

# Response to Nancy Leong's *Identity Capitalists*: Implications for Property, Academia, and Affirmative Action

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## INTRODUCTION

Professor Leong's work<sup>1</sup> is extraordinary in its effortless combination of data, legal theory, and personal narrative. As someone who strives to incorporate those very different lenses into my own teaching and scholarship, Professor Leong's ease and skill in weaving these various approaches to illustrate a concept and craft a framework has left me in a state of awe.

In responding to her work, I will strive to strike a similar balance. Using Property as my legal framework, I will examine the ways in which I speak to my students about the policy for protecting rights in property and examine the way in which varying identities or characteristics may impact the strength of those protections. Next, I will look to the tenets of Critical Race Theory,<sup>2</sup> as I discuss in my seminar, to explore ways to balance a data driven approach to policy making with a narrative one. Then, following the lead of Critical Theorists like Professor Leong, because so much of this work resonated so personally, I will share the way in which my own identity, essence, and experiences fit into the nuanced concept of "Identity

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<sup>1</sup> NANCY LEONG, *IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY* (2021).

<sup>2</sup> See generally RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 8–10 (3d ed. 2017). Describing and categorizing the tenets is difficult because of the way the world and the doctrine are shifting. In this context, the tenets include: (1) race is normative; (2) interest convergence / material determinism; (3) social construct of race; (4) intersectionality; and (5) differential racialization.

Entrepreneurship.”

Between the publishing of Professor Leong’s work and the date of this symposium, the U.S. Supreme Court has granted certiorari to consolidated petitions examining appeals relating to affirmative action in higher education.<sup>3</sup> Within days of granting that petition for certiorari, the retirement of Justice Breyer<sup>4</sup> unleashed a debate about affirmative action at the level of the Justices themselves when the Biden administration confirmed its commitment to appointing a Black woman to the Supreme Court.<sup>5</sup> Professor Leong’s work provides a powerful lens and structure through which to view this very layered examination of racial identity.

### I. Personal Property (“Values”)

The law of Property, though pulled out as its own course in the first year of law school, is a doctrine that underlies almost every other area of law. In setting the tone for his widely used textbook, Professor Singer reminds students that Property is not the law of our things, but instead the law of our relationships with regard to those things.<sup>6</sup> Property is a pillar of both our legal education and our system of laws because of the way that claiming ownership has become central to our collective identity. In other words, our property is so much more than what we have—it is who we are.

In order to underscore this point, I have started asking students to share with me their stories of property that has a value that cannot be easily measured. The trend that quickly emerged was that these stories about items and places had very little to do with the bundle of sticks and exchange value and other concepts we traditionally apply in Property class, but they have everything to do with the identity of the individuals writing about them. Heirlooms gifted from ancestors. Talismans that are worthless but for the memories contained. Even more complex are the stories that come from students with multiple identities—items that have come from ancestral lands never visited, handwritten notes or items from past generations, or clothing or jewelry passed down for generations—most of the stories that students share are about items that are imbued with emotional value regardless of the

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<sup>3</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* 980 F.3d 157 (2020), *cert. granted*, 142 S. Ct. 895 (2022).

<sup>4</sup> Nina Totenberg, *Justice Stephen Breyer, an Influential Liberal on the Supreme Court, to Retire*, NPR, <https://perma.cc/BU4Q-44TJ> (last updated Jan. 26, 2022, 3:48 PM ET).

<sup>5</sup> Michael D. Shear & Charlie Savage, *Biden Expected to Nominate a Black Woman to the Supreme Court*, N.Y. TIMES (Jan. 26, 2022), <https://perma.cc/8XQ4-A822>.

<sup>6</sup> See JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES 3 (7th ed. 2017) (“Many rights go along with ownership or possession of property.”).

exchange value. And, as is consistent with psychological research, items that represent difficult or marginalized parts of individual identities carry a disproportionate weight. Whether a trinket purchased in a hospital gift shop reminding someone of a serious obstacle that was overcome many years ago, or an heirloom from a great-grandparent with an ethnic identity representing a fraction of the individual, the parts of our identities that demonstrate tests of character are those that are remembered. Collecting these stories of “personal property” has made clear that the “personal” is more valuable than the “property.”

