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Racial Commodification in the Era of Elective
Race: Affirmative Action and the Lesson of
Elizabeth Warren

Camille Gear Rich*

*University of Southern California Gould School of Law, cgrich@law.usc.edu

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Abstract

This Essay uses the current controversy over the racial self-identification decisions of former Harvard Law Professor Elizabeth Warren as an occasion to explore incipient cultural and legal anxieties about employers' ability to define race under affirmative action programs. The Essay characterizes Warren's racial self-identification decisions as proof of what I call "elective race," a contemporary cultural trend encouraging individuals to place great emphasis on their "right" to racial self-identification and a related desire for public recognition of their complex racial identity claims. I argue that our failure to attend to the importance placed on racial self-identification by Americans today places persons with complex racial identity claims at special risk for racial commodification. The Essay further suggests that the Warren controversy gives us an opportunity to rethink the way we conceptualize racial diversity. I argue that we must shift away the current model, which conflates race and cultural difference, toward a model that assumes racial diversity initiatives are sampling for employees that can teach us about the diverse ways that race is actualized and experienced. The Essay suggests that diversity initiatives that stress race's use value as a source of insight into the social process of racialization avoid the cultural commodification risks posed by current affirmative action programs, reorient employers away from thin concepts of diversity, and give employers a basis for making principled distinctions between employees' racial identification claims. The Essay concludes by identifying and defending a three-part inquiry that can be used to identify proper beneficiaries of diversity-based affirmative action programs.

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This Essay uses the current controversy over the racial self-identification decisions of former Harvard Law Professor Elizabeth Warren as an occasion to explore incipient cultural and legal anxieties about employers' ability to define race under affirmative action programs. The Essay characterizes Warren's racial self-identification decisions as proof of what I call "elective race," a contemporary cultural trend encouraging individuals to place great emphasis on their "right" to racial self-identification and a related desire for public recognition of their complex racial identity claims. I argue that our failure to attend to the importance placed on racial self-identification by Americans today places persons with complex racial identity claims at special risk for racial commodification. The Essay further suggests that the Warren controversy gives us an opportunity to rethink the way we conceptualize racial diversity. I argue that we must shift away the current model, which conflates race and cultural difference, toward a model that assumes racial diversity initiatives are sampling for employees that can teach us about the diverse ways that race is actualized and experienced. The Essay suggests that diversity initiatives that stress race's use value as a source of insight into the social process of racialization avoid the cultural commodification risks posed by current affirmative action programs, reorient employers away from thin concepts of diversity, and give employers a basis for making principled distinctions between employees' racial identification claims. The Essay concludes by identifying and defending a three-part inquiry that can be used to identify proper beneficiaries of diversity-based affirmative action programs.

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TABLE OF CONTENTS

INTRODUCTION	2
	7
PART I. THE POLITICS OF RACIAL IDENTIFICATION IN THE ERA OF ELECTIVE RACE	7
<i>A. The Right to Racial Self-identification In the Era of Elective Race</i>	11
<i>B. Employer Discretion In the Era of Elective Race</i>	14
PART II. REVISITING MALONE IN THE ERA OF ELECTIVE RACE	
<i>A. Authenticity Tests Versus Functionalist Inquiries About Race</i>	14
<i>B. Functionalist Inquiries About Race and the Risk of Racial Commodification</i>	16
<i>C. Re-writing Malone : Understanding the Social Processes of Racialization</i>	18
1. Physical Race or Phenotype-Based Race	18
2. Documentary Race	19
3. Social Race	21
PART III. DEFENDING FUNCTIONALIST INQUIRIES INTO RACE	22
<i>A. The Dangers of Laissez Faire Approaches to Race</i>	22
<i>B. The Dangers of Liberty- Based Approaches to Race (or the Return of the Honestly Held Belief Standard)</i>	25
<i>C. Applying the Functionalist Inquiry to Warren and Malone</i>	26
CONCLUSION	28

RACIAL COMMODIFICATION IN THE ERA OF ELECTIVE RACE: AFFIRMATIVE ACTION AND THE LESSON OF ELIZABETH WARREN¹

INTRODUCTION

Over the past fifty years, despite periodic Supreme Court skirmishes, Americans have lived under a negotiated peace with affirmative action programs². Meanwhile employers have labored in the trenches, attempting to implement affirmative action programs in a principled fashion. Employers' primary challenge in this process is balancing employees' dignity interests in racial self-identification and employers' countervailing interest in making so-called racial "authenticity" judgments to ensure the benefits of these programs are properly allocated.³ This normally invisible struggle was put on national display when we learned that Harvard Law School seemingly had manipulated the complex racial identification claims of law professor Elizabeth Warren after Warren disclosed that she was part Native American, based on family lore indicating that she had a biracial Native American grandfather.⁴ Given Harvard Law School's reported difficulty in finding minority faculty candidates, the school was quick to bracket Warren's primary claim of whiteness, and categorize her as a Native American professor to improve the school's diversity record.⁵ Years later, when Warren's Senate campaign led political muckrakers to uncover the tenuous

¹ Special thanks to Kim Yurako, Trina Jones, Kate Bartlett, Cheryl Harris, Devon Carbado, Melissa Murray, Nancy Leong, Zev Eigen, Stephen Rich, Mary Anne Case, Stephen Rich and Ariela Gross for their helpful thoughts during the writing process.

² For the most recent skirmishes involving affirmative action, see *Grutter v. Bollinger*, 539 U.S. 306 (2003) (permitting use of race as a plus factor in broader inquiry under affirmative action program) and *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003) (rejecting mechanical point system for racial groups in affirmative action plan). These debates will begin again next year as the Supreme Court considers challenges to the current affirmative action program at the University of Texas involving racial "critical mass." See *Fisher v. University of Texas*, 631 F.3d 213 (5th Cir. 2011) (*cert. granted*).

³ Cases involving putative affirmative action beneficiaries challenging definitions of race may be more common in the contemporary era than scholars currently believe. *U.S. v. NYC Board of Education*, 85 F. Supp. 2d 130 (E.D.N.Y. 2000) (reviewing plaintiff's challenge to allegedly over inclusive employer definition of Latinos for affirmative action program based on racial self-identification); *Peightal v. Metropolitan Dade Cty.*, 26 F.3d 1545 (11th Cir. 1994) (same). Cf. *Jana Rock Construction v. N.Y. Dept. of Econ. Dev.* 438 F.3d 195 (2006) (reviewing plaintiff's challenge to allegedly overly restrictive definition of Latino used to qualify for minority owned business program) For earlier cases, see Catherine R. Squires, DISPATCHES FROM THE COLOR LINE: THE PRESS AND MULTIRACIAL AMERICA 75-124 (2007) (discussing similar challenges brought by putative beneficiaries of affirmative action benefits in the 1980s and 1990s.)

⁴ Lucy Madison, *Warren Explains Minority Listing, Talks of Grandfather's High Cheekbones*, [CBS ONLINE] http://www.cbsnews.com/8301-503544_162-57427355-503544/warren-explains-minority-listing-talks-of-grandfathers-high-cheekbones/ (checked August 15, 2012) Subsequent reports indicate that Warren may not have Native American ancestry at all, as researchers have been unable to identify any documentary proof establishing that she has any Native American ancestor. See also, Kelefa Sanneh, *Elizabeth Warren's Family Ties*, June 4, 2012 (discussing general claim of Native American ancestry) <http://www.newyorker.com/online/blogs/newsdesk/2012/06/elizabeth-warren-who-is-native-american.html> (checked July 10, 2012).

⁵ See Mary Carmicheal & Stephanie Ebberet, *Warren Says She Told Schools of Her Heritage*, Boston.com (online version of the Boston Globe) May 30, 2012 (accessed on July 25, 2011 at http://www.boston.com/news/local/massachusetts/articles/2012/05/31/elizabeth_warren_acknowledges_telling_harvard_penn_of_native_american_status/?page=2).

basis for her claim of Native American identity, Warren was quick to point out that she was an “innocent victim” of Harvard’s racial categorization decisions, as she neither sought nor received any affirmative action benefits based on her decision to identify as Native American.⁶ However, Warren’s caveats did little to assuage the concerns of race scholars about the harms threatened by her case. For the Warren controversy revealed that there was no protective force that stood between Harvard’s strategic diversity interests, its related desire to commodify Warren by race, and Warren’s personal interest in racial self-identification. The Warren controversy warns about the ways in which an employee’s complex, racial identification decisions can be drafted to serve an employer’s purposes.

Concerns about the Warren controversy intensify when her treatment is contrasted against that of the Malone Brothers, two men who in 1977 self-identified as Black in their employment applications for the Boston Fire Department and were hired under an affirmative action program.⁷ Although the brothers previously had identified as white in their employment applications, they switched their racial identification to Black after they failed the Department’s standard entrance exam and learned of the more generous standards for Blacks under the Department’s court-ordered affirmative action program.⁸ The brothers felt entitled to make the switch, as family lore established that they had a Black great-grandmother.⁹ In stark contrast to Warren, the Malone brothers were fired when the tenuous basis for their claims of Blackness were discovered, and they were adjudged to have committed “racial fraud.”¹⁰ The different results in the two scenarios, more than forty years apart, again raise complex questions about how to negotiate employees’ interests in “elective” or voluntary self-identification by race, employers’ discretionary power to define racial categories, and authenticity contests under affirmative action.¹¹ For the fire department employer in *Malone*, just like Harvard in the Warren case, felt entitled to exercise its discretion to determine the character and content of racial categories, but this time employed a stricter, more rigorous authenticity-based standard that required further testing beyond the Malones’ simple act of self-identification.

Students of race look at the two cases and are puzzled. Why is it that Warren’s employer would embrace her tenuous claim of Native American ancestry today, but forty years ago the Malone Brothers similar claims about Blackness were the basis for termination?¹² What happened in the four decades that separate the two cases to

⁶ *See id.* Harvard made much of her Native American background, reportedly touting her as the University’s first woman of color hire. *See* Hillary Chabout, *I Used Minority Listing to Share Heritage* *1 (Boston Herald Online) http://bostonherald.com/news/politics/view/20220502warren_i_used_minority_listing_to_make_friends (checked on August 12, 2012).

⁷ *See Malone v. Haley*, 2 MSCR (Massachusetts Civil Justice Reporter) 1013. Additional details are provided on appeal. *See Malone v. Civil Service Commission*, 646 N.E.2d 150 (Mass. 1995)

⁸ *Malone*, 2 MSCR at 1015.

