Identity Entrepreneurs

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In my previous article, Racial Capitalism, I examined the ways in which white individuals and predominantly white institutions derive value from nonwhite racial identity. This process of deriving value from identity results from intense social and legal preoccupation with diversity. And it results in the commodification of nonwhite racial identity, with negative implications for both individuals and society.

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This Article builds on Racial Capitalism in three ways. First, as a foundation, it expands the concept of racial capitalism to identity categories more generally, explaining that individual in-group members and predominantly in-group institutions—usually individuals or institutions that are white, male, straight, wealthy, and so on—can and do derive value from out-group identities.

Second, the Article turns from the overarching system of identity capitalism to the myriad ways that individual out-group members actively participate in that system. In particular, I examine how out-group members leverage their out-group status to derive social and economic value for themselves. I call such out-group participants identity entrepreneurs. Identity entrepreneurship is neither inherently good nor inherently bad. Rather, it is a complicated phenomenon with both positive and negative consequences.

Finally, the Article considers the appropriate response to identity entrepreneurship in a number of legal contexts. As a general rule, judges, legislators, and other regulators should design laws and policies to maximize both individual agency and access to information for out-group members. Such reforms would protect individual choice while making clear the consequences of identity entrepreneurship for both individual identity entrepreneurs and for the out-group as a whole. A range of legal doctrines interact with and influence identity entrepreneurship, including employment discrimination under Title VII, rights of privacy and publicity, and copyright law. Modifying these doctrines to take account of identity entrepreneurship will promote progress toward an egalitarian society in which in-group and out-group identities are valued equally.

Introduction .............................................................................................................. 1335
I. Valuing Identities ...................................................................................................... 1339
   A. Racial Capitalism ................................................................................................. 1339
   B. Identity Capitalism .............................................................................................. 1343
II. Out-group Participation in Identity Capitalism ................................................... 1346
   A. Theories of Capital .............................................................................................. 1346
   B. Identity Entrepreneurship .................................................................................. 1347
   C. Identity Entrepreneurs in Action ........................................................................ 1351
      1. The Power of Women ....................................................................................... 1355
      2. An Asian Fantasy ............................................................................................ 1360
      3. Down with Gangstas ....................................................................................... 1364
III. Critiquing Identity Entrepreneurship ..................................................................... 1367
    A. Harms ................................................................................................................. 1367
       1. Reinforcing In-group Preferences .................................................................... 1368
       2. Dividing Out-group Members ......................................................................... 1370
INTRODUCTION

There are Negroes who will seek profit for themselves alone from the struggle. There are even some Negroes who will cooperate with their oppressors.¹

—Martin Luther King, Jr.

A candidate for a reality show exhibits stereotypically gay mannerisms to appeal to the show’s casting directors.² A black rapper produces music and videos that portray an exaggerated version of black urban culture, enhancing his commercial success among white middle-class consumers.³ A wealthy politician asserts his humble roots in order to connect with socioeconomically disadvantaged voters.⁴ A student with a distant Native American ancestor

¹ Martin Luther King, Jr., The Sword That Heals, CRITIC, June–July 1964, at 14.
² Ryan O’Connell, A Guide to Getting Cast on the Real World, THOUGHT CATALOG (May 10, 2011), http://thoughtcatalog.com/2011/a-guide-to-getting-cast-on-the-real-world (stating that “As you already know, The Real World allows one gay person on per season so this could be your chance!”).
identifies as Native American on a college application form and writes his admissions essay about the importance of preserving indigenous culture.\(^5\)

Each of these individuals is what I will call an \textit{identity entrepreneur}—someone who leverages his or her identity as a means of deriving social or economic value.\(^6\) While in theory a member of any identity group might become an identity entrepreneur, I focus here on the version of identity entrepreneurship where, in order to gain social or economic benefits, a member of an out-group intentionally makes her identity salient in a manner pleasing to the in-group.

Identity entrepreneurship takes place within a system of identity valuation that I call \textit{identity capitalism}. In previous work, I identified the phenomenon of \textit{racial capitalism}—the process of deriving social or economic value from the racial identity of another.\(^7\) A person of any race might engage in racial capitalism, as might an institution dominated by any racial group.\(^8\) But given existing power structures and distribution of resources, racial capitalism in

\begin{itemize}
\item \(^5\) See, e.g., Devon Carbado, \textit{Intraracial Diversity}, 60 UCLA L. REV. 1130, 1160 (2013) (stating that “[i]there is an incentive for applicants to structure their personal statements to align with the particular diversity benefits they believe their target colleges or universities seek to advance”).
\item \(^6\) I have discussed issues relating to identity entrepreneurship in a previous article and a symposium essay. See Nancy Leong, \textit{Racial Capitalism}, 126 HARV. L. REV. 2151 (2013); Nancy Leong, \textit{Dissenting In and Dissenting Out}, 89 CHI.-KENT L. REV. 723 (2014) (symposium essay). For the sake of precision, the discussion of the theoretical framework for identity capitalism and identity entrepreneurship closely tracks the language used in my other work, although to improve the readability of this Article I do not cite to my previous work in every sentence.
\item I note that the term “identity entrepreneur” occasionally has been used, with various meanings, in other disciplines. At the intersection of psychology and communication studies, for example, Michael Hogg and Scott Reid have used the term to refer to group leaders who shape the identity of the group. Michael A. Hogg & Scott A. Reid, \textit{Social Identity, Self-Categorization, and the Communication of Group Norms}, 16 COMM. THEORY 7 (2006). Within the literature on terrorism, Troy Thomas and his colleagues describe an identity entrepreneur as “an individual or group of individuals who find it desirable, profitable, or otherwise utilitarian to reinforce group identities.” Troy S. Thomas et al., \textit{Warlords Rising: Confronting Violent Non-State Actors} 79 (2005) (citing Barbara Ballis Lal, \textit{Identity Entrepreneurs: Do We Want Them? Do We Need Them?} (unpublished manuscript)). In political science, Linus Hagstrom has discussed identity entrepreneurs as those who “promote their desired versions of . . . identity.” Linus Hagstrom, \textit{Identity Change and Foreign Policy: Japan and Its “Others”} 4 (2015). And in sociology, Barbara Ballis Lal has written about “ethnic identity entrepreneurs”—who appeal to essentialized versions of ethnic identity as a justification for using scarce resources—and has examined such “ethnic identity entrepreneurs” in the context of transracial and intercountry adoptions. Barbara Ballis Lal, \textit{Ethnic Identity Entrepreneurs: Their Role in Transracial and Intercountry Adoptions}, ASIAN & PAC. MIGRATION J. 385 (1997). While I acknowledge these varied uses of the term in other literatures, my aim is to conceptualize a specific phenomenon for purposes of describing its interaction with the law, and so my use of the term will in some instances diverge from its use in other disciplines.
\item 8. Majority-minority institutions exist, such as historically black colleges and universities and minority-owned businesses. At such institutions, the in-group may actually be an out-group in society at large. The dynamics within such institutions may differ from those in society as a whole, although no institution is perfectly insulated from external distributions of power.
\end{itemize}
America generally involves white people and predominantly white institutions deriving value from nonwhite people.\footnote{Leong, Racial Capitalism, supra note 6, at 2153–54.}

Identity capitalism expands the concept of racial capitalism to include other identity categories. Individuals and institutions engage in identity capitalism when they derive social or economic value from identity categories such as race, gender, sexual orientation, class, and disability. Again, in theory, a member of any identity group might engage in identity capitalism, as might a group dominated by any identity. In practice, however, identity capitalism—as a system—occurs when individual members of in-groups or in-group-dominated institutions derive social and economic value from out-group identities. Like racial capitalism, identity capitalism maintains and reinforces existing distributions of power and resources. And like racial capitalism, identity capitalism flows from our legal and social preoccupation with diversity, in which out-group identity has become a valued commodity to be pursued, acquired, used, and manipulated for its market value.

This Article will focus on out-group identity entrepreneurship and the ways that outsiders participate in a system of identity capitalism that in-group members create and control. Consider, by way of example, two students with Native American ancestry, both of whom hope to improve their chances of admission at a college where Native American students are underrepresented. One student attempts to leverage a purely nominal identity affiliation—he checks the Native American box on a college application based on one distant ancestor, without experiencing any connection to or sympathy with any Native American group. The other student does have a meaningful commitment to a Native American community—he is a recognized member of a Native American tribe and has worked as an advocate for indigenous rights. He chooses to write a college application essay about his heritage and culture primarily because he believes that doing so will improve his chances of admission. While there may be important differences in the way that we think about these two applicants, both are identity entrepreneurs: each has taken affirmative steps to bring his identity to the attention of the in-group with the intent of reaping a social or economic benefit—in this case, to improve his chances of admission to a particular college.

Identity entrepreneurship does not lend itself to easy generalizations or straightforward conclusions. On the one hand, it has important benefits. Identity entrepreneurship is a way to exercise individual autonomy. Moreover, it often leads to material gains by out-group members and can further social progress by providing out-group members with visible and powerful platforms. On the other hand, identity entrepreneurship also causes harms. It reinforces in-group preferences by rewarding out-group identity performances that the in-group prefers. It creates divisions between out-group members who are willing
to engage in identity entrepreneurship and those who are not. And by tethering out-group advancement to in-group preferences, identity entrepreneurship risks perpetuating the continued subordination of the out-group.

These tensions reflect the dilemma that out-group members experience. How can out-group members receive compensation for the value associated with their identities without simply reinforcing the existing power dynamics that enable identity capitalism? Indiscriminately condemning identity entrepreneurship stifles individual autonomy. Yet indiscriminately encouraging identity entrepreneurship panders to in-group interests and causes an array of harms associated with identity commodification. Neither extreme helps us achieve a more egalitarian society.

As a first step, I therefore propose an approach designed to maximize both individual agency and access to information about the advantages and costs of individual behavior. The goal is a system in which individuals can engage freely in identity entrepreneurship as they choose, but do so with a full understanding of both the positive and negative consequences of identity entrepreneurship. Such a system will promote progress toward social equality. And I argue that various legal actors can deploy a range of legal doctrines to encourage this approach to identity entrepreneurship.

The Article proceeds as follows. In Part I, I examine the process by which identity is assigned value. I first retrace my analysis of racial capitalism from previous work, and then explain how that analysis extends beyond race to identity more generally, resulting in a process I call identity capitalism. In Part II, I turn to the incentives that identity capitalism creates for individual members of out-group identity categories. These systems pressure out-group members to become identity entrepreneurs—that is, to leverage their out-group identity for personal gain. In Part III, I consider when identity entrepreneurship furthers social equality and when it does not. After enumerating the harms and benefits associated with identity entrepreneurship, I conclude that identity entrepreneurs should retain agency to use their identities as they choose. Even if constraining identity entrepreneurship were legally possible, it would infringe unacceptably on individual autonomy. But ideally individuals would exercise such agency with full information about the consequences of their behavior for individual out-group members and the out-group as a whole.

Finally, in Part IV I propose several legal interventions for encouraging these conditions for identity entrepreneurship. I propose that many areas of law offer promising avenues for encouraging productive instances of identity entrepreneurship. As a case study, I examine workplace discrimination under Title VII. I also briefly consider rights of privacy and publicity and the law of copyright as two examples of other instances in which the law intersects with

10. Id. at 2172–98.
identity entrepreneurship. I present an optimistic view of the potential for adjusting available legal mechanisms to protect and promote instances of identity entrepreneurship that ultimately further equality.

I.

VALUING IDENTITIES

In America, assigning value to identity is nothing new. Such value attaches most explicitly to race, with black bodies treated as literal commodities throughout our shameful history of slavery. While historically white identity functioned as a form of valuable property, 11 in more recent years a unique form of value also attaches to nonwhite racial identity, a phenomenon that both reflects and reinforces our social and legal preoccupation with diversity. This preoccupation with diversity also provides the impetus to assign value to other identity categories. Part I.A examines the process by which society assigns value to race, which I have elsewhere termed racial capitalism, while Part I.B demonstrates how the framework applies to other identity categories.

A. Racial Capitalism

My previous work identifies a phenomenon I call racial capitalism—the process of deriving social and economic value from racial identity. 12 Both our legal system and society at large place a great deal of emphasis on racial diversity—or at least its appearance—and that emphasis both motivates racial capitalism and often rewards it richly.

The concept of diversity has a long history, ranging from corporate America to educational institutions, but the notion first gained legal force in Regents of the University of California v. Bakke. 13 Writing only for himself, Justice Powell provided the fifth vote to strike down a program that reserved sixteen seats for racial minorities. His opinion rejected several rationales for race-based affirmative action while upholding diversity as a compelling state interest. 14 Courts grappled with the notion of diversity for the next twenty-five years, with the Supreme Court reaffirming its place in affirmative action doctrine in Grutter v. Bollinger. 15

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12. Leong, Racial Capitalism, supra note 6, at 2172–98. As I noted previously, one other article has previously used the term “racial capital,” but to refer to a more limited set of circumstances. See id. at 2174 (discussing c. christi cunningham, Identity Markets, 45 HOW. L.J. 491 (2002)). Moreover, cunningham’s work examines the ways that in-group identities are valued over out-group identities; mine instead considers the processes by which out-group identities provide value to the in-group.
14. Id.
In the aftermath of *Bakke* and *Grutter*, our society assigns great importance to diversity in higher education. This is unsurprising, given that diversity remains the only compelling state interest justifying affirmative action programs. Although some Supreme Court justices signaled their skepticism about diversity in subsequent affirmative action cases such as *Fisher v. University of Texas* (*Fisher I*), which concluded that the Fifth Circuit had not applied true strict scrutiny to the University of Texas’s race-conscious admissions program and remanded for consideration using the appropriate standard, or *Schuette v. Coalition to Defend Affirmative Action*, which upheld Michigan’s statewide vote to ban race-based affirmative action, the Court’s most recent decision in *Fisher v. University of Texas* (*Fisher II*) continues to uphold the central legal principle of *Grutter*: that diversity provides a compelling state interest that can justify holistic race-conscious admissions programs. As a result, diversity remains a powerful influence in higher education, with colleges and universities striving to achieve diversity and to display the diversity they have achieved.

In the employment context, courts have in some instances also accepted diversity as a constitutionally sound rationale for affirmative action programs voluntarily undertaken by employers. While cases such as *City of Richmond v. J.A. Croson* and *Adarand v. Peña* struck down particular affirmative action programs, they also held that racial preferences in governmental contracting may be justified by the goal of remediating past discrimination by the particular governmental entity. And neither case discussed the diversity rationale. While those cases therefore prohibit some affirmative action programs, they do not limit possible justifications to those designed to remedy past wrongs. Both before and after *Croson* and *Adarand*, courts have held that diversity may provide a compelling state interest in employment. In challenges brought under Title VII, affirmative action programs are most frequently justified on the ground that they address a “manifest imbalance” in segregated job

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19. *See, e.g.*, Memorandum from John R. Schmidt, Assoc. Attorney Gen., to Gen. Counsels on Post-Adarand Guidance on Affirmative Action in Federal Employment 8 (Feb. 29, 1996), http://eeroa.army.pentagon.mil/web/doc_library/ACF8B0B.TXT [http://perma.cc/Q84W-9BCZ] (quoting the report “While both *Adarand* and *Croson* make clear that remedial interests can be sufficiently compelling to justify race-based measures, they did not explore the full range of interests that might be found compelling. . . . Some members of the Court and several lower courts, however, have suggested that, under appropriate circumstances, an agency’s operational need for a diverse workforce could justify the use of racial considerations. This operational need may reflect an agency’s interest in seeking diversity in order to bring a wider variety of perspectives to bear on the range of issues with which the agency deals. It also may reflect an interest in promoting community trust and confidence in the agency”).
20. *Leong, Racial Capitalism*, supra note 6, at 2163 n.51 (collecting citations).
categories where racial minorities have been traditionally underrepresented, but diversity has informed that analysis, and courts and commentators have suggested that it might provide an independent justification.

The takeaway, then, is that diversity maintains influence within the employment case law. And, in practice, many employers embrace diversity. In different workplaces, the affinity for diversity may arise for different reasons: employers may believe that diversity actually leads to a better-functioning workplace, or they may believe that the appearance of diversity bolsters their standing among customers, or they may actually believe in the remedial function of hiring members of groups historically subject to discrimination while strategically couching their reasons in the language of diversity. Whatever the specific reason, the result is that employers desire diversity in the workplace.

Our preoccupation with diversity in higher education, the workplace, and other institutions engenders a preoccupation with nonwhite racial identity. Existing theories of capital provide heuristics for understanding the way that white people and predominantly white institutions derive value from nonwhite racial identity. In Marxian terms, racial identity is a commodity that we all produce. The process of racial-identity production is complex, depending on variables ranging from one’s morphology to choices regarding grooming and dress to manner of self-presentation. But the specific racial commodity that


22. See Doe v. Kamehameha Schs., 470 F.3d 827, 842 (9th Cir. 2006) (“The Title VII cases, in the employment context, recognize the laudable goal of achieving diversity and proportional representation in the workplace.”); Davis, supra note 21, at 1039–53 (suggesting that diversity may justify affirmative action programs under Title VII); Cynthia L. Estlund, Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace, 26 BERKELEY J. EMP. & LAB. L. 1, 20–38 (2005). The Court also recently considered whether concerns regarding disparate treatment litigation under Title VII may justify race-based measures in Ricci v. DeStefano, 557 U.S. 557 (2009). But Ricci involved neither affirmative action nor a diversity justification, and is therefore of limited relevance here.


