

**CAN CRT SAVE DEI?:  
WORKPLACE DIVERSITY, EQUITY & INCLUSION IN THE SHADOW OF  
ANTI-AFFIRMATIVE ACTION**

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Abstract

*Just three years after the nation’s Summer of 2020 post-George Floyd “racial reckoning,” legislators across the nation are enacting anti-Critical Race Theory (CRT) bans in a seeming backlash to the advocacy for racial justice. The bans simultaneously mischaracterize CRT as anti-White discrimination while strategically conflating it with workplace DEI. Further inflaming the racially hostile public discourse is the Supreme Court’s recent decision in *Students for Fair Admissions v. Harvard* (2023) which greatly narrows the constitutional grounds for race-based affirmative action by questioning the coherence of diversity as a goal. As a result, corporate actors are apprehensive about the viability of their workplace diversity, equity and inclusion (DEI) initiatives as grounded by their multi-billion-dollar investment in workplace DEI trainings. Given the significant role of DEI training as a remedy for anti-discrimination law violations it is important for legal scholars to analyze the animating factors of the legal movement to outlaw workplace DEI trainings. This Essay details how the worker frustration with individual bias focused DEI trainings has dovetailed with the wrongful depiction of CRT, in ways that threaten the pursuit of racial equality. The Essay then explores a counterintuitive path forward of proposing a wholesale shift to CRT-framed DEI trainings as a defense against the attacks on individual bias focused trainings. Importantly, social science research suggests that programs focused on systemic and structural issues make the difference between well received and poorly received DEI interventions. They also yield better results in increasing workplace diversity, retaining employees of color and addressing harmful racially disparate systemic policies. The focus on systemic and structural aspects of racism is the very heart of what CRT concerns itself with. Put together, what this means is that what DEI actually needs is an infusion of CRT. Ironically, thanks to the legislative and political attacks on CRT, there is now greater public interest in learning what CRT is and what it has to offer. This Essay concludes by providing concrete evidence-based examples of what CRT-DEI workplace training can be for anti-discrimination law remedies and beyond.*

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## Introduction

After the nation’s Summer of 2020 post-George Floyd “racial reckoning,” institutions across the country began to consider and implement some version of DEI (diversity, equity and inclusion) measures. DEI is a term used to generally describe an organization’s concern or attention to: diversity, as the demographics of those who are and are not part of the organization; equity, as the fair treatment for all with consideration of the differential treatment a person’s unique circumstances require for true equality; and inclusion, as the degree to which an organization embraces all of its members and enables them to make meaningful contributions.<sup>1</sup> Years after the 2020 racial reckoning, the energy for pursuing DEI has seemingly waned while many question its efficacy. This has been accompanied by a wave of dismissals of corporate DEI officers (employees in charge of designing and monitoring an organization’s DEI efforts and policies).<sup>2</sup>

While the substance of the DEI efforts is varied, they all do share persistent questions about their efficacy and concerns with how to address the racial backlash they inspire. Further complicating DEI efforts in the workplace, is the growing corporate anxiety about their continued viability in the wake of the U.S. Supreme Court’s 2023 decision of *Students for Fair Admissions v. Harvard*,<sup>3</sup> restricting the use of race-based affirmative action in university admissions. Indeed, soon after the Court decision was released, the very same anti-DEI activist group that sued Harvard and UNC, filed lawsuits challenging various law firms for their diversity fellowship programs for law students aimed at diversifying the legal profession.<sup>4</sup> Moreover, some states and localities have legislated outright bans on DEI workplace

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<sup>1</sup> LILY ZHENG, DECONSTRUCTED DEI: YOUR NO-NONSENSE GUIDE TO DOING THE WORK AND DOING IT RIGHT 53-54 (2023).

<sup>2</sup> Kiara Alfonseca & Max Zahn, *How corporate America is slashing DEI workers amid backlash to diversity programs*, ABC NEWS, July 7, 2023, <https://abcnews.go.com/US/corporate-america-slashing-dei-workers-amid-backlash-diversity/story?id=100477952>.

<sup>3</sup> 143 S. Ct. 2141 (2023).

<sup>4</sup> Complaint, *American Alliance for Equal Rights v. Perkins Coie LLP*, (Docket No. 3:23-cv-01877). Complaint, *American Alliance for Equal Rights v. Morrison & Foerster*, (Docket No. 1:23-cv-23189); see also Theo Francis & Lauren Weber, *The Legal Assault on Corporate Diversity Efforts Has Begun*, WALL ST. J., Aug. 8, 2023)(detailing the anti-DEI lawsuits filed against Comcast, Amazon, and Starbucks).

initiatives in keeping with the Supreme Court’s worldview that focusing on racial inclusion is itself racially problematic.

Notably, the legislative attacks on DEI in the workplace have been promoted as an effort to abolish Critical Race Theory (CRT) by banning DEI “trainings” and related policies, modeled upon then President Trump’s Executive Order 13950<sup>5</sup> (which was later overturned by President Biden).<sup>6</sup> DEI trainings are sessions for a workforce to be educated and sensitized to workplace DEI issues.<sup>7</sup> In banning federal contractors and subcontractors from providing workplace diversity training and programs, Trump mischaracterized CRT as “toxic propaganda [that will] destroy our country.”<sup>8</sup> Like Executive Order 13950, those opposed to the growth of workplace DEI initiatives, have continued to conflate DEI as synonymous with CRT, and purposefully demonize it.<sup>9</sup> As Christopher Rufo, a Senior Fellow at the Manhattan Institute and self-described enemy of CRT has explicitly stated:

We have successfully frozen their brand – “critical race theory” – into the public conversation and are steadily driving up negative perceptions. We will eventually turn it toxic, as we put all of the various cultural insanities under that brand category . . . The goal is to have the public read something crazy in the newspaper and immediately think “critical race theory.” We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans.<sup>10</sup>

Rufo’s anti-DEI conflation with CRT has led him to organize attacks on the DEI training at Disney, American Express, Bank of America, and Verizon amongst others he labels as “CRT

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<sup>5</sup> Exec. Order No. 13950, 85 Fed. Reg. 60,683 (Sept. 22, 2020).