⁹ *Id.* at 1015-16

¹⁰ *Id.* at 1024-25, 1035-36. *See also*, Randall Kennedy, *Racial Passing*, 62 OHIO ST. L. J. 1145, 1191 (2001)

¹¹ Questions about affirmative action program administrators’ discretion to define racial categories have been raised obliquely in earlier Supreme Court cases. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting).

¹² Although many scholars have analyzed *Malone*, none have considered *Malone* in conjunction with the Elizabeth Warren controversy, namely, as an opportunity to reflect on employers’ potentially commodifying maneuvers in defining racial categories. *Cf.* Christopher Ford, *Administering Identity*, 82 CAL. L. REV. 1231 (1994) (using *Malone* as opportunity for cross national comparison to identify ideal method of defining race in

fundamentally change the employer's orientation from one invested in restrictive definitions of race that test the racial authenticity of employees, to one prepared to accept the most tenuous act of self-identification as proof positive of racial status? Additionally, as a normative matter, what should we make of the extraordinary power we seem to have given employers to shape and mold an employee's racial identity claims and draft them to its own purposes? Does an employer's strategic approach to racial identity issues operate on a different moral or ethical plane than the strategic maneuvering of individuals? What role, if any, is there for law to play in negotiating these conflicts?

The cultural context we live in today demands an answer to these questions, as we live in vastly different cultural milieu than that occupied by the Malone Brothers four decades ago. As this essay shows, Americans' understanding of race has changed dramatically in the past forty years, shifting from an approach that places great weight on racial phenotype to a model that places primary emphasis on "elective race" or voluntary, racial self-identification decisions.¹³ The law's failure to attend to this changed understanding of race threatens new dangers. Without a clear understanding of how to accommodate individuals' interest in elective race we risk potentially shutting out elective race candidates that are proper beneficiaries of affirmative action or, conversely, de-prioritizing the interests of candidates most marginalized by race — phenotypically-raced subjects who have little agency in racial identification matters. To address these dangers, this essay introduces the concept of elective race as a challenge the contemporary discourse of post-racialism. Our analysis of elective race will allow us to consider the role voluntary racial affiliation can and should play in diversity-based affirmative action programs.¹⁴

Indeed, contrary to post-racialists' claim that Americans are being acculturated to ignore race, the sociological literature shows that individuals are actually being acculturated to demand that government and private employers respect and recognize their ever more complicated interests in racial self-identification.¹⁵ To document this trend, this essay

affirmative action programs) Kennedy, *Racial Passing*, 62 OHIO ST. L. J. 1145, 1191-1193 (using *Malone* to explore risk of strategic deployment of race definitions by individuals); Kim Ford-Mazrui, *Race and the Law, Live and Let Love: Self Determination in Matters of Intimacy and Identity*, 100 MICH. L. REV. 2185, 2197 (2003)(discussing same); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, n.319 (1993)(discussing case as evidence of potential racial status interest in non-whiteness).

¹³ The multiracial movement has successfully convinced government to be more respectful of individuals' racial self-identification decisions. See *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 FED. REG. 58,782, 58,788-90 (1997) (issuing Office of Management and Budget directive to federal agencies requiring future racial data collection efforts to rely on individual's racial self-identification decisions rather than third party observation). [Hereinafter "Revised Directive 15"] For discussion of the multiracial movement efforts see Tanya Kateri Hernandez, *Multiracial" Discourse: Racial Classifications in an Era of Color-blind Jurisprudence*, 57 MD. L. REV. 97, 97 n.2, n.4 & n.7 (1998); Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1747- 48 (2003)(discussing same).

¹⁴ For examples of the post-racial account see Dinesh D'Souza, *The End of Racism: Principles for a Multiracial Society* (1996); Joseph Graves *The Race Myth: Why We Pretend Race Exists in America* (2004).

¹⁵ J. Scott Brown, et. al., *The Greater Complexity of Lived Race: An Extension of Harris and Sim* 87 SOC. SC. QUART. 411, 415 (2006) (explaining that "changing understandings of race in society have raised the legitimacy of multiracial identities"); Jennifer Lee & Frank Bean, *Americans Changing Color Lines: Immigration, Race, Ethnicity and Multiracial Identification*, 30 ANN. REV. SOC. 221, 222 (2004) (noting that 1 in 40 people describes themselves as multiracial today and current trends suggest that 1 in 5 will describe themselves as multiracial by 2050).

explores contemporary changes in our views about racial identity over the past forty years and considers the consequences these changes have for the administration of affirmative action programs. After documenting the challenges our changed cultural views about racial identity pose, the essay also warns that we must be mindful of the changed incentives of employers or affirmative action administrators in the era of elective race. In prior decades administrators might have opted for rather strict definitions of race; however, diversity demands and other factors have caused administrators contemporarily to prefer strategically deployed, flexible, and wide definitions for racial categories. Thus far, these changes in the understanding and treatment of race and their implications for affirmative action have gone unexplored.

To be clear, this essay is largely supportive of the current cultural trend encouraging greater respect for individuals' racial self-identification decisions. However, it also shows that there is a need to reclaim so-called authenticity judgments about race and properly name them for what they are: functionalist inquiries that structure and limit employer discretion to define racial categories. For functionalist inquiries about race in the employment context allow the law to consider with precision how race is being "commodified" or used by an employer in a given setting, and to set fair terms for what Nancy Leong calls a "racial capital" exchange.¹⁶ Additionally, by proposing substantive standards for this functionalist inquiry, ones that reject essentialist uses of race, the analysis charts a path that allows us to avoid the primary concerns Leong raises about racial commodification. For despite Leong's concerns about the tendency of employers to racially commodify employees while administering diversity-based affirmative action programs, she also recognizes that it is unlikely we can fully extricate race from market pressures.¹⁷ This essay demonstrates that a properly tailored functionalist analysis will serve as the market control that ensures that diversity programs do not become unintended vehicles for racial stereotyping and subordination.

Antidiscrimination scholars will recognize my approach as a variant of the "sociological approach" to antidiscrimination law articulated by Robert Post, a method that recognizes government's unavoidable and necessary role in shaping racial categories, even as it attempts to blunt their negative social significance.¹⁸ However, unlike Post, in this essay I fully embrace the functionalist logic of employment discrimination law.¹⁹ I show that functionalist inquiries that explore race's use value do not by definition create stereotyping dangers. Rather a properly tailored functionalist inquiry that uses race to explore and understand employees' varied experiences of racialization gives us a unique opportunity to redefine diversity in a more effective manner. More specifically, by redesigning diversity initiatives to select for employees with diverse experiences of racialization, we can both destabilize race and discourage employers from engaging in racial essentialism.

¹⁶ See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. __ (2013). See SSRN copy at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009877 at *6, *28, *30.

¹⁷ *Id.* at *6

¹⁸ Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 32–36 (2000).

¹⁹ Post, *Prejudicial Appearances* at 16–17 (arguing functionalism is part of the "dominant conception" of antidiscrimination law and prevents apprehension of the value of a sociological approach to antidiscrimination law)

Part I of the Essay charts our path into the era of “elective race,” identifying the demographic, political and social changes that have encouraged Americans to regard the right to racial self-identification as a key dignity interest. This evolution has occurred simultaneous with employers litigating Title VII and Fourteenth Amendment affirmative action cases challenging their authority to define racial categories and the qualifications necessary to claim membership in a particular group.²⁰ Although there is a rich scholarship on affirmative action and voluntary racial identification,²¹ no legal scholar has considered the impending conflict between employer’s discretionary definitional power over racial categories and the racial dignity interests of employees influenced by elective race understandings. I argue that, if employer discretion is left unbounded, employers will exercise broad power to shape race in ways that should give all Americans pause.

Part II revisits the so-called racial authenticity inquiry conducted in *Malone* to reveals its functionalist foundations, and to retool this functionalist logic in ways appropriate for contemporary diversity-based affirmative action programs. I show that, by mining the inchoate concepts of race articulated in *Malone*, we gain insight into the diverse range of racialization processes that are the proper focus of diversity initiatives. Part II then considers Leong’s concerns about racial capital exchanges that occur in diversity-based affirmative action programs.²² I argue that the functionalist standard outlined here will clarify the proper terms on which racial status inquiries are conducted, and in this way ensure that we move away from the thin conceptions of diversity that lead to the commodification of race in its worst form.

Part III turns to the most common concerns about the functionalist inquiry, namely that it involves government in the elaboration and policing of the definition of racial groups. Specifically, Richard Thompson Ford and Cristina Rodriguez have warned against involving courts in disputes over the definition of racial categories, as they believe that in order to resolve these disputes government is required to give legal imprimatur to racial stereotypes and create “identity group subsidies” for putative racially-linked cultural practices.²³ The revised functionalist analysis offered here is based on the understanding that we need greater demarcation between cultural diversity initiatives and racial diversity initiatives. I show that diversity initiatives that focus on diverse experiences of racialization largely avoid the stereotyping dangers that are the source of their concern. However, I also show that the law must recognize the link between race, culture and social subordination if it is to take account of the full range of racialization experiences that cause social subordination. Part III concludes by exploring Randall Thomas’s liberty-based arguments in support of relaxed

²⁰ See, e.g., *Peightal*, 26 F.3d 1545 (discussing Title VII challenge); *Jana Rock*, 438 F.3d 195 (discussing 14th Amendment challenge).

²¹ Most of the discussion of voluntary or “elective” racial affiliation and affirmative action explores concerns about individuals making strategic racial identity claims. See, e.g. Kennedy, *Racial Passing*, at 1191. See generally, John Martinez, *Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs*, 12 HARV. BLACKLETTER L. J. 49 (1995)(same); Chris Ballentine, *Who is a Negro--Revisited: Determining Individual Racial Status for Purposes of Affirmative Action*, 35 U. FLA. L. REV. 683 (1983)(same).

²² Leong, *Racial Capitalism* at 6*, 28.

²³ RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 91-97 (2005) (arguing that “civil rights [laws] should focus on eliminating status hierarchies, while generally leaving questions of cultural difference to the market and other institutions.”); Cristina Rodriguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1406 (2008) (raising concerns about essentialism in affirmative action selection decisions).

approaches to racial identification,²⁴ and the more contemporary manifestation of this argument in the work of Kenji Yoshino.²⁵ This liberty-based approach to racial self-identification again stresses the dignity injury employers and government inflict when they challenge employees' racial identification decisions. The essay explains that this dignity interest must bow to queries about one's experience of racialization when one claims, based on race, that one can advance an employer's diversity goals.

