
REFLECTIONS ON RACIAL CAPITALISM

*Nancy Leong**

In my article *Racial Capitalism*,¹ I expressed concern about the ongoing process of racial exploitation in which white people and predominantly white institutions derive value from the racial identity of people of color. I see this process as troubling and undesirable. Rendering racial identity a commodity harms people of color in many ways: by treating a deeply felt aspect of identity as merely another thing to be bought and sold; by giving outsiders a stake in the identities of nonwhite people; and by providing yet another obstacle to improved race relations in America.

Since the publication of *Racial Capitalism*, two events have occurred that relate to the article's conclusions. First, the Supreme Court decided *Fisher v. University of Texas at Austin*,² which considered the constitutionality of the school's race-conscious admissions scheme. Second, Professor Richard Ford responded directly to my article in this forum.³ My goal in this brief response is to consider these two contributions in light of the analytical framework set forth by *Racial Capitalism*.

I

After months of anxious anticipation by both proponents and opponents of affirmative action, the *Fisher* decision was nothing if not anticlimactic. The Court ultimately issued a short opinion stating simply that the Fifth Circuit had not accurately applied strict scrutiny to the University's race-conscious admission program, and remanded for the court to do so in the first instance.⁴

The Court's majority opinion in *Fisher* does, however, highlight two aspects of current affirmative action regimes to which I alluded in *Racial Capitalism*. First, the opinion reiterates that the "diversity rationale" is justified by its benefit to schools' educational mission. That is, schools decide what diversity is worth to *them* — indeed, they re-

* Assistant Professor, University of Denver Sturm College of Law. Thanks to Alan Chen, Charlotte Garden, Paul Gowder, Stephen Lee, and Justin Pidot for helpful thoughts and comments.

¹ Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

² 133 S. Ct. 2411 (2013).

³ Richard Thompson Ford, *Capitalize on Race and Invest in Justice*, 126 HARV. L. REV. F. 252 (2013).

⁴ *Fisher*, 133 S. Ct. at 2415.

ceive judicial deference in doing so.⁵ In practice, this usually means that a predominantly white institution that wishes to increase nonwhite enrollment is charged with assigning value to nonwhite racial identity. This situation troublingly evokes instances both past and present in which white people explicitly treated nonwhite people as commodities and assigned monetary value to their bodies.⁶

Second, the *Fisher* decision demonstrates the shortcomings of the diversity rationale for affirmative action in comparison with remedial and redistributive rationales. As I said in my article, I think that diversity is a worthy ambition; indeed, it is one necessary for racial progress. But there are better rationales for race-conscious admissions that, unlike the diversity rationale, do not obscure the reason such admissions policies are necessary in the first place — that is, the longstanding use of state force to subjugate nonwhite people in myriad ways.⁷ Moreover, these other rationales run less risk of racial capitalism because they focus on the remedies justice requires for particular groups of people, rather than the value educational institutions can derive by creating a particular composition in its student body — or at least the appearance of such. I do not want to waste much time bemoaning diversity as the second or third best rationale, as that ship sailed long ago. Still, I think it is worth reiterating that the selection of the diversity rationale has created a fertile environment for racial capitalism to flourish.

The *Fisher* opinions also highlight a new form of racial capitalism that has become increasingly popular with opponents of affirmative action: lumping Asian students together with white students in order to derive value from their racial identities. Justice Thomas's concurrence, for example, states: "There can be no doubt that the University's discrimination injures white and Asian applicants who are denied admission because of their race."⁸ This inclusion of Asians in the "injured" class serves an important rhetorical function. It directs attention away from the fact that the reason affirmative action is necessary in the first place flows from many years of white people and entirely white institutions enforcing policies favorable to whites and unfavorable to everyone else. Moreover, including Asians with whites masks the reality that opposition to affirmative action is, at core, a vote to

⁵ *Id.* at 2419.

⁶ See, e.g., KEVIN BALES, ET AL., MODERN SLAVERY 2–25 (2009) (discussing historical and modern instances of slavery in the United States and other countries).

⁷ See, e.g., Leong, *supra* note 1, at 2158–61 (discussing legal and institutional regimes of control).

⁸ *Fisher*, 133 S. Ct. at 2431.

maintain the existing racial hierarchy, with whites at the top and other groups lagging behind.⁹

Yet the claim that Asian students are “injured” by race-conscious admissions overlooks the reality that a majority of Asians in fact support affirmative action. The National Asian American Survey found that — depending on how the survey question was asked — between 75% and 81% of Asian Americans support affirmative action.¹⁰ Indeed, a substantial coalition of Asian American organizations filed a brief in support of the University of Texas’s policy.¹¹ So one might plausibly wonder whether applicants of Asian descent in fact consider their marginally diminished chances of admission an “injury.” Some probably do. But many others might view the social benefits flowing from affirmative action as a net gain rather than a loss, even if there is a small risk of negative consequences for them personally. Assuming that Asian students are “injured” by the program is like assuming that someone is “injured” by paying taxes, regardless of whether the taxpayer in fact *wants* to fund the public benefits their taxes will support.

