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ARTICLE

RACIAL CAPITALISM

*Nancy Leong*

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## RACIAL CAPITALISM

Nancy Leong\*

*Racial capitalism — the process of deriving social and economic value from the racial identity of another person — 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 nonwhite people to acquire social and economic value. Affirmative action doctrines and policies provide much of the impetus for this form of racial capitalism. These doctrines and policies have 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 deriving value from nonwhite racial identity.*

*Racial capitalism has serious negative consequences both for individuals and for society as a whole. The process of racial capitalism relies upon and reinforces commodification of racial identity, thereby degrading that identity by reducing it to another thing to be bought and sold. Commodification can also foster racial resentment by causing nonwhite people to feel used or exploited by white people. And the superficial process of assigning value to nonwhiteness within a system of racial capitalism displaces measures that would lead to meaningful social reform.*

*In an ideal society, racial capitalism would not occur. Given the imperfections of our current society, however, this Article proposes a pragmatic approach to dismantling racial capitalism, one that recognizes that progress must occur incrementally. Such an approach would require a transition period of limited commodification during which we would discourage racial capitalism. Moreover, we would ensure that any transaction involving racial value is structured to discourage future racial capitalism. I briefly survey some of the various legal mechanisms that can be deployed to discourage racial capitalism through limited commodification. Ultimately, this approach will 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.”<sup>1</sup>

A white man posts an ad on Craigslist explaining that he wants to make black friends.<sup>2</sup> A political figure accused of racial indifference casually refers to a black friend while addressing the NAACP.<sup>3</sup> Administrators at a predominantly white university, concerned that prospective students will be deterred by the school’s racial homogeneity, authorize the use of Photoshop to add a black student to the photo on the cover of the university’s application brochure.<sup>4</sup> A predominantly white company, facing an array of lawsuits alleging race discrimination,<sup>5</sup> aggressively recruits and hires nonwhite employees in order to create a track record of minority representation.<sup>6</sup>

Each of these incidents involves what I will call *racial capitalism* — the process of deriving social or economic value from the racial identity of another person.<sup>7</sup> 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

<sup>1</sup> Alex Haley, *Playboy Interview: Malcolm X*, PLAYBOY, May 1963, at 53, 57 (quoting Malcolm X).

<sup>2</sup> Devin Friedman, *Will You Be My Black Friend?*, GQ, Nov. 2008, at 185, available at <http://www.gq.com/news-politics/mens-lives/200810/devin-friedman-craigslist-oprah-black-white-friends-obama>.

<sup>3</sup> Sheryl Gay Stolberg, *In Speech to N.A.A.C.P., Bush Offers Reconciliation*, N.Y. TIMES, July 21, 2006, at A16, available at <http://www.nytimes.com/2006/07/21/washington/21bush.html>.

<sup>4</sup> William Claiborne, *School’s Diversity Too Good to Be True*, S.F. CHRON., Sept. 21, 2000, at A2, available at <http://www.sfgate.com/education/article/School-s-Diversity-Too-Good-to-Be-True-2737946.php>.

<sup>5</sup> See *Wal-Mart Settles Lawsuit on Hiring*, N.Y. TIMES, Feb. 21, 2009, at B2, available at <http://www.nytimes.com/2009/02/21/business/21walmart.html>; Press Release, Maumelle Med. Clinics, Inc., *Racial Discrimination Action Against Wal-Mart Trial Date Set* (Nov. 21, 2009), available at <http://www.prnewswire.com/news-releases/racial-discrimination-action-against-wal-mart-trial-date-set-pre-trial-testimony-shows-wal-mart-spied-on-african-americans-at-in-store-clinic-says-maumelle-medical-clinics-ceo-jerry-poole-134230188.html>.

<sup>6</sup> While of course outsiders cannot know the true reason underlying any company’s interest in increasing its racial diversity, in some instances those reasons correlate with negative publicity relating to discrimination lawsuits. Compare *Wal-Mart Settles Lawsuit on Hiring*, *supra* note 5 (discussing lawsuit initiated in 2004), with Press Release, Wal-Mart Stores, Inc., *Wal-Mart Details Progress Toward Becoming a Leader in Employment Practices* (June 4, 2004), available at <http://www.prnewswire.com/news-releases/wal-mart-details-progress-toward-becoming-a-leader-in-employment-practices-74373262.html> (detailing Walmart’s diversity initiatives from 2003 to 2004).

<sup>7</sup> Racial capitalism necessarily involves deriving value from the racial identity of another person. Subsequently, for the sake of brevity, I do not always state this proposition explicitly. While individuals may also derive value from their own racial identities, this practice is not racial capitalism. I discuss this phenomenon in future work. See Nancy Leong, *Identity Entrepreneurs* (Mar. 22, 2013) (unpublished manuscript) (on file with the Harvard Law School Library).

in which a white individual or a predominantly white institution<sup>8</sup> derives social or economic value from associating with individuals with nonwhite racial identities.<sup>9</sup> Such racial capitalism is common. In a society preoccupied with diversity, nonwhiteness is a valued commodity. And where that society is founded on capitalism, it is unsurprising that the commodity of nonwhiteness 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 white people and predominantly white institutions derive value from nonwhiteness. Of course, assigning value to race is nothing new in America. Whiteness has been a source of value throughout our history, conferring power and privilege on the possessor. For centuries, American courts explicitly recognized the value of whiteness — for example, numerous courts held that calling a white person “black” constituted defamation and therefore qualified for legal redress.<sup>10</sup> Litigants have also acknowledged the value of whiteness — for example, in *Plessy v. Ferguson*,<sup>11</sup> Homer Plessy referred to the perception of his whiteness as the “most valuable sort of property . . . the master-key that unlocks the golden door of opportunity.”<sup>12</sup> And scholars have examined the value of whiteness — for example, Cheryl Harris’s 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.<sup>13</sup>

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<sup>8</sup> Throughout the Article, my analysis will at times employ an oversimplified and arguably essentializing conception of whiteness and nonwhiteness. This oversimplification is necessary to introduce the analytical framework of racial capitalism that I develop here. I recognize that this oversimplified 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 CALIF. L. REV. 1497, 1503–04 (2010) (arguing that the interests of low-status whites have sometimes been sacrificed to defend the racial privilege of high-status whites). 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. Cf. generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing the ways in which the intersection of gender and race affects black women). 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 Leong, *supra* note 7.

<sup>9</sup> While all manifestations of racial capitalism are worthy of study, the form in which white people and predominantly white institutions capitalize on nonwhiteness has unique symbolic and practical implications. I will focus on this manifestation throughout this Article.

<sup>10</sup> See J.H. Crabb, Annotation, *Libel and Slander: Statements Respecting Race, Color or Nationality as Actionable*, 46 A.L.R.2d 1287 (1956).

<sup>11</sup> 163 U.S. 537 (1896).

<sup>12</sup> Brief for Plaintiff in Error at 9, *Plessy*, 163 U.S. 537 (No. 210).

<sup>13</sup> Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1734–37 (1993).

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Nonwhiteness has been valued differently and more ambiguously. The practice of using nonwhiteness as a justification for the commodification of nonwhite individuals is older than America itself, as our bitter history of slavery demonstrates. For centuries, nonwhiteness was used as a basis for *withholding* value by denying nonwhite people legal rights and privileges. More recently, however, nonwhiteness has been considered a source of value; decisions such as *Regents of the University of California v. Bakke*<sup>14</sup> and *Grutter v. Bollinger*<sup>15</sup> have validated 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. In part as a result of judicial action, nonwhiteness has acquired a new sort of value. We have internalized the idea that racial diversity is a social good, and as a result, we assign value to the inclusion of nonwhite individuals in our social milieu, our educational institutions, and our workplaces. Nonwhiteness 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 efforts of colleges and universities, employers, and other institutions to promote racial diversity should be celebrated, not disparaged. But problems with racial capitalism arise when white individuals and predominantly white institutions seek and achieve racial diversity without examining their motives and practices. Striving for numerical diversity, without more, results in awareness of nonwhiteness only in its thinnest form — as a bare marker of difference and a signal of presence. This superficial view of diversity consequently leads white individuals and predominantly white institutions to treat nonwhiteness as a prized commodity rather than as a cherished and personal manifestation of identity. Affiliation with nonwhite individuals thus becomes merely a useful means for white individuals and predominantly white 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 nonwhiteness — and race more generally — as a personal characteristic intrinsically deserving of respect. Worse still, the instrumental view of nonwhiteness inhibits efforts at genuine racial inclusiveness and cross-racial understanding.

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<sup>14</sup> 438 U.S. 265 (1978).

<sup>15</sup> 539 U.S. 306 (2003).

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The irony, then, is that our legal and social emphasis on diversity — while intended to produce progress toward a racially egalitarian society — has instead in many cases contributed to a state of affairs that degrades nonwhiteness by commodifying it and that relegates nonwhite individuals to the status of “trophies” or “passive emblems.”<sup>16</sup> Racial capitalism frequently does not benefit the nonwhite individuals whose identities are the source of capital, nor does it necessarily benefit society as a whole.

Racial capitalism is troubling on both a symbolic and a practical level. When white people and predominantly white institutions commodify nonwhiteness 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 nonwhiteness — and nonwhite 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 nonwhite 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. Throughout American history, whiteness has provided social and economic value to those who possess it; this trend continues today. For much of this history, nonwhiteness has had the opposite effect, diminishing one’s status and, for centuries, 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 nonwhiteness. The irony, however, is that the value of nonwhiteness is still largely measured by its worth to white people and predominantly white institutions.

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 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 deriving economic and social value from the racial identity of another person. While any racial identity might be commodified and exchanged<sup>17</sup> in a manner that generates capital, my focus in this Article is on the way that nonwhiteness is capitalized as a consequence of the preoccupation with diversity.

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<sup>16</sup> Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1041 (2011).

<sup>17</sup> 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 *infra* section II.B, pp. 2183–90.

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Thus, the form of racial capitalism with which I am most concerned is one in which white individuals or predominantly white institutions exploit relationships or affiliations with nonwhite individuals in order to accumulate for themselves the capital associated with nonwhiteness. Acquiring such racial capital involves an underacknowledged exchange — for example, a white individual or predominantly white institution might offer a nonwhite 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.<sup>18</sup>

Part III raises serious concerns regarding racial capitalism and the commodification of nonwhiteness. I lay the groundwork for my critique by discussing the theoretical literature on commodification. I then turn to the commodification of race. Commodification of racial identity precedes and enables racial capitalism, but racial capitalism instantiates the commodification of race and intensifies its harms. One set of concerns with commodification relates to the harm that nonwhite 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 prioritizing racial representation at its thinnest and most tokenistic. These serious concerns lead to my conclusion that racial capitalism is a net loss for everyone.

Part IV offers a way forward. In an ideal world, racial capitalism and the commodification of nonwhiteness it entails would not occur. But in our imperfect world, still tarnished by the stain of racism, an immediate, wholesale decommodification of identity would be unfeasible and would have the negative consequence of freezing current racial hierarchies as they now exist. I therefore offer a pragmatic proposal entailing a transition period of limited commodification. During this transition, we should discourage racial capitalism. But when racial capitalism does occur, we should respond to it by explicitly identifying it, calling attention to its harms, and ensuring that the transaction of racial value is structured in a way that discourages future racial capitalism. The Article concludes with some thoughts about how we

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<sup>18</sup> 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 nonwhiteness.

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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 nonwhiteness was a source of value only insofar as it allowed possession of a nonwhite person as property. That is, whiteness was valued in itself, while nonwhiteness provided whites with justification for deriving value from another person. For nearly a century after the Civil War, this function of nonwhiteness continued, though without the official label of slavery. In recent years, however, our increased legal and social preoccupation with diversity has shifted the way that we value nonwhiteness. Nonwhiteness 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.”<sup>19</sup>

This section 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 by functioning as property.

Historically, whiteness contributed to a racialized conception of property in several ways. One way was to 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 those of black people, although some Native Americans were also enslaved.<sup>20</sup> Whiteness both allowed ownership of property and insulated those considered white from becoming the property of others.

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<sup>19</sup> LOUIS C.K., *I Enjoy Being White*, on CHEWED UP (Image Entertainment 2008). Here and throughout the Article, I draw upon jokes and other comic sources for sociological insight. As Sigmund Freud observed, 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 generally, e.g., SIGMUND FREUD, *JOKES AND THEIR RELATION TO THE UNCONSCIOUS* (James Strachey ed. & trans., 1960) (1905). To examine our jokes, then, is to unearth our collective social preoccupations.

<sup>20</sup> See Laurence Armand French, *Native American Reparations: Five Hundred Years and Counting*, in *WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND*

Whiteness itself 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 opportunities to use personal faculties.”<sup>21</sup> 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 white people could lay claim by virtue of their whiteness. Because whiteness enabled access to these entitlements, it was itself valuable property.

Whiteness also functioned as traditional property by conferring the right to exclude — what Thomas Merrill has called the “*sine qua non*” of property.<sup>22</sup> White individuals and institutions had the power to police their own boundaries by deciding who was and was not white.<sup>23</sup> 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.”<sup>24</sup> Via mechanisms such as the one-drop rule,<sup>25</sup> 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 endows the owners with certain privileges flowing from a public conception of their identity and personhood.<sup>26</sup> In *Plessy v. Ferguson*, Plessy’s brief complained that, by consigning him to the “colored” car even though he was seven-eighths white,<sup>27</sup> the state law mandating this separation deprived him of the “most valuable sort of property . . . the master-key that unlocks the golden door of opportunity.”<sup>28</sup> That is, the law deprived him of his whiteness and the privilege that accompanied it. Also in the era of *Plessy*, courts further contributed to the value of whiteness — and

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REPARATIONS FOR HUMAN INJUSTICE 241, 242 (Roy L. Brooks ed., 1999) (“Contrary to popular belief, Indian slavery was not unusual during the colonial era.”).

<sup>21</sup> Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 129 (1990).

<sup>22</sup> Thomas W. Merrill, Essay, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

<sup>23</sup> See, e.g., IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 78–108 (2006).

<sup>24</sup> *Id.* at 78.

<sup>25</sup> A history of the one-drop rule, according to which any amount of black ancestry was sufficient to mark a person as nonwhite, is offered in F. JAMES DAVIS, *WHO IS BLACK?* 5 (1991).

<sup>26</sup> Harris, *supra* note 13, at 1734.

<sup>27</sup> Brief for Plaintiff in Error, *supra* note 12, at 3.

<sup>28</sup> *Id.* at 9.

thus reified the property interest in it — by recognizing defamation actions predicated on false denial of someone’s whiteness.<sup>29</sup> As J. Allen Douglas explains, “courts . . . created the value in white honor and white subjectivity by etching racial boundaries around the right of reputation in whiteness.”<sup>30</sup>

Whiteness as property persists today.<sup>31</sup> It continues to confer privilege on those individuals who possess it.<sup>32</sup> It also continues to allow exclusion, as predominantly white institutions continue to police the boundaries of whiteness by creating the racial categories to which others are relegated.<sup>33</sup> The existing distribution of social goods that was originally determined by whiteness continues to define the normative baseline for such distribution.<sup>34</sup> And the legal regime that determines entitlements to those social goods continues to enforce that normative baseline.<sup>35</sup>

Our equal protection jurisprudence provides a telling example of the persistence of whiteness as property.<sup>36</sup> 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, including tangible goods, status, and privilege.<sup>37</sup> 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, courts preserve a racial hierarchy in which whiteness is privileged without the necessity of white

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<sup>29</sup> 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).

<sup>30</sup> *Id.* at 912.

<sup>31</sup> See Harris, *supra* note 13, at 1757–77; see also CHRIS ROCK: BIGGER AND BLACKER (HBO Home Video 1999) (“There ain’t a white man in this room that would change places with me . . . and I’m rich.”).

<sup>32</sup> See Harris, *supra* note 13, at 1758–61.

<sup>33</sup> The U.S. 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 reflecting and 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 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. See Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1760 (2003).

<sup>34</sup> Harris, *supra* note 13, at 1757–58.

<sup>35</sup> *Id.*

<sup>36</sup> See *id.* at 1757–77.

<sup>37</sup> See Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 2–3 (1991); Harris, *supra* note 13, at 1768–69.

people acknowledging their own privilege.<sup>38</sup> Insofar as whiteness continues to permit differential entitlement to goods and resources, it 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 control cultural meanings.”<sup>39</sup> I discuss this possibility in more detail in Part III. For present purposes, however, my claim is straightforward: under any of a number of traditional and modern understandings, whiteness functions as a valuable form of property.

### B. Diversity as Revaluation

“Diversity is at the very core of our ability . . . to maximize return for our shareholders.”<sup>40</sup>

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,<sup>41</sup> 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.<sup>42</sup> Indeed, in 1977 the U.S.

<sup>38</sup> See Barbara J. Flagg, “*Was Blind but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969–73 (1993).

<sup>39</sup> Madhavi Sunder, *Property in Personhood*, in RETHINKING COMMODIFICATION 164, 168 (Martha M. Ertman & Joan C. Williams eds., 2005).

<sup>40</sup> *Diversity and Inclusion*, GOLDMAN SACHS, <http://www.goldmansachs.com/who-we-are/diversity-and-inclusion/index.html> (last visited May 10, 2013) (quoting Lloyd C. Blankfein) (internal quotation mark omitted). Similar testimonials adorn the websites of virtually every large American company.

<sup>41</sup> 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.” Exec. Order No. 10,925, 3 C.F.R. 448, 450 (1959–1963). 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.

<sup>42</sup> See, e.g., *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 507 (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,” *id.* at 516); *Weiner v. Cuyahoga Cmty. Coll. Dist.*, 238 N.E.2d 839, 844 (Ohio Ct. 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* 151 (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 the remedial rationale).

