Disability Diversity and Identity Capitalism

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INTRODUCTION

I first read Professor Nancy Leong's compelling book *Identity Capitalists: The Powerful Insiders Who Exploit Diversity to Maintain Inequality*[1] when I was asked to provide a pre-publishing peer review.[2] I was equal parts captivated and troubled by the numerous examples of identity capitalism (and its counterpart, identity entrepreneurialism) that I had never thought about, and perhaps even acquiesced in.

So, what is identity capitalism? As explained by Leong, identity capitalism is when members of an "ingroup" (think: white, straight, able-bodied, male) benefit through their interactions with members of an "outgroup."[3] Leong draws the reader in with a simple example—white people using their personal friendships or relationships with people of color to show that they are not racist. In Leong's case, the white person was an old college friend who invited Leong (a person of color) to the friend's wedding and, at said wedding, admitted to Leong that she (the friend) was glad Leong could attend the wedding because, if Leong had not, all of the wedding

guests would have been white.[4] At an institutional level, some of the more troubling examples of identity capitalism involve educational institutions doctoring photos in college brochures to make a college seem more diverse than it is[5] or politicians whose policies clearly harm most people of color emphasizing their relationships with a select few people of color to send the message that they are not racist (despite policies and other evidence that demonstrate otherwise).[6]

But in all honesty, I was troubled after my initial review of the manuscript because I had the sense that Leong was suggesting that diversity itself is bad, or at least that concentrating on diversity is bad. Upon my review of the published book, I was happy to see that my concerns were unwarranted. In the published book, Leong takes care to argue that it is not diversity itself that is bad—it is the fact that people and institutions capitalize on that diversity in a way that benefits the institution and harms the members of the groups that are supposed to be the beneficiaries of diversity efforts.[7]

Accordingly, with that concern addressed, my second read of this book highlighted a different issue—what about disability? And, more specifically, what does it mean to include disability as part of diversity initiatives? I will use this essay to address that issue. But first, I will briefly summarize the book in Part I and provide my thoughts and impressions of the arguments Leong makes. Then in Part II, I will explore what identity capitalism means for disability diversity.

I.   Leong's Book

To start, let me provide my overall impression of this book:[8] It is thought-provoking and entertaining. It expertly weaves the personal with the political, and individual relationships with institutional hierarchies. It exposes a problem that is ubiquitous but has not been explored for a general audience. But instead of just exposing the prevalence and problem of identity capitalism and entrepreneurism, Leong helps the reader think about practical solutions.

Using examples from her personal life, along with examples from history, entertainment, politics, and other public places (e.g., corporations

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[4]   LEONG, *supra* note 1, at 1.

[5]   LEONG, *supra* note 1, at 26.

[6]   LEONG, *supra* note 1, at 18–20.

[7]   *See* LEONG, *supra* note 1, at 15.

[8]   *See* LEONG, *supra* note 1 (deriving summary in part from Porter's blurb written for the book jacket).

and universities), Leong explores what identity capitalism is and why it is harmful. As discussed above, identity capitalism occurs when members of an ingroup (generally: white, heterosexual, able-bodied, male) use members of an outgroup (those who differ on one or more measures of sex, race, sexual orientation, etc.) to benefit the ingroup. Leong explains in this book why identity capitalists are harmful to both the members of the outgroup (who often recognize that they are being used as a tool to benefit the ingroup), but also harmful for attempts to actually create a more inclusive society. Below I will provide a quick summary of each chapter before turning to my general impressions.

A. *Chapter Summary*

The introductory chapter sets the stage; the wedding example I mentioned briefly above introduces the concepts of identity capitalism to the reader and explains why it is harmful. Leong also introduces the concept of identity entrepreneurs in this chapter, the most prominent example being Diamond and Silk, two black women who have made a career out of vouching for the Republican party and, specifically, for Donald Trump. These women "actively leveraged their identity as black women and used it to their advantage."[9] Moreover, Leong describes the harm caused by identity entrepreneurs like Diamond and Silk—they damage the "interests of their own outgroup while yielding rewards for a few privileged outgroup members."[10]

1.   Fake Diversity

In this chapter, Leong explores the most obvious examples of identity capitalism—when people or institutions embellish their relationships with members of an outgroup in order to achieve some benefit. For instance, universities might embellish actual minority enrollment by doctoring photos. In one particularly egregious example, the University of Wisconsin photoshopped the face of a black student into a picture taken at a football game, but this student had never attended a football game. The admissions booklet with this photo on the front cover was sent to over 100,000 prospective students.[11] Another example is when presidential candidate John McCain chose Sarah Palin for his running mate, with the hope that she would attract some female voters that might otherwise have voted for Obama. Law firms and other companies plastering their websites with

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[9] LEONG, *supra* note 1, at 7–8.

[10] LEONG, *supra* note 1, at 9.

[11] LEONG, *supra* note 1, at 13.

photos of employees of color are also identity capitalists.[12] Individuals who rebut a claim of racism, homophobia, or sexism by pointing to their one black friend, their one gay friend, or, in the case of Justice Kavanaugh, the parade of women who supported him, are all identity capitalists.[13] Leong rightfully points out why these attempts at identity capitalism are nonsensical. Trump can still be (and is, in my opinion) a racist even though he has a few black friends. Someone can vehemently oppose any laws that provide rights to LGBTQ+ individuals while at the same time having one gay friend (even if that friendship is genuine). And Justice Kavanaugh clearly could have assaulted his high school acquaintance despite the fact that there are many women who he treats well enough to have earned their support. Finally, this chapter explains why this "fake diversity" is harmful. I address this more below.[14]