PART I. THE POLITICS OF RACIAL IDENTIFICATION IN THE ERA OF ELECTIVE RACE

Mark Twain famously quipped, "Reports of my death are greatly exaggerated" after hearing that his obituary had been published in the *New York Journal*.²⁶ Similarly, one senses the announcement of the death of race is premature, despite the extensive legal and political commentary announcing the advent of the post-racial era. While there is a rich scholarship devoted to combating claims about post-racialism,²⁷ few have brooked what I consider to be the key contemporary legal challenge for legal scholars: to develop accounts of law that can negotiate individuals' complex racial identity claims and the challenges they create for antidiscrimination law.²⁸ To address what I see as a disturbing silence in the literature on this topic, I have coined the term "elective race," to document our steady march down a path that encourages individuals to make more complex racial identity claims and to demand that employers, government and other social institutions recognize and respect these complex racial identity interests.²⁹ As the next section shows, the contours of this racial self-identification interest are far from clear, but Americans have come to invest more and more significance in their racial self-identification decisions.

A. The Right to Racial Self-identification In the Era of Elective Race

Most Americans identify by race;³⁰ however, the racial identity claims that most characterize the modern era are those made by multiracial Americans: persons who make complex claims regarding their racial ancestry and who in prior decades more willingly

²⁴ Kennedy, *Racial Passing* at 1191-1193 (arguing that government should respect self-identification decisions)

²⁵ KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 21-26 (2006) (arguing that civil rights law should protect against covering demands that require the individual to mute aspects of his or her authentic self).

²⁶ SHELLEY FISHER FISHKIN, *LIGHTING OUT FOR THE TERRITORY: REFLECTIONS ON MARK TWAIN AND AMERICAN CULTURE* 134, 1998 (recording precise quote as "The report of my death was an exaggeration.")

²⁷ See, e.g. Mario L. Barnes *et. al.*, *A Post Race Equal Protection*, 98 *GEO. L. J.* 967 (2010) (discussing discursive and analytic limitations of the construct); Sumi Cho, *Post Racialism*, 94 *IOWA L. REV.* 1589 (2009) (discussing same).

²⁸ For a discussion of the problems multiracials' racial identification decisions create for equal protection law, see Hernandez, *Multiracial Discourse* at 126. (1998); See also, John A. Powell, *The Colorblind Multiracial Dilemma: Racial Categories Reconsidered*, 31 *U.S.F. L. REV.* 789, 797 (1997) (discussing same).

²⁹ For further discussion of this phenomenon, see Camille Gear Rich, *Elective Race* (est. release Spring 2013) Draft available upon request.

³⁰ See, e.g., Eric D. Knowles & Kaiping Peng, *White Selves: Conceptualizing and Measuring a Dominant-Group Identity*, 89 *J. OF PERSONALITY AND SOC. PSYCH.* 223-241 (2005) (discussing tendency for whites to focus more on white identity when interacting with persons of other races); Brian Lowery, *et. al. Concern For The In-Group and Opposition to Affirmative Action*, 90 *J. OF PERSONALITY & SOC. PSYCH.* 961-974 (2006) (same).

would have been absorbed into monoracial categories.³¹ Scholars such as Tanya Hernandez and Naomi Mezey have shown how in the 1990s multiracial advocacy groups shaped the national conversation on race as they petitioned for the addition of a new “multiracial” race category in the 2000 Census and 2010 Census.³² Multiracial advocates’ request for a separate multiracial category was ultimately rejected in favor of an option that allows multiracials to check off all racial categories with which they identify. Despite this setback, the multiracial movement still profoundly shaped federal policy and national discourse about race. Most significantly, the movement’s efforts caused the Office of Management and Budget to issue a revised “Directive 15,” the administrative guidance document that controls all federal racial data collection efforts. The new Directive 15 requires that all federal agencies respect an individual’s interest in racial self-identification and allow the exercise of this right or interest whenever possible in government-sponsored or solicited data collection processes.³³

The federal government’s shift away from data collection efforts that primarily relied on third-party observer racial categorization of citizens in favor of approaches that stress the individual citizen’s right to select her racial identity marks an important cultural sea change. As a result of this policy shift, individuals that might not have otherwise reflected much on racial identity matters are now disciplined by a regime that demands that one make consciously chosen racial self-identification decisions periodically throughout one’s life.³⁴ The Census tends to receive the most attention in literature on this subject, but its effects are relatively limited since it only requires one to answer racial self-identification questions every ten years.³⁵ However, employers are required to collect racial data on a yearly basis to facilitate the enforcement of Title VII³⁶ and, as a consequence, they require employees to answer racial identification on a fairly frequent basis. Also, educational institutions, at all levels, from grade school through post graduate education, are required to collect racial information for the enforcement of Title VI. Parents are given primary responsibility for identifying a child’s race until the child completes her secondary education, after which time the student’s right to racially self-identify is triggered. Consequently, once a person reaches the age of majority she can expect to be confronted with racial self-identification questions as she moves through the educational process and professional life.³⁷ These racial information

³¹ Aliya Saperstein, *Double Checking the Race Box: Examining Inconsistency Between Survey Measures of Observed and Self Reported Race*, 1 ETHNICITY AND RACIAL STUDIES 1, 2 (2011) (demonstrating that self reported race and third party classification often yield dissimilar results despite government policies that treat methods as producing similar findings).

³² Hernandez, *Multiracial Discourse* at 97, n.2, n.4 & n.7; Mezey, *Erasure and Recognition* at 1747- 48.

³³ See *Revised Directive 15* at 2. (“Respect for individual dignity should guide the processes and methods for collecting data on race and ethnicity; ideally, respondent self-identification should be facilitated to the greatest extent possible, recognizing that in some data collection systems observer identification is more practical.”)

³⁴ MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 148, 177-184 (Alan Sheridan trans., 1977).

³⁵ Mezey, *Erasure and Recognition* at 1719

³⁶ Joseph Z. Fleming, *I Believe There Is Something Out There Watching Us; Unfortunately, It’s the Government: An Analysis of the EEOC’s EEO-1 and OFCCP Reporting Requirements*, American Law Institute - American Bar Association Continuing Legal Education ALI-ABA Course of Study November 30 - December 2, 2006, SM027 ALI-ABA 1209 at 3, 12-13

³⁷ See *Rich Decline to State* at 585 n.1 (discussing Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 FED. REG. 59, 266, 59, 277 (Oct. 19, 2007))

requests, taken together, encourage Americans' view that racial self-identification is an important part of one's identity construction.

While Americans have been encouraged to see these moments of racial identity selection as important, the values and understandings that guide their decisions are surprisingly unclear.³⁸ Some Americans may regard these inquiries as moments in which they are required to identify how they are racially perceived by others, regardless of whether their perceived race matches their personal racial identity commitments. Others answer these questions based on how they believe they are expected to answer these questions, either because of their family's racial identity commitments or those of their cultural group. Still others answer these questions based on their symbolic commitment to particular communities, regardless of whether they have had any social experiences in which they were recognized as members of a given racial category. The wide variation in how individuals make their racial self-identification decisions makes these decisions ripe for misunderstanding, exploitation and abuse.

In addition to shaping federal racial-data-collection efforts, the multiracial movement also had a profound discursive impact on the language and constructs Americans use to articulate their relationship to race. For example, Census data shows that after the multiracial movement there was a surge in the number of persons that describe themselves as mixed race.³⁹ Relatedly, a new group of "white multiracials" has emerged.⁴⁰ These are persons who identify as white in certain circumstances, but also are willing to shift to a minority or multiracial identity when they enter a particular cultural context that makes minority background relevant, in response to significant life events, or even to gain potential strategic advantages in social interactions.⁴¹ Also, many more Americans are willing to challenge traditional, established racial categories and resist the default racial designation that would normally be assigned to them.⁴² For example, although persons who identify as Latino may regard this identity as a racial identity, federal law treats being Latino as a kind of ethnic designation and requires Latinos to further racially identify as white, Black or by using another federally recognized racial category.⁴³ At present, large numbers of Latinos, particularly the young, resist this attempt to structure their racial identification choices and

³⁸ Saperstein, *Double Checking the Race Box* at 2-3 (discussing various motivations that shape individuals responses to racial self-identification decisions).

³⁹ J. Scott Brown, et. al., *The Greater Complexity of Lived Race* at 413 (explaining that "changing understandings of race in society have raised the legitimacy of multiracial identities").

⁴⁰ Some believe the growth of white multiracials is in large part driven by interracial marriage rates. See Lee & Bean, *Americans Changing Color Lines* at 228. The authors report that, in the 25-34 year old cohort, 2/3 of U.S. born Asians marry outside of their race, usually to someone white, and 2/5 of Latinos in this cohort marry outside of their race, typically to someone white).

⁴¹ See, e.g. Marie L. Miville et al., *Chameleon Changes: An Exploration of Racial Identity Themes of Multiracial People*, 52 J. COUNSELING PSYCHOL. 507, 511 (2005).

⁴² See, e.g., Elizabeth Vaquera & Grace Keo, *Implications of Choosing "No Race" on the Saliency of Hispanic Identity* 47 SOC. Q. 375, 389 (2006) (noting that 2/3 of Hispanic youth in their research sample refused to choose any of the established racial categories when told Latino would not be recognized as a racial category)

⁴³ Wendy D. Roth, *Racial Mismatch: The Divergence Between Form and Function in Data for Monitoring Racial Discrimination of Hispanics*, 91 SOC. SCI. Q. 1288, 1289 (2010)(explaining Latino or Hispanic is not a racial designation for federal data collection purposes and discussing Latino resistance to this rule); Vaquera & Kao, *Implications of Choosing No Race* at 375 (discussing same).

choose “other race” rather than select another option.⁴⁴ Similarly, federal standards indicate that Middle Easterners should be categorized as white, but persons who identify as Middle Eastern may reject this proposition, citing their special experiences of discrimination as evidence that they are of a different race.⁴⁵

Further complicating matters, sociologists have raised questions about the integrity of peoples’ elective race decisions over time, as multiracials may change their responses to inquiries about race depending on the kind of form that is used, the order of the questions, and the context in which these questions are asked.⁴⁶ Also, although the law review literature has devoted almost no attention to this issue, structural variables strongly influence racial identification decisions. For example, issues such as class, history of imprisonment and other experiences of social marginalization can trigger multiracials to “choose” to claim a minority identity. These insights are important, as they reveal that in many cases fluctuations in multiracials’ racial self-identification decisions are not driven by thin expressive interests or strategic considerations, but may be profoundly linked to grounding experiences of alienation and marginalization.⁴⁷ Given the diverse array of influences that affect individuals’ racial self-identification decisions, we must develop legal analyses that treat elective race decisions in a manner that gives due weight to their complexity. Government has an obligation to develop an intelligent, coherent response on how to manage and interpret individuals’ shifting and sometimes conflicting racial identification choices as, in many cases, individuals fail to fully appreciate the legal significance that attaches to these decisions.