<sup>6</sup> Executive Order 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

<sup>7</sup> ZHENG, *supra* note 1, at 17.

<sup>8</sup> Cady Lang, *President Trump Has Attacked Critical Race Theory. Here’s What to Know About the Intellectual Movement*, TIME, Sept. 29, 2020, <https://time.com/5891138/critical-race-theory-explained/>.

<sup>9</sup> Bryan K. Fair, *Crying Wolf: Neo-Patriots, Critical Race Theory, and the Constitutional Protection of “Dangerous” Ideas*, 27 U.C. DAVIS SOC. JUST. L. REV. 1, 5 (2023).

<sup>10</sup> Laura Meckler & Josh Dawsey, *Republicans, spurred by an Unlikely Figure, See Political Promise in Critical Race Theory*, WASHINGTON POST, June 19, 2021.

proponents.<sup>11</sup> Across the nation several jurisdictions have instituted public workplace DEI bans,<sup>12</sup> and copycat legislation is currently pending before the United States Congress, Senate and several state legislatures.<sup>13</sup> An even larger number of CRT bans target public school curricular offerings and content.<sup>14</sup>

In reality, CRT is the intellectual practice of examining race as a social construct and racism as systemically ingrained within institutions.<sup>15</sup> CRT thus goes beyond the traditional interrogation of race and racism that is limited to the focus on badly-intentioned individuals.<sup>16</sup> It instead seeks to reveal and transform the relationship among race, racism and power with its examination of color blind structural and systemic barriers to inclusion for designing effective solutions.<sup>17</sup> Few if any DEI efforts have been self-consciously designed to be CRT interventions. Indeed, CRT scholars have rarely focused on assessing DEI practices outside of the educational context, let alone with respect to the employment sector that is a significant consumer of DEI training.<sup>18</sup>

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<sup>11</sup> Bobbi K. Dominick, *Critical Race Theory and Workplace Diversity Efforts*, 64 IDAHO ADVOCATE 36, 37 (2021).

<sup>12</sup> 2021 ARIZ. REV. STAT. § 41-1494 (2021); ARK. CODE ANN. §25-1-904 (2022); FL. STAT. § 760.10 (2022); GA. CODE ANN. § 20-1.11; IOWA CODE § 25A.1 (2021); N.H. STAT. ANN. § 354-A:29 (2021); TEX CODE ANN. § 51.3525 (2023). Legality of the use of “Critical Race Theory” and “antiracism” programming, 58 Montana Att’y Gen. Op. 1 (May 27, 2021).

<sup>13</sup> S. 968, 117<sup>TH</sup> CONG. § 2 (2021); S. 2221, 117<sup>TH</sup> CONG. § 2 (2021); S. 2346, 117<sup>TH</sup> CONG. § 2 (2021); H.R. 3235, 117<sup>TH</sup> CONG. (2021); ALA. H.B. 9 § 2 (2022); ALA. H.B. 312 § 2 (2022); ALA. S.B. 7 § 2 (2022); ALA. S.B. 292 § 2 (2022); N.J. S.B. 664 § 2 (2022); N.D. S.B. 2247 (2023); OH. H.B. 322 § 2 (2021); PA. H.B. § 2 1532 (2021).

<sup>14</sup> AFRICAN AMERICAN POLICY FORUM, *Legislative Attacks on Racial and Gender Justice Education Interactive Map*, (July 26, 2023, 9:00 AM), <https://www.aapf.org/truthbetold>.

<sup>15</sup> CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

<sup>16</sup> VICTOR RAY, ON CRITICAL RACE THEORY: WHY IT MATTERS & WHY YOU SHOULD CARE 19 (2022).

<sup>17</sup> CRITICAL RACE THEORY: THE CUTTING EDGE 2-3 (Richard Delgado & Jean Stefancic eds., 3<sup>rd</sup> ed. 2013).

<sup>18</sup> *Contra* Michael Z. Green, (A)Woke Workplaces, 2023 WISCONSIN L. REV. 811, 853 (uniquely considering how DEI workplace training can continue in jurisdictions with anti-DEI laws by focusing on Title VII obligations to inform employees about equality law obligations as a liability prevention action).

Contemporary workplace diversity trainings have largely turned to focusing on concerns with implicit bias.<sup>19</sup> In particular, the trainings for the most part have emphasized the relevance of implicit bias for the individual and not its implications for structural racism.<sup>20</sup> Leading diversity consultant Tanya Odom argues that too many diversity officers work in “vacuums” without linking their work to historical contexts.<sup>21</sup> Yet it is structural racism that anti-discrimination law is geared to address in the context of crafting institutional remedies for findings of discrimination.

Importantly, social science research suggests that programs focused on systemic and structural issues make the difference between well received and poorly received DEI interventions.<sup>22</sup> They also yield better results in increasing workplace diversity, retaining employees of color and addressing harmful racially disparate systemic policies.<sup>23</sup> The focus on systemic and structural aspects of racism is the very heart of what CRT concerns itself with. Put together, what this means is that what DEI actually needs is an infusion of CRT. However, the huge legislative onslaught of efforts to ban “CRT” is based upon a faulty conception of CRT as focused on the implicit bias of individual mindsets and a call to reject of personal race privilege.