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.”<sup>43</sup> Courts repeatedly accepted such remedial justifications.<sup>44</sup>

The first explicit judicial endorsement of diversity as a rationale for affirmative action occurred in *Regents of the University of California v. Bakke*.<sup>45</sup> There, Justice Powell’s opinion — eventually regarded as the controlling opinion, since there was no majority<sup>46</sup> — rejected several rationales for affirmative action while specifying that the educational benefits of diversity could justify some race-conscious admissions programs.<sup>47</sup> Justice Powell declared that “the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education.”<sup>48</sup> He linked diversity to the notion of academic freedom, expressing support for the position that “universities must be accorded the right to select those students who will contribute the most to the ‘robust exchange of ideas’” and explaining that “our tradition and experience lend support to the view that the contribution of diversity is substantial.”<sup>49</sup>

For a brief time, the diversity rationale and the remedial rationale coexisted.<sup>50</sup> But as the Court incrementally established strict scrutiny

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<sup>43</sup> U.S. COMM’N ON CIVIL RIGHTS, STATEMENT ON AFFIRMATIVE ACTION 2 (1977), available at <http://www.law.umaryland.edu/marshall/usccr/documents/cr11054.pdf>.

<sup>44</sup> See, e.g., *Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971) (en banc) (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, 683–85 (2004).

<sup>45</sup> 438 U.S. 265 (1978). Eboni Nelson locates the roots of the diversity rationale in the integration and desegregation cases decided three 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 the 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).

<sup>46</sup> 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 Wash.*, 233 F.3d 1188, 1199–1200 (9th Cir. 2000) (positing that Justice Powell’s opinion is controlling), with *Hopwood v. Texas*, 236 F.3d 256, 275 n.66 (5th Cir. 2000) (“[W]e read *Bakke* as not foreclosing (but certainly not requiring) the acceptance by lower courts of diversity as a compelling state interest.”). As discussed below, *Grutter* dispelled any confusion. See *infra* pp. 2163–67.

<sup>47</sup> *Bakke*, 438 U.S. at 306–14 (opinion of Powell, J.).

<sup>48</sup> *Id.* at 311–12.

<sup>49</sup> *Id.* at 313.

<sup>50</sup> See, e.g., Nunn, *supra* note 45, at 711.

as the standard in all cases involving race-based affirmative action,<sup>51</sup> remedial justifications became increasingly unlikely to succeed, with a narrow exception for an entity's implementation of remedial measures for its own past discrimination,<sup>52</sup> 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 discrimination."<sup>53</sup> 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."<sup>54</sup> 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 locate rights in the notion of liberty rather than equality.<sup>55</sup> While these accounts diverge in some ways, they both recognize the Court's reluctance to countenance affirmative action programs on remedial grounds. As a result of this shift, advocates of race-conscious policies in both employment and education increasingly relied on the interest in diversity as their most promising legal strategy. The Court's 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."<sup>56</sup>

With respect to higher 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* upheld attainment of a diverse student body

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<sup>51</sup> See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986) (plurality opinion) (holding that strict scrutiny standard applied to program providing minority teachers with greater employment protection); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.) (noting that strict scrutiny standard applied to minority set-aside plan in construction contracting); *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").

<sup>52</sup> *Croson*, 488 U.S. at 509 (opinion of O'Connor, J.).

<sup>53</sup> See generally PAUL M. SNIDERMAN & EDWARD G. CARMINES, *REACHING BEYOND RACE* (1997) (examining attitudes of white Americans toward affirmative action).

<sup>54</sup> Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1142 (2002).

<sup>55</sup> Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 747–50 (2011).

<sup>56</sup> Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 13 (2005).

as a compelling interest in higher education.<sup>57</sup> Most recently, in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>58</sup> the Court reiterated that it had accepted diversity in higher education as a compelling state interest while emphasizing that “the admissions program [upheld in *Grutter*] focused on each applicant as an individual, and not simply as a member of a particular racial group”<sup>59</sup> 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.”<sup>60</sup>

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.*<sup>61</sup> and *Adarand Constructors, Inc. v. Peña*<sup>62</sup> found 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.<sup>63</sup> While those cases prohibit some affirmative action programs, they do not limit possible justifications to the purely remedial,<sup>64</sup> and both before and after *Croson* and *Adarand*, courts have found that workplace diversity can provide a compelling state interest.<sup>65</sup> In challenges brought under Title VII, affirmative action pro-

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<sup>57</sup> *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (upholding law school admissions plan that considered race as one factor in holistic assessment of each candidate’s application on the ground that student-body diversity is a compelling state interest).

<sup>58</sup> 551 U.S. 701 (2007).

<sup>59</sup> *Id.* at 722.

<sup>60</sup> *Id.* at 723. *Parents Involved* went on to invalidate the challenged race-conscious school assignment scheme because it lacked this individualized consideration — rather, “race, for some students, [was] determinative standing alone.” *Id.*

<sup>61</sup> 488 U.S. 469 (1989).

<sup>62</sup> 515 U.S. 200 (1995).

<sup>63</sup> See *Croson*, 488 U.S. at 492–93 (opinion of O’Connor, J.); *Adarand*, 515 U.S. at 220–21.

<sup>64</sup> See, e.g., Memorandum from John R. Schmidt, Assoc. Attorney Gen., to Gen. Counsels, Re: Post-*Adarand* Guidance on Affirmative Action in Federal Employment 8 (Feb. 29, 1996), available at [http://eeoa.army.pentagon.mil/web/doc\\_library/ACF8BoB.txt](http://eeoa.army.pentagon.mil/web/doc_library/ACF8BoB.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 may reflect an interest in promoting community trust and confidence in the agency.”).

<sup>65</sup> See, e.g., *Alexander v. City of Milwaukee*, 474 F.3d 437, 441, 445 (7th Cir. 2007); *Petit v. City of Chicago*, 352 F.3d 1111, 1114–15 (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, 695–96 (6th Cir. 1979); see also

grams are most frequently justified on the ground that they address a “manifest imbalance” in segregated job categories where racial minorities have been traditionally underrepresented,<sup>66</sup> but diversity has informed that analysis, and courts and commentators have suggested that it might provide an independent justification.<sup>67</sup> Some commentators have read *Grutter* as an opportunity to buttress diversity in the employment context — Cynthia Estlund, for example, argues that *Grutter*’s conception of the diversity rationale offers a broad understanding of integration that is equally applicable in the employment realm.<sup>68</sup> Indeed, the *Grutter* majority’s reliance on arguments advanced by corporations and the military implies that diversity-based justifications for affirmative action in higher education may also apply to such programs in the employment context.<sup>69</sup> The important point is that diversity has maintained influence within the employment case law and has, as a result, led employers to embrace diversity.<sup>70</sup> 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 value of hiring members of groups historically subject to discrimination but strategically couch their justifications in the language of diversity. Whatever the specific reason, however, the result is a desire for diversity in the workplace.

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Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (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).

<sup>66</sup> See, e.g., Johnson v. Transp. Agency, 480 U.S. 616, 628 (1987); United Steelworkers of Am. v. Weber, 443 U.S. 193, 197 (1979). 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).

<sup>67</sup> See Doe v. Kamehameha Sch., 470 F.3d 827, 842 (9th Cir. 2006) (en banc) (“The Title VII cases, in the employment context, recognize the laudable goal of achieving diversity and proportional representation in the workplace . . .”); Davis, *supra* note 66, at 1039–53 (suggesting that diversity may justify affirmative action programs under Title VII). The Court also considered whether concerns regarding disparate treatment litigation under Title VII may justify race-based measures in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009). But *Ricci* involved neither affirmative action nor a diversity justification, and is therefore of limited relevance here.

<sup>68</sup> Estlund, *supra* note 56, at 20–38.

<sup>69</sup> For example, the Court cited the amicus brief filed by retired military officers for the proposition that a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle [sic] mission to provide national security.” *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (quoting Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae Supporting Respondents at 5, *Grutter*, 539 U.S. 306 (Nos. 02-241 & 02-516)) (internal quotation marks omitted).

<sup>70</sup> See generally FREDERICK R. LYNCH, *THE DIVERSITY MACHINE* (1997) (cataloging pre-occupation with diversity in business); PETER WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* 201–25 (2003) (same).

*Bakke* and subsequent decisions regarding both education and employment 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.”<sup>71</sup> Diversity is beneficial because it promotes cross-racial understanding, helps to dismantle stereotypes, and improves classroom discussion.<sup>72</sup> Moreover, diversity in the classroom is important because students need preparation to be able to function in a diverse workforce.<sup>73</sup> Federal appellate courts both before and since *Grutter* have acknowledged such rationales.<sup>74</sup>

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,<sup>75</sup> while other research has questioned that finding.<sup>76</sup> Although scholars have evaluated this empirical debate,<sup>77</sup> 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 years<sup>78</sup> 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 advocat-

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<sup>71</sup> *Grutter*, 539 U.S. at 315 (internal quotation marks omitted).

<sup>72</sup> *Id.* at 330.

<sup>73</sup> *Id.* at 330–31.

<sup>74</sup> *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 218–20 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012); *Smith v. Univ. of Wash., Law Sch.*, 392 F.3d 367, 373 (9th Cir. 2004); *Smith v. Univ. of Wash., Law Sch.*, 233 F.3d 1188, 1197 (9th Cir. 2000); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 499 (10th Cir. 1998).

<sup>75</sup> See, e.g., Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 6–10, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915) (attesting that both “longstanding research” and recent “experimental and field studies” support positive consequences of diversity); Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 215 (2009) (correlating diversity with increase in sales revenue and customers).

<sup>76</sup> See, e.g., Charles A. O’Reilly III et al., *Work Group Demography, Social Integration, and Turnover*, 34 ADMIN. SCI. Q. 21, 29–30 (1989) (finding improved outcomes in homogenous work groups); Stanley Rothman et al., *Does Enrollment Diversity Improve University Education?*, 15 INT’L J. PUB. OPINION RES. 8, 24 (2003) (finding that increased diversity in educational settings “brought increased perceptions of personal discrimination among students”).

<sup>77</sup> See, e.g., Nelson, *supra* note 45, at 587–92; Justin Pidot, Note, *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).

<sup>78</sup> See, e.g., *Parents Involved*, 551 U.S. at 722 (2007) (recognizing once again the “interest in diversity in higher education” as “compelling for purposes of strict scrutiny”).

ing the value of diversity.<sup>79</sup> Scholars interested in the advancement of minorities in education and employment have also focused on diversity's benefits.<sup>80</sup> And social scientists have devoted years to studying the benefits of diversity in educational and employment contexts.<sup>81</sup> Even more striking than these legal and scholarly developments is the way that diversity has proliferated into an industry. A large and increasing number of companies conduct diversity training or maintain a formal diversity program,<sup>82</sup> contributing to "an explosion in corporate diversity initiatives" over the past fifteen years.<sup>83</sup> A brief perusal of any 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.<sup>84</sup> In the aggregate, the legal, academic, corporate, and educational emphasis placed on diversity has instantiated diversity as a social value.<sup>85</sup>

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 per-

<sup>79</sup> 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 Amici Curiae 65 Leading American Businesses in Support of Respondents at 2–3, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 & 02-516); Brief of General Motors Corp. as Amicus Curiae in Support of Respondents at 2–3, *Grutter*, 539 U.S. 306 (Nos. 02-241 & 02-516); Brief of the Harvard Black Law Students Ass'n, Stanford Black Law Students Ass'n, and Yale Black Law Students Ass'n as Amici Curiae Supporting Respondents at 2–4, *Grutter*, 539 U.S. 306 (No. 02-241); Brief of the American Bar Ass'n as Amicus Curiae in Support of Defendants-Appellants at 5–8, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 01-01447); Brief of International Union, United Automobile, Aerospace & Agriculture Implement Workers of America, as Amicus Curiae, in Support of Appellants Lee Bollinger, et al. at 11–16, *Grutter*, 288 F.3d 732 (No. 01-01447).

<sup>80</sup> 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, 1611–12 (2003); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 862–65 (1995).

<sup>81</sup> See, e.g., Patricia Gurin, *The Compelling Need for Diversity in Education*, 5 MICH. J. RACE & L. 363, 363 (1999) (expert report prepared for litigation in *Grutter* and *Gratz*).

<sup>82</sup> ELIZABETH LASCH-QUINN, *RACE EXPERTS* 162–63 (2001).

<sup>83</sup> 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).

<sup>84</sup> 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).

<sup>85</sup> Of course, not everyone values diversity for its own sake. Even those who do not inherently care about diversity realize that they need to place some value on diversity because a lot of other people do — for example, a company's leadership may place no inherent value on diversity but may nevertheless pursue a diverse workforce because its customers care about diversity.

suasions. On the right, diversity is the subject of widespread ridicule and indignation.<sup>86</sup> Justice Thomas, concurring in part in *Grutter v. Bollinger*, slightly referred to diversity as “more a fashionable catchphrase than . . . a useful term,” and to 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.”<sup>87</sup> Popular pundit Ann Coulter claims: “Never in recorded history has diversity been anything but a problem. . . . ‘Diversity’ is a difficulty to be overcome, not an advantage to be sought.”<sup>88</sup> This disparagement of diversity represents a backlash against its pervasiveness.

From the left, the diversity rationale also has been criticized since its inception.<sup>89</sup> 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 reliance on grades and test scores that privilege well-to-do, mainly white applicants.”<sup>90</sup> From a more individualistic perspective, Richard Ford 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 identities in order to justify their presence within institutions.<sup>91</sup> Like Bell, he argues that the focus on diversity detracts from more compelling rationales for affirmative action, such as corrective or distributive justice.<sup>92</sup>

Yet at the end of the day, the diversity rationale currently remains the primary justification for affirmative action.<sup>93</sup> 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 — even if, given a choice, they might have preferred the remedial rationale that runs through the Court’s early desegregation ju-

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<sup>86</sup> See, e.g., Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1900–10 (1996); see also RICHARD A. POSNER, *OVERCOMING LAW* 81–107 (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*, 80 ST. JOHN’S L. REV. 323, 345 (2006).

<sup>87</sup> *Grutter v. Bollinger*, 539 U.S. 306, 354 n.3 (2003) (Thomas, J., concurring in part and dissenting in part).

<sup>88</sup> Ann Coulter, *At the End of the Day, Diversity Has Jumped the Shark, Horrifically*, ANNCOUTLER.COM (Nov. 18, 2009), <http://www.anncoulter.com/columns/2009-11-18.html>.

<sup>89</sup> See TERRY EASTLAND & WILLIAM J. BENNETT, *COUNTING BY RACE* 172–74 (1979) (describing opposition to *Bakke* by progressive politicians and academics).

<sup>90</sup> Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).

<sup>91</sup> RICHARD T. FORD, *RACIAL CULTURE* 59–64 (2005).

<sup>92</sup> *Id.*

<sup>93</sup> 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.

risprudence. 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 grant of certiorari in *Fisher v. University of Texas at Austin*<sup>94</sup> 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.

### C. *The Worth of Nonwhiteness*

“How much diversity is enough?”<sup>95</sup>

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.<sup>96</sup> Efforts to create racial diversity usually begin — and often end — with increasing the number of nonwhite people within a group or institution. As a result, nonwhiteness has acquired a unique value because, in many contexts, it signals the presence of the prized characteristic of diversity.<sup>97</sup>

Here I wish to pause in order to draw an important distinction between two iterations of the diversity objective. The first iteration — what I will call the “thin” version of the diversity objective — emphasizes numbers and appearances. That is, it is exclusively concerned with improving the superficial appearance of diversity. The second iteration — what I will call the “thick” version of the diversity objective — is not focused on the appearance of diversity, but rather views diversity as a prerequisite to cross-racial interaction, which fosters inclusivity and improves cross-racial relationships, thereby benefiting institutions and individuals of all races.<sup>98</sup>

The thin version of diversity is of far greater concern because of its unabashed superficiality and preoccupation with numerical representation, so I focus on that version in the remainder of this Article. More importantly, the thin version of diversity deserves more attention be-

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<sup>94</sup> *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

<sup>95</sup> Nat Hentoff, *How Much Diversity Is Enough?*, VILLAGE VOICE, Mar. 25, 2003, at 31, available at <http://www.villagevoice.com/2003-03-25/news/how-much-diversity-is-enough>.

<sup>96</sup> See, e.g., PAGE, *supra* note 80.

<sup>97</sup> The value of both whiteness and nonwhiteness varies depending on context. While there may be exceptions, most mainstream organizations assign some value to nonwhiteness.

<sup>98</sup> While I artificially separate the thin and thick iterations of the diversity objective into two contrasting categories, it would be more accurate to describe institutional diversity as falling on a continuum, with the thin and thick versions as endpoints. However, the binary conception is more useful in highlighting the heightened concerns with the thin version of diversity.

cause it is the version to which many institutions gravitate, simply because it is far easier and less costly to obtain.<sup>99</sup> Hereafter, when I refer to the diversity objective, the concerns I express center on the thin version of that objective.

With that clarification in mind, I turn to the concerns with the diversity objective. First, the way that nonwhiteness is valued under the diversity objective highlights an important distinction between the remedial and diversity objectives. The remedial objective aims to correct for past injustice, and so a successful remedial program must actually improve the situation of nonwhite individuals. In contrast, the diversity objective aims to improve the functioning of a particular social group or institution, so it does not matter whether nonwhite individuals themselves benefit.

This distinction leads to tangible differences in the implementation of affirmative action programs depending on whether such programs are justified by a diversity or remedial rationale. Either objective will likely require increasing the number of nonwhite people within an institution. But an increase in the raw number of nonwhite people present may or may not signify actual progress toward racial equality. This is where the diversity objective and the remedial objective diverge: the former assumes that benefits will result from the mere presence of nonwhite people, while the latter requires tangible progress toward racial equality and, by extension, meaningful institutional efforts at inclusion that make such progress possible.<sup>100</sup> Put another way, the numerical representation embraced by the thin conception of

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<sup>99</sup> The thick version of diversity is not, however, entirely exempt from concern. For instance, institutions may not distinguish clearly between the thick and thin versions, or the message may become muddled within an institution. A directive from the top may in good faith seek thick diversity but may result in a superficial quest for increased presence of racial minorities that produces only thin diversity. And even if the thick version of diversity is actualized successfully, it may obscure the need for affirmative action in the first place — that is, the troubled history of race in America.

