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THE OBJECT OF DIVERSITY

George H. Taylor*

Immersion in the work of Derrick Bell has been one of the great privileges of my life as a scholar and teacher.¹ In my teaching it was a particular pleasure to be able to co-teach a course with Bell when he visited the University of Pittsburgh for a semester several years before his death. I take as the inspiration for this Article a theme prominent in the course and also in several of his speeches during this time period. The course's title was "Race, Religion, and Law," and a primary impetus for the course was Bell's searching inquiry into the relationship between many racists and their Christianity. Typical for Bell, he was not drawn to the self-congratulatory side of the story that the civil rights movement gained significant strength from Christian and Jewish support, including of course the role of Dr. King.² Rather, he wanted to engage the troubling question of the support many racists drew from Christianity and Christian belief.³ In the course and in his speeches, Bell kept returning to a quotation that he viewed to be fundamental to understanding this conjunction. I too want to build upon the quotation and Bell's insights into its meaning, although I shall turn the implications in the direction of

* Professor of Law, University of Pittsburgh School of Law. Professor Taylor would like to thank Janet Dewart Bell for permission to cite Professor Bell's unpublished speeches.

¹ See George H. Taylor, *The Last Decade of Derrick Bell's Thought*, in RACISM AND RESISTANCE: ESSAYS ON DERRICK BELL (Timothy J. Golden ed., forthcoming 2015); George H. Taylor, *Derrick Bell's Narratives as Parables*, 31 N.Y.U. REV. L. & SOC. CHANGE 225 (2007); George H. Taylor, *Racism as "The Nation's Crucial Sin": Theology and Derrick Bell*, 9 MICH. J. RACE & L. 269 (2004), reprinted in abridged form in THE DERRICK BELL READER 433 (Richard Delgado & Jean Stefancic eds., 2005). I co-taught with Bell a course on "Race, Religion, and Law" during the fall of 2006 at the University of Pittsburgh School of Law.

² See, e.g., DAVID L. CHAPPELL, A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW (2003).

³ For example, racist Christians cite Noah's condemnation of his son Ham's progeny, due to Ham's misconduct, *Genesis* 9:25 (Revised Standard), and Ham was understood to be black. See DAVID M. GOLDENBERG, THE CURSE OF HAM: RACE AND SLAVERY IN EARLY JUDAISM, CHRISTIANITY, AND ISLAM 142-43, 149, 167 (2003) (noting and criticizing this view).

law rather than religion. In so doing, I shall also turn more direct attention away from Bell's work to a new generation of scholars on race, although Bell's work remains an impetus and, as I shall indicate, a source of insight throughout.

Given the importance of fiction in his own work,⁴ it is perhaps not surprising that Bell locates in a novel rather than in a theological text the quotation inspiring his assessment of the conjunction between racism and Christianity. The excerpt is drawn from Nikos Kazantzakis's novel, *The Last Temptation of Christ*. The setting for the excerpt is a scene following the Last Supper, when Jesus informs his disciples of his impending death. While other disciples are caught up in their grief, one disciple, Jacob, looks to the future and promises that the disciples will work to ensure that Jesus's words shall not die with him.

“We'll establish them firmly in new Holy Scriptures, we'll make laws, build our own synagogues and select our own high priests, Scribes and Pharisees.”

Jesus is horrified. “You crucify the spirit, Jacob,” he shouted. “No, no, I don't want that!”

Jacob tries to reassure him. “This is the only way we can prevent the spirit from turning into air and escaping.”

“But it won't be free any more; it won't be spirit!”

“That doesn't matter,” Jacob responds. “It will look like spirit. For our work, Rabbi, that's sufficient.”⁵

For Bell, the racist Christian faith “crucif[ies] the spirit” of Christianity; the racist Christian faith disengages the underlying spirit of Christianity and rests upon a hollow structure. For the racist Christian faith, it matters not that it lacks “spirit” if it “look[s] like spirit.” The racist Christian faith replaces substance with form.⁶

⁴ See, e.g., Taylor, *Derrick Bell's Narratives as Parables*, *supra* note 1, at 244–57.

⁵ NIKOS KAZANTZAKIS, *THE LAST TEMPTATION OF CHRIST* 419 (1961).

⁶ For Bell's citation of the Kazantzakis passage, see DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* 83, 92 (2002) [hereinafter BELL, *ETHICAL AMBITION*]; Derrick Bell, Martin Luther King, Jr. Was He a 20th Century Jesus? 6 (Carnegie Mellon University, 2006 [Dec. 29, 2005 draft]) (on file with author) [hereinafter Bell, Martin Luther King, Jr.]; Derrick Bell, Racism's Religious Perspective 6–8 (Black Law Journal Anniversary Conference, Nov. 18, 2005) (on file with author); Derrick Bell, Howard Thurman and the Christians as Racists Paradox 3–4 (Howard Thurman Center, Stetson University, Gulfport, Florida, Nov. 15, 2005) (on file with author).

I take away two lessons from Bell's repeated attention to this passage, both of which I shall attempt to apply to current discussions of race in law. First, "spirit" is available as a source of sustenance and insight into the enduring qualities sought when trying to use the law to address disparities suffered on account of race; this resource correlatively offers a vantage point from which to critique existing or proposed law. This "spirit"—this sense of underlying values—may be but need not be religious or Christian. Second, we may address whether the law or any institution acts in better or worse ways to instantiate an underlying nonracist "spirit." There is no necessary disjuncture between "spirit" and laws or between substance and form. Although I do not develop the point here, in my reading of Bell's work it is apparent that he focuses on the first point—the availability of a separate source from which to critique and to withstand the inadequacies of the law—but he also attends the second—the possibility of correlation between racial justice and its concrete manifestation, to varying degrees, in the law.⁷

Reversing Bell's priorities, in this Article I will give greater attention to the second point than the first, even though I want to offer points of emphasis on the first also. As noted, I also want to move beyond a focus on Bell's work to some newer writing on race. My principal subject of analysis will be Nancy Leong's prominent and provocative article, *Racial Capitalism*, the lead article in the June 2013 issue of the *Harvard Law Review*,⁸ in which she criticizes implementation of the goal of racial diversity.

I begin with Bell's first point on the role of a "spirit" that is a source of sustenance in the fight for racial equality and also a location from which to criticize existing law and existing approaches to reform. Three sub-themes are worthy of delineation here. First, this "spirit" locates the civil rights sought on the basis of an ontological sense of justice and rightness. It is a hallmark of critical race theory that it originated in significant part out of a rejection of critical legal studies' assertion that rights were simply a matter of social construction, with no deeper underpinnings.⁹ Writers within critical race theory identify something more

⁷ BELL, ETHICAL AMBITION, *supra* note 6, at 83, 92; Bell, Martin Luther King, Jr., *supra* note 6, at 6–8; Racism's Religious Perspective, *supra* note 6, at 7–8; Howard Thurman and the Christians as Racists Paradox, *supra* note 6, at 3–4.