Nevertheless, the legislative attacks on CRT may provide the antidote to poorly received DEI interventions. Despite being ill-informed, the anti-CRT legislative movement has brought nationwide public attention to CRT. As a jurisprudential method previously ensconced within the domain of legal scholarship, the legislative

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<sup>19</sup> Jennifer Y. Kim, “*I’m biased and so are you. What should organizations do? A review of organizational implicit-bias training programs,*” 74 CONSULTING PSYCHOLOGY J., 19-39 (2022).

<sup>20</sup> JESSE SINGAL, THE QUICK FIX: WHY FAD PSYCHOLOGY CAN’T CURE OUR SOCIAL ILLS 193 (2021).

<sup>21</sup> PAMELA NEWKIRK, DIVERSITY, INC: THE FAILED PROMISE OF A BILLION-DOLLAR BUSINESS 147 (2019).

<sup>22</sup> Alexander Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589-617 (2006) (cataloging the deficiencies of many DEI trainings). See also Anthony G. Greenwald et al., *Implicit-Bias Remedies: Treating Discriminatory Bias as a Public-Health Problem*, 23 PSYCH. SCI. IN THE PUB. INT. 7 (2022) (explaining how DEI trainings do not have long lasting effects on eviscerating implicit bias from an individual but when combined with systemic initiatives are useful in increasing retention of employees of color and addressing racial disparities in hiring and workplace disparities).

<sup>23</sup> See *infra* Part IV.

attacks have created a large-scale interest in learning what CRT is and what it has to offer.<sup>24</sup> As its appearance on the popular television show SNL: Saturday Night Live attests to, CRT opponents have made CRT more relevant to the public than any time in its approximately three decades of formal existence.<sup>25</sup> As the old adage attests, “there's no such thing as bad publicity except your own obituary.”<sup>26</sup>

If properly harnessed, the public attention on legal theory provides the opportunity to activate CRT-informed DEI interventions. Thus, the truth of what CRT is could be deployed as the key to the survival of DEI. Given the important role of DEI training as an anti-discrimination law remedy, this Essay explores the specifics of how the true CRT could save DEI, and seeks to offer a roadmap with models as to how CRT might save DEI in its pursuit of social justice.

Part I of the Essay situates the historical importance of DEI trainings within antidiscrimination law. Part II then assesses how contemporary DEI trainings, as influenced by anti-affirmative action jurisprudence have implemented a constrained vision of equality. Part III examines the individual bias focused content of DEI training and the employee dissatisfaction they generate. Part IV concludes the Essay's analysis of DEI training with a set of evidence-based models for implementing CRT informed DEI initiatives.

## I. THE ROLE OF DEI IN ANTI-DISCRIMINATION LAW

When plaintiffs win or settle antidiscrimination lawsuits, there are a range of remedies for putting the victim into the same position they would have been in had the discrimination never occurred. For instance depending upon the facts of an employment discrimination case, Title VII of the Civil Rights Act of 1964, allows for placement in the job that discrimination barred, along with backpay and employee

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<sup>24</sup> See CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS (Dorothy A. Brown ed., 3<sup>rd</sup> ed. 2014) (providing concrete explanations of how CRT is relevant to the entire first year law school curriculum).

<sup>25</sup> SNL *Saturday Night Live*: Season 47 Episode 1 (NBC television broadcast Oct 3, 2021); SNL *Saturday Night Live*: Season 47 Episode 5 (NBC television broadcast Nov. 6, 2021).

<sup>26</sup> DOMINIC BEHAN, MY BROTHER BRENDAN 158 (1965) (quoting Brendan Behan).



benefits.<sup>27</sup> Compensatory damages will pay the victim for out-of-pocket expenses caused by the discrimination (such as medical expenses and job search costs), along with compensation for emotional harm. Punitive damages are awarded when an employer has committed an especially malicious or reckless act of discrimination. Additional remedies include the ability to recover attorney's fees, expert witness fees, and court costs. Similar remedies are available for instances of housing discrimination under the Fair Housing Act,<sup>28</sup> school-based discrimination,<sup>29</sup> public accommodations discrimination (except for monetary damages),<sup>30</sup> and health care discrimination (except for emotional harm monetary damages).<sup>31</sup>

However, institutions that discriminate are also responsible for stopping any discriminatory practices and taking steps to prevent discrimination in the future.<sup>32</sup> Consequently, consent decrees resolving discrimination lawsuits often include mandatory training of employees on matters of discrimination and reform of exclusionary institutional policies and practices.<sup>33</sup> Indeed, one study of EEOC class action consent decrees over an 8 year period tabulated that eighty-nine percent required diversity training.<sup>34</sup>

Notably absent from the consent decrees, are any specifics about what the content of the discrimination training should contain. Moreover, most institutions outsource the implementation of

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<sup>27</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, "Remedies for Employment Discrimination" (June 22, 2023, 9:00 AM), <https://www.eeoc.gov/remedies-employment-discrimination#:~:text=Remedies%20May%20Include%20Compensatory%20%26%20Punitive.%2C%20disability%2C%20or%20genetic%20information.>

<sup>28</sup> U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *Learn About the FHEO Complaint and Investigation Process* (June 22, 2023, 9:30 AM), [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/complaint-process.](https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process.)

<sup>29</sup> Title VI of the Civil Rights Act of 1964.

<sup>30</sup> Title II of the Civil Rights Act of 1964.