Indeed, the law may be on a collision course with the cultural default emphasizing the importance of the right to racial self-identification, for most individuals are unaware that, to the extent this right exists, it is a defeasible one. Census officials still rely on third party observation or other categorization methods when it is impossible or more likely inconvenient to get racial self-identification information.⁴⁸ This rule may result in a census official racially categorizing an individual in a way that fundamentally contradicts the individual’s own understanding of her race.⁴⁹ Similarly, employers also retain the ability to racially identify employees when the employee declines to state his or her race, when conditions make racial data collection impossible or impracticable, or when the employee

⁴⁴ Lee & Bean, *Americans Changing Color Lines* at 232 (reporting that in 1990 Census and 2000 Census, slightly more than 97% of those who chose “other race” were Latino).

⁴⁵ See John Tehranian, *Compulsory Whiteness: Towards A Middle Eastern Legal Scholarship*, 82 IND. L.J. 1, 5 (2007)

⁴⁶ See, e.g., David R. Harris & Jeremiah Joseph Sim, *Who is Multiracial? Assessing the Complexity of Lived Race*, 67 AM. SOC. REV. 614, 619 (2002)(noting that 6.8% of persons who identified as a single race on questionnaire either switched races or identified as multiracial when questionnaire was re-administered in a different context). The authors also found that 12% of self identified multiracials switched racial designation when questionnaire was administered in a different context.

⁴⁷ Saperstein, *Double Checking the Race Box* at 3 (discussing research showing working class and poor biracial whites were more likely to identify as Black than middle class ones); Aliya Saperstein & Andrew M. Penner, *The Race of a Criminal Record: How Incarceration Colors Racial Perceptions*, 57 SOC. PROB. 92, 92 (2010) (showing incarcerated biracial whites were more likely to identify as Black upon release and were more likely to be seen as Black, regardless of how they self identified or were perceived previous to incarceration)

⁴⁸ Christopher A. Ford, *Administering Identity: The Determination of “Race” in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1243 (1994)

⁴⁹ *Id.*

appears to have engaged in racial fraud.⁵⁰ Education officials enjoy the same discretion.⁵¹ Last, and perhaps most important for our discussion here, employers and public entities retain the ability to define racial categories and the ultimate authority to determine whether an individual's racial identity claims will be respected.⁵² Indeed *Malone*, while not cited for this proposition, stands for the principle that a public employer may define the content of a racial category and its membership.⁵³ Subsequent cases have made this point more explicitly, as employees have challenged the technical definitions of race used by employers or government agencies when these definitions would prevent them from accessing benefits.⁵⁴

B. Employer Discretion in the Era of Elective Race

The powerful role employers can play in defining and maintaining racial categories need not raise alarm, but it gives many individuals pause. Much turns on the normative and practical considerations the employer brings to the inquiry—considerations that I argue have dramatically changed in recent years. For example, in the 1980s many race scholars saw *Malone* as a progressive case involving employer discretion.⁵⁵ *Malone* they argued featured an employer who took the question of racial membership and social justice seriously, as the administrator in the case attempted to preserve the benefits of the Boston Fire Department's affirmative action program for its proper beneficiaries, systematically excluded Blacks. For others, however, the case was a disturbing authenticity tale,⁵⁶ with courts being asked to apply a litmus test for race in a way disturbingly reminiscent of the racial identification trials documented by Ariela Gross in the post-Civil War South and by Ian Haney Lopez in his discussion of racial determination trials in early Nineteenth Century citizenship cases.⁵⁷ Discussion of the case cycled between these two concerns for many years, but dissipated as *Malone* seemingly faded in social significance.

When *Malone* is raised today, scholars tend to argue that employer racial authenticity inquiries are rare given the substantial financial cost of making such inquiries, and the uncomfortable nature of applying so-called racial authenticity tests. However, the truth is far more complicated. One still sees a fair number of authenticity contests in employment discrimination cases involving disputes between the employer and the employee over the definition of the term Latino when used in affirmative action programs. Disputes may concern whether beneficiaries must speak Spanish, consistently identify as Latino, hail from a Spanish country or have a Spanish surname. These challenges to employer race definitions have come from affected employees of other races or from applicants frustrated by what they perceive to be as overly generous or overly conservative definitions of the term Hispanic or

⁵⁰ Fleming, *I Think Someone Is Watching Us* at 12-13.

⁵¹ See Rich, *Decline to State* at 585, n1 (discussing Dept. of Education standards)

⁵² See *supra* notes 2 & 7.

⁵³ *Malone*, 2 MSCR at 1015.

⁵⁴ See cases collected *supra* note 2.

⁵⁵ See e.g., Kennedy, *Racial Passing* at 1705; source at *infra* n. 56

⁵⁶ SQUIRES, DISPATCHES FROM THE COLOR LINE at 75-94.

⁵⁷ See generally Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998); IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996)

Latino.⁵⁸ Challenges to applicants petitioning to be recognized as African American were highlighted by the media in the 1980s and 1990s.⁵⁹ Certainly, there are not a large number of reported cases, but it seems premature to argue these conflicts are “rare” or have entirely disappeared.

Moreover, even if we assume that traditional racial authenticity inquiries are largely a thing of the past, the Elizabeth Warren debacle shows that employers currently are using their discretionary power to define race in other disturbing ways, one that capitalize on elective race norms. For employers and other entities charged with the administration of affirmative action now tend towards capacious definitions of race that are extremely accommodating of individual’s self-identification choices. Scholars such as Randall Kennedy have suggested this move is evidence of a kind of cultural sophistication we have developed about race.⁶⁰ He believes that affirmative action programs must grant respect for individuals’ personal racial identity decisions and understand the great range of diversity within ethnic and racial categories.⁶¹ Lani Guinier, in contrast, raises red flags about the expansive definition of race under affirmative action, arguing that administrators have incentives to engage in cherry-picking within racial categories in ways that frustrate affirmative action’s original social justice goals.⁶²

Others might regard administrators’ use of capacious definitions of race as evidence of what I call “racial fatigue—”⁶³ an abstract commitment to racial equality, but impatience, anxiety and ultimately disinterest in the quotidian struggles required to achieve this goal. For example, Angelia Castagno argues that employers and universities have consciously turned away from so-called authenticity inquiries about race as the costs of policing race are too politically fraught, too expensive, and too often against their own interests. Indeed, employers and multiracials have arrived at a moment of what Derrick Bell calls “interest convergence.”⁶⁴ Institutions invested in representing themselves as diverse to the public find that their incentives are aligned with employees who make tenuous identity claims to belong

⁵⁸ See *supra* cases at n.2

⁵⁹ These challenges involved persons with racially ambiguous phenotypes, or weak social ties to minority communities or, alternatively, persons shut out by technical definitions of race based on ancestry, but whom physically appeared Black and held themselves out as black persons. See SQUIRES, DISPATCHES FROM THE COLOR LINE at 74-94.

⁶⁰ See Kennedy, *Racial Passing* at 1191-1193.

⁶¹ Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES, June 24, 2004, at A1. (discussing symposium remarks from Lani Guinier and Henry Louis Gates Jr., warning that majority of Blacks admitted to Harvard under affirmative action were African immigrants, West Indians and children of biracial unions). Guinier noted that these individuals do add to institutional diversity, but are not the primary constituency initially targeted by affirmative action—children of former slaves). For further discussion see Squires, DISPATCHES FROM THE COLOR LINE at 122.

⁶² See Rimer & Arenson, *Top Colleges Take More Blacks, But Which Ones* at 1 (discussing Guinier’s concerns)

⁶³ Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539, 551 (2009)

⁶⁴ See Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523-528 (1980)(describing interest convergence as circumstances in which different interest groups find themselves united in pursuit of a single goal but for very different political reasons). Bell’s primary goal in introducing this construct is to demonstrate how this phenomenon results in temporary unstable coalitions in the battle for racial equality.

to historically disempowered racial groups.⁶⁵ From the institution or employer's perspective, they get the benefit of an employee they can count as a minority for diversity purposes, without doing the work necessary to reach out to the most subordinated and heavily racialized minority communities.

Employers consequently seem at risk for two types of behavior: overly restrictive authenticity judgments that are not sufficiently respectful of employees' dignity interests in racial self-identification, or conversely, overly capacious definitions of race that threaten to eviscerate the social justice underpinnings of affirmative action programs. The danger of overly rigid definitions is that they may be experienced as a form of violence by the employee, denying her recognition for what she perceives to be one of her most important personal identity characteristics. Additionally, rigid definitions born of convenience, political expediency or detached administrative logic can function as racial litmus tests that shut out from affirmative action programs persons that have experienced racialization in culturally salient ways. In contrast, the danger posed by employers' use of capacious definitions for race is that one ends up with a formal, wooden affirmative action inquiry that grants benefits to anyone willing to claim minority status purely as a documentary matter and purely on a short term basis. The concern is that, over time, affirmative action programs using these definitions will not confer benefits on persons that are culturally marginalized or socially subordinated, but rather sophisticated players attempting to gain a strategic advantage in competitive hiring, admission, or promotion processes.⁶⁶

Additionally, employer discretion of this nature poses a unique threat to individuals, one distinct from the aforementioned group-based and social redistribution harms worried about by many race scholars. For, as Elizabeth Warren discovered, when employers are granted full discretion to define and police race, employers can coerce or cajole an employee into certain kinds of racial identification that the employee would otherwise avoid. That is, merely because an individual has a colorable phenotype-based, cultural or familial link to a racial category does not mean that he or she is prepared to embrace that identity as a public matter, particularly if the racial identity in question does not match the lived experiences she has as a racialized person. Indeed, case law suggests that Warren may not be an isolated case, for there are a growing number of cases in which employers attempt to instrumentally use employees' self-identification decisions in the workplace, deploying their employees' racial identification decisions in a sophisticated, and extremely strategic manner. For example, the employer may cite the employee's failure to racially identify with a particular group as a basis for denying the employee affirmative action program benefits.⁶⁷ Yet the employee may bear markers of racial status that would otherwise signal that he or she is a member of an eligible racial category. Relatedly, an employer may use the employee's prior

⁶⁵ Angelia E. Castagno, *Native Mascots and Ethnic Fraud in Higher Education: Using Tribal Critical Race Theory and the Interest Convergence Principle as an Analytic Tool*, 40 EQUITY & EXCELLENCE IN EDUCATION, 3-13 (2007)

⁶⁶ See, e.g., A.T. Panter et al., *It Matters When and How You Ask: The Self Reported Race/Ethnicity of Incoming Law Students*, 15 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL 51, 58 (2009) (noting that majority of students identifying as "other" on the LSAT were multiracial white students who subsequently identified as white after the law school admissions process ended).

