

RACIAL CAPITALISM

Nancy Leong^{*}

ABSTRACT

Racial capitalism—the process of deriving social and economic value from racial identity—is a longstanding, common, and deeply problematic practice. This Article is the first to identify racial capitalism as a systemic phenomenon and to undertake a close examination of its causes and consequences.

The Article focuses on instances of racial capitalism in which white individuals and predominantly white institutions use non-white people to acquire social and economic value. Our affirmative action doctrine provides much of the impetus for this form of racial capitalism. That doctrine has fueled an intense legal and social preoccupation with the notion of diversity, which encourages white individuals and predominantly white institutions to engage in racial capitalism by using non-white people to acquire social and economic value. An examination of these consequences is particularly timely given the Supreme Court's recent grant of certiorari in *Fisher v. University of Texas*.

Racial capitalism has serious negative consequences both for individuals and for society as a whole. The process of racial capitalism requires commodification of racial identity, which degrades that identity by reducing it to another thing to be bought and sold. Commodification also fosters racial resentment by causing non-white people to feel used or exploited by white people. And the superficial value assigned to non-whiteness within a system of racial capitalism displaces measures that would lead to meaningful social reform.

In an ideal society, commodification of racial identity would not occur. Given the imperfections of our current society, however, the Article instead proposes a pragmatic approach of reactive commodification. Under this approach, we would

^{*} Assistant Professor, University of Denver Sturm College of Law.

discourage commodification of race. But if commodification did occur, we would identify it as commodification, call attention to its harms, and ensure that non-white individuals received compensation for the value derived from their racial identity. This approach would ultimately allow progress toward a society in which we successfully recognize and respect racial identity without engaging in racial capitalism.

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INTRODUCTION

“Usually things like this are done by white people to benefit themselves.”¹

A white man posts an ad on Craigslist explaining that he wants to make black friends.² A political figure accused of racial

¹ Malcolm X, *The Playboy Interview*, PLAYBOY, May 1963 (interviewed by Alex Haley).

² Devin Friedman, *Will You Be My Black Friend?*, GQ, Nov. 2008, available at <http://www.gq.com/news-politics/mens-lives/200810/devin-friedman-craigslist-oprah-black-white-friends-obama>.

indifference casually refers to a black friend during an address to the NAACP.³ A predominantly white university's administration, concerned that prospective students will be deterred by the school's racial homogeneity, uses Photoshop to add a black student to the photo on the cover of its application for admission.⁴ A predominantly white company, facing an array of lawsuits alleging race and gender discrimination, aggressively recruits and hires non-white employees in order to create a track record of minority representation.⁵

Each of these incidents involves what I will call *racial capitalism*—the process of deriving social or economic value from racial identity. A person of any race might engage in racial capitalism, as might an institution dominated by any racial group. But in this Article, my focus is on the version of racial capitalism in which a white individual or a predominantly white institution⁶

³ Sheryl Gay Stolberg, *In Speech to N.A.A.C.P., Bush Offers Reconciliation*, N.Y. TIMES, July 21, 2006, available at <http://www.nytimes.com/2006/07/21/washington/21bush.html>.

⁴ William Claiborne, *School's Diversity Too Good to Be True*, SAN FRAN. CHRON. Sept. 21, 2000 at A2, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2000/09/21/MN100063.DTL>.

⁵ Compare Wal-Mart Class Website, at http://www.walmartclass.com/public_home.html with *Wal-Mart Details Progress Toward Becoming a Leader in Employment Practices*, June 4, 2004, at <http://walmartstores.com/pressroom/news/4645.aspx>.

⁶ Throughout the Article, my analysis will, at times, employ an over-simplified and arguably essentializing conception of whiteness and non-whiteness. This over-simplification is necessary to introduce the analytical framework of racial capitalism that I develop here. I recognize that this over-simplified view does not provide a complete understanding of racial value. Within the group of those we might call "white," there is considerable variation in the benefits whiteness confers. See, e.g., Camille Gear Rich, *Marginal Whiteness*, 98 CAL. L. REV. 1497 (2010). The intersection of race with other identity categories, such as gender, class, and sexual orientation, affects the degree of privilege that any individual white person in fact experiences—and, consequently, the value of that person's whiteness. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). So the analytical framework I develop in this Article will serve as the foundation for future work that develops a more nuanced account of the way that racial identities are valued and capitalized. See Nancy Leong, *Identity Capitalists* (draft on file with author).

derives social or economic value from non-white racial identity.⁷ Such racial capitalism is common. In a society preoccupied with diversity, non-whiteness is a valued commodity. And because that society is also founded on capitalism, it is unsurprising that the commodity of non-whiteness is exploited for its market value.

This Article is the first to identify racial capitalism as a systemic phenomenon and the first to describe the way that non-whiteness, in particular, is capitalized. Of course, assigning value to race is nothing new for America. Whiteness has been a source of value throughout our history, conferring power and privilege on the possessor. Courts have recognized the value of whiteness—for example, they have held that calling a white person “black” constitutes defamation and therefore qualifies for legal redress.⁸ Litigants have also acknowledged the value of whiteness—for example, in *Plessy v. Ferguson*, Homer Plessy referred to his racial identity as the “most valuable sort of property.”⁹ And scholars have examined the value of whiteness—for example, Cheryl Harris’ acclaimed work *Whiteness as Property* posits that whiteness is a kind of “status property” that can be both analogized to conventional forms of property and literally converted to those forms.¹⁰

Non-whiteness has been valued differently and more ambiguously. The practice of using non-whiteness as a justification for assigning value to non-white racialized *bodies* is older than America itself, as our bitter history of slavery reveals. And for centuries, non-whiteness was used as a basis for *withholding* value by denying non-white people legal rights and privileges.

⁷ While all manifestations of racial capitalism are worthy of study, the form in which white people and predominantly white institutions capitalize on non-whiteness has unique symbolic and practical implications. I will focus on this manifestation throughout this Article.

⁸ J.H. Crabb, Annotation, *Libel and Slander: Statements Respecting Race, Color or Nationality as Actionable*, 46 A.L.R. 2d 1287, 1289 (1956).

⁹ *Plessy v. Ferguson*, 163 U.S. 537 (1896); Brief for Plaintiff in Error at 9, *Plessy* (No. 210).

¹⁰ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1734-35 (1993).

More recently, however, decisions such as *Bakke v. Regents of the University of California*¹¹ and *Grutter v. Bollinger*¹² have upheld affirmative action programs in the interest of fostering racial diversity in colleges and universities. This rationale both reflects and reifies the premium that privileged segments of American society place upon diversity, both within and beyond institutions of higher education. At the hands of the judiciary, non-whiteness has acquired a new sort of value. We have internalized the idea that racial diversity is a social good, and as a result, we like it when our social milieu, our educational institutions, and our workplaces include non-white individuals. Non-whiteness has therefore become something desirable—and for many, it has become a commodity to be pursued, captured, possessed, and used.

To be clear, I see nothing inherently problematic in encouraging racial diversity within social groups and formal institutions, and I am convinced that such diversity is a necessary prerequisite to improving racial relations in America. The problem with racial capitalism lies in the unexamined way that white individuals and predominantly white institutions seek and achieve racial diversity. Striving for numerical diversity, without more, results in awareness of non-whiteness only in its thinnest form—as a bare marker of difference and signal of presence. This, in turn, leads white individuals and predominantly white institutions to treat non-whiteness as a prized commodity rather than as a cherished and personal manifestation of identity. Affiliation with non-white individuals thus becomes merely a useful means for such individuals and institutions to acquire social and economic benefits while deflecting potential charges of racism and avoiding more difficult questions of racial equality. This instrumental view is antithetical to a view of non-whiteness—and race more generally—as a personal characteristic intrinsically deserving of respect. Worse still, the instrumental view of non-whiteness fails utterly to inspire efforts at genuine racial inclusiveness and cross-racial understanding.

The irony, then, is that our legal and social emphasis on diversity—while intended to produce progress toward a racially

¹¹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹² *Grutter v. Bollinger*, 539 U.S. 306 (2003).

egalitarian society—has instead created a state of affairs that degrades non-whiteness by commodifying it and that relegates non-white individuals to the status of “trophies,” or “passive emblems.”¹³ Racial capitalism does not necessarily benefit the non-white individuals whose identities are the source of that capital, nor does it necessarily benefit society as a whole.

Racial capitalism is troubling at both a symbolic and a practical level. When white people and predominantly white institutions commodify non-whiteness and exploit its value, even under the auspices of a well-intentioned diversity rationale, racial capitalism evokes one of the darkest eras in American history, during which non-whiteness—and non-white human beings—were assigned value and transferred among white people as commodities. Racial capitalism also forecloses progress on a practical level, both by inflicting identity harms on non-white individuals and by displacing substantive antidiscrimination reform. We should therefore decline to engage in racial capitalism and should instead develop more meaningful mechanisms for improving racial relations in America.

The Article begins in Part I with an examination of the value assigned to race. Both historically and today, whiteness has provided social and economic value to those who possess it. In the past, non-whiteness had just the opposite effect, diminishing one’s status and even marking one’s person as suitable for possession by whites. More recently, affirmative action doctrine has initiated a legal and social preoccupation with diversity, which has conferred a certain value upon non-whiteness. The irony, however, is that the value of non-whiteness is still measured by its worth to white people and predominantly white institutions, and that white people therefore continue to control what non-whiteness is worth.

Part II analyzes this dynamic of racial value through the lens of capital. I draw from both the Marxian conception of capital and more recent research on social capital and status markets to develop a novel framework for understanding the way that race is used and valued in American society. I call this framework *racial capitalism*. As I use the term, racial capitalism is the process of

¹³ Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017 (2011).

deriving economic and social value from racial identity. While any racial identity might be commodified and exchanged¹⁴ in a manner that generates capital, my focus in this Article is on the way that non-whiteness is capitalized as a consequence of diversity thinking. Thus, the form of racial capitalism with which I am most concerned is one in which white individuals or institutions exploit relationships or affiliations with non-white individuals in order to accumulate for themselves the capital associated with non-whiteness. Acquiring such racial capital involves an unspoken exchange—for example, a white individual or institution might offer a non-white individual social status, friendship, goodwill, professional advancement, prestige, monetary compensation, tangible goods, or any number of other benefits in return for the capital derived from the affiliation.¹⁵

Part III raises serious concerns regarding racial capitalism and the commodification of non-whiteness. I lay the groundwork for my critique by discussing the theoretical literature on commodification. I then turn to the commodification of race. One set of concerns with commodification relates to the harm that non-white individuals suffer. That is, commodification damages the integrity of individual identity, demands certain types of identity performance, and results in tangible material harm. Another set of concerns involves broader social harms. That is, commodification of racial identity impoverishes our discourse around race, fosters racial resentment by inhibiting the reparative work essential to improved racial relations, and detracts from more meaningful antidiscrimination goals by emphasizing racial representation at its thinnest and most tokenistic. These serious concerns lead to my conclusion that racial capitalism is a net loss for everyone.

¹⁴ Obviously I do not mean that racial identity is physically traded. Rather, a transfer of the value associated with racial identity results from affiliations among individuals and affiliations between individuals and institutions. See *supra* Part II.B.

¹⁵ Not all affiliations that result in racial capitalism flow from self-interested or cynical motivations. Two individuals might affiliate simply because they like each other. But even in these situations, the existing social backdrop means that a transfer of racial capital will occur. Because my focus lies with the problems associated with treating racial identity as a commodity, this Article emphasizes the more cynical motivations for capitalizing non-whiteness.

Part IV offers a way forward. In an ideal world, racial capitalism and the commodification of non-whiteness it entails would not occur. But in our imperfect world, still tarnished by the historical stain of racism, an immediate, wholesale decommodification of identity would be unfeasible and would have the negative consequence of freezing existing racial hierarchies as they now exist. I therefore suggest an approach that I call *reactive commodification*. We should discourage commodification of non-whiteness. But when commodification does occur, we should react to it by identifying it as commodification, calling attention to its harms, and ensuring that non-white people receive compensation for the commodification of their racial identity. The Article concludes with some thoughts about how we might preserve our commitment to the worthy aspects of diversity while avoiding the perils of racial capitalism.

I. VALUING RACE

American history reveals a long tradition of assigning value to race. Whiteness and property are intricately related. Historically, whiteness both allowed possession of property and itself functioned as property, while non-whiteness was a source of value only insofar as it allowed possession of a non-white *person* as property. That is, whiteness was valued in itself, while non-whiteness provided whites with justification for deriving value from another person. Following the Civil War, this function of non-whiteness receded from sight for a time. In recent years, however, our increased legal and social preoccupation with diversity has shifted the way that we value non-whiteness. Non-whiteness has acquired a distinct value, albeit one more circumscribed and equivocal than that associated with whiteness.

A. Whiteness as Property

“I’m not saying that white people are better. I’m saying that *being* white is *clearly* better.”¹⁶

This subpart reveals the value of whiteness through the lens of property. Scholars have advanced many paradigms of property, and I do not argue for one over another here. Rather, I aim to show that under any of several influential definitions of property whiteness acquires value insofar as it functions as property.

Historically, whiteness contributed to a racialized conception of property in several ways. The first two classify people in relation to the property regime: First, property ownership was contingent on racial identity—only white people (specifically, men) could own property. Second, some racialized bodies *were* property—most obviously Blacks, although some Native Americans were also enslaved.¹⁷ Whiteness both allowed ownership of property and insulated those considered white from becoming the property of others.

Whiteness also functioned as property in two traditional paradigms. It functioned as property in the classical sense by entitling a person to a suite of legal rights. As Laura Underkuffler puts it, property under this view “included not only external objects and people’s relationships to them, but also all of those human rights, liberties, powers, and immunities that are important for human well-being, including: freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal

¹⁶ Louis CK, *Chewed Up*, available at <http://www.youtube.com/watch?v=TG4f9zR5yzY>. Here and throughout the Article, I draw upon jokes and other comic sources for sociological insight. As Sigmund Freud observes, we repress certain ideas because we find them too disturbing to confront directly, but those ideas do not disappear—they return in the form of dreams, verbal slips, solecisms, and jokes. *See, e.g.*, SIGMUND FREUD, *THE JOKE AND ITS RELATION TO THE UNCONSCIOUS* (1905). To examine our jokes, then, is to unearth our collective social preoccupations.

¹⁷ *See, e.g.*, WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 242 (Roy L. Brooks, ed., 1999) (“Contrary to popular belief, Indian slavery was not unusual during the colonial era.”).

opportunity to use personal faculties.”¹⁸ This traditional view embraces a broad notion of property that encompasses much more than simply physical things. It also includes the entire set of legal entitlements to which a white person could lay claim by virtue of their whiteness.

Whiteness also functioned as traditional property by conferring the right to exclude—what Thomas Merrill has called the *sine qua non* of property.¹⁹ White individuals and institutions had the power to police their own boundaries by deciding who was and was not white. Ian Haney López has traced the mechanisms by which “legal institutions and practices, as essential components of our highly legalized society, have had a hand in the construction of race.”²⁰ Via such mechanisms as the one-drop rule, those in power—for the most part, white Americans—exercised the essential property right of exclusion.

Under more modern conceptions of property, whiteness itself functions as what Cheryl Harris has influentially described as “status property”—a reputational interest that endowed the owner with certain privileges flowing from a public conception of their identity and personhood.²¹ In *Plessy v. Ferguson*, Plessy’s brief complained that, by consigning him to the “colored” car even though he was seven-eighths white, the state law mandating this separation has deprived him of the “most valuable sort of property”—his whiteness and the privilege that accompanied it.²² Also in the era of *Plessy*, courts further contributed to the value of whiteness—and thus reified the property interest in it—by recognizing defamation actions predicated on false denial of someone’s whiteness.²³ As one scholar explains, “courts . . .

¹⁸ Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 128-29 (1990).

¹⁹ Thomas Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

²⁰ See, e.g., IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 78-108 (2006).

²¹ Harris, *Whiteness as Property*, *supra* note 10, at 1734-36.

²² *Plessy v. Ferguson*, 163 U.S. 537 (1896); Brief for Plaintiff in Error at 9, *Plessy* (No. 210).

²³ J. Allen Douglas, *The “Most Valuable Sort of Property”: Constructing White Identity in American Law 1880-1940*, 40 SAN DIEGO L. REV. 881, 911-13 (2003).

created the value in white honor and white subjectivity by etching racial boundaries around the right of reputation in whiteness.”²⁴

Whiteness as property persists today.²⁵ It continues to confer privilege on those individuals who possess it.²⁶ It also continues to allow exclusion, as predominantly white institutions continue to police its boundaries by creating the racial categories to which others are relegated.²⁷ And whiteness continues to define the normative baseline for the distribution of social goods, including, but not limited to, the legal regime that determines entitlements to those goods.

Our Equal Protection jurisprudence provides a telling example of the persistence of whiteness as property.²⁸ By adopting a principle of colorblindness, the Supreme Court protects the property interest in whiteness by defending the status quo of the distribution of social resources.²⁹ Rather than asking whether certain outcomes are fair to the parties to a case, or even whether they serve society as a whole, courts simply ask whether they are facially race-neutral. In so doing, they preserve a racial hierarchy in which whiteness is privileged without the necessity of white people acknowledging their own privilege.³⁰ Insofar as whiteness

²⁴ *Id.* at 912.

²⁵ Harris, *Whiteness as Property*, *supra* note 9, at 1757-77.

²⁶ *Id.* at 1758-59.

²⁷ The United States Census provides a particularly legible example of the process of racial identity creation and demarcation. The Census has featured a different set of categories each year since its inception, thereby continuously creating the framework in which we understand race. But the government also has a hand in repressing racial identities. Prior to the 2000 Census, stakeholders pressed the government to include a “Multiracial” category. *See, e.g.*, Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 491-92 (2010) (describing multiracial category activism). That the government did not choose to recognize such a category, and instead allowed individuals only to choose multiple existing categories, affects our view of the legitimacy of the “multiracial” label in relation to the formally recognized categories. Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701 (2003).

²⁸ *See* Harris, *supra* note 10, at 1757-77.

²⁹ *See* Neil Gotanda, *A Critique of “Our Constitution is Colorblind”*, 44 STAN. L. REV. 1 (1991); Harris, *supra* note 10, at 1768.

³⁰ Barbara Flagg, “*Was Blind but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

continues to permit differential entitlement, legal and otherwise, to goods and resources, it thus remains a valuable form of property.

Scholars have more recently suggested the possibility of property as a tool for historically disempowered groups to gain “the right to create [their] identity and to construct control cultural meanings.”³¹ I discuss this possibility in more detail in Part III. For present purposes, however, my claim is straightforward: that under any of a number of traditional and modern understandings, whiteness functions as a valuable form of property.

B. Diversity as Revaluation

“Our diversity is our greatest asset.”³²

While whiteness today remains a marker of status and therefore a source of value, our preoccupation with diversity has caused a shift in the dynamics of valuing race. Here, I trace that preoccupation to the Supreme Court’s affirmative action jurisprudence.

The concept of affirmative action evolved gradually,³³ and diversity was not always its express or implied rationale. When the first affirmative action programs emerged in employment settings in the 1960s, their justification was explicitly remedial.³⁴ Indeed,

³¹ See, e.g., Madhavi Sunder, *Property in Personhood*, in *RETHINKING COMMODIFICATION* 168 (Martha M. Ertman & Joan C. Williams, eds. 2005).

³² THE HOME DEPOT, Hiring, at <http://homedepotretailmanagement.com/home>. Similar testimonials characterize the websites of virtually every large American company.

³³ The term “affirmative action” appeared in governmental documents for the first time in President John F. Kennedy’s order establishing the President’s Committee on Equal Employment Opportunity, which stated: “[All government contractors] will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.” Executive Order 10,925 at § 301(1) (Mar. 6, 1961). The language is arguably ambiguous: It might be interpreted to mean something like the modern concept of colorblindness. Or treatment without regard to race might be interpreted to require remediation, in some form, for past discrimination.

³⁴ See, e.g., *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968) (invalidating existing seniority system on ground that “Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns”);

in 1977 the U.S. Commission on Civil Rights defined affirmative action as an effort “beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future.”³⁵ Courts repeatedly accepted such remedial justifications.³⁶

The first explicit statement of diversity as a rationale for affirmative action occurred in *Regents of the University of California v. Bakke*.³⁷ There, Justice Powell’s opinion—eventually regarded as the controlling opinion, since there was no majority³⁸—rejected several rationales for affirmative action while

Weiner v. Cuyahoga Cmty Coll., 238 N.E. 2d 839, 844 (Ohio Com. Pl. 1968) (“The [Civil Rights Act of 1964] provides a remedy for a long-continued denial of vital rights of minorities and of every American—the right to equality before the law.”); JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* 145-51 (1996) (“[E]quality was consistently being understood as both an equality of treatment and an equality of economic results.”); *id.* at 161-66 (describing early cases upholding affirmative action programs on basis of remedial rationale).