<sup>31</sup> *Cummings v. Premier Rehab Keller*, 142 S. Ct. 1562 (2022) (foreclosing private action access to financial compensation for emotional distress harm for discrimination pursuant to Section 504 of the Rehabilitation Act of 1973 & Section 1557 of the Affordable Care Act).

<sup>32</sup> *Id.*

<sup>33</sup> *See, e.g., EEOC v. Prewett Enterprises, Inc. d/b/a B&P Enterprises, and Desoto Marine, LLC*, No. 3:18-cv-213 (N.D. Miss. Mar. 18, 2020) (mandating training of employees in consent decree resolving workplace race harassment lawsuit).

<sup>34</sup> Theanne Liu, Note, *Ethnic Studies as Antisubordination Education: A Critical Race Theory Approach to Employment Discrimination Remedies*, 11 WASH. U. JURISPRUDENCE REV. 165, 175 n. 64 (2019).



discrimination training in an effort to seek specialized expertise in designing its content. All of which means that the juridical enforcement of antidiscrimination law relies heavily on the DEI professional sector for devising steps to prevent discrimination in the future. Thus, to fully understand how antidiscrimination law operates on the ground it is vital to examine the role of DEI professional mediated training.

## II. THE CONSTRAINED VISION OF CONTEMPORARY DEI FORMULATIONS

Over the last decade DEI efforts have resulted in a growing profession of corporate DEI trainers and administrators. This is a departure from the historically smaller community of DEI trainers borne out of social justice movements, for whom DEI training was part of their civil rights vocation and not primarily a professional endeavor.<sup>35</sup> One estimate suggests that DEI has now become a multibillion-dollar industry.<sup>36</sup> The C.E.O. Action for Diversity initiative, in which CEOs nationwide committed to implement bias workplace trainings, certainly increased the demand.<sup>37</sup> Many online and offline programs for diversity training have emerged, along with national diversity organizations and conferences targeted in fields like law and higher education. Firms have been created to guide large corporations through “rocky terrain,” global companies devoted to diversity have appeared, and a multitude of diversity journals and magazines have been published.<sup>38</sup>

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<sup>35</sup> The People’s Institute for Survival and Beyond, is a prime example of a social justice movement entity providing systemic-focused DEI training for over 40 years. UNDOING RACISM, *Our History* <https://pisab.org/our-history/> (last visited Sept. 25, 2023).

<sup>36</sup> NEWKIRK *supra* note 21, at 5 (detailing how despite the explosion in DEI programming much of the actual workforce is still not racially diverse). *See also*, Jesse Singal, *What if Diversity Trainings Do More Harm Than Good?*, N.Y. TIMES, Jan. 22, 2023, at SR 9 (noting that U.S. DEI market reached an estimated \$3.4 billion in 2020 alone).

<sup>37</sup> Camille Olson et al., *Implicit Bias Theory in Employment Litigation*, 63 PRAC. LAW. 37, 38 (2017).

<sup>38</sup> NEWKIRK *supra* note 21, at 156.

Notably, the lucrative industry of diversity is flourishing, even though diversity for the most part is not.<sup>39</sup> In order to better understand the mismatch between the contemporary investment in corporate DEI trainings and the slow pace of actual DEI metrics, it will be helpful to consider what has influenced the development of DEI trainings. As with any big business there is variation in the content of what DEI professionals provide for the institutions they work with. Nevertheless, there are identifiable trends endemic to the profession.

Early iterations of DEI training date back to the passage of the Civil Rights Act of 1964.<sup>40</sup> They were formulated as liability circumvention devices, and their primary focus was on educating institutions about legal prohibitions and how best to avoid being sued.<sup>41</sup> The liability-containment approach did not for the most part concern itself with transforming institutions to be more diverse and inclusive let alone equitable. Indeed, courts came to view the mere existence of diversity training programs along with other workplace equal opportunity policies as an indicator of a workplace free of discrimination, without actually considering the adequacy of the training and policies.<sup>42</sup>

Over time, the increased societal concern with remaining competitive in a globalized economy in which cross-cultural competence was valued, inspired the inclusion of inter-personal cultural awareness into training formats.<sup>43</sup> This was accompanied with a proliferation of social science research underscoring the business case for diversity as enhancing innovation and efficiency.<sup>44</sup> The studies show that diverse teams are more rigorous and thoughtful in their decision-making deliberations with the inclusion

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<sup>39</sup> *Id.* at 153.

<sup>40</sup> Garry G. Mathiason & Mark A. de Bernardo, *The Emerging Law of Training*, 45 FEDERAL LAWYER 24 (May 1998).

<sup>41</sup> Lauren Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992).

<sup>42</sup> LAUREN EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 101, 164-65, 174, (2016).

<sup>43</sup> Iain D. Macpherson, *Cultural Differences Matter, and They Don't: Transcending Polarized and Polarizing Cultural Stereotypes in Diversity Training*, 2 IAFOR J. OF BUS. & MGMT. 51 (2017) (describing the cultural awareness focus of DEI trainings); Emmy Kowal, Hayley Franklin & Yin Paradies, *Reflexive Antiracism: A Novel Approach to Diversity Training*, 13 ETHNICITIES 316 (2013).

