once told me that I made too much of my race. "After all," he said, "I don't even think of you as black." Yet, sometime later, when another black woman became engaged in an ultimately unsuccessful tenure battle, he confided to me that he wished the school could find more blacks like me. I felt myself slip in and out of shadow, as I became nonblack for purposes of inclusion and black for purposes of exclusion; I felt the boundaries of my very body manipulated, casually inscribed by definitional demarcations that did not refer to me.

Id. Quite apart from any intentionality on Williams's part, her representation of blackness had created a racial precedent against which other blacks would be compared.

[128] *See* Michele Wallace, *Negative Images: Towards a Black Feminist Cultural Criticism, in* THE CULTURAL STUDIES READER 118, 122-24 (Simon During ed., 1993) (suggesting that, notwithstanding Oprah Winfrey's success, she has entrenched, if not legitimized, negative stereotypes about black women).

D.   Other Strategies: *Dis*comfort, Selling Out, and Buying Back

Three other strategies deserve mention. First, some outsiders may adopt a *dis*comfort strategy. The outsider may choose to emphasize his or her outsider status in a way that makes insiders uncomfortable. The outsider may, for example, consistently point out instances of unfairness against outsiders. Most people tend to think of such behavior as authentic or politically principled. Often times it is. But sometimes such behavior is strategic in that the goal may be to satisfy an institutional need. To the extent the institution can handle some dissent, the discomfort strategy may work to provide the institution with legitimacy, by creating the image of a democratic institution, for example. Outsiders also might adopt the discomfort strategy as a way to set the ground work for a discrimination claim by identifying and calling attention to examples of discrimination within the institution.

Second, there is the "sell-out" strategy. An outsider can make arguments that work to the advantage of insiders so that insiders can then claim that their arguments are not purely self interested or even racial. For example, a claim made by an insider in a predominantly white institution concluding that a particular (racial) episode was not racial does not carry as much weight as a similar claim made by an outsider. The argument might be employed, explicitly or implicitly, to legitimize the insider's perspective.[129] The employee may be rewarded for selling out. Many believe that former President Bush rewarded Clarence Thomas, a black man, for selling out by nominating him to the Supreme Court.[130] In this sense, selling out might be thought of as a specific kind of comfort strategy. However, given the pervasive pop cultural and political use of the term, the phenomenon deserves separate analytical attention.

Third, a "buy-back" strategy may be adopted by outsiders who think their performance of comfort strategies may have resulted in costs to their community and want to make amends. These individuals may engage in both comfort and discomfort strategies. For example, the Asian American who emphasizes his technical skills to take advantage of the stereotype that Asian Americans are good at technical subjects may recognize the costs of his actions and support other outsider claims of institutional discrimination to buy back or make amends for the cost. A more cynical view is that an outsider who en-

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129   Compare this with the situation in which the outsider is arguing that there is discrimination. Here, the outsider story is suspect and needs white racial authentication. *See* Carbado, *supra* note 1 (manuscript at 122-23).

130   *See* Manning Marable, *Clarence Thomas and the Crisis of Black Political Culture, in* RACE-*ing* Justice, *En-gendering* Power: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 61, 62 (Toni Morrison ed., 1992) ("Clarence Thomas's climb to power is directly related to his abandonment of the principles of the black-freedom struggle.").

gages in comfort strategies may engage in some visible discomfort strategies to retain status in the outsider community, while simultaneously maintaining a certain amount of legitimacy within the insider institution.

Of course, the outlined strategies are situationally driven. How an outsider performs these strategies will depend on the specific institutional context. Different institutions have specific norms, values, structures, and cultures that create incentives for employees to behave in particular ways.

<div align="center">CONCLUSION</div>

Workplace discrimination is driven by more than the physiological markers of outsider difference. It is also driven by the ways in which outsiders perform their workplace identities. By this, we do not mean to suggest that outsiders *invite* discrimination by performing their identities in certain ways; rather, they are *disciplined*[131] for not performing their identities in ways that are palatable to their insider employers. The result is that outsiders, to the extent they wish to survive in the workplace, often find themselves having to do extra work to make themselves palatable and their insider employers comfortable. This extra work is directly linked to colorblind and assimilationist workplace norms.