This concept is illustrated time and again in the first year Property class. Courts build a system to evaluate what is predictable and fair with regard to disputes over property and in doing so create a structure that reflects some collective “values” about what we “value.” Examples of the psychology associated with property include a recognition that real property is unique and may require some equitable remedies,<sup>7</sup> that property that is rare or unique is more valuable,<sup>8</sup> and that residential property is worth more than just its exchange value. In other words, the concept of “home” has value that the law cannot always easily measure but must account for.<sup>9</sup>

The relative value of property can be found throughout our first-year doctrinal course and indeed in modern practice. Accounting for that relativity is an essential element that underlies Professor Leong's ideas about Identity Capitalism. Understanding, as Professor Leong does, the social construction of race, individuals, entities, and institutions find ways to capitalize on various identities by promoting diversity, thus reinforcing and strengthening the foundations of hierarchies based on subordinating identities. The concept of differential racialization<sup>10</sup> explains the ways in which “dominant society racializes different minority groups at different times, in response to shifting needs such as the labor market.”<sup>11</sup> This concept makes clear the ways in which the value of different races or identities may

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<sup>7</sup> See *Somerville v. Jacobs*, 170 S.E.2d 805, 808–15 (W. Va. 1969); *When Specific Performance May Be Ordered in a Real Estate Transaction*, HG.ORG, <https://perma.cc/5MAU-L9DR> (last visited Apr. 15, 2022).

<sup>8</sup> See *Charrier v. Bell*, 496 So. 2d 601, 603–05 (La. Ct. App. 1986); *Popov v. Hayashi*, No. 400545, 2002 Cal. Super. LEXIS 5206, at \*1 (Dec. 18, 2002) (musing that the financial value of Barry Bonds' record setting home run baseball reflected the fame of the man who hit it).

<sup>9</sup> See generally *Mohrlang v. Draper*, 365 N.W.2d 443, 446 (Neb. 1985) (explaining that specific performance should be granted where a valid contract exists and a remedy at law is inadequate); *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954) (explaining that where there is no fraud, misrepresentation, or other inequity, specific performance is appropriate).

<sup>10</sup> DELGADO & STEFANCIC, *supra* note 2, at 8.

<sup>11</sup> DELGADO & STEFANCIC, *supra* note 2, at 8.

be fluid in their definition and, accordingly, their value. The ways in which various marginalized identities have shifted in response to world events and economic needs has an impact on the “capital” held by each identity. People who are ethnically Irish, Japanese, or South Asian, for instance, have been portrayed, stratified, and commodified in different ways in response to trends in immigration, labor needs, and global conflicts.

Professor Leong demonstrates that Identity Capitalists and Identity Entrepreneurs are driven in many cases by self-interest and opportunity. Whether these individuals who are taking advantage of this system are explicitly aware or intending to or not, participating in structures that capitalize on various identities reinforces those same structures. Yet, the way that identity is valued makes identity capitalism distinct from the other ways in which property is used to generate income. The cost of identity capitalism, like the cost of identity itself, is something different than our collective values. Identity capitalism comes at the cost of upholding structures and systems that are built on stratifying people based on race. The way in which Professor Leong demonstrates concepts that sit at the intersection of psychology, sociology, and economics is astute and skilled. Doing so through the lens of the law provides an opportunity to examine the ways in which we can choose to participate in or dismantle the system of identity capitalism.

## II. Data, Narrative, Calling Out, & Calling In

Beginning with her own very personal anecdote at a wedding, Professor Leong weaves together examples and parties that demonstrate her concepts to illustrate the ways in which our legal system and institutions are a fertile ground for identity capitalism.<sup>12</sup> In addition to her own story about one relationship and event, Professor Leong also calls upon interactions and concepts that are likely familiar to readers, and accordingly, help to fill in the way a reader understands Identity Capitalism.

In the discussing the “Fifth Black Woman” hypothetical crafted by Devon Carbado and Mitu Gulati,<sup>13</sup> Professor Leong explores different tactics in uncovering the nuances of Identity Capitalism.<sup>14</sup> Professor Leong

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<sup>12</sup> LEONG, *supra* note 1, at 1–23.