<sup>44</sup> Roger C. Mayer et al., *Do Pro-Diversity Policies Improve Corporate Innovation?* 47 FIN. MGMT. 617, 628-29 (2017).

of their different perspectives.<sup>45</sup> The business case for diversity was also supported by the data that corporations with the most ethnically diverse executive teams are 33% more likely to outperform corporations than the least ethnically diverse teams in terms of profitability, and that companies in the top quartile for both gender and ethnic diversity are 12% more likely to be more profitable than companies in the lower quartiles and that the gap increased by 36% compared to companies in the fourth quartile.”<sup>46</sup> The sum of the research studies find that “organizations with inclusive cultures are twice as likely to meet or exceed financial goals, three times as likely to be high performing, six times more likely to be innovative, and eight times more likely to achieve better business outcomes.”<sup>47</sup>

Particularly attractive to the corporate sector, were the findings that companies with diverse workforces tend to experience higher sales revenue, attract more customers, gain a larger market share, and achieve greater profits compared to less diverse companies.<sup>48</sup> In addition, the Supreme Court cases historically upholding diversity as a constitutionally valid justification for affirmative action programs of inclusion, increased the attention to the idea of diversity within the public discourse.<sup>49</sup> In turn, DEI trainings further entrenched the focus on cross-cultural understanding, and inter-personal communication with reflections on one’s personal identity.<sup>50</sup>

Despite the Supreme Court’s original endorsement of diversity as a concept, the content of diversity training sessions did not expand much beyond the cultural awareness framework. As one diversity consultant noted at the time, the common diversity training curriculum was designed “to increase awareness of one’s own cultural

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<sup>45</sup> JULIET BOURKE, WHICH TWO HEADS ARE BETTER THAN ONE? HOW DIVERSE TEAMS CREATE BREAKTHROUGH IDEAS AND MAKE SMARTER DECISIONS 15 (2016).

<sup>46</sup> Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 29 (2022).

<sup>47</sup> *Id.* at 30.

<sup>48</sup> Shelby R. Buckman, Laura Y. Choi, Mary C. Daly & Lily Seitelman, *The Economic Gains from Equity* 17 (Fed. Reserve Bank of San Francisco, Working Paper No. 2021-11, 2021); David B. Wilkins, *From ‘Separate is Inherently Unequal’ to ‘Diversity is Good for Business.’: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004).

<sup>49</sup> *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>50</sup> Emma Kowal et al., *Reflexive Antiracism: A Novel Approach to Diversity Training*, 13 ETHNICITIES 316, 319 (2013).

lens . . . and to increase one’s skills in working effectively in a diverse team.<sup>51</sup>” Nor should this be surprising, given how narrow the Supreme Court’s vision of diversity was constructed to be. As scholar Yale Plitmann details, the jurisprudential construction of diversity was a symbolic legal standard that “was never designed to revise the racial makeup of institutions.<sup>52</sup>”

This is because starting with Justice Lewis Powell’s 1978 plurality opinion in *Regents of the University of California v. Bakke*, and continuing with later Supreme Court decisions, diversity was divorced from civil rights and antidiscrimination values grounded in efforts to address historical wrongs.<sup>53</sup> Rather, diversity has been a thin theoretical legal construction to authorize race as only one element in a range of factors that a university can consider in an applicant selection process, and only for the purpose of seeking a student population where a robust exchange of ideas will be facilitated. The Supreme Court untethered considerations of race from racial justice as it equated race with any “diverse” personality trait an individual may hold (hometowns, professional experiences, etc.).<sup>54</sup>

The Supreme Court’s most recent reconsideration of the constitutionality of university affirmative action plans in 2023, has further constrained the vision of what diversity means. In *Students for Fair Admission v. Harvard*,<sup>55</sup> the Supreme Court assessed whether the college admissions systems used by Harvard College and the University of North Carolina were lawful under the Equal Protections Clause of the Fourteenth Amendment. While the decision is only applicable to the university educational context, the Court’s shift towards viewing the goal of diversity as incoherent if not sufficiently measurable, has already caused commentators to reconsider the continued viability of their corporate DEI initiatives.<sup>56</sup>

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<sup>51</sup> *Should you be offering diversity training?* 34 No. 17 QUINLAN, SCHOOL OF LAW BULLETIN art. 13 Sept. 1, 2007.

<sup>52</sup> Yael Plitmann, *Authentic Compliance with a Symbolic Legal Standard? How Critical Race Theory Can Change Institutional Studies on Diversity in the Workplace*, 47 LAW & SOC. INQUIRY 331, 338 (2022).

<sup>53</sup> *Id.* at 337.

<sup>54</sup> *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

<sup>55</sup> 143 S. Ct. 2141 (2023).

<sup>56</sup> Kenji Yoshino & David Glasgow, *What SCOTUS’s Affirmative Action Decision Means for Corporate DEI*, HARV. BUS. REV., July 12, 2023, <https://hbr.org/2023/07/what-scotuss-affirmative-action-decision-means-for-corporate-dei>.

In other words, the Court’s suspicion of diversity as a constitutionally viable compelling interest for promoting the expression of diverse viewpoints, stands to chill the corporate pursuit of DEI policies despite the way in which corporate law duties impel and authorize corporate attention to diversity.<sup>57</sup> Thus, while *Students for Fair Admission v. Harvard*, is not directly relevant or binding on the workplace, it is nevertheless important to examine the judicial discourse likely influencing the labor market and beyond.

*Students for Fair Admission*, stands in marked contrast to the earlier precedent of *Grutter v. Bollinger*, in which the Court authorized the University of Michigan Law School’s pursuit of a diverse student enrollment and deferred to the Law School’s educational expertise and judgement that diversity was essential to its educational mission. *Grutter*, lauded the educational benefits that diversity was designed to produce, including cross-racial understanding to better prepare students for a diverse work force and global marketplace. Conversely, *Students for Fair Admission*, characterizes those goals as no longer “sufficiently coherent for purposes of strict scrutiny” because “it is unclear how courts are supposed to measure any of these goals.<sup>58</sup>” The Court’s newfound concern with metrics measuring the benefits of diversity are rooted in its rejection of *Grutter*’s deference to a university’s assessment that diversity provides tangible value. Now a university must provide empirical data of how diversity helps students acquire new knowledge based on diverse outlooks that prepares them for the global marketplace and leadership.