As things stand, the law does little to address the extent to which outsiders are burdened by identity performance. In this sense, identity performances constitute a form of "shadow work"—largely unacknowledged and thus unregulated. To the extent the law has recognized the extra burdens of identity performance, it has been in

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131   Alan Hunt and Gary Wickham provide the following account of disciplinary power:

   Discipline, rather than being constituted by 'minor offenses,' is characteristically associated with 'norms', that is, with 'standards' that the subject of a discipline come to internalise or manifest in behaviour, for example standards of tidiness, punctuality, respectfulness, etc. These standards of proper conduct put into place a mode of regulation characterised by interventions designed to correct deviations and to secure compliance and conformity . . . It is though the repetition of normative requirements that the 'normal' is constructed and thus discipline results in the securing of normalisation by embedding a pattern of norms disseminated throughout daily life and secured through surveillance.

   . . . .

   '[E]xercises' and the repetition of tasks characterise the disciplinary model of [ ]power.

ALAN HUNT & GARY WICKHAM, FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE 49-50 (1994); *see also* Michel Foucault, *The Subject and Power, in* MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208, 221 (Herbert Dreyfus & Paul Rabinow eds., 1982) (suggesting that disciplinary power "structures the possible field of actions of others").

narrow sets of circumstances such as pregnancy and marriage.[132] Firing one black employee in favor of another because the latter performed his identity in a way that was more racially palatable appears to pass muster.

The hard question is: Are there solutions to this problem? We think so. The law does not offer much promise, though doctrinal changes might provide some help.[133] More important, there are institutional changes employers can make to ameliorate the working identity phenomenon. Employers, especially in the high level jobs that we describe, often bewail the lack of diversity in their institutions and claim that they are willing to make extra efforts to solve the problems of retaining and hiring "qualified" outsiders. To the extent that they can be persuaded that outsiders bear extra costs in working identity that are, in substantial part, a function of the existing institutional structures and workplace norms, perhaps they can be persuaded to modify those structures. In a paper further developing this theme, we tackle precisely the questions of how the existing institutional structures might be altered to address the problems that this Article has identified.[134]

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[132] As we have presented the ideas in this Article at a number of workshops, one question that we have been asked: "Isn't what you describe (the phenomenon of working identity) something that everyone does? Is the amount of identity work that outsiders do meaningfully different from the work that insiders do?" The answer to the first question is, of course, "Yes, this is a generalizable phenomenon. Everyone works identity." As to the second question, our answer is typically that the amount of extra work is likely to be a function of the type of stereotypes at play. That said, our sense is that the extra identity work that outsiders do is substantial. In conveying that point, the following analogy may be useful. That analogy is to the bitter complaints that are often made by insiders about the burdens and constraining effects of sexual harassment laws and "PC-ness"—that both over-regulate and constrain their workplace interactions; both prevent them from being who they are and saying what they would like. The burdens and constraints that women and minorities face on a daily basis are akin to those, except magnified many times over. *See supra* note 94 (citing articles detailing these costs).

[133] *See* Devon W. Carbado & Mitu Gulati, *Title VII's Racial Subject,* J. CONTEMP. LEGAL PROBS. (forthcoming 2001) (exploring the doctrinal implications of identity performances).

[134] As we have said, the discussion reflects a static conception of insider behavior. Insider behavior, of course, is not static. Just as outsider behavior can be a function of perceptions of discrimination, so can insider behavior. The question of the interactional dynamic between insiders and outsiders also arises. In our paper following this Article, we relax the assumption that insider behavior is static. In doing so, we suggest that creating an explicit awareness on the part of insiders (and outsiders) can be a step towards creating workplace environments in which the extra costs of working identity are significantly ameliorated. *See* Carbado & Gulati, *supra* note 21.