<sup>13</sup> See Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 714–21 (2001) (detailing a hypothetical of four Black women who were promoted and the fifth who was not and including a short analysis of the ways in which each woman shows or “covers” parts of her identity, which reveals a much different picture of what “diversity” is in an institution than just the mere numbers).

<sup>14</sup> LEONG, *supra* note 1, at 117–21.

showcases her understanding of the ways in which, in addition to balancing data and narrative in consideration of a subject, considerable nuance can be uncovered by understanding a bit of the cognitive impacts of race.<sup>15</sup> Understanding the relationship between collecting data and the problems with “essentialism”<sup>16</sup> in our practices helps to clarify the challenges of defining and achieving productive diversity. Discussing this scenario helps to illustrate the ways in which data can sometimes fall short of explaining a phenomenon. Professor Jerry Kang’s descriptions of “Racial Mechanics,”<sup>17</sup> racial schema,<sup>18</sup> racial meaning and racial mapping,<sup>19</sup> and automaticity<sup>20</sup> highlight the ways in which race is a relevant factor in both personal interaction and also in the aggregate of ways that we collectively interact with one another. This collective action serves to build and perpetuate systems that are built on racist assumptions, both implicit and explicit.

In the first piece of his article *Trojan Horses of Race*, Professor Kang makes a note that resonated while reading Professor Leong’s work:

Recognizing our self-understanding to be provisional, we must still confront the difficult choices to come. As social cognitionists further demonstrate the possibility of altering levels of implicit bias . . . we will encounter difficult philosophical and legal questions about our autonomy, our normative commitments to racial equality, and the proper role of explicit collective action by private and public actors to decrease implicit bias.<sup>21</sup>

Ultimately, understanding the relationship between the use of data and narrative for the creation of law and policy, but also those less visible and more fundamental social structures, is crucial. Though there are no clear answers and no established and predictable rules regarding balancing data

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<sup>15</sup> See generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490, 1498, 1500 (2005) (explaining cognitive impacts on race, such as implicit bias).

<sup>16</sup> Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 16, 19 (1995) (“Essentialism is the notion that there is a single woman’s or Black person’s, or any other group’s, experience that can be described independently from other aspects of the person – that there is an ‘essence’ to that experience. An essentialist outlook assumes that the experience of being a member of the group under discussion is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts.”).

<sup>17</sup> Kang, *supra* note 15, at 1497–98.

<sup>18</sup> Kang, *supra* note 15, at 1498–1500.

<sup>19</sup> Kang, *supra* note 15, at 1500.

<sup>20</sup> Kang, *supra* note 15, at 1504.

<sup>21</sup> Kang, *supra* note 15, at 1539.

and narratives, Professor Leong's recognition of that tension and modeling a way forward is a remarkable feature of her work. Personal narratives are incredibly impactful on our brains and biases, and the way that we collectively respond to those narratives shapes the nature of what parts of their stories that others feel at liberty to share. Professor Loretta Ross<sup>22</sup> examines the dynamics of how the expression of criticism may or may not be productive:

"I have no problem calling out politicians who aren't living up to the oaths that they swore to," she said. She cited Colin Kaepernick, someone who quite effectively called out a powerful organization, the N.F.L. "The thing I am sharply critical of is punching down, calling out people who have less power than you *simply because you can get away with it*. But there is a very *strategic use of punching up*."<sup>23</sup>

In the aggregate, the way we decide to respond, the choices we make about "calling out" or "calling in," will inform the direction of narrative, which in turn will change the data points that our brains have to craft our biases that will shape our implicit responses. Connecting the work of Professors Leong, Kang, and Ross helps to illuminate with research and terms of art that which many viscerally know: our small interactions have a big impact and should be treated with care.

