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### Dissenting In and Dissenting Out

Nancy Leong

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# DISSENTING IN AND DISSENTING OUT

NANCY LEONG\*

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\* Assistant Professor, University of Denver Sturm College of Law. I am grateful to Holning Lau for organizing the symposium where this article was presented and to the editors of the Chicago-Kent Law Review for their careful and thorough work.

## INTRODUCTION

Individuals sometimes assert their group identity as a means of deriving social or economic value. I have elsewhere called such individuals *identity entrepreneurs*. While a member of any identity group might engage in identity entrepreneurship by deriving value from her own identity, my focus in this Essay is on a particular version of identity entrepreneurship in which a member of an outgroup makes her outgroup identity salient in order to derive a benefit from an ingroup individual or from an ingroup-dominated institution.

Identity entrepreneurship takes place within a system of identity valuation that I have elsewhere described as identity capitalism.<sup>1</sup> Within a system of identity capitalism, individuals and institutions derive social or economic value from identity categories including, but not limited to, race, gender, sexual orientation, and class. Again, in theory, a member of any identity group might engage in identity capitalism, as might a group dominated by any identity category. In practice, however, identity capitalism—as a system—occurs most frequently when individual members of ingroups or ingroup dominated institutions derive social and economic value from outgroup identities. Identity capitalism flows from our legal and social preoccupation with the appearance of diversity and nondiscrimination, in which outgroup identity has become a valued commodity.<sup>2</sup>

Within existing systems of identity capitalism, identity entrepreneurship might take a variety of forms. Both ingroup and outgroup individuals and institutions might become identity entrepreneurs by deploying and leveraging their own identities. Elsewhere, I have described the implications of participation by outgroup members in a system of identity capitalism largely created and controlled by ingroup members.

Generalizing about identity entrepreneurship poses a number of challenges. The phenomenon reflects the awkward position in which outgroup members often find themselves: how can they assert agency and retain control over the value associated with their identities without simply reinforcing the existing power dynamics instantiated by identity capitalism? To condemn identity entrepreneurship stifles agency, while to encourage iden-

1. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013); Nancy Leong, *Identity Entrepreneurs* (Jan 15, 2014) (unpublished manuscript) (on file with author). Some of the material in the Introduction and Part I closely tracks the structure and phrasing of material I have used in related research. I use this tactic as a way of minimizing any confusion about the way I am using various terms that refer to specific concepts. While for the sake of convenience and unnecessary footnoting I do not cite to my other work in every sentence, I explicitly acknowledge these similarities.

2. *Id.*

tity entrepreneurship indiscriminately encourages stereotyping and an array of harms related to commodification. In other work, I propose some doctrinal solutions to this seeming double bind.<sup>3</sup>

This Essay explores a different dimension of identity entrepreneurship by examining the entrepreneurial implications of dissent *within* outgroups. Such dissent can take many forms. My goal here is not to pass judgment on different forms of identity dissent. Rather, I hope to differentiate between two forms of dissent that I call “dissenting in” and “dissenting out.” “Dissenting in” refers to the phenomenon of outgroup members leveraging outgroup identity by minimizing outgroup associations—that is, by engaging in identity performances and adopting attitudes that distance themselves from the outgroup and associate them more closely with the ingroup. “Dissenting out” describes the parallel phenomenon of outgroup members leveraging outgroup identity by distancing themselves from *both* the ingroup and the outgroup simultaneously. The theoretical frame that I present here will provide the groundwork for a more nuanced understanding of the way that outgroup members gain value by presenting their identities.

## I. VALUING IDENTITIES

American history reveals a long tradition of assigning value to a range of identities, including, but not limited to, race, gender, sexual orientation, class, and color.<sup>4</sup> By way of example, Part I.A traces the process of assigning value to race, while Part I.B expands the analysis to other identity categories.

### A. Racial Capitalism

In previous work, I developed a detailed account of what I call racial capitalism—the process of deriving social and economic value from racial identity.<sup>5</sup> The process is driven by a social and legal preoccupation with diversity.<sup>6</sup>

While the concept of diversity has a long history, particularly in corporate America, the notion first gained legal force in *Bakke*.<sup>7</sup> Writing only for himself, Justice Powell rejected several rationales for race-based af-

3. *Id.* (proposing mechanisms for managing identity entrepreneurship, including modifications to Title VII doctrine, copyright, trademark, and expressive association).

4. See, e.g., Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1761 (1993).

5. See generally Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

6. *Id.* at 2161-68.

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

firmative action while upholding diversity as a compelling state interest.<sup>8</sup> Courts grappled with the notion of diversity for the next twenty-five years, with the Supreme Court ultimately reiterating the diversity rationale's place in our affirmative action doctrine in *Grutter v. Bollinger*.<sup>9</sup> In the aftermath of *Bakke* and *Grutter*, our society continues to assign a great deal of importance to diversity in the higher education context.<sup>10</sup>

In the employment context, courts have, in some instances, accepted diversity as a rationale for affirmative action programs voluntarily undertaken by employers.<sup>11</sup> The Supreme Court has not explicitly precluded diversity as a justification.<sup>12</sup> While the Supreme Court has prohibited some forms of affirmative action in the workplace, the decisions do not limit possible justifications to the purely remedial,<sup>13</sup> and lower courts have left open the possibility that diversity might provide a compelling state interest in employment.<sup>14</sup> While this possibility manifests itself in a doctrinal<sup>15</sup> and scholarly<sup>16</sup> debate beyond the scope of this Essay, the important point is

8. *Id.* at 311-15.

9. 539 U.S. 306 (2003).

10. Leong, *supra* note 1, at 2161-69.

11. *Id.* at 2164-65.

12. *City of Richmond v. J.A. Croson Co.* and *Adarand v. Peña* both held that racial preferences in governmental contracting may be justified by the goal of remedying past discrimination by the particular governmental entity, but neither discussed the diversity rationale. *City of Richmond*, 488 U.S. 469, 493 (1989); *Adarand*, 515 U.S. 200, 227 (1995).

13. See, e.g., Memorandum from John R. Schmidt, Assoc. Att'y Gen., on Post-*Adarand* Guidance on Affirmative Action in Fed. Empt. to Gen. Counsels, (Feb. 29, 1996), available at [www.reginfo.gov/public/do/DownloadDocument?documentID=89725&version=1](http://www.reginfo.gov/public/do/DownloadDocument?documentID=89725&version=1) ("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.").

14. Leong, *supra* note 1, at 2164 n.65.

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

16. See *Doe v. Kamehameha Schs.*, 470 F.3d 827, 842 (9th Cir. 2006) ("The Title VII cases, in the employment context, recognize the laudable goal of achieving diversity and proportional representation in the workplace . . ."); Davis, *supra* note 15, at 1039-53 (suggesting that diversity may justify affirmative action programs under Title VII); Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. 1, 20-38 (2005). The Court also recently considered whether concerns regarding disparate treatment litigation under Title VII may justify race-based measures in *Ricci v. DeStefano*, 557 U.S. 557 (2009). But *Ricci* involved neither affirmative action nor a diversity justification, and is therefore of limited relevance here.

that diversity has maintained influence within employment case law and, as a result, has led employers to embrace diversity for a variety of reasons.<sup>17</sup>

In sum, *Bakke* and subsequent decisions regarding both education and employment contend that diversity is valuable.<sup>18</sup> The Supreme Court has accepted diversity as a rationale for affirmative action for over thirty years<sup>19</sup> and 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.<sup>20</sup> In the aggregate, the legal, academic, corporate, and educational emphasis placed on diversity has instantiated diversity as a social value.<sup>21</sup> Diversity has been the subject of considerable critique, but it retains currency as both the primary justification for race-conscious affirmative action and as a broader social value.