⁸ Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

⁹ For discussion of the differences between critical legal studies and what came to be known as critical race theory, see, e.g., PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 146–65 (1991); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 745–51 (1994).

fundamental: a “truth,” a “‘really-out-there’ object[,]” “a ‘real’ reality out there.”¹⁰ Bell frequently cites the following famous lines from Patricia Williams:

[B]lacks always believed in rights in some larger, mythological sense—as a pantheon of possibility. It is in this sense that blacks believed in rights so much and so hard that we gave them life where there was none before; held onto them, put the hope of them into our wombs, mothered them, not the notion of them; we nurtured rights and gave rights life.¹¹

As evident from this vocabulary, the sense of “spirit” could be but need not be religious.¹² Second, it is on the basis of this deep-seated sense of rightness that the struggle for civil rights has perdured, as witnessed in this statement by Williams, independently by Bell,¹³ and by figures in the movement such as King.¹⁴ This sense of rightness offers a foundational rock that anchors the fight for racial justice in the face of the continuing turbulent stream of resistance and oppression. Third, it is this deep sense of “spirit” that also inspires the drive toward creation of its manifestation concretely in law and provides a vantage point from which to evaluate the limitations of this legal manifestation. There is an interrelation between the sense of rightness and its presence in the law; the latter sought to instantiate the sense of justice; there is no necessary separation between them, even if the instantiation falls severely short. As I shall discuss, Leong, for her part,

¹⁰ Harris, *supra* note 9, at 751, 753 (internal citations omitted).

¹¹ DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 25 (1992) (quoting Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, in *A LESS THAN PERFECT UNION: ALTERNATIVE PERSPECTIVES ON THE UNITED STATES CONSTITUTION* (Jules Lobel ed., 1988), at 64). For Williams’s subsequent revision of this language, see WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS*, *supra* note 9, at 163. For Bell’s similar quotations of Williams, see, e.g., BELL, *ETHICAL AMBITION*, *supra* note 6, at 176; DERRICK BELL, *GOSPEL CHOIRS: PSALMS OF SURVIVAL IN AN ALIEN LAND CALLED HOME* 185–86 (1996); Derrick Bell, *Who’s Afraid of Critical Theory*, 1995 U. ILL. L. REV. 893, 900 (1995); Derrick Bell & Preeti Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1619 (1988).

¹² Williams writes that the quest for civil rights under the law has been “a fiercely motivational, almost religious, source of hope.” Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 417 (1987) (emphasis added).

¹³ BELL, *ETHICAL AMBITION*, *supra* note 6, at 76 (2002) (“I have relied on my faith. Particularly in hard times, my Christian faith provides reassurance that is unseen but no less real. It never fails to give me the fortitude I need when opposing injustice . . .”).

¹⁴ See, e.g., MARTIN LUTHER KING, *WHY WE CAN’T WAIT* 75 (1964) (“God’s companionship does not stop at the door of a jail cell.”).

adheres to an underlying sense of rightness, based on personhood, and finds not a correlation but a dissociation between that sense of personhood and the manifestation of diversity.¹⁵

This brief foray into the underlying sense of “spirit”—of truth, of justice, of rightness—sets the stage for our more prolonged attention to the second side of the framework Bell poses: the relation between this spirit and its expression in institutions such as the law. Here I concentrate more on the work of Leong and argue that she is mistaken that there is a disjunction between the basic sense of rightness—again for her, of personhood—and the implementation of diversity. The stance I adopt aims to be consistent with Bell’s “racial realism.”¹⁶ Even if the inspiring “spirit” hearkens to a robust image of racial equality that is our ultimate ambition, we recognize that this ambition will not be capable, given the forces of resistance, of satisfaction. We need to acknowledge with Bell that we are truly realistic only when we confront the tragedy of the continuing gap between “spirit” and its implementation in the law.

For Bell’s own racial realism, the possibility of legal implementation remains a haunting, if unfulfilled, goal. He lauds, for example, the promise of the Emancipation Proclamation,¹⁷ the Post-Civil War Amendments,¹⁸ *Brown*, the Civil Rights Act of 1964,¹⁹ the Voting Rights Act of 1965,²⁰ and affirmative action;²¹ even as he goes on to observe painfully that each time one of these doors open, legal forces subsequently close it.²² This continually thwarted promise of the law leads him to rest more on the nurturance of “spirit” than on its manifestation in the law, even as he continues to push for legal reform.

Additionally, we need to be aware of movements that contemplate rejection of legal implementation, because that implementation itself might hinder the perpetuation of an underlying spirit. When, for instance, I worked as a boycott

¹⁵ Leong, *Racial Capitalism*, *supra* note 8, at 2205–06.

¹⁶ Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

¹⁷ Emancipation Proclamation, No. 17, 12 Stat. 1268 (1863).

¹⁸ U.S. CONST. amend XIII; amend. XIV.

¹⁹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections).

²⁰ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 4237 (codified in scattered sections).

²¹ *See, e.g.*, *University of California v. Bakke*, 438 U.S. 265 (1978) (upholding principle of affirmative incorporation of racial classifications in university admissions decisions).

²² DERRICK BELL, *AFROLANTICA LEGACIES* 158–64 (1998).

organizer for the United Farm Workers in Los Angeles, the UFW was seriously considering not promoting legislatively a law allowing farm workers to organize collectively in California.²³ The UFW had witnessed the dissipation of the civil rights movement in the South after the passage of civil rights law, despite the continuing need for organizing to promote the law's implementation and to pursue areas of redress that these laws clearly did not encompass.²⁴

Sometimes there is also the sense that with the passage of a law, the suits—the lawyers—take over, and the interests of those for whom the law was passed become secondary. Legal form takes priority over substance. Bell prominently wrote about this, of course, in criticizing civil rights lawyers—himself included—for promoting the distant goal, resisted by many whites, of school integration, when many in the African-American community instead gave priority to quality education, whether integrated or not.²⁵ Whatever one's tack on the relation between an underlying spirit and its instantiation in the law, implementation and enforcement of the law do not rest on the law's own formal properties but are informed by the efforts of those organizing on behalf of or in resistance to the law. This message but reinforces the distinction between a law and its underlying spirit, which different sides may understand and promote in divergent ways.

I turn now to the work of Leong and her claim of a separation between an underlying sense of spirit and the implementation of racial diversity. As I will later explore in more detail, Leong wants to protect personhood, and more particularly racial identity, from becoming alienated from the person and appropriated by another for its own purposes. In her discussion of the goals of diversity, Leong displays some admirable racial realism herself. On the one hand, she is attentive to critiques of diversity as the goal of racial justice, a critique prominently leveled by

²³ Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 29 (2005).

²⁴ *Id.* The UFW did decide to pursue creation of a California law and was successful in so doing. See CAL. LAB. CODE §§ 1140–1166 (1975). That Act met a fate similar to the civil rights laws that Derrick highlighted: after a change to a Republican Governor, implementation of the Act became controlled by grower interests. Gordon, *supra* note 23, at 40, 43–44. Critical scholars such as Mark Tushnet have generalized the insight: the grant of legal rights does not protect against their manipulation or their subsequent removal. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1386 (1982). Civil rights and farm worker legislation created important toeholds within the legal system, legal rights rather than simply moral ones. But the institutionalization of these values facilitated the exertion of countervailing pressures upon them.

²⁵ Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideal and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

Bell himself. Leong quotes Bell's objection that the diversity rationale neglects the historic barriers of race discrimination that continue to affect entry.²⁶ This critique is a position that she herself adopts.²⁷ In my own reading of Bell's work and my interchanges with him, his lesson of the continuing impingement on the present of our racial history is one that most forcefully stays with me. On the other hand, Leong recognizes, as a matter of racial realism, that seeking racial justice on the basis of redress of prior injury will not be a strategy that wins much white support. The goal of racial diversity may be the most realistic option for racial justice.²⁸ Very appropriately, Leong types the adoption of racial diversity as a prototypical example of Bell's theory of "interest convergence": in practice the white majority's attention to racial concerns can be elicited not as a matter of redress but only so long as this attention benefits white interests as well.²⁹ Some benefits accrue to racial minorities but only because those benefits lead to white benefits also. The cup of racial justice is not full, but it is not empty. Further, if at any point the sense of white benefit becomes redirected, the benefits for racial minorities will leave also. While Bell himself does not accept the priority that some institutions grant to the remedy of diversity, he too acknowledges that it fits his interest convergence theory.³⁰

²⁶ Leong, *Racial Capitalism*, *supra* note 8, at 2168 (quoting Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003)).