2.   All-American Exploitation

This chapter starts with the history of identity capitalism, explaining how identity capitalism has been around for centuries. Specifically, Leong discusses the "lies of slaveholders," who attempted to justify slavery by using identity capitalism—falsely claiming that actual slaves reported being happy as slaves.[15] Another historical example is male anti-suffragists using their wives and other women to make the claim that women should not have the right to vote. Even back then, politically astute men understood that it was better to have a woman say "I don't want to vote and I think voting would be bad for me and bad for all women" than it was for the men themselves to make the same argument.[16] Historically, Leong pinpoints the 1978 Supreme Court decision in *Regents of the University of California v. Bakke*,[17] where Justice Powell's opinion accepted diversity as a lawful rationale for affirmative action in higher education, as the moment in time when diversity became so popular.[18] Finally, this chapter turns to the age of Trump to illustrate the connection between racism and misogyny and to demonstrate that identity capitalism is often about an ingroup being anxious to keep the power they have, even if that power was gained on the backs of

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[12] LEONG, *supra* note 1, at 23–29.

[13] LEONG, *supra* note 1, at 19–21.

[14] *See infra* Part II(B).

[15] LEONG, *supra* note 1, at 41–46.

[16] *See* LEONG, *supra* note 1, at 46–49.

[17] 438 U.S. 265 (1978).

[18] LEONG, *supra* note 1, at 54–59.

an outgroup.[19]

3. Anxiety and Absolution

Building on the theme of anxiety about loss of power, Chapter 3 explores the psychology behind identity capitalism. Specifically, most people are anxious about their status, and some of this anxiety surrounds race. In other words, white people are deeply afraid of being considered racist. Men are anxious about being considered sexist.[20] Leong also describes what she calls "status leaks," which is when an ingroup's use of a relationship with someone in an outgroup improves the reputation of the ingroup member while simultaneously harming the reputation of the outgroup member.[21] Here and throughout the book, Leong uses pop cultural references (television shows, movies, famous musicians, etc.) of people engaging in identity capitalism to demonstrate her point. I believe it makes the book more relatable for a broad audience (and more entertaining).

4. Identity Entrepreneurs

As the title demonstrates, this chapter is devoted to the other side of the problem—identity entrepreneurs, those outgroup members who use their identity as an outgroup member to gain some social capital. Sarah Palin used her gender, the five stars of the Queer Eye use their sexual orientation, Asian porn stars use their ethnicity to become more famous porn stars, many of us use our outgroup status to get invited on to a panel at a conference to avoid the panel being all white men, and so on.[22] Although Leong is careful to note that identity entrepreneurs are not inherently bad or doing something wrong, she also identified problems with identity entrepreneurship. Specifically, it often reinforces stereotypes about a particular identity, making life more difficult for other outgroup members who do not match such stereotypes.[23]

5. Unequal Protection

This chapter explores how the law reinforces identity capitalism. Although there are many examples, I want to highlight the ones I am most familiar with—sexual harassment and sex discrimination in the workplace.

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[19] LEONG, *supra* note 1, at 59–62.

[20] LEONG, *supra* note 1, at 63–67.

[21] LEONG, *supra* note 1, at 69.

[22] LEONG, *supra* note 1, at 83–98.

[23] LEONG, *supra* note 1, at 106–07.

In the sexual harassment context, men engage in identity capitalism by using their power over women to make them the subject of their "crude jokes and sexualized power plays."[24] And women who tolerate harassment in order to avoid negative job consequences can be seen as identity entrepreneurs, albeit very sympathetic ones.

In the anti-discrimination context, the problem is more evident. Courts engage in at least two practices that harm employees who bring discrimination claims against their employers. First, employers use the fact that someone in a decision-making process is a member of the same outgroup as a plaintiff to successfully defend against a discrimination claim. In other words, if an employer has a black person on a committee that made a promotion decision, a black woman who does not get the promotion and believes discrimination was the reason will have an uphill battle in winning her claim. The assumption is that a black person will not discriminate against another black person, a woman will not discriminate against a woman, etc. And yet we know this is not true.[25] The second practice employers use to win discrimination claims is to make sure they treat well individuals who are of the same outgroup as a plaintiff; when this happens, courts often have a difficult time seeing the adverse decision as discriminatory. For example, a law firm might promote four black female attorneys and refuse to promote one black female attorney. Even if there is evidence that the decision was race-based (the attorney who was not promoted was the "wrong kind of black woman"),[26] the court will often be blinded by the fact that four black women were promoted. As Leong states, "The result is a particularly ugly form of identity capitalism: using favored members of an outgroup to mask discrimination against a disfavored member."[27]

6. The Law of Identity Capitalism

This chapter moves beyond anti-discrimination law to demonstrate the influence of identity capitalism throughout the laws and legal system of the United States.[28] First, opponents of affirmative action have made efforts to find a few Asian Americans who oppose affirmative action, knowing that the arguments against race-based affirmative action will be more compelling from a plaintiff who is a person of color.[29] Second, despite a law prohibiting

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[24] LEONG, *supra* note 1, at 109–10.

[25] LEONG, *supra* note 1, at 112–15.

[26] LEONG, *supra* note 1, at 119.

[27] LEONG, *supra* note 1, at 120.

[28] LEONG, *supra* note 1, at 137.