Our preoccupation with diversity in turn engenders a preoccupation with non-white racial identity. I have used heuristics from various existing theories of capital to develop a theory of deriving value from non-white racial identity. In Marxian terms, we can think of racial identity as a commodity that we all produce.<sup>22</sup> The process of racial identity production is complex, depending on variables ranging from one's morphology, to one's choices regarding grooming and dress, to one's manner of self-presentation.<sup>23</sup> The specific racial commodity that each of us produces, however, often provides, in Marxian terms, "use value" to the people and institutions with which we affiliate. Marxian analysis therefore provides a useful analogy for the value that powerful institutions—in America, usually predominantly white institutions—derive from racial commodities.

17. PETER WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* 201-25, (2003) (cataloging preoccupation with diversity in business); FREDERICK R. LYNCH, *THE DIVERSITY MACHINE* 177-82 (1997) (same).

18. Some social scientists have critiqued the diversity rationale. While I acknowledge the ongoing debate, it is actually orthogonal to my own analysis. My starting point is that diversity is in fact a legal and social concept that profoundly influences our thinking on race.

19. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007) (reaffirming "interest in diversity in higher education" as a "compelling for purposes of strict scrutiny").

20. See Leong, *supra* note 1, at 2155.

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

22. See KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY*, VOL. 1 131 (1990). This is a descriptive claim, not a normative one.

23. 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); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 865-75 (2002) (discussing various models of identity performance); JUDITH BUTLER, *BODIES THAT MATTER* x-xi (1993) (describing theory of "gender performativity"); JUDITH BUTLER, *GENDER TROUBLE* xxxi (1999) (initiating the notion of identity performance in the context of sex and gender).

With the Marxian understanding of capital as a backdrop, theories of social capital enhance the analysis of racial value by providing a better understanding of the way that racial value is transferred. Unlike the tangible commodities with which Marx was most concerned, the value of racial identity is transferred through affiliation and social networks.

From the Marxian and social capital frameworks, I derive a specific concept—racial capital—to describe the value associated with racial identity.<sup>24</sup> But not all racial identity is valued equally, or valued in the same way.<sup>25</sup> Existing power structures—that is, existing structures in which power is concentrated among white people and predominantly white institutions—lead to a system of racial capitalism in which the power disparity allows exploitation of relationships for the value associated with non-white racial identity.<sup>26</sup>

A few examples help to illustrate the concept. Some racial capitalism occurs at the individual level—for example, when an individual asserts that he cannot be racist because he has non-white friends,<sup>27</sup> or that a particular view cannot be racist because his non-white friends agree with it.<sup>28</sup> Other racial capitalism occurs at an institutional level—for example, when a college uses Photoshop™ to insert a non-white person into its viewbook,<sup>29</sup> or when a company intentionally hires a racially diverse workforce to shield itself from litigation.<sup>30</sup>

As I explore in much more detail elsewhere, racial capitalism harms individuals, non-white groups, and society as a whole. On an individual level, racial capitalism harms non-white people by commodifying them and by distorting identity performance.<sup>31</sup> For non-white groups, racial capitalism creates discursive harms and suppresses historical understandings of discrimination.<sup>32</sup> And on a social level, racial capitalism fosters racial resentment and displaces more meaningful reforms.<sup>33</sup>

24. Leong, *supra* note 1, at 2172–2198.

25. *Id.* at 2187.

26. *Id.* at 2173–74, 2188–89.

27. *Id.* at 2179–82.

28. *Id.*

29. *Id.* at 2192–93.

30. *Id.* at 2196–97.

31. *Id.* at 2204–2212.

32. *Id.* at 2213–15.

33. *Id.* at 2216.

### B. Identity Capitalism

The concept of racial capitalism readily expands to encompass other identity categories. While there are obvious differences among various categories, my focus, both in past work and here, is on the ways in which identity capitalism is similar across some of the most salient identity categories.<sup>34</sup> As in the context of race, various forms of capital offer a useful heuristic to understand the process of an ingroup deriving value from the identity of an outgroup. Theories of social capital provide an understanding of how identity value is transferred through affiliations. The process resembles the Marxian notion that power disparities predetermine who will derive value from the production of a particular commodity—here, the commodity of identity.

Also as in the context of race, the impetus for identity capitalism may be traced in part to our intense social and legal preoccupation with diversity. A sizeable body of research has documented the preoccupation with female leadership—how to encourage it, why there isn't more of it, why we should value it, and which companies have it.<sup>35</sup> Likewise, we rank companies on their congeniality to outgroups on a number of metrics: race, gender, and sexual orientation.<sup>36</sup> Much identity capitalism finds its roots in the credibility that comes with the presence of outsiders. The presence of racial minorities, women, and LGBT individuals helps to provide organizations with status, and proof of lower class roots is particularly useful in establishing credibility in the business world. Companies often tout the humble beginnings or modest upbringings of their high-ranking officials as a way of cultivating the image of a work place where anyone can succeed if they work hard and remain loyal to the company.<sup>37</sup> Indeed, this variant of identity capitalism invokes the American dream itself.<sup>38</sup>

34. Future research might profitably focus on the differences, rather than on the similarities.

35. See, e.g., Herminia Ibarra & Morten T. Hansen, *Women CEOs: Why So Few?*, HBR BLOG NETWORK, HARV. BUS. REV. (Dec. 21, 2009 3:00 PM), [http://blogs.hbr.org/cs/2009/12/women\\_ceo\\_why\\_so\\_few.html?cm\\_mmc=npv\\_-WEEKLY\\_HOTLIST\\_-DEC\\_2009\\_-HOTLIST1228](http://blogs.hbr.org/cs/2009/12/women_ceo_why_so_few.html?cm_mmc=npv_-WEEKLY_HOTLIST_-DEC_2009_-HOTLIST1228).

36. See, e.g., DiversityInc, *About the DiversityInc Top 50*, DIVERSITYINC, <http://www.diversityinc.com/about-the-diversityinc-top-50/> (last visited Jan. 8, 2014) (maintaining lists of the top fifty companies for overall diversity as well as for blacks, Latinos, Asians, women, LGBT people, and people with disabilities); *Best Law Firms*, VAULT, <http://www.vault.com/company-rankings/law> (last visited January 30, 2014) (ranking law firms for overall diversity and then in subcategories of “diversity for women,” “LGBT diversity,” and “diversity for minorities”).

37. See, e.g., Jason Buckland, *The Humble Beginnings of CEO Big Shots*, Feature in *Small Business Centre*, MSN (May 12, 2011, 1:39 PM), <http://money.ca.msn.com/small-business/gallery/gallery.aspx?cp-documentid=27996773&page=1>.

38. Cf. Nancy Leong, *The Open Road and the Traffic Stop: Narratives and Counter Narratives of the American Dream*, 64 FLA. L. REV. 305 (2012).



In some instances, capitalism involving other identity categories explicitly invokes the value we place on diversity within institutions. We see such identity capitalism within educational institutions. For example, college viewbooks and company websites frequently deploy visual evidence of diversity along gender lines as well as racial lines.<sup>39</sup> Similarly, such materials often include information about the presence of LGBT groups and profiles of LGBT individuals.<sup>40</sup>

Identity capitalism is also a force in the business world. Statistics featured on company websites often include, in addition to information on racial diversity, information on the number of women and LGBT individuals within their workforce.<sup>41</sup> And the move to diversify companies along the lines of gender, sexual orientation, and other identity categories is also motivated by the same preemptive desire to insulate against liability in litigation alleging claims of race discrimination.<sup>42</sup>

Identity capitalism also arises in the political arena. Parties often select and promote candidates based on their predicted ability to appeal to certain demographics. Consider Sarah Palin, whose nomination as John McCain's running mate in the 2008 election was a surprise to most people given her inexperience and relative lack of name recognition. When viewed through the lens of political strategy, however, the nomination reveals an attempt by the Republican Party to capture the votes of women who were disappointed by Hillary Clinton's failure to win the Democratic Party's nomination.<sup>43</sup> We might ask whether the strategy was successful, given that a large number of women (fifty-nine percent, according to one poll, and an even higher percentage of independents) perceived the selection as mostly the result of

39. See, e.g., *Does the College Diversity Brochure Depict Dreams or Realities?*, THE TAKEAWAY (Oct. 11, 2012), <http://www.thetakeaway.org/story/242838-does-college-recruitment-brochure-depict-diversity-dreams-or-realities/>.