²⁷ Adoption of this perspective is more direct in a subsequent article responding to criticisms of her approach. Nancy Leong, *Reflections on Racial Capitalism*, 127 HARV. L. REV. F. 32, 33 (2013): "[T]here are better rationales for race-conscious admissions that, unlike the diversity rationale, do not obscure the reason such admission policies are necessary in the first place—that is, the longstanding use of state force to subjugate nonwhite people in myriad ways." In her *Racial Capitalism* article, Leong's focus on diversity is more descriptive: diversity describes the current jurisprudence in the courts on affirmative action. Leong, *Racial Capitalism*, *supra* note 8, at 2168.

²⁸ Leong, *Reflections on Racial Capitalism*, *supra* note 27, at 33: "I do not want to waste much time bemoaning diversity as the second or third beset rationale, as that ship sailed long ago."

²⁹ Leong, *Racial Capitalism*, *supra* note 8, at 2171 (citing Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980)).

³⁰ Bell, *Diversity's Distractions*, *supra* note 26, at 1624; Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1066 (2004–2005):

Once revealed as a motivating factor, interest convergence can be transformed into useful strategy. Those that defended the University of Michigan's affirmative action plans, for example, utilized interest convergence by promoting diversity as being in the self-interest of the University. Interest convergence was part of their strategy, planned for in advance, rather than a happy coincidence recognized in retrospect.

Internal to her analysis of diversity, Leong describes two different versions. As I shall go on to describe, the “thin” version is superficial and is satisfied by “numbers and appearances”; the thick version emphasizes inclusivity and the improvement of relationships across races, benefiting institutions and all individuals.³¹ Her article understandably concentrates on the first, thin version; it is the subject of her critique of diversity as a form of racial capitalism.³² In ultimately arguing for a more robust vision of diversity, I want to question whether on its own terms Leong’s thin version of diversity permits a thick version. I contend that we must reorient the understanding of diversity contained in Leong’s thin version in order to open the possibility for a thick version. I conclude by offering, in what I hope is a properly racial realist perspective, some thoughts on what a more robust version of diversity might entail, including its limitations.

Leong’s critique of racial capitalism is embodied in her assessment of the thin version of diversity. Her most telling example of this abuse of diversity helps to vivify her theoretical argument. Leong writes of a university using for publicity purposes a photograph of white students cheering at a football game into which the university Photoshopped the picture of one of its African-American students.³³ Leong describes this appropriation as an act of “racial capitalism,” a “process of deriving economic and social value from the racial identity of another person.”³⁴ A white individual or predominantly white institution takes for itself the “capital associated with nonwhiteness.”³⁵ The university wants to protect or enhance its status as a diverse institution but does so literally only on the surface. Leong finds this appropriation a current aspect of institutions’ adoption of racial diversity. The institution seeks to satisfy the goals of diversity simply as a superficial matter of appearance or numbers rather than through a sea change requiring recasting of racial and cultural norms.³⁶

In illuminating fashion, Leong builds her analysis of racial capitalism in significant part by drawing on the critique of capitalism by Marx and on the

³¹ Leong, *Racial Capitalism*, *supra* note 8, at 2169.

³² *Id.* at 2169–70.

³³ *Id.* at 2192–93. The appropriation was, not surprisingly, without the student’s permission. *Id.* at 2193. This incident acts as a frequent point of reference. *See id.* at 2153, 2206, 2223.

³⁴ *Id.* at 2156.

³⁵ *Id.* at 2157.

³⁶ *Id.* at 2169.

critique of commodification by Margaret Jane Radin. I treat each briefly in turn. On Marx, I applaud Leong's effort to engage with his work. It takes considerable courage to bring Marx back into contemporary discussion. Leong wants to locate insight in perceptive social and economic critique such as she finds in Marx, whatever her and our views on the separable consequences of Marxism as a political force. The recourse to Marx is also worthy for its endeavor to engage in deep theoretical analysis. Ultimately, as I shall indicate, my own response to Leong reflects in part a different reading of Marx, but that does not lessen my respect for her approach.

As Leong relates, Marx differentiates between an item's use value—the ends to which it is put—and its exchange value—its economic price in the market. Over time, a capitalistic system replaces a focus on the object and its end with a focus on exchange and money. We lose sight of the object; the object becomes quantified on the basis of its economic measure; it is fungible.³⁷ Part of Leong's issue with the thin version of diversity is that it places diversity within this system of economic exchange; diversity becomes a commodity. While she probes how the commodification of diversity might be resisted,³⁸ “the current reality,” she contends, “is that by living in society and interacting with other people, our racial identity ‘produce[s] use-value for others,’ and, as a result of that process, becomes a commodity.”³⁹ Marx's second contribution, for Leong's purposes, is the well-known theory of surplus value. Not only does the object produced by labor become a commodity, an item in exchange, but also the laborer does not receive payment for the full value of the commodity in the exchange market. A factory owner appropriates that surplus value and, more generally, so does the capitalist in the process of continued exchange.⁴⁰ In the contemporary context, not only is diversity a commodity but its surplus value inures to the benefit of institutions, not to members of racial minorities. The institution appears tolerant and diverse even when its efforts to instill diversity are quite meager and superficial.⁴¹

Leong's primary thesis is that we should avoid the dangers to racial identity of exchange and appropriation as surplus value by protecting racial identity from

³⁷ *Id.* at 2183, 2187–88.

³⁸ *Id.* at 2186.

³⁹ *Id.*

⁴⁰ *Id.* at 2187–88.

⁴¹ *Id.* at 2189.

commodification. “People should not commodify race because racial commodification enables racial capitalism and the exploitation and inequality that process engenders.”⁴² She finds support for this thesis in parts of Marx’s argument which support non-commodification.⁴³ Her primary resource for this thesis, though, lies in the influential argument of Radin, who maintains, “‘things important to personhood’ should not be exchanged in markets.”⁴⁴ Radin, whose own proposal draws significantly from Marx and Hegel,⁴⁵ contends that central attributes of personhood are vitiated if they are placed into economic exchange. These qualities become reduced to nodes of economic calculus.⁴⁶ Radin concludes that ideally these qualities should be “market inalienable.”⁴⁷ The danger, for both Radin and Marx,⁴⁸ of the “alienation” of primary human activity into economic exchange is that we lose and give up to market exchange core aspects of our person.⁴⁹ In the context of diversity, race becomes for institutions a “prized commodity” rather than a manifestation of individual personal identity.⁵⁰ This commodification leads to a kind of corruption that degrades individual identity.⁵¹ Leong argues “there is no way to structure a transaction involving race in a way that avoids this degradation.”⁵²

Leong does not side completely with either Marx or Radin. She does not accept what she views as Marx’s endorsement of a perspective “approaching universal non-commodification.”⁵³ While she believes commodification is not

⁴² *Id.* at 2201.

⁴³ *Id.* at 2199.

⁴⁴ *Id.* at 2200 (quoting Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1903 (1987)).

⁴⁵ Radin, *supra* note 44, at 1871–72 (discussing Marx), 1892–96 (discussing Hegel).

⁴⁶ Leong, *Racial Capitalism*, *supra* note 8, at 2200.