³⁵ U.S. Comm’n on Civil Rights, Statement of Affirmative Action 2 (1977).

³⁶ See, e.g., *Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971) (upholding affirmative action program as “a method of presently eliminating the effects of past racial discriminatory practices and . . . making meaningful in the immediate future the constitutional guarantees against racial discrimination”); see also Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 683-87 (2004) (collecting cases).

³⁷ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Eboni Nelson locates the roots of the diversity rationale in the integration and desegregation cases decided two decades prior to *Bakke*. Eboni S. Nelson, *Examining the Costs of Diversity*, U. MIAMI L. REV. 577, 592-98 (2009). Most commentators, however, view *Bakke* as a milestone in bringing diversity to prominence. See, e.g., Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 38 (2007) (citing *Bakke* as first statement of diversity rationale); Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 710 (2008) (same); Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1181 (2007) (citing *Bakke* as first judicial recognition of benefits of racial diversity in higher education).

³⁸ In the years following *Bakke*, federal appellate courts considering affirmative action in higher education disagreed as to whether Justice Powell’s opinion controlled. Compare *Smith v. Univ. of Washington*, 233 F.3d 1188, 1199-1200 (9th Cir. 2000) (positing that Justice Powell’s opinion is controlling) with *Hopwood v. State of Texas*, 236 F.3d 256 (2000) (“[W]e read *Bakke* as not

specifying that the educational benefits of diversity could justify some race-conscious admissions programs.³⁹ Justice Powell indicated that “the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education.”⁴⁰ He linked diversity to the notion of academic freedom, explaining that “universities must be accorded the right to select those students who will contribute most to the ‘robust exchange of ideas’” and that “our tradition and experience lend support to the view that the contribution of diversity is substantial.”⁴¹

The diversity rationale did not immediately and wholly replace the remedial rationale. For a brief time, the two rationales coexisted.⁴² But as the Court incrementally established strict scrutiny as the standard in all cases involving race-based affirmative action,⁴³ remedial justifications became increasingly unlikely to succeed, with a narrow exception for an entity’s implementation of remedial measures for its own past discrimination,⁴⁴ and the focus subsequently shifted to diversity. This doctrinal shift both reflected and reinforced an increasing social concern that whites had become the victims of “reverse

foreclosing (but certainly not requiring) the acceptance by lower courts of diversity as a compelling state interest.”). As discussed below, *Grutter v. Michigan* dispelled any confusion. See *supra* text accompanying notes 48-80.

³⁹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (Powell, J., concurring in the judgment).

⁴⁰ *Id.* at 311-12.

⁴¹ *Id.* at 313.

⁴² See, e.g., Nunn, *supra* note 37, at 711.

⁴³ See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (Powell, J., announcing judgment and issuing opinion in which three justices joined) (holding that, under strict scrutiny standard, program providing preferential protection for minority employees was unconstitutional); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (holding that, under strict scrutiny standard, minority set-aside plan in construction contracting was unconstitutional), *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that “all racial classifications, imposed by [any] governmental actor, must be analyzed by a reviewing court under strict scrutiny” and remanding to determine whether challenged program satisfied that standard).

⁴⁴ *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

discrimination.”⁴⁵ Jed Rubenfeld calls this trend the “anti-antidiscrimination agenda,” and argues that it flows from the antipathy of an increasingly conservative Supreme Court to what it perceives as “the erosion of meritocracy” and “the creation of a sense of entitlement among undeserving people.”⁴⁶ Kenji Yoshino suggests that the Court instead suffers from “pluralism anxiety”—anxiety resulting from the introduction of new or newly visible groups of people—which has led not to a wholesale hostility to rights, as Rubenfeld argues, but rather to an array of restrictions on Equal Protection jurisprudence and a general movement to located rights in the notion of liberty rather than equality.⁴⁷ While these accounts diverge in some ways, they similarly recognize the Court’s reluctance to countenance affirmative action programs on remedial grounds. As a result of these broad trends, advocates of race-conscious policies in both employment and education increasingly relied on the interest in diversity as their most promising legal strategy. The courts’ evolving approach to the two areas illustrates “the permeability of the doctrinal lines between employment and other settings for affirmative action, and between constitutional and statutory standards governing its legality.”⁴⁸

With respect to education, the Court continues to accept diversity as a justification for affirmative action. Since *Bakke*, the Court has reiterated that the educational benefits derived from diversity constitute a “compelling interest” sufficient for a race-conscious affirmative action program to survive strict scrutiny under the Equal Protection Clause. In 2003, *Grutter v. Bollinger* upheld attainment of a diverse student body as a compelling interest in higher education.⁴⁹ Most recently, in *Parents Involved*

⁴⁵ See generally PAUL M. SNIDERMAN & EDWARD G. CARMINES, *REACHING BEYOND RACE* (1997) (examining attitudes of white people regarding affirmative action preferences).

⁴⁶ Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 *YALE L.J.* 1141, 1142 (2002).

⁴⁷ Kenji Yoshino, *The New Equal Protection*, 124 *HARV. L. REV.* 747 (2011).

⁴⁸ Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 *BERKELEY J. EMP. & LAB. L.* 1, 13 (2005).

⁴⁹ *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding law school admissions plan that considered race as one factor in holistic assessment of

in *Community Schools v. Seattle School District No. 1*, the Court reiterated that it had accepted diversity in higher education as a compelling state interest while emphasizing that “the application program [upheld in *Grutter*] focused on each applicant as an individual, and not simply as a member of a particular racial group” and that a necessary prerequisite to surviving constitutional scrutiny was that “the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance.”⁵⁰

In the employment context, courts have also in some instances accepted diversity as a rationale for affirmative action programs voluntarily undertaken by employers. No case has explicitly foreclosed that possibility: *City of Richmond v. J.A. Croson Co.* and *Adarand v. Peña* held that racial preferences in governmental contracting may be justified by the goal of remedying past discrimination by the particular governmental entity, but did not discuss the diversity rationale.⁵¹ While those cases therefore prohibit some affirmative action programs, they do not limit possible justifications to the purely remedial,⁵² and both

candidate’s application). See also *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down affirmative action program that allocated set number of points to minority applicants for admission on ground that this precluded individualized assessment).

⁵⁰ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722-23 (2007). *Parents Involved* went on to invalidate the challenged race-conscious school assignment scheme because it lacked this individualized consideration—rather, “race, for some students, is determinative standing alone.” *Id.* at 723.

⁵¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

⁵² See, e.g., Memorandum to General Counsels on Post-*Adarand* Guidance, at http://eoa.army.pentagon.mil/web/doc_library/ACF8B0B.TXT (“While both *Adarand* and *Croson* make clear that remedial interests can be sufficiently compelling to justify race-based measures, they did not explore the full range of interests that might be found compelling. . . . Some members of the Court and several lower courts, however, have suggested that, under appropriate circumstances, an agency’s operational need for a diverse workforce could justify the use of racial considerations. This operational need may reflect an agency’s interest in seeking internal diversity in order to bring a wider variety of perspectives to bear on the range of issues with which the agency deals. It also

before and after *Croson* and *Adarand*, courts have held that diversity may provide a compelling state interest in employment.⁵³ In challenges brought under Title VII, affirmative action programs are most frequently justified on the ground that they address a “manifest imbalance” in segregated job categories where racial minorities have been traditionally underrepresented,⁵⁴ but diversity has informed that analysis, and courts and commentators have suggested that it might provide an independent justification.⁵⁵ Some commentators have read *Grutter* as an opportunity to buttress diversity within the employment context—Cynthia Estlund, for example, has argued that *Grutter*’s conception of the diversity rationale offers a broader understanding of integration equally applicable in the employment realm.⁵⁶ Indeed, the *Grutter* majority’s reliance on the arguments of corporations and the military implies that justifications for affirmative action may apply

may reflect an interest in promoting community trust and confidence in the agency.”).

⁵³ See, e.g., *Alexander v. City of Milwaukee*, 474 F.3d 437, 441, 445-46 (7th Cir. 2007); *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003); *Patrolmen’s Benevolent Ass’n v. City of New York*, 310 F.3d 43, 54 (2d Cir. 2002); *Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981); *Detroit Police Officers’ Ass’n v. Young*, 608 F.2d 671, 679, 695-96 (6th Cir. 1979); *Jones v. City of Springfield*, 540 F. Supp. 2d 1023 (C.D. Ill. 2008); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (O’Connor, J., concurring in part and concurring in the judgment) (indicating that goal of establishing racial diversity among faculty, which parties had not raised, might sustain affirmative action program).

⁵⁴ See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transp. Agency*, 480 U.S. 616 (1987); see generally Kenneth R. Davis, *Wheel of Fortune: A Critique of the “Manifest Imbalance” Requirement for Race-Conscious Affirmative Action Under Title VII*, 43 GA. L. REV. 993 (2009).

⁵⁵ See *Doe v. Kamehameha Schs.*, 470 F.3d 827, 842 (9th Cir. 2006) (“The Title VII cases, in the employment context, recognize the laudable goal of achieving diversity and proportional representation in the workplace.”); Davis, *supra* note 53, at 1039-53 (suggesting that diversity may justify affirmative action programs under Title VII). The Court also recently considered whether concerns regarding disparate treatment litigation under Title VII may justify race-based measures in *Ricci v. DeStefano*, 557 U.S. 557 (2009). But *Ricci* involved neither affirmative action nor a diversity justification, and is therefore of limited relevance here.

⁵⁶ Estlund, *supra* note 48, at 20-38.

to affirmative action programs in employment as well.⁵⁷ The important point is that diversity has maintained influence within the employment case law and has, as a result, led employers to embrace diversity.⁵⁸ In different workplaces, the affinity for diversity may arise for different reasons: employers may believe that diversity actually leads to a better-functioning workplace, or they may believe that the appearance of diversity bolsters their standing among customers, or they may actually believe in the remedial function of hiring members of groups historically subject to discrimination, but strategically couch their reasons in the language of diversity. Whatever the specific reason, however, the result is that diversity is desired in the workplace.

Bakke and subsequent decisions regarding both education and employment simultaneously reveal a belief that diversity is valuable—sometimes even a compelling state interest—and a fuzzy rationale for why this is so. *Grutter* upheld a policy that “aspires to achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.”⁵⁹ Diversity is beneficial because it promotes cross-racial understanding, helps to dismantle stereotypes, and improves classroom discussion.⁶⁰ Moreover, diversity in the classroom is important because students need preparation to be able to function in a diverse workforce.⁶¹ Federal appellate courts both before and since *Grutter* have acknowledged such rationales.⁶²

⁵⁷ For example, the Court cited the amicus brief filed by retired generals for the proposition that a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.” *Grutter*, 539 U.S. at 331-32.

⁵⁸ PETER WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* 201-25 (2003) (cataloging preoccupation with diversity in business); FREDERICK R. LYNCH, *THE DIVERSITY MACHINE* (1997) (same).

⁵⁹ *Grutter*, 539 U.S. at 315 (internal quotation marks omitted).

⁶⁰ *Id.* at 330-31.

⁶¹ *Id.*

⁶² *Fisher v. Univ. of Texas*, 631 F.3d 213 (5th Cir. 2011), *cert granted*, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345); *Smith v. Univ. of Wash.*, 392 F.3d 367 (9th Cir. 2004); *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1197

The social science evidence reaches mixed conclusions on the benefits of diversity within both educational and employment contexts. Some research has found substantial benefits from diversity,⁶³ while other research has questioned that finding.⁶⁴ Although scholars have evaluated this empirical debate,⁶⁵ my goal here is not to offer an independent assessment.

Rather, I begin from the reality that the Supreme Court has consistently accepted diversity as a rationale for affirmative action for over thirty years⁶⁶ and that this acceptance of the diversity rationale both reflects and reinforces the value placed on diversity beyond the legal realm. The result is a pervasive trend in American society of valuing diversity. Lawyers have invested immense effort in advocating the value of diversity.⁶⁷ Scholars

(9th Cir. 2000); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 499 (10th Cir. 1998).

⁶³ See, e.g., Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 6-9, *Parents Involved*, 551 U.S. 701 (Nos. 05-908 & 05-915) (attesting that “the best available research evidence” supports positive consequences of diversity); Cedric Herring, *Does Diversity Pay? Race, Gender, and the Business Case for Diversity*, 74 AMERICAN SOCIOLOGICAL REVIEW 208, 208, 215 (2009) (correlating diversity with increase in sales revenue and customers).

⁶⁴ See, e.g., ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED 362 (1993) (finding no benefit from diversity when controlling for cross-racial interaction); Charles A. O’Reilly III et al., *Work Group Demography, Social Integration, and Turnover*, 34 ADMINISTRATIVE SCIENCE QUARTERLY 21, 29-33 (1989) (finding improved outcomes in homogenous work groups); Stanley Rothman et al., *Does Enrollment Diversity Improve University Education?*, INT’L JOURNAL OF PUBLIC OPINION RESEARCH 8, 24 (2003) (finding that increased diversity in educational settings “brought increased perceptions of personal discrimination among students”).

⁶⁵ See, e.g., Nelson, *supra* note 37, at 587-93; Justin Pidot, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in Grutter v. Bollinger and Gratz v. Bollinger*, 59 STAN. L. REV. 761 (2006) (evaluating the social science research used in University of Michigan affirmative action litigation).

⁶⁶ See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (reaffirming “interest in diversity in higher education” as “compelling for purposes of strict scrutiny”).

⁶⁷ The litigation in *Grutter v. Bollinger* and *Gratz v. Bollinger* is one of many examples in which amicus participants focused heavily on the benefits of diversity. For a few examples, see Brief of the American Bar Association as Amicus Curiae in Support of Respondents, *Grutter* (No. 02-241); Brief of the

interested in the advancement of minorities in education and employment have also focused on diversity's benefits.⁶⁸ And social scientists have made careers out of studying the benefits of diversity in educational and employment contexts.⁶⁹ Even more striking than these legal and scholarly developments is the way that diversity has proliferated into an industry. David Wilkins testifies to "an explosion in corporate diversity initiatives" over the past fifteen years,⁷⁰ and a large and increasing number of companies conduct diversity training or maintain a formal diversity program.⁷¹ A brief perusal of any physical or online bookstore reveals a remarkable selection of publications—ranging in genre from scholarly works to glossy management pamphlets—devoted to recruiting, retaining, and managing a diverse workforce.⁷² In the

Harvard Black Law Students Association, Stanford Black Law Students Association, and Yale Black Law Students Association as Amicus Curiae Supporting Respondents, *Grutter* (No. 02-241); Brief of Amicus Curiae 65 Leading American Businesses in Support of Respondents, *Grutter* (No. 02-241); Brief of International Union, United Automobile, Aerospace & Agriculture Implement Workers of America, in Support of *Bollinger* (No. 02-241); Brief of General Motors Corporation as Amicus Curiae in Support of Defendants-Appellants (No. 02-241).

⁶⁸ See, e.g., RICHARD D. BUCHER, *DIVERSITY CONSCIOUSNESS: OPENING OUR MINDS TO PEOPLE, CULTURES, AND OPPORTUNITIES* (3d ed. 2009); SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007); DEREK BOK, *BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY* 98-100 (1982); Jack Greenberg, *Diversity, the University, and the World Outside*, 103 *COLUM. L. REV.* 1610 (2003); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, *CAL. L. REV.* 953 (1996); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 *STAN. L. REV.* 855, 862-63 (1995).

⁶⁹ See, e.g., Patricia Gurin, *The Compelling Need for Diversity in Education* (1999) (expert report prepared for litigation in *Grutter*).

⁷⁰ David B. Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 *HARV. L. REV.* 1548, 1556 (2004)

⁷¹ ELIZABETH LASCH-QUINN, *RACE EXPERTS: HOW RACIAL ETIQUETTE, SENSITIVITY TRAINING, AND NEW AGE THERAPY HIJACKED THE CIVIL RIGHTS REVOLUTION* 163 (2001).

⁷² See, e.g., NATALIE HOLDER-WINFIELD, *RECRUITING AND RETAINING A DIVERSE WORKFORCE* (2007); *THE PSYCHOLOGY AND MANAGEMENT OF WORKPLACE DIVERSITY* (Margaret S. Stockdale & Faye J. Crosby, eds. 2004).

aggregate, the legal, academic, corporate, and educational emphasis placed on diversity has instantiated diversity as a social value.⁷³

The emphasis on diversity—both as a way of justifying race-conscious affirmative action programs and in society more broadly—has been the subject of critique by commentators of all political persuasions. On the right, diversity is the subject of widespread ridicule and indignation.⁷⁴ Justice Clarence Thomas, concurring in part in *Grutter v. Bollinger*, slightly refers to diversity as “more a fashionable catchphrase than it is a useful term,” and a school’s interest in diversity as an “aesthetic” desire to “have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.”⁷⁵ Ann Coulter voices the sentiments of many Americans when she claims that “[n]ever in recorded history has diversity been anything but a problem . . . ‘diversity’ is a difficulty to be overcome, not an advantage to be sought.”⁷⁶ This disparagement of diversity represents a backlash against its pervasiveness.

From the left, the diversity rationale also has been criticized since its inception.⁷⁷ Derrick Bell argues that the diversity rationale “enables courts and policymakers to avoid addressing directly the barriers of race and class that adversely affect so many applicants” and “serves to give undeserved legitimacy to the heavy

⁷³ Of course, not everyone values diversity for its own sake. But even those who don’t realize that they need to place some value on diversity because a lot of other people do—for example, a company’s leadership may not care about diversity, but if its customers care, then the leadership will still value a diverse workforce.

⁷⁴ See, e.g., Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839 (1996); see also RICHARD A. POSNER, *OVERCOMING LAW* 81-82 (1995); Mark Nadel, *Retargeting Affirmative Action: A Program to Serve Those Most Harmed by Past Racism and Avoid Intractable Problems Triggered by Per Se Racial Preferences*, ST. JOHN’S L. REV. 324, 344 (2006).

⁷⁵ *Grutter v. Bollinger*, 539 U.S. 306, 354 n.3 (2003) (Thomas, J., concurring in part and dissenting in part).

⁷⁶ Ann Coulter, *At the End of the Day, Diversity Has Jumped the Shark, Horrifically*, ANNCOUTLER.COM, Nov. 18, 2009, at <http://www.anncoulter.com/cgi-local/article.cgi?article=340>.

⁷⁷ See TERRY EASTLAND & WILLIAM J. BENNETT, *COUNTING BY RACE: EQUALITY FROM THE FOUNDING FATHERS TO BAKKE AND WEBER* 172-73 (1979) (describing opposition to *Bakke* by progressive politicians and academics).

reliance on grades and test scores that privilege well-to-do, mainly white applicants.”⁷⁸ From a more individualistic perspective, Richard Ford also critiques the diversity rationale on the grounds that it essentializes minorities by ascribing certain characteristics to them and requiring racial minorities to “perform” stereotyped versions of their identity in order to justify their presence within institutions.⁷⁹ Like Bell, he also argues the focus on diversity detracts from more compelling rationales for diversity, such as corrective or distributive justice.⁸⁰

Yet at the end of the day, the diversity rationale currently remains the primary justification for affirmative action.⁸¹ As a result, many people and institutions who support redistribution of social benefits such as higher education along racial lines have accepted diversity as a rationale—some wholeheartedly, some reluctantly—even if, given a choice, they might have preferred the remedial rationale that runs through the Court’s early desegregation jurisprudence. These stakeholders have gone to great lengths to laud the benefits of diversity, and the concept of diversity has taken root both within and beyond education and the workplace. And while the Court’s recent grant of certiorari in *Fisher v. University of Texas*⁸² may result in a revision of affirmative action doctrine, it will not immediately undo this collective social preoccupation with diversity. *Fisher* might, however, offer a unique opportunity for the Court to take account of the consequences that the diversity rationale has engendered.

⁷⁸ Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).

⁷⁹ RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 59-64 (2005).

⁸⁰ *Id.*

⁸¹ Under *Adarand* and *Parents Involved*, an institution might also implement an affirmative action program to compensate for its own past acts of discrimination—but this justification requires institutions to engage in the unappealing act of confessing past wrongdoing.

⁸² *Fisher v. Univ. of Texas*, 631 F.3d 213 (5th Cir. 2011), *cert granted*, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345).

C. *The Worth of Non-Whiteness*

“How much diversity is enough?”⁸³

The result of our dedication to the concept of diversity is that what was once a means to an end has become an end in itself. We have come to believe (or at least to claim we believe) that diversity is an intrinsically desirable sociological condition.⁸⁴ Creating racial diversity usually means increasing the number of non-white people within a group or an institution. And so non-whiteness has acquired a unique and distinct value because, in many contexts, it signals the presence of the prized characteristic of diversity.⁸⁵

The way that non-whiteness is valued under the diversity rationale highlights an important distinction between the diversity and remedial rationales. The remedial rationale is meant to correct for past injustice, and so a successful remedial program must actually improve the situation of non-white individuals. In contrast, the diversity rationale is meant to improve the functioning of a particular group or institution, so it does not matter whether non-white individuals themselves benefit.

