

When Diversity Is Not Enough: A Reflection on *Identity Capitalists*

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INTRODUCTION

Since I completed the manuscript for *Identity Capitalists* in 2019, the ground has shifted under our feet. We have borne witness to a pandemic, a racial reckoning in the wake of the murder of George Floyd, and an attempted coup. Each day we watch the rise in white nationalism. The #MeToo movement continues to face new questions and challenges. Advocates press for greater protections for LGBTQ+ and disabled people, even as the rights of these groups are under threat at the Supreme Court. And the legality of affirmative action hangs by a thread.¹

In the wake of this upheaval, identity is at the forefront of legal and social discourse as never before. As the threats around us have intensified, the need for careful critique and informed dialogue has never been so urgent. The #MeToo movement and racial reckoning have brought welcome introspection. To an extent unprecedented in American history, members of ingroups—for example, white people, men, heterosexual people, the wealthy, the non-disabled—have incentives to demonstrate their acceptance of socially marginalized groups—for example, non-white people, women, LGBTQ+ people, the poor, and the disabled. Research has documented the pressures on businesses, colleges and universities, government, entertainment, the media, and other institutions to demonstrate their commitment to the wellbeing of marginalized groups. Likewise, individuals—politicians, entertainers, and everyday folks—face social and political pressure to demonstrate similar commitments.

This environment offers considerable incentives for *identity capitalists*—the term I have coined to describe individuals or institutions that use

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¹ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S.Ct. 895 (2022), <https://perma.cc/6VZH-4L4P>.

outgroup identity to benefit themselves.² From the white person who parades a Black friend to the company that features diverse photos on its website, identity capitalists are not a new phenomenon.³ But as the pieces comprising this symposium make clear, our current moment offers new and evolving opportunities for identity capitalists to profit from the identities of others.

To be clear, increased attention to the circumstances of outgroup members, and awareness of the historical conditions that have advantaged some groups while oppressing others, are both necessary. Yet diversity measures should also be evaluated critically. Many stakeholders—businesses, politicians, educational institutions, regular people—want credit for doing their part to remedy the country’s injustices without actually doing anything that will improve material inequality.

At core, *Identity Capitalists* is about the gap between show and substance, between signal and virtue. The responses to my book, accumulated as this symposium, clearly, powerfully, and sometimes painfully demonstrate the way that diversity is sometimes treated as an end in itself rather than as a means to an end of equity.

I. The Limits of Diversity

From the beginning, I have linked identity capitalism and the preoccupation with diversity. This preoccupation can be traced to the Supreme Court’s decision in *Regents of the University of California v. Bakke*, in which the Court narrowly held that an affirmative action program could be constitutionally justified by a school’s interest in diversity.⁴ As Professor Asad Rahim has shown, Powell was drawn to the rationale because he believed it would combat intellectual radicalism. Surely a rationale that could include both descendants of slaves and “farm boys from Idaho” deserves caution.⁵

In the wake of *Bakke*, advocates have understandably emphasized the importance of diversity because it is the only way for an affirmative action program to be upheld. Yet critical race theorists have, for years, expressed concern about a focus on diversity as an end in itself rather than as a means to an end. In the context of affirmative action in higher education, Professor

² NANCY LEONG, *IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY* 15–16 (2021).

³ See generally *id.* ch. 1 (cataloging many examples of identity capitalism).

⁴ 438 U.S. 265, 317 (1978) (“In such an admissions program, race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file . . .”).

⁵ Asad Rahim, *Diversity to Deradicalize*, 108 CALIF. L. REV. 1423, 1425 (2020).

Derrick Bell has described diversity as a “distraction” from substantive and systemic reforms because it “avoid[s] addressing directly the barriers of race and class.”⁶ In the context of college admissions, for example, “[d]iversity . . . is less a means of continuing minority admissions programs in the face of widespread opposition than it is a shield behind which college administrators can retain policies of admission that are woefully poor measures of quality, but convenient vehicles for admitting the children of wealth and privilege.”⁷ That is, the focus on diversity is a way of avoiding bigger and harder questions about the reasons that some racial groups are systemically disadvantaged and how a just admissions process might take account of that. Why do some students have access to resources such as test preparation classes and admissions counselors? How should the admissions process take account of these disparities? Not only does the diversity rationale fail to answer these questions—it also fails even to ask them.

To be clear—and as I have said many times—diversity is a good thing, not a bad thing. Diversity furthers many important aims, both for dominant and marginalized groups. But it is not an end in and of itself. Problems arise when institutions focus on diversity *instead of*, as opposed to *in addition to*, substantive equality.⁸ We need to look further: in a diverse group, how are historically marginalized groups treated, and how do they benefit?