⁴⁷ Radin, *supra* note 44; Leong, *Racial Capitalism*, *supra* note 8, at 2200 (citing Radin).

⁴⁸ And, I would add, for Hegel. *See infra* text accompanying notes 107–10.

⁴⁹ Leong, *Racial Capitalism*, *supra* note 8, at 2205 (citing Marx); Radin, *supra* note 44, at 1871–72 (on Marx). I return to the point whether all exchange leads to the alienation of these core personal traits. *See infra* text accompanying notes 77–85.

⁵⁰ Leong, *Racial Capitalism*, *supra* note 8, at 2155.

⁵¹ *Id.* at 2199.

⁵² *Id.* at 2202.

⁵³ *Id.* at 2199.

appropriate in certain circumstances—including race⁵⁴—it may be appropriate in others.⁵⁵ She is dissatisfied with Radin’s reliance on subjective moral judgment to assess whether commodification in a particular context impairs human personhood.⁵⁶ In addition, Leong, like Radin,⁵⁷ acknowledges a certain pragmatism in application of her own views. While non-commodification of racial identity should be the goal, a time of transition would not engage in an outright ban of racial commodification but measure legal penalty on the basis of the nature of the wrong inflicted.⁵⁸

As I turn to evaluation of Leong’s argument, it is important to retain the many strengths of her thesis. We do need not to lose sight of the downsides of the appeal to racial diversity. Not only does this orientation neglect the focus on redress of prior racial injury,⁵⁹ on its own terms the implementation of diversity can result in superficiality and form without substance. Leong’s critique of the “thin” type of diversity is a significant contribution. This critique understandably orients her article on “Racial Capitalism.” As already noted, Leong distinguishes the “thin” version of diversity from a positive “thick” version that she does not develop.⁶⁰ The question that guides my own assessment of Leong’s thesis is whether the conceptual framework of her critique of diversity permits a thick version. I will argue for a broader conceptual framework that does not diminish Leong’s critique but resituates it within an approach that allows for both thin and thick constructions of diversity.

I begin my evaluation by raising apparent tensions within Leong’s own account. In particular, I want to examine whether the thin orientation of diversity is due to the commodification of race—that is, is due to the placement of race within economic exchange itself—or due to the surplus value of the economic exchange,

⁵⁴ *Id.* at 2201. *See supra* text accompanying note 42.

⁵⁵ *Id.* at 2199.

⁵⁶ *Id.* at 2201.

⁵⁷ *Id.* at 2220–21.

⁵⁸ *Id.* at 2222. In his review of Leong, Richard Thompson Ford is particularly critical of her aspiration for the total noncommodification of race. *See* Richard Thompson Ford, *Capitalize on Race and Invest in Justice*, 126 HARV. L. REV. F. 252, 257 (2013) (“There can be no pure, whole, and freely chosen racial identity. Racial identity is a product of the very alienating and corrupt, motivations, coercion, and power relations Leong would try to purify it of.”).

⁵⁹ *See supra* text accompanying notes 26–27.

⁶⁰ Leong, *Racial Capitalism*, *supra* note 8, at 2169.

where the exchange disproportionately benefits white institutional interests. If the damage of the thin version of diversity is due to the economic exchange being unequal and exploitative, then the problem may lie not in economic exchange or “commodification” but in the disproportion of the exchange. If, however, the problem is due simply to commodification, then even an exchange that is economically equal will have adverse consequences. The tension between these two accounts, I will claim, may offer a conceptual space for appreciating that the ultimate deficit of the thin version of diversity lies less with commodification than with diversity treated as a form of reification—a thing—something divorced from the human values—the “spirit”—that inspired it. A more positive, “thicker” account of diversity may be recovered if we emphasize the difference between the negative reification of diversity and an account of diversity as a more positive form of “objectification.”

We have already witnessed some sense of the tension in Leong’s account in her differentiation between an institution’s appropriation of the surplus value of diversity and diversity as commodification in and of itself. On the one hand we have statements such as the following: “People should not commodify race because racial commodification enables racial capitalism and the *exploitation and inequality* that process engenders.”⁶¹ Here the surplus value of non-whiteness accrues to the benefit of white individuals and white majority institutions.⁶² Further, at other points not yet discussed, Leong acknowledges the work of a second generation of commodification theorists who pose that the issue may be whether a particular commodifying exchange is objectionable rather than commodification by itself.⁶³ According to this logic, sometimes commodification may “preserve the value of the particular good that is exchanged,”⁶⁴ which suggests both that commodification may itself not be the issue and may not be an issue when the exchange is one of equal value rather than surplus value. At other points, Leong also addresses the argument that commodification may sometimes have “desirable collateral consequences.”⁶⁵ The claim here is that motivation for diversity may be

⁶¹ *Id.* at 2201 (emphasis added).

⁶² *See also id.* at 2191 (discussing the “capturing [of] the surplus value associated with nonwhiteness”).

⁶³ *Id.* at 2200. More generally, Leong at several points references the book *Rethinking Commodification*, which is a collection of articles reassessing the nature of commodification. *See* Leong, *Racial Capitalism*, *supra* note 8, at 2161 n.39, 2199 n.245, 2203 n.245, 2203 n.268 (citing *RETHINKING COMMODIFICATION* (Martha M. Ertman & Joan C. Williams eds., 2005)).

⁶⁴ Leong, *Racial Capitalism*, *supra* note 8, at 2200.

⁶⁵ *Id.* at 2219.

exploitative—say, to feature nonwhite individuals in promotional materials—but this may lead positively to a more diverse institution.⁶⁶ The commodification may turn into a more positive and productive event.⁶⁷ Sometimes Leong agrees that these consequences may be positive, while insisting that the commodification is temporary.⁶⁸ At other times, she is suspicious whether these events will really result in reform.⁶⁹ Across these alternative approaches to commodification, Leong’s own approach does not appreciably change. Commodification may not be an issue in areas outside the context of racial capitalism,⁷⁰ and within that context, any seeming positive benefits either prove to be hypothetical and so not real⁷¹ or marginal accounts⁷² not incorporated into her rejection of racial commodification as per se violative of personhood. Despite the space that these examples seem to create for a possible differentiation between racial commodification and exploitation, Leong disagrees. Racial capitalism is criticized as the “process of deriving social or economic value from the racial entity of another person,”⁷³ regardless of whether the exchange might somehow otherwise be equal. Racial identity, Leong maintains, “cannot be commodified and its value exchanged consistent with notions of equality.”⁷⁴ For her the problem lies less in the surplus value of exchange than in the commodification inherent in exchange.⁷⁵

If, however, commodification inures in exchange, it would seem impossible to create a positive, “thick” version of diversity, because diversity in any form

⁶⁶ *Id.*

⁶⁷ *Id.* at 2224–25.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2219.

⁷⁰ *Id.* at 2200–01.

⁷¹ *Id.* at 2219.

⁷² *Id.* at 2224–25.

⁷³ *Id.* at 2153. *See also id.* at 2156.

⁷⁴ *Id.* at 2202.

⁷⁵ Leong addresses the differences between a focus on surplus value and a focus on exchange in citing contrasts in the secondary literature between commodification as problematic due to “coercion”—the exploitative nature of exchange that arises from inequality and economic necessity—and due to “corruption”—the degrading consequences of reduction to market value. *Id.* at 2199. She does not sort out the implications of these differentiations for her own argument but rather emphasizes the corruptive nature of commodification. *Id.*

would still leave an institution with the social and economic benefit derived from the association with persons of color. Racial identity would still be commodified.