This distinction leads to tangible differences in the way that affirmative action programs under the diversity and remedial rationales will be implemented. Either rationale will likely require increasing the number of non-white people within an institution. But an increase in the raw number of non-white people present may or may not signify actual progress toward racial equality. This is where the diversity rationale and the remedial rationale diverge: the former assumes that benefits will result from the mere

⁸³ Nat Hentoff, *How Much Diversity is Enough?*, THE VILLAGE VOICE, Mar. 25, 2003, at <http://www.villagevoice.com/2003-03-25/news/how-much-diversity-is-enough/>.

⁸⁴ See, e.g., SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (2007).

⁸⁵ Of course, the value of both whiteness and non-whiteness varies depending on context. Non-whiteness is assigned value of some sort in many or most mainstream organizations today. There may, of course, remain enclaves where it is not valued.

presence of non-white people, while the latter requires tangible progress toward racial equality, and, by extension, the meaningful institutional efforts at inclusion that make such progress possible.⁸⁶ Put another way, the numerical representation embraced by the diversity rationale is a necessary but not a sufficient condition for progress toward racial inclusion in our institutions. If non-white people are not present, they cannot be included. But the fact that they are present does not guarantee that they will be included. By placing the focus on raw numbers, then, the diversity rationale does not press upon the harder question of racial progress.

Two interrelated ironies consequently characterize the revaluation of non-whiteness that the diversity rationale has engendered. The first irony is that the diversity rationale values non-whiteness in terms of its worth to white people. White people reap the stated benefits of non-white presence in institutions, such as exposure to new ideas and understanding of other cultures. Indeed, some social science evidence suggests that, within an institution, white people benefit more from the effects of diversity than non-white people.⁸⁷ So while the diversity rationale bolsters affirmative action measures superficially similar to those that were once justified by reference to remedial reasoning, the purpose of diversity-justified affirmative action policies is entirely different. Such policies cannot be justified simply in terms of remedial redistribution or fundamental fairness—that is, the value they

⁸⁶ One variation of the diversity rationale involves a more robust conception of institutional effort by requiring that institutions take proactive steps to create the conditions under which the benefits associated with diversity ensue. Even this more robust variant, however, does not require benefits to non-white people as a measure of success. *See, e.g.*, Patricia Gurin, Evidence for the Educational Benefits of Diversity in Higher Education: Response to the Continuing Critique by the National Association of Scholars of the Expert Witness Report of Patricia Gurin in *Gratz, et al. v Bollinger, et al.* and *Grutter v. Bollinger, et al.* (May 20, 2003), <http://www.umich.edu/~urel/admissions/research/pgurin-nas.html>.

⁸⁷ *See, e.g.*, Barbara A. Noah, *A Prescription for Racial Equality in Medicine*, 40 CONN. L. REV. 675, 718 (2008) (“[C]ritics have observed that ‘the whole argument over what whites will learn from the presence of a critical mass [of minority students] suggests that ‘diversity’ is for the educational benefit of whites.”); Daria Rothmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 211-13 (2004) (concluding that *Grutter* decision appears to benefit interests of white students over students of color).

would have to non-white people. Instead, diversity-justified affirmative action policies must be legitimized by the value that such policies have for white people. Valuation of non-whiteness under the diversity rationale thus provides a classic example of Derrick Bell's theory of interest convergence: progress for non-white people occurs only when it benefits white people as well.⁸⁸

The second irony, related to the first, is that the diversity rationale confers on white people and predominantly white institutions the *power* to determine the value of non-whiteness. Because non-whiteness is valued in terms of what it adds to white people's experiences or endeavors, white people determine what non-whiteness is worth. Certainly this may play out in ways that provide benefits to non-white people—for example, a non-white person may be admitted to a school or offered a job that but for affirmative action she would not. Yet when white people are responsible for valuation of non-whiteness, that valuation may be a two-way ratchet. If a white majority at a school comes to perceive that there is “enough” diversity, for example, the marginal value of non-whiteness diminishes.⁸⁹ The value of non-whiteness, then, is contingent on its worth to white people. So even when non-whiteness is highly valued, white people retain control over the assignment of value, and may increase or diminish that value at will.

Under the diversity rationale, the value of non-whiteness depends on its benefit to white people and predominantly white institutions. The diversity rationale, in other words, creates conditions conducive to racial capitalism.

⁸⁸ Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522-23 (1980).

⁸⁹ See Jeffrey F. Milem, et al., *Making Diversity Work on Campus: A Research-Based Perspective*, ASSOCIATION OF AMERICAN COLLEGES & UNIVERSITIES 2005, at 4; Lino A. Graglia, *Race Norming in Law School Admissions*, 42 J. LEG. EDUC. 97, 101 n.11 (1992) (suggesting that Asians may provide “too much diversity” through overrepresentation in the pool of “highly qualified” applicants).

II. A THEORY OF RACIAL CAPITAL

Building upon the insights of Part I, this Part sets forth a framework for understanding the valuation of non-whiteness. Perhaps the most obvious way of conceptualizing that value would be to describe it as property. Cheryl Harris has argued that, unlike whiteness, non-whiteness cannot be considered property because it does not have the same characteristics of status that whiteness does.⁹⁰ Jim Chen, in response, has suggested that non-whiteness qualifies as “new property” simply because affirmative action regimes have created an expectation of a particular entitlement—that of enhanced consideration under affirmative action policies.⁹¹ Who we believe is correct depends, in large measure, on the theory of property we adopt, and there is no real consensus as to which theory is most accurate.⁹²

More importantly, however, the characteristics associated with both the traditional and the contemporary understanding of property do not capture some of the implications of the way that non-whiteness is currently assigned value. Therefore, a more useful lens for understanding the value assigned to non-whiteness is that of capital.⁹³ Capital has been theorized in many forms. One of the most influential is Karl Marx’s critique, rooted in political economy, of the relationship between private property, accumulated wealth, and exploitative social relations.⁹⁴ Subsequent theorists have posited other kinds of capital. Theodore Schultz introduced the notion of human capital—the value added to a laborer when the laborer acquires education, skills, training,

⁹⁰ Harris, *supra* note 10, at 785.

⁹¹ Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 COLO. L. REV. 1123, 1134-40 (1997) (“Since government has defined eligibility for [benefits such as scholarship eligibility or faculty employment] according to race, the applicant has a property interest in his or her race.”).

⁹² Compare Underkuffler, *supra* note 18, with Merrill, *supra* note 19.

⁹³ Of course, in many understandings of the term, capital is a form of property. See, e.g., KARL MARX, CAPITAL VOLUME I 729 (Penguin Classics 1990). But the theorization of capital provides richer material for understanding the way that race is valued than does the theory underlying property.

⁹⁴ MARX, *supra* note 93.

knowledge, or other attributes that improve her usefulness in process of producing and exchanging goods.⁹⁵ Pierre Bourdieu later distinguished among several forms of capital, including economic capital, cultural capital, social capital, and symbolic capital.⁹⁶ Catherine Hakim has developed the idea of erotic capital as a mechanism for furthering both social and economic interests through sexual attractiveness.⁹⁷ In many contexts, then, scholars have found the lens of capital a useful way of examining particular phenomena.

In the analysis I develop here, capital serves only as a metaphor. But in understanding how race is valued—and in particular how non-whiteness is valued—the metaphor of capital provides a useful way of thinking about both that process of valuation and about how racial identity consequently functions in markets, economic and otherwise.

Capital illuminates several aspects of the valuation of non-whiteness. First, positing non-whiteness as a form of capital helps to expose the dynamic processes by which non-whiteness is assigned value. The capital framework also allows for a more transparent examination of who, precisely, derives value from non-whiteness. That is, the question is not simply who “possesses” racial identity, but who reaps value from it, and conceiving of non-whiteness as capital helps to illustrate this process of exploitation and profit. Moreover, the capital framework highlights the dynamism of the value assigned to racial identity—that the value of racial identity fluctuates depending on the situation. And perhaps most importantly, the idea of capital exposes the imbalance in power that frames the valuation of non-whiteness.

This Part therefore introduces three conceptions of capital in relation to the valuation of race. Part II.A describes the Marxian account of capital as an entry point for an analysis of race—and, in particular, non-whiteness—as a form of capital. The Marxian lens yields a useful understanding of the way that race-related

⁹⁵ Theodore W. Schultz, *Investment in Human Capital*, 51 AM. ECON. REV. 1-17 (1961); see also GARY S. BECKER, HUMAN CAPITAL 15-20 (1964).

⁹⁶ Pierre Bourdieu, *The Forms of Capital*, in J.G. RICHARDSON, ED., HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION (1986).

⁹⁷ CATHERINE HAKIM, EROTIC CAPITAL 9-30 (2011).

characteristics function as capital and the way that race, as a commodity, is produced for exchange. Marxian analysis fails, however, to account for the influence of social networks, which is critical to an understanding of how racial value is transferred across social situations and institutional settings. To fill this gap, Part II.B turns to the literature regarding social capital and connects it with recent research examining the role of status in markets. In so doing, it offers a sociological framework for understanding the capitalization of non-whiteness. Finally, Part II.C synthesizes the elements of Marxian and social capital to develop an original account of the value derived from race, which I will refer to as *racial capital*.⁹⁸ Throughout, I highlight how the capitalization of non-whiteness is both a manifestation and a reinforcement of the historical valuation of race and the contemporary revision of that valuation through the diversity narrative.

A. Race as Marxian Capital

“Nothing can have value without being an object of utility.”⁹⁹

I use Marx’s conception of capital as a means to initiate my own analysis of the way that race is valued.¹⁰⁰ His work provides

⁹⁸ My research has uncovered only a single previous article that has used the term “racial capital” to refer to the valuation of race. christi cunningham has applied Marxian analysis to racial disparity, arguing that “[r]acial capital describes the process by which race was created and exploited.” e. christi cunningham, *Identity Markets*, 45 HOW. L. J. 491, 507 (2002). cunningham’s research is helpful in illuminating many of the root causes underlying current disparities in racial value. Her focus, however, is on the way that *state* force assigns whiteness a disproportionate value through the illusion of scarcity. As a result, she does not develop an account of the myriad social influences beyond state force that shape racial value; nor does she consider the way the non-whiteness is valued, including the value conferred by diversity thinking; nor does she consider the concept of racial capital beyond the workplace. My use of the term “racial capital,” therefore, encompasses a considerably broader range of influences on racial value than previous work has recognized.

⁹⁹ MARX, *supra* note 93, at 125.

an imperfect analogy for our society's process of racial valuation, but it supplies a useful starting point for an analysis of the way that racial identity generally—and non-whiteness in particular—functions as capital. Throughout this Part, I will use Marx's market rhetoric in my description of how race is commodified and capitalized. The result is jarring, but this is my intent. By exposing the dissonance between market rhetoric and racial identity, I lay the groundwork for my critique of racial identity markets.

Marx begins with the concept of the commodity, which he defines as “an external object, a thing which satisfies human needs of whatever kind.”¹⁰¹ Commodities have both a use-value—“the inherent usefulness of a thing”—and an exchange-value—a value derived from the trade of the commodity for other commodities or for money.¹⁰² The amount of labor—defined objectively¹⁰³—that goes into a particular commodity establishes the rate of exchange.¹⁰⁴ Notably, for my purposes, “[a] thing can be useful, and a product of human labor, without being a commodity”—that is, someone who creates something and derives use from it, but does not exchange it, has not created a commodity.¹⁰⁵ To produce a commodity, a laborer must produce use-value *for others*.¹⁰⁶ And to realize fully the exchange-value of that commodity, the laborer needs to surrender that commodity to someone else.¹⁰⁷

The Marxian analysis supplies a useful lens for examining the way that racial identity is produced, used, and exchanged in society. We can think of racial identity as a commodity that we all produce.¹⁰⁸ The process of racial identity production is complex

¹⁰⁰ My account of Marx will be succinct and therefore, by necessity, incomplete and somewhat impressionistic. My goal is to put forth Marx's framework for analysis at a high level of generality in order to analyze the way that racial identity is assigned value.

¹⁰¹ MARX, *supra* note 93, at 125.

¹⁰² *Id.* at 126.

¹⁰³ *Id.* at 129.

¹⁰⁴ *Id.* at 128-31.

¹⁰⁵ *Id.* at 131.

¹⁰⁶ *Id.* at 131.

¹⁰⁷ *Id.* at 131.

¹⁰⁸ This is a descriptive claim, not a normative one. In Part III I will argue that commodification of identity has negative consequences for both individuals

and multifaceted. To some degree, racial identity production is determined by what Camille Gear Rich calls “morphology-based ascription”—the interpretation of another person’s visible, physical features to correlate with a set of features identified with a particular race or ethnic group.¹⁰⁹ But as scholars such as Judith Butler and Kenji Yoshino have argued, perception of identity is also deeply influenced by the manner in which that identity is performed¹¹⁰—indeed, “while certain physical traits may suggest a particular racial or ethnic identity or interfere with the performance of one’s chosen identity category . . . some people actively perform racial or ethnic identities in an attempt to cancel out the contrary symbolic effect of their morphology, and are successful in doing so.”¹¹¹ Rich explains that perception of racial identity is influenced by both “passive identity performance”—traits such as one’s accent—and “active identity performance”—voluntary

and, ultimately, for society. Here, the point is simply that identity production occurs.

¹⁰⁹ Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1145-46 (2004).

¹¹⁰ See JUDITH BUTLER, *GENDER TROUBLE* (1990) (initiating the notion of identity performance in the context of sex and gender); JUDITH BUTLER, *BODIES THAT MATTER* x-xi (1993) (describing theory of “identity-performance”); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 865-875 (2002) (discussing various models of identity performance). Although the notion of identity performance appears to have been theorized first with respect to sex and gender, subsequent research has applied it to racial identity as well. See, e.g., LÓPEZ, *supra* note 20, at 1-55 (noting history of racial performance as a means for determining whether immigrants were eligible for citizenship); Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 883-98 (2006) (considering racial and sexual identity performance); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 646, 658-59 (2005) (describing disfavored workplace identity performances); Rich, *supra* note 109 (describing racial identity performance and resulting potential for race discrimination); Devon Carbado & Mitu Gulati, *The Fifth Black Woman*, J. CONTEMP. LEGAL ISSUES 701 (2001) (using concept of identity performance to explain that racialization is based not just on phenotypic difference but also on how one chooses to present that difference); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998) (describing racial performance as a means for determining racial identity for determining whether individuals were slaves or free).

¹¹¹ Rich, *supra* note 109, at 1179.

engagement in racially-associated acts such as wearing particular clothing or speaking a non-English language.¹¹²

Moreover, perception of one's racial identity may also be shaped by traits that are not explicitly correlated with race. Devon Carbado and Mitu Gulati have termed the process of negotiating and performing identity "working identity."¹¹³ They emphasize that identity performance takes place against the backdrop of stereotypes and social preconceptions regarding race—for example, a Korean-American employee at a law firm may be both positively stereotyped as hardworking and negatively stereotyped as unassertive.¹¹⁴ In his production of racial identity, that employee may need to do very little to communicate that he is hardworking, but may need to go to great lengths to demonstrate the leadership skills necessary to advance within the firm.¹¹⁵ The extent to which the employee performs these characteristics successfully will in turn influence others' perception of his race. For instance, if the Korean American employee successfully convinces those within the firm of his leadership abilities, he may in turn come to be perceived as less Korean and more American.¹¹⁶

¹¹² Rich, *supra* note 109, at 1161-66. Whether such identity performance deserves legal protection is a separate issue, and Rich makes a compelling case that it should. *Id.* at 1199-1230. My point here is simply that performance of racially-associated acts affects the way that racial identity is perceived, and, ultimately, valued.

¹¹³ Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1260-62 (2000). Carbado and Gulati's analysis is framed within the workplace, but applies equally well to identity negotiation within society more broadly.

¹¹⁴ *Id.* at 1267-70.

¹¹⁵ *Id.*

¹¹⁶ No particular identity performance has a single meaning. As Gowri Ramachandran has explained, a single instance of identity performance may be read in multiple ways. For example, butch-femme lesbian behavior might be read either to reify or to mock traditional gender scripts. Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 20-30 (2006). To impose a single reading of identity performance thus risks essentializing the individual engaged in performance. *Id.* Still, we can talk of racial commodities in terms of the value particular actors ascribe to particular racial identity performances without necessarily engaging in such essentialism.

Such identity performances, in all their myriad complexity, affect the way that others experience our race, or, put in market terms, they shape the racial commodity that we produce. Some performances make non-white identity less salient. For example, a person with a racially-identified first name might choose to adopt a nickname—for example, to eschew “Muhammed” in favor of “Mo,”¹¹⁷ or a black woman might choose to straighten her hair.¹¹⁸ Other identity performances made non-white identity more salient—Mo might choose to remain Muhammed, or the black woman might choose to wear her hair in a style that emphasizes its natural texture.¹¹⁹ Each of these examples of identity performance involves a complex process through which an individual produces the commodity of racial identity. And, as I will address in more detail in Parts III and IV, each performance ultimately affects the exchange-value of the racial commodity that performance produces.

Thus, the racial raw material with which we begin, coupled with the identity performance in which we choose to engage, is the process of production of the commodity of racial identity. Racial identity does not *have* to become a commodity—in Marxian terms,

¹¹⁷ See generally *El-Hakem v. BJY, Inc.*, 415 F.3d 1068 (9th Cir. 2005) (holding that CEO created racially hostile environment for Muslim employee of Egyptian origin by referring to him as “Manny” rather than “Mamdouh” over employee’s objection; according to employee, this practice was designed to “make it easier” for customers to interact with employees who did not have traditionally Western names (*El Hakem v. BJY, Inc.*, 262 F. Supp. 2d 1139, 1142 (D. Or. 2003)).

¹¹⁸ The styling of black women’s hair has been considered for Title VII protection by courts, see *Rogers v. Am. Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981), and provides a paradigmatic instance of identity performance for scholars, see, e.g., Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010).

¹¹⁹ Rich suggests that employees’ racial and ethnic performance practices may actually increase when employers attempt to restrict such performances because the employer has undermined the status of the performance-restricted group, thereby inflicting a dignitary harm and motivating the employee to “attempt[] to maintain her hold on her chosen racial or ethnic identity.” Rich, *supra* note 109, at 1183.

it might be produced and kept for the use of the individual alone.¹²⁰ But the current social reality is that one's own racial identity "produce[s] use-value for others," and, as a result of that process, becomes a commodity.¹²¹ Consider, for example, a law firm engaged in hiring a class of summer associates. Voluminous cognitive and social psychology research indicates that white people are perceived as more competent than identically qualified non-white people, both by employers and by customers.¹²² Therefore, white racial identity might add use-value for the law firm. Sometimes, as a result of affirmative action policies designed to promote diversity, employers and customers also desire non-white presence in the ranks of their employees.¹²³ Therefore, non-white racial identity might also add use-value for the firm. In both instances, racial identity has been commodified.¹²⁴ Of course, these are not the only ways that racial identity might provide use-value to a law firm; they are simply examples that I will continue to refine in subsequent sections.

Different racial identity commodities are not always, or even usually, valued equally by society. Put in Marx's terms: two racial identities might have the same "use-value" to the individuals who produce them—that is, each person's racial identity might serve her equally well in developing a coherent sense of herself. But that does not mean that the two racial identities have the same "exchange-value" across a range of social and institutional settings. Depending on the setting, society values some racial identities more than others. Moreover, even within the same setting, the exchange value of a particular racial identity varies because the conditions under which racial identity is valued are dynamic, evolving, and highly dependent on context.¹²⁵ The exchange-value that two people each receive for their racial

¹²⁰ Marx, *supra* note 93, at 131.

¹²¹ *Id.* at 131.

¹²² See, e.g., Maria Bertrand & Sendhil Mullainathan, *Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991-1014 (2004).

¹²³ See *infra* Part I.B; see *supra* Part III.

¹²⁴ These are only examples, and racial identity might add value for a law firm or other employer in many other ways as well.

¹²⁵ Marx, *supra* note 93, at 131.

identity is not the same, even if the use-value to the individual is identical. I will further develop this idea in Part II.C, but the important point for now is that racial identities are not always valued equally, and the value they are assigned varies from one setting to the next.