To be clear, the Court decision, does refrain from explicitly outlawing race-based affirmative action. However, it does so while at the same time articulating a deep-seated suspicion of any university expression of a diversity justification that must now be proven like an accountant showing of ledgers for a contentious audit. The value of

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<sup>57</sup> Brummer & Strine, Jr., *supra* note 46, at 1 (arguing that corporate law fiduciaries are not only bound by duties of loyalty to comply with statutory antidiscrimination laws but can also enable corporate policies that go beyond the legal minimum and embed a commitment to DEI in all aspects of corporate interactions); *see also* Atinuke O. Adediran, *Racial Targets*, 118 NORTHWESTERN L.R. \_\_ (2024) (observing that in the wake of *SFFA v. Harvard* employers are still legally authorized to use voluntary DEI hiring goals as part of their compliance with Title VII antidiscrimination)

<sup>58</sup> 143 S. Ct. at 2166.

diversity has been downgraded and relegated only to the space of what an applicant may choose to say about themselves. In the words of the Court, “nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.<sup>59</sup>” In short, educational diversity as a concept is acceptable now only in relation to an applicant’s First Amendment right to express themselves as they choose in a written essay thereby limiting diversity to a matter of individual perspective. In contrast, a university’s expression of a collective pursuit of diversity borne out of a concern with systemic racism is highly suspect.

This is in part why so many commentators characterized the court decision as “outlawing” race-based affirmative action, despite the Court desisting from doing so.<sup>60</sup> Like a ripple effect, the media mischaracterization of affirmative action as abolished has heightened the current corporate concern with the viability of their DEI training programs and initiatives. Affirmative action controversy induced corporate caution regarding DEI efforts has long been noted in how DEI initiatives have not kept up with what the jurisprudence indicates is permissible under Title VII.<sup>61</sup>

At the same time, the corporate susceptibility to the media mischaracterization of diversity-based affirmative action as dead, was facilitated by the growing segment of employees resenting DEI sessions as “worthless” individual bias training. Certainly, some employees can be opposed to any training regardless of its specific content and no investment in optimal program design will alter their view. However, a majority of U.S. workers report that focusing on DEI in the workplace is a good thing.<sup>62</sup> Significantly, studies show that

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<sup>59</sup> 143 S. Ct. at 2177.

<sup>60</sup> See, e.g., Alison Durkee, *Supreme Court Gets Rid of Affirmative Action in College Admissions*, FORBES, June 29, 2023, <https://www.forbes.com/sites/alisondurkee/2023/06/29/supreme-court-gets-rid-of-affirmative-action-in-college-admissions/?sh=1f827eb32857>.

<sup>61</sup> Zachary McCoy, *Workplace Diversity, Equity, and Inclusion Programs: Inclusive Environments and Diversity Promotion Programs*, 55 U.S.F. L. REV. 153, 155 (2021).

<sup>62</sup> Rachel Minkin, *Diversity, Equity and Inclusion in the Workplace*, PEW RESEARCH REPORT (May 17, 2023), [file:///C:/Users/thernandez/Downloads/ST\\_2023.05.17\\_Culture-of-Work-DEI\\_Report.pdf](file:///C:/Users/thernandez/Downloads/ST_2023.05.17_Culture-of-Work-DEI_Report.pdf).



the type of DEI training influences the participants' perceived utility of the session.<sup>63</sup>

Worrisome then, are those employees who are open-minded about the value of DEI training but walk away frustrated and disinclined to pursue DEI initiatives. The DEI-disaffected together with the DEI-automatic opponents, constitute a constituent base that directly and indirectly supports the current legislative attacks to ban workplace DEI training. In order to understand the many facets of the legislative attacks to ban workplace DEI training, it is important to identify the DEI training content provoking in part the support of the bans.

### III. THE WORKPLACE OPPOSITION TO INDIVIDUAL BIAS FOCUSED DEI

Contemporary workplace diversity trainings have largely turned to focusing on concerns with individual mindsets and particularly implicit bias.<sup>64</sup> This is a marked contrast from the systemic-focused DEI sessions informed by social justice movement priorities that predated the explosion in resources allocated to corporate DEI professionals.<sup>65</sup> Today corporate DEI trainings for the most part have emphasized the centrality of individual identity and the relevance of implicit bias for the individual and not its implications for structural racism.<sup>66</sup> However, two-thirds of human resource specialists report that individual-focused trainings have no effect on the careers of people of color or diversity within the ranks of management, and little effect on levels of implicit bias.<sup>67</sup> Yet, such training “remains the go-to solution for corporate executives and university administrators facing public relations crises, campus

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<sup>63</sup> Nicolette Ann Rainone, *How Useful Do You Think This Diversity Training Is? The Impact of Training Type and Individual Differences on Pre-Training Perceived Utility of Diversity Training* (June 2022) (unpublished Ph.D. dissertation, City University of New York) (on file with CUNY Graduate Center).

<sup>64</sup> Jennifer Y. Kim, “*I’m biased and so are you. What should organizations do? A review of organizational implicit-bias training programs,*” 74 *CONSULTING PSYCHOLOGY J.*, 19-39 (2022).

<sup>65</sup> See, e.g., RACE FORWARD, *Racial Justice Trainings*, <https://www.raceforward.org/racial-justice-trainings> (last visited Sept. 25, 2023).

<sup>66</sup> SINGAL, *supra* note 20, at 193.