<sup>100</sup> The thick version of the diversity objective 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 measure success by the advancement of nonwhite people toward equality. For instance, Patricia Gurin, who served as an expert witness for the University of Michigan in the *Gratz* and *Grutter* affirmative action cases, argues that “the presence of diverse peers” is valuable because it “provides the possibility of having actual experience with diversity” and because “positive educational outcomes result from having actual experience with diverse peers.” 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.*, UMICH.EDU (May 20, 2003), <http://www.umich.edu/~urel/admissions/research/pgurin-nas.html>. Moreover, simply describing something as motivated by achieving diversity rather than remedying past discrimination has consequences: it changes the discourse around affirmative action and affects stakeholders’ perceptions of its goals.

diversity is a necessary but not a sufficient condition for progress toward racial inclusion in our institutions. If nonwhite 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, the diversity objective does not force people to consider the harder question of racial progress.

Two interrelated ironies consequently characterize the revaluation of nonwhiteness that the diversity rationale has engendered. The first irony is that the diversity rationale values nonwhiteness in terms of its worth to white people. White people reap the stated benefits of nonwhite presence in institutions, such as exposure to new ideas and understanding of other cultures. Indeed, some critics have argued that, within an institution, white people benefit more from the effects of diversity than nonwhite people.<sup>101</sup> So while the diversity rationale bolsters affirmative action measures superficially similar to those once justified by remedial goals, diversity-justified affirmative action policies have an entirely different purpose. Such policies cannot be justified simply in terms of remedial redistribution or fundamental fairness — that is, by the value they would have to nonwhite people. Instead, diversity-justified affirmative action policies must be legitimized by the value that such policies have for white people. The diversity rationale thus provides a classic example of Bell's theory of interest convergence: progress for nonwhite people occurs only when it benefits white people as well.<sup>102</sup>

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 nonwhiteness. Because nonwhiteness is valued in terms of what it adds to white people's experiences or endeavors, white people determine what nonwhiteness is worth. Certainly this may play out in ways that provide benefits to nonwhite people — for example, a nonwhite person may receive offers of employment or admission to schools that she would not have received but for affirmative action. Yet when white people are responsible for assigning value to nonwhiteness, that value may vary greatly depending on context. If a white majority at a school comes to perceive that there is “enough” diver-

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<sup>101</sup> See, e.g., Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 211–17 (2004) (concluding that *Grutter* decision appears to benefit interests of white students over students of color); Abigail Thernstrom & Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, 21 CONST. COMMENT. 251, 262 (2004) (“[T]he whole argument over what whites will learn from the presence of a critical mass suggests that ‘diversity’ is for the educational benefit of whites . . .”).

<sup>102</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

sity, for example, the marginal value of nonwhiteness diminishes.<sup>103</sup> For instance, overrepresentation of Asian students in higher education has led to their exclusion from many affirmative action programs, indicating a devaluation of their nonwhiteness.<sup>104</sup> The value of nonwhiteness is contingent on its worth to white people and predominantly white institutions. So even when white people and predominantly white institutions highly value nonwhiteness, they retain control over the assignment of value and may increase or diminish that value at will.

The thin conception of diversity creates a system in which white people and predominantly white institutions derive value from nonwhite racial identity. As a result, the value of nonwhiteness depends on its benefit to white people and predominantly white institutions. I explore the workings of this system in the next Part.

## II. A THEORY OF RACIAL CAPITALISM

Building upon the insights of Part I, this Part sets forth a framework for understanding how society assigns value to nonwhiteness. Perhaps the most obvious way of conceptualizing that value is to describe it as property. Cheryl Harris has argued that, unlike whiteness, nonwhiteness cannot be considered property because it does not bestow privilege in the way that whiteness does.<sup>105</sup> Jim Chen, in response, has suggested that nonwhiteness 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.<sup>106</sup> Who is correct depends, in large measure, on the theory of property adopted, and there is no consensus as to which theory is most accurate.<sup>107</sup>

More importantly, however, the characteristics associated with both traditional and contemporary understandings of property do not capture some of the implications of the way that nonwhiteness is currently

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<sup>103</sup> See JEFFREY F. MILEM ET AL., MAKING DIVERSITY WORK ON CAMPUS 3–5 (2005) (critiquing the common conception of diversity as balanced student-body composition).

<sup>104</sup> See Lino A. Graglia, *Race Norming in Law School Admissions*, 42 J. LEGAL EDUC. 97, 100 n.11 (1992); Selena Dong, Note, “Too Many Asians”: *The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027, 1030 (1995) (arguing that *Bakke* allows preferential treatment for white students over Asian students when there are “too many Asians” (internal quotation marks omitted)).

<sup>105</sup> Harris, *supra* note 13, at 1784–85.

<sup>106</sup> Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. 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.” *Id.* at 1139).

<sup>107</sup> Compare Underkuffler, *supra* note 21, at 128–29 (describing a broad sense of property rights, including human rights), with Merrill, *supra* note 22, at 730 (describing property rights as primarily the right to exclude).

assigned value. Therefore, a more useful lens for understanding the value assigned to nonwhiteness is that of capital.<sup>108</sup> Capital has been theorized in many forms. One of the most influential theories is Karl Marx's critique, rooted in political economy, of the relationship between private property, accumulated wealth, and exploitative social relations.<sup>109</sup> 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, knowledge, or other attributes that improve her usefulness in the process of producing and exchanging goods.<sup>110</sup> Pierre Bourdieu later distinguished among several forms of capital, including economic capital, cultural capital, social capital, and symbolic capital.<sup>111</sup> Catherine Hakim has developed the idea of erotic capital as a mechanism for furthering both social and economic interests through sexual attractiveness.<sup>112</sup> In many contexts, then, scholars have found the lens of capital a useful way of examining particular phenomena.

In the analysis I develop in this Article, existing theories of capital serve as heuristics for understanding the way that race is valued and the way that racial value is exchanged. There are undeniable differences between economic and racial markets, and so I do not claim that the analogy to any given theory of capital is a perfect explanation for the dynamics of racial value. But as a means to understand how race is valued — and in particular how nonwhiteness is valued — the various theories of capital provide useful frameworks for thinking about both that process of valuation and about how racial identity consequently functions in markets, economic and otherwise.

Theories of capital thus clarify several aspects of the valuation of nonwhiteness. For example, conceptions of social capital further illustrate the reasons that nonwhiteness has value to white people and predominantly white institutions. Relatedly, social capital provides an understanding of the way that racial value is transferred through interaction and affiliation. These ideas then provide the basis for understanding the process of exploitation and profit that Marxian theories of capital illuminate. That is, the question is not simply who “possesses” racial identity, but also who reaps value from it, and conceiving of

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<sup>108</sup> Of course, in many understandings of the term, capital is a form of property. See, e.g., 1 KARL MARX, CAPITAL 728–30 (Ben Fowkes trans., Penguin Books 1990) (1867). But the theorization of capital provides richer material for understanding the way that race is valued than does the theory underlying property.

<sup>109</sup> See generally *id.*

<sup>110</sup> See generally Theodore W. Schultz, *Investment in Human Capital*, 51 AM. ECON. REV. 1, 1–17 (1961); see also GARY S. BECKER, HUMAN CAPITAL 15–16 (1975).

<sup>111</sup> Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 243 (John G. Richardson ed., 1986).

<sup>112</sup> CATHERINE HAKIM, EROTIC CAPITAL 9–30 (2011).

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nonwhiteness as capital helps to illustrate this process of exploitation and profit. The Marxian capital framework likewise highlights the dynamism of the value assigned to racial identity — that is, how the value of racial identity fluctuates depending on the situation. The Marxian capital framework also allows for a more transparent examination of who, precisely, derives value from nonwhiteness. And perhaps most importantly, the framework exposes the imbalance in power that frames the valuation of nonwhiteness.

This Part therefore introduces three conceptions of capital in relation to the process of assigning and extracting racial value. Section II.A builds upon the prior discussion of the social preoccupation with diversity and my critique of thin diversity. It begins with the literature regarding social capital and connects that literature with recent research examining the role of status in markets. In so doing, it offers a sociological framework for understanding the capitalization of nonwhiteness, which reveals both why nonwhiteness is valuable and how racial value is transferred. Section II.B then introduces the Marxian account of capital, revealing that the value assigned to race through social interaction creates conditions under which nonwhiteness functions as a commodity. Marxian analysis also offers a more specific account of the way that racial commodities are produced and their value exchanged. This section further uses Marxian analysis as a heuristic to understand the power imbalance that facilitates and instantiates the racial exploitation of nonwhite people. Finally, section II.C synthesizes 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*, and the process by which people and institutions derive and appropriate surplus racial value, which I will refer to as *racial capitalism*.<sup>113</sup> Throughout, I highlight how the capitalization of nonwhiteness both manifests and reinforces the historical valuation of race and the contemporary revision of that valuation through the diversity narrative.

Finally, I wish to explicitly reserve one very important issue for discussion at a later date. The theory of racial capitalism I develop

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<sup>113</sup> Only a single previous article has used the term “racial capital” to refer to the valuation of race. Applying Marxian analysis to racial disparity, e. christi cunningham argues 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). This work is helpful in illuminating many of the root causes underlying current disparities in racial value. Her focus, however, is on the way that the *state* exerts force to assign 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 that nonwhiteness 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.

here describes a system of racial commodification and subsequent exploitation that spans society. The goal of this Article is to examine that system and its consequences. In future work, I will turn to the ways that individual nonwhite people and members of other outgroups choose to act within that system.<sup>114</sup> My examination of individual behavior will consider the incentives that the system creates for individual behavior, the ways in which individuals leverage outgroup identity, the importance of individual autonomy, and the possibility of group harm resulting from an individual leveraging her identity performance. For the present, however, my focus lies with the system of racial capitalism rather than with the behavior of individuals within the system.

### A. *Race as Social Capital*

“Obviously, whites want black friends so as not to appear racist.”<sup>115</sup>

Theories of social capital illuminate the way that people and institutions derive value from racial identity because racial value arises through human interaction. Researchers have developed “radically divergent” conceptions of the term “social capital,” but prominent scholars agree that the concept includes value derived from interpersonal networks.<sup>116</sup> Here, I adopt Nan Lin’s influential definition of social capital as an “investment in social relations with expected returns in the marketplace.”<sup>117</sup> Lin further specifies that “[t]he market chosen for analysis may be economic, political, labor, or community.”<sup>118</sup> This definition is useful because it is broad enough to capture the notion of racial value — and, more specifically, the value of nonwhiteness — as part of the value that is transferred through human interaction. It also allows for an understanding of how nonwhiteness is capitalized in a range of settings.

Lin explains that social capital influences “exchange” — a sociological term describing an interaction between actors in which a transaction of resources takes place.<sup>119</sup> Exchange has both a social component (the exchange requires a relationship between the actors) and an economic component (the transaction of resources).<sup>120</sup>

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<sup>114</sup> Leong, *supra* note 7.

<sup>115</sup> Kristen Warner, *Having Black Friends*, STUFF WHITE PEOPLE LIKE (Jan. 21, 2008), <http://stuffwhitepeoplelike.com/2008/01/21/14-having-black-friends>.

<sup>116</sup> 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).

<sup>117</sup> NAN LIN, SOCIAL CAPITAL 19 (2001) (emphasis omitted).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 143–44.

<sup>120</sup> *See id.*

Lin's account reveals the way that nonwhiteness functions as social capital.<sup>121</sup> The preoccupation with diversity detailed in section I.B lends value to nonwhiteness, and white individuals and institutions capture the value of that nonwhiteness through relationships with nonwhite individuals resulting in "exchange." The analogy is not a perfect one, but it improves the understanding of the way that nonwhiteness is valued and the way in which 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 nonwhite individuals. Analysis of the dual social and economic components of such exchanges helps to 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 rational;<sup>122</sup> others contend that the explanation is "rational principles other than the individual profit-seeking motive."<sup>123</sup> Lin's explanation embraces both rationality *and* the idea that actors behave in order to maximize self-interest.<sup>124</sup> 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."<sup>125</sup>

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."<sup>126</sup> In this formulation, one's reputation "is a function of the extent to which one receives recognition in a social group,"<sup>127</sup> and the motiva-

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<sup>121</sup> Nonwhiteness could also aptly be described as social capital under the various other accounts. I have selected Lin's account because it is particularly well adapted to describe the capitalization of race, but other accounts do not differ in ways material to the conception of nonwhiteness as capital.

<sup>122</sup> A.R. BROWN, *THE ANDAMAN ISLANDERS* 84 (1964) (explaining that the reason for exchanges is "to produce a friendly feeling"); Claude Lévi-Strauss, *The Principle of Reciprocity*, in *THE GIFT: AN INTERDISCIPLINARY PERSPECTIVE* 19, 20 (Aafke E. Komter ed., 1996) (positing nonrational "vehicles and instruments for realities of another order: influence, power, sympathy, status, emotion").

<sup>123</sup> LIN, *supra* note 117, at 147 (citing motivations such as "approval, esteem, liking, or attraction from the other actor" and "trust").

<sup>124</sup> *See id.* at 149.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 152.

<sup>127</sup> *Id.* at 153.

tion to engage in unequal exchanges “is to gain reputation through recognition in networks and groups.”<sup>128</sup>

The importance of recognition and reputation to the concept of social capital connects that concept to a recent strand of sociological research that examines 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 in social settings, but also in the market.<sup>129</sup> The desire for status affects actors’ willingness to form relationships and otherwise affiliate with other actors.<sup>130</sup>

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.”<sup>131</sup> 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.”<sup>132</sup> 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.”<sup>133</sup> He demonstrates this principle with the example of the investment banking industry,<sup>134</sup> in which individual investment banks hesitate to enter into exchange relations with lower-status banks,<sup>135</sup> and the example of wineries, which hesitate to list the appellation of lower-status regions on their labels — and may even hesitate to create objectively higher-quality products if that would involve associating themselves with a region with subjectively lower status.<sup>136</sup> The desire for status therefore influences the exchanges

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<sup>128</sup> *Id.* at 156 (emphasis omitted).

<sup>129</sup> JOEL M. PODOLNY, *STATUS SIGNALS* 7–9 (2005).

<sup>130</sup> *See id.* at 5. Podolny provides the example of firms’ decision to affiliate with either NASDAQ or NYSE to affect how others perceive them.

<sup>131</sup> *Id.* at 15.

<sup>132</sup> *Id.* at 76.

<sup>133</sup> *Id.* at 15. Podolny — correctly, in my view — couches this status recalibration in terms of tendencies rather than absolutes. One 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). Importantly, an actor may be high status in one dimension but low status in another. Consider a friendship between a popular but average student and a smart but unpopular student: such a relationship might result in leakage of “intelligence status” in one direction and “popularity status” in the other. As I discuss, the same may apply to white and nonwhite individuals, who simultaneously may be high status in some areas and low status in others.

<sup>134</sup> *Id.* ch. 3.

<sup>135</sup> *Id.* at 77.

<sup>136</sup> *Id.* ch. 5.

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 nonwhiteness is transferred. As a result of the legal and social 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 nonwhite individuals.

One might, for instance, conceive of a status market in "nonracism." Within this specific market, white individuals and predominantly white institutions tend to have relatively low status.<sup>137</sup> When a white individual or a predominantly white institution engages in an exchange with a nonwhite person within such a market, in Podolny's terms, a status leak occurs. The nonwhite party loses some amount of status, and the white party absorbs some of the status that the nonwhite party has lost. Put more concretely, the white individual or predominantly white institution has increased its status within the "nonracism" market by demonstrating the ability to engage in a relationship with a nonwhite individual. Meanwhile, the nonwhite person's status may have 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, limited recognition of this sort of racial status exchange has emerged: Randall Kennedy, for instance, has chronicled the status diminution of black people, particularly those in "elite, predominantly white settings," when other blacks perceive that they have "sold out" to the expectations of white society.<sup>138</sup>

Alternatively, one might conceive of a status market in "nonwhite cultural competence." Again, this market has arisen as a result of the priority that our legal doctrines and social practices place on diversity, and again, white individuals and predominantly white institutions tend to have relatively low status within this specific market.<sup>139</sup> When a white individual or a predominantly white institution engages in an exchange with a nonwhite person within a market in nonwhite cultural competence, a status leak occurs once more. The white individual or predominantly white institution gains status: the person or institu-

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<sup>137</sup> This is not a normative proposition, but rather a descriptive generalization, and a crude one at that. I make no claim about any particular individual or institution.

<sup>138</sup> 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 nonwhite individual has lost a measure of racial credibility in the process of gaining entry to elite, predominantly white circles — figures prominently in his work.

<sup>139</sup> This remains a crude and purely descriptive generalization. See *supra* note 137.

tion has successfully affiliated with a nonwhite individual and has thereby acquired some of the presumption of greater cultural understanding stereotypically attributed to nonwhite people. At the same time, the nonwhite person may lose status through the association. For example, nonwhite entertainers are often accused of losing their cultural legitimacy when they become popular within mainstream white culture or when they perform with white entertainers.<sup>140</sup>

Such status markets are particularly important because they create proxies for other, more substantive characteristics. People often use status-indicating affiliations as proxies for independent judgments about the relevant characteristics of individuals or institutions.<sup>141</sup> Job applicants' resumes provide a classic example: "[I]t 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."<sup>142</sup> Acquiring certain affiliations thus becomes a way of signaling status to those with whom one wishes to engage in some way.

A white person or institution who engages in an exchange with a nonwhite person, therefore, gains status as a nonracist and cross-culturally competent actor by *signaling* those attributes through affiliation. Because one 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, observing a white person's affiliation with a nonwhite individual serves as a proxy for making independent judgments along those axes.<sup>143</sup> Such affiliation signals to outsiders that the white person or institution is nonracist: if the person or institution were racist, the reasoning goes, she would not want to participate in the exchange with the nonwhite person, and the nonwhite person would not agree to participate in the exchange with her. Such status-seeking explains the intensity of the drive to acquire the capital associated with nonwhiteness through affiliation. It also explains why nonwhiteness is particularly desirable to market participants seeking either to distinguish themselves favorably from other participants or to avoid distinguishing themselves unfavorably.