⁶⁷ *U.S. v. NYC Board of Education*, 85 F. Supp. 2d 130 (E.D.N.Y. 2000) (permitting employer to reject requests for benefits by putative Latino employees who failed to identify as Latino in employment forms)

self-identification claims to defeat her discrimination claim, arguing the employee has not previously identified as minority.⁶⁸ However, this prior self-identification decision may be a surprise to those whom encounter the employee in the workplace and recognize her phenotype to clearly place her in a vulnerable racial category. These cases suggest that antidiscrimination law may be more effective if it ensures that courts look beyond an employee's bare racial self-identification decisions when there are conflicts over race discrimination or affirmative action, in favor of a more searching inquiry. The next section returns to *Malone* to consider the multiple ways one can describe the experience of race, and the social consequences of these experiences of racialization. The discussion then assesses the relevance of these issues for our project—developing a functionalist analysis of race appropriate for diversity-based affirmative action programs.

PART II. REVISITING MALONE IN THE ERA OF ELECTIVE RACE

A. Authenticity Tests Versus Functionalist Inquiries About Race

The racial “authenticity” examination conducted in *Malone* attracted some criticism in its time; however it would be deeply worrisome in today's cultural climate. Some might see it as “a racial truth” inquiry, an idea deeply concerning to scholars like Cristina Rodriguez and Richard Thompson Ford, both of whom warn about the dangers of government-driven authenticity inquiries about race.⁶⁹ Close review of *Malone* tends to only heighten concerns. The dispute in *Malone* concerned the Boston Fire Department's court-ordered affirmative action program, a program created after litigation established that the Department had engaged in a pattern of discrimination against Blacks. The administrator began her analysis by acknowledging that there were no written guidelines regarding who could identify as Black prior to the *Malone* dispute, but she concluded that her approach was sufficiently comprehensive to avoid any notice or unfairness concerns. She then conducted a three-part inquiry to determine whether the Malones could be counted as “Black” by Department officials. The hearing officer considered: 1) the documentary proof the brothers could provide to establish their race; 2) the brothers' phenotype or racially-marked physical characteristics; and 3) whether the brothers had identified as Black socially, by holding themselves out to the community as Black persons.⁷⁰ After laying out the three-part test, the administrator further indicated that, even if the Malones failed to establish that they were Black under the three-part rule, she would rule in their favor if they held the “honest belief” that they were Black. With this proviso we see one of the earliest examples of an administrator's accommodation of “elective race”: the dignity interest an individual has in public recognition of his racial self-identification decisions.⁷¹

Fairly viewed, the *Malone* decision is riddled with problems. As an initial matter, it should raise due process concerns. For the brothers were held accountable under a racial

⁶⁸ See, e.g., *Lopez-Galvan v. Men's Warehouse*, 2008 WL 2705604, at *7 (W.D.N.C. July 10, 2008) (rejecting employee's claim of race discrimination because plaintiff solely alleged anti-Black animus but self identified as Latino and conceded his national origin was Dominican); *Green v. Swaine County Partnership*, 342 F.Supp.2d 442, 451 (W.D. Ca. 2004)(employer challenging plaintiff's claim to be Native American because she did not identify as Native American on her employment application and was not an enrolled member of a tribe).

⁶⁹ Ford, RACIAL CULTURE at 91-97; Rodriguez, *Against Individualized Consideration* at 1406.

⁷⁰ *Malone*, 2 MSCR at 1015.

⁷¹ *Malone*, 2 MSCR at 1015-1016

definition standard that had not been established, much less circulated, prior to the dispute about their racial identities. Second, the criteria the hearing officer used to assess the brothers' racial status claims were based on what Reva Siegel calls "group salient" characteristics: traits that are statistically correlated with a given race but are not actually possessed by all members of that racial group.⁷² Consequently, the variables the hearing officer relied on could be challenged as being under or over inclusive in identifying members of a given racial category. Third, and perhaps most important, although the hearing officer claims that she is engaged in a functionalist inquiry, she does not explicitly outline how her definition of race is informed by and reflective of the purposes of the affirmative action program in that case. As a consequence, the hearing officer appears to be defining what it means to be Black, rather than what it means to be Black for the remedial purposes of the Boston Fire Department's affirmative action program. However, close examination of the *Malone* administrator's decision shows that the list of considerations she offered were designed to ensure that opportunity was extended to persons who were most likely to be socially recognized as Black, and thereby excluded from the Boston Fire Department's pool of eligible hires during the relevant period.

Our interest in *Malone* stems from the understanding that the decision is a basic blueprint for understanding the multiple ways in which persons are racialized in society. Put differently, *Malone* charts dynamics I have elsewhere described as the various forms of voluntary and involuntary racial ascription.⁷³ *Malone* allows us to identify the three most common methods of racial ascription or "racialization" one might experience: ascription based on physical characteristics, documentary decisions, and symbolic social practices or "race performance."⁷⁴ The hearing officer rightly concluded that persons who had been subject to any of these forms of racialization were proper beneficiaries of the Department's remedially-focused affirmative action program. Yet our inquiry cannot end here, for contemporary affirmative action programs are premised on increasing diversity, not the explicitly remedial norms that informed *Malone*. Moreover, contemporary racial diversity initiatives have been articulated in ways that stress cultural diversity,⁷⁵ an interest that has little apparent relationship to the various processes of voluntary and involuntary racialization explored in *Malone*.⁷⁶ For example, employers argue racial diversity makes workplace teams smarter because teams can make decisions that are enriched by minority workers' cultural experiences.⁷⁷ Employers also argue that racial diversity assists with marketing as employers can more easily reach out to minority customers if they have employees that understand these

⁷² Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 91 (2000)

⁷³ See Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1145-46 (2004).

⁷⁴ *Id.* For a more expansive discussion of the ways in which discrimination based on documentary race can trigger discrimination, see generally Angela Onwachi Willig & Mario Barnes, *By Any Other Name? On Being Regarded as Black and Why Title VII Should Apply Even If Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283 (discussing studies showing discrimination triggered in written application process because of applicants' racially marked first names)

⁷⁵ Carol T. Kulik & Lorian Roberson, *Diversity Initiative Effectiveness: What Organizations Can (and Cannot) Expect From Diversity Recruiting, Diversity Training and Formal Mentoring Programs*, in DIVERSITY AT WORK 265 (ed. Arthur P. Brief) (2008)

⁷⁶ *Id.* at 265-269.

⁷⁷ *Id.*

groups' cultural predispositions.⁷⁸ My project is to encourage scholars to reconsider the discursive and analytic commitments we have made by privileging culture in discussions of racial diversity. The time has come to recognize that our conflation of race and culture in discussions of racial diversity is essentialist, misleading and does little to transform social arrangements in ways that ensure fair and equal opportunity to persons of all races.

B. Functionalist Inquiries About Race and the Risk of Racial Commodification

Robert Post's analysis of the normative underpinnings of antidiscrimination law helps one understand why our conflation of racial diversity and cultural diversity causes serious problems. Post explains that employment discrimination law is based on a functionalist logic that reduces employees to a set of skills or traits that are valued by the employer.⁷⁹ Race, according to this functionalist logic, should be irrelevant to an employer's evaluation of an employee as it does not have any bearing on the employee's actual skills.⁸⁰ Consequently, employers can be prohibited from using race in making employment decisions. In my view, however, contemporary diversity-based affirmative action programs do violence to this distinction. Contemporary diversity arguments invite employers to abandon this traditional bright line rule prohibiting the use of race in functionalist inquiries about employees' skills because these arguments suggest that racial minorities' *racially-inflected cultural differences* can and should be viewed as relevant skill sets that should be put to use in the workplace. The problem is, once race is brought into dialogue with the functionalist logic the workplace, many employers assume they have a "green light" to engage more broadly in the racial and ethnic commodification of their employees. This is ironic, as this functionalist logic was initially articulated to explain why racial differences should be *ignored*.

Despite these issues, one need not assume that employers' functionalist inquiries about race must create racial commodification problems. Functionalist inquiries about race can be bounded in ways that serve our interest in racial diversity but avoid cultural essentialism. The first step is to ensure that employers recognize that race is *not culture*, although the two are indelibly shaped by one another. The second point follows from the first: arguments in favor of cultural diversity should be weighed separately from arguments in favor of racial diversity. For cultural diversity may improve workplace decision-making, but the justification for racial diversity is an entirely separate matter. Third, employers interested in understanding the justification for racial diversity must understand that recruiting and promoting racial minorities provides the employer with opportunities to explore diverse experiences of racialization (by phenotype, by social performance or by documentary decisions, among other considerations). Racial diversity initiatives therefore should focus on the ways in which racial minorities have had disparate experiences of racialization, to better understand how these various processes of racialization result in subordination. The employer is interested in these experiences because the goal is to ensure that the workplace is refashioned in ways that avoid these effects.