24. I have previously discussed these theories in Racial Capitalism, supra note 6 and Dissenting In and Dissenting Out, supra note 6.

25. See 1 KARL Marx, CAPITAL 131 (Friedrich Engels ed., 2007). This is a descriptive claim, not a normative one. For a discussion of the broader similarities between critical race theory and Marxism, see Donna E. Young, Post Race Posthaste: Towards an Analytical Convergence of Critical Race Theory and Marxism, 1 COLUM. J. RACE & L. 499 (2012).

each of us produces often provides, in Marxian terms, “use value” to the people and institutions with which we affiliate. Marxian analysis therefore provides a useful analogy for the value that powerful institutions—which, in America, are usually predominately white—derive from racial commodities.

Theories of social capital complement our understanding of racial value. Such theories posit that racial value is exchanged among people during various types of social interactions. Unlike the tangible commodities with which Marx was most concerned, the value of racial identity is transferred through affiliation and social networks.

In combination, the Marxian and social-capital frameworks contribute to the concept of racial capital. Racial capital is a way of understanding the value associated with racial identity. But not all racial identity is valued equally or in the same way. Structures in which power is concentrated among white people and predominantly white institutions enable a system of racial capitalism. In such a system, the existing power disparity allows white people to exploit relationships to derive the value associated with nonwhite racial identity.

A few examples help illustrate the concept. Some racial capitalism occurs at the individual level—for example, when an individual asserts that he cannot be racist because he has nonwhite friends, or that a particular view he holds cannot be racist because his nonwhite friends agree with it. Other racial capitalism occurs at an institutional level—for example, when a college or business Photoshops a nonwhite person into its promotional materials, or when a political organization attempts to emphasize its racial diversity.

Racial capitalism harms individuals, nonwhite groups, and society as a whole. On an individual level, racial capitalism harms nonwhite people by

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performance appears to have been theorized first with respect to sex and gender, subsequent research has applied it to racial identity as well.

27. Leong, Racial Capitalism, supra note 6, at 2175–83.
28. Id.
29. Id. at 2190–98.
30. Id.
31. Id.
33. See, e.g., Sam Greenspan, 11 Photos Where Black People Were Awkwardly Photoshopped in or out, 11 POINTS (July 9, 2009), http://www.11points.com/Misc/11_Photos_Where_Black_People_Were_Awkwardly_Photoshopped_In_or_Out [https://perma.cc/Q2YS-55KN].
commodifying them and by distorting identity performance. For nonwhite
groups, racial capitalism creates discursive harms and suppresses historical
understandings of discrimination. And on a social level, racial capitalism
fosters racial resentment and displaces more meaningful reforms.

B. Identity Capitalism

The concept of racial capitalism readily expands to encompass other
identity categories. While there are obvious differences in the way identity
capitalism operates across such categories, I focus here on the similarities
among some of the most salient identity categories rather than attempt an
exhaustive catalog of the differences among categories or make any claim as to
which categories are most susceptible to identity capitalism.

Parallel to the previous discussion of race, theories of capital provide
useful heuristics for understanding how other identity in-groups derive value
from the identities of out-group members. Theories of social capital provide an
understanding of how identity value is transferred through affiliations. The
process resembles the Marxian notion that power disparities predetermine who
will derive value from the production of a particular commodity—here, the
commodity of identity.

As with race, the impetus for identity capitalism may be traced in part to
our intense social and legal focus on diversity. Research has documented the
preoccupation with female leadership—how to encourage it, why there isn’t
more of it, why we should value it, and which companies have it. Likewise,
we rank companies on their congeniality to out-groups on a number of
metrics—race, gender, and sexual orientation.

Identity capitalism is a force in the business world. Companies often
showcase leaders who are nonwhite, female, LGBT, or some combination

35. Leong, Racial Capitalism, supra note 6, at 2204–07.
36. Id.
37. Id.
38. While I don’t want to downplay those differences, for present purposes I want to focus on
the similarities in order to understand the broad phenomenon of identity entrepreneurship.
39. Future research might profitably focus on the differences, rather than on the similarities.
40. Leong, Racial Capitalism, supra note 6, at 2175–83.
Women,” “LGBT Diversity,” and “Diversity for Minorities”).
thoroughly using pictures on their websites or text in their promotional materials.\textsuperscript{43} Virtually every company posts diversity information prominently on its website. Companies often leverage class identity by touting their humble origins\textsuperscript{44} or the ordinary upbringings of their high-ranking executives.\textsuperscript{45} Such maneuvers portray the company as a place where anyone can succeed if she works hard and remains loyal to the company. In sum, much workplace identity capitalism is motivated by the desire for the credibility that comes with the inclusion of outsiders—or at least the appearance of inclusion. The presence of nonwhite people, women, and LGBT individuals, among members of other marginalized groups, helps to provide organizations with cachet that translates to business success and organizational status.\textsuperscript{46}

Identity capitalism also operates in the political arena. Parties often select and promote candidates based on predicted ability to appeal to certain demographics. Consider Sarah Palin: as an inexperienced and little-known governor from Alaska, her nomination as John McCain’s running mate was a surprise to nearly everyone. When viewed through the lens of identity capitalism, however, the nomination reveals the Republican Party’s attempt to capture female voters disappointed by Hillary Clinton’s failure to win the Democratic Party nomination.\textsuperscript{47} And while the strategy was ultimately unsuccessful, it did yield some of its intended consequences: in one poll taken soon after the announcement, one in three white women said that they were more likely to vote for McCain following his selection of Palin,\textsuperscript{48} although at the same time a large number of women—59 percent, according to one poll, and an even higher percentage of independents—perceived the selection as mostly the result of political calculation.\textsuperscript{49}

Identity capitalism also occurs in entertainment. Movies and television shows face pressure to include LGBT characters, racially diverse casts, and

\begin{itemize}
\item \textsuperscript{43} See, e.g., Patrick S. Shin & Mitu Gulati, Showcasing Diversity, 89 N.C. L. REV. 1017 (2005).
\item \textsuperscript{44} See, e.g., 10 Fortune 500 Companies That Started with Next to Nothing, BUS. PUNDIT (Mar. 1, 2009), http://www.businesspundit.com/fortune-500-rags-to-riches [https://perma.cc/4H6L-VCFZ].
\item \textsuperscript{46} David B. Wilkins, From “Separate Is Inherently Unequal” to “Diversity is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar, 117 HARV. L. REV. 1548, 1557 (2004).
\item \textsuperscript{47} See, e.g., Kathleen Mollick, No Laughing Matter, in POLITICAL WOMEN: LANGUAGE AND LEADERSHIP 102 (Michele Lockhart & Kathleen Mollick, eds., 2013).
\item \textsuperscript{48} Julia Baird, Sarah Palin and Women Voters, NEWSWEEK (Sept. 12, 2008), http://www.newsweek.com/sarah-palin-and-women-voters-88503 [https://perma.cc/8FP6-5TW6].
\item \textsuperscript{49} Matt Bai, Retro Identity Politics, N.Y. TIMES MAG. (Sept. 12, 2008), http://www.nytimes.com/2008/09/14/magazine/14wwln-lede-t.html [https://perma.cc/S67H-3Q4F].
\end{itemize}
women in powerful roles, and receive criticism when they do not.⁵⁰ Consider the acclaim the television show 24 won for casting not one, but two black presidents,⁵¹ or the celebration of the diversity in casting on Modern Family, or the criticism of Girls’s all-white cast,⁵² or the attention garnered by the hashtag #OscarsSoWhite. Indeed, the reality dating show The Bachelor was even the target of a lawsuit brought by two black men rejected in the early rounds of auditions.⁵³ Those involved in the creation of movies and television shows recognize economic gains that will result from featuring diverse identities and take affirmative steps to derive value from the actors of color who are featured on their shows.

While network television continues to struggle to reflect racial diversity, casting decisions reflect an understanding that diverse casts are more likely to reach diverse viewers and garner higher ratings.⁵⁴ A prominent justification for diverse casting is economic. As one commentator explains, diverse shows are often cast:

[N]ot out of political correctness, but because [network officials] believed these were the shows that would attract the most advertising dollars. . . . So the vote of confidence . . . doesn’t just come from Hollywood creative types or network suits, but from corporate America. It’s not about quotas or tokenism, it’s about free-market capitalism in action.⁵⁵

Thus, seeking diversity in media and entertainment is at least in part an economic decision. Entertainers of color are a source of racial value, which translates to economic value, at least for television executives and advertisers. Whether actors who represent out-groups also reap benefits is less assured, and it is to this issue I turn in the next Section.

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II.

OUT-GROUP PARTICIPATION IN IDENTITY CAPITALISM

This Section looks at identity capitalism from the other side—the out-group. My previous work examined the process through which members of racial in-groups derive value from the identities of out-group members. But a vital complement to that work is an examination of the myriad ways that out-group individuals respond to identity capitalism. This Section surveys the complex landscape of out-group participation in identity capitalism. It then focuses on the subset of that participation I will call identity entrepreneurship—circumstances in which an individual member of an identity out-group intentionally leverages her identity for personal benefit.

A. Theories of Capital

As in my previous work, my point is not that any specific theory of capital, whether Marxian, human, social, or cultural, perfectly describes out-group participation in identity capitalism. Rather, aspects of these theories provide useful heuristics for understanding the ways that individual out-group members participate in a system of identity capitalism and the way their identities are assigned value as a result.

Out-group participation in identity capitalism evokes the Marxian distinction between artisan labor and cottage industries. Artisan labor produced items for particular consumers rather than for the market more broadly. Consequently, Marx considered the relationship between a guild master and his apprentices qualitatively different from the conditions present in cottage industries, or small-scale producers of goods for the general market. In particular, cottage industries more closely replicated the exploitative relationship between a capitalist and his workers than the symbiotic master-apprentice relationship. Cottage industries did away with the barriers to capitalism that the guild system preserved; as a result, Marx viewed them as rudimentary manifestations of capitalism and their products as commodities.

56. See Leong, Racial Capitalism, supra note 6, at 2172–98.
57. MARX, supra note 25, at 1020–23.
58. Of guild masters, Marx wrote:

He is an artisan in the first instance and is supposed to be a master of his craft. . . . Hence his approach to his apprentices and journeymen is not that of a capitalist, but of a master of his craft, and by virtue of that fact he assumes a position of superiority in the corporation and hence towards them.

Id. at 132.
59. “[T]here is an absolute predominance of the domestic system of large-scale production [in the cottage industries], i.e., an unquestionably capitalist form of industry.” VLADIMIR I. LENIN, What the “Friends of the People” Are and How They Fight the Social-Democrats, in 1 COLLECTED WORKS 206 (1960) (quoting SERGEI ANDREEVICH KHARIZOMENOV, THE SIGNIFICANCE OF COTTAGE INDUSTRIES (1883)).
This dichotomy provides a way of understanding the complexity of out-group participation in identity capitalism. Identity might be produced in an artisanal process, in which an individual develops an identity for their own pleasure and that of the people with whom they have personal relationships, without regard to the larger systems of capitalism and thus without commodification and valuation of identity. Alternatively, identity production becomes a cottage industry when it is produced with a more generic consumer in mind. While not a fully systematized version of capitalism, such cottage-industry production advances identity as a commodity.

These analogies, while imperfect, reveal the complexity of out-group participation in identity production within a system of identity capitalism. Such participation might be genuinely pleasurable, beneficial, and entirely individualistic—something that undermines and subverts oppressive systems of identity capitalism. Alternatively, such participation might bolster and instantiate systems of identity capitalism from the ground up.

Out-group participation in identity capitalism is complicated, contingent, and fraught with ambiguity. Unlike the commodification and exploitation perpetrated within a system of identity capitalism, which I have argued are generally harmful, out-group participation in existing systems of identity capitalism is a more complex phenomenon requiring nuanced evaluation. These questions of whether and when identity entrepreneurship is laudable invite closer scrutiny. When does artisanal labor become a cottage industry? When does individual identity performance become identity commodification? The next Section takes up these questions.

B. Identity Entrepreneurship

Although out-group members are often conscripted involuntarily into identity capitalism, they are not necessarily helpless pawns in a complex game beyond their understanding or control. Rather, out-group members often find ways to exercise limited agency even in conditions of extreme disempowerment and abuse, such as the antebellum slave markets. Walter Johnson recounts the way that slaves sold at market mediated the expectations of the slave traders and prospective buyers by shaping their own identity performance. As Johnson explains, the slaves “knew what the traders wanted them to say and what the buyers wanted to hear.” This knowledge provided an opportunity for slaves to influence their own futures: “[S]laves could create

60. Leong, Racial Capitalism, supra note 6, at 2204–20.
63. Id.
64. Id. at 176.
themselves in the slave market, matching their self-representations to their own hoped-for outcomes. Sometimes, at enormous risk, they shaped a sale to suit themselves.65 In this complex interaction, the prospective buyers’ power was less than absolute: “their market method [was] vulnerable to the vagaries of human interaction—deception, manipulation, and misunderstanding.”66

Thus, out-group members historically have found ways to exercise agency even under circumstances of grievous subordination. In comparison, the subtler exploitation of modern identity capitalism allows out-group members to exercise agency to a far greater degree. While out-group members cannot exercise complete control over the way that in-group individuals and institutions might use their identities, they can often construct and leverage their identities to improve their chances of reaping economic or social benefits from the in-group.

I will refer to someone who intentionally leverages her out-group identity to derive social or economic benefit as an identity entrepreneur.67 I have chosen the word “entrepreneur” deliberately. First, it conveys neither universally positive nor universally negative implications. Entrepreneurs, particularly small business owners, are increasingly respected and popular in America.68 Yet the word “entrepreneur” is sometimes used in a far less laudatory way to communicate that the person in question is self-promoting, grasping, inauthentic, a climber.69 The word therefore appropriately reflects our collective ambivalence about the practice of identity entrepreneurship.

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65. Id. at 176–77.
66. Id. at 179.
67. See supra note 6.
68. See, e.g., Lydia Saad, Democrats More Confident in Labor; Republicans, in Business, GALLUP (June 20, 2012), http://www.gallup.com/poll/155267/Democrats-Confident-Labor-Republicans-Business.aspx [http://perma.cc/QG83-SZY8]. The poll reports that 75 percent of Republicans and 63 percent of Democrats have “a great deal” or “a fair amount” of confidence in small businesses; for Republicans, this is more than anything except the military, while for Democrats this is more than anything except the President and the military. Id.
Out-group involvement in identity capitalism is not inherently identity entrepreneurship. The former consists of any participation in the system of identity exploitation devised by the in-group, whether voluntary or involuntary. But not every out-group participant in an overarching system of identity capitalism is an identity entrepreneur. Rather, identity entrepreneurship occurs when an out-group member intentionally makes her out-group identity more salient than she would without in-group incentives that provide some sort of social or economic benefit.

An example illustrates the difference between mere participation and full-blown identity entrepreneurship. Consider two students. The first is socially identified as Asian—that is, a person on the street would perceive him as Asian—and attends a predominantly white university. If the school photographs the student extensively, features him on its website, and perhaps even Photoshops him into a brochure, the student has been recruited—involuntarily, perhaps even unknowingly—into participation in identity capitalism.

Contrast this student’s passive involvement with the behavior of a second student. The second student appears ethnically ambiguous, although his mother is part Chinese. Suppose that this person’s ethnic background is not particularly important to him. Yet also suppose that he takes affirmative steps to make his Asian identity salient to the predominantly white institutions with which he interacts. For example, he checks only the “Asian” box on his college application, knowing that the schools to which he is applying enroll few Asian students. He writes his personal statement about his Asian heritage. He prominently lists his membership in Asian cultural groups on his resume. He expands further on his Asian identification when he applies for a scholarship designed for underrepresented minorities.

The first student is merely a passive participant in a system of identity capitalism. The second student is an identity entrepreneur. Against a backdrop of identity capitalism, in which racial diversity is a commodity valued by institutions, the second student knows that his Asian racial identity is a commodity of value and has chosen to act on that knowledge. By making that identity explicit to admissions and scholarship committees, he reaps tangible benefits in the form of increased chances of admission, more generous financial aid, and perhaps even opportunities for leadership within the school.

For now, I am not judging the choices or behavior of either student. My goal is the purely descriptive one of distinguishing between two different forms of involvement in identity capitalism. What separates the two is the deliberate effort of the second student to derive value from his identity through behavior that he would not engage in without the incentives the in-group put in place.
I also distinguish identity entrepreneurship from “selling out,” which other scholars have examined in detail.\textsuperscript{70} Randall Kennedy, for example, defines a sellout as “a person who betrays something to which she is said to owe allegiance.”\textsuperscript{71} He explains that, when used in a racial context, sellout “is a disparaging term that refers to blacks who knowingly or with gross negligence act against the interest of blacks as a whole.”\textsuperscript{72} Selling out is also a familiar concept among other out-group populations.\textsuperscript{73} Selling out is thus, by definition, an act by an out-group member that disadvantages the interests of the out-group. For that reason, the out-group as a whole tends to view selling out as a wrongful act. People might disagree about whether particular behavior constitutes selling out,\textsuperscript{74} but once they reach a consensus that selling out has taken place, they have no trouble labeling it as undesirable, perhaps even disgraceful or reprehensible.