Real-world examples reveal the status associated with affiliation with nonwhite people. First, closeness with nonwhite people allows whites to deflect charges of racism. As the popular satirical blog *Stuff*

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<sup>140</sup> Cf. generally EVERYTHING BUT THE BURDEN: WHAT WHITE PEOPLE ARE TAKING FROM BLACK CULTURE (Greg Tate ed., 2003) (discussing the interplay between black culture, white appropriation, and the black community's ideas regarding that appropriation).

<sup>141</sup> See PODOLNY, *supra* note 129, at 18–19.

<sup>142</sup> *Id.* at 106.

<sup>143</sup> See Shin & Gulati, *supra* note 16, at 1033 (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").

*White People Like*<sup>144</sup> puts it, “[o]bviously, whites want black friends so as not to appear racist.”<sup>145</sup> Bradford Plumer has referred to this phenomenon as the “some of my best friends” defense<sup>146</sup> — the idea is that, if one has close nonwhite 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 many whites harbor prejudice and resentment, they frequently sheltered these views behind claims of having nonwhite friends and associates.<sup>147</sup> Such capitalization of nonwhiteness 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.<sup>148</sup>

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.<sup>149</sup> “You know what’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 pres-

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<sup>144</sup> For the uninitiated, *Stuff White People Like*, created by Christian Lander, “skewers the sacred cows of lefty Caucasian culture.” Katharine Mieszkowski, *The Unbearable Whiteness of Being*, SALON (July 5, 2008, 4:06 PM), [http://life.salon.com/2008/07/05/white\\_people](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 23–25 (2000) (referring to an “ethno-racial 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*, ATLANTIC MONTHLY, Oct. 2008, at 91, 91, 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, *supra*. 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 nonwhiteness. 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.

<sup>145</sup> Warner, *supra* note 115.

<sup>146</sup> Bradford Plumer, *Rick Santorum: A Brief History of the “Some of My Best Friends” Defense*, NEW REPUBLIC (June 16, 2011), <http://www.tnr.com/article/politics/90059/gop-rick-santorum-best-friend-defense>.

<sup>147</sup> EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS 57–58 (3d ed. 2010).

<sup>148</sup> See, e.g., Elie Mystal, *Racist Is the New N-Word*, TRUE/SLANT (Feb. 11, 2010, 8:42 AM), <http://trueslant.com/eliemystal/2010/02/11/racist-is-the-new-n-word>; Tracy O’Connor, *Is Racism the New N-Word?*, I HATE MY MESSAGEBOARD (Feb. 18, 2009), <http://ihatemymessageboard.com/2009/02/18/is-racism-the-new-n-word>.

<sup>149</sup> *Seinfeld: The Diplomat’s Club* (NBC television broadcast May 4, 1995).

ence 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."<sup>150</sup>

Elected officials even invoke nonwhite 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."<sup>151</sup> In the speech, President Bush referenced his black "friends" Robert L. Johnson, the founder of Black Entertainment Television, and the Reverend Anthony T. Evans, a prominent pastor in Dallas; he also name-dropped Secretary of State Condoleezza Rice while discussing the then-recent extension of the Voting Rights Act.<sup>152</sup> President Bush's references to black people with whom he was affiliated, either through friendship or a close professional relationship, may be read as a strategic attempt to leverage his status to rebut allegations of racism.<sup>153</sup>

Nonwhiteness 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 nonwhite people accordingly. Bonilla-Silva's research suggests that white people inflate both the number and closeness of their nonwhite friends.<sup>154</sup> And a re-analysis of sociological research cited in *Grutter* and *Gratz* reveals similar tendencies. In the original study, researchers examined a Gallup survey polling law students at the University of Michigan and Har-

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<sup>150</sup> *Id.*

<sup>151</sup> Lisa de Moraes, *Kanye West's Torrent of Criticism, Live on NBC*, WASH. POST, Sept. 3, 2005, at C8, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090300165.html>.

<sup>152</sup> See Sheryl Gay Stolberg, *Bush, in First Speech to N.A.A.C.P., Offers Message of Reconciliation*, N.Y. TIMES, July 21, 2006, at A16, available at <http://www.nytimes.com/2006/07/21/washington/21bush.html>.

<sup>153</sup> Other political examples are common. For example, in the 2012 presidential election, Paul Ryan's reference to the fact that he had a black girlfriend in college arguably also functions as a rebuttal of charges of racism. Patrik Jonsson, *Paul Ryan's Black Ex-Girlfriend: What Does It Mean to Election 2012?*, CHRISTIAN SCI. MONITOR (Aug. 23, 2012), <http://www.csmonitor.com/USA/Elections/President/2012/0823/Paul-Ryan-s-black-ex-girlfriend-What-does-it-mean-to-Election-2012>. Likewise, the Tea Party sponsored a panel at the 2013 Conservative Political Action Conference called "Trump the Race Card: Are You Sick and Tired of Being Called a Racist When You Know You're Not One?" that ostensibly presented a solution to the "diversity inclusion problem" and urged attendees to deflect charges of racism by referring to themselves as "Frederick Douglass Republicans." Alexandra Petri, *How Not to Sound Racist: The Most Awkward CPAC Panel Ever*, WASH. POST (Mar. 15, 2013, 6:11 PM), <http://www.washingtonpost.com/blogs/compost/wp/2013/03/15/how-not-to-sound-racist-the-most-awkward-cpac-panel-ever/?hpid=z2>.

<sup>154</sup> See BONILLA-SILVA, *supra* note 147, at 87-97.

vard about how many cross-racial friendships they had.<sup>155</sup> Of white students, 92.4% reported having three or more close friends of other races, as compared to only 37.3% of black students, 29% of Latino/a students, and 53.4% of Asian students.<sup>156</sup> 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 more than *nineteen* close friendships with white law students — a result that seems at best highly unlikely.<sup>157</sup>

The tendency to engage in status-seeking behavior explains why white students claim nonwhite students as their close friends. One explanation is that white people desire nonwhite friends in part to signal that they are not racist. But the explanation is broader than a mere desire to perform a nonracist identity script. Claiming social affiliation with nonwhite 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”<sup>158</sup> “Diversity,”<sup>159</sup> and “Being the Only White Person Around.”<sup>160</sup> The reason this “stuff” is appealing to white people is not only that they wish to insulate themselves against charges of racism. It’s also that, for example, “[t]he number of black friends white people possess also illustrates their comfort with black culture,”<sup>161</sup> an independently desirable characteristic given the “coolness” often associated with that culture.<sup>162</sup>

Thus, concepts of social capital and status markets provide insight into the reasons that individuals and institutions value particular racial identities and seek affiliations with individuals with those identities. The value acquired through such affiliations is part of the calculus that assigns worth to racial identity. And ultimately the fact that race is valued in this way is the foundation for the conversion of race into a commodity. The next section turns to Marxian capital to examine this process of commodification as it relates to the capitalization of race.

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<sup>155</sup> Gary Orfield & Dean Whitley, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 143, 154, 157 tbl.5 (Gary Orfield ed., 2001).

<sup>156</sup> *Id.* at 157 tbl.5.

<sup>157</sup> Pidot, *supra* note 77, at 789. The assumptions are “that all reported close friendships were with other law students” and “that every cross-racial friendship contained one white student and one student of color.” *Id.*

<sup>158</sup> Warner, *supra* note 115.

<sup>159</sup> Christian Lander, *Diversity*, STUFF WHITE PEOPLE LIKE (Jan. 19, 2008), <http://stuffwhitepeoplelike.com/2008/01/19/7-diversity>.

<sup>160</sup> Christian Lander, *Being the Only White Person Around*, STUFF WHITE PEOPLE LIKE (Feb. 20, 2008), <http://stuffwhitepeoplelike.com/2008/02/20/71-being-the-only-white-person-around>.

<sup>161</sup> Warner, *supra* note 115.

<sup>162</sup> See generally BLACK COOL (Rebecca Walker ed., 2012).

*B. Race as Marxian Capital*

“[N]othing can be a value without being an object of utility.”<sup>163</sup>

In the previous section, I used theories of social capital to explain the way that race acquires value through social interaction. This section builds on that analysis by using a Marxian conception of capital to understand how assigning value to race leads to the commodification and subsequent capitalization of race.<sup>164</sup> Marxian theory provides an imperfect analogy for this process, but it supplies a useful starting point for an analysis of the way that racial identity generally — and nonwhiteness in particular — functions as capital.

I use Marx’s market rhetoric in my analysis of how race is commodified and capitalized. The result is jarring. But this is precisely my intent. By exposing the dissonance between market rhetoric and racial identity, I lay the preliminary 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 through its qualities satisfies human needs of whatever kind.”<sup>165</sup> Commodities have both a use-value — “the usefulness of a thing” — and an exchange-value — a value derived from the trade of the commodity for other commodities.<sup>166</sup> The amount of labor<sup>167</sup> that goes into a particular commodity establishes the rate of exchange.<sup>168</sup> Notably for present 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.<sup>169</sup> To produce a commodity, a laborer must produce use-value *for others* and surrender that commodity to someone else in an exchange.<sup>170</sup>

The Marxian analysis thus provides a lens for examining the way that racial identity is produced, used, and exchanged in society. We

<sup>163</sup> 1 MARX, *supra* note 108, at 131. Here, Marx means value in the market, as opposed to intrinsic worth. I discuss the distinction between these two concepts in Part III.

<sup>164</sup> My account of Marx will be succinct and therefore, by necessity, incomplete and somewhat impressionistic. My goal is to put forth his analysis at a high level of generality in order to provide a basic framework for understanding the way that racial identity is assigned value.

<sup>165</sup> 1 MARX, *supra* note 108, at 125.

<sup>166</sup> *Id.* at 126.

<sup>167</sup> For purposes of establishing the rate of exchange, Marx defines the amount of labor objectively. *Id.* at 129. As I will discuss later, the amount of labor required to produce racial commodities may in fact vary from one individual to the next. See *infra* section II.C, pp. 2190–98.

<sup>168</sup> 1 MARX, *supra* note 108, at 129 & n.9.

<sup>169</sup> *Id.* at 131.

<sup>170</sup> *Id.*

can think of racial identity as a commodity that we all produce.<sup>171</sup> The process of racial identity production is complex and multifaceted.<sup>172</sup> 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.<sup>173</sup> 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 performed.<sup>174</sup> Indeed, as Rich says, “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.”<sup>175</sup> Rich explains that perception of racial identity is influenced by both passive race/ethnicity performance — traits such as one’s accent — and active race/ethnicity performance —

<sup>171</sup> 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, ultimately, society. Here, the point is simply that identity production occurs.

<sup>172</sup> See Rich, *supra* note 8, at 1516.

<sup>173</sup> 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 (2004).

<sup>174</sup> See JUDITH BUTLER, *BODIES THAT MATTER* x–xi (1993) [hereinafter BUTLER, *BODIES THAT MATTER*] (describing theory of “gender performativity”); JUDITH BUTLER, *GENDER TROUBLE* viii (1990) (initiating the notion of identity performance in the context of sex and gender); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 865–75 (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., Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 703 (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); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 646, 658–59 (2005) (describing disfavored workplace identity performances involving appearance); 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 in adjudicating whether individuals were slaves or free); Angela Onwuachi-Willig, Essay, *Undercover Other*, 94 CALIF. L. REV. 873, 883–98 (2006) (considering racial and sexual identity performance); Rich, *supra* note 173, at 1158–66 (describing racial identity performance and resulting potential for race discrimination).

<sup>175</sup> Rich, *supra* note 173, at 1179 (footnote omitted). I note that important distinctions separate Rich from Butler and Yoshino. Butler’s and Yoshino’s work suggests that we possess a core essence of identity, which may either be masked or revealed by identity performance. See BUTLER, *BODIES THAT MATTER*, *supra* note 174, at x; Yoshino, *supra* note 174, at 773–74. Rich, in contrast, adopts a more postmodern view of identity, in which there is no inherent “essence” to identity and identity is instead contingent on social acknowledgement. See Rich, *supra* note 173, at 1134. For the purpose of recognizing the production of racial commodities, however, this distinction does not matter: whether racial identity is essential or contingent, its performance results in some amount of value that may be transferred, as described in section II.A, and both commodified and capitalized, as I will discuss in the balance of this section and the next.

voluntary engagement in racially associated acts such as wearing particular clothing or speaking a non-English language.<sup>176</sup>

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 used the term "working identity"<sup>177</sup> to describe the "process of negotiating and performing identity."<sup>178</sup> 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.<sup>179</sup> In his production of racial identity, that employee may need to do very little to communicate that he is hardworking, but he may need to go to great lengths to demonstrate the leadership skills necessary to advance within the firm.<sup>180</sup> 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.<sup>181</sup>

Such identity performances, in all their myriad complexity, affect the way that others experience one's race, or, put in market terms, identity performances shape the racial commodity that we produce. Some performances make nonwhite identity less salient. For example, a person with a racially identified first name might choose to adopt a nickname — perhaps eschewing "Muhammed" in favor of "Mo"<sup>182</sup> —

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<sup>176</sup> Rich, *supra* note 173, at 1161–66. Whether such identity performance deserves legal protection is a separate issue, and Rich makes a compelling case that it does. *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.

<sup>177</sup> Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000).

<sup>178</sup> *Id.* at 1265. Carbado and Gulati's analysis is framed within the workplace, but applies equally well to identity negotiation within society more broadly.

<sup>179</sup> *Id.* at 1267–70.

<sup>180</sup> *Id.* at 1269–70.

<sup>181</sup> 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, 21–24 (2006). To impose a single reading of identity performance thus risks essentializing the individual engaged in performance. *Id.* at 24–26. 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.

<sup>182</sup> *Cf.* *El-Hakem v. B.J.Y. Inc.*, 415 F.3d 1068 (9th Cir. 2005). In *El-Hakem*, the court held that a CEO created a racially hostile environment for a Muslim employee of Egyptian origin by referring to him as "Manny" rather than "Mamdouh" over the employee's objections; according to the employer, "a 'Western' name" was "more acceptable" to customers. *Id.* at 1071.

or a black woman might choose to straighten her hair.<sup>183</sup> Other identity performances make nonwhite 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.<sup>184</sup> Each of these examples of identity performance involves a complex process through which an individual produces the commodity of racial identity. And, as Parts III and IV address in more detail, each performance ultimately affects the exchange-value of the racial commodity that the individual's performance produces.

Thus, the racial raw material with which we begin, coupled with the identity performance in which we engage, produces the commodity of racial identity. In theory, racial identity does not have to become a commodity — in Marxian terms, it might be produced and kept for the use of the individual alone.<sup>185</sup> But the current reality is that by living in society and interacting with other people, our racial identity “produce[s] use-value . . . for others,” and, as a result of that process, becomes a commodity.<sup>186</sup>

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 nonwhite people, both by employers and by customers.<sup>187</sup> 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 nonwhite presence in the ranks of their employees.<sup>188</sup> Accordingly, nonwhite racial identity might also add use-value for the firm. In both instances, racial identity has been commodified. 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 subsequently continue to refine.

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<sup>183</sup> The styling of black women's hair has been analyzed by courts under Title VII, *see, e.g.*, *Rogers v. Am. Airlines*, 527 F. Supp. 229, 231–33 (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; Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010).

<sup>184</sup> 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 173, at 1183.

<sup>185</sup> I MARX, *supra* note 108, at 131.

<sup>186</sup> *Id.*

<sup>187</sup> *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, 1011 (2004).

<sup>188</sup> *See supra* section I.B.

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 and her relationship to society. 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.<sup>189</sup> I will further develop this idea in section II.C, but for now the important points are, first, that different racial identities are often not valued equally, and second, that the value assigned to racial identity varies from one setting to the next.

Returning to the law firm I have described, whether the firm values white or nonwhite racial commodities may depend on a number of factors, including the current racial composition of the firm's workforce and the preferences of the firm's customers. Regardless, racial identity — as produced by prospective employees — “satisfies human needs of whatever kind”<sup>190</sup> and is thus a commodity that prospective employees exchange during the hiring process in return for a job. Of course, the prospective associates' other attributes, such as their law school grades, their personalities, and the fit of their expertise with the 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 someone and pays her a salary, a transaction has taken place — the exchange of a racial commodity for money.<sup>191</sup>

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.<sup>192</sup> 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.<sup>193</sup> In Marx's

<sup>189</sup> See Rich, *supra* note 173, at 1161–66; cf. 1 MARX, *supra* note 108, at 131.

<sup>190</sup> 1 MARX, *supra* note 108, at 125.

<sup>191</sup> This exchange occurs even if the firm does not explicitly mean to purchase a racial commodity and the individual does not explicitly 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.

<sup>192</sup> 1 MARX, *supra* note 108, 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 . . .” *Id.* at 255.).

<sup>193</sup> See, e.g., JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 34 (Longmans, Green, Reader & Dyer 1871) (1848) (defining capital as the “accumulated stock of the produce of

process-driven model, capital results from the circulation of value through the repeated process of exchanging money for commodities and the consequent accumulation of value through these exchanges.<sup>194</sup> 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.<sup>195</sup> 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.<sup>196</sup> 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.<sup>197</sup> That the surplus value remains with the dominant class demonstrates the exploitative social relationship between the two classes.<sup>198</sup>

More broadly, though, exploitation does not only result from an 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 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, which yields economic benefits. It may be able to recruit other em-

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labour"); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 70–75 (G. Walker 1822) (1776) (listing land, labor, and capital stock as the “component parts of price”).

<sup>194</sup> 1 MARX, *supra* note 108, at 247–49, 255.

<sup>195</sup> *See id.* at 320–25, 725–34.

<sup>196</sup> *See 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.” (footnote omitted)); *id.* at 320–29.