By contrast, I want to draw on the second generation of commodification theorists to help pursue how commodification, even in the context of race, need not be unremittingly negative but also can have positive benefits. I go further than these theorists in grounding the negative aspect of commodification in reification rather than in economic exchange and in posing “objectification” as a positive alternative to reification. At the same time I do not at all dismiss or disparage the contributions of Leong and Radin in resisting the negative implications of commodification. I do not urge that this resistance to commodification is simply a vestige of outworn, passé romantic individualism or that in a contemporary world where irony and cynicism predominate, it is simply a matter of sophistication to accept the reality of “universal commodification,”⁷⁶ where not only does it seem that everything can be bought and sold but that we also assess value according to the metric of economic value. The conceptual framework of “objectification” may help us to rethink other measures of value or, in my introductory vocabulary, to restore access to “spirit” even as it is objectified within institutional settings.

Following up on and responding to Radin’s groundbreaking work, the second generation of commodification theorists argues that to commodify or not is not the critical question.⁷⁷ Rather, commodification has “multivalent” meanings even in any one context.⁷⁸ Whether commodification is positive or negative may rest in how we frame the activity, as Radin herself now recognizes.⁷⁹ Regina Austin’s work on the commodification of Kwanzaa provides an apt example. Kwanzaa, Austin writes, is “swathed in ironies.”⁸⁰ Intended in part to counter the commercialism of Christmas,⁸¹ Kwanzaa has become commercialized itself.⁸² This

⁷⁶ Radin, *supra* note 44, at 1859–70.

⁷⁷ See, e.g., Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not to Commodify: That Is Not the Question*, in *RETHINKING COMMODIFICATION*, *supra* note 63, at 362.

⁷⁸ Miranda Joseph, *The Multivalent Commodity: On the Supplementarity of Value and Values*, in *RETHINKING COMMODIFICATION*, *supra* note 63, at 383.

⁷⁹ Margaret Jane Radin & Madhavi Sunder, *Introduction: The Subject and Object of Commodification*, in *RETHINKING COMMODIFICATION*, *supra* note 63, at 8, 16.

⁸⁰ Regina Austin, *Kwanzaa and the Commodification of Black Culture*, in *RETHINKING COMMODIFICATION*, *supra* note 63, at 178, 187.

⁸¹ *Id.* at 183.

⁸² *Id.* at 185.

commercialism has in turn increased participation in the holiday and in the holiday's endorsement of African American and African culture.⁸³ While "Kwanzaa was anti-capitalist in concept . . . it has spread through commercialization, which has helped to sustain a market for Afrocentric commodities manufactured and distributed by black-owned concerns."⁸⁴ The meaning of Kwanzaa, Austin contends, does not rest on commodification per se. Instead, the real struggle is over the meaning embedded in the things representing Kwanzaa.⁸⁵ These things may be commodified, but their meaning may not be reducible to their economic commodification.

Leong acknowledges Austin's work but wants to distinguish between commodification as applied to culture—where it may have a positive capacity—and as applied to individual racial identity—where, as we have seen, it is for Leong something negative.⁸⁶ While it seems artificial to separate individual identity from one's culture, I do not debate that point here. Rather, I want to develop, as commodification theorists do not, how we can articulate conceptually the positive space that commodification may inhabit in the midst of its multivalent meanings. The opening lines of Austin's essay provide a descriptive point of entry into this analysis:

A people expresses its personhood collectively through its culture. Sometimes that culture is made tangible in the form of a *thing*, as with the music (rap or hip hop), dance (breakdancing), poetry ("spoken word"), street art (graffiti), and styles of dress (urban) that are part and parcel of the collective way of life and meaning making of contemporary black and brown urban youth.⁸⁷

As in her discussion of Kwanzaa, Austin goes on to argue that these expressions of culture can become commodified in ways that have both positive and negative consequences.⁸⁸ While continuing to endorse that insight, I want to attend

⁸³ *Id.* at 185, 187.

⁸⁴ *Id.* at 188.

⁸⁵ *Id.* See also Radin & Sunder, *supra* note 79, at 16, citing this passage.

⁸⁶ Leong, *Racial Capitalism*, *supra* note 8, at 2203.

⁸⁷ Austin, *supra* note 80, at 178 (emphasis added).

⁸⁸ *Id.* at 179–81.

something different in this passage. Culture and cultural personhood are expressed positively through *things*: music, dance, poetry, art, dress. I would add that individual personhood is no different. We inevitably and ineluctably express ourselves through outward manifestations that externalize ourselves, that present ourselves in objects—things—including our very speech. The problem of commodification rests not fundamentally on whether we delineate expression of ourselves in economic terms⁸⁹ but on whether these expressions allow us to manifest ourselves or become severed from us. I want to distinguish between whether these expressions allow us *positively* to *externalize* ourselves—our values, our “spirit”—or *negatively* to become *alienated* from ourselves, become simply things without our imbuing value, become *reified*, mere things. The etymology of the term “reification” from the Latin *res*, thing,⁹⁰ is helpful, as it underscores the transformation of something into only a thing. Its human and relational qualities are gone. Austin, for example, remarks that negative commodification of black culture occurs when it “becomes disconnected from its source, out there, frozen in time and space, un beholden to the people and the socioeconomic conditions that gave it vitality.”⁹¹ The negative side of commodification is less economic valuation than reification. Although she does not pursue the issue, this differentiation is not unknown in Radin. Radin, writing with Madhavi Sunder, comments how commodification can be viewed as a “reduction of the person (subject) to a thing (object).”⁹² We find a similar statement in Leong: “Commodifying race causes us to think of it as just another thing. . . .”⁹³

I want to distinguish between a positive externalization in an object and a negative alienation in a thing. Alienation is reification, an externalization reduced to a thing. Objectification is positive, external expression.⁹⁴ To delineate the

⁸⁹ I say “not fundamentally” because I do not want to dismiss out of hand that in some contexts reduction of our expressions to economic valuation may be pernicious. I just do not track that argument here.

⁹⁰ See WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1210 (1994).

⁹¹ Austin, *supra* note 80, at 179–80.

⁹² Radin & Sunder, *supra* note 79, at 8.

⁹³ Leong, *Racial Capitalism*, *supra* note 8, at 2213.

⁹⁴ I am not wedded to the term “objectification,” given its negative connotation as illustrated in the remainder of the paragraph in the text. I retain the term because it has been used positively in English, for example in translations of Marx, *see infra* text accompanying notes 115–16, and in most translations of Paul Ricoeur’s usage. *See infra* text accompanying notes 119, 123 & 124. The French term “objectivation,” *see infra* note 95, may come closer to what I am attempting to characterize: a sense of

distinction between objectification and alienation or reification, I draw upon the work of the philosopher Paul Ricoeur.⁹⁵ Ricoeur's contribution proceeds against a more general intellectual backdrop that criticizes the way in which human meaning has become lost due to its transformation into things. As we shall see, Ricoeur agrees with this critique but is distinctive in trying to distinguish between objectification as something positive and reification as something negative. Let me offer a few examples of this critique and its unfortunate negative characterization of the term "objectification." In Radin's own aim to protect personhood from the treatment of individuals as means or objects, she describes as objectification the failure "to make space in practice for the human subject."⁹⁶ Charles Taylor discusses how the external world is no longer viewed as having inherent meaning, a "reflection of a cosmic order," but has become viewed as simply composed of objects. He calls this development the "'objectification' of the world."⁹⁷ Over time, he writes, this objectification has extended "beyond external nature to englobe human life and society."⁹⁸ Social relations and practices have themselves become objectified.⁹⁹ Martha Nussbaum writes of the ways that persons come to treat other persons as things,¹⁰⁰ the objectification of one by another.¹⁰¹ This is a problem of particular weight in sexual relations.¹⁰² Hans-Georg Gadamer critiques the methods of the human sciences, because their objectification of human relations into categories alienates those relations from us.¹⁰³ In the attempt to break away from

human activity engaged in an objectifying process rather than just the object produced, the objectification. Occasionally, Ricoeur's use of the French term "objectivation" has been translated into English by the identical term. See Paul Ricoeur, *Philosophical Hermeneutics and Theological Hermeneutics*, 5 STUDIES IN RELIGION/SCIENCES RELIGIEUSES 14, 18 (1975–76) (Can.).