By contrast, identity entrepreneurship is neither inherently good nor inherently bad. Leveraging one’s own identity for personal social or economic gain might be good for a variety of reasons—it might advance a historically disadvantaged out-group member, redistribute social resources more equitably, or improve society as a whole.\textsuperscript{75} But leveraging one’s own identity might also have negative consequences—it might advantage the individual at the expense of the group, reify in-group identity preferences, or incentivize out-group identity performances most favored by the in-group. Indeed, it might lead to the same sorts of disadvantages as selling out.

Thus, selling out is a form of identity entrepreneurship, but identity entrepreneurship is not always selling out. Distinguishing the two requires an examination of both the individual actor’s motivation and impact. Identity entrepreneurs leverage their out-group identity for any one of a number of motivations and with a wide range of consequences. Sellouts intentionally use their identity to gain an advantage for themselves at the expense of other members of their out-group. Selling out is therefore a subset of identity entrepreneurship, the broader category of leveraging identity for social or economic gain.

\textsuperscript{71} Id., supra note 70, at 4.
\textsuperscript{72} Id.
\textsuperscript{75} Of course, people often disagree about what is and is not a desirable consequence. I will begin to address these issues in Part III.A.
The distinction between selling out and other forms of identity entrepreneurship is not always clear. It hinges on the intent of the individual and the consequences of her actions, and therefore must be evaluated on a case-by-case basis. Moreover, we must take into account the possibility of false consciousness. Within a system of identity capitalism, a participant may not understand that her identity performance benefits the in-group at the expense of the out-group. While such false consciousness might affect the way we feel about an out-group identity entrepreneur—for example, we might feel more sympathy for her, even if we dislike the consequences of her actions—it does not affect the categorization of particular behavior as identity entrepreneurship.

Finally, I focus for now on situations in which an individual’s status as an out-group member is uncontested. An individual who simply lies about out-group status for personal gain might also be considered an identity entrepreneur, but the concerns associated with such identity entrepreneurship are quite different. My focus here is on those who do have a colorable entitlement to out-group identity, and who affirmatively choose to assert or make salient that identity to gain a social or economic benefit.

C. Identity Entrepreneurs in Action

Identity entrepreneurship has deep historical roots. In the early days of American slavery, for example, white slavemasters often richly rewarded black slaves who used their status within the black community to learn of plans for escape or rebellion. Yet the phenomenon was more complex than it might seem at first glance: many such slaves, in turn, used the information they gleaned as a result of their masters’ trust to improve other slaves’ chances of escape, often at considerable risk to themselves. Further, Randall Kennedy has documented the rewards reaped by black opponents of the civil rights movement.

76. Engels to Franz Mehring, Marx-Engels Correspondence 1893, https://www.marxists.org/archive/marx/works/1893/letters/93_07_14.htm [https://perma.cc/5S4E-LX89] (last visited Aug. 6, 2016) (explaining that “[i]deology is a process accomplished by the so-called thinker consciously, indeed, but with a false consciousness. The real motives impelling him remain unknown to him. . . . Hence he imagines false or apparent motives”).


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


80. Id. at 125–26.
movement who assisted in maintaining the white supremacist status quo. And more recently, identity entrepreneurship of many varieties has become commodified.

Commentators have acknowledged such identity commodification in many contexts, including the literal market. Susan Danuta Walters explains that “gay entrepreneurship has become a boom industry.” Everywhere there are gay entrepreneurs, creating flourishing businesses in retailing (selling every form of pink triangle and rainbow accessory!), travel, services, entertainment. The same is true for products created by members of other out-groups: these products include “girl power” T-shirts, allegedly authentic out-group ethnic foods, products and experiences marketed to in-group members, rags-to-riches autobiographies—neither of which would exist save for the identity politics that renders it a commodity.

Identity entrepreneurship also provides a defense against charges of racism. In this context, it serves as a way of meeting demand within a “market” for nonbigotry. Identity entrepreneurs sometimes leverage out-group identity either to avoid charges of racism or prejudice, or to allow in-group members to avoid such charges. The news is replete with individuals asserting that they cannot be racist because they, themselves, are racial minorities, or because they have nonwhite friends, family members, or associates.

The political arena is also rife with identity capitalism, and in-group identity exploitation creates opportunities for would-be elected officials to engage in identity entrepreneurship. Female politicians from Sarah Palin to Hillary Clinton to Carly Fiorina sometimes leverage their out-group identity for a range of benefits from the political in-group. Although the three women are quite different as political candidates, they have each found ways to make their gender an advantage with political insiders.

Other politicians tout their modest beginnings as a way of connecting with working-class and socioeconomically disadvantaged voters. John Edwards, as both a 2004 vice-presidential candidate and a 2008 presidential candidate,

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81. KENNEDY, supra note 70, at 49–54.
83. Id. at 7.
84. See, e.g., Howard Koplowitz, Barbara Espinosa, Arizona Radio Host, Stands by Obama ‘Monkey’ Remark and Denies She’s Racist, Int’l BUS. TIMES (June 20, 2012), http://www.ibtimes .com/barbara-espinosa-arizona-radio-host-stands-obama-monkey-remark-and-denies-shes-racistvideo-703628 [http://perma.cc/L58J-FBSE] (reporting that, after she called Barack Obama a “monkey” on her radio show, Barbara Espinosa claimed “with a last name of Espinosa I’m anything but racist”).
86. Part II.C.1 examines Palin’s identity entrepreneurship in detail.
continually referenced his humble origins as a way to connect with working-class voters despite his considerable wealth. Edwards seldom missed an opportunity to mention that his father was a millworker or recount the time his family had to leave a restaurant because it was too expensive for their budget. Similarly, in the 2012 Republican primary, Rick Perry’s campaign videos frequently emphasized his family’s meager resources and his small-town upbringing. Richard Carmona, former Surgeon General of the United States, emphasized both his modest upbringing and Latino heritage in his campaign for senator of Arizona to demonstrate his empathy for his constituents. Of his background, Carmona has said: “I’m Hispanic and I’m first born in this country. My parents were immigrants, you know, we were poor.”

Research demonstrates that, in the workplace, out-group members struggle to fit in, often at great personal cost. Yet research also suggests that in some circumstances making out-group identity salient can yield certain benefits. For example, coming out at work may be preferable to keeping one’s sexual orientation secret given that many organizations have protective policies in place, and that identifying one’s sexual orientation publicly may actually facilitate “collegial banter” with coworkers and catalyze new business relationships. And in certain industries, making out-group identity salient yields decided advantages: within the fashion industry, for example, many


91. See, e.g., Fabian, supra note 87.

92. Id.


94. Sylvia Ann Hewlett & Karen Sumberg, For LGBT Workers, Being “Out” Brings Advantages, HARV. BUS. REV., July–Aug. 2010, at 28 (stating that 85 percent of Fortune 500 companies have protective policies in place—an increase from 51 percent just eleven years earlier).

95. Id.
commentators believe that explicitly performing stereotypical gay male identity helps one’s career by exploiting stereotypes about gay male fashion sense.96

I have already discussed how diversity has become a valued commodity in education.97 This creates incentives for identity entrepreneurship. As Devon Carbado explains, “There is an incentive for applicants to structure their personal statements to align with the particular diversity benefits they believe their target colleges or universities seek to advance.”98 Angela Onwuachi-Willig agrees: “[C]ollege applicants are increasingly working to uncover their ethnic ancestries and backgrounds through genetic testing in order to then assert a minority identity on applications and gain an ‘advantage’ in the admissions game.”99 Indeed, outside influences explicitly urge this entrepreneurship, with some genetic testing companies urging people to get tested in order to determine their “eligibility for race-based college admissions or government entitlements.”100

Likewise, within entertainment, media, and sports, LGBTQ identity can provide advantages, such as prompting interest and establishing or renewing a fan base. Contemporary examples—Ellen DeGeneres, Anna Paquin, Ricky Martin, Jason Collins, Anderson Cooper, George Takei, and Neil Patrick Harris—reveal that coming out does not necessarily derail a career. Commentators have even suggested that “[s]ome celebrities whose stars were fading have gotten a career boost after going public about being gay.”101 And in advising people how to get selected for reality TV, one website suggests that “to appeal to the largest demographic, casting directors often look for many

97. See supra text accompanying notes 16–17.
98. Carbado, supra note 5.
100. Id. at 1218.
different types of people.” Such a statement indicates that out-group identity might help a candidate get selected for inclusion on a show.

To lay the groundwork for further analysis, I next examine three identity entrepreneurs. Initially, my goal is not to present any of the three as a positive or negative example of identity entrepreneurship. My goal, rather, is to demonstrate the complexity of identity entrepreneurship and the conflicting results it can produce.

1. The Power of Women

Identity entrepreneurship often provides a springboard for political campaigns. This happened in 2008 when Republican presidential nominee John McCain sought to benefit from Hillary Clinton supporters’ disappointment with Barack Obama’s selection as the Democratic nominee. McCain’s selection of then-governor Sarah Palin as his running mate was an act of identity capitalism—an attempt by the Republican male in-group to derive value from Palin’s out-group status as a woman. Mike Huckabee voiced the sentiments of the party when he stated: “Governor Palin . . . will remind women that if they are not welcome on the Democrat’s ticket, they have a place with Republicans.” Similarly, commentator Jim Geraghty described her as “probably the only pick McCain could make who could simultaneously appeal to Hillary supporters who think sexism cost her the nomination, and consolidate large swaths of the conservative base.”

Despite this in-group optimism, many expressed cynicism regarding Palin’s selection. Kaili Joy Gray accused McCain: “You think I’m stupid. . . . You think I will forget every single one of my personal and political values just because there’s a vagina on your pro-war, anti-woman, anti-science ticket.” Ta-Nehisi Coates described the selection of Palin as the “crassest, most bigoted decision that I’ve seen in national electoral politics,” adding, in an expression of sympathy for Palin, that “there is a price for being turned into a symbol.”

103. See, e.g., Baird, supra note 48. The same strategy plays out in fiction. See, e.g., Commander-in-Chief (ABC television broadcast 2005–06) (the first primetime series featuring a female President of the United States, portrayed by Geena Davis).
And on The Daily Show, Samantha Bee caricatured the women John McCain thought would vote for Palin: “As a proud Vagina American myself, I can tell you I’ll be voting for McCain in November” even though “John McCain chose a woman who is almost completely unprepared for the job and who disagrees with me on every core value I believe in.”

Yet despite the criticism of the motives underlying her nomination, Palin emerged as a consummate identity entrepreneur. She chose to frame McCain’s selection of her as bold reform rather than a purely strategic maneuver, explaining that McCain “didn’t go with a conventional, safer pick. John believed in change, the power of independent and committed individuals, the power of women. He thought it was time to shake things up.” Her explanation testifies to the identity capitalism inherent in Palin’s selection—the belief in the “power of women” to change the political outcome.

At the same time, Palin’s response to her nomination suggests an entrepreneurial effort to make her gender more salient by openly embracing it as one factor in her selection; rather than noncommittally accepting the GOP’s statements about her selection, Palin voluntarily leveraged her gender to gain additional political advantage. For example, she misquoted Madeleine Albright, stating that “[t]here’s a place in Hell reserved for women who don’t support other women.” Palin took a more direct approach at a speech closer to the election, flanked by female supporters, arguing:

Our opponents think they have the women’s vote all locked up, which is a little presumptuous since only our side has a woman on the ticket. . . . When it came time for choosing a vice president, somehow [Obama] couldn’t bring himself to choose a woman who got 18 million votes in the primaries.

Ultimately, of course, McCain and Palin lost the election, perhaps marking McCain and the Republican Party’s selection of Palin as an example of unsuccessful identity capitalism. Nonetheless, Palin’s identity entrepreneurship survived and transcended the 2008 presidential race, establishing her as a fixture on the national political scene and yielding considerable financial gain for her and, as a direct result, her family. Following


110. Nico Pitney, Palin Misquotes Albright, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/2008/10/05/palin-misquotes-albright_n_131967.html [http://perma.cc/S2CT-NAN4]. Albright actually said: “There’s a place in Hell reserved for women who don’t help other women.” Id. Albright quickly distanced herself from Palin’s speech, issuing a statement: “Though I am flattered that Governor Palin has chosen to cite me as a source of wisdom, what I said had nothing to do with politics.” Id.


Palin’s identity entrepreneurship is complex: she makes her gender identity salient, frequently expressing viewpoints that might be classified as feminist, yet avoids making her gender identity threatening to men.\footnote{See, e.g., Morvareed Z. Salehpour, Election 2008: Sexism Edition: The Problem of Sex Stereotyping, 19 UCLA WOMEN’S L.J. 117, 139 (2012) (stating that “Palin seems to have tried to play into the female stereotype so that she, seeming unthreatening to the current system, would attract voters”).} She talks readily about the role of women in politics and agrees that women can make unique contributions, explaining, “Women have a unique perspective. Typically, they are less ambitious for superficial [sic] power than men and more focused on providing for the needs of others.”\footnote{Sarah Kendzior, The Princess Effect, POLITICO (July 14, 2014), http://www.politico.com/magazine/story/2014/07/glass-ceilings-glass-mirrors-108516.html#ixzz36Mw34oXg [http://perma.cc/L8AV-PZE7]; Andrew Prokop, More “Feminine” Women Are More Likely to Win Elections in Red States, Vox (May 15, 2014), http://www.vox.com/2014/5/15/5720280/do-female-politicians-perceived-as-less-feminine-do-worse-in-elections [http://perma.cc/8Z7R-GPSQ].} Yet while this statement is nominally feminist—it promotes leadership roles for women—it is also deeply essentialist, evoking an idea of women as selfless caregivers with limited ambition.

By asserting that women are more selfless and less concerned with personal glory than men, Palin comforts men suffering from anxiety that women might prove to be better leaders and replace them altogether. Her performance of womanhood is reassuringly stereotype-affirming to the male-dominated political in-group. Thus, Palin’s identity entrepreneurship reveals that in order to reap the rewards of identity entrepreneurship, it’s not enough simply to make one’s identity as a woman salient: one has to be the right kind of woman.\footnote{PALIN, GOING ROGUE, supra note 109.}

Moreover, Palin offers reassurance that the presence of women in leadership roles will not destabilize traditional gender roles. Her own family—she has been married since 1988 and has five children—validates her
assurances. Palin explicitly disclaims any notion of revising traditional understandings of family and gender roles, renouncing the view of “self-described feminists” that “family and children hold women back and limit their professional choices.”\textsuperscript{119} On the contrary, she explains that, “far from holding me back, my family is my main motivation.”\textsuperscript{120} Indeed, her family is a job qualification: Palin argues that “[m]oms can be count on to fight for their children’s future,”\textsuperscript{121} and that “there’s no better training ground for politics than motherhood.”\textsuperscript{122} She recalls that “[d]uring the vice-presidential campaign, people would ask me how I could expect to balance it all if we won the White House. I thought, 	extit{They really don’t get it. I don’t balance anything. We do it together.”}\textsuperscript{123} Thus, with respect to her maternity, Palin made “motherhood an explicit part of her appeal, running as a self-proclaimed hockey mom.”\textsuperscript{124} Palin situated herself as one of many women who share her views and values: “These women are at the forefront of a new wave of strong, confident American women who are positively affecting not just the Republican Party, but America itself. They’re building businesses, managing charities, leading men and women in government—and, while they’re at it, raising families.”\textsuperscript{125} Palin’s optimism regarding the compatibility of traditional family structures and women in public office, untroubled by any notion that the two might conflict, offers a comforting version of identity to men uneasy with the notion of women in public life.

While leveraging her gender by reassuring the political male in-group, Palin also increases her identity value by connecting with other women. She explains her outrage at people who describe her children as liabilities when those same people did not make similar claims about men.\textsuperscript{126} She describes her experience of not fitting in with a predominantly male old guard in her first elected office as a city council member: “[A]mong its members, I stuck out like a Brownie at a Cub Scout meeting. Most of the guys were around my grandfather’s age. In some ways, they had a kind of paternalistic way of governing.”\textsuperscript{127} She describes bonding with a female reporter in the women’s restroom,\textsuperscript{128} and in one of her most explicit admissions of entrepreneurship, she

\begin{footnotes}
\begin{enumerate}
\item \textsuperscript{119} \textsc{Palin, America by Heart}, supra note 116, at 93.
\item \textsuperscript{120} \textit{Id.} at 93–94.
\item \textsuperscript{121} \textit{Id.} at 129.
\item \textsuperscript{122} \textsc{Palin, Going Rogue}, supra note 109, at 115.
\item \textsuperscript{123} \textsc{Palin, America by Heart}, supra note 116, at 94.
\item \textsuperscript{125} \textsc{Palin, America by Heart}, supra note 116, at 128.
\item \textsuperscript{126} \textsc{Palin, Going Rogue}, supra note 109, at 71.
\item \textsuperscript{127} \textit{Id.} at 65.
\item \textsuperscript{128} \textit{Id.} at 200.
\end{enumerate}
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describes her ability to transform a sexist incident into a media boon by connecting with an already-sympathetic reporter:

I shook my head in a “can you believe what we women have to put up with?” way and milked it for all it was worth. “I know, I know,” I said. “But you just have to rise above all that and plow through! Look, we have to work twice as hard to prove we’re half as capable as men think they are.”