This shift in the way we articulate the justification for racial diversity would bring necessary clarity to the current glut of incoherent responses from employers about why they

⁷⁸ *Id.*

⁷⁹ Post, *Prejudicial Appearances* at 13 -15

⁸⁰ *Id.*

value racial diversity initiatives. For employers rush to achieve cultural diversity by reference to racial diversity makes little sense, unless we have reasons to specially value the cultural diversity provided by historically racially-subordinated groups. Moreover, as Mitu Gulati and Devon Carbado explain, employers show little interest in allowing minority culture to transform the workplace, preferring instead to hire employees that conform with the established workplace cultural baseline.⁸¹ Consequently, there is little reason to believe that initiatives that stress cultural diversity will make the workplace more racially inclusive. In contrast, when we assume that diversity initiatives will instead focus on ensuring that an employer has access to a pool of employees with diverse experiences of racialization, one better understands how affirmative action can transform the workplace in ways that make affirmative action less necessary. For persons with different experiences of racialization will be more adept at identifying and disrupting what Susan Strum describes as “second generation” discrimination, structural issues and other discriminatory workplace dynamics that prevent minorities from advancing within a company.⁸² This is not to devalue the benefits an employer might enjoy by having access to employees shaped by different cultural influences. My goal is simply to point out that culture has been over emphasized in conversations about *racial* diversity.

Moreover, the shift to a diversity analysis that inquires into specific kinds of racialization would avoid many of the commodification risks Nancy Leong associates with the administration of affirmative action programs. In her article *Racial Capitalism*, Leong explains that she is primarily concerned about diversity initiatives that are focused on “thin” conceptions of diversity, ones that reduce race to mere presence, rather than trying to effect substantive change.⁸³ This “thin” conception of diversity makes racial minorities prized commodities, and reduces race to yet another “thing bought and sold.”⁸⁴ Leong rightly notes the connection between the definition of diversity and the use of race, an issue I have attempted to re-theorize here. Simply put, my model posits that employers’ inquiries about race in affirmative action programs should be narrowly focused on identifying candidates that have experienced racialization in ways that give them insights about social subordination. In this way, the model pushes employers to see race as something more than “mere presence” or the inclusion of brown bodies in the workplace. Rather, the diversity model is premised on the idea that employers will want to make use of the substantive insights racialized employees have about race discrimination dynamics that could potentially surface in the workplace. In this way, my analysis is distinguishable from Leong’s, as she believes that we must discourage the commodification of race. Instead, I would argue that we should ensure that we control the terms on which race is commodified. We must use the law to set terms that ensure that race’s use-value is limited to the insights it provides about the process and experience of racial subordination. In this way my functionalist inquiry serves as a much needed market control over employer’s use of race *and* it ensures that the employees hired under affirmative action programs have the skills necessary to effect change

⁸¹ See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262, 1293-98 (2000);

⁸² Numerous scholars have called for greater attention to workplace structures that cause minorities to experience discrimination in the absence of specifically prejudice motivated conduct. See Samuel Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 2-3 (2006) (criticizing Susan Strum, Tristin Green and others for structural turn).

⁸³ Leong, *Racial Capitalism* at 6.

⁸⁴ *Id.*

in the workplace. By redefining diversity, by redefining race's use value, the functionalist inquiry re-orientes the employer to be receptive to his employees' exercise of their skills in identifying race discrimination.

In order to have a more nuanced conversation about individuals' experiences of racialization, the next section revisits the *Malone* analysis, to consider the ways in which today's elective race climate would complicate the court's inquiries into the various processes of voluntary and involuntary racialization. As the next section shows, despite the complex sociological considerations that should be weighed in understanding the racialization process, it is possible to use these inquiries to achieve racial diversity while destabilizing the concept of race itself. Additionally, the *Malone* analysis allows us to revisit the question of the role of "honest belief" in the era of elective race. I suggest that "honest belief" arguments, to the extent they rely on an understanding of racial self-identification that focuses on individual liberty, should have little role in affirmative action inquiries. An individual's freedom to express his "authentic desire" to identify with a given race must fall to more concrete functionalist inquiries.

C. Re-writing Malone: The Social Processes of Racialization in the Era of Elective Race

1. Physical Race or Phenotype-Based Race

The hearing officer in *Malone* began her inquiry with the brothers' physical characteristics, or what I call a phenotype-based or physical race. The hearing officer concluded that both brothers had "fair skin, fair hair coloring, and Caucasian features" and therefore they "did not appear to be Black." She also noted that the brothers conceded as much about their appearance when questioned.⁸⁵ While the hearing officer's claim about identifiable Black features triggered some controversy when *Malone* was decided, it would elicit far more controversy today. Americans are far more sophisticated about the wide range of physical characteristics that might cause a person to be socially categorized as a member of a given racial group. Moreover, contemporary disputes today are less focused on African Americans (who arguably have a clearer phenotypic profile) and more on persons in racially liminal minority groups.⁸⁶ Many of these groups, including Native Americans, Middle Eastern persons and Latinos are not understood to have a clearly distinguishable phenotype or profile. Persons who presume to "know" what members of these racial groups look like tend to privilege the features of the subset ethnic group in that racial class with which they are most familiar.⁸⁷ Additionally, recent sociological studies suggest that racial phenotype determinations are strongly influenced by one's perceived class. In one study viewers were shown a racially ambiguous person and asked to determine his race. When the racially ambiguous model was dressed as a janitor he tended to be identified as Black; when dressed

⁸⁵ Philip Malone stated at the hearing "“Someone might question and say, [I] do[n’t] look Black or whatever.” 2 MCSR 1030.

⁸⁶ GEORGE YANCY, WHO IS WHITE? LATINOS, ASIANS AND THE NEW BLACK/NONBLACK DIVIDE 37-44 (2004) (noting the growth of Asian and Latino populations in the United States have succeeded in moving discussions of race away from Black/White paradigm).

⁸⁷ Vaquera & Keo, *The Implications of Choosing No Race* at 376 (explaining that Mexicans as the largest Latino ethnicity are primary referent for assumptions about Latinos' culture and appearance)

in a business suit, the model was more likely to be characterized as white.⁸⁸ This insight suggests that poor or working class multiracials are more likely to be assumed to be members of socially subordinated racial groups.

Recognition of the difficulties associated with identifying racial phenotypes or “physical race” does not require the conclusion that phenotype-based inquiries are inappropriate when identifying individuals eligible for affirmative action programs. Rather, physical race remains the most common way in which persons are racialized in our society, and should be recognized as an important trigger for socially disadvantageous treatment. However, any phenotype-based inquiry conducted today must acknowledge that determinations about physical features are always determined by the specific “racial lexicon” of the viewer, or the social experiences a viewer has had with persons in other racial groups.⁸⁹ Additionally, phenotype-based inquiries always should be clearly described as an exercise exploring the social meaning of race in a particular context. For the phenotype inquiry at bottom is nothing more than an attempt to understand how an individual’s features are most likely to be interpreted in a particular community or by a particular group of persons. By recognizing the inquiry into physical race as a cultural and interpretive project, the employer insulates the inquiry from claims of racial essentialism and from over or under inclusiveness challenges.

2. Documentary Race

The hearing officer in *Malone* next inquired into whether the Malones could provide documentary proof of their claimed racial status, apart from their self-identification decision in their second set of employment applications. The administrator concluded that they had no persuasive evidence to establish that they were Black as the sole documentary proof they could offer was a sepia-colored photograph of a woman they claimed to be their great grandmother. The hearing officer noted, however, that the brothers could not prove the race of the morphologically ambiguous woman in the picture. In contrast, the hearing officer pointed to the brothers’ birth certificates, which listed not only each brother’s racial identity, but the racial identity of all of their ancestors for three generations.⁹⁰ Because the brothers and all of their family members accounted for in the birth certificates identified as white, the hearing officer concluded that, for documentary purposes, the brothers were racially white.⁹¹

While not part of the formal documentary race inquiry, the hearing officer also seemed swayed by other documentary evidence showing that the brothers were inconsistent about their racial identification decisions in ways that seemed strategically motivated. These issues are discussed as part of her inquiry into whether the Malone Brothers’ views about their race were “genuinely held,” but they are surveyed here to help us understand the range of documentary sources courts today would consider as part of this inquiry. Specifically, the hearing officer noted that the first time the brothers took the Fire Department test in 1975

⁸⁸ Jonathan Freeman *et al.*, *Looking the Part: Social Status Cues Shape Race Perception* PLOS ONE 1 (2011) (online peer reviewed journal) (available at www.plosone.org).

⁸⁹ Siegfried Ludwig Sporer, *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7 PSYCHOLOGY, PUBLIC POLICY, & LAW 36-97 (Mar 2001) (noting that greater exposure to different racial groups leads to greater accuracy in categorizing faces into racial groups)

⁹⁰ *Malone*, 2 MSCR at 28.

⁹¹ *Malone*, 2 MSCR 1030.

they identified as white, and they only decided to identify as Black in 1977, after they failed to meet the general entrance exam standard and sought to qualify under the more relaxed standard for Blacks. Additionally, she noted that one brother failed to respond to questions about his racial status in the employment form he filled out the day of his hire, and that another claimed his father was Black - which she deemed to be a misrepresentation.⁹² Last, she noted one Malone brother did not list his status as Black when he applied for a promotion to lieutenant, which she intimated was due to the fact that there was no affirmative action program for the lieutenant position. On this application form, the brother declined to state race at all.⁹³

While the hearing officer seems extremely confident in her discussion of the Malone Brothers' documentary proof, sociologists work on race reveals that her determination today would be understood to stand on much more shaky ground. First, the birth certificates of racially liminal persons are notoriously unstable.⁹⁴ Researchers studying the racial identification data for babies who die in the first year have discovered that racially liminal babies are often reported as one race on their birth certificates, but their identified race is reported differently on the death certificate issued less than one year later.⁹⁵ Some of this discrepancy is caused by parents who may avoid identifying a mixed race child as minority, in order to protect the child from discrimination.⁹⁶ With this understanding, it seems far less remarkable today that the Malone Brothers were listed for three generations as white persons, even if they had a Black great grandmother. Inconsistencies in the racial designations for the infants studied also was due to the fact that racially liminal persons may be racially categorized in different ways by different observers. These insights, as applied to our analysis, suggest that when we look at the documentary race evidence for a racially liminal adult person, we should expect to see some inconsistency, particularly if third parties are involved in some of these racial categorization decisions. Importantly, none of the third-party racial categorization decisions may properly reflect the individual's personal views about his or her racial identity. Affirmative action administrators and courts reviewing affirmative action disputes therefore must learn to distinguish between the different kinds of documentary evidence involved in documentary race decisions to identify the documents that actually reflect the employee's decisions about racial self presentation. Also, they should be attuned to the fact that a person who has a record of seemingly inconsistent racial designations may have a particularly insightful and interesting perspective on racialization that would be relevant in conversations about diversity.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See generally Robert A. Hahn, et al., *Inconsistencies in Coding of Race and Ethnicity Between Birth and Death In US Infants: A New Look At Infant Mortality*, 1983-1985, 267 JAMA 259 (1992)(explaining that Asian and Latino babies have the highest rates of inconsistent reports of race between the two events). In both groups, 40% of deceased babies were recategorized. Racially liminal babies in both racial categories tended to be recategorized as white.