⁹⁵ See, e.g., PAUL RICOEUR, LECTURES ON IDEOLOGY AND UTOPIA 21–102 (George H. Taylor ed., 1986) [hereinafter RICOEUR, LECTURES]; Paul Ricoeur, *Objectivation et Aliénation dans l'Expérience Historique*, 45 ARCHIVIO DI FILOSOFIA 27 (1975) [hereinafter Ricoeur, *Objectivation et Aliénation*]; Paul Ricoeur, *Aliénation*, 1 ENCYCLOPAEDIA UNIVERSALIS 660 (1968). I acknowledge my bias toward Ricoeur as a former graduate student of his and as the editor of the *Lectures on Ideology and Utopia*, *supra*.

⁹⁶ MARGARET JANE RADIN, CONTESTED COMMODITIES 155 (1996).

⁹⁷ CHARLES TAYLOR, HEGEL 539 (1975).

⁹⁸ *Id.*

⁹⁹ *Id.* at 540.

¹⁰⁰ Martha C. Nussbaum, "Objectification," in SEX AND SOCIAL JUSTICE 218 (1999).

¹⁰¹ *Id.* at 215.

¹⁰² *Id.* at 218.

¹⁰³ See *infra* note 121.

the reification of human meaning, the last part of the twentieth century was marked, Ricoeur observes, by the prevalence of “categories of a leap, of deviation, of fracture, crisis, revolution.”¹⁰⁴

Ricoeur’s work differentiating objectification and reification requires a short conceptual detour through its origins in Hegel and Marx. This detour also will also mark a different reading of these two thinkers than by Radin—and by Leong, who is informed by Radin.¹⁰⁵ Radin originally derived her conception of commodification in significant part from Hegel’s *Philosophy of Right*.¹⁰⁶ More seems operative in this text than Radin allowed. At one point Hegel asks whether the attainments of the artist, scholar, or preacher—their “art, erudition, ability to preach a sermon,” etc.—are “things.” He notes that these attainments are something internal to the mind, and yet by expressing them can be *externalized* and *alienated* and so become “things.”¹⁰⁷ We need to differentiate here between the characterization of externalization and alienation. Externalization can be positive. As the examples of the artist, scholar, and preacher indicate, their will and person manifest themselves in externalizations in their work. Who we are inwardly needs to be externalized, needs to be expressed outwardly. The embodiment of the will is “an immediate external thing.”¹⁰⁸ The interior self becomes actualized through the process of externalization.¹⁰⁹ Alienation, by contrast, is negative. As the translator quotes Hegel in a subsequent footnote, “Alienation is giving up something which is my property and which is already external, it is not to externalize.”¹¹⁰ The

¹⁰⁴ PAUL RICOEUR, *MEMORY, HISTORY, FORGETTING* 224 (Kathleen Blamey & David Pellauer trans., 2004).

¹⁰⁵ See Leong, *Racial Capitalism*, *supra* note 8, at 2200 (discussing Radin).

¹⁰⁶ RADIN, *CONTESTED COMMODITIES*, *supra* note 96, at 35–40 (citing G.W.F. HEGEL, *HEGEL’S PHILOSOPHY OF RIGHT* (T.M. Knox trans., 1952)). It is not that Radin’s own conception rises or falls to the degree it adheres to Hegel; the rigor and depth of her ideas must be assessed on their own terms. For a more expansive analysis of Radin, from which the present discussion builds, see George H. Taylor & Michael J. Madison, *Metaphor, Objects, and Commodities*, 54 CLEVE. ST. L. REV. 141, 142–57 (2006). I thank Mike Madison for permission to draw from this co-authored account.

¹⁰⁷ HEGEL, *HEGEL’S PHILOSOPHY OF RIGHT*, *supra* note 106, ¶ 43.

¹⁰⁸ *Id.* ¶ 33.

¹⁰⁹ See RICOEUR, *LECTURES*, *supra* note 95, at 38–39 (describing the Hegelian approach).

¹¹⁰ HEGEL, *HEGEL’S PHILOSOPHY OF RIGHT*, *supra* note 106, at 322 n.16 (citation omitted).

alienation of property places it into the market, and it is this alienation that generates Radin's conception of commodification.¹¹¹

Hegel's positive characterization of externalization is also available in the young Marx. Marx goes beyond Hegel in criticizing the alienation of one's labor to the extent that labor is not a matter of self-expression but rather defined and imposed on the laborer from outside.¹¹² This is the more typical contemporary understanding of labor as alienated. Under these conditions, Marx writes, "[l]abor produces not only commodities: it produces itself and the worker as a commodity. . . ."¹¹³ When Radin and Leong discuss Marx as someone totally opposed to commodification,¹¹⁴ this is the Marx to whom they refer. This process of externalization is negative because alien. Yet Marx also wants to retain a positive concept of externalization, a process that he, in fact, calls "objectification." The proper rather than alienated object of labor is "the objectification of man's species life."¹¹⁵ As Marx comments in another passage, "[l]abor's realization is its objectification."¹¹⁶ This productive capacity of externalization is positive: "[i]t is life-engendering life."¹¹⁷ For the early Marx, writes Ricoeur, "humanity produces itself . . . by objectifying itself."¹¹⁸

¹¹¹ RADIN, *CONTESTED COMMODITIES*, *supra* note 96, at 156. As previously noted, *see supra* note 77, second generation commodification theorists challenge the equivalence between commodification and alienation in its negative sense. At a few points in her original work, Radin did seem to acknowledge the possibility of a more positive conception of objection, but this recognition was not incorporated into her larger thesis. *See, e.g.*, Radin, *supra* note 44, at 1874 (discussing "false objectification," which would seem to allow for true objectification), 1896 (asking why it is that "personhood cannot be objectified while at the same time personhood requires objectification (in things)").

¹¹² *See, e.g.*, KARL MARX, *THE ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844 111* (Dirk J. Struik ed., 1964) [hereinafter *MARX, MANUSCRIPTS*].

¹¹³ *Id.* at 107 (emphasis omitted).

¹¹⁴ *See* RADIN, *CONTESTED COMMODITIES*, *supra* note 96, at xiii (claiming that Marx's theory represents the pole of "universal noncommodification"); Radin, *supra* note 44, at 1871–73 (same).

¹¹⁵ *MARX, MANUSCRIPTS*, *supra* note 112, at 114 (emphasis omitted).

¹¹⁶ *Id.* at 108. Marx goes on to say that now "[i]n the sphere of political economy this realization of labor appears as loss of realization for the workers; objectification as the loss of the object and bondage to it; appropriation as estrangement, as alienation." *Id.* (emphasis omitted).

¹¹⁷ *Id.* at 113.

¹¹⁸ *See* RICOEUR, *LECTURES*, *supra* note 95, at 44.