40. *Id.*

41. See, e.g., *Diversity & Inclusion Report*, WALMART (2013), <http://cdn.corporate.walmart.com/10/4b/76e4650945ab9e854854d1372a7e/2013-diversity-inclusion-report.pdf>. Walmart is the top-ranked company in the Forbes 500. *Fortune 500*, CNNMONEY (2013), <http://money.cnn.com/magazines/fortune/fortune500/>.

42. Cf. Leong, *supra* note 1, at 2196-97.

43. See, e.g., *VP Pick Palin Makes Appeal to Women Voters*, TODAY (Aug. 29, 2008), [http://www.today.com/id/25970882/ns/politics-decision\\_08/#.UuiSUWTnafR](http://www.today.com/id/25970882/ns/politics-decision_08/#.UuiSUWTnafR) (quoting Mike Huckabee as stating, "Governor Palin . . . will remind women that if they are not welcome on the Democrat's ticket, they have a place with Republicans."); Jim Geraghty, *First Thoughts on the "Wow" Pick that is Sarah Palin*, NATIONAL REVIEW ONLINE (Aug. 29, 2008), <http://www.nationalreview.com/campaign-spot/8939/first-thoughts-wow-pick-sarah-palin> (describing Palin as "probably the only pick McCain could make who could simultaneously appeal to Hillary supporters who think sexism cost her the nomination, and consolidate large swaths of the conservative base").

political calculation,<sup>44</sup> but the selection itself still provides an example of identity capitalism.

And identity capitalism also takes place throughout the entertainment industry. Television channels face pressure to include LGBT characters,<sup>45</sup> racially diverse casts,<sup>46</sup> and women in powerful roles,<sup>47</sup> and risk criticism when they do not.<sup>48</sup> Television shows set aside positions for “diversity hires.”<sup>49</sup> The show *24* won acclaim for casting not one, but two, black presidents.<sup>50</sup> Accession to these pressures represents a calculus about the economic gains that will result from featuring diverse identities and affirmative steps to derive value from the actors of color who are featured on their shows.

Network television continues to struggle to reflect racial diversity, but casting decisions reflect an understanding that diverse casts serve the necessity of reaching “members of long-ignored groups who are making up an ever-increasing percentage of the mainstream viewership the networks need, more than ever, to reach.”<sup>51</sup> And the foremost justification for diverse casting is economic:

Simplistic though it may seem, consider why [diverse casting] is important. Is it just because it’s the right thing to do? That’s one good reason, of course, but there are practical motivations. . . . To begin with, if the nation’s population is increasingly diverse, doesn’t it make sense that more people might watch TV if the casts in otherwise good shows reflected them and their lives? For a lot of reasons, television can’t afford to lose more viewers.<sup>52</sup>

44. Matt Bai, *Retro Identity Politics*, N.Y. TIMES (Sept. 14, 2008), [http://www.nytimes.com/2008/09/14/magazine/14wwln-lede-t.html?pagewanted=2&\\_r=3&ei=5070&emc=eta1](http://www.nytimes.com/2008/09/14/magazine/14wwln-lede-t.html?pagewanted=2&_r=3&ei=5070&emc=eta1).

45. See, e.g., Brian Stelter, *Gay on TV: It’s All in the Family*, N.Y. TIMES (May 8, 2012), <http://www.nytimes.com/2012/05/09/business/media/gay-on-tv-its-all-in-the-family.html>.

46. Cynthia Lee, *Study Finds TV Shows with Ethnically Diverse Casts, Writers Have Higher Ratings*, UCLA NEWS (Oct. 8, 2013), <http://newsroom.ucla.edu/portal/ucla/study-finds-that-tv-shows-with-248757.aspx>.

47. Willa Paskin, *A Good Time for TV Ladies*, SLATE (July 19, 2013 9:00 AM), [http://www.slate.com/blogs/browbeat/2013/07/19/women\\_on\\_tv\\_better\\_characters\\_and\\_shows\\_now\\_than\\_ever\\_before.html](http://www.slate.com/blogs/browbeat/2013/07/19/women_on_tv_better_characters_and_shows_now_than_ever_before.html).

48. *Girls* (HBO).

49. Beejoli Shahgt, *In the White Room with Black Writers: Hollywood’s “Diversity Hires*, DEFAMER (Dec. 20, 2013), [defamer.gawker.com/in-the-white-room-with-black-writers-hollywoods-dive-1486789620/@beejoli](http://defamer.gawker.com/in-the-white-room-with-black-writers-hollywoods-dive-1486789620/@beejoli).

50. Gary Rudoren, *24 Can Have Two Black Presidents, Why Can’t We Have One?* HUFFINGTON POST: THE BLOG (Jan. 20, 2007), [http://www.huffingtonpost.com/gary-rudoren/24-can-have-two-black-pre\\_b\\_39111.html](http://www.huffingtonpost.com/gary-rudoren/24-can-have-two-black-pre_b_39111.html).

51. Gary Susman, *Fall TV Diversity Scorecard*, AOLTV, (May 30, 2010), <http://www.aoltv.com/2010/05/30/fall-tv-diversity-scorecard/>.

52. David Wiegand, *Television Drags Its Feet on Diversity*, SFGATE (June 19, 2012, 4:00 AM), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/06/18/DDL81P1D82.DTL&ao=all>.

And when shows do feature diverse casts, commentators frame that decision in economic terms. That is, diverse casts arise

not out of political correctness, but because [network officials] believed these were the shows that would attract the most advertising dollars. Sponsors . . . want shows that will provide hospitable environments for their commercials and will attract desirable groups of viewers. So the vote of confidence . . . doesn't just come from Hollywood creative types or network suits, but from corporate America. It's not about quotas or tokenism, it's about free-market capitalism in action.<sup>53</sup>

Thus, seeking diversity in media and entertainment is seen as an economic decision: entertainers of color are a source of racial value for television executives and advertisers.

Indeed, the drive towards identity capitalism in media and entertainment is made particularly clear by what happens when media and entertainment industries present insufficiently diverse arrays. Vanity Fair's all-white cover in 2010 drew scathing criticism.<sup>54</sup> Shows such as *Girls* stir national debate for their lack of diversity.<sup>55</sup> The show's creator, Lena Dunham, attempted damage control: "I [wish there were more women of color] too, and if we have the opportunity to do a second season, we'll address that."<sup>56</sup> And the reality dating show *The Bachelor* has been the target of a lawsuit brought by two black men rejected in the early rounds of auditions.<sup>57</sup> In other words, the failure to present diversity has direct social and indirect economic costs, and these costs motivate entertainment figures to mitigate their losses by seeking out the value associated with outgroup identity.

## II. OUTGROUP PARTICIPATION IN IDENTITY CAPITALISM

This Part examines the ways in which members of outgroups participate in the overarching social process of deriving value from identity. Giv-

53. Susman, *supra* note 51.

54. See, e.g., Joanna Douglas, *Vanity Fair "New Hollywood Issue Completely Lacks Diversity"*, SHINE (Feb. 2, 2010 8:16 PM), <http://shine.yahoo.com/fashion/vanity-fairs-quot-new-hollywood-quot-issue-completely-lacks-diversity-578862.html>; Dodai Stewart, *Young Hollywood is White, Thin*, JEZEBEL (Feb. 1, 2010, 3:20 PM), <http://jezebel.com/5461571/young-hollywood-is-white-thin>.