To return to the law firm I have described, whether the firm values white or non-white racial commodities may depend on a number of factors, including the current racial composition of the firm's work force and the preferences of the firm's customers. Regardless, racial identity—as produced by prospective employees—“satisfies human needs of whatever kind” and is thus a commodity that those prospective employees exchange during the hiring process in return for a job. Of course, the other attributes of the prospective associates, such as their law school grades, their personalities, and the fit of their expertise with the law firm's practice needs, matter as well. But explicitly or implicitly, the commodity of racial identity is part of the value that the firm acquires by hiring a particular individual. When the law firm hires the individual and pays him or her a salary, a transaction has taken place—the exchange of a racial commodity for money.¹²⁶

This discussion of the commodity brings us to the idea of capital. For Marx, capital is a social *process*—the transformation of labor into commodities and commodities into money—rather than merely a concrete thing.¹²⁷ This view contrasts markedly with the definitions of capital found in classical political economics, where capital is viewed as something static or fixed such as a stock of assets.¹²⁸ In Marx's process-driven model, capital results from

¹²⁶ This exchange occurs even if the firm does not explicitly mean to purchase a racial commodity and the individual does not mean to sell one. That is, against the backdrop of a society that assigns value to racial identity, exchange of racial identity commodities can be unintentional.

¹²⁷ *Id.* at 247-57 (“[I]n the circulation [of money and commodities] both the money and the commodity function only as different modes of existence of value itself.”).

¹²⁸ See, e.g., ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 70-75 (1822) (listing land, labor, and capital stock as the “component parts of price”); JOHN STEWART MILL, PRINCIPLES OF POLITICAL ECONOMY: WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 34 (7th ed. 1871) (defining capital as the “accumulated stock of the produce of labour”).

the circulation of value through the repeated process of exchanging money for commodities, and the consequent accumulation of value through these exchanges.¹²⁹ It is an investment process in which surplus value is produced and captured. That surplus value, in turn, leads to further investment.

Marx's dynamic model accounts for the exploitation that results from unequal power—in Marxian analysis, this power disparity manifests itself as a class disparity. That is, a laborer who produces a commodity initially receives the exchange-value of the commodity through a payment of money; the laborer captures none of the surplus value of the commodity.¹³⁰ But the capitalist—the person who purchases the commodity, and then resells it for more money—derives the surplus value from the commodity as the commodity continues to circulate in commerce.¹³¹ Because capital is a process of investment and reinvestment, those who are able to invest—the dominant class—capture the surplus value of the investments.¹³² That the surplus value remains with the dominant class demonstrates the exploitative social relationship between the two classes.¹³³

More broadly, though, exploitation need not result from explicitly class-based disparity; the necessary precondition is simply a disparity in power. Marxian analysis therefore provides a useful analogy for the value that powerful institutions—in America, usually predominantly white institutions—derive from racial commodities. Let us return to the example of the law firm. So far I have only addressed the value derived by the individual who engages in the production of racial identity: the salary that person derives includes the exchange-value of the racial identity that he or she has produced. But the racial commodity the firm has

¹²⁹ *Id.* at 247-49, 255.

¹³⁰ Marx, *supra* note 93, at 320-25; 725-34.

¹³¹ *Id.* at 255 (“[V]alue is here the subject of a process in which, while constantly assuming the form in turn of money and commodities, it changes its own magnitude, throws off surplus-value from itself considered as original value, and thus valorizes itself independently.”); *id.* at 320-29.

¹³² *Id.* at 725-34 (describing the “right” of the capitalist “to appropriate the unpaid labour of others or its product, and the impossibility, on the part of the worker, of appropriating his own product”).

¹³³ *Id.* at 927-30.

acquired by hiring a particular individual continues to provide value for the firm beyond the initial hiring. Suppose, for instance, that a nearly all-white law firm hires a Latina. The firm derives economic benefits from her presence on an ongoing basis. It may improve relationships with its customers who value diversity—this yields economic benefits. It may be able to recruit other employees (both other employees of color and employees of all races who care about diversity) more successfully, giving it access to a broader talent pool—this, too, yields economic benefits. It may be able to attract new clients through the enhanced trust and racial credibility it has gained by having a Latina employee—again, this yields economic benefits.

Put another way, the law firm has used the commodity of racial identity acquired through hiring its Latina employee to derive surplus value through its own image as a diverse, tolerant, and non-racist institution. In such fashion, one actor may derive value from the racial identity of another. The law firm I have described is a capitalist actor in the Marxian sense, deriving surplus value on an ongoing basis from the racial identities of its employees. This is possible because the law firm has the power to exploit the racial commodities its employees produce.¹³⁴ The

¹³⁴ The notion of exploitation is central in Marxist theory, with the idea that the inherent class disparity makes capitalism possible. The capitalist holds all the power and accumulates all the wealth in Marx's view; the laborers who are engaged in production receive only subsistence wages. Other theorists have reoriented Marx's analysis so as to entertain the possibility that the laborer, too, can accumulate capital. In theories of human capital, for example, *both* the laborer and the firm gain capital when the laborer acquires knowledge, skills, training, education, and other assets. See, e.g., GARY S. BECKER, HUMAN CAPITAL (1964). Theories of human capital therefore allow for the possibility that the laborer may ultimately capture some of the value added in the form of higher wages or other benefits. *Id.* Likewise, the theory of cultural capital also postulates that individuals can acquire capital by assimilating to dominant cultural values—what Pierre Bourdieu calls *habitus*—and adopting these as their own. Bourdieu, *supra* note 96. That I have not devoted more discussion to theories of human and cultural capital does not mean I reject those theories. Indeed, I find the idea of human capital helpful insofar as it opens the possibility that the laborer can acquire capital—as I have already suggested, I think that individuals can acquire a measure of capital as they acquire education and training that allows them to perform their racial identity in a way that is more valuable. Whether this is a good thing is another question entirely, and one I

inherent power disparity between the law firm and its employees is the factor that, ultimately, enables the firm to acquire surplus value from its employees' production of racial identity.

As I noted at the beginning of this discussion, the Marxian account is an analogy, and is imperfect in many ways. Marx was concerned with the way that material commodities—bread; clothing—were produced and exchanged. Although his account provides a useful starting point for the analysis of how any commodity moves and creates value in a market, it does not perfectly describe intangible commodities like racial identity. Relationships among people play a much greater role with respect to the commodity of racial identity; that is, we see the value of racial identity transferred and captured through interpersonal interaction, affiliations, and networks. To this end, the analogy that the Marxian account of capital provides is incomplete. In the next section, therefore, I turn to a discussion of social capital and status markets that assists in understanding how race functions as capital.

B. Race as Social Capital

“Obviously, whites want black friends so as not to appear racist.”¹³⁵

Because race is capitalized through human interaction, research regarding social capital complements the Marxian account of capital by developing a fuller understanding of the way people and institutions derive value from racial identity. Researchers have developed “radically divergent” conceptions of the term “social capital,” but prominent scholars agree that the concept includes

will address in Part III. The idea of cultural capital is also helpful because it makes explicit the fact that cultural capital—here, favored performances of racial identity—is infused with the values and norms of the dominant social group, that is, white individuals. So while I do not spend a great deal of time on research exploring concepts of human and cultural capital here, this research informs the concept of racial capital I develop in Part II.C.

¹³⁵ Kristen Warner, *Having Black Friends*, STUFF WHITE PEOPLE LIKE (Jan. 21, 2008), <http://stuffwhitepeoplelike.com/2008/01/21/14-having-black-friends/>

value derived from networks.¹³⁶ Here, I adopt Nan Lin's definition of social capital as an "investment in social relations with expected returns in the marketplace."¹³⁷ Lin further specifies that "[t]he market chosen for analysis may be economic, political, labor, or community."¹³⁸ This definition is useful because it is broad enough to capture the notion of racial value—and, more specifically, the value of non-whiteness—as part of the value that is transferred through human interaction. It also allows for an understanding of how non-whiteness is capitalized in a range of settings.

Lin explains that social capital influences "exchanges"—a sociological term describing interactions between actors in which a transaction of resources takes place.¹³⁹ Exchanges have both a social component (the exchange requires a relationship between the actors) and an economic component (the transaction of resources).¹⁴⁰

Lin's account readily reveals the way that non-whiteness functions at a general level as social capital.¹⁴¹ The diversity preoccupation detailed in Part I.B lends value to non-whiteness, and white individuals and institutions capture the value of that non-whiteness through relationships with non-white individuals resulting in "exchanges." As with Marxian capital, the analogy is not a perfect one, but it improves the understanding of the way that non-whiteness is valued and the way that value may be transferred.

In particular, the metaphor of social capital allows a more detailed understanding of the dynamics of the exchange that takes place between white and non-white individuals. Analysis of the dual social and economic components of such exchanges helps to

¹³⁶ JOHN FIELD, SOCIAL CAPITAL 11 (2d ed. 2008) (noting convergence on importance of networks among otherwise contrasting work by Pierre Bourdieu, James Coleman, and Robert Putnam).

¹³⁷ NAN LIN, SOCIAL CAPITAL 19 (2001).

¹³⁸ *Id.*

¹³⁹ *Id.* at 143-44.

¹⁴⁰ *Id.*

¹⁴¹ Non-whiteness could also aptly be described as social capital under the various other accounts. I have selected Lin's because it is particularly well-adapted to encompass the capitalization of race, but other accounts do not differ in ways material to the conception of non-whiteness as capital.

explain why unequal exchanges occur, or, put more concretely, why an actor possessing high social status and considerable resources would engage in a transaction with an actor possessing lower social status and fewer resources. Some researchers have argued that such exchanges take place because not all interactions are rational¹⁴²; others contend that the explanation is “rational principles other than the individual profit-seeking motive.”¹⁴³ Lin’s explanation embraces both rationality *and* the idea that actors behave so as to maximize self-interest.¹⁴⁴ He acknowledges that self-interest may include considerations related to collective interest, but that “collective interest comes into the calculation only when it is embedded in self-interest; there is a self gain if the collective interest is served.”¹⁴⁵

Lin finds this self-interest in the concept of “recognition”—the idea that a “creditor,” or higher status actor, derives benefit from the “greater visibility of the creditor in the larger social network or community” and from improved reputation as an actor who is willing to act to “sustain the well-being of another actor in the community.”¹⁴⁶ In this formulation, one’s reputation “is a function of the extent to which one receives recognition in a social group,”¹⁴⁷ and the motivation to engage in unequal exchanges “is to gain reputation through recognition in networks and groups.”¹⁴⁸

The importance of recognition and reputation to the concept of social capital connects that concept to a recent strand of sociological research that interrogates the role of “status” in markets. Joel Podolny has emphasized that status—defined as an actor’s position in a hierarchical order—explains behavior not only

¹⁴² ALFRED RADCLIFFE-BROWN, *STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETIES* (1952) (explaining that reason for exchanges is “a moral one [intended] to bring about a friendly feeling”); Claude Levi-Strauss, *The Principle of Reciprocity*, in *THE GIFT: AN INTERDISCIPLINARY PERSPECTIVE* 19 (Aafke E. Komter ed., 1996) (positing non-rational “vehicles and instruments for realities of another order: influence, power, sympathy, status, emotion”).

¹⁴³ LIN, *SOCIAL CAPITAL*, *supra* note 136, at 147 (citing motivations such as “approval, esteem, liking, or attraction from the other actor” and “trust”).

¹⁴⁴ *Id.* at 149.

¹⁴⁵ *Id.* at 149.

¹⁴⁶ *Id.* at 152.

¹⁴⁷ *Id.* at 152.

¹⁴⁸ *Id.* at 156.

in social settings, but also in the market.¹⁴⁹ The desire for status affects actors' willingness to form relationships and otherwise affiliate with other actors.¹⁵⁰

Importantly, Podolny establishes that status "leaks"—that "when two actors are involved in an association, exchange, or deference relation with one another and when others perceive that linkage, status leaks through the linkage."¹⁵¹ The exchanges through which social capital is generated, then, have consequences beyond the transactions of resources on which Lin focuses. They also result in "a *forced alienation* of status that occurs when two parties enter into an exchange that can be verified by third parties."¹⁵² Moreover, Podolny explains, if an exchange "is between actors of unequal status, the higher-status actor will tend to experience a drop in status while the lower-status actor will tend to experience a gain."¹⁵³ He demonstrates this principle with the examples of investment banks,¹⁵⁴ which hesitate to enter into exchange relations with lower-status banks, and wineries, which hesitate to list the appellation of lower-status regions on their labels.¹⁵⁵ The desire for status therefore influences the exchanges that generate social capital. It partially determines which exchanges actors will engage in, and why.

The exchange mechanism Lin posits, in conjunction with Podolny's account of status-seeking behavior by market participants, reveals the way that the value associated with non-whiteness is transferred. As a result of the legal and social

¹⁴⁹ JOEL M. PODOLNY, STATUS SIGNALS (2005).

¹⁵⁰ *Id.* at 5. Podolny provides the example of firms' decision to affiliate with NASDAQ or NYSE to affect others' perceptions.

¹⁵¹ *Id.* at 15.

¹⁵² *Id.* at 76 (emphasis in original).

¹⁵³ *Id.* at 15. Podolny—correctly, in my view—couches this status recalibration in terms of tendencies rather than absolutes. We might imagine situations where a high status actor engages with a low status actor and the interaction enhances the status of both individuals. For example, a popular professor might decide to go out to lunch with a few of her students, both elevating her status (she has students who want to eat lunch with her, and is nice enough to accommodate them) and theirs (they are worthy of spending time with a busy and important professor).

¹⁵⁴ *Id.* at 40-102.

¹⁵⁵ *Id.* at 103-31.

preoccupation with diversity arising from affirmative action doctrine, white people and predominantly white institutions may elevate their status within various markets by affiliating themselves with non-white individuals.

We might, for instance, conceive of a status market in “non-racism.” Within this specific market, white individuals and predominantly white institutions tend to have relatively low status.¹⁵⁶ When a white individual or a predominantly white institution engages in an exchange with a non-white person within such a market, we see, in Podolny’s terms, a status leak. The non-white party loses some amount of status, and the white party absorbs some of the status that the non-white party has lost. Put more concretely, the white individual or predominantly white institution has increased status within the “non-racism” market by demonstrating the ability to engage in a relationship with a non-white individual. Meanwhile, the non-white person’s status has diminished within that same market through affiliation with a white individual or a predominantly white institution. Although such exchanges are not fully theorized in the scholarly literature, we do see limited recognition this sort of racial status exchange: Randall Kennedy, for instance, has chronicled the status diminution of non-white people, particularly those in “elite, predominantly white settings,” when other non-whites perceive that they have “sold out” to the expectations of white society.¹⁵⁷

Alternatively, we might conceive of a status market in “cross-cultural competence.” Again, this market has arisen as a result of the priority our legal doctrines place on diversity, and again, white individuals and predominantly white institutions tend to have relatively low status within this specific market.¹⁵⁸ When a white individual or a predominantly white institution engages in an exchange with a non-white person within such a market, we see,

¹⁵⁶ This is a purely descriptive generalization, and a crude one at that. I make no claim about any particular individual.

¹⁵⁷ See RANDALL KENNEDY, *SELLOUT: THE POLITICS OF RACIAL BETRAYAL* 58-69 (2008). Kennedy does not couch his analysis in market terms, but the notion of exchange—the idea that a non-white individual has lost a measure of racial credibility in the process of gaining entry to elite, predominantly white circles—figures prominently in his work.

¹⁵⁸ Again, this is a crude and purely descriptive generalization.

again, a status leak. The white individual or predominantly white institution gains status: the person or institution has successfully affiliated with a non-white individual, and has thereby acquired some of the presumption of greater cultural understanding stereotypically attributed to non-white people. At the same time, the non-white person's status may be diminished through the association. For example, we often see non-white entertainers accused of losing their cultural legitimacy, when they become popular within mainstream white culture or when they perform with white entertainers.¹⁵⁹

Such status markets are particularly important because they serve proxies for other, more substantive characteristics. We often use status-indicating affiliations as a proxy for independent judgments about the relevant characteristics of individuals or institutions.¹⁶⁰ Job applicants' resumes provide a classic example: "it is often easier to observe educational affiliations and the status of an applicant's references than it is to immediately observe differences in individual performance."¹⁶¹ Acquiring certain affiliations thus becomes a way of signaling our status to those with whom we wish to engage in some way.

A white person or institution who engages in an exchange with a non-white person, therefore, increases its status as a non-racist and cross-culturally competent actor by *signaling* those attributes through affiliation. Because we cannot, generally, probe the inner cognitive processes of a white individual for racist ideation or infiltrate the internal workplace culture of an institution to detect racist norms, a white person's affiliation with a non-white individual serves as a proxy for making independent judgments along those axes.¹⁶² Such affiliation signals to outsiders that the white person or institution is non-racist because, presumably, if

¹⁵⁹ See EVERYTHING BUT THE BURDEN: WHAT WHITE PEOPLE ARE TAKING FROM BLACK CULTURE (Greg Tate ed., 2003).

¹⁶⁰ Podolny, *supra* note 149, at 14.

¹⁶¹ *Id.* at 106.

¹⁶² See generally Shin & Gulati, *Showcasing Diversity*, *supra* note 13, at 1031-37 (arguing that placing women and minorities in prominent positions in the workplace "signals . . . a certain level of geniality toward members of the showcased individual's group and a certain kind of sensitivity or attitude about diversity in general").

they *were* racist, they would not want to participate in the exchange with the non-white person, and the non-white person would not agree to participate in the exchange with them. Such status-seeking explains the intensity of the drive to acquire the capital associated with non-whiteness through affiliation. It also explains why non-whiteness is particularly desirable to market participants seeking either to distinguish themselves favorably from other participants or simply to avoid distinguishing themselves unfavorably.

Real world examples reveal the status associated with affiliation with non-white people. First, closeness with non-white people allows whites to deflect charges of racism. As the popular satirical blog *Stuff White People Like*¹⁶³ puts it, “Obviously, whites want black friends so as not to appear racist.”¹⁶⁴ One commentator has referred to this as the “some of my best friends” defense¹⁶⁵—

¹⁶³ For the uninitiated, *Stuff White People Like* is a satirical blog, authored primarily by Christian Lander, that “skewers the sacred cows of lefty Caucasian culture.” Katharine Mieszkowski, *The Unbearable Whiteness of Being*, SALON, July 5, 2008, at http://life.salon.com/2008/07/05/white_people/. Of course, the group of “White People” satirized on *Stuff White People Like* does not map perfectly onto the socio-legal category of “white people” more commonly recognized by scholars in legal academia and the social sciences. See, e.g., DAVID A. HOLLINGER, POSTETHNIC AMERICA: BEYOND MULTICULTURALISM 23-25 (referring to an “ethnoracial pentagon” of Asian, Latino/a, White, Black, and Native American). By “White People,” Lander is really referring to “well-off, well-educated, youngish, self-described progressives.” Benjamin Schwarz, *Intolerant Chic*, THE ATLANTIC, Oct. 2008, available at <http://www.theatlantic.com/magazine/archive/2008/10/intolerant-chic/6976/>.

One can therefore be a White Person without being a white person, and one can also be a white person without being a White Person. *Id.* Lander himself acknowledges that White People do not include “the wrong kind of white people,” such as “poor, right-wing white people, and rich, right-wing white people.” Mieszkowski, *Unbearable Whiteness*, *supra* note 163. Given the popularity of *Stuff White People Like*, I view the blog as providing insight into a subset of the white people and institutions who capitalize non-whiteness. That is, Lander is focused on a certain progressive demographic, while I am concerned with a broader constituency that desires the appearance of diversity, of which that progressive demographic is one part.

¹⁶⁴ Kristen Warner, *Having Black Friends*, STUFF WHITE PEOPLE LIKE (Jan. 21, 2008), <http://stuffwhitepeoplelike.com/2008/01/21/14-having-black-friends/>

¹⁶⁵ Bradford Plumer, *Rick Santorum: A Brief History of the “Some of My Best Friends” Defense*, THE NEW REPUBLIC, June 16, 2011, at

the idea is that, if one has close non-white friends (or friends of other outsider groups) one cannot also be racist (or prejudiced against those groups). Sociologist Eduardo Bonilla-Silva identified this defense as a common theme in a series of interviews with white people about race relations, finding that, while whites harbor prejudice and resentment, a common tactic was to shelter these views behind claims of having non-white friends and associates.¹⁶⁶ Such capitalization of non-whiteness is valuable given the manifest undesirability of the “racist” label, which commentators have dubbed the only true equivalent to a racial epithet for white people.¹⁶⁷

The “some of my best friends” defense has infiltrated popular culture. In one episode of *Seinfeld*, George’s boss accuses him of racism, and George desperately wants to prove him wrong.¹⁶⁸ “It’d be great if he could see me with some of my black friends,” George muses. “Yeah, except you don’t really have any black friends,” Jerry observes. George eventually pays Jerry’s pest exterminator—the only black person he knows—to go to lunch with him in the presence of his boss. The plan, however, backfires when the scheme is uncovered; George’s boss tells him that he has “sunk to a new low.”