In turn, Ricoeur himself insists that exteriorization or objectification is an ineluctable element of human activity;¹¹⁹ it is as primitive and radical—that is, to the root—as possible.¹²⁰ We understand the self, others, actions, or history through the marks or signs they display.¹²¹ These marks or signs are exteriorizations. Writing is a form of exteriorization,¹²² and action is textual in its objectification or exteriorization that is similar to the fixation that occurs in writing.¹²³ Ricoeur argues that humans objectify themselves through the works of our discourse, just as we do through the products of our craft and our art.¹²⁴

Contrary to Leong and Radin, then, externalization does not in and of itself entail a loss of personhood. In fact, externalization may be one of the most individually and culturally productive—and inevitable—ways we cultivate and manifest our humanity. A few broader examples may concretize this point. If we adhere to law as not simply a system of order but one pointing toward the just, then it seems we must recognize that promotion of the legally just requires also externalization of our personal sense of the just into legal structures and institutions. Sometimes the legal instantiation of our sense of the just is more just, sometimes less, but this instantiation is not per se a form of reification, a separation of the thing—the law—from the human values that inspire it. Similarly, if exteriorization were necessarily negative, we would need to abandon race as a categorical concept with potentially positive connotations. We are all aware that race is not a biological construct but rather a social, cultural, and political one.¹²⁵ We are also aware of the unspeakable evils which ascription of race has caused. Slavery is an extreme manifestation of the reification of another human being on

¹¹⁹ Ricoeur, *Objectivation et Aliénation*, *supra* note 95, at 27.

¹²⁰ *Id.* at 35.

¹²¹ This emphasis in Ricoeur marks a signal departure of his hermeneutics from that of Gadamer's. Gadamer views objectification as necessarily alienating, and he critiques the method of the human sciences as alienating because objectifying. *See, e.g.*, PAUL RICOEUR, FROM TEXT TO ACTION 70 (Kathleen Blamey & John B. Thompson trans., 1991) (exploring this distinction in Gadamer).

¹²² Ricoeur, *Objectivation et Aliénation*, *supra* note 95, at 35.

¹²³ RICOEUR, *supra* note 121, at 150 (action as objectification); THE PHILOSOPHY OF PAUL RICOEUR 149, 160 (Charles E. Reagan & David Stewart eds., 1978) (action as exteriorization). As with discourse, action's exteriorization permits its subsequent inscription in archives and documents. *Id.*

¹²⁴ Ricoeur, *Philosophical Hermeneutics and Theological Hermeneutics*, *supra* note 94, at 21.

¹²⁵ For a popular account, see GUY P. HARRISON, RACE AND REALITY: WHAT EVERYONE SHOULD KNOW ABOUT OUR BIOLOGICAL DIVERSITY (2009).

the basis of race—the rendering and oppression of the person as only a “thing.”¹²⁶ Yet, we also know that race can be a positive source of individual and cultural identity. Leong herself writes evocatively of how racial identity can “inspire community, solidarity, empathy, and tolerance. Racial identity can evolve to become a signifier of difference but not of hierarchy, inspiring respect rather than animus.”¹²⁷ Even if, as I shall return to, race remains a contested concept, it can be a positive form of externalization of personhood, a positive form of objectification. Absent this objectification, no positive sense of categorization—no positive sense of law, no positive sense of race—would exist.

With the differentiation between objectification and reification in mind, I return to application in the context of diversity. I argue for two lessons, both of which are consistent with the insights of Bell’s reference to Kazantzakis with which I began. I briefly describe these lessons and then move to greater elaboration. On the one hand, “spirit”—that is, some sense of underlying human values, including Leong’s and Radin’s emphasis on personhood—cannot remain isolated in its own sphere but inevitably will and must become externalized in institutional instantiations. The quest here is to establish instantiations that better represent positive objectifications of this spirit, these values, and to fight against negative, diminishing reification of these values. Part of the message here is that this battle is never won and any instantiation is never pure, always a matter of more or less, and always under potential threat. Second, acknowledgment of an underlying spirit provides both a vantage point from which to recognize the limitations of any instantiation and a resource, a sense of deep rightness, that gives one the sustenance and nurturance to fight for better instantiations of this spirit over time.

As applied to diversity the goal is to seek more positive objectifications and instantiations at the same time that we recognize, as a matter of racial realism, that diversity even at its best is a goal that does not attend redress for the continuing consequences of historical racial injury. Diversity remains susceptible to the negative forms of commodification, of racial capitalism, that Leong eloquently and insightfully addresses. A significant aspect of the aspiration here, then, is to

¹²⁶ Leong rightly discusses slavery as a perverse form of commodification. Leong, *Racial Capitalism*, *supra* note 8, at 2155.

¹²⁷ Leong, *Reflections on Racial Capitalism*, *supra* note 27, at 38. Given Leong’s critique, it is also interesting to read her separate acknowledgment that for purposes of affirmative action, some forms of racial classification are necessary and so not inherently reifying. See Nancy Leong, *Multiracial Identity and Affirmative Action*, 12 *ASIAN PAC. AM. L.J.* 1, 33 (2006–07).

determine how a “thick” version of diversity can be sought even if this version faces the continued challenge of appropriation by a “thin” version.¹²⁸ In part, the goal of the thick version of diversity is to allow for individual or cultural difference, for example, in forms of dress and expression. Also basic, it seems to me, is recognition that diversity at its best serves not only the goal of institutional participation by people of color, but also a recasting, through this participation, of institutional norms. The function of diversity in this thick version is not assimilation to pre-existing institutional values. Not only are greater individual differences allowed but the institution’s culture changes as well. The institution’s identity changes. Further, the institutional identity sought is not one common identity but one that allows for plurality. The objective is not to allow diversity to be a tool for the purpose of an institutional identity—either static or changing—that allows for initial participation on the basis of difference but with the end of commonality.¹²⁹ This more plural structuring of diversity may itself allow for a more continuing, positive objectification of diversity as a form of institutional identity and so help resist diversity’s reduction to or appropriation as something reified and commodified.¹³⁰

One of the great and perduring contributions of critical race theory lies precisely in its attempt to theorize plural identity in the context of racial identity. Brief reference to this well-known literature may help contextualize the prospects of plural identity as applied to diversity. Recognizing that African-American women face oppression on the basis of both gender and race, Kimberlé Crenshaw asserts that recognition of intersectionality may offer a vehicle for mediating the tension between multiple identity and the needs of group politics.¹³¹ Arguing similarly for the anti-essentialism of the categories of being black or a woman,

¹²⁸ Leong, *Racial Capitalism*, *supra* note 8, at 2169 (differentiating between thin and thick characterizations of diversity).

¹²⁹ For depiction of, though not agreement with, the contrary position, see Roberta Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1299 (2011).

¹³⁰ In her assessment of Leong, Stacy Hawkins also argues that a “more robust version of diversity” is available. Stacy L. Hawkins, *Selling Diversity Short*, 40 RUTGERS L. REC. 68, 70 (2012–13). Devon Carbado offers ways that diversity can be positively implemented, in an instrumental fashion, for the benefit of racial minorities. Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130 (2013). While noting Leong’s critique of the existing norms of the diversity rationale, Carbado seeks the positive possibilities of diversity within its existing doctrinal constraints. *Id.* at 1177 n.147.

¹³¹ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1283, 1296 (1993).