### III. Identity Entrepreneurs: Voices & Choices

As noted above, the work of Activist and Professor Loretta Ross is informed and compelling. I came to know of Professor Ross because she teaches at my alma mater, Smith College. In my experience, Smith is a relatively progressive all-women's college that makes authentic efforts to diversify, and even recognizes the ways in which racism has been a part of the systems in which it operates.<sup>24</sup> Owning my personal biases, which are, admittedly, based on a great deal of personal experience as a student at that institution and as a member of the Smith community, it is my belief that these efforts are as thoughtful and as effective (if still flawed) as I have seen in the diversity space.

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<sup>22</sup> Loretta J. Ross: Associate Professor of the Study of Women & Gender, SMITH C., <https://perma.cc/DN8V-V5RP> (last visited Apr. 15, 2022).

<sup>23</sup> Jessica Bennet, *What If Instead of Calling People Out, We Called Them In?*, N.Y. TIMES (Nov. 19, 2020), <https://perma.cc/K898-R629> (emphasis added).

<sup>24</sup> See *Toward Racial Justice at Smith*, SMITH C., <https://perma.cc/4A2Z-UH8Q> (last visited Apr. 15, 2022) ("Because Smith was not originally designed for the diverse students, staff and faculty that we have now, we are called to reflect on our past and present to build a more just and inclusive future.").

Hiring Professor Ross is such a positive step in this work; I am particularly interested in seeing people with Professor Ross' background and experience in race, gender, and activism represented in academia. Professor Ross' perspective and leadership in the classroom is consistent with why representation in academia is incredibly important.<sup>25</sup> Despite having a rational understanding and positive feelings about all of these individuals and institutional goals, something about the thought of Professor Ross gives me pause. Smith College should highlight its work on racial justice, especially as it is thoughtful and informed. Professor Ross, who has stated that she never expected to have a life in academia, is deserving of her accolades and should enjoy the fruits of her labor. Her non-traditional path to the front of a lecture hall with a captive audience that is far beyond her classroom is earned. Still, in my personal narrative, I am hesitant about the threat of 'toxic positivity' that may distract from the larger problem of the demographics of academia.

As someone from a background not well represented in academia, I can hold the contradiction of being happy and proud of the good work done by Professor Ross and Smith College with the warning and sadness in my heart about the status quo. In the most personal version of my story, I worry that I do not have the strength of character or experience that Professor Ross does as I struggle sometimes with the particular loneliness that accompanies the incredible personal connections made with countless students and young lawyers. While I am honored and fortunate to be in the position that I am, to have the opportunity to teach and learn and bond with students and new associates, I have sometimes been acutely aware that the ways in which I exist on a faculty, or in a senior position at a predominantly white law firm, are different than the vast majority of my colleagues. And yet it is complicated: the mix of pride, humility, and feelings both of being socially overwhelmed while also lonely are not just a product of my gender, race, and class, but also of my lived experiences and most importantly my choices.

So, when I consider the importance of representation, and how I have seen time and again how some students have parts of their identities activated in such positive ways, I want to highlight the victories, like Professor Loretta Ross, while simultaneously modeling and validating the feeling of caution. Reading Professor Leong's work gave me the words and tools, including the concept of Identity Entrepreneurship, to hold all of these contradictions and find ways to name them that are helpful and productive.

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<sup>25</sup> See Meera E. Deo, *LSSSE at Fifteen: Celebrating Our Success and Planning Our Future*, 69 J. LEGAL EDUC. 396, 397-400 (2020).

#### IV. More Identity Entrepreneurs: Layers of Affirmative Action

The concept of Identity Entrepreneurship takes many different forms. Where, in the previous section, I began to uncover my own grappling with the feeling of what it means to take advantage of the existing system of identity capitalism, others may do the same in a very different way and with a very different result. The concept of Identity Entrepreneurship is embedded in the cultural, psychological, and legal questions related to affirmative action, and in our current moment, the question of the value of race in our systems is receiving multiple levels of scrutiny.