We even see elected officials invoke non-white friends as a defense to accusations of racism. For example, President George W. Bush spoke at the NAACP’s annual meeting after facing harsh criticism of the administration’s response to Hurricane Katrina, including, most visibly, Kanye West’s blunt statement that “George Bush doesn’t care about black people.”¹⁶⁹ In the speech, Bush referenced his black “friends” Robert L. Johnson, the founder of Black Entertainment Television, and the Reverend Anthony T.

<http://www.tnr.com/article/politics/90059/gop-rick-santorum-best-friend-defense>.

¹⁶⁶ EDUARDO BONILLA SILVA, *RACISM WITHOUT RACISTS* 53-72 (3d ed. 2010).

¹⁶⁷ See, e.g., Elie Mystal, *Racist Is the New N-Word*, TRUE/SLANT, Feb. 11, 2010, at <http://trueslant.com/eliemystal/2010/02/11/racist-is-the-new-n-word/>.

¹⁶⁸ *Seinfeld*, *The Diplomat’s Club*, May 4, 1995.

¹⁶⁹ Lisa de Moraes, *Kanye West’s Torrent of Criticism*, *Live on NBC*, THE WASH. POST, Sept. 3, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090300165.html>.

Evans, a prominent pastor in Dallas; Bush also gratuitously name-dropped Secretary of State Condoleezza Rice while discussing the then-recent extension of the Voting Rights Act.¹⁷⁰ Bush's references to black people with whom he is affiliated, either through friendship or a close professional relationship, may be read as a strategic attempt to leverage his status so as to rebut allegations of racism.

Non-whiteness likewise allows white people to enhance their status by signaling cross-cultural credibility. Given the premium placed upon diversity, a racially diverse friend circle generates social status, and white people tend to emphasize their friendships with non-white people accordingly. Bonilla-Silva's research reveals that white people inflate both the number and closeness of their non-white friends.¹⁷¹ And a recent reanalysis of sociological research cited in *Grutter* and *Gratz* reveals similar tendencies. In the original study, researchers examined a Gallup survey polling law students at University of Michigan and Harvard about how many cross-racial friendships they had.¹⁷² 90% of white students reported having three or more close friends of other races, as compared to only 37% of black students, 29% of Latino/a students, and 53% of Asian students.¹⁷³ The reanalysis revealed that if all the white students were telling the truth, then every student of color reporting three or more cross-racial friendships must have had an average of *nineteen* close friendships with white law students—a result that seems at best highly unlikely.¹⁷⁴

The tendency to engage in status-seeking behavior explains why white students claim non-white students as their close friends. One explanation relates to the previous explanation I have discussed—that white people desire non-white friends in order to signal that they are not racist. But the explanation is broader than a

¹⁷⁰ Sheryl Gay Stolberg, *In Speech to N.A.A.C.P., Bush Offers Reconciliation*, N.Y. TIMES, July 21, 2006, available at <http://www.nytimes.com/2006/07/21/washington/21bush.html>.

¹⁷¹ BONILLA-SILVA, *supra* note 166, at 87-97.

¹⁷² Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 154 (Gary Orfield ed., 2001).

¹⁷³ *Id.* at 157 tbl. 5.

¹⁷⁴ Pidot, *supra* note 65.

mere desire to perform a non-racist identity script. Claiming social affiliation with non-white individuals also allows whites to signal characteristics of tolerance, cosmopolitanism, and cultural literacy.

Popular culture reflects awareness of this signaling function. *Stuff White People Like* includes entries such as “Having Black Friends”¹⁷⁵ “Diversity,”¹⁷⁶ and “Being the Only White Person Around.”¹⁷⁷ The reason this “stuff” is appealing to white people is not only because they wish to insulate themselves against charges of racism. It’s that, for example, “the number of black friends white people possess also illustrates their comfort with black culture,”¹⁷⁸ an independently desirable characteristic given the “coolness” associated with black culture.¹⁷⁹

The concepts of social capital and status markets help to explain why individuals and institutions value particular racial identities and why they seek affiliations with individuals with particular racial identities. The value acquired through such affiliations is part of the calculus that assigns worth to racial identity.

C. Racial Capital

“In America, white people need black people to create define and validate.”¹⁸⁰

The Marxian concept of capital, in conjunction with research on social capital and status markets, provides the

¹⁷⁵ Kristen Warner, *Having Black Friends*, STUFFWHITEPEOPLELIKE.COM, Jan. 21, 2008, at <http://stuffwhitepeoplelike.com/2008/01/21/14-having-black-friends/>

¹⁷⁶ Christian Lander, *Diversity*, STUFFWHITEPEOPLELIKE.COM, Jan. 18, 2008, at <http://stuffwhitepeoplelike.com/2008/01/19/7-diversity/>.

¹⁷⁷ Christian Lander, *Being the Only White Person Around*, STUFF WHITE PEOPLE LIKE, Feb. 20, 2008, at <http://stuffwhitepeoplelike.com/2008/02/20/71-being-the-only-white-person-around/>.

¹⁷⁸ Kristen Warner, *Having Black Friends*, STUFF WHITE PEOPLE LIKE, Jan. 21, 2008, <http://stuffwhitepeoplelike.com/2008/01/21/14-having-black-friends/>.

¹⁷⁹ See REBECCA WALKER, *BLACK COOL: ONE THOUSAND STREAMS OF BLACKNESS* (2012).

¹⁸⁰ Michaela Angela Davis, *The Beautiful Ones*, in *EVERYTHING BUT THE BURDEN* 132 (Greg Tate, ed. 2003).

foundation for a new concept: racial capital. I define racial capital as the economic and social value derived from an individual's racial identity, either by that individual, by other individuals, or by institutions. The value is not always economic in the immediate sense, although it may be transformed into economic terms. For instance, acquiring racial capital might allow someone to deflect charges of racism. It might provide credibility in making decisions that affect public policy. Or it might allow an institution to avoid legal liability for race-based discrimination.¹⁸¹

This definition bears some resemblance to Marxian account of capital. We can think of race identity as a commodity that we each produce. But the value of that commodity is not static; it is influenced by the context in which the commodity emerges. Moreover, individuals are not the only ones who acquire value from their own racial identity. Rather, individuals and institutions also derive value from the racial identities of those with whom they affiliate. Theories of social capital help to clarify the way that race in general, and non-whiteness in particular, are valued, and how that value passes from one actor to another. That value consists of the status and other resources that individuals and institutions derive from affiliating with someone possessing a particular racial identity.

The Marxian account of capital also makes transparent the power dynamics that determine the valuation of racial identity. Although all individuals produce the commodity of racial identity, it is members of the dominant group—generally white people and predominantly white institutions—who most often engage in racial capitalism by capturing the surplus value associated with non-whiteness. They gain access to non-whiteness through affiliations with friends, colleagues, and employees, and continue to derive

¹⁸¹ Most readers will see the economic implications of the final example more readily than those of the first two. But the ability to deflect charges of racism also has economic value—for instance, it might allow an individual or company to avoid reputational harm that will translate to negative career repercussions (including financial repercussions) for the individual or lost profits for the company. Or a public figure—say a politician—may be able to garner more support for her policies if she has acquired significant racial capital; these policies might have considerable financial implications to the extent they deal with taxes or allocation of other resources.

both economic and social value from those affiliations. The ironic result, then, is that white people and predominantly white institutions are the primary determinants of what non-whiteness is worth. My account of racial capitalism does not exclude the possibility that those other than white people and predominantly white institutions could engage in racial capitalism. But given the existing system of racial value instantiated by the diversity rationale, the long history of subordination of and discrimination against non-white people, and the fact that white people still control the vast majority of powerful institutions, I focus on that form of racial capitalism here.

Racial capitalism melds concepts from other theories of capital. But defining racial capital as a distinct concept is useful because it highlights the unique ways in which we derive value from race. I am not arguing for race exceptionalism.¹⁸² Rather, my argument acknowledges that our unique history regarding race and the social meaning of race warrant a specific analysis of the way that race continues to be assigned value in society today.

Two examples illustrate the troubling ways that racial capitalism currently occurs within institutions. First, consider the way that race functions in higher education. A diverse student body has become a point of pride among colleges and universities as well as a prerequisite to remaining competitive in the enrollment competition. With a few exceptions, elite schools are disproportionately white; thus, achieving diversity usually means increasing the enrollment of non-white students.

Schools engage in racial capitalism in a variety of ways. First, non-whiteness is a recruitment tool, a way of marketing the school to both white and non-white students who care about racial

¹⁸² That is, I am not claiming that we should view race as more important than other identity categories. Nor am I claiming that race supplies capital while other identity categories do not. My aim is to acknowledge that different identity categories occupy different historical and social spaces and to reflect that understanding in my account of how race is valued. Of course, the intersection of race with other identity categories such as gender, sexual orientation, and class affects the way that racial identity is valued. *See* Crenshaw, *supra* note 6. While focus on race here, such intersections provide a rich avenue for future inquiry. *See* Nancy Leong, *Identity Capitalists* (manuscript on file with author).

diversity. Signaling the presence of non-whiteness at a school is a way for the school to signal its commitment to creating a safe environment for students of color. Likewise, the presence of non-whiteness provides a recruiting tool for potential faculty members who value diversity in the students they will teach and mentor or who view numerical diversity as a litmus test for the school's views on race-related issues.

One way in which schools capitalize on non-whiteness is by making prominent images and statistics reflecting the non-white students in their student population. A recent study examined the promotional materials of 371 colleges and universities and found that non-white students were significantly overrepresented in photographs.¹⁸³ For example, Asians made up 3.3% of enrolled students but 5.1% of portrayed students, and Blacks made up 7.9% of enrolled students but 12.4% of portrayed students.¹⁸⁴ Put another way, the percentage of Blacks and Asians portrayed in viewbooks is more than 50% higher than the percentage of Blacks and Asians enrolled in schools. Moreover, the researchers found that such overrepresentation is widespread: 75% of schools in the sample appeared to overrepresent Black students in their materials. These disparities suggest a motivation by schools to capture the likenesses of Black and Asian students in their viewbooks, which in turn suggests an institutional attempt to capitalize on non-whiteness by converting it to a recruitment tool.

Schools occasionally take more drastic measures to accumulate racial capital. In 2000, the University of Wisconsin's undergraduate application included a photograph of cheering white students at a football game into which an image of a black student

¹⁸³ *Viewbook Diversity vs. Real Diversity*, INSIDE HIGHER ED, July 2, 2008, at <http://www.insidehighered.com/news/2008/07/02/viewbooks>. Accord Matthew Hartley & Christopher C. Morpew *What's Being Sold and to What End? A Content Analysis of College Viewbooks*, 79 J. OF HIGHER ED., 671, 686-87 (2008).

¹⁸⁴ See *Viewbook Diversity vs. Real Diversity*, *supra* note 183. The researchers acknowledged the difficulty of attempting to identify students by physical appearance, and so their conclusions are approximate.

Diallo Shabazz had been photoshopped.¹⁸⁵ When the photoshopping was exposed, Paul Barrows, the school's vice chancellor for student affairs, explained that it had happened after he told the school's admissions director to "[f]ind something more diverse."¹⁸⁶ The school officials responsible for the photoshopping decision apologized, and the school's application materials were reprinted at a cost of about \$64,000.¹⁸⁷

The incident made transparent the school's efforts at racial capitalism. Shabazz's racial identity was clearly of value to the school, or he would not have been photoshopped into the brochure. Indeed, school officials admitted selecting Shabazz's image because he was black and they wished to increase the value of the photo in signaling diversity. Moreover, Shabazz sued over the unauthorized use of his likeness and won a "budgetary apology" in the form of ten million dollars earmarked for recruitment of minority students and diversity initiatives across the University of Wisconsin system.¹⁸⁸ By obtaining monetary compensation for the unauthorized use of his image, Shabazz laid bare the economic motivation underlying the school's use of his image.

¹⁸⁵William Claiborne, *School's Diversity Too Good to Be True*, SAN FRAN. CHRON. Sept. 21, 2000 at A2, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2000/09/21/MN100063.DTL>.

¹⁸⁶*Id.* The fact that school officials were unable to find a photograph of white and non-white students interacting is surprising. But the lack of such photos also likely reflects the reality of student life. The percentage of black students at the University of Wisconsin at Madison decreased from 2.19% in 1980 to 2.15% in the 1999-2000 academic year. *University of Wisconsin Says It Faked Diversity Photo*, JET, Oct. 9, 2000, available at http://findarticles.com/p/articles/mi_m1355/is_18_98/ai_66157053/.

¹⁸⁷*Racial Image Doctoring Costs UW \$64,000*, LifeWhile, available at <http://www.lifewhile.com/news/82319/detail.html>. While the University of Wisconsin incident is perhaps the best known, it is by no means an isolated incident. The University of Idaho, for instance, was found to have altered a photo on its website by replacing images of two white students with an image of a black student and an image of an Asian student. See Danielle Nicole Devoss & Julie Platt, *Image Manipulation and Ethics in a Digital-Visual World*, http://www.bgsu.edu/cconline/ethics_special_issue/DEVOSS_PLATT/.

¹⁸⁸Lisa Wade, *Doctoring Diversity: Race and Photoshop*, THE SOCIETY PAGES, Sept. 2, 2009, at <http://thesocietypages.org/socimages/2009/09/02/doctoring-diversity-race-and-photoshop/>.

Racial capitalism also allows schools to gain status relative to other institutions. Colleges and universities are acutely aware of status hierarchies and their position within them, as well as the principle that “status is . . . zero sum in character. One actor cannot increase his status without another losing status.”¹⁸⁹ The sheer amount of time spent producing and analyzing the *U.S. News* rankings—and the proliferation of supposedly more informative alternative ranking systems¹⁹⁰—makes clear that schools are inextricably enmeshed in the rankings game.¹⁹¹

One way that schools negotiate their role in the status hierarchy is by enrolling diverse student bodies. This allows a school to gain status by burnishing its reputation as a progressive and inclusive institution. At present, “diversity” is not reflected in the *U.S. News* rankings, although the California Bar recently sent *U.S. News* a letter suggesting that a school’s “diversity success” should count for 15% of its overall ranking,¹⁹² and a recent symposium sponsored in part by the Society of American Law Teachers invited contributions about how diversity might meaningfully be incorporated.¹⁹³ Moreover, *U.S. News* does currently maintain a separate ranking system based on its “diversity index,”¹⁹⁴ and schools who score high on that metric often publicize their status.

¹⁸⁹ PODOLNY, *supra* note 149, at 25.

¹⁹⁰ See, e.g., Forbes, *America’s Top Colleges*, FORBES.COM, at <http://www.forbes.com/top-colleges/list/>.

¹⁹¹ Rankings are not merely about status for its own sake. They also have a direct financial component, as donors are more likely to give large gifts if they perceive that a school’s administrative is helping it to thrive—where, of course, thriving is defined as moving up in the rankings.

¹⁹² Bob Morse, *Should Diversity Be Added to Best Law Schools Rankings?*, U.S. NEWS & WORLD REPORT, Aug. 7, 2011, at <http://www.usnews.com/education/blogs/college-rankings-blog/2011/04/07/should-diversity-be-added-to-best-law-schools-rankings>

¹⁹³ Society of American Law Teachers, *Open Doors: Making Diversity Matter in Law School Admissions*, Sept. 8, 2011, at <http://www.saltlaw.org/contents/view/stjohnsdiversity>.

¹⁹⁴ *2011 Law School Diversity Index*, U.S. NEWS & WORLD REPORT, at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-school-diversity-rankings>.

In short, claiming non-whiteness in their student bodies allows schools—often predominantly white schools—to gain status, honor, and respect. These qualities translate into economic gain as those schools attract more applicants and more donors. Non-whiteness thus yields both social and economic value for colleges and universities through the process of racial capitalism.

Another example of racial capitalism emerges in the workplace. Racial capitalism leads directly to economic gain in labor markets. Businesses—large law firms are a prime example—emphasize the presence of non-whiteness within their work force. Many such businesses purport to embrace diversity—and hence non-whiteness—because it makes good business sense, touting a range of substantive benefits that flow from a work environment that includes individuals of many backgrounds.¹⁹⁵ A variant of this reasoning is the notion that—even if diversity does not improve a company’s substantive output—clients desire diversity, and so diversifying ranks helps the bottom line. Advocates of these variants of the “good for business” rationale support creating a diverse workforce because it generates economic benefits.¹⁹⁶

One way that businesses gain racial capital is by placing non-white people in highly visible positions. Patrick Shin and Mitu Gulati have discussed the practice of “showcasing,” in which employers place minorities on corporate boards or in other prominent positions in order to signal that the employer has “(1) the ability to make itself attractive to individuals who would contribute to diversity, such as members of the showcased individual’s minority group; (2) a disinclination to engage in openly discriminatory employment action; and (3) a sensitivity to the significance of diversity.”¹⁹⁷ This version of racial capitalism provides a variety of benefits. Showcased non-white individuals help to recruit talented new employees, both those who are themselves non-white and those who care about diversity.¹⁹⁸

¹⁹⁵ See also Wilkins, *supra* note 70 (describing history of “good for business” rationale).

¹⁹⁶ *Id.* at 1571-91.

¹⁹⁷ Shin & Gulati, *supra* note 13, at 1034.

¹⁹⁸ One handbook on minority recruiting advises companies to “[c]reate a positive image for your organization” by “us[ing] the national print media (e.g.,

Similarly, showcasing non-whiteness provides significant instrumental value to employers as a means to retain current customers and attract new ones.¹⁹⁹ Ultimately, these various uses of non-whiteness translate to economic returns.

Yet showcasing a few select non-white employees does not actually require changing a workplace culture in which most non-white individuals feel subtly unwelcome.²⁰⁰ Indeed, employers may actually preserve existing racial hierarchies by hiring and showcasing non-white employees. christi cunningham argues that the practice of “tokenism . . . leverages undervalued identities” and “preserves commodified values of race by parading an exception.”²⁰¹ By showcasing non-white employees in prominent positions, employers signal that unsuccessful non-white employees are responsible for their own failures, while at the same time maintaining a system in which white employees are in fact preferred.²⁰²

Whether overtly furthering a company’s reputation or more covertly maintaining the racial status quo, showcasing does not actually require numerical diversity within a company’s ranks to match the appearance of diversity in its leadership. But if an employer does acquire a numerically diverse workforce, that non-white presence has additional instrumental value.

First, numerical diversity yields racial capital by establishing and maintaining the company’s good reputation. Wilkins explains that diversity statistics are used to “convey[] a reassuring message to law schools and the public at large that slow but nevertheless significant progress is being made on overcoming the legacy of [previous] racist and exclusionary practices.”²⁰³ Employers often features diversity statistics on their websites and

be sure to publicize activities that support the minority community).” WILLIAM G. SHACKELFORD, *MINORITY RECRUITING* (1996).

¹⁹⁹ See, e.g., Wilkins, *supra* note 70, at 1561-62, 1567, 1576-86 (acknowledging that law firms are responsive to client preferences, although such preferences do not always favor diversity).

²⁰⁰ See Green, *Work Culture*, *supra* note 110.

²⁰¹ cunningham, *supra* note 98, at 526-27.

²⁰² *Id.*

²⁰³ Wilkins, *supra* note 70, at 1593-94.

in promotional materials as a way of communicating that information as widely as possible.

Moreover, the presence of non-white employees throughout an employer's workforce adds racial capital by providing a statistical defense against current litigation or preempting future litigation. For example, Wal-Mart recently undertook a well-publicized initiative to diversify its own ranks and to insist on diversity in its business partners.²⁰⁴ Wal-Mart *has* achieved some striking numerical results. It wrote to each of its top one hundred law firms, stating that to retain Wal-Mart as a client that firm had to "demonstrate a meaningful interest in the importance of diversity"; it also required each firm to submit a slate of candidates to serve as the "relationship attorney" with Wal-Mart, with at least one female and one person of color on the slate.²⁰⁵ The initiative resulted in changing forty relationship attorneys and shifting \$60 million worth of Wal-Mart's legal work to management by female or non-white attorneys.²⁰⁶

These diversity measures have accompanied—and, we might infer, are designed to respond to—a wave of employment discrimination allegations against Wal-Mart. The company recently succeeded in securing dismissal of a class action brought by more than 1.5 million women alleging sex discrimination in hiring and promotion.²⁰⁷ Several of the women who served as lead plaintiffs in *Wal-Mart v. Dukes* testified to racial as well as gender discrimination in their depositions.²⁰⁸ Wal-Mart also faced a smaller class-action lawsuit initiated by two black truck drivers,

²⁰⁴ See, e.g., *Wal-Mart Details Progress Toward Becoming a Leader in Employment Practices*, June 4, 2004, at

<http://walmartstores.com/pressroom/news/4645.aspx>.