To understand the limits of diversity, compare two hypothetical law schools:

Each year Law School #1 graduates 100 students, of whom ninety-five are white and five are not. The five students of color receive grades below the school’s median and fail the bar significantly more frequently than the white students. The students of color report depression, anxiety, and feelings of isolation at far higher rates than their white peers. Despite the struggles of its students of color, half of the photos on Law School #1’s website and promotional materials are of its small number of non-white students.

Each year Law School #2 graduates 100 students, of whom fifty are white and fifty are not. The fifty students of color receive grades below the school’s median and fail the bar significantly more frequently than the white students. The students of color

⁶ Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).

⁷ *Id.* at 1632. See LEONG, *supra* note 2, at 10.

⁸ Nick Anderson & Susan Svrluga, *How Do Colleges Use Race in Admissions Decisions?*, WASH. POST, <https://perma.cc/6P5L-G7VL> (last updated Jan. 24, 2022, 6:35 PM EST) (analyzing whether Harvard and UNC treat applicants of different racial backgrounds fairly when reviewing their applications); LEONG, *supra* note 2, at 184 (describing the demographic situation in educational institutions as being “frankly alienating” for non-white students).

report depression, anxiety, and feelings of isolation at far higher rates than their white peers. Despite the struggles of its students of color, half of the photos on Law School #2's website and promotional materials are of its non-white students.

This simple example shows why diversity is, if not (per Derrick Bell) a distraction, also not the whole story. It is easy to say what is wrong with Law School #1: it should improve its racial diversity. Yet diversity is not enough. Law School #2 is highly diverse, yet it is *also* failing its students of color.

In addition to failing to prompt answers to the hard questions, the diversity rationale incentivizes identity capitalism. *Both* Law School #1 and Law School #2 are identity capitalists. They are *capitalizing* on their students by generating benefits for themselves from their students of color—and the students of color are not similarly benefiting.

In a thoughtful essay for this symposium, Professor Ellen Farwell demonstrates how a similar dynamic emerges in the business world. She examines two California laws: SB-826 requires at least two women on boards of five or fewer, and at least three women on boards of six or more; and AB-979 requires that “public companies headquartered in the state include on their boards at least ‘one director from an underrepresented community,’” referring to both racial identity and sexual orientation.⁹ The example both captures why diversity is important, and it also captures why it is not enough. Farwell explains that presence is not the same as substantive influence: within boards, members of underrepresented groups are less likely to occupy positions of influence such as the board chair or the head of recruitment or compensation.¹⁰

The case of corporate boards demonstrates the insufficiency of institutional diversity as an end goal. Professor Farwell astutely observes: “Getting seats at the corporate board table for women, Black people, and other outgroup members is a necessary step in the direction of true equity in corporate America. But it is not enough.”¹¹ Stakeholders in these companies—and in other institutions—must take care to ensure that individuals held up as evidence of diversity are also treated equitably.

II. When Diversity Does Not Fit

In other arenas, trying to fit social justice into a diversity framework is again like trying to fit a round peg into a square hole.

⁹ Ellen E. Farwell, *A Real Seat at the Table: Identity Capitalism and State Law Efforts to Diversify Corporate Boards*, 56 NEW ENG. L. REV. 141, 146–47 (2022).

¹⁰ *Id.* at 151.

¹¹ *Id.* at 149.

In her contribution to this symposium, Professor Nicole Porter makes the case for promoting “disability diversity” by “increasing the number of people with disabilities in any setting.”¹² She cites research showing that companies that are more inclusive of disabled employees are more successful on a number of business metrics, and she reasons that increasing the number of (presumably openly) disabled people in a particular setting “will lead to a greater acceptance of people with disabilities.”¹³

I am entirely convinced by Professor Porter’s work that acceptance of people with disabilities in institutional settings is an important goal. I also agree that identity capitalism with respect to people with disabilities is real—for instance, we have all seen promotional materials featuring individuals with visible disabilities—and that this sort of identity capitalism can be problematic if not accompanied by efforts to welcome those with disabilities into workplaces, schools, and other institutions.¹⁴

Yet the case of disability also exposes the limits of the diversity rationale. The diversity rationale fails to account for fundamental differences between disability and some other identity categories that we consider protected classes, such as race, gender, and sexual orientation. I think that most people would say that a law school that failed to enroll any Black people had not been successful in its diversity efforts; I think that most people would not say the same thing about a law school that failed to enroll any people with an anxiety disorder. This is so even given the relative frequency of these categories: 18.1% of the population suffers from an anxiety disorder, while 12.4% of the population is Black. I think that this intuition likely stems from the different histories of Black people and people with anxiety and the different social standing that those groups currently occupy. The failure of diversity to take account of this difference is, I think, a failure of the diversity rationale itself. A rationale rooted in remedial or distributive justice would help us think through why we might or might not wish to affirmatively recruit those with disabilities to particular settings. Diversity, however, is not the right tool for this job.