<sup>197</sup> *See 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,” *id.* at 730).

<sup>198</sup> *See id.* at 927–30.

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ployees more successfully (both other employees of color and other employees of all races who care about diversity), giving it access to a broader talent pool and yielding further economic benefits. It may also be able to attract new clients through the enhanced trust and racial credibility it has gained by having a Latina employee — again yielding economic benefits.

Put another way, the law firm has used the commodity of racial identity acquired through hiring the Latina employee to derive surplus value by enhancing its own image as a diverse, tolerant, and nonracist institution. 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.<sup>199</sup> The 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. In such fashion, one actor may derive value from the racial identity of another.

As I noted at the beginning of this discussion, the Marxian account is a heuristic and is imperfect in many ways. Marx was concerned with the way that material commodities such as bread and clothing were produced and exchanged. Although his account provides a useful way of analyzing how commodities move and create value in a market, it does not perfectly describe intangible commodities like racial identity. As explained in section I.A, relationships among people create the conditions for the commodification of racial identity; that is,

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<sup>199</sup> The notion of exploitation is central in Marxist theory. The idea is that class disparity makes capitalism possible. In Marx's view, the capitalist holds all the power and accumulates all the wealth; 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 159 (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.* at 49–55. Likewise, the theory of cultural capital also postulates that individuals can acquire capital by assimilating dominant cultural values — what Pierre Bourdieu calls *habitus* — and adopting these as their own. See generally Bourdieu, *supra* note 111. That I have not devoted more discussion to theories of human and cultural capital does not mean that 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 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 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 that I develop in section II.C.

we see the value of racial identity transferred and captured through interpersonal interaction, affiliations, and networks. Nonetheless, what Marxian analysis adds is the way that this assignment and transfer of racial value results in the commodification of race, the capitalization of racial value, and the capture of that value by white people and predominantly white institutions. The next section, then, synthesizes these elements into a unique process — the process of racial capitalism.

### C. *Racial Capitalism*

Research on social capital and status markets, in conjunction with the Marxian concepts of commodities and capital, provides the foundation for the concept of *racial capital*. I define racial capital as the economic and social value derived from an individual's racial identity, whether by that individual, by other individuals, or by institutions.<sup>200</sup> The value is not always economic in the immediate sense, although it may often 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.<sup>201</sup>

This definition bears some resemblance to the Marxian account of capital. We can think of racial 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. In this regard, theories of social capital help to clarify the way that race in general, and nonwhiteness in particular, is 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. Thus, racial *capitalism* — the process of deriving social and economic value from the racial identity of another — occurs when racial capital is exchanged in the market.

The Marxian account of capital thus assists in explaining the process of racial capitalism by making transparent the power dynamics

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<sup>200</sup> To be clear, racial capital is simply value derived from racial identity. The concept of racial capital is therefore distinct from that of racial *capitalism*, which necessarily involves deriving value from the racial identity of another person.

<sup>201</sup> 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 economic implications to the extent they deal with taxes or allocation of other resources.

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that determine the valuation of racial identity. Although all individuals produce the commodity of racial identity, it is members of the dominant group — in the United States, generally white people and predominantly white institutions — who most often engage in racial capitalism by capturing the surplus value associated with nonwhiteness. They gain access to nonwhiteness through affiliations with friends, colleagues, and employees, and continue to derive 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 nonwhiteness 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 nonwhite 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 capitalism 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.<sup>202</sup> Rather, my argument acknowledges that America's unique history regarding race and the continued social salience of race warrant a specific analysis of the way that race continues to be assigned value in society today.

Racial capitalism permeates American society, affecting relationships ranging from the interpersonal to the institutional. Several examples illustrate the troubling ways that racial capitalism currently occurs. 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 nonwhite students.

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

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<sup>202</sup> 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 generally* Crenshaw, *supra* note 8. While I focus on race here, such intersections provide a rich avenue for future inquiry. *See generally* Leong, *supra* note 7.

Signaling the presence of nonwhiteness 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 nonwhiteness 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 nonwhiteness is by publicizing images and statistics reflecting the nonwhite students in their student population. A recent study examined the promotional materials of 371 colleges and universities and found that nonwhite students were significantly overrepresented in photographs.<sup>203</sup> 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.<sup>204</sup> 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.<sup>205</sup> These disparities suggest that schools are motivated to capture the likenesses of black and Asian students in their viewbooks, which in turn suggests an institutional attempt to capitalize on nonwhiteness by converting it into 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 black student Diallo Shabazz had been Photoshopped.<sup>206</sup> 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."<sup>207</sup> The school officials responsible for the

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<sup>203</sup> *Viewbook Diversity vs. Real Diversity*, INSIDE HIGHER ED (July 2, 2008), <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. HIGHER EDUC. 671, 686–87 (2008).

<sup>204</sup> See *Viewbook Diversity vs. Real Diversity*, *supra* note 203. The researchers acknowledged the difficulty of attempting to identify students by physical appearance, and so their conclusions are approximate.

<sup>205</sup> *Id.*

<sup>206</sup> Claiborne, *supra* note 4.

<sup>207</sup> *Id.* The fact that school officials were unable to find a photograph of white and nonwhite 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, at 24.

Photoshopping decision apologized, and the school's application materials were reprinted at a cost of about \$64,000.<sup>208</sup>

The incident made transparent the school's efforts at racial capitalism. Shabazz's race was clearly of value to the school; otherwise 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.<sup>209</sup> By obtaining something of monetary value for the unauthorized use of his image, Shabazz laid bare the economic motivation underlying the school's use of his image. Ironically, this agreement may have furthered the university's attempt to acquire racial capital, albeit in a more costly fashion than using photo-manipulation software.

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,<sup>210</sup> as well as the principle that "status is . . . zero-sum in character. One actor cannot increase his status without another losing status."<sup>211</sup> The sheer amount of time spent producing and analyzing the *U.S. News* rankings — and the proliferation of alternative ranking systems<sup>212</sup> — makes clear that schools are inextricably enmeshed in the rankings game.<sup>213</sup>

One way that schools negotiate their position in the status hierarchy is by enrolling diverse student bodies. This strategy allows a school to gain status by burnishing its reputation as a progressive and

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<sup>208</sup> *University of Wisconsin Says It Faked Diversity Photo*, *supra* note 207, at 24. 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*, COMPUTERS & COMPOSITION, [http://www.bgsu.edu/cconline/ethics\\_special\\_issue/DEVOSS\\_PLATT](http://www.bgsu.edu/cconline/ethics_special_issue/DEVOSS_PLATT) (last visited May 10, 2013).

<sup>209</sup> Lisa Wade, *Doctoring Diversity: Race and Photoshop*, SOC'Y PAGES (Sept. 2, 2009, 10:48 AM), <http://thesocietypages.org/socimages/2009/09/02/doctoring-diversity-race-and-photoshop>.

<sup>210</sup> See Alfred L. Brophy, *The Emerging Importance of Law Review Rankings for Law School Rankings, 2003–2007*, 78 U. COLO. L. REV. 35, 37 (2007) ("The obsession with law school rankings by current and prospective law school students, law school administrators and faculty, and alumni is continuing unabated.")

<sup>211</sup> PODOLNY, *supra* note 129, at 25.

<sup>212</sup> See, e.g., *America's Top Colleges*, FORBES, <http://www.forbes.com/top-colleges/list> (last visited May 10, 2013).

<sup>213</sup> 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 administration is helping it to thrive — where, of course, thriving is defined as moving up in the rankings.

inclusive institution. Consider law schools, for example. At present, “diversity” is not reflected in the *U.S. News* law school rankings, although the California Bar recently sent *U.S. News* a letter suggesting that a school’s “diversity success” should count for fifteen percent of its overall ranking,<sup>214</sup> and a symposium sponsored in part by the Society of American Law Teachers invited contributions about ways the rankings might meaningfully incorporate diversity.<sup>215</sup> Moreover, *U.S. News* maintains a separate ranking system based on its “diversity index,”<sup>216</sup> and schools that score high on that metric often publicize their status.

In short, claiming nonwhiteness in their student bodies allows schools — often predominantly white schools — to gain status, honor, and respect. These qualities translate into economic gain because they help those schools attract more applicants and more donors. Nonwhiteness 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 nonwhiteness within their work force. Many such businesses purport to embrace diversity — and hence nonwhiteness — because it makes good business sense, touting a range of substantive benefits that flow from a work environment that includes individuals of many backgrounds.<sup>217</sup> 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.<sup>218</sup>

One way that businesses gain racial capital is by placing nonwhite 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

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<sup>214</sup> Robert Morse, *Should Diversity Be Added to Best Law Schools Rankings?*, U.S. NEWS & WORLD REP. (Aug. 7, 2011), <http://www.usnews.com/education/blogs/college-rankings-blog/2011/04/07/should-diversity-be-added-to-best-law-schools-rankings>.

<sup>215</sup> *Law School Symposium — Opening Doors: Making Diversity Matter in Law School Admissions*, ST. JOHN’S UNIV., [http://www.stjohns.edu/academics/graduate/law/diversity\\_symposium.event@digest.stjohns.edu%2Facademics%2Fgraduate%2Flaw%2Fdiversity\\_symposium.xml?context\\_date=11/11/2011](http://www.stjohns.edu/academics/graduate/law/diversity_symposium.event@digest.stjohns.edu%2Facademics%2Fgraduate%2Flaw%2Fdiversity_symposium.xml?context_date=11/11/2011) (last visited May 10, 2013).

<sup>216</sup> *2011 Law School Diversity Index*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-school-diversity-rankings> (last visited May 10, 2013).

<sup>217</sup> See Wilkins, *supra* note 83, at 1553–58 (describing history of the “good for business” rationale).

<sup>218</sup> See *id.* at 1571–91.

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.”<sup>219</sup> This version of racial capitalism provides a variety of benefits. Showcased nonwhite individuals help to recruit talented new employees, both those who are themselves nonwhite and those who care about diversity.<sup>220</sup> Similarly, showcasing nonwhiteness provides significant instrumental value to employers as a means to retain current customers and attract new ones.<sup>221</sup> Ultimately, these various uses of nonwhiteness translate to economic returns.

Yet showcasing a few select nonwhite employees does not actually require changing workplace cultures in which many nonwhite individuals often feel subtly unwelcome.<sup>222</sup> Indeed, employers may actually preserve existing racial hierarchies by hiring and showcasing nonwhite employees. As e. christi cunningham argues, the practice of “[t]okenism leverages undervalued identities” and “preserves commodified values of race by parading an exception.”<sup>223</sup> By showcasing nonwhite employees in prominent positions, employers signal that unsuccessful nonwhite employees are responsible for their own failures, while at the same time maintaining a system in which white employees are in fact preferred.<sup>224</sup>

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 nonwhite presence provides an additional opportunity for racial capitalism.

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.”<sup>225</sup> Employers often feature diversity sta-

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<sup>219</sup> Shin & Gulati, *supra* note 16, at 1034.

<sup>220</sup> 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., be sure to publicize activities that support the minority community).” WILLIAM G. SHACKELFORD, *MINORITY RECRUITING* 35 (1996).

<sup>221</sup> See, e.g., Wilkins, *supra* note 83, at 1561–62, 1567, 1576–83 (acknowledging that law firms are responsive to client preferences, although such preferences do not always favor diversity).

<sup>222</sup> See Green, *supra* note 174, at 646–53.

<sup>223</sup> cunningham, *supra* note 113, at 526–27.

<sup>224</sup> See *id.*

<sup>225</sup> Wilkins, *supra* note 83, at 1593–94.

tistics on their websites and in promotional materials as a way of communicating that information as widely as possible.

Moreover, the presence of nonwhite employees throughout an employer's workforce adds racial capital by providing a statistical defense against current litigation or preempting future litigation. For example, beginning in 2003 Walmart undertook a well-publicized initiative to diversify its own ranks and to insist on diversity in its business partners.<sup>226</sup> Walmart *has* achieved some striking numerical results. It wrote to each of its top one hundred law firms, stating that to retain Walmart 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 Walmart, with at least one female and one person of color on the slate.<sup>227</sup> The initiative resulted in changing forty relationship attorneys and shifting \$60 million worth of Walmart's legal work to management by female or nonwhite attorneys.<sup>228</sup>

These diversity measures have accompanied — and, one might infer, are designed to respond to — a wave of employment discrimination allegations against Walmart. 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.<sup>229</sup> 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.<sup>230</sup> Walmart also faced a smaller class action lawsuit initiated by two black truck drivers, alleging race discrimination in hiring.<sup>231</sup> And the NAACP's 2005 Industry Survey gave Walmart a grade of C minus

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<sup>226</sup> See, e.g., *Diversity is a Way of Life at Wal-Mart*, WALMART (Mar. 3, 2006), <http://news.walmart.com/news-archive/2006/03/03/diversity-is-a-way-of-life-at-wal-mart>. Compare WAL-MART CLASS WEBSITE, [http://www.walmartclass.com/public\\_home.html](http://www.walmartclass.com/public_home.html) (last visited May 10, 2013), with Press Release, Wal-Mart, Wal-Mart Details Progress Toward Becoming a Leader in Employment Practices (June 4, 2004), available at <http://www.prnewswire.com/news-releases/wal-mart-details-progress-toward-becoming-a-leader-in-employment-practices-74373262.html>.

<sup>227</sup> *Wal-Mart Requires Diversity in its Law Firms*, WALMART, <http://news.walmart.com/news-archive/2005/12/09/wal-mart-requires-diversity-in-its-law-firms> (last visited May 10, 2013).

<sup>228</sup> *Id.* But we don't know whether the Walmart 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 Walmart without any net gain.

<sup>229</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011).

<sup>230</sup> *Store Locations of Class Member Declarants*, WAL-MART CLASS WEBSITE, <http://www.walmartclass.com/staticdata/walmartclass/declarations/> (last visited May 10, 2013) (declarations of Thearsa Collier, Gina Espinoza-Price, Jennifer Johnson, Umi Jean Minor, and Lorie Williams).

<sup>231</sup> Jonathan D. Glater, *2 Black Truckers Sue, Accusing Wal-Mart of Hiring Bias*, N.Y. TIMES (July 14, 2005), [http://www.nytimes.com/2005/07/14/business/14bias.html?\\_r=0](http://www.nytimes.com/2005/07/14/business/14bias.html?_r=0).

“within the areas of employment, vendor development, advertising/marketing, charitable giving and investing/franchising.”<sup>232</sup>

Regardless of whether Walmart committed race discrimination within the meaning of the law, its diversity initiatives have protected the company’s image to some degree. The company has received awards and considerable media praise for its efforts.<sup>233</sup> And by affiliating itself with nonwhite employees and racially diverse business partners, Walmart also insulates itself from future allegations of race discrimination. Racial capitalism thus yields valuable rewards: Walmart’s diversity initiative may ultimately save the company billions of dollars in adverse jury verdicts or litigation settlements.

Indeed, racial capitalism is so prevalent that even a judicial variant has emerged. Justin Driver’s meticulous research uncovers substantial variation in the circumstances in which courts choose to explicitly identify the race of parties or other individuals discussed in their opinions.<sup>234</sup> One trenchant example is *Ricci v. DeStefano*,<sup>235</sup> in which the Supreme Court held that the New Haven fire department’s decision to disregard standardized test results that disparately affected racial minorities violated Title VII.<sup>236</sup> Justice Kennedy’s majority opinion discussed three witnesses who testified before the New Haven Civil Service Board regarding standardized testing and the fire department’s method for determining promotions.<sup>237</sup> The opinion identified two of the witnesses only by their professional credentials; of the third, Vincent Lewis, the opinion stated explicitly that Lewis “is black” and emphasized that Lewis testified most strongly that the test was nondiscriminatory.<sup>238</sup> As Driver succinctly explains: “This identification is most striking because, in a decision that cautions against the dangers of racially disparate treatment, it treats Lewis disparately by race.”<sup>239</sup> The emphasis on Lewis’s race is particularly notable because one of the other experts was also black — yet Kennedy chose to racially iden-

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<sup>232</sup> See NAACP 2005 Industry Surveys Give Five Major Industries “C” and “D” Grades, NAACP (July 11, 2005), <http://www.naacp.org/press/entry/naacp-2005-industry-surveys-give-five-major-industries-c--and--d--grades>.

<sup>233</sup> See, e.g., Press Release, Wal-Mart Stores, Inc., Wal-Mart Receives American Bar Association Award for Outstanding Achievements in Promoting Diversity (Feb. 12, 2007), available at <http://finance.paidcontent.org/paidcontent/news/read/1135848/wal>.

<sup>234</sup> See Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404 (2012).

<sup>235</sup> 129 S. Ct. 2658 (2009); see also, e.g., *Georgia v. Ashcroft*, 539 U.S. 461, 471, 485–91 (2003) (rejecting challenge to Georgia’s redistricting plan while emphasizing that “[t]en of the eleven black senators voted for the plan,” *id.* at 471).

<sup>236</sup> *Ricci*, 129 S. Ct. at 2689.

<sup>237</sup> See *id.* at 2668–69.

<sup>238</sup> *Id.* at 2669.

<sup>239</sup> Driver, *supra* note 234, at 407.

tify only Lewis, the expert whose assessment of the test best harmonized with the result the Court ultimately reached.<sup>240</sup>

*Ricci*'s otherwise gratuitous racial emphasis reveals a form of racial capitalism. That is, the implication of the majority's statement that Lewis was black is that if a *black* expert believed that a test was non-discriminatory, it is more likely that it was. By identifying Lewis's race, the majority therefore derived racial value. It used race to buttress its conclusion that the test was nondiscriminatory; to reinforce the correctness of its analysis; to emphasize that the result in the case was not racist; and ultimately to perpetuate a broader narrative of fairness and racial equality in racial discourse.

These examples illustrate the myriad ways that racial capitalism occurs both among individuals and 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. Marx recognized that capitalism both perpetuates itself and in so doing augments its effects, referring repeatedly to "[t]he circuit of money capital."<sup>241</sup> That is, while the production of commodities is a prerequisite for capitalism, the process of capitalism reinforces both the commodification of individual labor and the exploitative social relations made possible by that commodification.