²⁰⁵ *Wal-Mart Requires Diversity in its Law Firms*, Dec. 9, 2005, at <http://walmartstores.com/pressroom/news/5519.aspx>.

²⁰⁶ *Id.* But we don't know whether the Wal-Mart initiative resulted in an overall improvement for women and people of color, or whether employees in those categories were simply shifted from other clients to Wal-Mart without any net gain.

²⁰⁷ *Wal-Mart v. Dukes*, ___ U.S. ____ (2011).

²⁰⁸ Wal-Mart Class Website, Store Locations of Class Member Declarants, at <http://www.walmartclass.com/staticdata/walmartclass/declarations/> (declarations of Umi Jean Minor, Gina Espinoza-Price, Jennifer Johnson, Thearsa Collier, and Lorie Williams).

alleging race discrimination in hiring.²⁰⁹ And the NAACP's 2005 Industry Survey gave Wal-Mart a grade of C minus "within the areas of employment, vendor development, advertising/marketing, charitable giving and investing/franchising."²¹⁰

Regardless whether Wal-Mart committed race discrimination within the meaning of the law, its diversity initiatives have succeeded in protecting the company's image. The company has received awards and considerable media praise for its efforts.²¹¹ And by affiliating itself with non-white employees and racially diverse business partners, Wal-Mart also insulates itself from future allegations of race discrimination. Racial capitalism yields valuable rewards: Wal-Mart's diversity initiative may ultimately save the company billions of dollars in adverse jury verdicts or litigation settlements.

These examples illustrate the way that racial capitalism occurs within institutions. The phenomenon is so common as to be unremarkable. But in the following Part, I will demonstrate that racial capitalism has profoundly negative consequences for society.

III. CRITIQUING RACIAL CAPITALISM

Racial capitalism has troubling consequences. The process of deriving social and economic value associated with racial capitalism results in the commodification of race. Such commodification reinforces inequality through harms both to non-white individuals and to society at large. This Part first provides a theoretical foundation for analysis of commodification, and then examines the negative consequences of the commodification of race.

²⁰⁹ Jonathan D. Glater, *Two Black Truckers Sue, Accusing Wal-Mart of Hiring Bias*, N.Y. TIMES, July 14, 2005, at <http://select.nytimes.com/gst/abstract.html?res=F10E13F939540C778DDDAE0894DD404482>.

²¹⁰ See NAACP 2010 Survey Gives Five Major Industries "C" and "D" Grades, NAACP.ORG, at <http://www.naACP.org/press/entry/naACP-2005-industry-surveys-give-five-major-industries--c--and--d--grades>.

²¹¹ See Wal-Mart Corporate, *Awards and Recognition*, at <http://walmartstores.com/Diversity/338.aspx> (listing awards).

A. Commodification

“Tell me that you want the kind of thing that money just can’t buy.”²¹²

We tend to place our loftiest ideals beyond the reach of the market. Money can’t buy happiness, we say, and the best things in life are free. Commodification, by contrast, places things within the market, and therefore within the realm of the mundane. Commodifying something makes it fungible with other commodities available on the market. This section examines research on commodification generally, then situates the commodification of racial identity that I have described in Part II within that literature.

Scholars debate whether and in what circumstances commodification is socially desirable. Some have advocated universal commodification. Richard Posner epitomizes this market position; he appears to favor markets in almost everything.²¹³ At the opposite extreme, others, such as Karl Marx, have argued for something approaching universal noncommodification.²¹⁴ While I incorporated elements of Marxian analysis in my discussion of capital in Part II.A, I do not adopt wholesale his views on commodification. Rather, I align myself with a pluralistic position, shared by most commentators, in which commodification is appropriate in some instances but not in others.

The question, then, is how we ought to differentiate between appropriate and inappropriate commodification. Michael Sandel has usefully distinguished two objections to commodification. The first is a concern about coercion, which “points to the injustice that can arise when people buy and sell things under conditions of severe inequality or dire economic

²¹² The Beatles, *Can’t Buy Me Love*, on A HARD DAY’S NIGHT (Capitol 1964).

²¹³ See also Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEG. STUD. 323 (1978).

²¹⁴ Marx, *supra* note 93.

necessity” because such transactions are not truly voluntary.²¹⁵ The second is a concern about corruption, which “points to the degrading effect of market valuation and exchange on certain goods and practices.”²¹⁶ The two arguments express a different view of markets: the coercion argument is not an objection to commodification per se, but, rather, to commodification carried out against a background of inequality; the corruption argument, on the other hand, posits that commodification inherently degrades certain goods and practices under conditions of equality and inequality alike.²¹⁷

Within the corruption framework, commentators have advanced different tests for determining whether something should be exchanged in markets. One influential argument, developed by Margaret Radin, is that “things important to personhood” should not be exchanged in markets.²¹⁸ Personhood encompasses the idea of “human flourishing” and has three aspects: freedom, or the ability “to act for ourselves through free will”; identity, or a “sel[f] that [is] integrated and continuous over time”; and contextuality, or the ability of “self-constitution in relation to the environment of things and other people.”²¹⁹ Within the paradigm of human flourishing, some things cannot be understood as “monetizable or completely detachable from the person”—to engage in such monetization “is to do violence to our deepest understanding of what it is to be human.”²²⁰ For Radin, these things include “one’s

²¹⁵ Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, in *RETHINKING COMMODIFICATION* 122 (Martha M. Ertman & Joan C. Williams, eds. 2005).

²¹⁶ *Id.*

²¹⁷ *Id.* at 123. Glenn Cohen rightly observes that these two arguments are sometimes conflated. Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 *HARV. L. REV.* 689, 689 (2003). He also adds a third concern—crowding out—which “suggests that when markets enter the domain they push out altruistic giving.” Glenn Cohen, *Clarifying Commodification*, *Concurring Opinions*, Aug. 17, 2010, at <http://www.concurringopinions.com/archives/2010/08/clarifying-commodification.html>.

²¹⁸ Margaret Jane Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849, 1903 (1987).

²¹⁹ *Id.* at 1904-05.

²²⁰ *Id.* at 1906.

politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes.”²²¹ Such particulars are “integral to the self” and cannot be commodified and exchanged without irreparable harm.²²² This analytical framework leads Radin to conclude that the commodification of sex, infants and surrogacy impedes human flourishing, and that in an ideal world such things would remain market-inalienable.²²³

Glenn Cohen adds a useful gloss to corruption arguments such as Radin’s by asserting that we must examine *both* the nature of a good or service *and* the nature of the exchange in which it is transferred to determine whether a particular transaction is an “objectionable commodifying exchange.”²²⁴ Transactions have an “expressive nature”—they might operate either to denigrate or to preserve the value of the particular good that is exchanged, depending on whether the structure of a particular transaction expresses the idea that the things exchanged are commensurable.²²⁵ For example, the outright sale of a baby for ten thousand dollars may be objectionable because it expresses the idea that the value of a human infant is entirely capturable in monetary terms, while a transaction in which adoptive parents agree to pay a woman’s medical expenses, but no more, in exchange for the adoption of the baby may be unobjectionable because the transaction expresses the notion that the value of a human infant cannot be fully captured in financial terms.²²⁶ This distinction suggests that even controversial commodifications—sexual services, for example—might be rehabilitated if the transaction were appropriately conceptualized so as to express the values the transaction implicates.²²⁷

²²¹ *Id.*

²²² *Id.* at 1881, 1906.

²²³ *Id.* at 1921-36. Radin is a self-described pragmatist, and acknowledges that in our current, nonideal world it sometimes may be better to commodify incompletely than not at all to allow evolution toward a better world. *Id.* at 1903, 1915. I will elaborate on this “transition problem” in Part IV.

²²⁴ Cohen, *The Price of Everything*, *supra* note 217, at 703-10.

²²⁵ *Id.* at 707.

²²⁶ *Id.* at 710.

²²⁷ See, e.g., Cohen, *The Price of Everything*, *supra* note 217, at 708-09 (discussing “arch-anticommodificationist” Elizabeth Anderson’s concession that sex therapy aimed at helping people liberate themselves from oppressive forms

Theories about what should and should not be commodified tend to be unsatisfying because they rely to some degree on subjective moral judgments. Radin, for example, leaves largely unanswered the critical question of how we determine whether commodification of a particular thing impairs human flourishing. She acknowledges this lack, explaining that “[t]here is no algorithm or abstract formula to tell us which items are (justifiably) personal. A moral judgment is required in each case.”²²⁸ Radin concludes that we should “rely . . . on our best moral judgment in light of the best conception of personhood as we now understand it.”²²⁹ Yet such analysis assumes that a universal concept of human flourishing exists, and, moreover, assumes that we will be able to reach consensus on what human flourishing is.²³⁰ It is difficult to envision a way of defining human flourishing that will not reduce to a subjective judgment about what such flourishing requires.

For present purposes, I do not develop a comprehensive theory of commodification.²³¹ My argument is specific to race.²³² We should not commodify racial identity because commodification of race is inherently inconsistent with equality. Commodification of race harms individual identity, degrades the way that we think

of sexuality might be permissible if framed as a “quasi-gift . . . for which money could not entirely compensate”).

²²⁸ Radin, *Market-Inalienability*, *supra* note 218, at 1908.

²²⁹ *Id.* at 1909.

²³⁰ Perhaps Radin’s point is that in each case we should find the common denominator—the moral principles on which we can all agree. Yet the vast range of opinion on, for example, the relationship of sex to personhood calls into question whether we can find a common denominator robust enough to be useful. Or perhaps her point is that we should *try* to reach consensus, and that whatever imperfect consensus we achieve will still provide the best available guidance as we shape commodification regimes in our nonideal world. Yet she offers no support for the idea that imperfect consensus is the best way to guide policy. These issues raise particular concerns to the extent that we believe that minority groups may have different conceptions of human flourishing than majority groups.

²³¹ While I do not necessarily accept Radin’s argument wholecloth, I believe that any reasonable definition of human flourishing would require noncommodification of race.

²³² The argument might extend equally well to other identity categories, although I save discussion of those categories for another day.

and talk about race, and engenders racial hierarchy. Moreover, there is no way to structure a transaction involving race in a way that avoids this degradation: the value associated with racial identity cannot, for example, be conceived as an appropriate gift or subject of barter, in part because of the close linkage between racial identity and selfhood, and in part because such a transaction cannot avoid evoking historical and ongoing racialized slavery in America.²³³ Because racial identity cannot be commodified and exchanged consistent with notions of equality, race should ideally remain uncommodified.²³⁴

My objection to the commodification of race is distinct from—and does not necessarily forbid—the commodification of culture, even cultural artifacts that are associated with particular racial identities. Scholars disagree as to whether commodification of culture is objectionable: some condemn it as appropriation,²³⁵ while others, such as Madhavi Sunder and Regina Austin, view cultural commodification as rebellious, liberatory, and potentially transformative.²³⁶ While I find the latter view intriguing, it does not implicate my claim about the commodification of race *qua* race. The commodification literature often conflates race and culture,²³⁷ but the two are analytically distinct.²³⁸ It is one thing to claim that the commodification of particular cultural objects or

²³³ The latter concern gestures at the distinction Cohen draws between “conventionalist” and “essentialist” accounts of corruption. The former examines the way that goods and transactions are figures in a particular society; the latter looks to their inherent nature. Cohen, *The Price of Everything*, *supra* note 217, at 707.

²³⁴ The question of whether race should remain uncommodified in our current *nonideal* society is a separate question, which I address in Part IV.

²³⁵ See, e.g., Greg Tate, *Nigs R Us, or How Blackfolk Became Fetish Objects*, in *EVERYTHING BUT THE BURDEN: WHAT WHITE PEOPLE ARE TAKING FROM BLACK CULTURE* 1-14 (Greg Tate ed., 2003).

²³⁶ See, e.g., Madhavi Sunder, *Cultural Dissent*, 54 *STAN. L. REV.* 495 (2001); Regina Austin, *Kwanzaa and the Commodification of Black Culture*, in *RETHINKING COMMODIFICATION* (Martha M. Ertman & Joan C. Williams, eds. 2005).

²³⁷ Martha M. Ertman & Joan C. Williams, *Preface: Freedom, Equality, and the Many Futures of Commodification*, in *RETHINKING COMMODIFICATION I* (Martha M. Ertman & Joan C. Williams, eds. 2005) (conflating race and culture by referring to commodification of “racial identity” through “FUBU clothing”).

²³⁸ Cf. FORD, *supra* note 79.

practices has liberatory potential, and quite another to make the same claim about the actual race of an individual human being. We might think of it as the difference between saying “you can use my stuff if you pay me” and “you can use *me* if you pay me.” So I conclude that race simply should not be commodified, while culture requires a more complex analysis.²³⁹ Of course, to the extent that a particular cultural practice is almost synonymous with racial identity, we might find its commodification more problematic. But in general I see a ready distinction between the dense traditions and practices we typically consider cultural property and the thin version of racial identity most susceptible to commodification. And because this Article’s focus is the commodification of race, it need not confront the question of when cultural commodification becomes problematic.

The remainder of this Part articulates the specific ways that the commodification of race detailed in Part II frustrates racial equality. I will first argue that commodification of racial identity has negative consequences for individual well-being; I will then argue that commodification of racial identity also has negative consequences for social progress.

B. Individual Harms

Commodification of racial identity harms non-white individuals: it fractures identity, creates pressure for non-white individuals to engage in particular identity performances, and

²³⁹ Proponents of cultural commodification might claim that non-whiteness is no different than any other form of cultural property. In my view, the notion that *racial* identity is *cultural* property conflates the notions of race and culture. *See id.* Still, setting aside that objection, the argument might proceed along the following lines: people should be entitled to capitalize on non-whiteness—indeed, to do so is empowering because it imparts value to non-whiteness—and to deny the opportunity for commodification is to deny a source of power. But I think that there is an important distinction between capitalizing non-whiteness as a form of cultural property by those to whom it belongs and those to whom it does not. To the extent that non-whiteness itself is cultural property, when white people exploit the capital associated with non-whiteness, they appropriate that cultural property. This distinction removes the cultural property justification for many of the scenarios that most concern me in regard to the treatment of non-whiteness as capital.

inflicts economic harm by placing non-white individuals at the greater mercy of the market.²⁴⁰ These harms reinforce the inequality of non-white people to white people.

1. Fractured Identity

“I live a life that is often disjointed, troubling.”²⁴¹

Racial identity is a deeply personal characteristic that individuals negotiate throughout their lives.²⁴² As a key part of development, children and adolescents strive to establish a racial identity that is “coherent and continuous while also consistent with external representations.”²⁴³ This is particularly true with respect to non-white individuals who—unlike white individuals, whose race is largely “invisible”—are required to think about their race continuously and to engage in intricate identity performances.²⁴⁴ For non-white individuals, considerable social science research emphasizes the importance of racial identity formation to

²⁴⁰ In my view white people also suffer harm when their racial identities are commodified, but the harm is different because of the way that the diversity rationale and diversity thinking more generally have shaped our thinking about non-white identity. See *supra* Part I.B. Because my focus in this Article is on commodification of non-white identity, I will save expanded discussion for future work. See Nancy Leong, *Identity Capitalists* (draft on file with author).

²⁴¹ JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY* 7 (1995).

²⁴² See Rich, *supra* note 109, at 1172-86 (discussing racial identity formation and maintenance; collecting literature on same); Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 296-99 (2006) (examining the importance of racial identity formation for people of color in integrated America); Scott Cummings, *Affirmative Action and the Rhetoric of Individual Rights: Reclaiming Liberalism as a “Color-Conscious” Theory*, 13 HARV. BLACKLETTER L. J. 183 231-33 (1997) (examining individual struggle with racial identity).

²⁴³ Holning Lau, *Pluralism: A Principle for Children’s Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 329-335 (2007) (discussing work of Erik Erikson and James Marcia on identity development); see also Rich, *supra* note 109, at 1172-1186.

²⁴⁴ See Flagg, *supra* note 30, at 957 (“The most striking characteristic of whites’ consciousness of whiteness is that most of the time we don’t have any.”), see also *supra* notes 31-80.

individual self-esteem and comfort with their surroundings.²⁴⁵ Camille Gear Rich eloquently explains that “[f]or individuals who have chosen to enact a particular racial or ethnic identity, race/ethnicity associated practices provide certain assurances about their group position and importance in the world, even though they know that certain material or personal realities will not remain the same.”²⁴⁶ Negotiated and lived racial identity provides an important element of continuity in personhood.

Given the fundamental role that racial identity in fact plays in our lives, whole personhood requires integration of racial identity with one’s concept of self. Commodification of race instead disassociates racial identity from the individual; it separates identity from the person who lives that identity.²⁴⁷ The result of commodification is that race no longer forms one component of an integrated self. To borrow Marx’s vocabulary, two kinds of alienation result.²⁴⁸ Commodification of race results in alienation of racial identity in the sense that identity may be bought and sold on the market. It also results in alienation of racial identity in the sense that individuals are distanced from that aspect of their personhood. The treatment of race as a commodity thus fractures identity, impairing individuals’ relationship to a core personal trait. This rupture recalls Marx’s concern that “workers who internalize market rhetoric conceive of their own labor as a commodity separate from themselves as persons; they dissociate their daily life from their own self-conception.”²⁴⁹

²⁴⁵ Rich, *supra* note 109, at 1172-86; *see also* Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 296-99 (2006) (examining the importance of racial identity formation for people of color); Adriana J. Umaña-Taylor, *An Examination of Ethnic Identity and Self-Esteem with Diverse Populations: Exploration Variation by Ethnicity and Geography*, 13 CULTURAL DIVERSITY AND ETHNIC MINORITY PSYCHOLOGY 178 (2007) (describing empirical research which shows “a positive relationship between ethnic identity and indices of psychological well-being such as self-esteem”).

²⁴⁶ Rich, *supra* note 109, at 1180.

²⁴⁷ Scholars have noted the fragmentation of identity that results from commodification with respect to other identity categories as well. *See, e.g.*, David M. Skover & Kellye Y. Testy, *Lesbigay Identity as Commodity*, 90 CAL. L. REV. 223, 226 (2002) (discussing fragmentation of “lesbigay” identity).

²⁴⁸ Radin, *Market Inalienability*, *supra* note 218, at 1871 (discussing Marx).

²⁴⁹ *Id.* at 1907.

Such dissociation of racial identity undermines the effort that each individual puts forth into creating a cohesive, continuous racial identity. This concern recalls both the “identity” and “contextuality” elements of Radin’s conception of whole personhood.²⁵⁰ If identity resides in a self that is integrated and continuous over time, then commodification interrupts that continuity, causing a loss of control of identity. A non-white individual will struggle to maintain the integrity of her own racial identity if others are simultaneously assigning her identity market value and claiming its value for themselves. Likewise, if contextuality resides in the ability of self-constitution in relation to the environment of things and other people, commodification also usurps that ability. A non-white individual has little control over her relationship with her surroundings if her identity is merely a commodity to be used by herself and others alike for monetary gain.

Recall Diallo Shabazz.²⁵¹ When the University of Wisconsin photoshopped Shabazz into a photo on its admissions brochure, it did more than use his likeness for its own gain. It also interrupted his control over that likeness, and in so doing harmed the integrity of his identity. The same is true for his relationship with his environment. By photoshopping Shabazz’s image into a situation he had not chosen with people he had not sought, the University ran roughshod over Diallo’s efforts to forge a unique, personal way of relating to the world and interacting with the people in it. Not every instance of racial commodification so explicitly forecloses the goal of contextuality, but in many instances commodification interferes with an individual’s ability to shape his relationship with the world.

Identity harms ensue not only from the actual commodification and exchange of racial value on the market, but also from the use of market rhetoric in racial discourse.²⁵² Using market rhetoric to describe race denigrates race, not only separating people from their racial identity, but also degrading racial identity itself. When market rhetoric is applied to racial

²⁵⁰ *Id.* at 1904-05.

²⁵¹ *See supra* Part II.C.

²⁵² *cunningham, supra* note 98.

identity, that identity becomes a fungible object—one “replaceable with money or other objects; in fact, possessing a fungible object is the same as possessing money.”²⁵³ Such discourse trivializes racial identity by communicating that such identity may be valued in the market and described in market terms.

One might argue that commodifying non-whiteness could have benefits for non-white individuals’ self-esteem and sense of identity. So much value has been assigned to whiteness,²⁵⁴ both historically and currently, that there is an intuitive appeal to injecting the value of non-whiteness into our discourse as well. Or it may be psychologically beneficial to encourage non-white individuals to see their race as an asset given that so many social forces place it in the category of a liability.