Palin also relates to women by candidly sharing her familiar struggles on more personal issues common to many women. She recalls that during her very first campaign for city council, “Track and Bristol were still tiny, so I went door-to-door asking for people’s votes, pulling the kids through the snow on a sled.” At a high level of generality, the story evokes the paradigmatic working mother’s childcare dilemmas. Palin also admits she briefly contemplated abortion following her unexpected pregnancy with her youngest son, Trig—later diagnosed with Down syndrome—subtly signaling that she relates to a choice that millions of women have faced. She describes her concern for expressing too much emotion in public: “Even when my heart was breaking on the inside, I just never wanted to seem weak.” And in a lengthy interview with Runners World, she unhesitatingly expresses gratitude for the athletic opportunities that Title IX afforded her, again connecting herself with many other women who shared the same experience. And these connections with other women are not trivial. Indeed, Palin’s ability to connect with women and represent their interests may have independent benefits, such as role modeling.

Importantly, however, Palin’s connection with women is not—or at least is not only—an end in itself. It also increases her value to the in-group of men who continue to control the national political theater. Leveraging her identity to increase her value to the in-group marks Palin as a particularly successful identity entrepreneur. Ultimately, Palin’s genius lies in her ability to distinguish herself from the in-group without threatening them.

In addition to leveraging gender to increase her value to her own party, Palin also gave conservatives the opportunity to rebut charges of sexism from the left with similar accusations. These charges are linked not only to her gender but also to her performance of it—that is, to her attractiveness and her

129. Id. at 80.
130. Id. at 64.
131. Id. at 172.
132. Id. at 177.
motherhood. Jim Geraghty testifies to this phenomenon in a piece that manages to both be sexist and accuse others of the same thing: “Do I have to be the first to say it? She’s gorgeous. Stunning. A jaw-dropping knockout. This will inevitably cause some Democrat to call her a bimbo . . . That will backfire enormously.” Another commentator muses: “Perhaps that, in the end, accounts for her popularity. We live in an age where victimization carries undeniable cachet.” Although, ultimately, Palin did not emerge victorious in the 2008 election, she has still reaped massive benefits from her identity entrepreneurship.

2. An Asian Fantasy

Sexuality presents a particularly useful setting for examining identity entrepreneurship. As Elizabeth Emens has explained, we tend to tolerate the expression of racial preferences in romantic and sexual settings that we would find repugnant in the workplace or other public domains. As a result, identity entrepreneurship is particularly unconstrained in these settings.

Pornography is one avenue for both the relatively straightforward expression of identity preferences and the opportunity for identity entrepreneurs to leverage those preferences for personal gain. The actual commodification of sexuality incorporates the commodification of other identity categories. For example, race is commodified through pornography.

Almost innumerable genres of racialized pornography are available to consumers, but I will focus primarily on pornography that features Asian women and is targeted at heterosexual male consumers. Sexual stereotypes abound in such pornography. As Frank Wu explains: “[T]he West knows that Asian women are exotic erotics, alluring coquettes hiding behind their fans. The China Doll or Geisha Girl possesses Oriental sex secrets that make her aggressive in bed, but she also is trained to be obedient around the house.” Asian women are thus desirable for their simultaneously highly sexualized and docile personas. Mainstream media, movies, and television perpetuate these stereotypes overtly and subtly. A typical example arises in the movie Love and Other Drugs, in which a blonde white woman invites a white man to participate in a threesome, explaining, “This is my Thai friend . . . [and] ‘I’m a little

136.  Geraghty, supra note 105.
139.  FRANK H. WU, YELLOW 278 (2002).
140.  Indeed, substantial literature emphasizes the desirability of Asian women for these qualities and offers advice on how to seduce Asian women. See, e.g., JEFF BECKER, HOW TO DATE AN ASIAN WOMAN (2011); LARRY MONROE, HOW TO GET YOUNG ASIAN WOMEN IN BED (2008).
Thai-curious.” While the camera lingers on the Thai woman, she remains silent, functioning only as a prop for racialized wordplay and an object for (presumably heterosexual male) visual consumption.

These stereotypes pave the way for identity entrepreneurship. As the popular website Complex muses in introducing its list of the “50 hottest Asian porn stars of all time”: “Ah yes, Asian women. Long desired for their exquisite beauty and stereotypical submissiveness, the wild world of pornography has only gone out of its way to play up and often fetishize these traits. . . .” The massive quantity of pornography featuring Asian women attests to both the huge market for such material and the incentives the market creates for identity performance.

At an individual level, pornography offers Asian women the opportunity for identity entrepreneurship. Many aspiring adult film actresses leverage Asian identity by adopting Asian stage names or emphasizing their Asian background. Consider, for example, Jessica Steinhauser, of German and Japanese ancestry, who became one of the most famous adult film stars of all time after changing her name to Asia Carrera.

More recently, the adult film star Asa Akira provides a particularly trenchant example of identity entrepreneurship. Akira regularly appears at the top of lists of Asian porn stars. She ranks sixth on Complex’s list of the top Asian porn stars of all time and, as of September 2012, is the highest-ranked star currently active in the industry. Akira’s career reflects a sustained effort to leverage and profit from her race. The Internet Adult Film Database reports that she has appeared in 451 adult movies, about 50 of which are explicitly racialized Asian by their titles.

While some might believe that the following lengthy list of racialized titles is unnecessary, I include it because so many people have expressed skepticism or ignorance regarding my claims about the sheer quantity of racialized pornography that focuses on Asian women. See, e.g., A.S.A. ASIAN SEXT ADDICT (Vouyer Media 2011); ASIAN 1 ON 1 4 (Naughty America 2012); ASIAN ANAL ADDICTION (Mike Adriano Media 2012); ASIAN ANAL ASSASSINS (Wicked Pictures 2012); ASIAN ANNihilation (Vouyer Media 2009); ASIAN BOMBSHELLS (Elegant Angel 2013); ASIAN BOOTY (Elegant Angel 2010); ASIAN BOOTY 2 (Elegant Angel 2011); ASIAN EROTIC DREAMS (Penthouse...
evoke “Asianness” even when the title does not contain an explicit reference to race.  

But Akira’s identity entrepreneurship goes beyond her films. Adult film actresses often promote themselves and gain a following by blending their on-screen and off-screen personas. Akira exploits this opportunity by writing books within the memoir genre, such as *Insatiable* and *Dirty Thirty*, that blend her on-screen and off-screen life. Building upon this foundation, Akira’s performed identity—both on- and off-screen—leverages her Asianness in ways both subtle and overt. For example, the home page of her website characterizes her as “the hottest new Asian starlet in porn.” In a section titled “a little about me,” Akira chooses to list as one of five facts, that she was born in Tokyo. In one interview, when open-endedly asked to tell viewers about herself, she says, “I’m from Brooklyn, New York . . . but I’m originally Japanese,” and returns to the racial theme by mentioning that an upcoming movie includes her “first two interracial scenes.”

2010); *Asian Fever* 37 (Hustler Video 2009); *Asian Fuck Faces* 1 (Jonni Darkko Productions 2011); *Asian Fucking Nation* 3 (Jonni Darkko Productions 2009); *Asian Girls Are Sexy* (Digital Sin 2012); *Asian Honeycums* 3 (Overboard Video 2013); *Asian Lovin’* (Pornstar Empire 2013); *Asian Mouth 7* (Madness 2013); *Asian Party Sluts* 3 (Hustler Video 2012); *Asian Persuasion* (Vouyer Media 2013); *Asian Strap* (Joey Silvera Productions 2009); *Asian Throat Gaggers* (Hustler Video 2014); *Asians, Asians, Asians* (Digital Sin 2014); *Asians Love Anal* (Digital Sin 2012); *Bangkok Wives* (Penthouse 2010); *Cum Fu 2* (Muffia 2009); *Fornica* (Diabolic Video 2009); *I Was a Mail Order Bride* (Wicked Pictures 2013); *Inside the Orient 1* (Naughty America 2009); *Inside the Orient 3* (Naughty America 2010); *Inside the Orient 4* (Naughty America 2010); *Inside the Orient 5* (Naughty America 2011); *Inside the Orient 7* (Naughty America 2011); *Inside the Orient 8* (Naughty America 2012); *Total Black Invasian 2* (West Coast Productions 2011); *Invasian 4* (Jules Jordan Video 2010); *It’s an Asian Thing* (Digital Sin 2013); *It’s an Asian Thing 2* (Digital Sin 2014); *Jack’s Asian Adventure 4* (Handheld Pictures 2010); *Japanese Style* (Nuru Massage 2013); *Kung Fu Beauty 2* (Vivid 2011); *Not Just Another Asian Movie* (Wildlife Productions 2009); *Oriental Babysitters* (Penthouse 2009); *Orientation* (Bluebird Films 2011); *Sailor Poon: A XXX Interactive Parody* (Hustler Video 2012); *Slant Eye for the White Guy 2* (Kelly Madison Productions 2010); *Slavin’ Asians* (Jonni Darkko Productions 2013); *Smokin’ Hot Asians 1* (Teravision 2009); *Up My Asian Ass* (Jules Jordan Video 2012); *Yum Yum Dli Sum* (Wicked Passions 2013). The list of titles is drawn from the Internet Adult Film Database. Asa Akira Performance Credits, IAFD. http://www.iafd.com/person.rme/perfid=AsaAkira/gender=f/Asa-Akira.htm [http://perma.cc/9UXF-QA5F] (last visited Feb. 16, 2015).

147. For example, phrases like “fuck my tight little Asian pussy.”


151. Id.

Moreover, Akira intentionally reinforces the dual erotic stereotypes of Asian female hypersexuality and submissiveness. She emphasizes, for example, that she strongly prefers gonzo films to features. Her autobiography is replete with assertions of how much she loves sex: “The whole reason I got into porn in the first place was for the sex.” Akira also claims that she values her partner’s sexual pleasure, a quality stereotypically attributed to Asian women. She says, “I love thinking about guys jerking off to me. When a fan says to me ‘I just jerked it to you last night . . . ’ it’s even better than the actual sex.” Yet in interviews and her autobiography, Akira also emphasizes her stereotypically Asian docility. Akira explains that she once worked briefly as a dominatrix, but notes the incongruity of that employment, stating, “I’m such a submissive person in real life.” In her autobiography, she observes: “At that point in my life, I didn’t recognize myself as submissive or dominant. I just knew I liked to please.”

Akira is candid about the entrepreneurial possibilities presented by her Asian identity. As she explains in her autobiography:

When I first started porn, I resented getting cast as the token Asian . . . . One out of every three shoots was an “Asian” scene. I can’t even tell you how many times I’ve covered my naked body in sushi, or played the role of a mail-order bride . . . . Over time, I’ve come to embrace it. It’s gotten me to where I am today, and it pretty much guarantees me work until the day I quit, since there is always a shortage of Asian girls in the business.

Indeed, Akira appears to have thoroughly embraced the benefits of trading on her Asian identity. For example, when discussing her personalized Fleshlight:


153. Whack Magazine, supra note 152.

154. See generally Shimizu, supra note 148, at 239, 257–58 (positing that Asian women are stereotyped as hypersexual and submissive).

155. Whack Magazine, supra note 152. In contrast to features, gonzo films focus on hardcore sexual acts with minimal plot, dialogue, and character development. See id.

156. AKIRA, INSATIABLE, supra note 149, at 50–51; see also id. at 4 (stating that “[a]t the risk of sounding overly dramatic, almost every time I shoot a sex scene, I fall a little bit in love. . . . Not necessarily with my partner, but just in general. With the situation. In love with being watched. In love with being on display. In love with being the center of attention, for those precious thirty-five minutes”); id. at 128 (“Eventually, I would come to embrace my reputation as a slut.”); id. at 208 (“I showed the world a girl can enjoy herself being fucked like a dirty slut, with no scenario, no context, just straight-up hardcore fucking.”); id. at 239 (“In many ways, it was the best sex I had ever had up until that point in my life. It was as if I had never really been turned on before. I was always curious, horny, wanting to have sex.”).


158. Whack Magazine, supra note 152.

159. AKIRA, INSATIABLE, supra note 149, at 41.

160. Id. at 86.
texture, she explains: “My texture is the Dragon. Because I’m Asian.” Akira also frames her success in racialized terms, stating, “I was one of the top three current pornstars, and was regarded as the biggest Asian star in the history of porn.”

Akira’s leveraging of her Asian identity has paid valuable dividends within the mainstream porn world. She has won numerous Adult Video News awards—the highest honor in the adult film industry—and is ranked fourth on Complex’s list of the hundred hottest porn stars “right now.” The site reports that she is “one of the most bankable Asian stars in porn history” and that she makes $10,000 per scene.

Perhaps equally interesting are the ways in which Akira has recently defied some stereotypes about Asian femininity. Certainly her autobiography does nothing to challenge the stereotype of Asian female hypersexuality, but it also reveals her as often assertive and calculating—traits at odds with traditional stereotypes of docility. Similarly, Akira appears frequently on talk shows and other media, increasingly revealing herself as outspoken and even argumentative.

Perhaps the reward of successful identity entrepreneurship is the opportunity to deviate from the entrepreneurial script without penalty—or at least the opportunity to access a wider range of scripts without alienating one’s audience.

3. Down with Gangstas

Hip-hop culture provides a particularly complex forum for entrepreneurship. Stereotypically, hip-hop is associated with young urban black men. Yet the audience for hip-hop includes white people at all income levels. Indeed, hip-hop actually depends on white people for commercial success, with young white men comprising seventy percent of rap music consumers.

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162. AKIRA, INSATIABLE, supra note 149, at 194.
163. Id. at 223.
165. Id.
166. Id.
167. For example, she cohosts a podcast called DVDASA with graffiti artist David Choe. In an incident that garnered considerable attention, when Choe recounted a situation in which he forced a masseuse to perform oral sex on him, Akira was the first to say “you raped [her].” Jenn Fang, Did Korean American Graffiti Artist David Choe Confess to Rape on Podcast?, REAPPROPRIATE.COM (Apr. 21, 2014), http://reappropriate.co/?p=5293 [http://perma.cc/7TSW-NHPY].
168. The distinction between “rap” and “hip-hop” is fluid and open to debate. Many musicians sign onto a definition offered by KRS-One: “Rap is something you do, but hip-hop is something you live.” MICKEY HESS, IS HIP HOP DEAD? 23 (2007).
Rap artists who engage in identity entrepreneurship marshal a complex blend of identity categories—race, gender, class, and geography. At present, many rappers are stereotypically black, male, urban, and of modest socioeconomic backgrounds. Identity entrepreneurship by many rappers thus falls at the intersection of these four identity categories, and rappers leverage their affiliation with all four in the process of identity entrepreneurship.

Among rappers, 50 Cent has proved himself a particularly masterful identity entrepreneur. While all entertainers play up their identity in one way or another, 50 Cent engages in overt identity entrepreneurship in ways that translate rapidly to profits. First, he frequently emphasizes the poverty and violence that characterized his upbringing, as well as the violence that lingers in his current affluent lifestyle. Indeed, he has even exaggerated these characteristics, taking cover under a “semi-autobiographical” umbrella while simultaneously implying that fictionalized accounts capture truths.

One such instance is the movie Get Rich or Die Tryin’, which is based on 50 Cent’s life. While 50 Cent acknowledges that some of the film is fictionalized or embellished for cinematic effect, he claims that it is about 75 percent factual. Nonetheless, the film depicts his life as grimmer than it in fact was. For example, the film portrays the protagonist’s mother dying in a dramatic scene where her killer brutally murders her and sets fire to her residence. In reality, 50 Cent’s mother died of asphyxiation as the result of the murderer turning on the gas while she was sleeping. Also, while the film shows the protagonist buying his first firearm at a very young age for protection in an illegal transaction, 50 Cent’s autobiography instead describes his acquisition of the gun as a hand-me-down. Likewise, the film shows the protagonist sent to state prison for drug- and violence-related crimes where he experiences conflict with both fellow inmates and guards. In reality, 50 Cent served seven months in a military-style boot camp as an alternative to a lengthier sentence in a traditional prison. Collectively, these dramatized

170. There are some prominent exceptions, such as popular rapper Eminem, who identifies himself as white, and Pitbull, who identifies himself as Cuban American and has noted that being “white with blue eyes” in some ways made his transition into the rap industry more difficult. Christopher Lopez, Pitbull Headlines the Pepsi Musica Super Bowl Fan Jam, MIAMI NEW TIMES (Feb. 4, 2010), http://www.miaminewtimes.com/2010-02-04/music/pitbull-headlines-the-pepsi-musica-super-bowl-fan-jam/full [http://perma.cc/DQ9N-4FAT].
171. 50 Cent’s 2 Cents on Shooting Scenes, AFR. AM. LITERATURE BOOK CLUB (Nov. 1, 2005), http://aalbc.com/reviews/article.php?id=90 [https://perma.cc/3A6Y-PQRY] (interview in which 50 Cent claims Get Rich or Die Tryin is about 75 percent factual).
172. Id.
173. GET RICH OR DIE TRYIN’ (Paramount Pictures 2005).
174. Id.
175. 50 CENT, FROM PIECES TO WEIGHT 81 (2006).
176. Compare GET RICH OR DIE TRYIN’, supra note 173, at 0:23, with 50 CENT, supra note 175, at 48.
177. 50 CENT, supra note 175, at 124.
incidents feed the existing stereotypical in-group conceptions of the poor, urban, black male out-group experience.