Angela Harris ascribes voice to a “multiple consciousness.”¹³² Harris does not deny the need for categorization but contends that our categories should remain “explicitly tentative, relational, and unstable.”¹³³ Regina Austin supports a politics of racial identification that works through difference, that seeks solidarity without suppressing the heterogeneity of interests.¹³⁴ Scholars outside the African American scholarly community, such as the Latino critical race scholar Francisco Valdes, contend comparably: “The challenge . . . is to animate inter-connectivities based on commonalities of experience without ignoring or denying real and relevant difference. Difference, per se, is not necessarily incompatible with inter-connectivity.”¹³⁵

I find analogous support for diversity as a form of plural institutional identity in some of the theoretical contributions of Ricoeur. In his work on metaphor, for instance, Ricoeur argues that “metaphor reveals the logical structure of ‘the similar’ because, in the metaphorical statement, ‘the similar’ is perceived *despite* difference, *in spite* of contradiction.”¹³⁶ Elsewhere, in his work on narrative identity, Ricoeur maintains that there concordance is sought across and in spite of the discordant.¹³⁷ In yet other work, Ricoeur insists that we must come to grips with the various ways in which the self is itself an “other.”¹³⁸

Also supportive of the notion of a plural institutional identity are borrowings from ecological notions of the desirability of “polycultures”—and their diversity—to maintain environmental health. While monocultures have a limited range of resistance to disease and pestilence, the diversity of polycultures allows them more

¹³² Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584 (1990).

¹³³ *Id.* at 586.

¹³⁴ Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 S. CAL. L. REV. 1769, 1775 (1992).

¹³⁵ Francisco Valdes, *Sex and Race in Queer Legal Culture*, 5 S. CAL. REV. L. & WOMEN’S STUD. 25, 60 (1995). As apparent from his title, Valdes adds to the mix of differences that of sexual orientation.

¹³⁶ PAUL RICOEUR, *THE RULE OF METAPHOR* 196 (Robert Czerny trans., 1977).

¹³⁷ 1 PAUL RICOEUR, *TIME AND NARRATIVE passim* (Kathleen McLaughlin & David Pellauer trans., 1984).

¹³⁸ PAUL RICOEUR, *ONESELF AS ANOTHER* (Kathleen Blamey trans., 1992). For more extended discussion of these themes in Ricoeur and critical race theory, see George H. Taylor, *Reenvisioning Justice*, 12 LO SGUARDO: RIVISTA DI FILOSOFIA 65, 67–70, 75–78 (2013), available at http://www.losguardo.net/public/archivio/num12/articoli/2013_12_George_Taylor_Reenvisioning_Justice.pdf.

readily to thrive, which conduces to a terrain's vitality.¹³⁹ It may be a matter of "interest convergence"¹⁴⁰ that white majoritarian institutions recognize and endorse this positive value of diversity.

If we apply these conceptions to racial diversity, the object of diversity—to advert to my title—is twofold. First, the goal is to inculcate by means of diversity a plural institutional identity that is not reducible to multiple, separate identities of participant individuals or groups. There is a sense of a "commons" but the commons allows for multiplicity and for the pursuit of similarity and connection across difference, even as difference is respected and preserved.¹⁴¹ Second, the goal of a plural form of institutional diversity and identity depends on how diversity is structured and institutionalized, on the degree it remains an "object," a form of objectification rather than a form of reification. The structure of diversity makes a difference, and a more positive structure allows diversity better to thrive and adapt as a healthy polyculture rather than as a susceptible and reified monoculture. For present purposes, then, the first lesson of Bell's use of Kazantzakis is that it is inevitable that spirit becomes externalized and institutionalized in certain ways and that this applies to better and worse ways that diversity can become positively objectified. Contrary to Leong, diversity's institutionalization does not ineluctably lead simply to reification or a negative form of commodification.

The second lesson of the Kazantzakis example, though, is that reification of diversity can occur, and we must rely on the separable values or spirit underlying the goals of diversity to resist and critique the perversions of its institutionalization. I have offered this observation previously here¹⁴² and raise additional two points at

¹³⁹ See Thomas L. Friedman, *Kansas and Al Qaeda*, N.Y. TIMES, Aug. 11, 2013, Sunday Review, at 11, available at 2013 WLNR 19807820, citing the work of Wes Jackson at the Land Institute, Salina, Kansas. In the article, Friedman draws the analogy between the danger of monocultures in nature and their potential danger in politics, particularly current Arab politics. *Id.* In a subsequent article, Friedman returns to the contrast between monoculture and polyculture to criticize aspects of United States politics that seek the former instead of the latter. Thomas L. Friedman, *From Beirut to Washington*, N.Y. TIMES, Oct. 20, 2013, Sunday Review, at 1, available at 2013 WLNR 26322996.

¹⁴⁰ See *supra* text accompanying note 29.

¹⁴¹ There are aspects here of civic republican thought. See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1533 (1988) (discussing the modern republican notion of the common good as entailing a "commitment to social plurality"). Bell, with co-author Preeta Bansal, presciently casts a skeptical eye toward civic republicanism's endorsement of a common good, since historically that common good has been sought on the basis of an elitism and racism that has eliminated minority participation. Bell & Bansal, *supra* note 11, at 1610–11.

¹⁴² See *supra* text accompanying notes 9–15.

this juncture. The first is that if objectification can degenerate into reification, a critical vantage point allows us to appreciate how reification also can be positively transformed into objectification. For instance, at the end of a book devoted to criticism of developments in eighteenth century English law that were employed to protect oligarchical interests,¹⁴³ E.P. Thompson devotes several final pages to a contrary thesis: even if development of the rule of law was reified in practice instrumentally to protect ruling interests, the rule of law cannot engage in simple manipulation but must uphold “its own logic and criteria of equity” and, at least on occasion, actually be just.¹⁴⁴ As Thompson continues, even if the rhetoric of “law” were intended as a mask, the mask was subsequently borrowed, to considerable positive effect, including in the twentieth century by individuals such as Gandhi and Nehru.¹⁴⁵ I would say the same of diversity. Even if employed as a matter of institutional self-interest and commodification, the logic of diversity can be used to work against this reification. As in the martial arts, the force of the rhetorical power of diversity can be used against those employing that force simply for instrumental, self-serving ends. The use of this force against the prevailing authority can create cracks or wedges that undermine the reification and help create a more objectified form of diversity instead.

My second and concluding point is a more sober one. We must ensure that efforts to pursue diversity are not “starry-eyed”¹⁴⁶—romantic, idealistic, naïve, utopian—about its prospects. As discussed, diversity is limited as a remedy, and Leong has insightfully and rightly shown how on its own terms diversity can become reified and commodified. Bell’s racial realism helps us recognize that the self-interest inherent in reification and commodification will not end. Only sometimes the commodification of diversity will permit more equitable forms of exchange;¹⁴⁷ only sometimes the struggle for constructive objectification of

¹⁴³ E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 260* (1975) (summarizing this thesis).

¹⁴⁴ *Id.* at 263.

¹⁴⁵ *Id.* at 264, 266.

¹⁴⁶ *Id.* at 266.

¹⁴⁷ See, e.g., Leong, *Racial Capitalism*, *supra* note 8, at 2157 (“[A] white individual or predominantly white institution might offer a nonwhite individual social status, friendship, goodwill, professional advancement, prestige, monetary compensation, tangible goods, or any number of other benefits in return for the capital derived from the affiliation.”). Leong still criticizes this transaction as “racial capitalism,” as an exchange that “derive[s] economic and social value from the racial identity of another person.” *Id.* at 2156.

diversity will lead to some positive results. Yet even if the glass of diversity is not full, it may not be empty. Perhaps more importantly, at whatever level we find the water in the glass, it will not be clear or transparent but murky and unsettled. We have some room for hope and struggle, but the struggle for racial justice will need to and must endure.