[29] LEONG, *supra* note 1, at 137–41.

it, it is very easy for attorneys to strike potential jurors based on their race, leading to the situation that many black criminal defendants are tried before juries that do not look anything like them.[30] Third, women who regretted their abortions have been used to convince the Supreme Court to allow more stringent abortion restrictions despite the fact that those women speak for only a minority in the same position.[31] As Leong sums up, "Identity capitalism permeates both the substantive law—the statutes, regulations, and doctrines that govern us—and the legal process itself—the way the law is invoked, enforced, applied, and modified."[32]

7. Boycott

This chapter begins a two-chapter exploration of possible solutions. After exploring how and why identity capitalism is problematic, Leong turns to what efforts can be made to discontinue (or at least decrease) the use of identity capitalism in the law and in our lives. She suggests four guiding principles that should apply equally to individuals and institutions: honesty, apology, education, and authenticity. There are plenty of examples in this chapter of good and bad apologies, ways to educate yourself, identifying when education might be more helpful than punishment, and recognizing how politicians and others should be authentic about who they are and what they believe in.[33]

8. Conclusion: We, Identity Capitalists

This final chapter brings the book full-circle and back to a more personal perspective, where Leong recognizes that all of us (even Leong) might, at times, be identity capitalists or identity entrepreneurs. While doing so, she reinforces the lessons learned in the prior chapter.[34]

B. *The Good and Bad of Diversity*

As I mentioned in the introduction, despite really loving the manuscript on my first read (as much as one can "love" a book that exposes and explores such a difficult topic), my main concern was that it seemed to me Leong was suggesting that diversity itself is bad, and certainly that highlighting diversity (even a completely accurate portrayal) is bad. I wondered why it

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[30] LEONG, *supra* note 1, at 141–44.

[31] LEONG, *supra* note 1, at 148–51.

[32] LEONG, *supra* note 1, at 157.

[33] LEONG, *supra* note 1, at 157–80.

[34] LEONG, *supra* note 1, at 181–90.

was not better to attempt to have a diverse institution (whether a student body or workforce) than to not care about diversity at all. In other words, although I was deeply troubled by educational institutions photoshopping pictures for their brochures to make their pictures appear more diverse, I was not quite sure why it was harmful for an educational institution to attempt (through legitimate, non-photoshopping means) to highlight the actual diversity of the institution. For instance, if an educational institution has a student body that is 10% minorities, it seemed unobjectionable to me for that institution to ensure that a photo that has 10 students in it has one student of color (assuming the person of color is actually a student and was actually present for the taking of the photo). Of course, most institutions over-emphasize their diversity, so even with only a 10% minority student body, a picture of four students might have one black student and one Asian student, which is a misrepresentation of the actual diversity of the student body. I understood the problem with misrepresentations of diversity, but not truthful representations of diversity.

In the final published book, Leong takes care to explain that diversity itself is not necessarily harmful.[35] In fact, research reveals that "diversity improves outcomes in many areas of human endeavor."[36] And she states that even "showcasing diversity is not necessarily a bad thing" as it "communicates that diversity is important to the institution doing the showcasing . . . ."[37] But problems arise when the displays of diversity misrepresent reality and mislead the viewer.[38]

Moreover, even when statements or pictures marketed to the public accurately represent the actual diversity, it still might be problematic. As Leong explains, diversity mandates might "create incentives for an identity capitalist to game the system rather than actually make substantive changes such as hiring more outgroup members or creating the conditions that organically attract a diverse work force."[39] For instance, a diversity statement might mean that the company assumes that it has solved the problem and does not need to care or try any longer. Or perhaps a company hires many women but does not treat them well, making it a toxic environment for women and interfering with diversity at the highest

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[35] LEONG, *supra* note 1, at 25 ("Mandates to diversity—whether formal or informal—unquestionably have value.").

[36] LEONG, *supra* note 1, at 10.

[37] LEONG, *supra* note 1, at 16.

[38] LEONG, *supra* note 1, at 16.

[39] LEONG, *supra* note 1, at 25.

echelons of the company.[40] Another problem with highlighting diversity is that it might send a subtle message that those outgroup members are only there because of diversity and affirmative action, regardless of reality.

Finally, Leong emphasizes that part of the problem with diversity is that concentrating on it becomes a way of avoiding more difficult topics.[41] Instead of talking about whether workplaces or universities are equitable and inclusive, the focus is simply on diversity. As Leong discusses in Chapter 7, instead of just highlighting diversity, institutions should be authentic about their strengths and their shortcomings. So, a company might state that it is proud that it has increased the diversity of its workforce by hiring or promoting a particular number of minorities but that it also recognizes that it still has a deficit of minorities in the top leadership of the company.[42] This would be a more authentic way to highlight diversity while avoiding the identity capitalism trap.

As I stated in the introduction, I really like this book. It explains the ubiquitous problem of identity capitalism in an accessible and entertaining way. But instead of just exposing the prevalence and problem of identity capitalists and entrepreneurs, Leong helps the reader think about practical solutions. We should not value diversity for the benefits it brings to an ingroup, but instead, we should be trying to achieve true equality and inclusiveness.

Having said that, Leong's book did not have much of a focus on disability[43] and certainly not disability diversity.[44] Because much of my scholarship addresses disability issues, Leong's book made me think about what identity capitalism means for disability diversity. I turn to that next.

II. Disability Diversity

In some ways, Leong's book and this essay are coming at the perfect time. Recently, there has been a fairly expansive effort to get people to

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[40] LEONG, *supra* note 1, at 25.

[41] LEONG, *supra* note 1, at 55.

[42] LEONG, *supra* note 1, at 162–63.

[43] *But see* LEONG, *supra* note 1, at 24, 79.