55. Jon Caramanica, *Broadcasting a World of Whiteness*, N.Y. TIMES: CRITIC'S NOTEBOOK (Apr. 25, 2012), <http://www.nytimes.com/2012/04/29/arts/television/hbos-girls-is-hardly-the-only-example-of-monochromatic-tv.html?pagewanted=all>.

56. Christopher Rosen, *Leah Dunham, Girls Star, on "Labia Saturation," Oversharing, and her Tattoos*, THE HUFFINGTON POST (Apr. 9, 2012), [http://www.huffingtonpost.com/2012/04/09/lena-dunham-girls\\_n\\_1411470.html](http://www.huffingtonpost.com/2012/04/09/lena-dunham-girls_n_1411470.html).

57. Lanford Beard, *Men Suing 'The Bachelor' Discuss their Case*, ENTMT WEEKLY (Apr. 18, 2012), <http://insidetv.ew.com/2012/04/18/bachelor-lawsuit-explained/>.

en the backdrop of identity capitalism, how do *individual* outgroup members behave within this broader system?

### A. Outgroup Participation and Theories of Capital

As in my previous work, my goal here is not to demonstrate that outgroup participation in identity capitalism fits neatly into any one existing theory of capital, whether Marxian, human, social, or cultural.<sup>58</sup> Rather, aspects of these theories provide useful heuristics for understanding the ways that individual outgroup members participate in a system of identity capitalism and for determining the way that identity is valued within those systems as a result.

One way of understanding outgroup participation in systems of identity capitalism bears a rough resemblance to the Marxian understanding of artisan labor and cottage industries. Marx and later thinkers distinguished between the two. Artisan labor produced items for particular consumers rather than the market more broadly—for example, Marx examined the relation between a guild master and his apprentices, and found it qualitatively different from the relation between a capitalist and his workers.<sup>59</sup> In contrast, cottage industries did away with the barriers to capitalism that the guild system preserved; instead, that system was a rudimentary manifestation of capitalism and the products of that system could be categorized as commodities.<sup>60</sup>

This dichotomy provides a rough but nonetheless useful way of understanding the complexity of outgroup participation in identity capitalism. We might liken the production of identity to artisan labor—to a process in which an individual develops identity for his own pleasure and those around him, without regard to the larger systems of capitalism, and thus, without commodification and valuation of identity. Alternatively, we might liken the production of identity to a cottage industry. While not a fully systematized version of capitalism, such cottage industry production advances identity as a commodity.

58. See Leong, *supra* note 1, at 2172–97.

59. Of guild masters, Marx wrote: “He is an *artisan* in the first instance and is supposed to be a master of his craft. . . . Hence his approach to his apprentices and journeymen is not that of a capitalist, but of a *master* of his craft, and by virtue of that fact he assumes a position of superiority in the corporation and hence towards them.” See Marx, *supra* note 22 at 1029.

60. VLADIMIR I. LENIN, WHAT THE “FRIENDS OF THE PEOPLE” ARE AND HOW THEY FIGHT THE SOCIAL-DEMOCRATS 97 (Foreign Language Press trans., 1st ed. 1978) (“[T]here is an absolute predominance of the domestic system of large-scale production [in the cottage industries], i.e., an unquestionably capitalist form of industry.”).

These are different points along the spectrum of individual outgroup members' participation in identity capitalism, and they reveal the complexity of such participation. Particular ways in which outgroup members express their identities might be seen as genuinely pleasurable, beneficial, and entirely individualistic—something that undermines and subverts oppressive systems of identity capitalism. Alternatively, it might be seen as bolstering and instantiating systems of identity capitalism from the ground up.

My point is that outgroup participation in identity capitalism is complicated, contingent, and fraught with ambiguity—and that we should consider it as such. Unlike the commodification and exploitation perpetrated by identity capitalism—which I view as uncontroversially harmful—outgroup participation in such systems of identity capitalism is a complex phenomenon requiring nuanced evaluation.

Thus, the questions of whether and when outgroup individuals do and should participate in identity capitalism invite closer scrutiny. When does artisanal labor become a cottage industry? When does individual identity performance become identity commodification? The next section takes up these questions.

### *B. Outgroup Participation as Identity Entrepreneurship*

While outgroup members operate against a backdrop of identity capitalism, in practice, they are not mere pawns in a complex game of identity capitalism. Rather, outgroup members have agency, and find ways to exercise limited agency even in conditions of terrible disempowerment and abuse. Historically, such agency arose in the antebellum slave markets. Walter Johnson meticulously recounts the way that slaves sold at market mediated the expectations of the slave traders and prospective buyers by shaping their own performance. As he explains, the slaves “knew what the traders wanted them to say and what the buyers wanted to hear.”<sup>61</sup> This knowledge provided an opportunity to influence their futures: “slaves could create themselves in the slave market, matching their self-representations to their own hoped-for outcomes. Sometimes, at enormous risk, they shaped a sale to suit themselves.”<sup>62</sup> In this complex interaction, prospective buyers were, in certain ways, more vulnerable than the slaves they considered

61. WALTER JOHNSON, *SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET* 176 (1999).

62. *Id.* at 176-77.

purchasing—”their market method [was] vulnerable to the vagaries of human interaction—deception, manipulation, and misunderstanding.”<sup>63</sup>

That outgroup members found ways to exercise agency even in situations of grievous subordination is powerful evidence that within the more subtle system of exploitation created by modern identity capitalism, outgroup members can and will exercise agency to a far greater degree. While outgroup members cannot exercise complete control over the way that ingroup individuals and institutions might use their identities, outgroup members can often leverage their identities in ways that assure that they, too, reap benefits from the structures of identity valuation that take place within identity capitalism.

I have elsewhere referred to someone who intentionally leverages her outgroup identity to derive social or economic benefit within a system of identity capitalism as an “identity entrepreneur.” I have chosen the word “entrepreneur” deliberately. First, it conveys neither absolute positive nor absolute negative implications. Entrepreneurs—in the sense of small business owners—are increasingly respected and popular.<sup>64</sup> Yet the word “entrepreneurial” is sometimes used in a far less laudatory way, to communicate that the person in question is self-promoting, grasping, inauthentic, a climber.<sup>65</sup> The word therefore appropriately reflects ambivalence about the practice of identity entrepreneurship.

At the outset, I wish to distinguish between mere outgroup participation in identity capitalism on the one hand, and identity entrepreneurship on the other. Outgroup participation in identity capitalism consists of any involvement in the system of identity exploitation devised by the ingroup, whether voluntary or involuntary, knowing or unknowing. Not every outgroup participant in an over-arching system of identity capitalism is an identity entrepreneur. Rather, identity entrepreneurship occurs when an outgroup member knowingly makes her outgroup identity more salient in a way that she reasonably believes will yield some sort of social or economic benefit.

An example illustrates the difference between mere participation and identity entrepreneurship. Consider a person who is socially identified as

63. *Id.* at 179.

64. See, e.g., Lydia Saad, *Democrats More Confident in Labor; Republicans, in Business*, GALLUP POLITICS (June 20, 2012), <http://www.gallup.com/poll/155267/Democrats-Confident-Labor-Republicans-Business.aspx>. The poll reports that 75% of Republicans and 63% of Democrats have “a great deal” or “a fair amount” of confidence in small businesses; for Republicans, this is more than anything except the military, while for Democrats this is more than anything except the president and military. *Id.*

65. *Entrepreneurial Definition*, OXFORD DICTIONARIES.COM, <http://www.oxforddictionaries.com/definition/english/entrepreneurial?q=entrepreneurial> (last visited Jan. 28, 2014).