<sup>67</sup> Frank Dobbin & Alexandra Kalev, *Why Doesn’t Diversity Training Work? The Challenge for Industry and Academia*, 10 *Anthropology Now* 48, 49 (2018).

intolerance and slow progress on diversifying the executive and faculty ranks.<sup>68</sup> Unfortunately, DEI has long embodied the perspective that individualized self-help can resolve racism.<sup>69</sup>

The self-help perspective is magnified in the ubiquitous DEI use of the work of Robin DiAngelo, author of the book *White Fragility*.<sup>70</sup> Indeed, DiAngelo aims for her work to be a person-by-person consciousness raising that contributes to social change.<sup>71</sup> Both the book and the DEI workshops based on the book seek to address racism with individual reflection and self-administered correctives.<sup>72</sup> Attendees of *White Fragility* framed DEI workshops describe its content as follows.

The training facilitator opens by sharing statistics about the racial disparities that exist across society with power point slides and photographs. Once the concept of systemic racism is laid out, attendees are broken into pairs or small groups to answer personal questions such as “What are some of the ways that race has shaped your life?”<sup>73</sup> The facilitator then shares information on the concept of unconscious White privilege. Later attendees engage in an exercise designed to have them reflect on how racial privilege has personally operated in their lives. One variation has attendees rate the number of racial privileges they have from a printed checklist adapted from the work of scholar Peggy McIntosh, and then physically arrange themselves in the rank order of their cumulative counts for a visual impact of how racial privilege arrays itself.<sup>74</sup>

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<sup>68</sup> *Id.* at 49.

<sup>69</sup> Anthony Conwright, *The Trouble with White Fragility Discourse: Why HR divisions can't be on the vanguard of racial reform*, THE FORUM, May 12, 2022, <https://www.aapf.org/theforum-white-fragility-discourse>.

<sup>70</sup> ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* (2018).

<sup>71</sup> Conwright, *supra* note 69.

<sup>72</sup> *Id.*

<sup>73</sup> Daniel Bergner, *Whiteness Lessons*, N.Y. TIMES SUNDAY MAGAZINE, July 15, 2020, at 24 (updated and posted online Aug. 6, 2021, as *White Fragility is Everywhere. But Does Antiracism Training Work?*) <https://www.nytimes.com/2020/07/15/magazine/white-fragility-robin-diangelo.html>.

<sup>74</sup> Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE & FREEDOM MAG., July/Aug. 1989, at 10-12, [https://nationalseedproject.org/images/documents/Knapsack\\_plus\\_Notes-Peggy\\_McIntosh.pdf](https://nationalseedproject.org/images/documents/Knapsack_plus_Notes-Peggy_McIntosh.pdf).

A close analog of the popular *White Fragility* trainings, are what Sociologist Srivastava terms “Let’s Talk” DEI sessions.<sup>75</sup> The Let’s Talk approach is centered on encouraging the disclosure of personal feelings, stories, and experiences. However the sharing of stories is not directed towards collective change but rather personal transformation. It is a racial healing as therapy approach that the *White Fragility* trainings share. Specifically, “the therapeutic model is seen as a way of dealing with divisions, but it does so by side-stepping a discussion of the systemic cause of these inequities or the practical solutions for shifting them. Instead, revealing the emotions that underlie conflict becomes the goal in and of itself.”<sup>76</sup> DEI trainers report that therapeutic discourse actually obstructs organizational change.<sup>77</sup>

Along with *White Fragility* focused DEI trainings, implicit bias related content accounts for a lion share of contemporary DEI sessions.<sup>78</sup> The implicit bias frame in the sessions is centered on the idea that race relations can be resolved by addressing individual beliefs. This is because the concept of implicit bias refers to the unconscious mental processes that systematically shape how individuals see other people.<sup>79</sup>

Implicit bias focused trainings first introduce the research in the field of social psychology that reveals that individuals rely on implicit attitudes to process information and have biases that they do not know they have.<sup>80</sup> Implicit attitudes are positive or negative evaluations of some concept (person, place, thing, or idea) that occur outside of a person's awareness and control.<sup>81</sup> These implicit

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<sup>75</sup> SARITA SRIVASTAVA, “YOU’RE CALLING ME A RACIST?” THE EMOTIONAL LANDSCAPE OF RACIAL ENCOUNTERS (forthcoming 2024).

<sup>76</sup> Sarita Srivastava, “You’re Calling Me a Racist?” *The Moral and Emotional Regulation of Antiracism and Feminism*, 31 SIGNS: J. OF WOMEN IN CULTURE & SOC. 1 (2005).

<sup>77</sup> SRIVASTAVA, THE EMOTIONAL LANDSCAPE, *supra* note 75.

<sup>78</sup> SINGAL, *supra* note 20, at 193-4.

<sup>79</sup> MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE (2013).

<sup>80</sup> See Russell H. Fazio et al., *Attitude Accessibility, Attitude-Behavior Consistency, and the Strength of the Object-Evaluation Association*, 18 J. EXPERIMENTAL SOC. PSYCHOL., 339, 341 (1982) (an attitude “is an association between a given object and a given evaluative category”); Robert B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOL. 151 (1980) (noting that humans can control the way emotions are expressed, but not the fact that they exist).