[44] To be clear, disability as a diversity initiative is often not discussed so I do not intend this as a criticism of Leong's book. *See, e.g.*, Andrew Scheef, Cyndi Caniglia & Brenda L. Barrio, *Disability as Diversity: Perspectives of Institutions of Higher Education in the U.S.*, 33 J. POSTSECONDARY EDUC. & DISABILITY 49, 51–53 (2020) (stating in a study of institutions of higher education that mentioned diversity in their mission statement, only 4.6% of them specifically included disability).

include disability in diversity initiatives.[45] These diversity initiatives are often called "Diversity, Equity, and Inclusion" or "DEI." Here are a few examples of this increased attention to disability diversity. First, my own university has established a university-wide Disability Justice Advisory Board to discuss DEI issues for students, faculty, and staff with disabilities. Second, in legal academia, several law professors (including myself) have established the first ever Section of Law Professors with Disabilities and Allies as part of our national association of law schools, Association of American Law Schools. Our panel at the annual meeting in January 2022 was titled "The Forgotten Demographic: Law Professors with Disabilities in Legal Academia."[46] And the American Bar Association, the national association for lawyers and the accrediting agency for law schools, has begun a more vigorous effort to increase the number of people with disabilities in the legal profession.[47]

But all of these instances of attempting to include disability in diversity efforts raise the following questions: (1) Does disability diversity matter, and if so, why?; (2) If disability diversity does matter, what does diversity mean with respect to disability?; and (3) How does identity capitalism play out in disability diversity efforts? The remainder of this essay will attempt to answer these questions.

A. *Does Disability Diversity Matter?*

Disability diversity matters for many of the same reasons diversity matters for other identity groups. First of all, focusing on diversity often means there will be less discrimination in hiring and promotion decisions (of course, this is not always true, as well examined in Leong's book). Furthermore, there is evidence that companies benefit from hiring people with disabilities. As one example, companies who were identified as "Disability Inclusion Champions" experienced (on average) 28% higher revenue than their peers, double the net income, and 30% higher economic

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[45] *See, e.g.*, Robert Gould, Sarah Parker Harris, Courtney Mullin & Robin Jones, *Disability, Diversity, and Corporate Social Responsibility: Learning from Recognized Leaders in Inclusion*, 52 J. VOCATIONAL REHABILITATION 29, 30–31 (2020) (criticizing the fact that disability diversity is not normally considered by human resource and management professionals or researchers and stating that prior research has shown "limited attention to disability within . . . diversity planning").

[46] *See* ASS'N OF AM. LAW SCH., AALS 2022 ANNUAL MEETING: FREEDOM, EQUALITY, AND THE COMMON GOOD 3 (2022), https://perma.cc/2QZH-MXPA (outlining the program schedule for the annual meeting, including the different panels).

[47] *See generally* Am. Bar Ass'n, *Commission on Disability Rights*, ABA, https://perma.cc/3RN5-W9FW (last visited Apr. 2, 2022).

profit margins—they also experienced significantly higher shareholder returns.[48] Businesses that adopted diversity and inclusion strategies also benefited by having "greater employee retention, reduced recruiting costs, higher productivity, and increased morale."[49] In a national survey, 87% of customers reported a preference for doing business with companies that routinely employ people with disabilities.[50] Additionally, because the percentage of Americans who are disabled is increasing, employees with disabilities might have better insight into those customers' needs.[51]

Moreover, scholars have made the argument that increasing the number of people with disabilities in any setting will lead to a greater acceptance of people with disabilities.[52] This is certainly one of the arguments behind mainstreaming children with disabilities in the primary and secondary educational context.[53] But it is also an argument made with respect to adults.[54] As Katie Eyer has argued, increased interaction with people with disabilities has the potential to reduce biases against those individuals.[55]

Finally, for some employers, disability diversity is the law. Sections 501 and 503 of the Rehabilitation Act have affirmative action requirements for federal agencies (§ 501) and for federal contractors (§ 503).[56] Federal contracts in excess of $10,000 must contain a provision stating that the contractor will take "affirmative action to employ and advance in employment qualified individuals with disabilities."[57] For federal agencies,

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[48] Nancy Geenen, *Corporate Diversity Efforts Often Leave Out an Important Group: People with Disabilities*, FORTUNE (Aug. 23, 2019, 5:30 AM EDT), https://perma.cc/QG68-TAP8.

[49] *Id.*; *see* Gould et al., *supra* note 45, at 32 (discussing the benefits of hiring workers with disabilities include lower turnover, higher productivity, increased employee morale, and decreased stress levels).

[50] Gould et al., *supra* note 45, at 30.

[51] Gould et al., *supra* note 45, at 30.

[52] *See, e.g.*, LISA SCHUR, DOUGLAS KRUSE & PETER BLANCK, PEOPLE WITH DISABILITIES: SIDELINED OR MAINSTREAMED? 216 (2013) (discussing the idea that increased exposure to people with disabilities leads to greater acceptance of them).

[53] *Cf.* Scheef et al., *supra* note 44, at 55–56 (stating that institutions of higher education who include disability in their diversity statements "can be very inclusive as the number of students with disabilities increase in their student population" and noting that it is better to house services for students with disabilities in a diversity-focused department in order to reduce the stigma of disability and support the notion that "disability is just one of the many forms of human diversity").

[54] *See, e.g.*, Gould et al., *supra* note 45, at 38 (discussing the push for mainstreaming and integrating people with disabilities).

[55] Katie Eyer, *Claiming Disability*, 101 B.U. L. Rev. 547, 581–86 (2021).

[56] 29 U.S.C. §§ 791, 793 (2014).

[57] 29 U.S.C. § 793(a) (2014).

each department or agency must have an affirmative action plan "for the hiring, placement, and advancement of individuals with disabilities . . . ."[58]

What about the counter-arguments? Leong would likely argue that focusing on disability diversity is problematic if it is being done for the wrong reasons. In other words, it would be problematic if institutions were engaging in disability diversity and publicizing the initiative only for the optics of it. There is some evidence that this is happening.[59] Disability scholars have noted that some companies use people with disabilities in visual materials for marketing purposes.[60] Some universities recruit students with disabilities, just as they might recruit other minority students.[61] Some might see this as a positive—as evidence that attitudes are changing and society is beginning to embrace people with disabilities.[62] But some of the language used in these discussions of disability diversity really rings of identity capitalism. For instance, "disability is starting to become more sexy, and I think diversity professionals in corporations see . . . an interesting diversity thread that they can't really afford to ignore . . . ."[63] Moreover, "simply acknowledging disability as a category within diversity does little to ameliorate the additional barriers to inclusion that many employees with disabilities and their family members face."[64]

Although achieving disability diversity for the wrong reasons is problematic, on balance, I believe the pros outweigh the cons, especially if we can persuade institutions to concentrate on disability diversity without engaging in identity capitalism. Assuming we should care about disability diversity, we need to figure out what disability diversity means. I turn to that next.