Asian and who attends a predominantly white university. If the school photographs the student extensively, features him on its website, and perhaps even uses Photoshop™ to place him into a brochure, the student has been recruited—involuntarily, perhaps even unknowingly—into participation in identity capitalism.

Such passive participation contrasts with identity entrepreneurship. Consider a person who appears ethnically ambiguous, but whose mother is part Asian. Suppose that he takes ongoing affirmative steps to make his Asian identity salient to the predominantly white institutions with which he interacts. For example, he checks only the “Asian” box on his college application, knowing that the Midwest schools to which he is applying have few Asian students. He writes his personal statement about his Asian heritage. He prominently lists his membership in Asian cultural groups on his resume. And he expands further on his Asian identity when he applies for a scholarship designed for underrepresented minorities.

The second student is an identity entrepreneur. Against a backdrop of identity capitalism—in which racial diversity is a commodity valued by institutions—the student knows that his Asian racial identity is a commodity of value. By making that identity explicit to admissions and scholarship committees, he reaps tangible benefits in the form of potentially increased chances of admission and increased financial aid.<sup>66</sup>

For the moment, I am not evaluating the choices or behavior of either student. My goal is the purely descriptive one of separating what I see as two different forms of participation in identity capitalism. The second student is an identity entrepreneur. The first is not. What separates the two is the conscious efforts of the second student to derive value from his identity.

Identity entrepreneurship is neither inherently good nor bad. The act of leveraging one’s own identity to derive value for oneself might be good for a variety of reasons: it might advance a historically disadvantaged outgroup member; it might redistribute benefits in a way we find more equitable; it might improve society as a whole in a range of ways.<sup>67</sup> Leveraging one’s own identity might also have a range of negative consequences: it might advantage the individual at the expense of the group; it might reify ingroup identity preferences; it might incentivize outgroup identity performances most congenial to the ingroup; indeed, it might lead to disad-

66. Affirmative action does not always increase Asian applicants’ admission chance; indeed, sometimes, it diminishes it. See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (Thomas, J., concurring). But sometimes it can, and that is the situation I am referencing here.

67. Of course, we might argue over what is and is not a desirable consequence. I will begin to address these issues in Part III.A.

vantages associated with leveraging one's identity such as resentment from other outgroup members.

Finally, I wish to note that I am chiefly concerned here with instances in which an individual's status as an outgroup member is essentially uncontested. An individual who simply lies about outgroup status for personal gain might also be considered an identity entrepreneur. This phenomenon is not uncommon, both historically and today.<sup>68</sup> But the concerns associated with that sort of entrepreneurship are quite different, and here my concern is with those who do have an arguable entitlement to outgroup identity and who affirmatively choose to assert or make salient that identity to gain a social or economic benefit.<sup>69</sup>

### C. Identity Entrepreneurship in Action

Identity entrepreneurship has deep historical roots. In the early days of American slavery, for example, black slaves who used their status within the black community to learn of plans for escape or rebellion were often richly rewarded by white slavemasters.<sup>70</sup> Randall Kennedy has documented the rewards reaped by black opponents of the civil rights movement who assisted in maintaining the white supremacist status quo.<sup>71</sup>

More recently, identity entrepreneurship of many varieties has become a commodities market. Commentators have acknowledged identity commodification in many contexts.

One context is the literal market. Susan Danuta Walters explains, "[G]ay entrepreneurship has become a boom industry."<sup>72</sup> "Everywhere there are gay entrepreneurs, creating flourishing businesses in retailing

68. Historically, the twin fire fighters who lied about being black. *See, e.g.*, Susan Diefenhouse, *Boston Case Raises Questions on Misuse of Affirmative Action*, N.Y. TIMES (Oct. 9, 1988), <http://www.nytimes.com/1988/10/09/us/boston-case-raises-questions-on-misuse-of-affirmative-action.html>. More recently, for example, Elizabeth Warren was accused of leveraging her fractional Native American ancestry to gain advantage on the legal academic market, although the allegations ultimately receded from public debate. *See, e.g.*, Katherine Q. Seelye & Abby Goodnough, *Voters Shrug at Revelations of Ethnic Claim in Senate Race*, N.Y. TIMES (May 23, 2012), <http://www.nytimes.com/2012/05/24/us/politics/elizabeth-warrens-indian-claims-dont-sway-voters.html?pagewanted=all>.

69. Our assessment of the depth and sincerity of an outgroup member's commitment to the outgroup's well-being might ultimately affect our normative evaluation of the desirability of a particular instance of identity entrepreneurship.

70. DAVID ROBERTSON, DENMARK VESEY 123 (1999).

71. Randall Kennedy, SELLOUT: THE POLITICS OF RACIAL BETRAYAL 49–54 (2008).

72. SUSAN DANUTA WALTERS, ALL THE RAGE: THE STORY OF GAY VISIBILITY IN AMERICA 273 (2001).



(selling every form of pink triangle and rainbow accessory!), travel, services, entertainment.”<sup>73</sup>

Another context is as a defense to charges of racism. Identity entrepreneurs sometimes leverage outgroup identity to avoid charges of prejudice or bigotry. For example, George Zimmerman’s family and friends have emphasized his Hispanic background and multiracial family as a way of communicating that the shooting of Trayvon Martin could not have been an act of racism.<sup>74</sup> Indeed, the news is replete with individuals asserting that they cannot be racist because they are racial minorities themselves.<sup>75</sup>

The political arena is also rife with identity capitalism, and these systems of ingroup identity exploitation create opportunities for would-be elected officials to engage in identity entrepreneurship. Sarah Palin and Michele Bachmann provide recent examples of female politicians leveraging their outgroup identity for a range of benefits. Other politicians have made their class-based outgroup identity explicit as a way of marketing themselves to voters. Politicians frequently tout their humble beginnings as a way of connecting with working class and socioeconomically disadvantaged voters. John Edwards, as both a 2004 vice presidential candidate and a 2008 presidential candidate, continually referenced his humble origins as a way of connecting with working class voters.<sup>76</sup> During the 2004 and 2008 presidential races, Edwards seldom missed an opportunity to mention that his father was a millworker<sup>77</sup> or to recount the time his family had to leave a restaurant because it was too expensive for their budget.<sup>78</sup>

73. *Id.* at 7.

74. Rene Stutzman, *George Zimmerman’s Father: My Son Is Not Racist; Did Not Confront Trayvon Martin*, ORLANDO SENTINEL (March 15, 2012, 10:42 PM), [http://articles.orlandosentinel.com/2012-03-15/news/os-trayvon-martin-shooting-zimmerman-letter-20120315\\_1\\_robert-zimmerman-letter-unarmed-black-teenager](http://articles.orlandosentinel.com/2012-03-15/news/os-trayvon-martin-shooting-zimmerman-letter-20120315_1_robert-zimmerman-letter-unarmed-black-teenager). This is, of course, an odd claim; it presumes that a Hispanic person cannot harbor racism against a black person.

75. See, e.g., Howard Koplowitz, *Barbara Espinosa, Arizona Radio Host, Stands by Obama ‘Monkey’ Remark and Denies She’s Racist*, INT’L BUS. TIMES (June 20, 2012, 1:05 PM), <http://www.ibitimes.com/barbara-espinosa-arizona-radio-host-stands-obama-monkey-remark-and-denies-shes-racist-video-703628> (claiming, after calling Barack Obama on her radio show that “with a last name of Espinosa I’m anything but racist.”).

76. Consider Richard Carmona’s Senate campaign, which emphasized both his economically disadvantaged upbringing and his Latino heritage as a way of connecting with voters in those identity categories. See Jordan Fabian, *Carmona Stresses Latino Heritage, Keeps Distance from Obama in Ariz. Senate Race*, UNIVISION NEWS (FEB. 16, 2012), <http://univisionnews.tumblr.com/post/17721000549/richard-carmona-arizona-senate-obama>.