Yet it seems unlikely that injecting the market value we assign to non-whiteness into our discourse will change the way we talk and think about race for the better. The value assigned to non-whiteness is not analogous to the value assigned to whiteness. Rather, whiteness resides at the top of the racial hierarchy, and the value assigned to non-whiteness is a highly specific and contingent form of value that leaves the higher status of whiteness untouched. Assigning value to non-whiteness therefore feels empty; a poor exchange for the many detriments to capitalizing non-whiteness that I have listed here.

2. Performance Demands

“I wanted to show that I was like white people. ‘Don’t be afraid. I’m one of the *good* blacks.’”²⁵⁵

Treating racial identity as a commodity places identity demands on non-white individuals. It pressures non-white people both to perform their non-whiteness *and* to perform it in a way palatable to the white majority. These accepted identity categories

²⁵³ Radin, *Market-Inalienability*, *supra* note 218, at 1880.

²⁵⁴ See *supra* Part I.

²⁵⁵ PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* 6 (2000).

and scripts then become self-perpetuating as social norms infuse case law and case law reinscribes social norms.²⁵⁶

The commodification of non-whiteness pushes individuals to make their non-whiteness salient because their access to various social goods is determined, in part, on their performance of non-whiteness. Non-white college applicants, for example, are frequently instructed to emphasize their non-whiteness in their admissions essays in order to prove themselves qualified for admission under the diversity rationale.²⁵⁷ Moreover, these identity demands do not disappear once a non-white person has matriculated at an educational institution or begun work at a company. Rather, when race is commodified and a person's added value is intertwined with her racial identity, the demand for production of that identity continues. Non-white individuals are therefore subject to ongoing pressure to justify their presence through performance of non-whiteness.²⁵⁸

Yet in this complex performance of racial identity, making non-whiteness salient is only the opening act. When racial identity is commodified, the value assigned to non-whiteness varies depending on tastes reflected in the market. Some manifestations of non-white identity are viewed far more favorably by the dominant white culture, and the non-white individual is rewarded for conforming his identity performance to those tastes.²⁵⁹ The dominant white culture prefers a version of blackness that is closer to Martin Luther King, Jr. than to Al Sharpton; closer to Wynton Marsalis than Lil Wayne. Thus, the non-white individual must thread the needle: she must be identifiably non-white to capitalize

²⁵⁶ See Kenneth Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 295 (1995) ("Law maintains a vocabulary of identities and sometimes even channels claims (and thus claimants) into recognized identity categories with conventional scripts for behavior."); see also Devon Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633, 634 (2009); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1381 (1988).

²⁵⁷ See Nancy Leong, *Multiracial Identity and Affirmative Action*, UCLA ASIAN PAC. AM. L.J. 1, 22 n.98 (2007).

²⁵⁸ FORD, *supra* note 79, at 59-64.

²⁵⁹ See, e.g., Carbado & Gulati, *The Fifth Black Woman*, *supra* note 110, at 714-19.

on her non-whiteness, yet the version of non-whiteness she performs must meet with white approval.

This continual process of identity management is burdensome for non-white individuals. In their discussion of identity work, Carbado and Gulati explain that, while “everyone works identity” to some degree, the greatest amount of identity work falls on outsiders to the dominant culture because they are subject to more negative stereotypes that they must work to overcome.²⁶⁰ Identity work has downsides: it is exhausting and consuming; “the outsider not only has to perform, but she has to perform well.”²⁶¹ Moreover, “[i]dentity performances can become a denial of self,”²⁶² or can backfire if the performance is identified as strategic.²⁶³ The costs of identity performance, then, are greater for non-white individuals.²⁶⁴

Case law reveals the double-edged sword of racial identity commodification: non-whiteness is valued, but only if performed according to a script approved by majority identity groups in the workplace. Many employers who have affirmative action plans nonetheless adopt policies hostile to some instances of racially-correlated identity performance, such as regulations banning certain hairstyles or non-English languages.²⁶⁵ A particularly clear example appears in *Equal Employment Opportunity Commission v. United Virginia Bank*, in which the Fourth Circuit examined the hiring practices of a bank that maintained an extensive affirmative action program yet repeatedly expressed disapproval in interview notes of “Afro, bush, or mod” hairstyles as well as the red hair of one black candidate.²⁶⁶

Even where a grooming policy does not explicitly ban an instance of racially-correlated identity performance, employers may still prefer to hire minorities who perform versions of identity

²⁶⁰ Carbado & Gulati, *Working Identity*, *supra* note 113, at 1269-70.

²⁶¹ *Id.* at 1291.

²⁶² *Id.* at 1288.

²⁶³ *Id.* at 1291.

²⁶⁴ For a discussion of the harms of ascribed identity scripts to democracy, see Holning Lau, *Identity Scripts and Democratic Deliberation*, 94 MINN. L. REV. 897, 915-930 (2010).

²⁶⁵ Rich, *supra* note 109.

²⁶⁶ 615 F.2d 147 (4th Cir. 1980).

more congenial to the dominant group.²⁶⁷ And—aware of these preferences—non-white people may feel obligated to perform their identity in a manner consistent with this unwritten code. For example, a Thai man whose name is difficult to pronounce for many native speakers of American English may feel obligated to adopt a nickname, or a black woman may feel pressure to expend effort and expense relaxing her hair, or an Indian woman may feel obligated to replace her saris with khakis and button down shirts. Such identity performances often demand time, money, and psychological resources. Thus, in addition to the disparate burden of identity management, non-white people are also subject to the disparate pressure of conformity to a workplace culture more distant from their own.

The distortion of racial identity performance also emerges in the way that non-white entertainers literally perform on television and in movies. The overall number of non-white individuals who appear in these forums is low,²⁶⁸ and even lower when one removes the shows and movies targeted at a non-white audience. The entertainment industry has been criticized for this underrepresentation, and powerful figures within that industry have expressed motivation to feature more people of color on screen.²⁶⁹ Part of the calculus—whether stated or unstated—is likely that increased inclusion of non-white people would benefit the

²⁶⁷ Green, *Work Culture*, *supra* note 110.

²⁶⁸ See, e.g., Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 21-23 (2007) (finding, in 2005 study, that 82% of lead roles in films grossing over one million dollars were played by white people); 2007 & 2008 SAG Casting Data, http://www.sag.org/files/sag/documents/2007-2008_CastingDataReports.pdf (citing statistics); Dave McNary, *SAG stats: Diversity Lags*, VARIETY, Oct. 23, 2009, <http://www.variety.com/article/VR1118010361?refCatId=1055> (racial minorities declined to 27.5% of all entertainers in 2008); Jennifer Armstrong & Margeaux Watson, *Diversity in Entertainment: Why Is TV So White?* ENTERTAINMENT WEEKLY, Jun. 13, 2008, <http://www.ew.com/ew/article/0,,20206185,00.html> (discussing lack of minority characters on television).

²⁶⁹ See, e.g., Brent Lang, *Hollywood Won't Learn: It's a White Summer Again*, THE WRAP, May 3, 2011, <http://www.thewrap.com/movies/article/hollywood-won%E2%80%99t-learn-it%E2%80%99s-white-summer-again-27050>.

entertainment industry financially by attracting both non-white audiences who wish to see members of their race depicted on the screen and white audiences who pride themselves on openmindedness to films featuring diverse casts.²⁷⁰

Yet despite the value that non-white identity has acquired within the industry, performance of that identity is consigned to a narrow set of scripts that meet with white approval. A quick perusal of the list of the ten highest-earning black actresses reveals that all but one wear their hair long and relaxed, in conformance with white norms of appearance.²⁷¹ In fall 2011, nearly every main character on twenty-seven new television shows were white, and black actors were often relegated to the stereotypical role of “black best friend.”²⁷² The role of a black best friend is “patiently explaining the magic of life to their white best friend, in ways only a cool, non-white person can,” and offering “wise advice, delivered with a dash of sass and the occasional finger snap.”²⁷³ Thus, black best friends “are often a diversity head fake—a quick way to make the casts of TV shows look racially diverse, without taking time to create real characters of color with story lines all their own.”²⁷⁴ Adherence to these scripts has psychic costs for the actors involved.²⁷⁵ And it also continues to reify the notion of acceptable identity performance to society at large, whose members consume and internalize the performances they see in television and movies.

Racial capitalism thus pressures non-white individuals to do identity work. Because part of their value in a particular setting is tied to their non-whiteness, they are subtly—or not-so-subtly—encouraged both to perform their non-whiteness and to do so in a way that meets with the approval of the dominant culture.

²⁷⁰ For example, consider films such as *The Help* and *Crash*.

²⁷¹ MarcinSLR, *Highest-Paid Black Actresses*, SOCYBERTY.COM, <http://socyberty.com/people/highest-paid-black-actresses/>.

²⁷² Eric Deggans, *How TV Shows Use BFFs to Appear Racially Diverse*, NPR.org, <http://www.npr.org/2011/10/11/141227508/on-tv-the-black-best-friend-concept-is-growing>.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Robinson, *Casting and Caste-ing*, *supra* note 268, at 27-28.

3. Economic Disadvantage

“I think they’ve gotten enough.”²⁷⁶

Apart from these identity harms, the commodification of race also has material negative consequences for individuals. Commodification renders racial minorities particularly vulnerable to broad fluctuations in market conditions. Polodny observes that, “[s]ince the value of status increases with uncertainty, [institutions] will be more willing to enter into exchange relations with lower-status partners when there is less uncertainty in the market.”²⁷⁷ Polodny is referring specifically to banks, which are demonstrably more hesitant to enter into transactions with lower-status partners when there is more risk involved in the transaction.²⁷⁸ But the principle may be extrapolated to interactions between employers and individual employees whose value is viewed—at least partially—as flowing from their non-whiteness. When market conditions worsen, prospective employees viewed as lower status—here, non-whites—are less likely to be hired, retained, and promoted.

Research suggests that white individuals are more hesitant to hire people of color in difficult economic times. Robert LeVine and Donald Campbell first noted this phenomenon in their account of realistic group conflict theory, which states that in-group bias increases in response to threats such as scarce resources.²⁷⁹ More recently, research led by Eden King found that white research subjects instructed to imagine that they were human resource assistant managers rated a hypothetical white male job applicant more positively and a Hispanic female applicant more negatively when the economy was expected to decline than when the

²⁷⁶ BONILLA-SILVA, *supra* note 166, at 81 (interview with “Roland”).

²⁷⁷ POLODNY, *supra* note 149, at 77.

²⁷⁸ *Id.* at 73-75

²⁷⁹ ROBERT ALAN LEVIN & DONALD THOMAS CAMPBELL, *ETHNOCENTRISM: THEORIES OF CONFLICT, ETHNIC ATTITUDES, AND GROUP BEHAVIOR* (1972); *see also* Victoria M. Esses et al., *Intergroup Competition and Attitudes Toward Immigrants and Immigration: An Experimental Model of Intergroup Conflict*, 54 J. OF SOC. ISSUES 699 (1998).

economy was expected to improve.²⁸⁰ Thinking of racial identity in economic terms encourages such outgroup bias.²⁸¹ As a result, white people and predominantly white institutions come to view racial diversity as simply another non-essential item—not unlike catered lunches or technology upgrades—to sacrifice in times of economic hardship.

Available real-world evidence supports the idea that assigning economic value to racial identity leaves non-white people vulnerable to fluctuations in the overall economy. A recent ABA study reported that diversity initiatives are often eliminated or reduced when economic hardship necessitates a spending cut.²⁸² And the statistics on the differential effect of the recent economic downturn on racial minorities paint an equally sobering picture. From 2009 to 2010, the overall unemployment rate increased from 9.3% to 9.5% overall, from 8.5% to 8.7% for whites, but from 14.8% to 16.0% for blacks.²⁸³ Some of the difference, of course, results from the overrepresentation of blacks in industries that tend to be more heavily affected by the economic downturn. But the magnitude of the difference also suggests another explanation—that, to the extent they believe it risky to invest in racial capital, employers will be less likely to do so during difficult economic times.²⁸⁴

²⁸⁰ Eden B. King et al., *The Influence of Economic Conditions on Aspects of Stigmatization*, 66 J. OF SOC. ISSUES 446, 453 (2011).

²⁸¹ *Id.* at 455-57.

²⁸² Karen Sloan, *The Recession is Undermining Diversity Initiatives*, THE NAT'L L.J., Feb. 4, 2010 (“[S]ince the economic recession began a year[] and a half ago . . . [s]pending on law firm diversity initiatives has dried up and layoffs are undoing the gains the profession has made.”). Indeed, difficult economic times may provide an opportunity for those already skeptical of diversity measures to advocate their curtailment. See Heather MacDonald, *Recession-Proof Diversity*, FORBES.COM, Jan. 10, 2009, at http://www.forbes.com/2009/01/09/harvard-diversity-lamont-oped-cx_hd_0110donald.html (“When one is cutting budgets, the most obvious items to target are those that don’t accomplish anything. The diversity racket fits that description to a tee.”).

²⁸³ United States Department of Labor, Bureau of Labor Statistics, *Unemployment Status of the Civilian Noninstitutional Population by Age, Sex, and Race*, available at <ftp://ftp.bls.gov/pub/special.requests/lf/aat5.txt>.

²⁸⁴ See, e.g., Center for American Progress, *Weathering the Storm: Black Men in the Recession*, at

Information from law firms also supports the idea that diversity declines during economic hardship. Vault's 2010 Law Firm Diversity Survey, which includes results from 260 firms, reports that "for the first time in the survey's seven-year history, the results showed virtually no increase in the percentage of minority equity partners, which remained stagnant at 6.06%" and that "minority recruitment was down at all levels," with minorities comprising only 19.09% of attorneys hired in 2009—less than the 21.77% hired in 2008.²⁸⁵ Moreover, the percentage of minority associates who left their firm increased to 16.64% in 2009 from 13.98% in 2008.²⁸⁶ Although these trends slowed in 2010, they did not reverse.²⁸⁷ Collectively, this information indicates that commodifying non-whiteness has negative economic consequences for non-white people.

C. Social Harms

Broader social harms also result from commodifying racial identity. Such commodification impoverishes our discourse around race, fosters racial resentment, and ultimately displaces more meaningful antiracist measures. These harms prevent progress towards eliminating racism and inequality.

http://www.americanprogress.org/issues/2009/04/black_men_recession.html (suggesting that economic downturn may exacerbate existing patterns of discrimination in hiring).

²⁸⁵ Mary Kate Sheridan, *Law Firm Diversity Progress Stalled by Economy*, VAULT'S LAW BLOG: LEGAL CAREERS AND INDUSTRY NEWS, Sept. 29, 2010, at http://www.vault.com/wps/portal/usa/blogs/entry-detail?blog_id=1260&entry_id=11908.

²⁸⁶ *Id.*

²⁸⁷ Vera Djordjevich, *Diverse Attorneys Making Progress But Still Behind on Partnership Prospects*, VAULT'S LAW BLOG: LEGAL CAREERS AND INDUSTRY NEWS, Sept. 27, 2011, http://www.vault.com/wps/portal/usa/blogs/entry-detail?blog_id=1260&entry_id=13651.

1. Impoverished Discourse

“[I]t’s very hard to talk about race . . . when myths, clichés, and bromides have so overrun the discourse.”²⁸⁸

We struggle to have good conversations about race. Commentators have examined this difficulty, both within and outside the academy.²⁸⁹ The news is full of conversations gone bad,²⁹⁰ and sometimes it seems like every internet thread involving race eventually degenerates into epithets and slurs.²⁹¹ Not long ago President Barack Obama called on Americans to have a conversation about race—and some groups responded—but it is hard to say whether this symbolic pronouncement and the response to it has advanced our national discourse.²⁹²

²⁸⁸ PATRICIA J. WILLIAMS, *SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE* 51 (1997).

²⁸⁹ BEVERLY DANIEL TATUM, *CAN WE TALK ABOUT RACE? AND OTHER CONVERSATIONS IN AN ERA OF SCHOOL RESEGREGATION* xiii, 83 (2007) (discussing conversations about race in cross-racial friendships); Richard Delgado, *Rodrigo’s Book of Manners—Standing, Imperial Scholarship, and Beyond*, 86 *GEO. L.J.* 1051 (1998) (proposing rules for conducting scholarly conversations about race); Matt Bai, *Race: Still Too Hot to Touch*, *N.Y. TIMES*, July 24, 2010, at <http://www.nytimes.com/2010/07/25/weekinreview/25bai.html> (discussing difficulty of racial discourse); Lynette Holloway, *Why Is Talking About Race So Hard?*, *THE ROOT*, Sept. 24, 2010, <http://www.theroot.com/buzz/why-talking-about-race-so-hard> (same).

²⁹⁰ Compare Gene Marks, *If I Were a Poor Black Kid*, *FORBES*, December 12, 2011, <http://www.forbes.com/sites/quickerbetteertech/2011/12/12/if-i-was-a-poor-black-kid/>, with Shamika Sanders, *My Rebuttal to “If I Were a Poor Black Kid [Written By a Middle Class, White Man]”*, *THE URBAN DAILY*, December 14, 2011, <http://theurbandaily.com/special-features/shamika-sanders/if-i-were-a-poor-black-kid-written-by-a-middle-class-white-man/>.

²⁹¹ See YAMAN AKDENIZ, *RACISM ON THE INTERNET* (2009); Jessie Daniels, *Race, Civil Rights, and Hate Speech in the Digital Era*, in *LEARNING RACE AND ETHNICITY: YOUTH AND DIGITAL MEDIA* (Anna Everett ed. 2008); Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 *SAN DIEGO L. REV.* 817 (2001).

²⁹² Larry Rother & Michael Luo, *Groups Respond to Obama’s Call for National Discussion About Race*, *N.Y. TIMES*, Mar. 20, 2008, at <http://www.nytimes.com/2008/03/20/us/politics/20race.html>.

Commodification of racial identity impoverishes our thought and discourse surrounding race. It infects the way we think about and talk to one other. As Radin explains: “Theories are formed in words. Fact- and value-commitments are present in the words we to reason and describe, and the shape our reasoning and description, and . . . reality itself.”²⁹³ Commodifying race causes us to think of it as just another *thing*—like bread or furniture—that we can take, use, consume, exploit, enjoy, and discard as we wish. This way of thinking is fundamentally at odds with an attitude of respect for racial identity. Rather than inculcating this better way of thinking, commodification precludes it.

An exaggerated thought experiment helps to make clear how the commodification of race affects our thinking and discourse about race.²⁹⁴ Radin, worrying about a domino effect with respect to the commodification of sex, asks, “What if sex were fully and openly commodified?” She invites us to envision a world in which sexual services are advertised pervasively, sexual partners can be ordered through catalogs or at trade shows, and recruitment and training of sex workers is carried out just as corporate headhunting and training is now. She concludes that “[a] change would occur in everyone’s discourse about sex.”²⁹⁵

Yet the futuristic world that Radin envisions with respect to the open commodification of sex is not so distant from the world we have now with respect to race. People advertise openly for sexual and romantic partners of particular races; indeed, some websites *require* users to indicate a racial preference in order to use the site.²⁹⁶ People actively seek friends of particular races.²⁹⁷ Schools and employers proclaim their interest in enrolling or hiring a “diverse” group of individuals. In higher education, admissions officers ponder, “how can we get more blacks?” and the question

²⁹³ Radin, *Market-Inalienability*, *supra* note 218, at 1882.

²⁹⁴ *Id.* at 1922.

²⁹⁵ *Id.*

²⁹⁶ Elizabeth Emens, *Intimate Discrimination: The State’s Role in Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1343-44 (2009)

²⁹⁷ Devin Friedman, *Will You Be My Black Friend?*, GQ Nov. 2008, available at <http://www.gq.com/news-politics/mens-lives/200810/devin-friedman-craigslist-oprah-black-white-friends-obama>.

does not feel so different from the question of “how can we get more of those really good ballpoint pens?”

Commodification of race, and the corresponding desire for racial commodities, continues to influence our thinking and our discourse. The desire for particular racial commodities that the diversity rationale inspires does not reflect what we might deem worthy feelings about race, such as a desire for respect or inclusion. Rather, it reveals a desire to improve institutional status by improving diversity numbers. This desire dehumanizes people of color by stripping away their individuality and replacing their personhood with a single detached attribute: their race. Further commodification would further dehumanize non-white people and further impair our ability to think and converse productively about race.

As things now stand, market rhetoric impoverishes our social discourse surrounding race. Couching conversations about race in market rhetoric limits racial discourse to discussions of deriving monetary value. If a law firm merely wants to hire more people of color so that it can display their pictures on its website and brag about its numerical diversity to its customers, then the firm’s conversation about race halts at hiring. Such a conversation does not allow for examination of the broader historical, experiential, and cultural dimensions of racial identity. The result is a discourse in which only a thin and visible version of racial identity is welcomed; other aspects of individuals’ racial identity are squeezed out and dismissed from view because they lack economic significance.