B. *What Does Disability Diversity Mean?*

As I believe that disability diversity does matter, the next inquiry is what does disability diversity mean and how do we measure it? Is it based on the total number of individuals employed or enrolled as students who have

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[58] 29 U.S.C. § 791(b) (2014).

[59] *See, e.g.*, Gould et al., *supra* note 45, at 34 (stating that there is a "growing consensus about the value of visible organizational commitments to diversity").

[60] SCHUR ET AL., *supra* note 52, at 217.

[61] SCHUR ET AL., *supra* note 52, at 218.

[62] SCHUR ET AL., *supra* note 52, at 217; *see* Scheef et al., *supra* note 44, at 49 ("Including disability as a form of diversity reinforces the notion that there is no *normal* and reduces the *othering* of individuals with disabilities.").

[63] SCHUR ET AL., *supra* note 52, at 223 (quoting Andy Imparato).

[64] Gould et al., *supra* note 45, at 38.

identified as disabled? Does it include all individuals with disabilities regardless of the type or severity of disability? The problem that arises is that individuals with disabilities are a very heterogeneous group. Compare it to race: most institutions will report their total racial diversity, including all races. So, an employer might say that 15% of our employees are people of color. Large institutions might also break it down by race, but the percentage that is more often promoted is the total percentage of all racial minorities. Similarly, most institutions report or promote the total percentage of individuals who identify as LGBTQ+. Certainly, both racial minorities and LGBTQ+ individuals do not all share the same experiences. But I think there is even more heterogeneity among people with disabilities. The experience of someone with diabetes is very different from the experience of someone who uses a wheelchair, etc.

More importantly, if a student with a disability is deciding which university to attend, that student is likely to be curious or concerned about whether there are others that share the student's particular experience. Someone with a learning disability might want to know how many students attend the university who also have a learning disability, someone with a mental illness might want to know how many students have a mental illness, and so on. This is because these experiences vary so much, and prospective students would want to know whether the university will be a welcoming environment for individuals with their particular type of disability. Someone who uses a wheelchair is likely concerned about building accessibility, while a student with a learning disability is likely more worried about academic accommodations and the stigma the student might face if there is not a critical mass of students with learning disabilities.

The other issue with disability diversity is that, regardless of how we define and report the percentage of disabled persons, we have a serious under-reporting problem. Many people with disabilities do not identify as such. As Katie Eyer has noted, despite the fact that the majority of Americans have an impairment that would likely be considered a disability under the expanded definition of the ADA Amendments Act of 2008,[65] the number of people who self-identify as disabled is very low.[66] In fact, one study revealed that only 14% of those people who had an impairment that would likely qualify as a disability under federal law actually identified as disabled.[67] Even among the 48% of respondents who rated their impairments as

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[65] Eyer, *supra* note 55, at 564–65.

[66] Eyer, *supra* note 55, at 565.

[67] Eyer, *supra* note 55, at 565–66.

"severe," few identified as disabled.[68] And even among those individuals who have what we might call a "traditional" disability, such as someone who uses a wheelchair, significant numbers do not identify as disabled.[69] And of course, those with invisible disabilities are especially reluctant to identify as disabled.[70]

The reasons are complex and varied. I explore some of those reasons in a recent article, *Disclaiming Disability*,[71] but for our purposes here, I will summarize them briefly. The most significant reason disabled people do not self-identify as such is the fear of stigma.[72] This stigma can take many different forms, causing "exclusion, prejudice, stereotyping, and neglect."[73] Doron Dorfman has argued that being labeled as disabled can create stigma that manifests in "fear, disgust, and misunderstanding."[74]

Some people might avoid identifying as disabled because their impairment is particularly stigmatizing. Mental illnesses are probably the most common impairments that result in significant stigma.[75] Other stigmatized impairments include HIV and learning disabilities.[76] And in the employment context, some disabled people do not self-identify as such because of the stereotype that being disabled means that they are not capable of doing their jobs.[77]

Another reason some might not identify as disabled is because it makes them feel vulnerable, and most people want to avoid feeling vulnerable.[78] The fear of vulnerability surrounding disability is often the fear of death or dependency.[79] As Michelle Travis notes: "Our highly resilient 'illusion of invulnerability' combined with the general existential anxiety triggered by

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[68] Eyer, *supra* note 55, at 566

[69] Eyer, *supra* note 55, at 566.

[70] Eyer, *supra* note 55, at 567.

[71] *See generally* Nicole Buonocore Porter, *Disclaiming Disability*, 55 U.C. DAVIS L. REV. 1829 (2022) [hereinafter Porter, *Disclaiming Disability*].

[72] *Id.* at 1855.

[73] *Id.* at 1858.

[74] Doron Dorfman, *Disability Identity in Conflict: Performativity in the U.S. Social Security Benefits System*, 38 T. JEFFERSON L. REV. 47, 51 (2015).

[75] Porter, *Disclaiming Disability*, *supra* note 71, at 1860. *See generally* PAUL HARPUR, ABLEISM AT WORK: DISABLEMENT AND HIERARCHIES OF IMPAIRMENT (2020); Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1, 18–19 (2010) (discussing the animus against people with mental illness).