The analogy holds true for racial capitalism. The commodification of race is a prerequisite for the process of deriving social and economic value that comprises racial capitalism. Racial capitalism then leads to the exploitation of nonwhite racial value, and in so doing it instantiates race as a commodity. That is, racial capitalism and commodification are inextricably linked and mutually reinforcing. Throughout this Part, therefore, I will sometimes refer to a particular harm as associated with racial capitalism, and will sometimes focus more specifically on harms flowing from the closely related phenomenon of racial commodification.

With that, this Part turns to the harms of racial capitalism. The processes of racial capitalism reinforce inequality through harms both to nonwhite people and to society at large. Given the close relationship between racial capitalism and the commodification of race, this Part first provides a theoretical foundation for a closer analysis of the harms of commodification, and then examines the negative consequences of both the commodification of race itself and the inextricably related process of racial capitalism.

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<sup>240</sup> *Id.* at 408.

<sup>241</sup> 2 KARL MARX, CAPITAL 109 (David Fernbach trans., Penguin Classics 1992).

### A. Commodification

“Tell me that you want the kind of things that money just can’t buy.”<sup>242</sup>

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. Judge Posner, who favors markets in almost everything, epitomizes this view.<sup>243</sup> At the opposite extreme, others, such as Karl Marx, have argued for something approaching universal noncommodification.<sup>244</sup> While I incorporate elements of Marxian analysis in my discussion of capital in section 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 objectionable in some instances but not in others.

The question, then, is how we ought to differentiate between objectionable and unobjectionable 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 necessity” because such transactions are not truly voluntary.<sup>245</sup> The second is a concern about corruption, which “points to the degrading effect of market valuation and exchange on certain goods and practices.”<sup>246</sup> The two arguments express two different views 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.<sup>247</sup>

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<sup>242</sup> THE BEATLES, *Can't Buy Me Love, on A HARD DAY'S NIGHT* (Parlophone Records 1964).

<sup>243</sup> See generally, e.g., Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

<sup>244</sup> See generally 1 MARX, *supra* note 108.

<sup>245</sup> Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, in RETHINKING COMMODIFICATION, *supra* note 39, at 122, 122.

<sup>246</sup> *Id.*

<sup>247</sup> *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*,

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.<sup>248</sup> 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 necessity of self-constitution in relation to the environment of things and other people.”<sup>249</sup> 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.”<sup>250</sup> For Radin, these things include “one’s politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes.”<sup>251</sup> Such particulars are “integral to the self” and cannot be commodified and exchanged without irreparable harm.<sup>252</sup> 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.<sup>253</sup>

Glenn Cohen adds a useful gloss to corruption arguments such as Radin’s by advocating for examination of *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.”<sup>254</sup> 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.<sup>255</sup> 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 may be fully captured in mone-

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117 HARV. L. REV. 689, 690 (2003) [hereinafter *Price of Everything*]. He also adds a third concern — crowding out — which “suggests that when markets enter [a] domain they push out altruistic giving.” Glenn Cohen, *Clarifying Commodification*, CONCURRING OPINIONS (Aug. 17, 2010, 8:53 AM), <http://www.concurringopinions.com/archives/2010/08/clarifying-commodification.html>.

<sup>248</sup> Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1903 (1987).

<sup>249</sup> *Id.* at 1904.

<sup>250</sup> *Id.* at 1906.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*; see also *id.* at 1881.

<sup>253</sup> See *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 elaborate on this “transition problem” in Part IV.

<sup>254</sup> *Price of Everything*, *supra* note 247, at 689.

<sup>255</sup> *Id.* at 707.

tary 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.<sup>256</sup> This distinction suggests that even controversial commodifications — sexual services, for example — might be rehabilitated if the transaction were appropriately conceptualized to express the values the transaction implicates.<sup>257</sup>

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 to determine whether commodification of a particular thing impairs human flourishing. She acknowledges this shortfall, 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.”<sup>258</sup> Radin concludes that we should “rely . . . on our best moral judgment in light of the best conception of personhood as we now understand it.”<sup>259</sup> Yet such analysis assumes that a universal concept of human flourishing exists, and moreover, assumes the ability to reach consensus on what human flourishing is.<sup>260</sup> 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.<sup>261</sup> My argument is specific to the process of racial capitalism that results from commodifying race.<sup>262</sup> People should not commodify race because racial commodification enables racial capitalism and the exploitation and inequality that process engenders. Racial

<sup>256</sup> *Id.* at 710.

<sup>257</sup> *See, e.g., id.* at 708–09 (discussing “arch-anticommodificationist” Elizabeth Anderson’s concession that sex therapy aimed at helping people liberate themselves from oppressive forms of sexuality might be permissible if framed as a “quasi-gift . . . for which money could not entirely compensate”).

<sup>258</sup> Radin, *supra* note 248, at 1908.

<sup>259</sup> *Id.* at 1909.

<sup>260</sup> Perhaps Radin’s point is that in each case people should find the common denominator — the moral principles on which everyone can agree. Yet the vast range of opinion on, for example, the relationship of sex to personhood calls into question whether there is a common denominator robust enough to be useful. Or perhaps her point is that people should *try* to reach consensus, and that whatever imperfect consensus they achieve will still provide the best available guidance to shape commodification regimes in this 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 one believes that minority groups may have different conceptions of human flourishing than majority groups.

<sup>261</sup> While I do not necessarily accept Radin’s argument in its entirety, I believe that any reasonable definition of human flourishing would require noncommodification of race.

<sup>262</sup> The argument extends in many ways to other identity categories, although I save discussion of those categories for another day.

capitalism then reinforces racial commodification, and the social circumstances resulting from this dialectic relationship ultimately harm individual identity, degrade the way that people think and talk about race, and entrench 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 understood as an appropriate gift or subject of barter, in part because of the close linkage between racial experience and selfhood, and in part because the social meaning of such a transaction inevitably invokes the historical and ongoing racialized slavery in America.<sup>263</sup> Perhaps most troublingly, racial capitalism gives others a stake in one's racial identity — that is, if race is the subject of commodification and exchange, then these circumstances implicitly justify pressure from outsiders regarding the way that racial identity should be performed.

Collectively, these features of racial commodification reveal its inconsistency with equality. The historical and ongoing effects of racism render white and nonwhite people unequal in society, with the result that racial capitalism affects the two groups in dramatically different ways. Because racial identity cannot be commodified and its value exchanged consistent with notions of equality, race ideally should remain uncommodified.<sup>264</sup> Indeed, the inequality engendered by racial capitalism raises legal as well as social concerns. Equal protection doctrine guards against disparate treatment caused by discriminatory intent. Given the disparate social status of white and nonwhite individuals, racial capitalism not only reflects but also intentionally creates disparities, thereby engendering inequality in a manner that is plausibly proscribed by existing doctrine.<sup>265</sup>

My objection to the commodification of race is distinct from — and does not necessarily forbid — the commodification of culture, even cul-

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<sup>263</sup> See generally KEVIN BALES & RON SOODALTER, *THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY* (2009). 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. *Price of Everything*, *supra* note 247, at 689.

<sup>264</sup> The question of whether race should remain entirely uncommodified in our current *nonideal* society is a separate question, which I address in Part IV.

<sup>265</sup> I am not particularly optimistic that the broad social practice of racial capitalism would ever give rise to an equal protection claim in and of itself. But the activities arising from racial capitalism and racial commodification may well illuminate disparities in particular contexts that would engender litigation. For example, consider the hypothetical example of a nonwhite school district employee who refuses to act as the public spokesperson defending the racial segregation created by the district's zoning decisions. She is subsequently terminated for insubordination. If she brings an equal protection claim, she might call attention to the disparate impact of the school's practices as well as its discriminatory intent in attempting to leverage her racial identity to defend its actions. Put another way, she might argue that the school intentionally imposed a disparate burden on her because of her race.

tural artifacts that are associated with particular racial identities. Scholars disagree about whether commodification of culture is objectionable: some condemn it as appropriation,<sup>266</sup> while others, such as Regina Austin, view cultural commodification as potentially rebellious, liberatory, and transformative.<sup>267</sup> 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,<sup>268</sup> but the two are analytically distinct.<sup>269</sup> It is one thing to claim that the commodification of particular cultural objects or practices has liberatory potential, and it is quite another to make the same claim about the racial identity of individual human beings. 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.<sup>270</sup> Of course, to the extent that a particular cultural practice is almost synonymous with racial identity, commodification of that practice may be more problematic. But in general I see a ready distinction between the thick notion of cultural property rooted in traditions and practices 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 in which the commodification of race both intrinsic to and instantiated by racial capitalism frustrates racial equality. I will first argue that racial capi-

<sup>266</sup> See, e.g., Greg Tate, *Introduction: Nigs R Us, or How Blackfolk Became Fetish Objects*, in EVERYTHING BUT THE BURDEN, *supra* note 140, at 1, 2.

<sup>267</sup> See, e.g., Regina Austin, *Kwanzaa and the Commodification of Black Culture*, in RETHINKING COMMODIFICATION, *supra* note 39, at 178.

<sup>268</sup> See, e.g., Martha M. Ertman & Joan C. Williams, *Preface: Freedom, Equality, and the Many Futures of Commodification*, in RETHINKING COMMODIFICATION, *supra* note 39, at 1, 1 (conflating race and culture by referring to commodification of “racial identity” through “FUBU clothing”).

<sup>269</sup> Cf. generally FORD, *supra* note 91 (distinguishing racism from discrimination on the basis of cultural difference).

<sup>270</sup> Proponents of cultural commodification might claim that nonwhiteness 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.* ch. 2. Still, setting aside that objection, the argument might proceed along the following lines: people should be entitled to capitalize on nonwhiteness — indeed, to do so is empowering because it imparts value to nonwhiteness — and to deny the opportunity for commodification is to deny a source of power. But I think that there is an important distinction between the capitalization of nonwhiteness as a form of cultural property by those to whom it belongs and those to whom it does not. To the extent that nonwhiteness itself is cultural property, when white people exploit the capital associated with nonwhiteness, they appropriate that cultural property. Thus, even if capitalization imparts value to nonwhiteness as cultural property, it may do so in a way that empowers the appropriator, not those to whom the property belongs.

talism has negative consequences for the well-being of nonwhite people; I will then argue that racial capitalism also has negative consequences for social progress.

### B. Harm to Nonwhite People

Racial capitalism harms nonwhite people: it fractures identity, creates pressure for nonwhite people to engage in particular identity performances, and inflicts economic harm by placing nonwhite people at the greater mercy of the market.<sup>271</sup> These harms may be conceptualized both as harms to individual nonwhite people and as harms to nonwhite racial groups. Ultimately, then, the effect of racial capitalism and the racial commodification that it instantiates is to reinforce the inequality of nonwhite people and white people.

1. *Fractured Identity*. — “I live a life that is often disjointed, troubling.”<sup>272</sup>

Racial identity<sup>273</sup> is a deeply personal characteristic that people negotiate throughout their lives.<sup>274</sup> 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.”<sup>275</sup> This is particularly true with respect to nonwhite people who — unlike white people, whose race is largely “invisible” — are regularly required to think about their race and to engage in intricate identity performances.<sup>276</sup> For nonwhite people, considerable social science research emphasizes the importance of racial identity for-

<sup>271</sup> 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 — has shaped our conceptions of nonwhite identity. See *supra* section I.C, pp. 2169–72. Because my focus in this Article is on commodification of nonwhite identity, I will save expanded discussion for future work. See Leong, *Identity Entrepreneurs*, *supra* note 8.

<sup>272</sup> JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN* 7 (1995).

<sup>273</sup> My reference to identity-based harms in this section implicates both individual identity and group identity. Some harms occur at an individual level, infringing on values such as autonomy and self-determination. Others affect racial groups, thereby damaging group standing and obstructing equality among groups. The harms overlap, and an analysis of both is necessary to an understanding of the negative consequences of commodification. I thank Laura Gomez and Cheryl Harris for focusing me on this point.

<sup>274</sup> See Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 296–304 (2006) (examining the importance of racial identity formation for black individuals 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 the conflict between national and individual identity for nonwhite people in the United States); Rich, *supra* note 173, at 1172–86 (discussing various theories of racial identity formation and maintenance; collecting literature on same).

<sup>275</sup> Holning Lau, *Pluralism: A Principle for Children’s Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 332 (2007) (discussing work of Erik Erikson and James Marcia on identity development); see also Rich, *supra* note 173, at 1172–86.

<sup>276</sup> Cf. Flagg, *supra* note 38, at 957 (“The most striking characteristic of whites’ consciousness of whiteness is that most of the time we don’t have any.”); see also *infra* section III.B.2, pp. 2207–11.

mation to individual self-esteem and comfort with their surroundings.<sup>277</sup> 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.”<sup>278</sup> 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. Racial capitalism instead dissociates racial identity from the individual; it separates identity from the person who lives that identity.<sup>279</sup> The result is that race no longer forms one component of an integrated self. To borrow Marx’s vocabulary, two kinds of “alienation” result.<sup>280</sup> First, because racial capitalism requires and reinforces the commodification of race, it 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 an individual’s 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.”<sup>281</sup>

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.<sup>282</sup> 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 nonwhite 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,

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<sup>277</sup> See Rich, *supra* note 173, at 1172–86; see also Adams, *supra* note 274, at 296–301 (examining the importance of racial identity formation for black individuals); Adriana J. Umaña-Taylor & Nana Shin, *An Examination of Ethnic Identity and Self-Esteem with Diverse Populations: Exploring Variation by Ethnicity and Geography*, 13 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 178, 179 (2007) (describing empirical research that shows “a positive relationship between ethnic identity and indices of psychological well-being such as self-esteem”).

<sup>278</sup> Rich, *supra* note 173, at 1180.

<sup>279</sup> Scholars have noted the fragmentation of identity that results from commodification of other identity categories as well. See, e.g., David M. Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 CALIF. L. REV. 223, 226 (2002).

<sup>280</sup> See Radin, *supra* note 248, at 1871 (discussing Marx).

<sup>281</sup> *Id.* at 1907.

<sup>282</sup> *Id.* at 1904–05.

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 nonwhite individual has little control over her relationship with her surroundings if her identity is merely a commodity to be used by others for monetary gain.

Recall Diallo Shabazz.<sup>283</sup> 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 interfered with 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 Shabazz'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-based 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.<sup>284</sup> 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 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.”<sup>285</sup> Such discourse trivializes racial identity by communicating that such identity may be valued in the market and described in market terms.

Moreover, the use of market rhetoric in discussions about race displaces more robust discourse regarding the group harms that nonwhite people have suffered and continue to experience. For instance, the focus on acquiring and displaying diversity may preempt conversations about past racial injustice, the reasons for current racial inequality, and possible measures that individuals and society might undertake to improve such inequality.

One might argue that commodifying nonwhiteness could have benefits for nonwhite individuals' self-esteem and sense of identity. So much value has been assigned to whiteness,<sup>286</sup> both historically and currently, that there is an intuitive appeal to injecting the value of nonwhiteness into our discourse as well. And it may be psychological-

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<sup>283</sup> See *supra* pp. 2192–93.

<sup>284</sup> Cf. Radin, *supra* note 248, at 1907 (discussing the dissociation that results when workers “internalize market rhetoric”).

<sup>285</sup> *Id.* at 1880.

<sup>286</sup> See *supra* section I.A, pp. 2158–61.

ly beneficial to encourage nonwhite 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 nonwhiteness into our discourse will change the way we talk and think about race for the better. The value assigned to nonwhiteness is not analogous to the value assigned to whiteness. Rather, whiteness resides at the top of the racial hierarchy, and the value assigned to nonwhiteness is a highly specific and contingent form of value that is defined in relation to the higher status of whiteness, ultimately leaving the baseline value of whiteness untouched. Assigning economic value to nonwhiteness therefore feels empty — a poor exchange for the many detriments to racial capitalism that I have described in this section.

2. *Performance Demands.* — “I wanted to show that I was like white people: ‘Don’t be afraid. I’m one of the *good* blacks.’”<sup>287</sup>

Racial capitalism places identity demands on nonwhite people. It pressures nonwhite people both to perform their nonwhiteness *and* to perform it in a way palatable to the white majority. These accepted identity categories and scripts then become self-perpetuating: social norms infuse case law, and case law reinscribes social norms.<sup>288</sup>

The ubiquity of racial capitalism incentivizes nonwhite people to make their nonwhiteness salient because their access to various social goods is determined, in part, by their performance of nonwhiteness. Many nonwhite college applicants, for example, will receive advice from admission consultants or simply encounter conventional wisdom that instructs them to emphasize their nonwhiteness in their admissions essays in order to prove themselves qualified for consideration under the diversity rationale.<sup>289</sup> Moreover, these identity demands do not disappear once a nonwhite person has matriculated at an educational institution or begun work at a company. Rather, in a system of racial capitalism, a person’s added value is intertwined with her racial identity, and the demand for production of that identity continues. Nonwhite people are therefore subject to ongoing pressure to justify their presence through performance of nonwhiteness.<sup>290</sup>

Yet in this complex performance of racial identity, making nonwhiteness salient is only the opening act. When racial identity is

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<sup>287</sup> PAUL M. BARRETT, *THE GOOD BLACK* 6 (1999).

<sup>288</sup> See Kenneth L. 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 W. 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).

<sup>289</sup> See Nancy Leong, *Multiracial Identity and Affirmative Action*, 12 *ASIAN PAC. AM. L.J.* 1, 22 n.98 (2007).

<sup>290</sup> FORD, *supra* note 91, at 59–64.

commodified, the value assigned to nonwhiteness varies depending on tastes reflected in the market. Some manifestations of nonwhite identity are viewed far more favorably by the dominant white culture, and nonwhite people are rewarded for conforming their identity performance to those tastes.<sup>291</sup> 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 to Lil Wayne. Thus, within a system of racial capitalism, nonwhite people must thread the needle: they must be identifiably nonwhite to benefit from their nonwhiteness, yet the version of nonwhiteness they perform must meet with white approval.