Part of 50 Cent’s success as an identity entrepreneur lies in his ability to distinguish himself from rappers who exhibit a less stereotypical—and hence less appealing to white in-group members—version of the poor, black, male, and urban experience. 50 Cent further distances himself from “inauthentic” rappers by saying: “Most of the niggas out there who talk gangsta and thug shit in raps don’t really want to be a part of the stuff they’re putting on their records. They’re not ready for guns to bang off on some real shit.”178 Likewise, he differentiates himself from “weak artist[s]” who try to “hang with gangstas,” stating: “If someone’s whole gangsta backstory is a lie, he’s going to try to make it look like it’s real by standing next to someone who may have had those experiences. But that doesn’t mean that you’re down with gangstas.”179 The implicit claim is that 50 Cent is, in fact, “down with gangstas.” 50 Cent thus engages in identity entrepreneurship by laying claim to an “authentic” version of the poor, black, male, urban experience.

50 Cent is, at least in some ways, aware of his own identity entrepreneurship. He readily acknowledges that some aspects of his identity as a rapper are artificially produced. In his autobiography, he explains: “Truth is, there’s no such thing as a ‘gangsta rapper,’ because no one can be a gangsta and a rapper at the same time. A rapper can have gangsta ties, he can know gangstas, but he can’t be a gangsta. He has to be an artist if he’s going to be an artist.”180 That is to say, the very act of being a rapper precludes being a wholly authentic gangsta.181 But, ultimately, 50 Cent understands the cache that preserving an appearance of authenticity holds. He says: “[B]ecause the lyrical content of my records reflects the environment that I’m from, it all came together in people’s minds: 50 Cent is a problem. I’ll be honest, I loved the free publicity.”182

50 Cent’s identity entrepreneurship has yielded remarkable financial rewards: in 2013, Forbes estimated his net worth at $125 million.183 Although more recently he has had serious money troubles, he still goes to great lengths to conceal the effects of these troubles on his lifestyle, such as by posting photos of stacks of money on social media.184 He has also engaged in a diverse

178. Id. at 196.
179. Id. at 213.
180. Id. at 198.
181. BUN B FEAT. SEAN KINGSTON, That’s Gangsta, on GANGSTAS AND HUSTLERS (Rap-A-Lot 2010) (“gangsta ‘til the end.”)
182. 50 CENT, supra note 175, at 215.
array of business ventures beyond music, including several movies, a self-help book, a children’s book, a book about fitness, video games, a reality television show aptly titled *The Money and the Power*, and even a partnership with the makers of Vitamin Water. The diversity and success of these ventures signal that 50 Cent has succeeded as an identity entrepreneur.

### III. CRITIQUING IDENTITY ENTREPRENEURSHIP

Systems of identity capitalism created and maintained by identity in-groups present difficult challenges for members of identity out-groups. When in-group members control these overarching systems, they often control the terms of participation in identity entrepreneurship.

This Section considers how identity entrepreneurship is beneficial and how it is detrimental. The phenomenon is complex, and I ultimately conclude that identity entrepreneurship and the identity commodification it entails cannot be classified as either good or bad. Rather, identity entrepreneurship places in sharp relief what Margaret Radin has called the transition problem: in a perfect society, we would not commodify identity, but given that we live in an imperfect society, an immediate decommodification of all identity would reinforce existing inequality and suffering.

This Section begins by detailing the harms and benefits associated with identity entrepreneurship, considering how the fact that both are important considerations creates tension between competing objectives for many identity entrepreneurs. The Section then concludes by offering a way of reconciling the tension that prioritizes agency, information, and progress toward the long-term decommodification of identity.

#### A. Harms

Out-group identity entrepreneurship is a risky proposition—one often fraught with peril. Part III.A traces the harms that can ensue from leveraging one’s out-group identity to derive benefits from the in-group. Leveraging identity can reinforce in-group preferences regarding out-group identity, especially considering that such preferences generally assign greater value to favored identities. It can also cause divisions between out-group members who choose to leverage identity for personal gain and those who do not or cannot. Indeed, identity entrepreneurship inevitably affects more than the individual who engages in it, given that the fates of those perceived as members of the same out-group are intertwined.

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1. Reinforcing In-group Preferences

Leveraging identity to derive value renders out-group members vulnerable to in-group preferences. Out-group identity is more valuable if it conforms to these preferences, which distorts incentives for out-group identity performance and privileges certain identity performances over others. We laugh when Homer Simpson says, “You know me, Marge. I like my beer cold, my TV loud, and my homosexuals flaming.”187 But there is a reason that Homer, something of an everyman, prefers gay men who act in a stereotypical way.

Such in-group preferences apply to many out-group identity categories. Consider, for example, Asa Akira, in addition to the well-known gay entertainer Carson Kressley. Akira’s literal performance in her films, in addition to her identity performance in her closely linked “real life” persona, communicate her conformity to stereotypes of hypersexuality and submissiveness.188 Without communicating these traits, her career would be less successful. Likewise, Kressley’s homosexual flamboyance is central to his brand.189 Were he to start wearing pleated-front khaki pants and bland button-down shirts, his popularity and fame would diminish, at least if he continued to pursue a career in an industry related to fashion. In other words, in-groups expect certain things from Asian women and gay men; when they fail to meet those expectations, the in-group withholds rewards. As Chris Rock observes, there is a dearth of black people in the entertainment industry, and “the black people they do hire tend to be the same person.”190

The incentive that in-group preferences create for identity entrepreneurs engenders fetishism. Fetishism may not be an entirely bad thing—as Phyllis Rose explains, “[c]ompared with racism, exoticism is merely decorative and superficial”—yet fetishism is still undesirable. Rose also states: “If one is to be treated as a thing, one would rather be treated as a rare and pretty thing than as a disgusting or dangerous one. But that is still to be treated as a thing.”192 And identity entrepreneurship can create a cycle that both privileges in-group preferences and reifies the stereotypes the in-group holds. Because Asa Akira is successful, Asian women entering the adult film industry are more likely to model their self-presentation after hers. Because 50 Cent is successful, more young black men who wish to enter the music industry will pattern themselves after him. In both instances, in-group preferences dictate the payoff for identity entrepreneurs and thereby shape the identity performances that result.

187. The Simpsons: Homer’s Phobia (Fox Network television broadcast Feb. 16, 1997).
188. Supra Part II.C.2.
192. Id.
Identity entrepreneurs are particularly likely to enhance the vulnerability of their out-group with respect to individuals who are intersectionally disadvantaged—for example, individuals who are out-group members with respect to both race and gender, or with respect to both race and sexual orientation.\textsuperscript{193} The marginalization of black gay men provides one such example. Eddie Murphy’s highly successful comedy routines often display rampant homophobia for laughs, as when Murphy says: “I’m afraid of gay people. Petrified. I have nightmares about gay people.”\textsuperscript{194} Likewise, black gay men are routinely excoriated in rap and hip-hop, with rampant use of the word “faggot” bringing about its normalization.\textsuperscript{195} Patrick Johnson has examined the homophobic elements of many black entertainers’ performances, explaining that “behind the laughs lurks a black tragedy of major proportions: the refusal of white and black America to entertain seriously new stylistic options for black men caught in the deadly endeavor of rejecting black machismo identities.”\textsuperscript{196}

Identity entrepreneurship also burdens out-group members who grow tired of providing identity value in a particular way. Consider the popular notion that every straight woman needs a gay best friend, one fueled by television and movies such as My Best Friend’s Wedding, Will and Grace, and Sex and the City, as well as by innumerable articles.\textsuperscript{197} “A gay best friend adds more value to your life than anybody else,”\textsuperscript{198} one insists. Indeed, the phenomenon has become a topic for scholarly investigation, with a recent study finding that women with more gay friends feel more sexually attractive.\textsuperscript{199}

A number of gay men have leveraged the gay best friend trope for their own gain. Kressley, for example, first gained national attention as the “Fashion

\textsuperscript{193} Cf. Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241 (1991) (positing that black women are marginalized in the discourse on violence against women because of their race-gender intersectional identity).

\textsuperscript{194} EDDIE MURPHY: DELIRIOUS (Eddie Murphy Productions 1983).


Savant” on five seasons of *Queer Eye for the Straight Guy*, where he became famous for delivering lines that made salient a stereotyped version of gay identity. A small sampling includes: “You don’t have a complete inventory of all your couture?”; “The only thing that separates us from the heterosexuals is our ability to accessorize”; and “We can either clean this place or sing show tunes!”

Kressley’s entrepreneurial efforts were successful. Nevertheless, other gay men grow weary of playing the “best friend” role, and the existence of identity entrepreneurs can make it more difficult for out-group members to quell in-group expectations. Mark Pampanin recently gave a TED talk about the dehumanizing effect of being treated as “an adorable accessory for lonely straight girls,” or, more succinctly, a “pet homosexual.”

As a commenter on a gay news site put it:

> Women that collect us like fashion accessories are sort of fun when you’re in that stage of your life, but now kind of make me sick. They assume that every gay man is just there to hang on their arm... We do, for some reason, make them feel very attractive and progressive and cosmopolitan.

Thus, by playing along with in-group desires and preferences, identity entrepreneurs may increase their own social or economic standing, but they potentially do so at the expense of other members of their out-group who are unable or unwilling to leverage their identities in the same way.

2. **Dividing Out-group Members**

Identity entrepreneurship also creates divisions among out-group members. Such division can occur in several ways. First, out-group members may inherently disapprove of the entrepreneurship altogether, believing that leveraging identity in pursuit of personal gain inherently harms other out-group members. The phenomenon of out-group disapproval is closely linked to the much-maligned subset of identity entrepreneurship that Randall Kennedy has described as “selling out.”

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200. *Queer Eye* itself became a cultural icon. The show was immensely popular, peaking at 3.3 million viewers per episode. It also earned critical acclaim, winning an Emmy in 2004 and another nomination in 2005. *Out* magazine listed the Fab Five in its “OUT 100,” the “greatest gay success stories” of 2003. *The Out 100*, OUT, Dec. 2003, at 89.


205. See, e.g., supra notes 75–79.
Examples of selling out transcend identity categories. Clarence Thomas is a paradigmatic example; an entire body of literature examines whether he is a sellout, a race traitor, an embattled leader, or some combination of these things.\(^\text{206}\) It is unclear whether Thomas regards himself an identity entrepreneur, but one can argue that he fits the definition, as he has made his identity salient to the in-group and has reaped rewards as a result. Yet Thomas, as an individual, has also paid a price for his identity entrepreneurship. He is widely excoriated by other blacks and was scornfully dismissed as a puppet of Antonin Scalia.\(^\text{207}\) KRS-One speaks for many blacks when he raps:

The white man ain’t the devil I promise
You want to see the devil, take a look at Clarence Thomas.\(^\text{208}\)

Second, identity entrepreneurship fractures out-group solidarity. When out-group members leverage identity, in-group members create castes of out-group members by valuing some out-group identities more highly than others. This creates a hierarchy in which out-group members who perform a version of identity preferred by the in-group accrue greater social standing than those who refuse to do so.

One consequence of this stratification is that it intensifies the pressure on out-group members to determine the “right” way of performing identity.\(^\text{209}\) Negotiating identity performance becomes even more complex when some identities come with rewards and others do not. Consider stereotypically fashionable gay men such as Kressley. Some gay men celebrate Kressley’s success and take as validating his acceptance in mainstream culture.\(^\text{210}\) Others disagree, arguing that his flamboyance caricatures gay culture, fostering in-group confusion—recall The Onion’s satirical headline, “Gay-Pride Parade Sets Mainstream Acceptance of Gays Back 50 Years”\(^\text{211}\)—and marginalizes gay men who choose to perform their identity in other ways.\(^\text{212}\) Michael Warner has


\(^{208}\) Build and Destroy, in SEX AND VIOLENCE (Boogie Down Productions 1992).

\(^{209}\) Carbado & Gulati, supra note 93, at 1262.


\(^{212}\) Here and Now, supra note 210.
argued that these efforts to assimilate and please mainstream, straight America have repercussions far beyond the fashion runway, with concomitant pressures for gay men to adopt lifestyles essentially indistinguishable from those of mainstream straight couples. As such, tailoring identity performance to the preferences of the majority is a slippery slope from harmless displays of stylishness to conventional marital relationships and houses in the suburbs.

Identity entrepreneurs also create internal divisions within the entrepreneur’s out-group. Rap and hip-hop remain a source of strong disagreement among black people. Some embrace the genre and find it empowering, emphasizing the benefits of material success and fame, the ability to give back to the out-group, and the psychological benefits of profiting from the in-group. Others argue that the genre perpetuates stereotypes of black culture as violent, promotes sexism and homophobia, and offers yet another opportunity for white people to profit from black creativity. Identity entrepreneurship thus fractures out-groups, causing dissonance in communities already vulnerable to seeds of discontent sown by calculating members of in-groups.

Third, divisions created by identity entrepreneurship also create opportunities for in-groups to criticize out-groups for their disunity and to dismiss the positions of identity caucuses on the ground that they don’t speak for an out-group as a whole. For instance, white people who reject affirmative action often point to Justice Thomas as evidence that their opinion is correct. The same is true with respect to the death penalty and other aspects of the criminal justice system that disproportionately affect black people.

Finally, identity entrepreneurship also creates divisions between different out-groups. Asian Americans, for example, are often held up as model minorities and used as a tool to critique other racial groups. As Frank Chin puts it: “Whites love us because we’re not black.” The prospect of out-group divisions sometimes facilitates exploitation by the racial in-group. In the ongoing debate over affirmative action, for example, mostly-white opponents of affirmative action have attempted to frame affirmative action as a practice that advantages blacks and Latinas/os at the expense of Asian Americans.

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215. Id.
216. In so doing they engage in racial capitalism by deriving value from attaching an anti-affirmative action stance to a black person. See generally Leong, Racial Capitalism, supra note 6, at 2174 (defining racial capitalism as “the process by which people and institutions derive and appropriate surplus racial value”).
Although, as I have discussed, the purported disadvantage to Asian Americans is largely pretextual, it has gained traction with some Asian American groups.\(^ {219} \)

Identity entrepreneurship is complex, as illuminated by out-group discomfort and ambivalence regarding identity entrepreneurs.

3. \textit{Perpetuating Group Subordination}

As much as some may wish to believe otherwise, individual identity entrepreneurship does not occur in a vacuum. One person’s decision to leverage identity affects those around him. Sarah Palin’s performance of gender identity affects the way that people, particularly men, view women politicians. Asa Akira’s performance of Asian female identity affects the way that people, particularly white men and non-Asians of all races, think about Asian women’s sexuality.\(^ {220} \) And 50 Cent’s performance of a particular kind of black masculinity affects the way that black men are perceived more generally.

Researchers have documented this phenomenon, commonly known as linked fate—the notion that the behavior of out-group members inevitably affects the behavior of other out-group members, and that the group as a whole affects the fates of individual out-group members. Considerable research indicates that out-group members believe that their own fortunes are linked to those of others who share their identity characteristics,\(^ {221} \) and other research suggests that this is true.\(^ {222} \) As Mari Matsuda has written, “no person is free until the last and the least of us is free.”\(^ {223} \)

Moreover, linked fate influences deeply held stereotypes about out-group members. Identity entrepreneurs provide readily accessible material that creates or reinforces stereotypes about groups. When Asa Akira presents an image of Asian female submissiveness and hypersexuality, consumers of her films—particularly those who have minimal firsthand contact with Asian women—may accept as true the image she portrays. Although Akira’s portrayal of her

\begin{footnotes}
\footnote{219. \textit{Id.} at 92–95.}


\end{footnotes}
Identity may ring true for her, others may interpret it as not only true for Akira, but true for Asian women in general.

Identity entrepreneurship thus occupies discursive space and crowds out other portrayals that are more fragile because they are not already buttressed by stereotypes and rewarded by the in-group. These stereotyped portrayals sometimes yield benefits, including but not limited to financial success by out-group members, visibility of successful out-group members, and in-group familiarization with some members of the out-group. The latter two, in particular, can have important debiasing effects.\textsuperscript{224}

Yet such portrayals also frequently freeze identity in a way that perpetuates subordination, both for the identity entrepreneur and for those out-group members not like him. For the identity entrepreneur, the subordination arises from the contingencies placed on his identity reward. In order to keep making money, 50 Cent has to keep dressing, behaving, and rapping in a way that pleases the young middle- and upper-middle-class white men who comprise his fan base, as well as the white male executives who have a stake in his record label. By tethering his financial success to the desires of a racial in-group, 50 Cent allows that group to have a stake in his identity.

The subordination is both more straightforward and more sweeping for the person who resists identity entrepreneurship. Suppose that a black man from an urban neighborhood prefers rock music and attempts to form an alternative rock band. Many people will find it difficult to think of black rock musicians in recent memory,\textsuperscript{225} and such a band does not appear to satisfy the tastes of America. “It looks wrong,” people say. That’s because they expect something else, and identity entrepreneurship only reinforces that expectation.

By conditioning many prospects—financial, artistic, and otherwise—on out-group members’ compliance with in-group expectations, identity entrepreneurship limits out-group members’ opportunities for development as human individuals. These constraints are a form of subordination that in-group members do not experience.

\textbf{B. Benefits}

Identity entrepreneurship also has benefits. This Section discusses the ways that identity entrepreneurship sometimes benefits both individuals and groups. It affirms agency, confirming that out-group members have the ability

\textsuperscript{224} See Bartlett, supra note 134.

to act in ways that they choose—even if we might not like their choices. Also, by conferring power in the form of money, influence, or both on identity entrepreneurs, it can and does provide tangible material benefits to individual out-group members and sometimes to out-groups as a whole.