[76] Porter, *Disclaiming Disability*, *supra* note 71, at 1861.

[77] Porter, *Disclaiming Disability*, *supra* note 71, at 1861–62; Eyer, *supra* note 56, at 568.

[78] Porter, *Disclaiming Disability*, *supra* note 71, at 1862.

[79] Porter, *Disclaiming Disability*, *supra* note 71, at 1862.

stereotypic notions of disability create a strong force pushing most individuals not only to resist taking on the disability label, but to deny that the label will ever apply to them."[80]

The urge to not identify as disabled is so strong that both employees and students are often reluctant to admit they have a disability even if the question is asked as part of basic demographic information on a form that promises that the answers will remain confidential. Alternatively, some students might not respond to demographic questions about disability because they believe that the universities are only asking for diversity purposes, which they sometimes find offensive.[81] But let us assume we can get past this under-reporting problem. The next question brings us back to the subject of Leong's book—how identity capitalism will play out in the disability diversity context.

C. *Identity Capitalism and Disability Diversity*

Our final inquiry (and really the primary one) is how identity capitalism might play out in the disability context. In other words, if businesses are engaging in efforts to hire or promote more individuals with disabilities for the optics of it (rather than because it is the right thing to do), what do those optics mean for which individuals with disabilities will benefit and which will not? And more importantly, even if we cannot get rid of identity capitalism, do the benefits of disability diversity outweigh the disadvantages of identity capitalism?

The answer to the first question (which individuals with disabilities will be favored) will likely depend on how companies and educational institutions choose to promote their disability diversity. If they highlight their employees or students who have disabilities through pictures (on brochures or websites), they will likely favor those who have visible disabilities, usually those who use wheelchairs or perhaps have missing limbs. On the other hand, if employers and educational institutions promote their disability diversity through published statistics (percentages, etc.), then their approaches might vary. Some institutions might try to hire or admit individuals with a wide variety of physical and mental impairments that are visible and invisible. There are a great many disabilities that are, in fact, invisible—not only mental illnesses and learning disabilities, but all kinds of diseases, including diabetes, heart disease, many types of cancer (unless,

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[80] Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 Ga. L. Rev. 937, 989 (2012).

[81] Sue Eccles et al., *Risk and Stigma: Students' Perceptions and Disclosure of 'Disability' in Higher Education*, 20 Widening Participation and Lifelong Learning 191, 200–01 (2018).

perhaps, the person is going through chemo and losing their hair), rheumatoid arthritis, multiple sclerosis (if not advanced), seizure disorders, and many others. Taking pictures of these individuals and putting them on websites or brochures would likely not tell the viewer that they are disabled. And identity capitalists care about sending that message to the public. But they might hire these individuals if they are promoting their diversity through statistics rather than publicizing their disability diversity through pictures.

There is already a great deal of evidence that institutions are identity capitalists when addressing disability diversity. In other words, many institutions favor people who use wheelchairs over people with invisible disabilities, especially if those invisible disabilities are highly stigmatized. As evidence of this, note that our universal sign of disability is someone in a wheelchair. And if television shows or movies choose to highlight someone with a disability, they often highlight a character who uses a wheelchair.[82] Some examples: Artie Abrams, a paraplegic who uses a wheelchair in the Fox musical comedy-drama *Glee*,[83] and more recently, Isaac, a quadriplegic wheelchair user in Netflix's *Sex Education*.[84] And, in one classic identity capitalism example, in the NBC comedy *Superstore*, the character Garrett McNeil, a black man who uses a wheelchair, spends an entire episode trying to avoid a reporter and photographer who are writing a story about the store.[85] Garrett specifically acknowledges that because he is a black, disabled man, photographers love to get him in pictures.

Other scholars have discussed the privileging of those who use wheelchairs over those with other disabilities, such as people with mental illnesses, because of the fear and stigma surrounding mental illness. For instance, Michael Stein and Ryan Nelson, in an article reviewing a book by disability scholar Paul Harpur (*Ableism at Work: Disablement and Hierarchies of Impairment*),[86] argue that employment law entrenches a hierarchy of impairments, with physical impairments at the top, and mental impairments

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[82] *But see* Michelle Diament, *Max From NBC's 'Parenthood' Talks Asperger's*, DISABILITYSCOOP (Nov. 9, 2010), https://perma.cc/WP35-QWJ6 (showing there are counter-examples, such as the NBC TV show "Parenthood," which depicted a character with Asperger's Syndrome).

[83] *See Artie Abrams*, WIKIPEDIA (last modified Mar. 18, 2022, 9:09 PM UTC), https://perma.cc/L4DG-4DGD.

[84] *See* Alex Taylor, *Sex Education: Isaac Actor George Robinson Gets Intimate About Disability*, BBC NEWS (Sept. 21, 2021), https://perma.cc/RL8V-F9KJ.

[85] *See Superstore (Season 1),* WIKIPEDIA (last modified Feb. 19, 2022, 09:04 AM UTC), https://perma.cc/A9LX-49VF; *Superstore: Magazine Profile*, IMDB, https://perma.cc/SWU5-GWQY (last visited Apr. 2, 2022).

[86] HARPUR, *supra* note 75.

marginalized below out of bias against workers with mental illnesses (what they call "psychosocial disabilities").[87]

Is privileging people with visible physical disabilities a problem? Some might argue that having an impairment that necessitates using a wheelchair is more disabling than many other impairments, so such individuals should be given preference in hiring or admission decisions. But this argument depends on how we determine which impairments are more serious or disabling. Is it the significance of the functional limitations? Or is it which impairments cause the most stigma? Or is it which impairments cause the most pain? Or which impairments make it more difficult to obtain gainful employment?