⁹⁵ *Id.*

⁹⁶ Lee & Bean, *Americans Changing Color Lines* at 230 (reporting that 50% of Biracial White/Asian and Biracial White/Native American children were reported to be white by their parents).

Moreover, when we focus on the question of personal agency when making decisions about documentary race, we face new interesting questions. The Malones' seemingly inconsistent and ambivalent racial identification decisions are easily explained by current research on multiracials' attitudes about racial identity. That is, it is well known and accepted that many multiracial persons shift between racial identities, and they may invoke a minority identity when the identity provides some strategic advantage, either in a casual social situation or even when applying to an educational institution.⁹⁷ This behavior, today, tends to elicit little controversy among multiracials themselves, although the practice has clear moral, ethical or political significance. That being said, my view is that "race-switching" in and of itself is not a practice that should disqualify an individual from being a potential beneficiary of affirmative action. Instead affirmative action administrators and courts need a better understanding of the broad array of different kinds of documentary race evidence that may be presented, the limited responsibility individuals may have for many of these documentary race decisions, and the various reasons a person might switch between different racial identities when given a chance to do so.

3. Social Race

The hearing officer's last inquiry was into whether the Malones "held themselves out as Black" or were regarded as Black in the local community. The court concluded that since the Malones had no social ties in the Black community and they had not joined the Society of the Vulcans—the African American firefighters group in the area, they had not held themselves out as Black.⁹⁸ The conclusions produced in this inquiry are arguably the most troubling part of the hearing officer's decision. For today inquiries about racial status that require the establishment of social ties with the Black community would raise serious concerns. At worst, the social race inquiry she performs looks like a demand for proof of a certain set of social affiliations and practices to establish racial identity. Rigid social race inquiries of this kind affect most harshly on those who do not have physical characteristics stereotypically identified with a particular group, and potentially might constrain an individuals' expressive and associational choices. Also, a rigid social race inquiry of this kind could even undercut the claims of persons who, because of their physical features would meet the standard for physical race, but do not socialize with Blacks or lack clear ties to Black communities. The hearing officer's decision also seems curious because it appears to focus on whether the brothers were socially recognized by other Blacks as Black, rather than whether the brothers were recognized as Black by whites—the cohort that was most likely to discriminate against them. Ironically, the Malones did show that many of their white coworkers knew that they had identified as Black on their employment forms and they had not tried to hide their racial self-identification decisions.

Two changes are required to reform the social race inquiry. First, we must establish that inquiries into social race should not be converted into racial litmus tests that demand particular kinds of "race performance" to establish one's right to claim a given racial identity. There are no social practices that are required or constitutive of a given racial group. Rather, what administrators should look for is evidence of social activity that communicates a willing to be racialized in a particular fashion. Second, we must recognize that the inquiry into an

⁹⁷ Miville, *Chameleon Changes* at 511.

⁹⁸ *Malone*, 2 MSCR at 1031.

individual's social practices primarily should be directed to determining whether the person in question has engaged in social performances that would signal to outgroup members (or potential discriminators) that he is affiliated with a particular group. Evidence regarding these social practices can be important in identifying racialized persons who because of phenotype and inconsistent documentary race evidence, might have difficulty establishing that they have significant experiences of racialization. Simply put, in the social race inquiry, an administrator looks to evidence of a person's social practices to assess whether or not the individual has voluntarily taken on the risk and reward of racialization in public life. These risks and rewards are an essential part of the diversity conversation.

In summary, a multi-prong inquiry that would allow an individual to establish in three different ways that he was voluntarily or involuntarily systematically characterized as a racialized subject has many advantages, as it ensures that persons included in a racial category have a wide range of experiences. We might be particularly interested for diversity reasons in understanding the stigma suffered by persons whose phenotype establishes their racial identity, as distinct from those who are racialized by documentary evidence or social practices. Even persons who are solely raced by documentary processes have relevant things to contribute to conversations about diversity, as they have likely experienced adverse shifts in their treatment once they are "outed" as persons of color. Similarly a person who does not have physical characteristics associated with a given racial group may be able to speak about changes in his treatment once people learn about his adoption of certain racially-inflected social practices that would cause him to be recognized as a minority person. Even persons who because of their physical characteristics are recognized as minority but do not identify as such, have something unique to contribute to conversations about race. By ensuring that the pool of minority applicants includes people with a range of racialization experiences, an affirmative action program tends to destabilize race rather than fix its meaning.

PART III. DEFENDING FUNCTIONALIST INQUIRIES ABOUT RACE

A. The Dangers of Laissez Faire Definitions of Race

The multi-prong functionalist inquiry outlined here may still bring a cold shiver to some scholars' hearts. Richard Thompson Ford would likely raise concerns about the analysis as, in his view, government should not be in the business of creating racial definitions beyond what is minimally required to disrupt social subordination.⁹⁹ His primary concern would be with the third part of the analysis—the inquiry into social race. Specifically Ford believes that cultural practices associated with racial groups should not be protected by government. In the context of affirmative action, he would likely worry that the social race inquiry proposed here continues a fundamental confusion that conflates race with cultural practice or race performance. Ford also notes that cultural practices privileged in affirmative action discussions are merely group salient – they are not practices engaged in by all persons in a given racial category. Consequently, racial diversity discussions that emphasize culture promote racial essentialism. Finally, Ford fears that any regime that provides preferences or protects racially-inflected cultural practices will create incentives for racialized subjects to conform their behavior to the racial identity recognized under the

⁹⁹ Ford, RACIAL CULTURE at 91-97.

controlling legal standard. Cristina Rodriguez similarly worries that, in the affirmative action context, individuals will be incentivized to perform race in legally recognized ways to ensure that they receive institutional benefits. She would argue that the social race inquiry creates identity group subsidies for the social practices associated with particular racial groups.¹⁰⁰ Rodriguez argues that, in order to avoid racially-essentializing administrator inquiries that reward people for conforming to stereotype, administrators should simply accept the racial identity claims of all comers without further inquiry.¹⁰¹

Unlike Ford and Rodriguez, I am less concerned about antidiscrimination models that recognize race's link with culture and extend individuals some credit or consideration when they engage in cultural practices associated with marginalized racial groups. Each cultural practice is indelibly marked by the race of its community of origin. As I have elsewhere observed, the racial stigma attached to a given set of cultural practices is so strong that the practices are still stigmatized even when they are adopted by racial outgroup members.¹⁰² Because race marks cultural practices, legal analyses must account for the stigma employees experience when they engage in these practices. Because cultural practice often signals race, in the absence of other markers, it is critical to our understanding of social subordination based on race.

Certainly, the arguments offered by Ford and Rodriguez are understandable. Ford in particular wants to ensure that members of cultural communities can make decisions about the value of their cultural practices in an atmosphere that accurately informs them about these practices' current social utility. However, in reality, Ford's hands-off approach quickly devolves into a laissez faire or market-driven approach that is overly sanguine about whether cultural practices associated with minority communities can be fairly evaluated in the open market. For an employee who engages in cultural practices associated with a racially marginalized group has no reasonable expectation (in the absence of antidiscrimination law) that the employer will approach an analysis of his practices based on pure functionalist logic or the efficiency norms of the marketplace. Rather as scholars such as Mario Barnes and Angela Onwuachi-Willig have shown, employers (like other Americans) are still fairly hostile to the cultural performances of subordinated groups when assessing workers' compliance with professionalism norms.¹⁰³ If we leave disputes about racially-inflected cultural practices to the market, we should fully expect to see the market consolidate performances of race that tend to mute or cover ethnic difference. However, this market development tells us nothing about whether minority-associated cultural practices have any important economic or social value.

Rodriguez's concerns would focus more on the potentially problematic incentives created by the social race inquiry. She would argue that legal recognition of racialized cultural practices will make those who otherwise would not engage in these cultural practices more likely to do so.¹⁰⁴ But, at bottom, Rodriguez's argument is really about the exploitative

¹⁰⁰ Rodriguez, *Individualized Consideration*, 83 IND. L.J. at 1406.

¹⁰¹ *Id.*

¹⁰² See Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. Rev. 1134 (2004).

¹⁰³ See Onwuachi Willig & Barnes, *By Any Other Name* at 1303.

¹⁰⁴ Rodriguez, *Individualized Consideration*, 83 IND. L.J. at 1406.

use of these so-called “identity subsidies:” she seeks to protect sophisticated players in the affirmative action market that would feel tempted to try to “game the system.” For affirmative action programs that recognize the importance of racially-inflected cultural performance do not compel conformity unless one has questions about whether or not one has adequate experiences of racialization. In particular, the three-part analysis offered here establishes that social race or cultural practice is merely one way establishing that one has relevant experiences of racialization. Persons offended by the social race inquiry can avoid this inquiry altogether by providing other evidence of relevant racialization experiences. Administrators of affirmative action programs know that they cannot create a system that prevents gamesmanship entirely. However, they also might conclude that an affirmative action regime that spurs the strategic player to actually touch base with marginalized communities before attempting to claim affirmative action benefits might not be such a bad thing in the long term.

Ford’s and Rodriguez’s arguments might also be characterized as raising concerns about regimes that incentivize an employer to racially commodify an employee based on stereotypes about the employee’s racial group. Unfortunately, these scholars’ suggestion that we abstain from protecting racialized cultural practices does not escape the commodification problem; rather, it merely creates other commodification dangers. For when employers know that they can, with impunity, “prefer” performances of race that do not disrupt the baseline cultural default in a given workplace, they will naturally prefer minorities that engage in this more conservative version of race performance.¹⁰⁵ Devon Carbado’s and Mitu Gulati’s work supports this claim, as they show that employers have a preference for employees that “work identity,” or try to signal their conformity to established workplace culture, rather than challenging workplace cultural norms.¹⁰⁶ This current commodification dynamic threatens minorities’ dignity and self-identification interests far more than analyses that provide credit for culturally-associated performances of racial identity. For, in most workplaces, the default cultural norm is something produced by socially-privileged whites, and it would be hostile to if not actively discouraging of the expression of minority-associated cultural difference.