III. Diversity’s Distortions

One of my greatest concerns with respect to diversity—and the incentives it creates for identity capitalism—is the way it affects members of outgroups. In my book, I explain that identity entrepreneurs are outgroup

¹² See Nicole Buonocore Porter, *Disability Diversity and Identity Capitalism*, 56 NEW ENG. L. REV. 153, 163 (2022).

¹³ See *id.*

¹⁴ *Id.* at 167–68.

members who “leverage their outgroup status to derive social and economic value for themselves.”¹⁵ The racial reckoning has amplified opportunities for outgroup members to profit from their outgroup status. The phenomenon is particularly salient in the commercial marketplace. Brands that previously had never before expressed sympathy for or solidarity with Black people suddenly featured Black models in their print and online catalogs and their social media. The drive to showcase diversity has spread from Black individuals to those of other races, as well as to individuals embodying diversity along lines of gender, identity, sexual orientation, and beyond.

Corporate America’s newfound appreciation for diversity creates incentives not only for ingroup members, but also for outgroup members. Performances of identity that are acceptable to the ingroup become the performances with which mainstream America is most familiar. The result is a system that rewards performances of outgroup identity that are different, but not *so* different that they are challenging to the status quo or alienating to members of ingroups.¹⁶

These distortions of identity are amplified by the Internet. In his symposium essay, Professor Khaled Ali Beydoun describes the effects of the identity marketplace among digital influencers and the businesses and other interests they serve.¹⁷ He poignantly narrates the story of meeting with a young Muslim woman—a self-described journalist—with a substantial social media following who told him that she “stay[s] away from politics” in her online content.¹⁸ Her apolitical stances paid off: “her online presentation and performance successfully lured partnerships with global brands,” including “popular magazines, fashion brands, hotels, gatherings with socialites, and more.”¹⁹

While I do not wish to criticize any *individual* performance of identity, in the aggregate, we should be concerned if the identity performance of individual outgroup members is not representative of—or is even contrary to—the interests of the class as a whole. As with the Muslim journalist Professor Beydoun describes, the risk is that the outgroup members who are rewarded by the ingroup will be those who mostly do what the ingroup likes, resulting in a reinforcement of—rather than a challenge to—the status

¹⁵ LEONG, *supra* note 2, at 84; see Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333, 1334 (2016) [hereinafter Leong, *Identity Entrepreneurs*].

¹⁶ See Leong, *Identity Entrepreneurs*, *supra* note 15, at 1337–38.

¹⁷ Khaled A. Beydoun, *Digital Identity Entrepreneurs*, 56 NEW ENG. L. REV. 131, 134 (2022).

¹⁸ *Id.* at 135.

¹⁹ *Id.* at 137.

quo.²⁰ And when identity is mediated through the Internet, the reach of the favored version of identity is amplified and, sometimes, distorted.

CONCLUSION

The core message of *Identity Capitalists* is that diversity is both essential and insufficient. I have struggled with this duality throughout my career. Professor Natasha Varyani's essay eloquently captures these blended feelings of accomplishment and dissatisfaction, of being both "happy and proud of the good work done," and "acutely aware that the ways in which I exist on a faculty . . . are different than the vast majority of my colleagues."²¹ As Professor Varyani's poignant reflection demonstrates, *Identity Capitalists* is a book that prompts personal stories. Many readers (including the talented scholars included in this symposium) have shared with me stories of times they have been pulled into photos, visually showcased on websites, or paraded at social events. Yet when it comes time to ensure whether outgroup members—whether *we*, the participants in the symposium—are thriving, members of ingroups are often nowhere to be found. My hope is that, as we continue to consider how identity does, and should, function in our society, that we—all of us who are outsiders in one way or another—are able to recover some of our identity capital for ourselves.

²⁰ Beydoun, *supra* note 17, at 138–39; see LEONG, *supra* note 2, at 106–07.

²¹ Natasha Varyani, *Response to Nancy Leong's Identity Capitalists: Implications for Property, Academia, and Affirmative Action*, 56 NEW ENG. L. REV. 175, 181 (2022).