77. Kathleen Parker, *Did John Edwards Mention His Dad Was a Millworker?*, REALCLEARPOLITICS (Jan. 3, 2007), [http://www.realclearpolitics.com/articles/2007/01/john-edwards\\_his\\_dad\\_was\\_a\\_mil.html](http://www.realclearpolitics.com/articles/2007/01/john-edwards_his_dad_was_a_mil.html).

78. Nora Beane, *Presidential Hopeful John Edwards, Taking a Stand Against Poverty: Can a Rich Man Really Fight for the Poor*, YAHOO! VOICES (May 27, 2007), <http://voices.yahoo.com/presidential-hopeful-john-edwards-taking-stand-against-357400.html>.

In the workplace, a vast amount of literature has detailed the ways in which outgroup members struggle to fit in, often at great personal cost.<sup>79</sup> Yet more recent research suggests that making outgroup identity salient can also sometimes yield certain circumscribed benefits—for example, coming out at work may be preferable to keeping one’s sexual orientation secret given that many organizations have protective policies in place<sup>80</sup> and that identifying one’s sexual orientation publicly may actually facilitate “collegial banter” with coworkers and catalyze new business relationships.<sup>81</sup> And in certain industries, making outgroup identity salient yields decided advantages. Within the fashion industry, for example, many commentators believe that explicitly performing stereotypical gay male identity helps one’s career by exploiting stereotypes about gay male fashion sense.<sup>82</sup>

Likewise, within entertainment, non-straightness can provide certain advantages. Recent examples—Ellen DeGeneres, T.R. Knight, Anna Paquin—reveal that coming out need not derail a career. Indeed, commentators have suggested that “[s]ome celebrities whose stars were fading have gotten a career boost after going public about being gay.”<sup>83</sup> And in advising people how to get selected for reality TV shows, for example, one website explains that such shows “require large groups of people and in order to appear interesting to the audience and to appeal to the largest demographic, casting directors often look for many different types of people.”<sup>84</sup> Such a statement implies not only that outgroup identity might help a candidate get selected, but might also lead to a lengthier appearance on the show, as well as, perhaps, an entertainment career that transcends the show.

### III. DISSENTERS AS ENTREPRENEURS

Participation in systems of identity capitalism created and maintained by identity ingroups presents difficult challenges for dissenting members of identity outgroups. When ingroup members control the overarching sys-

79. See, e.g., KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2001); PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999).

80. Sylvia Ann Hewlett & Karen Sumberg, *For LGBT Workers, Being “Out” Brings Advantages*, HARV. BUS. REV. (July 2011), available at <http://hbr.org/2011/07/for-lgbt-workers-being-out-brings-advantages/ar/1> (stating that 85% of Fortune 500 companies have protective policies in place—an increase from 51% just eleven years earlier).

81. *Id.*

82. Eric Wilson, *In Fashion, Who Really Gets Ahead?*, N.Y. TIMES (Dec. 8, 2005), <http://www.nytimes.com/2005/12/08/fashion/thursdaystyles/08FASHION.html?pagewanted=all>.

83. *OK To Be Gay in Hollywood*, CBSNEWS (Sept. 25, 2008, 3:34 PM), [http://www.cbsnews.com/2100-500202\\_162-4478555.html](http://www.cbsnews.com/2100-500202_162-4478555.html).

84. *Selecting Reality TV Contestants*, JOBMONKEY, <http://www.jobmonkey.com/realitytv/selections.html> (last visited Jan. 8, 2014).

tems, they often control the terms of participation and the value assigned to attempts at identity entrepreneurship. Identity entrepreneurship and the identity commodification it requires is a complicated phenomenon that cannot be classified as either good or bad. Rather, identity entrepreneurship highlights the phenomenon that Margaret Jane Radin has identified as the transition problem—in a perfect society, we would not commodify identity, but given that we live in an imperfect society, an immediate decommodification of all identity would instantiate existing inequality and suffering.<sup>85</sup>

This Part begins by detailing the harms and benefits associated with identity entrepreneurship, and in particular, identity entrepreneurship by dissenting outgroup members. Both are important considerations. The Part then offers a way forward that prioritizes agency, information, and progress toward long-term decommodification of identity. I will use this theoretical foundation as a basis for future work discussing more specific legal reforms, including reforms involving copyright, Title VII, and expressive association.

#### *A. Harms and Benefits*

Outgroup identity entrepreneurship is a risky proposition, one often fraught with peril. This Part traces the harms that can ensue from leveraging one's outgroup identity to derive benefit from the identity ingroup. Leveraging identity can reinforce ingroup preferences regarding outgroup identity, given that such preferences generally assign greater value to favored identities. It can also cause divisions between outgroup members who choose to leverage identity for personal gain and those who do not or who cannot. And identity entrepreneurship inevitably affects more than the individual who engages in it, given that the fates of those perceived as members of the same outgroup are intertwined.

By leveraging their identity to derive value, outgroup members render themselves vulnerable to ingroup preferences. Outgroup identity is more valuable if it conforms to these preferences, which distorts incentives for outgroup identity performance and privileges identity. As Homer Simpson says, "You know me, Marge. I like my beer cold, my TV loud, and my homosexuals flaming."<sup>86</sup>

The incentive that ingroup preferences create for identity entrepreneurs engenders fetishism. Perhaps fetishism is not an entirely bad thing—as Phyllis Rose explains, "Compared with racism, exoticism is merely dec-

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

86. *The Simpsons: Homer's Phobia* (Fox television broadcast Feb. 16, 1997).

orative and superficial.” But nor is it a good thing—”If one is to be treated as a thing, one would rather be treated as a rare and pretty thing than as a disgusting or dangerous one. But that is still to be treated as a thing.”<sup>87</sup> And identity entrepreneurship can create a cycle that both privileges ingroup preferences and reifies the stereotypes the ingroup holds.

Identity entrepreneurs are particularly likely to enhance the vulnerability of their outgroup by reifying identity performances that are congenial to the majority with respect to individuals who are intersectionally disadvantaged—for example, individuals who are outgroup members with respect to both race and gender, or with respect to both race and sexual orientation.

Moreover, divisions created by identity entrepreneurship also create opportunities for ingroups to criticize outgroups for their disunity and to dismiss the positions of identity caucuses on the ground that they do not speak for an outgroup as a whole. Likewise, identity entrepreneurship also creates divisions *between* different outgroups. Asian Americans, for example, are often held up as model minorities and used as a tool to critique other racial groups. As Frank Chin puts it, “Whites love us because we’re not black.”<sup>88</sup>

The discussion illuminates outgroup discomfort and ambivalence regarding identity entrepreneurs. Against this backdrop, Oprah Winfrey’s instruction, “[d]o not be a slave to any form of selling out,”<sup>89</sup> might be read either as an inspirational message or as a warning.

As much as we might like to believe otherwise, identity entrepreneurship does not occur in a vacuum. One individual’s decision to leverage identity affects the situation of those around him. For example, Sarah Palin’s performance of gender identity affects the way that people—particularly men—view other women politicians. Researchers have described this phenomenon as “linked fate”—the notion that outgroup members are inevitably affected by the behavior of other outgroup members, and that the fates of individual outgroup members are affected by the fate of the group as a whole. Considerable research indicates that outgroup members *believe* that their own fortunes are linked to those of others who share their identity characteristics.<sup>90</sup> Other research suggests that this is, in

87. PHYLLIS ROSE, *JAZZ CLEOPATRA: JOSEPHINE BAKER IN HER TIME* 44 (1989).

88. ROBERT G. LEE, *ORIENTALS: ASIAN AMERICANS IN POPULAR CULTURE* 145 (1999).

89. Oprah Winfrey Oprah Winfrey Howard University Commencement Address, C-SPAN (May 12, 2007), <http://www.c-spanvideo.org/program/HowardUniversi> (available in C-SPAN Video Library).