1. Protecting Autonomy

For some identity entrepreneurs, commodification of identity represents an affirmative decision to leverage out-group identity for personal gain. This exercise of agency implicates important concerns regarding dignity and autonomy. A substantial psychological literature, for example, has documented the considerable psychological benefits associated with agency and self-determination. We cannot dismiss these concerns lightly. In addition to benefitting identity entrepreneurs who exercise agency, agency itself has social value. First, identity entrepreneurship prompts discourse regarding identity. Triggered by instances of entrepreneurship, in-group and out-group members can have productive conversations about what identity does and should mean. As bell hooks explains in the context of feminist discourse: “I believe feminist thinking is enriched by dissent. Opposing viewpoints should not be censored, silenced, or punished in any way.” Thus, hooks’s point is that the “concrete practice of contestation” actually strengthens the bonds among out-group members and that shared commitment to discourse in the face of disagreement produces a better world for all manifestations of identity.

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


228. Id.


Consider, for example, the small but growing number of rappers who present challenges to the strictures of the genre. Some men differentiate themselves by race. Some women adopt the attitudes of black male rappers, challenging the genre primarily through their presence without serious social commentary. Others critique rap culture through their music. Still others offer broader social commentary, often through a challenging and controversial lens of femininity and sexuality. Some artists critique rap music as the province of black men, challenging the genre through their presence as white women and the themes of their music. And some—while difficult to categorize—challenge preconceptions of heterosexuality and machismo.

Although one might dispute the musical merit of any or all of these artists, they are nonetheless engaged in a particular kind of identity entrepreneurship. One of the commodities they are selling is novelty. That is, the identity entrepreneurship that results in stereotypical rap music simultaneously creates a market for rap music that reacts to, or challenges, those stereotypes. Perhaps the non-stereotypical artists will not gain the same level of commercial success as the stereotypical artists. As I have discussed elsewhere, engaging in cultural dissent in a manner palatable to the in-group tends to yield greater material rewards than dissent in a manner that challenges in-group preferences. But such work nonetheless gains space and voice as a result of more traditional identity entrepreneurship.


233. See, e.g., NAS, HIP HOP IS DEAD (Def Jam Recordings 2006) (critiquing hip-hop music industry).


237. Leong, Dissenting In and Dissenting Out, supra note 6.
2. Material Gains by the Out-group

Commodification of out-group identity yields tangible material benefits to out-group identity entrepreneurs.238 Out-groups sometimes fantasize about the good identity entrepreneur, one who works his way up to a position of power and security and then uses his power to benefit other out-group members. An In Living Color sketch about Clarence Thomas at his first Supreme Court conference captures this fantasy. During the sketch, Thomas is initially obsequious, refilling the other Justices’ coffee, inviting them to call him by his first name, and agreeing on cases. Midway through the sketch, however, he realizes, “Wait a minute—I have this job for the rest of my life?” He smiles, leans back, crosses his ankles on the table, and announces with authority: “This is clearly a case of police brutality!”239 The skit, of course, bears no resemblance to reality. But it reveals the fantasy of millions of nonwhite Americans who would like to believe that Thomas agreed with their views on affirmative action, discrimination, immigration, and criminal justice—that is, it reveals the fantasy of the double-agent identity entrepreneur.

There are, however, real examples of identity entrepreneurs who devote considerable time to leveraging identity to place themselves in a position of wealth and power, and who then use their resources to help the out-groups of which they are members. 50 Cent, for example, has engaged in a range of charity projects. Many are tied to his G-Unity Foundation, which, until 50 Cent’s recent financial troubles, gave out college grants, fostered community gardens and other community improvement measures, and provided grants to nonprofit organizations that work directly on issues affecting urban communities.240 The foundation’s other projects have provided food to needy children both in the United States and in Africa.241

Even for those who do not explicitly act to elevate the out-group, there is a benefit to the out-group simply in having wealthy or powerful members. Regardless whether Sarah Palin helps other women politicians and leaders, it is good for Americans to see a woman candidate for a prominent political office. Regardless whether 50 Cent “gives back” to poor urban black communities, it is good for a black man to get rich. Seeing powerful women and rich black men normalizes those identities, which increases the ease with which future out-

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241. Kanani, supra note 240.
group members—perhaps more philanthropically minded ones—can fit into spaces previously reserved exclusively for members of identity in-groups.

3. Facilitating Social Progress

Identity entrepreneurs can also facilitate broader social progress.\textsuperscript{242} First, normalizing the presence of rich and powerful out-group members not only helps the out-group; it also helps to shape the way the in-group perceives the out-group. As Katherine Bartlett has explained in the employment context, the practice of showcasing out-group leadership can end up improving the in-group’s opinions of the out-group.\textsuperscript{243} Moreover, the improved perception of out-group members can occur regardless of whether the employer is engaging cynically in identity capitalism or whether the employer is sincerely attempting to improve working conditions for out-group members. Either way, the out-group member has the opportunity to break down individual in-group members’ conscious or unconscious prejudices.

Likewise, by gaining positions of prominence, out-group members can provide access and support for other members of the out-group. In a lengthy essay on people of color in the entertainment industry, Chris Rock described how Eddie Murphy helped him, and how he, in turn, has tried to help other black aspiring comedians:

I try to help young black guys coming up because . . . people took chances on me . . . I’d do the same for a young white guy, but here’s the difference: Someone’s going to help the white guy. Multiple people will. The people whom I’ve tried to help, I’m not sure anybody was going to help them.\textsuperscript{244} Rock’s description of his strategy suggests progress: it replaces identity entrepreneurship—with the corresponding necessity of tailoring one’s self-presentation to the preferences of white people—with a more balanced form of social capital. With more people like Chris Rock, gradually both black and white comedians will have people in the entertainment industry who identify with their experiences and who are correspondingly willing to help them get their first break.

And finally, out-group members who reach positions of power and prominence inspire other members of their out-group to do the same, even if the already-successful out-group members do nothing specific to mentor others. Simply seeing people gain power who are similar to them in important ways may encourage out-group members. For example, researchers found that a substantial performance gap between black and white participants on a

\textsuperscript{242} Of course, they may simultaneously inhibit social progress in other ways. See supra Part III.A.

\textsuperscript{243} Bartlett, supra note 134.

\textsuperscript{244} Rock, supra note 190.
The bare instance of witnessing success has the capacity to breed more success.

C. A Way Forward

As the previous Sections demonstrate, there are both positive and negative consequences to identity entrepreneurship. As a result, identity entrepreneurs walk a fine line. As Peter Beinart puts it: “[B]eing the ‘good’ black is tricky. The more whites love you, the more you must reassure your own community that you are still one of them. And the more you do that, the more you jeopardize your white support.” If our goal is progress from our imperfect world toward a better one, then the difficult reality is that some forms of identity entrepreneurship are helpful, and others are not. On the one hand, individual agency and autonomy deserve respect; constraining identity performance furthers neither of these things. Put another way, who am I—or who is anyone—to say that 50 Cent is doing black culture the “wrong” way? On the other hand, those of us who wish to facilitate progress toward racial equality face the reality that some identity entrepreneurs profit from leveraging out-group identities while inflicting real harms to the very out-group from which they benefit. Put another way, who am I—or who is anyone—to deny that Tyler Perry’s movies reinforce harmful stereotypes about black people?

In charting a way forward, those who create law and policy should contemplate two competing considerations. The first is the importance of respecting the individuality, autonomy, and agency of individual members of out-groups. The second is the desire to minimize harm to out-groups resulting from identity entrepreneurship that constrains identity options. Such entrepreneurship reinforces the idea that some versions of identity performance are superior to others and should be rewarded accordingly.

Ultimately, our legal doctrines and social policies relating to identity entrepreneurship should be governed by the following principles. First, doctrine and policy should respect individual agency. Second, doctrine and policy should encourage informed decision making—that is, choices about identity entrepreneurship should be made with an understanding of how those choices affect individuals, groups, and society. And finally, doctrine and policy should be evaluated according to whether they ultimately promote social progress toward a world in which identity is not a commodity and identity entrepreneurship is therefore irrelevant. The next Section offers several concrete ways to instantiate the correct approach to identity entrepreneurship in our legal doctrines.


247. See KENNEDY, supra note 70, at 9–10.
IV.
LEGAL INTERVENTION IN IDENTITY ENTREPRENEURSHIP

The law cannot solve every social problem. Many of the issues I have described are woven into the fabric of our society over generations. Improving upon the status quo requires work by individuals, families, workplaces, communities, and leaders at every level of government.

Nonetheless, many legal doctrines interact with and influence the process of identity entrepreneurship. As a result, the law has the power to encourage certain instances of identity entrepreneurship and shape the social response. To the extent that identity capitalism concerns us—and to the extent that we wish to discourage some forms of out-group member participation while encouraging others—I want to present an optimistic view of doctrinal reform as a mechanism for promoting certain forms of identity entrepreneurship. In particular, doctrine can protect out-group members’ agency while promoting informed decision making. Reforms accomplish these goals either by improving access to information about the consequences of identity entrepreneurship or simply by better protecting identity entrepreneurship, thus providing stronger incentives for out-group members to learn about its consequences.248

To that end, this Section first undertakes a detailed case study of employment discrimination claims under Title VII, considering the way identity entrepreneurship intersects with existing doctrine. This Section then considers how doctrine ought to be improved to promote identity entrepreneurship that furthers the equality project while avoiding incentives for the type of identity entrepreneurship that entrenches inequality. Following this detailed case study, the Article also briefly surveys a few of the many other areas of the law that intersect with identity entrepreneurship. It considers the tort doctrines of right of privacy and publicity, copyright, and the right of expressive association. This is by no means an exhaustive list, and my examination of each of these doctrines will be impressionistic rather than comprehensive, primarily designed to communicate the breadth of the relationship between identity entrepreneurship and the law.249

248. In some instances, I do not specifically describe the way that a particular doctrinal reform promotes full information; rather, the point is that when a reform provides more robust protection for identity entrepreneurship, entrepreneurs then have good incentives to seek out information about the consequences of their behavior.

249. My goal in this relatively brief discussion is not to solve every legal obstacle to my doctrinal proposals, and I acknowledge that some would represent substantial modification of existing doctrines. In future work, I will explore various legal applications of identity entrepreneurship in more detail.
A. A Case Study: Title VII

Identity entrepreneurship occurs in the workplace in a number of ways. Some workers become identity entrepreneurs to gain favor with workplace in-groups, often by adopting identity performances that the in-group tends to reward. Others refuse to become identity entrepreneurs, resulting in unfavorable comparisons either to other employees or to idealized conceptions of how members of their identity group should comport themselves. These various manifestations of identity entrepreneurship can affect workers’ claims of discrimination on the basis of race, gender, and other identity categories protected by Title VII.

How should we address identity entrepreneurship in the workplace? I offer three concrete proposals designed to take into account the pressures out-group individuals feel in the workplace and the ways in which they might choose to respond to them. First, in sexual harassment suits, defendants should have to prove that an alleged harasser’s behavior was welcome, rather than plaintiffs bearing the burden of proving that it was not. Second, courts should consider the degree to which different workers have engaged in identity entrepreneurship in determining the extent to which they are similarly situated. And finally, the law should provide employers with incentives to offer more nuanced and thorough trainings in preventing harassment and discrimination in the first instance.

1. Welcomeness

Decades ago, the Supreme Court established that “[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’” Since then, a number of scholars have critiqued the requirement and suggested a range of reforms. Nonetheless, the “welcomeness” requirement persists and continues to preclude recovery by plaintiffs in many sexual harassment suits.

Sometimes identity entrepreneurship involves tolerating or even joining in the behavior of the in-group. In many instances, plaintiffs who are subjected to

252. See, e.g., Gerald v. Univ. of P.R., 707 F.3d 7, 17 (1st Cir. 2013) (reiterating welcomeness requirement).
hostile workplace environments initially play along, wishing to demonstrate that they can fit in and deal with jokes, not wanting to be “that person” who rocks the boat.\footnote{253} Such behavior often emerges in sexual harassment claims. Along these lines, Gillian Flynn explains the phenomenon of the “Cool Girl”:

Men always say that as the defining compliment, don’t they? She’s a cool girl. Being the Cool Girl means I am a hot, brilliant, funny woman who adores football, poker, dirty jokes, and burping, who plays video games, drinks cheap beer, loves threesomes and anal sex, and jams hot dogs and hamburgers into her mouth like she’s hosting the world’s biggest culinary gang bang while somehow maintaining a size 2, because Cool Girls are above all hot. Hot and understanding. Cool Girls never get angry. . . . [The] Cool Girl . . . is basically the girl who likes every fucking thing [a man] likes and doesn’t ever complain. . . . Go ahead, shit on me, I don’t mind, I’m the Cool Girl.\footnote{254}

While Flynn is primarily talking about relationships, her description of the Cool Girl applies to the workplace as well. Women who fit in with the guys—as one commentator puts it, the Cool Girl is essentially “a dude in a hot girl’s body”\footnote{255}—are rewarded.\footnote{256} Those who complain about workplace dynamics are labeled “feminazis” and ostracized.\footnote{257}

Many women aspire to be the Cool Girl without considering exactly why.\footnote{258} Others—the identity entrepreneurs—deliberately leverage the ideal of the attractive, intelligent, tolerant woman who laughs at questionable jokes—thereby giving such jokes undeserved legitimacy—and use their Cool Girl status to advance in the workplace.\footnote{259}

Or at least they try. Unsurprisingly, Title VII cases reveal many attempts to be the Cool Girl. Myriad sexual harassment cases involve situations in which

\footnote{253. See Carbado & Gulati, supra note 93, at 1263, 1294–95.}
\footnote{254. GILLIAN FLYNN, GONE GIRL 222–23 (2013).}
\footnote{257. See, e.g., Rhonda Reaves, Retaliatory Harassment: Sex and the Hostile Coworker as the Enforcer of Workplace Norms, 2007 MICH. ST. L. REV. 403 (discussing cases involving ostracism at work following complaints of workplace sexual harassment); Howard Zimmerle, Common Sense v. EEOC: Ostracism and Shunning as Retaliation Under Title VII, J. CORP. L. (2005) (same).}
\footnote{259. Cf. Coffey, supra note 258; Petersen, supra note 258. Of course, it is difficult to identify whether a specific “Cool Girl” is leveraging identity consciously or unconsciously.
In keeping with the Supreme Court’s decision in Meritor, courts frequently hold that Cool Girls cannot recover under Title VII because they “welcomed” the questionable behavior by tolerating it, encouraging it, or even participating in it. In Mangrum v. Republic Industries, the court held that the plaintiff could not recover because she “participated in and, in some instances, initiated inappropriate language and activity.”

The plaintiff acknowledged that she hugged the coworker about whom she eventually complained, gave him back rubs, and “continued to participate in the sexual banter common in the workplace.” She tried to take his actions “with a grain of salt and went on unless I got mad at him and said, pervert why don’t you leave me alone . . . normally I’d just, you know, ha, ha, kept going . . . laugh[ ] it off and went on with it, just let it go.”

Letting it go and not getting angry is the hallmark of a Cool Girl identity entrepreneur. But it’s also the hallmark of a losing Title VII plaintiff.

The list of Cool Girls turned Title VII losers is a long one. In Scusa v. Nestle U.S.A., the plaintiff failed to demonstrate that conduct was unwelcome because she “engaged in behavior similar to that which she claimed was unwelcome and offensive,” including yelling at coworkers and using foul language in the workplace.

In Pittman v. Continental Airlines, the plaintiff failed to demonstrate unwelcomeseness because she flirted with coworkers, engaged in sexual banter, and asked a coworker if he was gay.

In Balletti v. Sun-Sentinel Company, the plaintiff failed to demonstrate unwelcomeseness when she participated in name-calling, swearing, attempts to pull down a male coworker’s pants, and bragging to coworkers about her sexual activities at the workplace.

In Marshall v. Nelson Electric, the court found that the plaintiff had not demonstrated unwelcomeseness when she was a “leading participant” in a “sexually charged environment” given that she used “dirty talk” in the workplace and asked coworkers about their sexual activities.

In Tindall v. Houston Authority of Fort Smith, the plaintiff failed to demonstrate unwelcomeseness because she acted like “one of the boys’ and freely joined in sexual jokes with the men” — a textbook definition of Cool Girl behavior.

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260. See, e.g., Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (finding against a plaintiff in a harassment suit after she initially accepted a lunch date with a coworker and told her supervisor she wanted to handle the situation herself).


262. Id. at 1241, 1253.

263. Id. at 1241 (omissions and alteration in original).

264. 181 F.3d 958, 966 (8th Cir. 1999).


Of course, no discussion of the Cool Girl would be complete without a discussion of Reed v. Shepard, in which the plaintiff used profanity, told off-color jokes, engaged in sexual horseplay and flirting, and failed to wear a bra underneath her T-shirt—which meant that she did not prevail in her suit even after alleging that:

[S]he was handcuffed to the drunk tank and sally port doors, that she was subjected to suggestive remarks . . . , that conversations often centered around oral sex, that she was physically hit and punched in the kidneys, that her head was grabbed and forcefully placed in members’ laps, and that she was the subject of lewd jokes and remarks. She testified that she had chairs pulled out from under her, a cattle prod with an electrical shock was placed between her legs, and that they frequently tickled her. She was placed in a laundry basket, handcuffed inside an elevator, handcuffed to the toilet and her face pushed into the water, and maced.269

As Vicki Schultz explains: “The Seventh Circuit’s analysis simultaneously professed its own horror at Reed’s coworkers’ activities and placed Reed herself outside the community of women deemed capable of being harmed by such horrific treatment” because she had “participated in sexualizing the atmosphere”—even if, as she testified, she did so “because she felt pressure to do so in order to be accepted.”270

My point is not necessarily that all of these plaintiffs deserved to win. My point is that because these women were identity entrepreneurs—because they matched their behavior to the existing workplace culture and the preferences of the in-group, or at least what they thought were the preferences of the in-group—they were guaranteed to lose. Schultz explains: “To conform to the image of the proper victim, women must comport themselves as sexually pure, even passive, beings who have been violated by their coworkers’ sexual predation.”271 But the incentives the in-group created in-group lead to exactly the opposite motivation for identity entrepreneurs.