2. Racial Resentment

“Rent-a-Negro.com . . . allow[s] you the chance to promote your connection with a creative, articulate, friendly, attractive, and pleasing African American person. This service comes without the commitment of learning about racism, challenging your own white privilege, or being labeled ‘radical.’”²⁹⁸

Non-white individuals are well aware of attempts by white individuals and institutions to capitalize on non-whiteness. The sheer number of jokes and parodic writings I have documented here reveal a widespread awareness—at least in the nominally progressive circles on which I focus here—that non-whiteness is commodified in a range of settings.

This awareness of white attempts to capitalize on non-whiteness harms human relationships. Commodification of racial identity changes the meaning of interactions between individuals. In particular, commodification cheapens cross-racial interaction and attempts at cross-racial understanding. When race is viewed as a commodity, white people are encouraged to think of non-white people in terms of their instrumental value, not their intrinsic worth.

The behavior that commodification encourages among white people in turn fosters a pervasive cynicism among people of color, in which all white people are suspected of trying to diversify their friend group or fulfill a racial fetish. Would-be friends might be disingenuous; would-be lovers might be thrill-seeking.²⁹⁹ The market for race as a commodity gives rise to these suspicions, which ultimately pose an obstacle to the formation of cross-racial relationships that could dismantle racial barriers.

²⁹⁸ Rent-a-Negro.com, at <http://rent-a-negro.com/negroabout.html>.

²⁹⁹ See, e.g., Emens, *supra* note 296; Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, Adoption*, 17 HARV. BLACKLETTER L.J. 57, 66-70 (2001); Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787, 2805-08 (2008).

Moreover, commodifying non-whiteness fosters racially offensive behavior by white people. Performance artist damali ayo issues a stinging criticism of white attempts to capitalize on non-white identity through her satirical website Rent-a-Negro.com and a subsequent book entitled *How to Rent a Negro*.³⁰⁰ Her point is that blacks have been used by white people throughout history and continue to be used today. She explains: “As we all know, the purchase of African Americans was outlawed many years ago. Now, black people are once again a valued and popular commodity. These days those who boast of black friends and colleagues are on the cutting edge of social and political trends.”³⁰¹ ayo’s implication is clear: commodification breeds resentment, and resentment forecloses reconciliation. Moreover, commodification echoes the attitudes that engendered slavery and Jim Crow, rendering meaningful movement past that history impossible. Ultimately, ayo’s sarcastic use of market rhetoric mocks and makes explicit a commodification that in fact occurs unironically throughout society.

Importantly, such resentment and cynicism may result even if non-white individuals nominally acquiesce to the capitalization of their non-whiteness. Suppose that a young Asian lawyer receives an offer of employment from a prestigious law firm. The hiring partner explicitly tells her that the firm hired her in part because they wish to improve their “diversity numbers,” and from the moment she begins work at the firm it imposes identity demands on her ranging from photographing her for promotional materials to assigning her to work on a proposal for an Asian prospective client. The young lawyer may participate in these demands without objection; she may view them as the price of employment at the firm, a job she deeply wants, and may perceive that she will suffer negative repercussions if she objects to the firm’s demands. Nonetheless, the firm’s capitalization of her non-whiteness may result in feelings of objectification, disenchantment, and alienation. Although the lawyer “consents” to the capitalization of her non-whiteness in the sense that she continues

³⁰⁰ DAMALI AYO, *HOW TO RENT A NEGRO* (2005).

³⁰¹ *Id.* at 2.

to work at the firm, the resentment she feels as a result attests to the harm to racial relations the law firm's behavior has caused.

Capitalization of non-whiteness, then, infuses already-tenuous race relations with inauthenticity, cynicism, and resentment. Whites view non-whites as sources of racial capital, or, perhaps, fear that non-whites will suspect them of capitalizing. Non-whites suspect their non-whiteness is being capitalized, even when, perhaps, there is no such intent. Within this maze of suspicion the opportunity for genuine improvement in racial relations is often lost.

3. Displaced Reform

“In the spirit of celebrating diversity at Iowa State University, a black guy was digitally added to the cover of the school's 2001 spring semester course catalog, school officials announced Monday.”³⁰²

Racial capitalism impedes progress toward racial equality. Given our nation's history of slavery, the exchange of racial commodities evokes the era in which blacks and Native Americans were enslaved on the basis of race. Indeed, the era of racialized slavery is not yet over: much modern slavery in America still tracks racial fault lines.³⁰³ Commodification of race cannot occur without evoking this social meaning. By reminding us of a time

³⁰² *Black Guy Photoshopped In*, THE ONION, Dec. 6, 2000, available at <http://www.theonion.com/articles/black-guy-photoshopped-in,1433/>.

³⁰³ Janice G. Raymond & Donna M. Hughes, *Sex Trafficking of Women in the United States: International and Domestic Trends*, COALITION AGAINST TRAFFICKING IN WOMEN (March 2001), http://www.heart-intl.net/HEART/081004/sex_traff_us.pdf (discussing research, based on the writings of men who solicited prostitutes, that showed women were marketed according to racist stereotypes, and johns often chose a woman/girl because of her race and had sexual expectations which aligned with racial stereotypes); *Asian Massage Parlors*, POLARIS PROJECT (2010), <http://www.polarisproject.org/human-trafficking/sex-trafficking-in-the-us/massage-parlors> (stating that there are over 5,000 brothels, disguised as massage parlors, in the United States, in which Asian sex slaves are forced to have sex with customers).

when racialized bodies were commodified, the commodification of race makes profound historical inequality a continuing reality.

From a forward-looking perspective, treating race as a commodity leads to a preoccupation with bare numerical diversity at the expense of more meaningful markers of antidiscrimination progress. Accruing the economically beneficial features of non-whiteness becomes an end in itself rather than a means to the end of racial equality.

First, preoccupation with numerical diversity often replaces efforts to make meaningful changes in institutional culture. Writing about the workplace, Tristin Green argues that “[t]he problem with work culture from an antidiscrimination perspective is that the process of social interaction is likely to be infected with discriminatory bias, leading to work cultures that are defined and imposed along racial and gender lines.”³⁰⁴ Failure to make changes in work culture, therefore, often means that non-white employees will fail to thrive in a particular workplace regardless whether the workplace has achieved the numerical diversity toward which racial capitalism strives.

Preoccupation with numerical diversity in educational institutions leads to an analogous failing. Colleges and universities across the country are intent on acquiring adequate diversity statistics to report to their boards of trustees, post on their websites, and cite to prospective students. Yet at the same time they may fail to take measures to ensure that non-white students integrate into campus life,³⁰⁵ succeed academically, and have access to job opportunities after graduation. Such failings undoubtedly explain much of the disparity between the academic performance of whites

³⁰⁴ Green, *supra* note 110, at 643-53; *see also* Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1904-08 1931, 1936 (explaining that implicit racial biases may be exacerbated when people feel forced to comply with nondiscrimination norms).

³⁰⁵ *See, e.g.,* Note, *Educational Benefits Realized, Universities' Post-Admissions Policies and the Diversity Rationale*, 124 HARV. L. REV. 527 (2010) (“Research suggests not only that institutional intervention is necessary to reap the benefits of structural diversity, but also that increasing only the structural diversity of an institution, without further intervention, may actually produce negative effects for students.”).

and non-whites, and might likewise help to explain the disparity in bar passage rates between whites and non-whites.³⁰⁶

The effort—or lack thereof—to reform institutional culture marks the dramatic difference between numerical racial diversity and racial inclusiveness. Yet this focus on numerical diversity follows directly from racial capitalism.

Moreover, preoccupation with numerical diversity often preempts a more nuanced understanding of institutional demographics. Within educational institutions, for instance, some admissions offices focus single-mindedly on how many students they can report as falling within the crude categories of “Asian,” “Black,” or “Latino,” while remaining ignorant of more granular disparities within those categories. Among Asians enrolled in colleges and universities, for example, individuals who identify as Chinese, Japanese, and Korean are well represented, but Thai, Lao, and Burmese remain underrepresented.³⁰⁷ Among those who identify as black, immigrants from African nations and their children are overrepresented, as are racially mixed individuals, while those who had four grandparents born in the United States are dramatically underrepresented.³⁰⁸ And among those who identify as Latino, those of Mexican and Puerto Rican descent are often underrepresented in educational settings.³⁰⁹

Surely numerical diversity is a prerequisite for accomplishing antidiscrimination goals of equality and just

³⁰⁶ See, e.g., Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, available at http://www.ncbex.org/uploads/user_docrepos/660497_Klein_Bolus.pdf (explaining that non-white bar exam takers are less likely to pass than white exam takers, but that most of this disparity is explained by differences in law school grades).

³⁰⁷ Brest & Oshige, *supra* note 68.

³⁰⁸ For example, a survey of 70% of Black undergraduates at Harvard conducted by the university’s Black student organization found that only about a third of students had four grandparents who were born in the United States. See Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES, June 24, 2004, at A1.

³⁰⁹ See, e.g., Kevin Brown & Tom I. Romero II, *The Social Reconstruction of Race and Ethnicity of The Nation’s Law Students: A Request to the ABA, AALS and LSAC for Changes in New Reporting Requirement 28-29* (Draft, Sept. 14, 2011).

distribution of social goods. But much more than numerical diversity is also necessary: institutions must also make efforts to integrate their constituencies and foster good racial relations. Racial capitalism interferes with this ideal version of inclusive thinking because capitalization is complete at the time a non-white student matriculates or a non-white employee is hired—that is, it leads only to the question of “how many of them can we count?” while bypassing the more important question of “how can we include everyone who is here?” Racial capitalism thus does nothing to foster robust inclusive measures. Indeed, it diverts attention away from them.

One might argue that even if white individuals and institutions engage in racial capitalism for reasons we find repellent, there may be collateral consequences to such capitalism that we desire. Suppose, for instance, that the management of a company seeks out non-white employees for precisely the worst reasons: they wish only to shield the company from litigation and to capture the image of the non-white employees in promotional materials featured on the company’s website and printed literature. Nonetheless, the company’s motivation leads it to take actions that result in a more diverse workforce, and perhaps even to place non-white individuals in prominent and powerful positions within the company.³¹⁰ We might hypothesize that, in the aggregate, the greater presence and influence of non-white individuals in the company’s work force will lead to changes in the workplace culture, ultimately making it more inclusive and more congenial to individuals of all races.³¹¹

On the basis of presence alone, however, reform seems unlikely. Changing workplace culture is a complicated endeavor, difficult to undertake successfully even with strong institutional support.³¹² An institution interested in non-whiteness only as capital is unlikely to provide that support. And so I am skeptical

³¹⁰ Cf. Shin & Gulati, *supra* note 162.

³¹¹ See, e.g., Katherine T. Bartlett, *Showcasing: The Positive Spin*, 89 N.C. L. REV. 1055, 1068 (2011).

³¹² Green, *supra* note 110, at 664-82.

that the bare presence of non-white individuals in incrementally greater numbers will change the culture of the company.³¹³

IV. A WAY FORWARD

Racial capitalism is rampant in American society. As I have shown, the commodification of non-whiteness harms both non-white individuals and society as a whole. But how do we decommodify race? In this relatively brief Part, I sketch the contours of a solution to the problem of racial capitalism. My account is intentionally impressionistic, and this Article will serve as a foundation for future work offering both broader discussion of identity capitalism and a more detailed account of how we should go about decommodifying race.³¹⁴

The first obstacle is that decommodification poses what Radin describes as a “transition problem”: there are difficulties inherent in moving from our current, nonideal world to an ideal one.³¹⁵ With respect to race, the view of race as a commodity is so deeply wrought in our collective imagination that it will take time to work the fundamental change in individual minds and collective social norms necessary for decommodification. Yet even if instant decommodification were possible, the prospect raises what Radin describes as a “double bind”: commodification powerfully symbolizes and legitimates racial hierarchy, yet an immediate, wholesale decommodification of race would freeze existing racial hierarchies as they currently stand.³¹⁶

³¹³ Perhaps implicit in my argument is the assumption that the change in numerical diversity will not be that great if the company wants only to protect itself from litigation and to have people of color around for display purposes. Of course, if a company’s non-white representation were to increase from 5% to 80%, it seems far more likely that the culture of the company would change to a more inclusive one. But if the company’s reasons for seeking out non-white individuals are limited to the purely self-interested ones I have associated with capitalizing non-whiteness, it seems unrealistic to believe that the company would engage in behavior that would result in such a dramatic change in its workforce. Such goals can be accomplished with a much smaller change in the demographics of those that the company employs.

³¹⁴ See Nancy Leong, *Identity Capitalists* (manuscript on file with author).

³¹⁵ Radin, *Market-Inalienability*, *supra* note 218, at 1875-1878, 1915-20.

³¹⁶ *Id.* at 1915-17.

Radin's approach to these difficulties is a pragmatic one.³¹⁷ In the nonideal world in which we live, "it may sometimes be better to commodify incompletely than not to commodify at all," and "in choosing the best alternative now available to us . . . we may have to tolerate some things that would count as harms in our ideal world."³¹⁸ Put another way, "[w]e cannot make progress toward the noncommodification that might exist under ideal conditions of equality and freedom by trying to maintain noncommodification now under historically determined conditions of inequality and bondage."³¹⁹ The challenge, then, is to "structure an incomplete commodification that takes account of our nonideal world, yet does not foreclose progress to a better world."³²⁰

Radin analyzes the transition problem in the contexts of sexuality and family life. Taking the transition problem into account leads her to conclude that the commodification of sex, infants and surrogacy impedes human flourishing, and that in an ideal world such things would ideally remain market-inalienable.³²¹ In our nonideal world, however, she believes that the sale of sexual services should be governed by a regime of incomplete commodification.³²² We should decriminalize the sale of sexual services, but we should work to prevent a domino effect of sexual commodification by banning pimping, recruitment, and advertising.³²³

The commodification of race raises a particularly difficult transition problem. As I discussed in Part III, many harms ensue from commodification, and collectively, these harms instantiate inequality. In an ideal world race would not be commodified. Yet the harms that ensue from commodification in the present also highlight the difficulty of disallowing commodification. Racism and discrimination are deeply entrenched both in the very structure of society and in the hearts and minds of even the best intentioned of us. Although the diversity rationale has reinforced a way of

³¹⁷ MARGARET JANE RADIN, *CONTESTED COMMODITIES* 14 (1996).

³¹⁸ Radin, *Market-Inalienability*, *supra* note 218, at 1903, 1915.

³¹⁹ *Id.* at 1916.

³²⁰ *Id.* at 1924.

³²¹ *Id.* at 1921-36.

³²² *Id.* at 1924.

³²³ *Id.* at 1925.

thinking of race as a commodity, it has also had material positive effects on the life trajectories of many individuals.³²⁴ To wholly commodify race now would remove a potential tool—flawed, but not entirely useless—for addressing lingering social inequality.

I therefore propose a solution of reactive commodification.³²⁵ We should discourage commodification of racial identity. But when commodification does occur, we should respond to it by identifying it as commodification, calling attention to its harms, and ensuring that non-white people receive compensation for the commodification of their racial identity. Where possible, some of the compensatory measures should be directed to the project of furthering equality and reducing future commodification, and the transaction should be structured so as to express those goals.³²⁶

Consider the following three examples arising in the social, educational, and employment contexts. Albeit satirically, *How to Rent a Negro* illustrate the possible implementation of reactive commodification in social settings. *ayo* envisions a fantasy world where white people have to *pay* when they use (or, as she puts it, “rent”) black people in social settings. That is, “renting” a black person as a way of demonstrating one’s own non-racism, or as a way of diversifying one’s social circle, requires compensating the black person for that use. *ayo* suggests that many white people may be “behind in their rental payments,” and imagines presenting white people with bills for services rendered. Of course, explicit rentals are both improbable and undesirable, but they do suggest how reactive commodification might be implemented. A non-white person who finds herself used in a social setting might call attention to the behavior of the person using her—“It’s offensive when you keep referring to me as your black friend.”

³²⁴ See generally WILLIAM B. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (2000).

³²⁵ This solution shares some characteristics with the regime of “incomplete commodification” that Radin prescribes for the commodification of sex. *Id.* at 1921-25. I have chosen the term “reactive commodification” as a more specific way of describing the limited role I see for commodification in our current society.

³²⁶ See Cohen, *supra* note 217.

In the educational context, consider Diallo Shabazz. Shabazz did not seek commodification of his racial identity. But when the school commodified him by photoshopping him into its admission brochure, he responded in accordance with the principles of reactive commodification. He objected publically to the use of his racial identity and brought attention to its harms in a concrete way by filing a lawsuit. The form of relief he sought—a “budgetary apology”—made clear that commodification had taken place. Shabazz even found a way to acknowledge and reject commodification simultaneously. He acknowledged the commodification by imposing a monetary cost to the school, but rejected the thinking implicit in commodification by seeking forward-looking measures that would ameliorate racial inequality rather than simply seeking financial gain for himself. In Cohen’s terms, this framed the transaction in a way that expressed the goal of racial equality rather than racial capitalism.³²⁷

Reactive commodification can also be implemented in the workplace. Non-white employees who find themselves constantly pulled into photos for the company website or saddled with obligations to mentor more junior employees who happen to be the same race can call their employer’s attention to this use.³²⁸ In so doing, they may be able to gain input into the employer’s practices, including outreach, hiring, and marketing. This input may result in the employer changing its practices in a way that both improves racial relations in the workplace and reduces the incidence of racial commodification.

A transitional period of reactive commodification may have some limited benefits in reshaping the way that we think about race. If, for example, employees see that non-whiteness is valued in the workplace, or if students see that non-whiteness is valued at their college, they may come to agree that it is valued. Katherine Bartlett argues that showcasing women and people of color in leadership positions may result in such benefits because “the

³²⁷ See Cohen, *supra* note 217.

³²⁸ This strategy emphasizes that numbers, while not sufficient, are necessary for change. Solidarity among non-white people and progressive allies, including other members of groups whose identity is commodified, is a critical component. A person who advocates change alone may be labeled “not a team player” and eventually sidelined.

presence of female and minority leadership positions operates indirectly to reduce implicit bias” and, more broadly, “[p]ositive attitudes strengthen positive attitudes.”³²⁹

I agree that positive depictions of non-white individuals, in sufficient quantities, have the potential to reduce implicit bias and other negative psychological reactions. Thus, a carefully circumscribed and contextualized form of commodification is not inherently inconsistent with improving the situation of non-white people in the long run. Suppose, for example, that a company commodifies a non-white person by placing her in a leadership position in order to improve relations with customers and enhance its recruiting efforts. Even if the majority of the company’s decisionmakers view the commodification in cynical and purely financial terms, the commodified individual and her allies may still turn the commodification into a net gain by contextualizing it for those within and outside the company.

The strategies of reactive commodification serve as a guide for how such contextualization may take place. As I have discussed, commodification risks promoting a view of non-white individuals as commodities rather than as role models to be admired. Moreover, the backlash against affirmative action programs suggests that simply announcing that non-whiteness is valued via hiring or promotion of non-white individuals may have precisely the opposite effect from what its proponents intend. Nonetheless, an individual placed in a leadership position may acquire the power to articulate the deficiencies of the current system. She may be able to explain to the company leadership what is wrong with their beliefs about race. She may be able to articulate to other employees a better set of beliefs. At the same time, her presence may defuse stereotypes and prejudices: social science research suggests that increased exposure tends to defuse such irrational cognitive biases.³³⁰ And her racial identity may have powerful symbolic value, encouraging and inspiring other employees.³³¹

³²⁹ Bartlett, *Showcasing*, *supra* note 311, at 1061-64.

³³⁰ *Id.* at 1061 n.29 (collecting research).

³³¹ Some scholars have described this as the “multiplier effect.” *See* Brest & Oshige, *supra* note 68.

In an ideal society, non-whiteness would not function as capital and race would have no bearing on our social and economic status. But we live in a flawed society of injustice and inequality. In our current society, then, commodification has a circumscribed role as we transition toward a better one.

CONCLUSION

Racial capitalism is both pervasive and troubling. It harms individuals—particularly non-white individuals—and impedes social progress toward racial equality. My view is that—ultimately—we should end racial capitalism. We should instead promote more robust forms of social capital that strengthen both interracial and intraracial networks, thereby furthering inclusiveness in social, educational, and employment settings while preserving respect for racial identity.

Some might argue that commodification of racial identity, and the use of racial identity as capital, is inevitable, even in the best possible world. One colleague with whom I discussed this project observed that his experience was that being a person of color within an institution means that “you’re going to get used,” and that the best and only response was to make sure you get enough in return. But my own view is that commodification is not inevitable. Decommodifying identity may take a great deal of effort across generations, but in the end I think it could happen. With persistence and courage, I think we could get there.