90. Claudine Gay & Jennifer Hochschild, *Is Racial Linked Fate Unique? Comparing Race, Ethnicity, Class, Gender, and Religion* (2010) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1644497](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1644497).

fact, often true.<sup>91</sup> Observational evidence from society, moreover, suggests that linked fate influences deeply held stereotypes about outgroup members. Identity entrepreneurs provide readily accessible material that creates or reinforces stereotypes about groups.

Identity entrepreneurship thus occupies discursive space and crowds out other portrayals that are more fragile because they are not already buttressed by stereotypes and rewarded by the ingroup. Such portrayals sometimes freeze identity in a way that perpetuates subordination; both for the identity entrepreneur and for those outgroup members not like him. For the identity entrepreneur, the subordination arises from the contingencies placed on his identity reward—to keep making money, the rapper 50 Cent has to keep dressing, behaving, and rapping in a way that pleases the young middle and upper-middle class white man who comprise much of his fan base as well as the white male executives who have a stake in his record label. By tethering his financial success to the desires of a racial ingroup, 50 Cent provides that group a stake in his identity.

For the person who resists identity entrepreneurship, the subordination is both more straightforward and more sweeping. Suppose that a black man from an urban neighborhood prefers rock music and attempts to form an alternative rock band. Many people will find it difficult to think of black rock musicians in recent memory,<sup>92</sup> and such a band simply does not satisfy the tastes of America. “It looks wrong,” people say. That is because they expect something else, and identity entrepreneurship only reinforces that expectation.

Yet outgroup identity entrepreneurship also yields benefits.<sup>93</sup> It affirms agency, confirming that outgroup members have the ability to act in ways that they choose—even if we might not like their choices. In addition to the value we associate with agency itself, the exercise of agency by identity entrepreneurs also has other social values. First, identity entrepreneurship prompts discourse regarding identity. Triggered by instances of entrepreneurship, ingroup and outgroup members can have productive conversations about what identity does and should mean. As bell hooks explains in the context of feminist discourse: “I believe feminist thinking is enriched by dissent. Opposing viewpoints should not be censored, silenced, or punished in anyway.”<sup>94</sup> hooks’ point is that the “concrete practice of

91. See *id.* at 31-34.

92. There are actually more black rock musicians than people think. Stereo Williams, *The 15 Greatest Black Rock Artists of All Time*, ROLLING OUT (Mar. 9, 2013), <http://rollingout.com/music/the-15-greatest-black-rock-artists-of-all-time/>.

93. See Leong, *supra* note 1 (manuscript at 52-55).

94. Bell Hooks, *OUTLAW CULTURE: RESISTING REPRESENTATIONS* 100 (1994).

contestation” actually strengthens the bonds among outgroup members—here, women—and that shared commitment to discourse in the face of disagreement produces a better world for all manifestations of identity.<sup>95</sup>

For some identity entrepreneurs, commodification of identity represents an affirmative decision to leverage outgroup identity for personal gain. This exercise of agency implicates important concerns regarding dignity and autonomy.<sup>96</sup> We cannot dismiss these concerns lightly.

Moreover, identity entrepreneurship can create incentives for rebellious and liberatory forms of identity performance. Madhavi Sunder explains that allowing “cultural dissent” prevents cultural meanings from becoming fixed.<sup>97</sup> Identity entrepreneurship challenges conventional cultural meanings and enriches the conversation about those meanings. Legal doctrine places considerable priority on facilitating dissent—indeed, as Charlotte Garden has explained, the right to such dissent receives constitutional protection.<sup>98</sup> Obviously, not every instance of identity entrepreneurship receives legal protection, let alone constitutional protection. But the protection that dissent receives in many contexts reflects our general understanding that dissent serves important social interests.

Outgroup entrepreneurship also provides tangible material benefits to individual outgroup members—Sarah Palin; 50 Cent—and, sometimes, to outgroups as a whole. Even when outgroup members who do not explicitly act to elevate the outgroup, the outgroup benefits simply by having wealthy or powerful members. Regardless of whether Sarah Palin helps other women politicians and leaders (arguably, she does<sup>99</sup>), it is good for Americans to see a woman candidate for a prominent political office. Regardless of whether 50 Cent “gives back” to poor urban black communities (he does<sup>100</sup>), it is good for Americans to see black men gain money and fame. Seeing powerful women and wealthy black men normalizes those identities, which increases the ease with which future outgroup members—perhaps increasingly philanthropically-minded ones—can fit into those spaces. And identity entrepreneurship, by conferring power in the form of money or influence or both on identity entrepreneurs, has the power to

95. *Id.*

96. See Leong, *supra* note 1 (manuscript at 52).

97. Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV 495, 498 (2001).

98. Charlotte Garden, *Meta-Rights* (Jan. 25, 2014) (unpublished manuscript) (on file with author).

99. See, e.g., Andy Barr, *Sarah Palin Endorses Nikki Haley for S.C. Governor*, POLITICO.COM (May 13, 2010), <http://www.politico.com/news/stories/0510/37225.html> (Haley won).

100. See, e.g., G-UNITY FOUNDATION, <http://www.gunityfoundation.org/about/> (last visited Feb. 19, 2014).

enact real substantive improvement in the lives of outgroup individuals and outgroups as a whole.

### *B. Dissent from Outgroups*

The complexities of outgroup identity entrepreneurship are intensified for those who dissent from standard outgroup identity scripts. Such dissenting outgroup entrepreneurs navigate all the obstacles described above and more. While one can identify many ways of dissenting from outgroup scripts, I will discuss two here. First, I consider how outgroup members can leverage outgroup identity by minimizing outgroup associations—that is, by engaging in identity performances and adopting attitudes that distance themselves from the outgroup and associate them more closely with the ingroup. I describe this form of identity entrepreneurship as “dissenting in.” Then I consider how outgroup members can leverage outgroup identity by emphasizing it—that is, by engaging in identity performances and adopting attitudes that distance themselves from both the ingroup and the outgroup.

#### 1. Dissenting in

Sometimes individuals engage in identity entrepreneurship by doing what I call “dissenting in.” Examples of dissenting in extend across many identity categories. Clarence Thomas is a paradigmatic example: by conforming to many conservative white norms of speech, behavior, and ideology, he distances himself from views held by the majority of blacks. It is unclear whether Thomas regards himself an identity entrepreneur, but he certainly fits the definition: He has made his identity salient to the ingroup, and has reaped rewards as a result.

Those who dissent in are often the targets of controversy. Distancing themselves from the outgroup may engender resentment from the outgroup, yet they may never reach full ingroup status. As a result, dissenting in may result in criticism from all sides. With respect to Thomas, an entire literature examines whether he is a sellout, a race traitor, an intellectual inferior to other justices, an improper beneficiary of affirmative action, an embattled leader, or some combination of the above.<sup>101</sup>

101. See, e.g., KEVIN MERIDA & MICHAEL A. FLETCHER, *SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS* (2007); Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113 (2005); Angela Onwuachi-Willig, *Just Another Brother on the SCT? What Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005); Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 HOW. L. REV. 323 (2004); Michael deHaven Newsom, *Clarence Thomas, Victim? Perhaps, and Victimizer? Yes—A Study in Social and Racial Alienation from African-Americans*, 48 ST. LOUIS U. L.J. 327 (2004).