Occasionally, Cool Girl plaintiffs do win. In Ladner v. Woodland Village Nursing Center, the plaintiff’s male supervisor allegedly pulled down her pants and underwear in front of coworkers, called sex chat lines in her presence, intentionally walked in on her in the bathroom, taped a large pair of underwear to her car, called her a “stupid bitch,” and “squirted cream into a glove like it was his penis ejaculating and rubbed it on the Plaintiff’s arm.”272 According to

269. 939 F.2d 484, 486–87, 491–92 (7th Cir. 1991) (punctuation altered for grammatical correctness).


271. Schultz, supra note 270, at 1732.

the defendant employer, the plaintiff “laughed at the incidents she complained of... and... refused to file any charges against those coworkers who perpetrated pranks on her”; likewise, a coworker stated that she “always thought the pranks went way too far, but [plaintiff] just went along with it, saying that was OK.” 273 But the coworker also stated: “I think that may have been her way of coping with the pranks.” 274 By smiling and tolerating some of this behavior—at least initially—perhaps Ladner was engaging in identity entrepreneurship, leveraging a version of feminine identity akin to Cool Girl. Yet the fact that she tried to make the best of her circumstances does not mean that the harms created by the harassment were any less serious. And sometimes courts recognize this pressure—here, by allowing Ladner to proceed with her suit—although generally only in cases where the harassing behavior was exceptionally severe. 275

While this Section is primarily focused on sexual harassment, it’s worth noting that the Cool Girl has a racial analog who faces similar doctrinal obstacles. It’s the minority who fits in with white people, who likes everything that his or her stereotypical white American counterpart likes, who laughs at questionable racial jokes, and who never, ever plays the race card. Perhaps some people of color exist for whom these activities are not actually identity entrepreneurship—they are not actively leveraging their identities, but rather just being themselves. 276 But for others, such behavior may be a conscious effort to fit into a racially charged workplace environment. Hints at such efforts appear in many cases. In Patel-Julson v. Paul Smith Las Vegas, for example, the plaintiff complained about hearing Tupac Shakur’s rap music containing the “n-word” played in the stockroom where she worked, but the court found her complaint suspect because she had never complained about the music

273. Id. at *2.
274. Id.
275. For another plaintiff who might have played the Cool Girl and won, see Smith v. City of New Smyrna Beach, 588 F. App’x 965 (11th Cir. 2014), in which the plaintiff, a female firefighter, underwent severe harassment at the hands of her coworkers and supervisors for over four years. When Smith was first hired, the city’s first female lieutenant offered advice which included “[k]eep your head down and your mouth shut” and “[b]e smart about the actions you take, and you’ll get through this, but it’s going to be difficult.” Id. at 968. This advice is, essentially, to be a species of Cool Girl—one who doesn’t complain, one who doesn’t get angry.

276. A more complicated question is what it means to “be oneself” in a society infected by inequality from day one. We might argue that everyone is leveraging identity in some ways, however subtle, even if they sincerely believe they are not. Indeed, this is the subject of debate between Kenji Yoshino and Richard Ford, and to a certain degree Richard Ford and myself. Cf. Yoshino, supra note 26; YOSHINO, supra note 93; RICHARD FORD, RACIAL CULTURE (2005); Richard Thompson Ford, Capitalize on Race and Invest in Justice, 126 HARV. L. REV. F. 252, 257 (2013); Nancy Leong, Reflections on Racial Capitalism, 127 HARV. L. REV. F. 32, 38 (2013). For purposes of this Article, I need not fully resolve this question. Rather, I will assume without deciding that perhaps some people really are born that way—that they are Cool Girls, or that they are nonwhite in appearance only—although I am not necessarily convinced that this is so.
before and had even asked a coworker to burn her a copy of one of Shakur’s songs.\footnote{Patel-Julson v. Paul Smith Las Vegas, Inc., 2015 WL 355480, at *6 (D. Nev. Jan. 27, 2015).}

The incentives to engage in such performances are so powerful that employers, supervisors, and coworkers should not assume that someone who is playing along welcomes otherwise inappropriate behavior. As a result, courts should revise their interpretation of Title VII and shift the burden from the plaintiff to prove unwelcomeness to the defendant to prove welcomeness.\footnote{Alternatively, Congress could amend Title VII to make this change explicit in the statute.} In keeping with this burden, judges should not view playing along as anything other than ambiguous evidence. The intervention I describe would better capture the experience of navigating the workplaces as an outsider, including the decision to engage in forms of identity entrepreneurship.

2. Comparators

Plaintiffs are not only disadvantaged by engaging in identity entrepreneurship, but are also in some instances punished for failing to engage in identity entrepreneurship when they do not behave as their supervisors and coworkers think they should; or, in some instances, as their more entrepreneurial coworkers have. As a result, even when two workers are the same race, gender, identity category, or combination of identity categories, their decisions regarding identity performance—and, more specifically, identity entrepreneurship—may lead to one worker being treated more favorably than the other.\footnote{Devon Carbado & Mitu Gulati, The Fifth Black Woman, 11 J. CONTEMP. LEGAL ISSUES 701, 714–26 (2001).}

In Soto v. John Morrell and Company, for example, the plaintiff describes how a supervisor gave longer breaks and other advantages “to those employees who went along with his harassment.”\footnote{285 F. Supp. 2d 1146, 1160, 1171 (N.D. Iowa 2003).} In her words: “[Sida] would wear sexy clothes to work and then she could miss any day or go home early. Tanner [the supervisor] wouldn’t even care.”\footnote{Id. at 1171.} On one occasion when the plaintiff was ill and went home early, Tanner became angry with her, and Sida allegedly said: “[O]h honey all you got to do is give Tanner a hug and a kiss and he will never tell you nothing. That’s what I do and he’ll just melt.”\footnote{Id.} In this situation, the plaintiff was punished for failing to leverage her femininity in the manner encouraged and rewarded by a male in-group member and the workplace structures that supported him.

Similarly, in Lopez v. Aramark Uniform and Career Apparel, Inc., resistance by two plaintiffs (Lopez and Villalpando) to a supervisor’s sexual advances led to worse treatment by their supervisor, Tomoson, and an overall
worse work environment. As the court explained, Lopez’s resistance to the supervisor’s behavior “polarized her from the remainder of the employees who acquiesced to Tomoson’s advances.” For example, “[t]he coworkers who did not object to Tomoson’s actions were often referred to as his ‘pets,’ and were permitted to leave for break early and return late. Additionally, Tomoson’s ‘pets’ were assigned easier job duties.” Likewise, “[a]t one point, Tomoson attempted to pick Villalpando up and grabbed her underneath her breasts from behind.” When Villalpando objected, “Tomoson instead picked Espinoza up and said, ‘Look, Yesenia doesn’t get mad.’” Further, Villalpando’s refusal to acquiesce to Tomoson’s advances had a negative effect on her relationships with her coworkers designated as “pets,” who teased her, spoke to her rudely and aggressively, began calling her “Chuckie with the big boobs,” and even scratched her in a physical altercation. In short, those who acquiesced to Tomoson’s advances—who engaged in identity entrepreneurship—were rewarded, and those who resisted were punished.

Recent events reveal a similar pattern. The pop star Kesha recently filed suit against producer Dr. Luke—born Lukasz Gottwald—alleging sexual harassment that resulted in serious harm to her mental and emotional health as well as to her career. In ruling against Kesha, the judge stated that “[t]here are no facts to support Gottwald’s animus toward women.” He explained: “Gottwald is alleged to have made offensive remarks about Kesha’s weight, appearance, and talent, not about women in general.” In other words, Gottwald didn’t dislike women: rather, he disliked Kesha’s particular identity performance in light of her role as a young female pop star.

Race discrimination cases reveal a similar pattern. When someone presents her racial identity in a way that provokes in-group disapproval, she may be punished even if other members of her identity group present their racial identities in ways deemed more acceptable. As one example, Bryant v. Begin Manage Program describes how a black supervisor terminated the plaintiff because he didn’t like the way the plaintiff performed her black identity. She alleged “that her employment was terminated and that she was
denied a transfer” because she “was not sufficiently ‘Afrocentric’” and because of her lighter skin color. In one encounter, her supervisor referred critically to the plaintiff’s blond hair and called her a “want to be,” which she described as “a common phrase in the black community” used to refer to someone who wants to be white.\textsuperscript{291}

Thus, when determining whether a plaintiff is similarly situated to others for purposes of discerning discrimination—in Title VII parlance, when determining the set of appropriate “comparators” to the plaintiff—courts should take into account different decisions relating to identity entrepreneurship. While I am not necessarily advocating the view that a black woman who engages in identity entrepreneurship is no longer “similarly situated” to one who does not, courts need to acknowledge that in many workplaces, identity entrepreneurship may create relevant differences between two members of the same identity category that warrant a more searching inquiry into whether they are appropriate comparators. Women who leverage an identity pleasing to male in-group members, and who are subsequently promoted at the same rate as men, don’t demonstrate that the workplace was free from gender discrimination against certain women. Courts should take account of these differences in evaluating whether someone provides an appropriate comparator.

3. Immunity

Finally, I advocate that employers should incorporate robust training about identity entrepreneurship into workplace diversity training. Moreover, we should provide employers with incentives for doing so by offering a carefully circumscribed immunity for those who can demonstrate that their training meets a set of demanding requirements. Workplace training cannot end with platitudes such as “treat everyone equally” or “respect differences.” While of course these aims are laudable, they simply do not go far enough in educating white people about the challenges people of color face, or educating men about the challenges women face, or—bearing in mind Kimberlé Crenshaw’s groundbreaking work on intersectionality—educating white people and nonwhite men about the challenges women of color face.

In order to create these incentives, I propose that courts adopt a form of employer immunity analogous in some ways to the \textit{Faragher-Ellerth} doctrine.\textsuperscript{292} Under that doctrine, employers may assert an affirmative defense against claims of hostile workplace harassment if they have not taken adverse employment action against the plaintiff and if either (1) the employer exercised

\textsuperscript{291} Id. at 564–65.
reasonable care to prevent or correct the sexually harassing behavior, or (2) the plaintiff unreasonably failed to avoid harm.\textsuperscript{293}

I propose an expansion of this doctrine. In all claims of workplace discrimination under Title VII—whether based on hostile environment or otherwise—employers should be able to assert an affirmative defense to liability if they can show that they implemented and enforced a robust and ongoing\textsuperscript{294} program involving both training and supervision that covers the myriad ways that discrimination occurs in the workplace. Such training would include discussion of identity capitalism and identity entrepreneurship in order to better facilitate an understanding of the complex incentives at play in out-group individuals’ behavior. This would educate in-group members who might otherwise remain oblivious to such concerns and, more importantly for my purposes, would improve access to information about the consequences of identity entrepreneurship for out-group members.

I make this recommendation with great caution. Many will argue that the last thing Title VII doctrine needs is a modification that makes it more difficult for plaintiffs to recover; enormous hurdles exist in the current doctrine. Cases such as \textit{Smith v. New Smyrna Beach} show exactly how much a plaintiff must endure in order to actually recover. Yet I base my prescription on the premise that litigation is never the best outcome in a situation in which someone is being subjected to identity-based abuse at work. People want to do their jobs in an environment of respect and collegiality. They do not want to litigate successfully when those norms are violated.

By creating a strong incentive—yet one that involves a demanding standard of training and supervision—for employers to prevent harassment before it occurs, the likelihood of rooting out workplace problems and dealing with bad actors is much greater. Better yet, with more training, such problems may never arise in the first place. Law can get us where we want us to go, not by providing recovery when the law is violated, but rather by providing strong incentives not to violate the law in the first place.

\textbf{B. Elsewhere in the Law}

This brief Section surveys some of the other ways in which identity entrepreneurship intersects with legal doctrine. As two examples, I examine the rights of privacy and publicity and the doctrine of copyright. My goal is not an exhaustive survey; rather, I intend merely to gesture at the breadth of the ways in which identity entrepreneurship intersects with, influences, and is shaped by the law.

\textsuperscript{293} Ellerth, 524 U.S. at 76.

\textsuperscript{294} When I reference ongoing training, I do not have a specific quantity in mind, but I envision something far more frequent than the yearly lecture that many employers institute. A relatively informal facilitated discussion over a brown-bag lunch once a week would work wonders in many workplaces, and the frequency of such an event would prevent problematic incidents from festering.
1. Rights of Privacy and Publicity

A problem for many out-group members is that in-group members capture the value of their out-group identities. Many out-group members engage in identity entrepreneurship for relatively straightforward reasons: for example, they wish to keep their jobs and they would like their colleagues to treat them professionally. To the extent that their out-group identity performances yield value beyond these goals, the out-group members don’t capture it—in-group members do. Their identity entrepreneurship—or, for individuals who elect not to engage in identity entrepreneurship, coping with the consequences of that choice—is extra emotional labor, and as Arlie Hoschchild has argued, such labor should be compensated.295

The common law torts of right of privacy and right of publicity should compensate out-group members for their identity labor. The rights of privacy and publicity protect important interests that bear upon identity entrepreneurship. A number of scholars have noted that these rights help to protect an individual’s control over her identity and the information she provides to the public.296 Alice Haemmerli, among others, has additionally noted that autonomy strongly justifies the right of publicity.297 And as Roberta Kwall has further observed, the right of publicity, in particular, is intended to serve dignitary interests.298

For purposes of this Article, the rights of privacy and publicity complement one another. Moreover, they advance the aspects of identity entrepreneurship I advocate for protecting and discourage predatory forms of identity capitalism. What follows is a brief explanation of those torts and some suggestions for how they could be modified to better protect out-group members’ choices regarding identity entrepreneurship.

The right of privacy originated as the right “to be let alone”299 and was soon conceived as a right to prevent the press from disclosing intrusive and embarrassing revelations.300 Restatement (Second) of Torts fully adopted William Prosser’s famous formulation, which divided the right of privacy into four discrete torts—(1) intrusion, (2) disclosure, (3) false light, and (4)

299. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS, OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 29 (2d ed. 1888).
appropriation. Today, courts and commentators more or less universally accept the four-tort formulation, descriptively if not normatively. The third is particularly relevant to identity entrepreneurship: a false light claim can be brought if someone:

[(G)ives publicity to a matter concerning another that places the other before the public in a false light . . . if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.]

Individual suits for infringement of privacy led to the emergence of the tort of infringement of right of publicity. The tort of infringement of privacy was a poor fit for well-known people who could not be harmed by the mere use of their image in a public manner. The right of publicity thus emerged. In *Haelan Laboratories v. Topps Chewing Gum*, the Second Circuit held that “in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph.” Subsequently, Melville Bernard Nimmer argued that people should have a property right to the commercial value of their identity, and that the right of privacy was not sufficient to cover such a right. Nimmer argued that while the right of publicity seemed most relevant for celebrities, anyone could use the doctrine to protect the commercial value of his or her identity. Eventually, the U.S. Supreme Court held that the right of publicity is necessary to “prevent[] unjust enrichment by the theft of good will,” explaining that “[n]o social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay.”

In some states, such as California, the elements of a right of publicity claim are: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”

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303. *Restatement (Second) of Torts* § 652E.
Other states, such as New York, interpret the tort to have only two elements: “the commercial use of a person[’]s name or photograph and the failure to procure the person’s written consent for such use.”\(^ {310}\) Although some states have a broad right of privacy doctrine designed to encompass the harms associated with both right of privacy and right of publicity, the majority of states recognize the two rights separately.\(^ {311}\)

A few examples highlight the way the doctrine of the right of privacy and right of publicity can better protect individual choices regarding identity entrepreneurship. Suppose that an “abstinence only” education poster uses Asa Akira’s image without her permission, with the words, in quotes: “Don’t make the mistakes I made.” Or suppose that a non-famous person—an Asian American college student who holds a leadership position in a conservative student organization, rarely associates with other Asian American students, and publicly promotes political positions associated with colorblindness—is Photoshopped by her school’s admissions office into a photograph depicting a meeting of a progressive Asian American student organization. Or suppose that a company repeatedly lists an Arab American worker’s first name as “Mohammed” on its website and other promotional materials, even after he has told them many times that he uses the nickname “Mo” professionally.\(^ {312}\)

The examples I have described infringe individuals’ ability to control their own presentation of identity. This is true whether they engage in identity entrepreneurship (Asa Akira) or refrain from it (the Asian student; the Arab American worker). The use of Akira’s image on the abstinence-only poster undermines her efforts to leverage the image of Asian female hypersexuality. The Asian college student’s inclusion in the brochure undermines her attempt to build a network within a predominantly white in-group. And the refusal to use the worker’s preferred name undermines his efforts to fit in with his coworkers by making his Arab American identity less salient.

could violate a plaintiff’s right of publicity, but it did not alter the basic elements of the claim. See KNB Enters., 78 Cal. App. 4th at 367 n.5.