Regardless of the U.S. Supreme Court's holding on the issue of Affirmative Action brought by Edward Blum and Students for Fair Admissions ("SFFA"), the concepts and vocabulary relating to Identity Capitalism provide an incredibly useful framework for viewing the decision around this issue.<sup>26</sup> As Professor Leong indicates, Edward Blum is a skilled Identity Entrepreneur who has been able to identify and respond to shifting cultural values regarding identity.<sup>27</sup> The U.S. Supreme Court has weighed in on the complex topic of considering racial diversity in admissions to institutions of higher education<sup>28</sup> as demographics,<sup>29</sup> public opinion, and cultural movements<sup>30</sup> have shifted. Mr. Blum has carefully navigated and crafted legal arguments and media representations around existing structures and institutions. After failing to accomplish his desired result with plaintiff Abigail Fisher, Mr. Blum has changed strategy and capitalized on Asian identity.<sup>31</sup> The way in which SFFA has used the identity of some Asians to craft a legal position whose aim is to dismantle a practice designed to achieve real diversity is an example of an innovation in Identity Entrepreneurship.

In the same week that the U.S. Supreme Court granted a petition for

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<sup>26</sup> See *id.* at 398 (emphasizing the importance of data and scholarship in understanding the necessity of affirmative action).

<sup>27</sup> LEONG, *supra* note 1, at 137–41.

<sup>28</sup> See *Fisher v. University of Tex.*, 570 U.S. 297, 303 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>29</sup> *2020 Census Statistics Highlight Local Population Changes and Nation's Racial and Ethnic Diversity*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://perma.cc/RT3R-6TW3>.

<sup>30</sup> See *generally* About, BLACK LIVES MATTER, <https://perma.cc/8DR9-ZJHA> (last visited Apr. 15, 2022) ("We are a collective of liberators who believe in an inclusive and spacious movement. We also believe that in order to win and bring as many people with us along the way, we must move beyond the narrow nationalism that is all too prevalent in Black communities. We must ensure we are building a movement that brings all of us to the front.").

<sup>31</sup> See *generally* LEONG, *supra* note 1, at 137–41.



certiorari to review the appeals of SFFA,<sup>32</sup> Justice Breyer announced his departure from the bench.<sup>33</sup> President Biden's promise to Representative James Clyburn, in advance of securing an endorsement that may have impacted the electoral outcome in South Carolina,<sup>34</sup> has since been the subject of great scrutiny as it sits at the nexus of Identity Capitalism, Identity Entrepreneurship, and Identity Politics. The U.S. Supreme Court will explicitly consider the legality and extent to which race should play a role in admission to institutions like Harvard in the challenges brought by Students for Fair Admissions, which are scheduled for oral arguments before the court in October of 2022. In a very direct way, this appeal will call on individual justices and legal scholars to examine their own identities and articulate a legal argument that is based in the sum of their very personal experiences.

The nomination and confirmation of Justice Ketanji Brown Jackson was historic and rife with identity capitalism from start to finish. Now that Justice Jackson is confirmed to the bench, her presence at the Court is bound to be influential. In reflecting on Justice Thurgood Marshall's tenure on the Court, his colleagues noted that though he was not the most prolific author of opinions, his impact on the jurisprudence of the time is difficult to overstate. His presence on the Court served as a moral compass as an individual with experience of being Black in the United States while considering issues related to the Civil Rights movement during a time of racial reckoning. The parallels with Justice Ketanji Brown Jackson are clear: through a nomination and confirmation process that put her race and gender in the front and center of her identity, she joins the Court in a time of a new kind of racial reckoning. Nominating a justice who may have experienced the feeling of having gained access to elite spaces after scrutiny on her race and gender, Justice Brown-Jackson is poised to serve a similar role as Justice Thurgood Marshall. As our country and the Court continue to navigate social and legal issues that will attend to fundamental questions about qualifications and the value of diversity, the vocabulary and tools given to us by Professor Leong will help provide clarity and structure to a difficult and nuanced issue.

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<sup>32</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).

<sup>33</sup> See Joseph R. Biden, President of the United States, *Remarks by President Biden on the Retirement of Supreme Court Justice Stephen Breyer* (Jan. 22, 2022), (transcript at <https://perma.cc/Q5QD-HZ57>).

<sup>34</sup> Chris Dixon, *Before the Clyburn Endorsement, an Elderly Church Usher with a Question*, N.Y. TIMES (Mar. 8, 2020), <https://perma.cc/2SFF-GELN>.

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