This continual process of identity management places a disparate burden on nonwhite people as a group. 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.<sup>292</sup> Identity work has downsides: it is exhausting and consuming; “the outsider not only has to perform, but she has to perform well.”<sup>293</sup> Moreover, “[i]dentity performances can become a denial of self”<sup>294</sup> or can backfire if the performance is identified as strategic.<sup>295</sup> The costs of identity performance are therefore greater for nonwhite people.<sup>296</sup>

Case law reveals the double-edged sword of racial capitalism: nonwhiteness is a valued commodity, 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.<sup>297</sup> A particularly clear example appears in *Equal Employment Opportunity Commission v. United Virginia Bank/Seaboard National*,<sup>298</sup> 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.<sup>299</sup>

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<sup>291</sup> See, e.g., Carbado & Gulati, *supra* note 174, at 714–19.

<sup>292</sup> Carbado & Gulati, *supra* note 177, at 1261 n.2, 1262, 1269–70.

<sup>293</sup> *Id.* at 1279, 1291.

<sup>294</sup> *Id.* at 1288.

<sup>295</sup> See *id.* at 1291.

<sup>296</sup> For a discussion of the harms of ascribed identity scripts to democracy, see Holning Lau, *Identity Scripts & Democratic Deliberation*, 94 MINN. L. REV. 897, 916–29 (2010).

<sup>297</sup> See generally, e.g., Rich, *supra* note 173.

<sup>298</sup> 615 F.2d 147 (4th Cir. 1980).

<sup>299</sup> *Id.* at 155.

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 more congenial to the dominant group.<sup>300</sup> And — because nonwhite people are aware of these preferences — they may feel obligated to perform their identity in a manner consistent with this unwritten code. 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, nonwhite people may also be subject to the disparate pressure of conformity to a potentially unfamiliar workplace culture.

The distortion of racial identity performance also emerges in the way that nonwhite entertainers literally perform on television and in movies. The overall number of nonwhite individuals who appear in these forums is low,<sup>301</sup> and even lower when one removes the shows and movies targeted at nonwhite audiences. 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.<sup>302</sup> Part of the calculus — whether stated or unstated — is likely that increased inclusion of nonwhite people would benefit the entertainment industry financially by attracting both nonwhite audiences who wish to see members of their race depicted on the screen and white audiences who pride themselves on open-mindedness to films featuring diverse casts.<sup>303</sup>

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<sup>300</sup> See Green, *supra* note 174, at 644–46.

<sup>301</sup> See, e.g., Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 21–23 (2007) (finding that 82% of lead roles in films released in 2005 that grossed more than one million dollars were played by white people); Press Release, SAG-AFTRA, Latest Casting Data Follows Historical Trends and Continues to Exclude People with Disabilities (Oct. 23, 2009), available at <http://www.sagaftra.org/press-releases/october-23-2009/latest-casting-data-follows-historical-trends-and-continues-exclude-p> (citing statistics); Jennifer Armstrong & Margeaux Watson, *Diversity in Entertainment: Why Is TV So White?*, ENT. WKLY. (June 13, 2008), <http://www.ew.com/ew/article/0,,20206185,00.html> (discussing lack of minority characters on television and including the opinions of various media insiders).

<sup>302</sup> See, e.g., Brent Lang, *Hollywood Won't Learn: It's a White Summer Again*, THEWRAP (May 3, 2011, 7:51 PM), <http://www.thewrap.com/movies/article/hollywood-won%E2%80%99t-learn-it%E2%80%99s-white-summer-again-27050>.

<sup>303</sup> See *id.* For examples of films likely to satisfy such tastes in white audiences, consider films such as THE HELP (DreamWorks Studios 2011); and CRASH (Bob Yari Productions 2004). Of course, some of this Hollywood sentiment may stem from egalitarian motives distinct from bottom-line interests, which could also explain why increased inclusion of nonwhite people has been relatively limited.

Yet despite the value that nonwhite identity has acquired within the industry, performance of that identity is consigned to a narrow set of scripts that meet with white approval. Among the highest-earning black actresses, almost all wear straight or wavy hairstyles, in conformity with white norms of appearance.<sup>304</sup> In fall 2011, nearly every main character on all twenty-seven new network television shows was white, and black actors were often relegated to the stereotypical role of “black best friend.”<sup>305</sup> 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.”<sup>306</sup> 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.”<sup>307</sup> Adherence to these scripts has psychic costs for the actors involved.<sup>308</sup> 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 nonwhite people to do identity work. Because part of their value in a particular setting is tied to their nonwhiteness, they are subtly — or not so subtly — encouraged both to perform their nonwhiteness and to do so in a way that meets with the approval of the dominant culture.

3. *Economic Disadvantage.* — “I think they’ve gotten enough.”<sup>309</sup>

Apart from these identity harms, racial capitalism also has material negative consequences for nonwhite people. The racial commodification that racial capitalism enforces renders racial minorities particularly vulnerable to broad fluctuations in market conditions. Podolny 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.”<sup>310</sup> Podolny 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.<sup>311</sup> But the princi-

<sup>304</sup> See MarcinSLR, *Highest-Paid Black Actresses*, SOCYBERTY.COM (Aug. 30, 2010), <http://socyberty.com/people/highest-paid-black-actresses>.

<sup>305</sup> *Morning Edition: How TV Shows Use BBFs to Appear Racially Diverse* (NPR radio broadcast Oct. 11, 2011), available at <http://www.npr.org/2011/10/11/141227508/on-tv-the-black-best-friend-concept-is-growing>.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> See Robinson, *supra* note 301, at 27–28.

<sup>309</sup> BONILLA-SILVA, *supra* note 147, at 81 (interview with “Roland”).

<sup>310</sup> PODOLNY, *supra* note 129, at 77.

<sup>311</sup> *Id.*

ple may be extrapolated to interactions between employers and individual employees whose value is viewed — at least partially — as flowing from their nonwhiteness. When market conditions worsen, prospective employees viewed as lower status — here, nonwhites — are less likely to be hired, retained, and promoted.

Research suggests that white people are more hesitant to hire people of color in difficult economic times. Robert LeVine and Donald Campbell first noted similar phenomena in their account of realistic group conflict theory, which states that in-group bias increases in response to threats such as scarce resources.<sup>312</sup> 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 they did when the economy was expected to improve.<sup>313</sup> Thinking of racial identity in economic terms encourages such out-group bias.<sup>314</sup> As a result, white people and predominantly white institutions come to view racial diversity as simply another nonessential 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 nonwhite 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.<sup>315</sup> 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 9.6% overall, and from 8.5%

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<sup>312</sup> See ROBERT A. LEVINE & DONALD T. CAMPBELL, *ETHNOCENTRISM: THEORIES OF CONFLICT, ETHNIC ATTITUDES, AND GROUP BEHAVIOR* 29–42 (1972). See generally Victoria M. Esses et al., *Intergroup Competition and Attitudes Toward Immigrants and Immigration: An Instrumental Model of Intergroup Conflict*, 54 J. SOC. ISSUES 699 (1998) (presenting research findings showing that competition for scarce resources significantly sharpens intergroup dynamics that tend to harm outgroup members).

<sup>313</sup> Eden B. King et al., *The Influence of Economic Conditions on Aspects of Stigmatization*, 66 J. SOC. ISSUES 446, 450, 453 (2010).

<sup>314</sup> See *id.* at 455–57.

<sup>315</sup> Karen Sloan, *ABA: The Recession Is Undermining Diversity Initiatives*, NAT'L L.J., Feb. 4, 2010 (“[S]ince the economic recession began . . . [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 Mac Donald, *Recession-Proof Diversity*, FORBES (Jan. 10, 2009, 12:01 AM), [http://www.forbes.com/2009/01/09/harvard-diversity-lamont-oped-cx\\_hd\\_0110donald.html](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.”).

to 8.7% for whites, but from 14.8% to 16.0% for blacks.<sup>316</sup> Some of the difference, of course, results from the overrepresentation of blacks in industries that tend to be more heavily affected by economic downturns.<sup>317</sup> 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.<sup>318</sup>

Information from law firms also supports the idea that diversity declines during economic hardship. Vault's 2009 Law Firm Diversity Survey, which includes results from 260 firms, reports that "[f]or 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 nearly stagnant at 6.06%."<sup>319</sup> Furthermore, "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.<sup>320</sup> Moreover, the percentage of minority associates — especially minority women — who left their firms increased significantly: whereas minority women comprised 13.98% of the third-year associates who left their firms in 2008, in 2009 they accounted for 16.64% of associates who left their firms.<sup>321</sup> Although these trends slowed in 2010, they did not reverse.<sup>322</sup> Collectively, this information indicates that racial capitalism has troubling economic consequences for nonwhite people.

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<sup>316</sup> BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 2010 ANNUAL AVERAGES — HOUSEHOLD DATA — TABLES FROM EMPLOYMENT AND EARNINGS, EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION BY SEX, AGE, AND RACE, available at [ftp://ftp.bls.gov/pub/special.requests/lfaa2010/pdf/cpsaat5.pdf](http://ftp.bls.gov/pub/special.requests/lfaa2010/pdf/cpsaat5.pdf).

<sup>317</sup> See, e.g., STEVEN PITTS, UNIV. OF CAL., BERKELEY LABOR CTR., RESEARCH BRIEF: BLACK WORKERS AND THE PUBLIC SECTOR 1 (2011), available at [http://laborcenter.berkeley.edu/blackworkers/blacks\\_public\\_sector11.pdf](http://laborcenter.berkeley.edu/blackworkers/blacks_public_sector11.pdf); SUZANNE MACARTNEY, ALEMAYEHU BISHAW & KAYLA FONTENOT, U.S. CENSUS BUREAU, POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY DATE AND PLACE: 2007–2011 3 (2013), available at <http://www.census.gov/prod/2013pubs/acsbr11-17.pdf> (showing black and Hispanic poverty rate of close to 25%, and white and Asian poverty rate near 12%); Timothy Williams, *Public Sector Sheds Jobs; Blacks Are Hit Hardest*, N.Y. TIMES, Nov. 29, 2011, at A16, available at <http://www.nytimes.com/2011/11/29/us/as-public-sector-sheds-jobs-black-americans-are-hit-hard.html>.

<sup>318</sup> See, e.g., Alexandra Cawthorne, *Weathering the Storm: Black Men in the Recession*, CTR. FOR AM. PROGRESS (Apr. 15, 2009), [http://www.americanprogress.org/issues/2009/04/black\\_men\\_recession.html](http://www.americanprogress.org/issues/2009/04/black_men_recession.html) (suggesting that economic downturns may exacerbate existing patterns of discrimination in hiring).

<sup>319</sup> *Law Firm Diversity Progress Stalled by Economy, According to Survey Results*, VAULT (Sept. 29, 2010), [http://www.vault.com/wps/portal/usa/blogs/entry-detail?blog\\_id=1260&entry\\_id=11908](http://www.vault.com/wps/portal/usa/blogs/entry-detail?blog_id=1260&entry_id=11908).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Diverse Attorneys Making Progress But Still Behind on Partnership Prospects*, VAULT (Sept. 27, 2011), <http://blogs.vault.com/blog/vaults-law-blog-legal-careers-and-industry-news/diverse-attorneys-making-progress-but-still-behind-on-partnership-prospects>.

### C. Harm to Society

Broader social harms also flow from racial capitalism. Racial capitalism impoverishes our discourse around race, fosters racial resentment, and ultimately displaces more meaningful antiracism measures. These harms prevent progress toward eliminating racism and inequality.

1. *Impoverished Discourse.* — “[I]t’s very hard to talk about race . . . when myths, clichés, and bromides have so overrun the discourse . . . .”<sup>323</sup>

We struggle to have good conversations about race. Commentators have examined this difficulty, both within and outside the academy.<sup>324</sup> The news is full of conversations gone bad,<sup>325</sup> and many online conversations involving race degenerate into epithets and slurs.<sup>326</sup> As a candidate, President Barack Obama called on Americans to have a conversation about race — and some groups responded<sup>327</sup> — but it is hard to say whether this symbolic pronouncement and the response to it have advanced our national discourse.

Racial capitalism reinforces the notion that race is a commodity, and in so doing, impoverishes our thought and discourse surrounding race. It infects the way we think about and talk to one another. As Radin explains: “Theories are formed in words. Fact- and value-commitments are present in the language we use to reason and describe, and they shape our reasoning and description, and . . . reality itself.”<sup>328</sup> 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 funda-

<sup>323</sup> PATRICIA J. WILLIAMS, *SEEING A COLOR-BLIND FUTURE* 51 (1997).

<sup>324</sup> See generally BEVERLY DANIEL TATUM, *CAN WE TALK ABOUT RACE?* xiii, 83 (2007) (discussing conversations about race in cross-racial friendships); Richard Delgado, Chronicle, *Rodrigo’s Book of Manners: How to Conduct a Conversation on Race — Standing, Imperial Scholarship, and Beyond*, 86 GEO. L.J. 1051, 1061–72 (1998) (reviewing DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON* (1997)) (proposing rules for conducting scholarly conversations about race); Matt Bai, *Race: Still Too Hot to Touch*, N.Y. TIMES, July 24, 2010, at WK1, available at <http://www.nytimes.com/2010/07/25/weekinreview/25bai.html> (discussing difficulty of racial discourse in contemporary political context); Lynette Holloway, *Why Is Talking About Race So Hard?*, ROOT (Sept. 24, 2010, 3:02 PM), <http://www.theroot.com/buzz/why-talking-about-race-so-hard> (same).

<sup>325</sup> Compare Gene Marks, *If I Were a Poor Black Kid*, FORBES (Dec. 12, 2011, 7:25 AM), <http://www.forbes.com/sites/quickerbetteertech/2011/12/12/if-i-was-a-poor-black-kid>, with The UrbanDaily Staff, *My Rebuttal to “If I Were a Poor Black Kid [Written By a Middle Class, White Man]”*, THEURBANDAILY (Dec. 14, 2011), <http://theurbandaily.com/special-features/shamika-sanders/if-i-were-a-poor-black-kid-written-by-a-middle-class-white-man>.

<sup>326</sup> See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009); Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130 (2000).

<sup>327</sup> See Larry Rohter & Michael Luo, *Groups Respond to Obama’s Call for National Discussion About Race*, N.Y. TIMES, Mar. 20, 2008, at A21.

<sup>328</sup> Radin, *supra* note 248, at 1882.

mentally at odds with an attitude of respect for racial identity. Rather than inculcating an attitude of respect, commodification precludes it.

An exaggerated thought experiment helps to make clear how the commodification of race affects our thinking and discourse about race. Radin, worrying about a domino effect with respect to the commodification of sex, asks, “What if sex were fully and openly commodified?”<sup>329</sup> 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,” such that people would become viewed in differentiated-market terms and the ideal of nonmonetized relationships would become lost entirely.<sup>330</sup>

Yet the alternate 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.<sup>331</sup> Many people actively seek friends of particular races.<sup>332</sup> 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 often seems troublingly similar to the question of “How can we get more of those really good ballpoint pens?”

Racial capitalism, 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 worthy feelings about race, such as a desire for respect or inclusion. Instead, it reveals a desire to improve institutional status by increasing the appearance of diversity. Even if the desire for numerical diversity is motivated by a desire for respect or inclusion, these good intentions do not necessarily breed good attitudes about diversity. Rather, the way one goes about pursuing diversity ineluctably affects the way one thinks about diversity — that is, striving for a thin, numerical version of diversity fosters a thin version of respect for inclusion more generally. This desire dehumanizes people of color by strip-

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<sup>329</sup> *Id.* at 1922.

<sup>330</sup> *Id.*

<sup>331</sup> Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1322 & n.59 (2009).

<sup>332</sup> See, e.g., Devin Friedman, *Will You Be My Black Friend?*, GQ, Nov. 2008, at 185, available at <http://www.gq.com/news-politics/mens-lives/200810/devin-friedman-craigslist-oprah-black-white-friends-obama>.

ping away their individuality and replacing their personhood with a single detached attribute: their race. Moreover, racial capitalism instantiates the commodification of race, which further impairs our ability to think and converse productively about race. That is, it would augment the exploitation already entrenched by the practices of racial capitalism.

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 economic and social 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 and social significance.

2. *Racial Resentment*. — “[R]ent-a-Negro.com . . . allows 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.’”<sup>333</sup>

Nonwhite people are well aware of attempts to engage in racial capitalism by white individuals and predominantly white institutions. The sheer number of jokes and parodic writings documented here reveal a widespread awareness that racial capitalism occurs in a range of settings.

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

The behavior that racial capitalism 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.<sup>334</sup> The market for race as a com-

<sup>333</sup> damali ayo, *rent-a-negro.com*, RHIZOME (2003), <http://rhizome.org/artbase/artwork/32231>.

<sup>334</sup> See, e.g., Emens, *supra* note 331, at 1343–45; 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).

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modity gives rise to these suspicions, and such suspicions ultimately pose an obstacle to the formation of cross-racial relationships that could dismantle racial barriers.

Moreover, racial capitalism fosters racially offensive behavior by white people. Performance artist damali ayo issues a stinging criticism of white attempts to capitalize on nonwhite identity through her satirical website *rent-a-negro.com* and her subsequent book entitled *How to Rent a Negro*.<sup>335</sup> 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.”<sup>336</sup> The 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 the commodification, reinforced by racial capitalism, that in fact occurs unironically throughout society.

Importantly, such resentment and cynicism may result even if nonwhite individuals nominally acquiesce to racial capitalism. Let us return to the law firm I have previously described. Suppose that a young Asian lawyer receives an offer of employment from that firm. The hiring partner explicitly tells her that the firm hired her in part because it wishes to improve its “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 overt racial capitalism may cause the young lawyer to feel objectified, disenfranchised, and alienated. Although the lawyer “consents” to the capitalization of her nonwhiteness in the sense that she continues 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 nonwhiteness thus infuses already-tenuous race relations with inauthenticity, cynicism, and resentment. Whites may view nonwhites as sources of racial capital, or fear that nonwhites will

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<sup>335</sup> DAMALI AYO, *HOW TO RENT A NEGRO* (2005).