The addition of Asians to an opinion adjudicating a claim by a white student that she was unconstitutionally denied admission is thus an emerging example of the ever-evolving phenomenon of racial capitalism. It represents an attempt to derive value from an entire nonwhite group’s racial identity in order to maintain that the argument against affirmative action is something more than mediocre white students complaining about attending their second-choice schools.

Finally, it is worth noting that *Fisher* — like many previous affirmative action opinions — ignores the fact that many beneficiaries of affirmative action have been white. Indeed, the primary beneficiaries of affirmative action over the years have been white women.¹² This oversight reveals a certain judicial myopia regarding the scope of affirmative action. Yet it also opens an intriguing inquiry into how other categories of identity, such as gender and sexual orientation, are capitalized. Indeed, one might argue that proponents of race-based affirmative action are themselves engaged in identity capitalism by

⁹ See, e.g., Scott Jaschik, *Meritocracy or Bias?*, INSIDE HIGHER ED (Aug. 13, 2013), <http://www.insidehighered.com/news/2013/08/13/white-definitions-merit-and-admissions-change-when-they-think-about-asian-americans> (describing study showing that whites are more likely to support affirmative action when informed that Asians benefit greatly from “meritocratic” admissions criteria).

¹⁰ *Where Do Asian Americans Stand on Affirmative Action?*, NAT’L ASIAN AM. SURVEY (June 24, 2013), <http://www.naasurvey.com/reports/affirmative-action.html>.

¹¹ Brief of the Asian American Legal Defense and Education Fund et al. as Amici Curiae Supporting Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345), 2012 WL 3308203.

¹² See, e.g., Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1139 n.2 (2008).

pointing to the policy's benefit to women. In future work, I will explore other forms of identity capitalism in greater detail.

II

I am grateful to Professor Ford for his engagement with my work. He and I are in substantial agreement about many of the racial ills that continue to plague America. For purposes of advancing the discourse, I will focus on four places where we diverge. In his response, Ford first argues that the benefits of what I call racial capitalism outweigh the harms. Second, he disagrees more generally that commodification of race is undesirable. Third and more broadly, he protests the Marxian analogy I have drawn as misleading and at times inapt. And finally, he disagrees with the very premise that racial identity can exist free and unencumbered, as well as with the notion that law can help to remove encumbrances on racial identity.

Ford's first argument is that racial capitalism in the form of hiring or admitting minorities into particular workplaces and schools, even for "unsavory" reasons of defeating bad publicity or deterring litigation, yields benefits: "Minorities who get positions because of civil rights pressure can win over their cynical bosses by doing a good job and disproving racial stereotypes. Minority students valued as tokens of equal opportunity can still change the hearts and minds of their classmates and professors by their example."¹³ This is a speculative claim, and I know of no conclusive empirical evidence in either direction, but intuition suggests that the opposite is at least as likely to be true. True, positive consequences might result from increasing minority presence, even if the motives underlying the increase are cynical or worse. But the problem is that we cannot artificially segregate bad motives from their most likely consequences — indeed, the two are closely intertwined. Improving racial relations within an institution requires hard work and self-reflection. And an institution that increases nonwhite presence purely because it wants attractive photos of nonwhite people and appealing diversity statistics for its website is unlikely to facilitate the conditions necessary for improved racial relations among its workforce.

Second, taken to its logical extension, Ford's argument that the commodification of race is unobjectionable leads to disquieting results. In the workplace context, he argues that "commodification" . . . is the very essence of the employment relationship," and adds that one's racial identity "being seen as an asset is hardly a bad thing for an employee in a profit-driven business."¹⁴ Suppose that we set aside, for a

¹³ Ford, *supra* note 3, at 253.

¹⁴ *Id.* at 253–54.

moment, concerns about the negative consequences of commodification in itself and engage, seriously, with the argument that market logic should govern employers' use of race in the workplace. Does not Ford's analysis suggest that workers of color are underpaid? Consider two associates at a predominantly white law firm: one white and one black. The black associate is asked to render a variety of what we might call racial services, ranging from being photographed for the website to being assigned to participate in the interview process for every prospective black associate. These services occupy time and effort that the white associate does not spend. Why then is the black associate not compensated for this additional value added to the company? If the commodification of race is truly unobjectionable, then law schools should counsel black students to demand more pay for these services, and law firms that set compensation based on individual contributions should agree.

Yet I strongly suspect that most of us would balk at such an arrangement. That shared instinct reveals the underlying intuition that there is, in fact, something crass and degrading about paying someone for racial services. And if such explicit payment is objectionable, then why is the implicit commodification of racial identity that results when employers use pictures of their nonwhite employees to decorate their websites and promotional materials any less so? Extracting racial services by suggestion and implication is no better than an explicit arrangement compensating such services. Indeed, in some ways the implicit arrangement is worse, because the employer captures the value of its nonwhite employees' racial identity, and the transaction is hidden rather than brought into the open for examination and critique.