The social race aspect of my proposal is bound to trigger controversy. However, I believe that in the affirmative action context, one can certainly acknowledge the way cultural performances trigger discrimination, without believing that this acknowledgement must lead to cultural conformity by all persons seeking recognition of their identification with a particular racial group. Moreover, the risk associated with ignoring racially-inflected cultural practices outweighs the concern about the law’s role in standardizing minority culture. It is clear that if we do not make social race a part of the affirmative action inquiry, administrators may overlook affirmative action candidates who may primarily be raced because of the cultural practices in which they engage. The refusal to recognize social race would fall most heavily on minority-identified morphologically-ambiguous persons, as they know that cultural practice is one of the key triggers for race discrimination in daily life. An affirmative action inquiry that gives credit for having suffered stigma based on these practices does much to disrupt dynamics of social subordination.

¹⁰⁵ See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262, 1293-98 (2000); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1200-02 (2004); Onwuachi Willig & Barnes, *By Any Other Name* at 1302-1305.

¹⁰⁶ See *id.*

B. The Dangers of Liberty-Based Approaches to Race (or the Return of the Honestly Held Belief Standard)

Randall Kennedy argues that the strength of *Malone* rests in part on its respect for the “honestly held belief” standard, an idea key to our understanding of elective race. Specifically, Kennedy argues that “no plausible aim of the affirmative action plan [in *Malone*] would have been worth the cost of excluding individuals from racial identifications that they honestly embraced.”¹⁰⁷ The virtue of the hearing officer’s decision, he explains, is that it accommodates “people who might conventionally be described as white but could nonetheless be classified as Black so long as they *honestly considered* themselves to be Black.”¹⁰⁸ In Kennedy’s view this approach pays “appropriate deference to the healthy intuition that a free society ought to permit people to exit and enter racial categories, even for purposes of gaining access to public entitlement programs, fettered only by the bounds of good faith.”¹⁰⁹ To rule otherwise, he explains, would return us to a time when we abided by the “baleful notion that state power should be used to confine every person to a given racial place regardless of individual preferences.”¹¹⁰ In Kennedy’s view, “it would be better to tolerate some or even considerable racial fraud under a regime of racial self-identification than to police affirmative action programs by subjecting individuals to racial identity tests.” Indeed, he explains, abolishing these programs would be preferable to maintaining them if intrusive racial policing became part of their price.¹¹¹

Kenji Yoshino’s work might also be cited in support of liberty-based approaches to racial identification, as he calls on us to adopt a broader antidiscrimination logic that takes seriously one’s interest in the presentation and recognition of one’s authentic self.¹¹² In his book, *Covering*, Yoshino explains that we all face “covering” demands with regard to various socially disfavored parts of our identities. What antidiscrimination law requires, in his view, is a way to more broadly recognize the dignity injury inflicted when we are asked to mute difference and deny our authentic selves in order to conform with the norms of the workplace or broader society.¹¹³ While he does not specifically speak to the issue of racial self-identification, one can easily see how multiracials would connect with Yoshino’s account of “covering” as a kind of discrimination. For multiracials have argued that they are forced to “cover” parts of their racial identities at various times and pass as monoracial. Additionally, multiracials and racially liminal persons have expressed serious concern about data collection requests that require them to “cover” or opt into existing racial categories that do not account for their racially-complex identity commitments. They easily could make similar claims about affirmative action programs that refuse to grant an applicant recognition or credit for all aspects of her racial identity.

Scholars that privilege individual autonomy and liberty in their accounts of individuals’ antidiscrimination interests provide multiracials and racially liminal persons

¹⁰⁷ Kennedy, *Racial Passing*, at 1193

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1193.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Yoshino, *Covering* at xii, 21-25

¹¹³ Yoshino, *Covering* at 23.

with precisely the normative justification they need as they demand recognition of their complex claims of racial self-identification, as well as their right to affirmative action benefits on this basis. For, once an individual's racial self-identification interest is represented as being part of her interest in authentic self-presentation, there is little negotiating room left to argue for employer functionalist inquiries into the basis for her racial-identity claims. The key consideration in establishing dialogue with persons who adopt a liberty-based position is to differentiate between the individual's interest in authentic self-presentation and the employer's or government institution's interest in tapping into certain insights produced by specific kinds of racialization. That is, employers are attempting to spur dialogue about the ways in which negative forms of racialization may be shaping workplace culture. To achieve this end, they need employees with something more than an amorphous symbolic interest in asserting a connection to a given minority group. Employees subject to an inquiry based on this functionalist concern will be required to answer a focused set of questions about the degree to which they have been racialized as a member of a particular group. However, this inquiry does not deny employees the freedom to pursue their expressive interests in claiming whatever racial identities they choose in other contexts. The functionalist inquiry will simply establish that, without more, an aspirational or purely symbolic connection to a racial group is insufficient to establish that one can address the employer's interest in learning more about racial diversity.

C. Applying the Functionalist Inquiry to Warren and Malone

Armed with our new understanding of the central role racialization experiences should play in understanding affirmative action and diversity, the Elizabeth Warren controversy becomes a much simpler case. First, the analysis allows us to set aside Warren's claim that her Native American identity "is an authentic and important part of who she is"¹¹⁴ as we understand that this statement is an expression of her personal interest in her Native American background, but it does not necessarily establish that she has relevant experiences of racialization. The three-part inquiry into the racial ascription experiences that she has had also reveals that she can provide a relatively thin basis for understanding the experiences of racially-subordinated Native Americans. Specifically, Warren made no claim that her phenotype had caused her to be recognized as Native American. Her documentary race evidence, while mixed, reveals a tendency to recede back into whiteness. Her best evidence of a desire to be socially recognized as Native American was her identification as Native American in the AALS Directory of American Law Teachers for close to ten years.¹¹⁵ However, Warren explained that she made this disclosure in order to meet other Native Americans and learn about their lives, and that she retreated back into identifying as white when this attempt failed. The strongest proof that this documentary attempt to establish race failed is that the hiring committee at Harvard was entirely unaware that Warren identified as Native American until after she was hired. Warren's evidence of social race was also limited. Her best evidence on this score was her contribution to an out of print 1984 cookbook called, "Pow Wow Chow: A Collection of Recipes From Families of the Five Civilized Tribes: Cherokee, Chickasaw, Choctaw, Creek, and Seminole."¹¹⁶ Even if we

¹¹⁴ Sanneh, *Warren Family Ties* at *3.

¹¹⁵ See Hillary Chabout, *I Used Minority Listing to Share Heritage* *1

¹¹⁶ Sanneh, *Elizabeth Warren's Family Ties* at *2.

assume, again, that this act reflects Warren's earnest desire to express her interest in Native American identity, there is no evidence that this act caused her to be regarded in daily life as a Native American person. As a whole, the evidence in Warren's case reveals that her understanding of discrimination against Native Americans in the workplace or in other social settings would be quite limited. Consequently, Warren was correct to conclude that she should not be a beneficiary of a diversity-focused affirmative action program.

Again, our determination that Warren should not have been eligible for benefits under a diversity-based affirmative action program does not invalidate her claim that her Native American background is *important to her personally*. Quite the contrary, in my view it provides a legal basis for suing her employer for exploitatively using her identity claims for diversity reporting purposes, if this administrative move was made without her permission. That is, Warren's sympathetic connection to Native Americans might make her particularly offended by the abusive use of her identity claims, particularly if they compromised opportunities for more clearly racially-marked Native Americans. Antidiscrimination scholars rightly worry about employers' exploitative use of an employee's cultural and racial heritage when the employee is asked to market to, recruit or network with other minority employees.¹¹⁷ We should not overlook, however, the dignity injury employees may feel when their racial identities are exploited for mere statistical purposes. Indeed, employer pressure of this kind can make an employee feel vulnerable and defensive and can quickly devolve into the kind of hostile environment conflict with which Title VII should be concerned. Legal protections preventing this use would help to forestall this kind of strategic employer behavior.

While the functionalist analysis makes Warren a simpler case, it makes *Malone* more difficult. For there is certainly evidence to suggest that the Malones' racial identity claims were strategic in nature, but times have changed in ways that make this strategic advantage taking a much more ambiguous ethical practice. Moreover, the Malones' case becomes more interesting when we consider that they worked in the Boston Fire Department for ten years while they were recorded in official department records as Black persons. During that period it is clear that they may have been racialized in some limited way, for the brothers explained that they told their coworkers that they identified as Black. We cannot know if the Malone Brothers strategic gambit caused them to experience discrimination; if they were differently regarded by their co-workers after the disclosure; or if this identity decision caused them to relate differently when they were confronted with race discrimination. An administrator might still reasonably conclude that the Malones did not have sufficient experiences with race discrimination and marginalization to be granted benefits under the Department's remedial affirmative action program. However, if we are focused on the issue of racial diversity, the Malones' experiences of racialization in the Department might be relevant, and might dovetail with the more sympathetic case of persons who phenotypically tend to be categorized as white, but who socially identify as Black. Indeed, Elizabeth Warren may have had her first real experiences with racialization after Harvard began characterizing her in public documents as their first minority female hire. She certainly had relevant experiences of racialization when some media analysts began questioning her qualifications after they learned she was Native American.

¹¹⁷ See Leong, *Racial Capitalism* at 28.

CONCLUSION

Our current cultural moment calls on us to re-evaluate *Malone* and the Warren controversy for political, moral and ethical reasons. We have long known that employers have broad power to define race for affirmative action programs. Yet his power raises new concerns in the era of elective race, as employees place more emphasis on their racial self-identification decisions and face a new, unique risk of racial exploitation. For a time scholars abandoned questions about how to define race for the purposes of affirmative action, as it appeared our only recourse was to return to the politically-fraught authenticity-based inquiries about racial identity from the early years of affirmative action, or to simply honor the racial membership claims of all applicants. This Essay shows that, armed with a more nuanced understanding of “elective race,” employers, policymakers and judges can approach affirmative action programs with proper respect for a person’s racial self-identification decisions, but also with an eye towards the functionalist goals of diversity programs. The functionalist approach outlined here allows employers a range of discretion to ask questions about the substance or basis for a racial status claim, but it remains dynamic enough to account for the multiple ways in which race is lived and experienced. The analysis promises to allow employers to discuss race in ways that tend to destabilize racial constructs and, equally important, responsibly administer affirmative action programs in the era of elective race.