These issues are likely to arise in what we call "intra-class discrimination" claims. In the employment context, intra-class discrimination claims involve more than one person with a disability competing for some employment benefit,[88] whether that benefit is being hired for a position, promoted for a position, or given a particular accommodation. Because there are very few cases addressing intra-class discrimination claims, in prior work, I discussed this issue by using a hypothetical generated from one of my former exam questions in my disability law class.[89] Briefly, the (modified)[90] hypothetical states:

> *A private manufacturing employer with 100 employees has an employee (Larry) who has worked for the shipping/receiving department for 10 years. This department has twenty-one employees and operates all three shifts—days (7:00 a.m.–3:00 p.m.); afternoons (3:00–11:00 p.m.); and nights (11:00 p.m.–7:00 a.m.). The employees must rotate through all three shifts—one week on the day shift, one week on the afternoon shift, and one week on the night shift. Larry was recently diagnosed with kidney failure and must go on kidney dialysis indefinitely until he gets a kidney transplant. The dialysis schedule makes it impossible for him to work the afternoon shift (because the dialysis is scheduled in the afternoons), but he also cannot work the night shift because he needs to recover from the dialysis, which is very fatiguing. Accordingly, Larry asks his employer to allow him to work only the day shift rather than rotating through all three shifts. The employer believes that rotating shifts are an essential function of the*

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[87] Ryan H. Nelson & Michael Ashley Stein, *Ability Apartheid and Paid Leave*, 120 MICH. L. REV., (forthcoming 2022).

[88] *See generally* Jeannette Cox, Disability Stigma and Intraclass Discrimination, 62 FLA. L. REV. 429 (2010).

[89] Nicole Buonocore Porter, *Cumulative Hardship*, 25 GEO. MASON L. REV. 753, 756, 806–07 (2018) [hereinafter Porter, *Cumulative Hardship*].

[90] The full hypothetical that I use for class has many other issues than the one I'm exploring here, so I've modified it to center the intra-class discrimination issue.

job and therefore refuses to give Larry the accommodation.[91]

> *Larry then asks for a transfer to another position in the company that works a straight day shift. There is only one such position in the company for which Larry is qualified. It is a position working the register in the on-site cafeteria. However, this position is highly coveted (because it's less physically arduous, not because it has more prestige, status, or pay) and one other employee, Mack, has also applied for this position. Mack has also been with the company for 10 years, so seniority will not play a role. Mack wants the job because he has a back injury and his job on the plant floor has caused him to be in constant pain. Mack knows that there is not an accommodation that would allow him to work on the plant floor without standing and walking so his only option would be to transfer to another position, and the only available one is the cashier position in the cafeteria.*[92]

Assuming both Larry and Mack have a disability as defined by the ADA, the question is how the employer should choose between giving the vacant position to Larry or to Mack.

In my 2018 *Cumulative Hardship* article, I suggested several factors that courts should use when deciding these intra-class discrimination issues. First, employers should consider the severity of each impairment.[93] This usually refers to a person's limitations. While we often think of this in terms of people who have mobility impairments (and use wheelchairs), not all persons who use wheelchairs will be more impaired than other individuals with other limitations. For instance, a former student of mine had an impairment that affected her mobility, but she used a walker, not a wheelchair. Importantly, she also had significant limitations on the use of her arms and hands, making it difficult for her to type, eat, and perform many other everyday activities. Her disability was more severe and was more difficult to accommodate[94] than another student I had who was a paraplegic. This latter student used a manual wheelchair, so he needed accessible entrances and exits from buildings and accessible bathrooms, but he did not require any other accommodations. In most workplaces (especially office jobs), he would be easier to accommodate and likely suffers

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[91] Porter, *Cumulative Hardship*, *supra* note 89, at 806. I believe this conclusion is wrong, but most of the caselaw says otherwise.

[92] Porter, *Cumulative Hardship*, *supra* note 89, at 806–07.

[93] Porter, *Cumulative Hardship*, *supra* note 89, at 791–92.

[94] To be perfectly clear, as someone who considers herself a disability rights advocate, I am always happy to provide the accommodations my students need, and I often make an effort to help them in other ways. I realize in saying this that I might be an "identity capitalist," but I thought it was more important to run that risk than to have the reader think I was complaining about accommodating any of my former (or current) students.

from fewer daily limitations than the first student I described. Moreover, how much pain someone is in might also be part of the severity inquiry. In other words, someone who lives with day-to-day severe pain is likely more severely disabled than someone who has mobility or functional limitations but no or little pain.[95] Even if we think employers who care about disability diversity should prioritize by severity of impairment, they should be thoughtful in how they do that and not automatically assume that a person who uses a wheelchair is the most disabled.

The second factor I recommended considering when deciding issues of intra-class discrimination is the stigma surrounding each disability. Scholars have criticized courts for not considering stigma when determining issues of intra-class discrimination.[96] And because most of the stigmatized disabilities are invisible (HIV, mental illness, learning disabilities), it is easy to see how identity capitalist employers would avoid hiring people with these disabilities and instead hire individuals with visible physical disabilities (like those who use wheelchairs). And yet, people with the most stigmatized disabilities might have the most difficult time finding and keeping jobs in situations where they must disclose their disabilities in order to receive accommodations.[97]

The final factor I recommended considering is the overall employability of competing employees. In other words, using the example I discussed above, where the employer must decide which employee with a disability should get the cafeteria cashier position as an accommodation, the employer should consider what the employment prospects would be for both employees if they lose their jobs.[98] This is because, for both workers, the cafeteria position is an accommodation of last resort; there are no other jobs that these employees can perform considering their limitations. So, for instance, if we consider the consequences of Larry not getting the cashier job and therefore losing his job while he is on kidney dialysis with the consequences of Mack not getting the cashier job with his back impairment, which employee will have a more difficult time finding other employment? Most likely, that would be Larry. Not only is his dialysis schedule limiting, but a prospective employer would know that eventually, he would need to go through a kidney transplant surgery and that would likely involve a lengthy leave of absence.[99]

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[95] Porter, *Cumulative Hardship*, *supra* note 89, at 792.