Moreover, by sanctioning markets for nonwhite racial identity, Ford raises the question of why we should not tolerate markets for *white* racial identity. That is, if we permit employers to seek out and display nonwhite employees when doing so is advantageous to the employers, it becomes more difficult to argue that we should not also permit employers to seek out white employees when doing so is advantageous — for example, when customers prefer it, or when current employees argue that homogeneity improves productivity. There might, of course, be reasons to distinguish between the commodification of white and nonwhite identity. But asserting that market logic unproblematically applies to one raises the question of why it should not apply to both. And there are legal barriers, as well: both Congress and the courts have emphasized that race cannot be a bona fide occupational qualification, meaning that coworker or customer preferences cannot serve as a justification for discrimination along racial lines.¹⁵

¹⁵ See 42 U.S.C. § 2000e-2(e) (2012); *Smith v. City of Jackson*, 544 U.S. 228, 233 n.3 (2005).

My third point speaks to a broader disagreement over the theoretical framework I developed in *Racial Capitalism*. Ford writes: “The meme of capitalism — with its Marxian implications — can be misleading, distracting us from more precise diagnoses.”¹⁶ In the article, I relied upon theories of both social capital and Marxian capital as “heuristics for understanding the way that race is valued and the way that racial value is exchanged,” noting explicitly that neither theory offered a perfect analogy.¹⁷ The contributions of the Marxian analogy are twofold: First, that framework highlights the power imbalance that makes possible the exploitation of nonwhite racial identity in the first instance. And second, the framework provides an explicit link between the commodification of identity and the harm that results.

Both of these contributions further an understanding of racial capitalism. Without a disparity in power — however subtle or contextual that disparity might be — it would not be possible to derive value from the racial identity of another. And as I see it, the commodification of racial identity is linked quite intimately to many of the harms to identity that I detail in the article. The point is that once your racial identity has been bought on the market — whether you’re aware of the transaction or not — it’s no longer *yours*. Other people — often other people more powerful than you — now have a stake in your identity. And in many instances negative consequences will result from your failure to conform your racial performance to others’ expectations and preferences. This loss of identity is different in both kind and degree from what Ford characterizes as the harm suffered by “everyone who has put on a suit and tie or pair of nylons they would rather leave in the closet because of a workplace dress code or stated norm of professionalism.”¹⁸ Traits and practices that are strongly correlated with race carry a potential for invidious discrimination that other such traits and practices do not, and animosity to these traits reflects *racial* hostility, not merely professional norms. To argue otherwise is to adopt an ahistorical view of the role that race has played in American society.

One can make this claim without engaging in the essentialism that Ford has elsewhere criticized.¹⁹ One need not view cornrows as “the cultural essence . . . of black women”²⁰ to recognize that the hairstyle is strongly associated with black women today, and that antipathy to the hairstyle flows in large measure from hostility to the black women with whom it is associated. It is therefore difficult for me to take seri-

¹⁶ Ford, *supra* note 3, at 255.

¹⁷ Leong, *supra* note 1, at 2173.

¹⁸ Ford, *supra* note 3, at 256.

¹⁹ See, e.g., RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 59–123 (2005).

²⁰ *Id.* at 24.

ously the claim that putting on a pair of nylons — an act that has no particular racial significance — is tantamount to giving up a hairstyle that a woman has, perhaps, worn her whole life, and that both she and most members of her society perceive as related to her race. If such a claim seems implausible then I am afraid that I must simply agree to disagree — or, at least, that I will be unable to convince anyone otherwise in this forum.

Fourth and finally, Ford is pessimistic about the possibility of creating a space, free from racial capitalism, in which racial identity can be valued without being commodified. He writes: “There is no hope of success for a project that seeks to make racial identities free or uncoerced, but there is the potential to create new and unnoticed forms of coercion and regulation, as well as to waste a lot of time, while pursuing such a project.”²¹ Law, he says, “must be the art of the possible.”²²

To be sure, institutions respond to developments in the law in self-interested ways, and unintended consequences are always a risk. But we should not assume that legal cures are worse than the societal diseases they strive to treat. Ultimately, I am optimistic about the prospect of freeing racial identity from the strictures of racial capitalism, as well as about the prospect of law as an instrument for this freedom. Buttressed by a long, complex, and sometimes ugly history, race remains socially significant today. And of course race sometimes inspires discrimination, coercion, and regulation. But I have also seen racial identification inspire community, solidarity, empathy, and tolerance. Racial identity can evolve to become a signifier of difference but not of hierarchy, inspiring respect rather than animus. And the law — along with many other disciplines — has a role to play in imparting the norms that can make this so.

²¹ Ford, *supra* note 3, at 257.

²² *Id.*