311. Compare Palmer v. Schonhorn Enters., Inc., 232 A.2d 458, 461 (N.J. Super. Ct. Ch. Div. 1967) (characterizing “appropriation . . . of plaintiff’s name or likeness” as an invasion of the right of privacy), with Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (identifying the right of publicity as separate from the right of privacy). Currently twenty-one states have adopted the right of publicity through common law with eight of those also recognizing the right through statute. J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 6:3 (2d ed. 2016). Eleven other states have statutes recognizing a right of publicity though some of those statutes are simply right of privacy statutes that are broad enough to encompass publicity. Id. This leaves eighteen states that have not yet adopted the right of publicity.

312. In both the Asian student and Arab American worker examples, the institution is probably engaging in identity capitalism, whether it wants an additional Asian student in a photo or a person with an Arab-identified name at its company.
All three examples should result in a remedy via rights of privacy and publicity.\footnote{313} In order for the individuals to recover to the extent necessary to compensate them for the damage to their individual identity performance, several modifications to existing state laws must take place.

First, in many states the existing right of publicity would likely apply to the abstinence-only poster featuring Asa Akira. But California’s “appropriated plaintiff’s name and likeness to defendant’s advantage, commercial or otherwise” standard is preferable to New York’s “commercial use” standard.\footnote{314} The damage to Akira’s reputation occurs regardless of whether the abstinence-only poster is for commercial use—perhaps created by a company that produces abstinence-only educational materials and sells them to schools—or whether the commercial use is less clear—perhaps a pro-abstinence group produced the posters on its own and distributed them to schools for free. Either way, the poster’s creator benefits from Akira’s likeness. In one instance the benefit is economic, but in both instances the creator benefits from promoting a particular ideological agenda.\footnote{315} State right-of-publicity claims should thus result whenever the appropriation of image advantages the defendant, economically or otherwise.

Second, a functionally unattainable standard for what is “highly offensive” should not preclude right of privacy claims. Currently, a requirement for the false light tort is that “the false light in which the other was placed would be highly offensive to a reasonable person.”\footnote{316} The “highly offensive” standard is a demanding one that often makes it difficult for plaintiffs to succeed on privacy claims.\footnote{317} But interfering with someone’s self-presentation of identity in a way that presents a false impression of that person should be considered inherently offensive.

Thus, courts should also recognize the harm to the Asian American student and Arab American employee I have described here as highly offensive. When Photoshopping an individual into a superficially harmless setting is damaging to an individual’s efforts to present her identity in a

\footnotesize{\textsuperscript{313} This does not, of course, preclude the possibility of other claims—libel and slander, for example.} 
\footnotesize{\textsuperscript{314} Supra text accompanying note 311.} 
\footnotesize{\textsuperscript{315} In some instances—depending on the specific situation—construing the right of publicity to cover noneconomic situations could raise First Amendment concerns. The Supreme Court has long held that commercial speech receives only intermediate scrutiny, while other speech by default receives strict scrutiny. \textit{See} Va. State Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748 (1976); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557 (1980). Given this caveat, courts have held that the right of publicity must be balanced against “the public interest in dissemination of news and information consistent with the democratic processes under the constitutional guarantees of freedom of speech and the press.” \textit{Gionfriddo v. Major League Baseball,} 114 Cal. Rptr. 2d 307, 313 (Ct. App. 2001). But note two things: first, this caveat applies primarily when the speech in question is newsworthy; and second, the First Amendment interests are \textit{balanced} against the right of publicity; they are not absolute.} 
\footnotesize{\textsuperscript{316} \textit{RESTATEMENT (SECOND) OF TORTS} \textsection{} 652E.} 
\footnotesize{\textsuperscript{317} Richards & Solove, \textit{supra} note 302, at 175.}
particular way, the resulting autonomy harm should be classified as highly offensive. Likewise, when refusing to use an employee’s professional name interferes with that employee’s self-presentation, the law should acknowledge the damage done to that employee as highly offensive.

And finally, false light claims should allow for damages to compensate for the full array of harms that individuals suffer. In addition to capturing whatever harm the Asian student experiences from being Photoshopped into a setting where she was not, those damages should also capture the damage to the student’s choices about identity performance, including, in this case, the choice to refrain from identity entrepreneurship. The student might, for example, seek compensation for any hardship that she subsequently experiences in obtaining the conservative policy job that she wants or any social capital she loses as the result of lost trust from her politically aligned peers. Likewise, to the extent that the employee “Mo” suffers harm to his desired workplace identity, the damages he receives should take those harms into account.

2. Copyright Law

Copyright law provides another mechanism for protecting and encouraging identity entrepreneurship. Ideally, identity entrepreneurs would receive protection not only for their works—which are protected in the United States—but also for their persona and their image—which are not protected under current U.S. law, but would be under the moral rights regime in existence in several European countries.

In the United States, copyright law protects “original works of authorship fixed in any tangible medium of expression”\(^\text{318}\) and provides creators of copyrighted works with the exclusive right to make and sell copies, perform or display their works publicly, and create derivative works.\(^\text{319}\) In general, U.S. copyright law emphasizes protection of economic profit over protection of other aspects of creation.\(^\text{320}\)

In contrast to current U.S. copyright law, moral rights protect artists’ reputations and artistic personas from harm relating to uses of their works, whether economic or otherwise.\(^\text{321}\) Many scholars have recognized the benefits of the moral rights regime,\(^\text{322}\) and continental European countries have long recognized moral rights. While there is some functional overlap between traditional copyright protections and moral rights, the focus of each is very

\(^{319}\) Id. § 106.
\(^{321}\) See id. at 39–40.
different: in contrast to the purely economic focus of copyright, moral rights protect the creator’s reputation and integrity as a creator.  

For present purposes, four moral rights are most relevant: attribution, integrity, disclosure, and withdrawal. The right of attribution is the author’s right to have her work attributed to her when it is presented to the public, and also protects against false attribution of works to people other than their authors. The right of integrity is the author’s right to prohibit uses and modifications of her work in a manner or context that is harmful to her reputation or repugnant to her artistic conception. The right of disclosure is the author’s right to determine whether to create a work, whether the work is complete, whether to disclose the work to the public, and how to disclose the work to the public. And finally, the withdrawal right protects authors’ “ongoing autonomy interest” by enabling them to withdraw a work from publication or to modify it after it has been disseminated.

With some limited exceptions, the United States does not expressly recognize moral rights. But a range of doctrines, arising from both case law and statute, have, at times, incorporated moral rights principles into U.S. copyright law. Cases in the 1980s imported the moral rights of attribution and integrity, holding that a plaintiff actor’s name could not be omitted from a film in which he starred and that a plaintiff songwriter’s name could not be omitted from an album cover and from sheet music. In a similar vein, the Second Circuit

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325. See id. at 561–62.
327. Neil Netanel, Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law, 12 CARDOZO ARTS & ENT. L.J. 1, 24, 37–38 (1994). A few examples reveal the scope of the integrity right. A court in France applied the right of integrity to prevent the owner of a refrigerator painted by artist Bernard Buffet from dismantling it and selling each pane. Id. (citing Judgment of May 30, 1962 (Fersing v. Buffet), Cour de cassation, 1965 G.P. 126). Other courts have applied the integrity right to prevent the display of modified reproductions of an artist’s work in a department store and to prevent the modification of an original operetta score. Id. And the integrity right has also been applied to prevent the use of a composer’s music in the background of a film: Twentieth-Century Fox used music by Dmitri Shostakovich and three other Soviet composers in the background of its Cold War–era film The Iron Curtain. The composers sued Fox, claiming that the use of their music in the film falsely imputed their disloyalty to their country. The suit highlights the difference between domestic and European regimes: the composers’ claim was successful in France, but was rejected in the United States. See id. at 38–39.
328. Id. at 24.
329. Id. at 32.
330. With respect to the right of attribution, the history begins with Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981). In Montoro, the plaintiff was promised star billing credit for a film, but the production company listed another actor as the film’s star in both its screen credits and advertising material. Id. at 603. The court concluded that the plaintiff stated a claim for relief under the Lanham Act by alleging that the defendant engaged in express reverse passing off by substituting his name with another actor’s name in the credits and advertisements. Id. at 603–07. Likewise, in Lamothe v. Atlantic
recognized a right akin to the integrity right in *Gilliam v. American Broadcasting Companies*, in which the court held that the American Broadcasting Corporation edited several Monty Python screenplays so heavily that they had effectively been mutilated.\footnote{331} These early gestures at moral rights-like recognition were sharply curtailed by *Dastar Corp. v. Twentieth Century Fox Film Corp.*, in which the Supreme Court limited use of the Lanham Act to protect creators’ moral rights.\footnote{332}

A few other domestic provisions offer limited moral rights-like protection. The Visual Artists Rights Act of 1990 (VARA) affords some moral rights protection to a limited class of works, but applies only to a “work of visual art.”\footnote{333} In the same vein, some states have enacted moral rights statutes. For example, the California Art Preservation Act grants the right to disclaim copyright infringement claim because the BBC was not entitled to “bis disclosure.”\footnote{334} New York adopted a similar law, called the New York Artists’ Authorship Rights Act.\footnote{335} And Article 6bis of the Berne Convention—to which the United States acceded in 1988—

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\footnote{331}{See 538 F.2d 14 (2d Cir. 1976). The plaintiffs, the Monty Python group, contracted to provide screenplays to the British Broadcasting Corporation (BBC). Under their contract, the BBC was only allowed to make minor changes to the screenplays without obtaining Monty Python’s approval and was not allowed to make any changes to a program once it was recorded. The BBC then licensed the episodes to the American Broadcasting Corporation, which heavily edited programs both for time and to remove “offensive or obscene” material. Id. at 18. Monty Python sued, asserting claims under both copyright and trademark law. Id. at 17–18. The court first held that Monty Python showed a likelihood of success on the merits of the copyright infringement claim because the BBC was not entitled to unilaterally alter Monty Python’s scripts and thus could not license anyone else to do so. Id. at 19–21. According to the court, this holding “reinforce[d] [its] initial inclination that the copyright law should be used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public.” Id. at 23. The court also found that Monty Python were likely to succeed on their claim that the editing so mutilated their work that broadcasting it as a Monty Python creation was a false designation of origin in violation of section 43(a) of the Lanham Act. Id. at 24–25.}

\footnote{332}{See 539 U.S. 23 (2003).}

\footnote{333}{A work of visual art is defined as a painting, drawing, print, sculpture, or photograph (but only one taken for exhibition purposes only) that exists in single copy or in a limited edition of 200 or fewer copies, each of which is signed and consecutively numbered. 17 U.S.C. §§ 101, 106A (2012). VARA grants to authors of qualifying works limited rights of attribution and of integrity. § 106A. Under VARA, the author of a work of visual art has the right to claim authorship of the work and to prevent the use of her name on a work that she didn’t create. § 106A(a)(1). VARA also empowers an author of a work of visual art to prevent the use of her name in connection with a work that has been distorted, mutilated, or modified in a way that would be “prejudicial to his or her honor or reputation.” § 106A(a)(2). Finally, subject to some limitations, VARA empowers authors to prevent (A) “any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation,” and (B) “any [intentional or grossly negligent] destruction of a work of recognized stature.” § 106A(a)(3) (emphasis added). VARA does not provide any right of withdrawal or disclosure.}

\footnote{334}{See 539 U.S. 23 (2003).}

\footnote{335}{CAL. CIV. CODE § 987; NIMMER & NIMMER, supra note 324, at § 8D.07.}

\footnote{336}{NIMMER & NIMMER, supra note 324, at § 8D.08.}
requires members to protect authors’ rights of attribution and integrity.\textsuperscript{336} Many do not regard the U.S. intellectual property legal patchwork as sufficient to satisfy the Berne Convention.\textsuperscript{337} My point is not that we live in a moral rights regime, but simply that moral rights are not entirely foreign to the American legal system.

Current U.S. copyright laws focus on protecting economic interests in individual works by granting copyright holders a monopoly in their copyrighted works, but subject to several important limitations that affect identity entrepreneurship. Fair use limits copyright protection by allowing anyone to use a copyrighted work without the copyright holder’s permission so long as the balance of four statutorily defined factors favors fair use. The more different the new use is from the creator’s original work, the more likely the use is fair.\textsuperscript{338} Thus, the uses of artists’ work that are most likely to be considered fair are those least likely to align with the artist’s own creative vision. The numerous compulsory licenses provided by statute also limit U.S. copyright protection. For example, 17 U.S.C. § 115 enables anyone to create a cover recording of a song without obtaining permission so long as the person pays a government-set fee, follows specified procedures, and does not significantly alter the song.\textsuperscript{339} Thus, an artist would be powerless to stop a politician from creating a cover version of her song and using it during political rallies. Finally, under certain circumstances the “works for hire” doctrine vests ownership of copyright in the commissioning organization—often a studio or record label—rather than in the artist.\textsuperscript{340}

As a number of scholars have noted, the existing copyright regime often disproportionately disadvantages out-group artists.\textsuperscript{341} A more robust copyright regime would protect creators across the board, but would also, in the aggregate, have more positive consequences for out-group identity entrepreneurs because their work is currently more vulnerable to

\textsuperscript{336} The United States acceded to the Berne Convention in 1988 when Congress passed the Berne Convention Implementation Act of 1987 (BCIA). At the time, Congress concluded that it was unnecessary to pass any moral rights legislation in the United States in order to comply with Article 6bis. Instead, Congress found that a patchwork of assorted state and federal laws—including section 43(a) of the Lanham Act—provided the kind of protection required under Article 6bis. See, e.g., H.R. Rep. No. 100-609, at 45-48 (1988).

\textsuperscript{337} See, e.g., William Patry, The United States and International Copyright Law: From Berne to Eldred, 40 Hous. L. Rev. 749, 751 (2003) (describing Congress’s assertion that no new moral rights legislation was required to comply with Article 6bis as a “charade”).


\textsuperscript{340} §§ 101, 201(b).

exploitation.\textsuperscript{342} In particular, moral rights could be used to encourage and offer greater protection to identity entrepreneurship by out-group members. Moral rights doctrine focuses on protecting the artist’s interest in his identity as communicated through his entire body of work. That interest is not limited by such doctrines as fair use, and is personal to the creator. Moral rights can therefore create incentives for identity entrepreneurs to actively cultivate, shape, and monetize their identities.

Consider, for example, Le1f, an openly gay rapper who raps about his sexuality—among other things—and has furthered his career by embracing and even promoting his out-group identity through his lyrics, appearance, and other personal information.\textsuperscript{343} Current U.S. copyright law protects Le1f’s songs and music videos but not Le1f’s persona. Thus, Le1f has no copyright protection in his expression of his identity through his mannerisms, dress, hair, and other aspects of his self-presentation. Depending on the terms of his contract and assuming Le1f writes his own songs, copyright in Le1f’s songs likely vests in Le1f while copyright in his music videos likely vests in the record label that commissions them.\textsuperscript{344} While Le1f has the right to stop infringing uses, performances, and derivatives based on his music, he does not have unlimited ability to stop others from using his music. For example, Le1f could not stop an openly homophobic politician from making fair use of Le1f’s music in an anti-gay campaign advertisement. Similarly, Le1f is powerless to stop the same politician from making a cover recording of one of Le1f’s songs and using it during political rallies.\textsuperscript{345}

Under a moral rights regime, Le1f would be able to protect both his works and his image. For Le1f, the most significant protection would come from right of integrity. The integrity right would enable Le1f to prevent uses of his music that harm his reputation or are repugnant to his artistic conception. It would, for example, enable Le1f to prevent the homophobic politician from using his music in a political ad or as part of his campaign. Similarly, the attribution right would ensure that Le1f is credited when his work is used, which would further help him maintain and benefit from his unique persona. It would also allow him to distance himself from works of which he does not approve by refusing to have his name used in connection with them. Finally, the disclosure and withdrawal rights would ensure that Le1f could prevent his label from releasing or continuing to publish an altered version of his work of which he does not

\textsuperscript{342} See Tehranian, supra note 341; Greene, supra note 341.
\textsuperscript{344} See 17 U.S.C. § 201(a) & (b) (2012).
\textsuperscript{345} I recognize, of course, that integrating a moral rights regime into U.S. law might require modification of other doctrines as well. For example, one might argue that there is tension in some of my arguments with current First Amendment doctrine. I do not address a number of such arguments here because this discussion is simply meant as a brief survey of what might be possible.
approve. Because these rights would enable Le1f to protect his persona as understood through his body of work, they would allow him to craft his identity expression both in general and in his work.

In short, moral rights promote both the individual agency and full information critical to identity entrepreneurship. They further agency by giving entrepreneurs more control over their works and personas. And they promote information by creating incentives for entrepreneurs to understand exactly how they are using their personas: under a moral rights regime an entrepreneur’s image is truly her own. These features will further the overarching goals of considering consequences for both individual identity entrepreneurs and the out-groups to which they belong.

CONCLUSION

Identity entrepreneurs did not choose the society in which they live, nor did they choose the system of identity capitalism that governs that society. Their choice lies in how to respond. And as makers of law and policy, we in turn choose how to respond to identity entrepreneurs. By protecting agency and promoting full information through both legal and social mechanisms, we can help to ensure that out-group identity entrepreneurs consider the consequences of identity entrepreneurship for both themselves and the out-group as a whole. In so doing, we can harness identity entrepreneurship as a force for progress toward an egalitarian society.