[96] *See, e.g.*, Cox, *supra* note 88, at 434–35.

[97] Porter, *Cumulative Hardship*, *supra* note 89, at 792–94.

[98] Porter, *Cumulative Hardship*, *supra* note 89, at 800–01.

[99] Porter, *Cumulative Hardship*, *supra* note 89, at 808.

This intra-class discrimination analysis can also be used in the disability diversity context. When employers[100] prioritize hiring individuals with disabilities as part of a diversity initiative, they must determine which individuals should be given priority, assuming there is more than one qualified, disabled applicant. In these cases, based on the analysis above, an employer should consider the severity of each disability, the stigma surrounding it, and perhaps most significantly, the employment prospects of both employees if they are not hired. An identity capitalist employer might only consider the perceived severity of a disability (whether or not that perception is accurate). Thus, an identity capitalist would almost always prioritize someone who uses a wheelchair over someone with a more stigmatizing disability. This is problematic for the reasons I have explored above.

Having said that, an employer who takes disability diversity into consideration but does so using identity capitalism (e.g., favoring a wheelchair user) is nevertheless better than employers who either (1) avoid hiring all people with known disabilities; or (2) hire people who have relatively minor disabilities (but still fall into the ADA's broad protected class) who would be easy to accommodate and whose impairments are not stigmatizing. This might include individuals who have high blood pressure, irritable bowel syndrome, asthma, osteoarthritis (for a desk job), carpal tunnel syndrome, etc.

Instead, I believe institutions can and should consider disability diversity by hiring (or admitting) a wide range of people with disabilities and (importantly) making efforts to have an inclusive environment for them. One guidepost employers might use if they choose to make efforts towards disability diversity is the regulations issued by the Equal Employment Opportunity Commission ("EEOC") with respect to the affirmative action requirements for federal agencies under the Rehabilitation Act that I mentioned earlier. The EEOC issued regulations in 2017 addressing affirmative action plans for federal agencies and published guidance to help federal employers understand the regulations.[101] As it relates to affirmative action based on disability, the regulations implementing Section 501 of the Rehabilitation Act use a concept called "targeted disabilities." Targeted

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[100] I am focusing on employment here because, generally speaking, institutions of higher education usually can admit all disabled students that meet their admission criteria, so it is unlikely they would be deciding between the admission of two different students with disabilities.

[101] *Questions & Answers: The EEOC's Final Rule on Affirmative Action for People with Disabilities in Federal Employment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Jan. 3, 2017), https://perma.cc/59JJ-LC9Y.

disabilities are those that cause the person to "face significant barriers to employment, above and beyond the barriers faced by people with the broader range of disabilities."[102] The targeted disabilities include: developmental disabilities (including autism and cerebral palsy), traumatic brain injuries, deafness or serious difficulty hearing (such as someone who uses American Sign Language), blindness, missing extremities, significant mobility impairments (use of wheelchair, scooter, walker, leg braces), partial or complete paralysis, epilepsy or other seizure disorders, intellectual disabilities, significant psychiatric disorders (bipolar, schizophrenia, PTSD, or major depression), dwarfism, and significant disfigurement (burns, wounds, accidents, or congenital disorders).[103]

If employers care about disability diversity but want to avoid engaging in identity capitalism, this list of targeted disabilities is a good place to start, for several reasons. First, it includes both visible and invisible disabilities, so an employer would not capitalize on the few (or only) employees who use a wheelchair. Second, using the criteria I identified above—severity, stigma, and employability prospects—all three are intrinsically considered if employers hire people with disabilities on this list (as long as not all individuals hired only fall into one category). Many of these impairments cause severe restrictions (such as paralysis and significant mobility impairments). Many of them are highly stigmatized (such as schizophrenia or disfigurements). And many, if not most, of them would mean the person would have a hard time finding another job.

In sum, I believe it is possible and beneficial for institutions to place an emphasis on disability diversity without engaging in identity capitalism. These institutions need to be thoughtful in making hiring or admission decisions and need to avoid the temptation to capitalize on individuals with visual disabilities. Moreover (and more importantly), these institutions need to do more than just hire and admit people with disabilities—they need to create an inclusive, accommodating environment for all people with disabilities.

CONCLUSION

I hoped to accomplish two goals with this essay. First, I hope I have convinced you to read Leong's book (if you haven't already). And I hope we all can use this opportunity to think critically and thoughtfully about areas in our lives where we might have engaged in identity capitalism (or identity

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[102] *Id.*

[103] *Id.*

entrepreneurism). This is not so that we feel bad or guilty, but rather so that we can think about where we can improve. This includes apologizing more sincerely (when necessary), educating ourselves about the experiences of those who are different from us, and trying to be more authentic in our interactions with outgroup members.[104]

Second, I hope I have contributed to an important conversation about disability diversity. Although I am in favor of actively considering diversity based on disability, institutions need to be very careful to avoid identity capitalism when doing so. And perhaps, even more important in this space than with respect to diversity based on other protected classes, diversity without inclusion and equity might be worse than not attempting to have disability diversity at all.

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[104] If you are an outgroup member, you might be thinking this does not apply to you. But as Leong explores, outgroup members are sometimes identity entrepreneurs. Moreover, even if you are a member of one or more outgroups (perhaps a woman who is a person of color), you are likely an ingroup member with respect to some other part of your identity (perhaps sexual orientation, gender identity, religion, or disability status).