In the aggregate, dissenting in tends to please ingroup members while creating divisions among outgroup members. Consider, first, the consequences with respect to the ingroup. By dissenting in, Thomas participates in identity capitalism. He has profited by dissenting in—by providing an example of a black man who espouses many conservative policies. This allows opportunities for racial capitalism.<sup>102</sup> For instance, white people who reject affirmative action often point to Thomas as evidence that their opinion is correct.<sup>103</sup> Note that this occurs in at least two ways. First, it functions as a form of racial capitalism for white people to derive value from attaching an anti-affirmative action stance to a black person<sup>104</sup>—that is, if Thomas rejects affirmative action. But Thomas *himself* also allows white people who view him as intellectually inferior to use him as an argument against affirmative action. Perhaps most ironically of all, the groups of people espousing these two views overlap, albeit incompletely. The irony inherent in this tension exposes the perils associated with dissenting in.

Outgroup responses, unsurprisingly, are also varied. First, outgroup members may inherently disapprove of dissenting in altogether, believing that leveraging identity in pursuit of personal gain inherently harms other outgroup members. This phenomenon is closely linked to the subset of identity entrepreneurship that Randall Kennedy has described as “selling out,”<sup>105</sup> widely regarded as one of the most contemptible acts in which a group member can engage. In such instances, identity entrepreneurship fractures outgroup solidarity.

And even where outgroup members do not inherently disapprove of entrepreneurship by other outgroup members, the outgroup still often subject those who dissent in to heightened scrutiny. The result is that those who dissent in must walk a fine line. As one commentator has said of Barack Obama: “[B]eing the ‘good’ black is tricky. The more whites love you, the more you must reassure your own community that you are still one of them. And the more you do that, the more you jeopardize your white support.”<sup>106</sup> When outgroup members leverage identity, ingroup members create castes of outgroup members by valuing some outgroup identities more highly than others. This stratifies outgroups along a continuum from

102. Leong, *supra* note 1, at 2175–82.

103. See, e.g., Steven Calabresi et al., *Supreme Thomas*, NATIONAL REVIEW (OCT. 21, 2011, 4:00 AM), <http://www.nationalreview.com/articles/280845/supreme-thomas-nro-symposium>.

104. *Id.*

105. RANDALL KENNEDY, SELLOUT (2009).

106. Peter Beinart, *Black Like Me*, THE NEW REPUBLIC, Feb. 5, 2007, at 6 *available at* <http://www.newrepublic.com/article/politics/black-me>.



“good blacks” to “thugs”; from “sassy gay friends” to “deviants.” Indeed, Thomas—as an individual—has paid a price in exchange for the benefits of his identity entrepreneurship. He is often excoriated by other blacks and dismissed, scornfully, as a puppet of Antonin Scalia.<sup>107</sup> The rapper KRS-One speaks for many when he says: “The white man ain’t the devil, I promise. You want to see the devil, take a look at Clarence Thomas.”<sup>108</sup>

This non-exhaustive examination demonstrates that dissenting in comes with both benefits and pitfalls. Ultimately, in evaluating the net social “good” of dissenting in, we might look at the consequences to the outgroup caused by particular instances of dissenting in. For example, one might argue that Barack Obama’s periodic strategy of dissenting in makes him palatable to white people—sometimes at the expense of more aggressive civil liberties causes—but that in net his identity performance has represented a gain for blacks, both in the symbolic effects of his leadership and in the consequences of his policies. By contrast, we might reach a less favorable conclusion regarding Clarence Thomas. Many of his decisions on issues that disproportionately affect black people—for example, affirmative action and criminal justice—ultimately cause quantifiable harm to other members of his racial outgroup. As a result, we might be more likely to see his dissenting in as a loss for black people.

## 2. Dissenting out

Other outgroup identity entrepreneurs “dissent out”—that is, they leverage identity in a way that distances them from both the ingroup and from the outgroup. It is more difficult to think of prominent identity entrepreneurs who dissent out than those who dissent in. I think this is not coincidental. Because it is more profitable to conform to the tastes of the ingroup—or if not the ingroup, then the outgroup or outgroups of which one is a member—manifesting identity in a way that distances one from both the ingroup and the outgroup has potentially negative material consequences.

The rapper Le1f could be viewed as dissenting out.<sup>109</sup> Le1f is a black, openly gay rapper who utilizes unconventional production styles and often satirizes traditional rap music. Spin Magazine explains: “His raps playfully subvert the hetero-normative tough-guy traditions of hip-hop — referenc-

107. Joan Biskupic, *After a Quiet Spell, Justice Thomas Finds Voice*, WASH. POST (May 24, 1999), <http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/thomas052499.htm>.

108. KRS-One and Boogie Down Productions, *Build and Destroy*, SEX AND VIOLENCE (Jive Productions) (1992).

109. Tentatively, I think that Margaret Cho might be another example, as might Tilda Swinton.

ing Public Enemy's boast 'My Uzi Weighs a Ton' on 'My Oozy'; sampling Lil Jon shouting 'gangsta!' on 'Gayngsta.'"<sup>110</sup> Indeed, Le1f is difficult to describe to people who have not watched his videos or listened to his songs.<sup>111</sup> While difficult to categorize—he challenges preconceptions of heterosexuality and machismo, and does so without conforming to either ingroup (straight, white) or outgroup (either black or gay) norms. Le1f himself has joked that his alphanumeric name is indicative of his distance from any cognizable identity category: "I feel more like an alien than a gay rapper."<sup>112</sup>

In some ways, intersectional identities provide examples of dissenting out.<sup>113</sup> Such identities certainly distance those who choose to dissent out from the ingroup. But they also distance those who dissent out from each outgroup of which they are a member. For example, a white person who is both poor and female may find herself unable to exercise white privilege in many ways, yet also remain marginalized by women's groups (because of her poverty) or socioeconomically disadvantaged people (because of her race).<sup>114</sup> Or a man who identifies as both Asian and gay may not find himself wholly at ease with straight white men—because his Asian-ness and sexual orientation do not conform with stereotypes of masculinity—yet also remain marginalized by some Asian groups (because of lingering tendencies toward homophobia) and gay groups (because of the whiteness and wealth of many of the most prominent spokespersons for the LGBT movements).

This is not to say that dissenting out is always a net negative for those who do it. People are sometimes attracted to difference and novelty—a tendency that helps to explain Le1f's popularity—and those who dissent out may also generate a kind of good will by providing a sense of safety to those who perform their identities in somewhat more conventional ways. That is, true outliers create more space for a range of less drastic iterations of dissenting out and identity performances more generally.

But the scarcity of identity entrepreneurs who distance themselves from both ingroup and outgroup members suggests that there are powerful incentives against stereotype-flouting identity performance, and—

110. Brandon Soderberg, *Le1f: New York Rap Deconstructionist Boasts Tricky Skills*, SPIN (Dec. 12, 2012), <http://www.spin.com/articles/le1f-new-york-rap-deconstructionist-boasts-tricky-skills/>.

111. See, e.g., Rich Juzwiak, *Rapper Le1f is Very Good and Very Gay*, GAWKER (July 23, 2012), <http://gawker.com/478355755>.

112. Soderberg, *supra* note 110.

113. Cf. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

114. See Camille Gear Rich, *Marginal Whiteness*, 98 CAL. L. REV. 1497 (2010).

unsurprisingly—little in the way of a road map to guide those who find themselves most gratified by dissenting out. As a result, we should craft legal interventions to serve the purposes of autonomy, information, and decommodification, while also paying attention to the relative hardness of stereotype-confirming and stereotype-disconfirming manifestations of identity.

#### CONCLUSION

Both dissenting in and dissenting out are forms of identity entrepreneurship that reveal many of the complexities of identity entrepreneurship itself. One consequence of the differential rewards associated with dissenting in and dissenting out is that such differential rewards intensify the pressure on outgroup members to determine the “right” way for them to perform identity.<sup>115</sup> Negotiating identity performance becomes even more complex when some identities come with rewards and others do not. The question remains how the law should treat such phenomena. My future work will discuss how a range of legal doctrines should interact with the various iterations of identity entrepreneurship.

115. Carbado & Gulati, *supra* note 79.