<sup>336</sup> *Id.* at 2.

suspect them of racial capitalism. Nonwhites may suspect whites of engaging in racial capitalism, even when 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.”<sup>337</sup>

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.<sup>338</sup> Commodification of race cannot occur without evoking this social meaning. By reminding us of a time when racialized bodies were commodified, the commodification of race makes profound historical inequality a continuing reality.

From a forward-looking perspective, racial capitalism leads to a preoccupation with bare numerical diversity at the expense of more meaningful markers of antidiscrimination progress. Accruing the economically beneficial features of nonwhiteness 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.”<sup>339</sup> Failure to make changes in work culture, therefore, often means that nonwhite employees will fail to thrive in a particular

<sup>337</sup> *Black Guy Photoshopped In*, ONION (Dec. 6, 2000), <http://www.theonion.com/articles/black-guy-photoshopped-in,1433>.

<sup>338</sup> Janice G. Raymond & Donna M. Hughes, *Sex Trafficking of Women in the United States: International and Domestic Trends*, COALITION AGAINST TRAFFICKING IN WOMEN 41 (March 2001), [http://www.heart-intl.net/HEART/081004/sex\\_traff\\_us.pdf](http://www.heart-intl.net/HEART/081004/sex_traff_us.pdf) (discussing research, based on the writings of men who solicited prostitutes, showing that women were marketed according to racist stereotypes, and that men often chose a woman because of her race and had sexual expectations that aligned with racial stereotypes); *Fake Massage Businesses*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/sex-trafficking-in-the-us/message-parlors> (last visited May 10, 2013) (stating that there are over 5000 brothels in the United States disguised as massage parlors, which often exploit Asian immigrants as sex slaves).

<sup>339</sup> Green, *supra* note 174, at 643–44; 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 (2009) (explaining that implicit racial biases may be exacerbated when people feel forced to comply with nondiscrimination norms).

workplace regardless of 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 nonwhite students integrate into campus life,<sup>340</sup> succeed academically, and have access to job opportunities after graduation. Such failings undoubtedly explain much of the disparity between the academic performance of whites and nonwhites, and might likewise help to explain the disparity in bar passage rates between white and nonwhite law graduates.<sup>341</sup> 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 provides the foundation for 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 those who identify as Thai, Lao, and Burmese remain underrepresented.<sup>342</sup> Among students 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.<sup>343</sup> And among

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<sup>340</sup> See, e.g., Note, *Educational Benefits Realized: Universities' Post-Admissions Policies and the Diversity Rationale*, 124 HARV. L. REV. 572, 584 (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.”).

<sup>341</sup> See, e.g., Stephen P. Klein & Roger Bolus, *Analysis of July 2004 Texas Bar Exam Results by Gender and Racial/Ethnic Group*, TEX. BD. OF LAW EXAMINERS (Dec. 15, 2004), [http://www.ble.state.tx.us/one/analysis\\_0704tbe.htm](http://www.ble.state.tx.us/one/analysis_0704tbe.htm) (explaining that nonwhite 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 credentials and grades).

<sup>342</sup> See Brest & Oshige, *supra* note 80, at 855–56, 873.

<sup>343</sup> 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 the surveyed 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.

those who identify as Latino, those of Mexican and Puerto Rican descent are often underrepresented in educational settings.<sup>344</sup>

Surely numerical diversity is a prerequisite for accomplishing anti-discrimination goals of equality and just distribution of social goods. But numerical diversity is insufficient: 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 its goals are achieved when a nonwhite student matriculates or a nonwhite employee is hired. In other words, racial capitalism 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 fails 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 objectionable, there may be desirable collateral consequences to such capitalism. Suppose, for instance, that a company’s management seeks out nonwhite employees for precisely the worst reasons: they wish only to shield the company from litigation and to capture the image of the nonwhite employees in promotional materials featured on the company’s website and printed literature. Nonetheless, the company’s motivations lead it to take actions that result in a more diverse workforce, and perhaps even to place nonwhite individuals in prominent and powerful positions within the company.<sup>345</sup> We might hypothesize that, in the aggregate, the greater presence and influence of nonwhite individuals in the company’s work force will lead to changes in the workplace culture, ultimately making it more inclusive and more congenial for individuals of all races.<sup>346</sup>

But as a general matter, the presence of minorities alone seems unlikely to trigger reform. Changing workplace culture is a complicated endeavor and is difficult to undertake successfully even with strong institutional support.<sup>347</sup> An institution interested in nonwhiteness only as capital is unlikely to provide that support. And so I am skeptical that the bare presence of nonwhite individuals in incrementally greater numbers will result in widespread change to workplace culture.<sup>348</sup>

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<sup>344</sup> See, e.g., Kevin Brown & Tom I. Romero II, *The Social Reconstruction of Race & Ethnicity of the Nation’s Law Students: A Request to the ABA, AALS, and LSAC for Changes in Reporting Requirements*, 2011 MICH. ST. L. REV. 1133, 1139.

<sup>345</sup> See Shin & Gulati, *supra* note 16, at 1024–26.

<sup>346</sup> See Katharine T. Bartlett, Commentary, *Showcasing: The Positive Spin*, 89 N.C. L. REV. 1055, 1067–68 (2011).

<sup>347</sup> See Green, *supra* note 174, at 664–82.

<sup>348</sup> 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 employ people of color for display purposes. Of course, if a company’s nonwhite representation were to

## IV. A WAY FORWARD

Racial capitalism is rampant in American society, harming both nonwhite individuals and society as a whole. But how do we end racial capitalism? In this relatively brief Part, I sketch the preliminary contours of a way to dismantle racial capitalism. My account is intentionally impressionistic, and for now I emphasize the qualities that a solution should have rather than describing the details of a specific solution. Consequently, this Article will serve as a foundation for future work offering both a broader discussion of identity capitalism and a more detailed account of how to deploy both legal and social mechanisms to decommodify race.<sup>349</sup>

The first obstacle to mitigating racial capitalism is simply that reform is difficult. Decommodification of racial identity poses what Radin describes as a “transition problem”: there are difficulties inherent in moving from our current, nonideal world to an ideal one.<sup>350</sup> With respect to race, the view of race as a commodity is so deeply entrenched in our collective imagination that it will take time to achieve decommodification by altering individual minds and collective social norms. Yet even if instant decommodification were possible, that prospect raises what Radin terms 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.<sup>351</sup> Such instantaneous decommodification would leave behind a society stratified along racial lines as the result of past commodification and would offer no way of altering this status quo.

Radin’s approach to these difficulties is a pragmatic one.<sup>352</sup> In the nonideal world in which we live, “it may sometimes be better to commodify incompletely than not to commodify at all,”<sup>353</sup> 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.”<sup>354</sup> Put another way, “[w]e cannot make progress toward the non-

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increase from five percent to eighty percent, 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 nonwhite individuals are limited to the purely self-interested ones associated with capitalizing nonwhiteness, 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 could be accomplished with a much smaller change in the demographics of the people the company employs, and such small demographic changes are unlikely to change a company’s culture.

<sup>349</sup> See Leong, *supra* note 7.

<sup>350</sup> Radin, *supra* note 248, at 1875–77, 1915–21.

<sup>351</sup> *Id.* at 1915–17.

<sup>352</sup> MARGARET JANE RADIN, *CONTESTED COMMODITIES* 14 (1996).

<sup>353</sup> Radin, *supra* note 248, at 1903.

<sup>354</sup> *Id.* at 1915.

commodification that might exist under ideal conditions of equality and freedom by trying to maintain noncommodification now under historically determined conditions of inequality and bondage.”<sup>355</sup> The challenge is thus to “structure an incomplete commodification that takes account of our nonideal world, yet does not foreclose progress to a better world.”<sup>356</sup>

Radin analyzes the transition problem in the contexts of sexuality and family life. Taking the 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 remain market-inalienable.<sup>357</sup> In our nonideal world, however, Radin believes that the sale of sexual services should be governed by a regime of incomplete commodification.<sup>358</sup> We should decriminalize the sale of sexual services, but we should work to prevent a domino effect of sexual commodification by banning pimping and recruitment and advertising of such services.<sup>359</sup>

The commodification of race endemic to racial capitalism raises a particularly difficult transition problem. As I discussed in Part III, many harms ensue from the mutually reinforcing practices of commodification and racial capitalism, and collectively, these harms instantiate inequality. In an ideal world, race would not be commodified. Yet commodification’s harms in the current world 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 thinking of race as a commodity, it has also had certain material positive effects on the life trajectories of many individuals.<sup>360</sup> To decommoify race immediately and completely would remove a potential tool — flawed, but not entirely useless — for addressing lingering social inequality.

I therefore propose an approach that takes into account the complexities of dismantling racial capitalism and provides for a transition period during which limited commodification has a role in facilitating progress.<sup>361</sup> As a baseline matter, we should discourage racial capitalism and the racial commodification it requires and reinforces. When racial capitalism does occur, we should deploy several strategies to ad-

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<sup>355</sup> *Id.* at 1916.

<sup>356</sup> *Id.* at 1924.

<sup>357</sup> *Id.* at 1921.

<sup>358</sup> *Id.* at 1924.

<sup>359</sup> *Id.* at 1924–25.

<sup>360</sup> See generally WILLIAM B. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (2000).

<sup>361</sup> This solution shares some characteristics with the regime of “incomplete commodification” that Radin prescribes for the commodification of sex. See Radin, *supra* note 248, at 1923–25.

vance the ultimate goal of productive discourse. First, we should respond by explicitly and publicly identifying instances of racial capitalism. Second, we should call attention to racial capitalism's harms. Third, we should impose penalties on those who engage in racial capitalism. Fourth, those penalties should be directed to the project of furthering racial equality and reducing future commodification. And finally, the transaction should be explicitly structured to express condemnation of racial capitalism and to facilitate the overarching goal of productive discourse directed at ending racial capitalism. This overarching goal reflects the reality that ending racial capitalism requires a shift in thinking, not merely a prohibition on certain behavior.<sup>362</sup> As such, my solution reflects two distinct phases in imposing penalties. First, the necessary transitional period would require a pluralistic approach under which we would calibrate penalties to the nature of the wrong incurred and its consequences.<sup>363</sup> Ultimately, however, the goal of the penalty regime I offer is complete deterrence — indeed, it is more than that. I want not only for us to end racial capitalism; I also want us to eradicate the thoughts and desires that lead to racial capitalism in the first place.

Consider the following three examples arising in the social, educational, and employment contexts. Albeit satirically, *How to Rent a Negro* illustrates a way to discourage racial capitalism in social settings consonant with the solution I have proposed. In the book, 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 nonracism, or as a way of diversifying one’s social circle, requires compensating the black person for that use.<sup>364</sup> Suggesting that many white people may be “behind in their rental payments,” ayo imagines presenting white people with bills for services rendered.<sup>365</sup> Of course, actual rental systems are both improbable and undesirable, but they do suggest a way to discourage racial capitalism in social settings. As a more realistic measure, a nonwhite 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.” Such an approach would accomplish the goals of identifying racial capitalism, calling attention to its harms, imposing a penalty — that is, social shaming — on those who perpetuate it, and fostering discourse regard-

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<sup>362</sup> See Cohen, *supra* note 247.

<sup>363</sup> See, e.g., Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1403–22 (2009) (advancing pluralistic conception of punitive damages depending on what purpose those damages serve).

<sup>364</sup> See generally AYO, *supra* note 335.

<sup>365</sup> *Id.* at 139–42.

ing racial capitalism. In particular, the conversations that might arise from such an interaction would diminish the likelihood that racial capitalism would occur in the future.

In the educational context, consider Diallo Shabazz. Shabazz did not seek commodification of his racial identity. But when administrators at the University of Wisconsin engaged in racial capitalism by Photoshopping him into the school's admission brochure, his response likewise reflected the principles of identifying, critiquing, penalizing, and discouraging racial capitalism, all with the overarching goal of facilitating productive discourse. Shabazz objected publicly to the use of his racial identity and brought attention to his injuries in a concrete way by filing a lawsuit. The form of relief he sought — a “budgetary apology”<sup>366</sup> — made clear that the school had commodified his identity. Moreover, Shabazz found a way to acknowledge and reject commodification simultaneously. He acknowledged the commodification by imposing a monetary cost on 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 strategy framed the transaction in a way that expressed the goal of racial equality rather than instantiating racial capitalism.<sup>367</sup>

The approach to dismantling racial capitalism I describe here also finds traction in the workplace. Individual nonwhite employees who find themselves constantly pulled into photos for the company website or overburdened with obligations to mentor more junior employees who happen to be the same race can call their employer's attention to this use.<sup>368</sup> Better still, others can communicate the same message with less risk. For example, white allies of the nonwhite employee or racial affinity groups within the workplace can communicate the same message with far less likelihood of negative individual repercussions. In so doing, they may be able to gain input into the employer's practices, including outreach, hiring, and marketing. Ultimately, such input may result in the employer changing its practices in ways that both improve racial relations in the workplace and reduce the incidence of racial capitalism.

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<sup>366</sup> Lisa Wade, *Doctoring Diversity: Race and Photoshop*, SOC. IMAGES (Sept. 2, 2009, 10:48 AM), <http://thesocietypages.org/socimages/2009/09/02/doctoring-diversity-race-and-photoshop> (Shabazz “asked that . . . the University put aside money for *actual* recruitment of minority students.”).

<sup>367</sup> See Cohen, *supra* note 247, at 696.

<sup>368</sup> This strategy emphasizes that numbers, while not sufficient, are necessary for change. Solidarity among nonwhite 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.

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Legal mechanisms offer a valuable opportunity to discourage racial capitalism according to the principles I have described. Again, I save for other work the detailed analysis that such mechanisms deserve, but I will offer a few preliminary ideas here, which I flesh out elsewhere.<sup>369</sup> First, the torts of right of privacy and right of publicity should be explicitly expanded to allow individuals to control institutions' use of their identities, racial and otherwise. Second, Title VII doctrine should be reformed in two ways. It should be expanded to provide explicit protection to non-job-related racial identity performance, which would mitigate the market tendency to make some racial commodities more valuable than others. And employers should receive immunity (roughly analogous to absolute immunity in constitutional tort law) for admission of past racial wrongdoing so long as they undertake good faith remedial measures, which would promote the honest dialogue that transition away from racial capitalism requires. Third, intellectual property law should adopt the European model recognizing so-called moral rights — in particular, the right to the integrity of a particular work — and should extend that right to protect many important forms of racial self-presentation from corruption. And finally, we should understand equal protection doctrine to recognize interests other than diversity as valid justifications for affirmative action, and also to recognize the purpose underlying the diversity rationale itself as a mechanism for righting past racial wrongs.

Aside from fulfilling the overarching goal of progress toward eliminating racial capitalism, the transitional period I have described is more tolerable because it has some limited benefits in reshaping the way that we think about race. If, for example, employees see that nonwhiteness is valued in the workplace, or if students see that nonwhiteness is valued at their college, some may come to agree that it is valuable. Katherine Bartlett argues that showcasing women and people of color in leadership positions may result in such benefits because “the presence of female and minority leadership positions operates indirectly to reduce implicit bias”<sup>370</sup> and, more broadly, because “[p]ositive attitudes strengthen positive attitudes.”<sup>371</sup>

I am persuaded by the evidence that Bartlett and others have marshalled to demonstrate that positive depictions of nonwhite individuals, in sufficient quantities, have the potential to reduce implicit bias and other negative psychological reactions. Thus, a carefully circum-

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<sup>369</sup> See Leong, *supra* note 7. This list of legal interventions is not meant to be exhaustive, but rather to respond to the extent to which racial capitalism permeates society and to communicate some optimism about the extent to which legal mechanisms can interrupt the process of racial capitalism.

<sup>370</sup> Bartlett, *supra* note 346, at 1061.

<sup>371</sup> *Id.* at 1064.

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scribed, contextualized, and explicitly temporary form of commodification is not inherently inconsistent with improving the long-term prospects of nonwhite individuals. Suppose, for example, that a company engages in racial capitalism by placing a nonwhite employee 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 her promotion in cynical and purely financial terms, the nonwhite individual and others troubled by racial capitalism may still turn the commodification into a productive event by contextualizing it for those within and outside the company. That is, they may use the incident to identify, critique, penalize, and discourage racial capitalism, as well as to facilitate productive discourse about racial capitalism.

The transitional approach I have described serves as a guide for how such contextualization may take place. As I have discussed, commodification risks promoting a view of nonwhite individuals as commodities rather than as role models. Moreover, the backlash against affirmative action programs suggests that simply announcing that nonwhiteness is valued via hiring or promotion of nonwhite 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.<sup>372</sup> And her racial identity may have powerful symbolic value, encouraging and inspiring other employees.<sup>373</sup>

In an ideal society, racial capitalism would not exist, and race would have no bearing on our social and economic status. But we live in a flawed society of injustice and inequality, one in which racial capitalism is deeply ingrained. In our current society, then, the unavoidable reality is that commodification has a circumscribed and temporary role as we transition toward a better society.<sup>374</sup>

#### CONCLUSION

Racial capitalism is both pervasive and troubling. It harms individuals — particularly nonwhite individuals — and impedes social

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<sup>372</sup> *Id.* at 1061 n.29 (collecting research).

<sup>373</sup> Some scholars have described this as the “multiplier effect.” Brest & Oshige, *supra* note 80, at 857.

<sup>374</sup> *Cf.* Radin, *supra* note 248.

progress toward racial equality. My view is that we should ultimately 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 being a person of color within an institution means that “you’re going to get used,” and that the best and only response is to make sure you get as much as possible in return. But my own view is that racial capitalism is not inevitable. Ending racial capitalism may take a great deal of effort across generations, but in the end I think it can happen.