<sup>81</sup> See Anthony Greenwald & Mahzarin Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 7 (1995).

attitudes, as psychologists call them, are picked up over a lifetime, absorbed from our culture, and work automatically to color our perceptions and influence our choices.<sup>82</sup> When those implicit attitudes attribute particular qualities to members of a specific social category, they are then implicit stereotypes.<sup>83</sup> Most people do not see their own implicit bias, which can appear spontaneously as intuition, a gut feeling, or a vague doubt about a person.<sup>84</sup> This is why discriminatory actions rooted in racial implicit bias are also referred to as “unconscious racism” by some legal scholars.<sup>85</sup>

After introducing the social psychology research, the facilitator then describes the implicit association test (IAT) that attendees are encouraged to take as a self-exploration tool. Social psychologists introduced the IAT in 1998 as a method designed to detect the extent of an individual's implicit biases.<sup>86</sup> The IAT studies how quickly individuals associate a group of people, shown in photographs, with either positive or negative words.<sup>87</sup> The test is rooted in the very simple hypothesis that people will find it easier to associate pleasant words with faces and names of socially favored groups than with socially disfavored group faces and names. Ease of association, measured by judgment speed, is taken as evidence of an implicitly held attitude toward that social group. Once the test is completed, test-takers receive ratings like “neutral,” “slight,” “moderate,” or “strong” preference for a particular group as a measure of their implicit bias on the subject tested.<sup>88</sup> In short, the IAT measures the strength of associations between concepts like particular racial groups and positive or negative evaluations or stereotypes about that concept.

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<sup>82</sup> See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1199-1200 (1995) (describing the relationship between implicit bias and schemas).

<sup>83</sup> Greenwald & Banaji, *Implicit Social Cognition*, *supra* note 81, at 14.

<sup>84</sup> *Id.* at 8 (“implicit attitudes are introspectively unidentified (or inaccurately identified) traces of past experiences that mediate favorable or unfavorable feeling, thought, or action toward social objects.”).

<sup>85</sup> See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

<sup>86</sup> See Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1465-66 (1998) (providing a model for administration of the IAT).

<sup>87</sup> BANAJI & GREENWALD, *BLINDSPOT*, *supra* note 79, at 39.

<sup>88</sup> PROJECT IMPLICIT, *The Implicit Association Test* (July 27, 2023, 5:10 PM), <https://implicit.harvard.edu/implicit/faqs.html>.

Implicit bias awareness is also pursued in sessions with interactive exercises in which attendees are asked to rate a series of pictures as to whether the qualities of warmth and/or competence are communicated.<sup>89</sup> This also includes time dedicated to exploring questions such as “What is one dimension of your identity that affects the way you see the world,” “How does this impact your work,” “Identify one situation in which you commit to mitigating your bias,” “How will you do this,?” and “How will mitigating this bias be beneficial to you?”

Regardless of which form of DEI training is offered, there are certainly attendees who can be resistant to the information imparted, and have gone so far as to sue employers for being obligated to participate in ways they found discriminatory.<sup>90</sup> In fact, legislative challenges to workplace DEI programming, have more often than not, specifically identified *White Fragility* structured trainings as what perturbs them about DEI.<sup>91</sup>

However, of greater relevance to the inquiry of this Essay, are those attendees who are moved by the sessions but are left with few tools to actually transform structural racism. For instance, *White Fragility* workshop attendees have reported “[it] gave me the opportunity to unpack my own socialization as a white person;” “I walked out with a heightened awareness of my white privilege . . . but I don’t know what [the employer] was trying to accomplish – this was a miss for me.”<sup>92</sup> Even the diversity directors of a hosting institution articulate the organizational goal of the sessions as simply “to get conversations started” but not followed up with the tracking of diversity employment and promotion numbers.<sup>93</sup>

A similar institutional lack of follow-up can accompany implicit bias focused training. After following a facilitator’s recommendation to take the free ten minute online IAT, an employee can feel that they are addressing implicit bias without taking any other tangible actions.<sup>94</sup> Importantly, the reliance on the IAT as the anchor for DEI

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<sup>89</sup> Interview with Jesus Paulino, Compliance Officer & Unconscious Bias Lecturer, Settlement Health, in N.Y., N.Y. (July 20, 2023).

<sup>90</sup> See, e.g., *Chislett v. NYC Dept. of Educ.*, No. 1:21-CV-09650 (SDNY filed Nov. 22, 2021).

<sup>91</sup> Conwright, *supra* note 69.

<sup>92</sup> Bergner, *supra* note 73.

<sup>93</sup> *Id.*

<sup>94</sup> SINGAL, *supra* note 20, at 198.

training is opposed by the designers of the IAT themselves and other social psychologists.<sup>95</sup> What these social psychologists recommend is that training programs instead be designed to use the IAT awareness information to launch inquiries into patterns of racially disparate outcomes that can better address systemic racism. Their advice is that organizations should stop approaching training sessions as person-by-person bias-prevention, and instead design them as systemic “disparity-finding” projects.<sup>96</sup>

Harvard Kennedy School social psychologist Robert Livingston, attributes the lack of follow up action to organizational leaders who are only interested in the expediency of hosting a DEI session as a quick method to perform corporate engagement.<sup>97</sup> The time and effort it takes to design a training that complements concrete follow up actions requires more effort than the window dressing of a tick-the-box approach of isolated DEI trainings. An additional factor, is that many in management mistakenly believe that simply making their employees aware of their attitudes will motivate them to act differently and that in turn will transform the workplace for greater inclusion and equity.<sup>98</sup>

The danger of not designing DEI sessions to be part of an institutional plan of action to address structural barriers, is that the DEI sessions can cause participants to conclude that the organization is cleansed of bias in ways that make them oblivious to the systemic racism continuing to occur and even cause them to be more likely to discriminate based on prideful hubris that what they do is no longer animated by bias.<sup>99</sup> This is because the fact of having been in a

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<sup>95</sup> Greenwald et al., *Implicit-Bias Remedies*, *supra* note 22, at 7.

<sup>96</sup> *Id.* at 25 & 30.

<sup>97</sup> ROBERT LIVINGSTON, THE CONVERSATION: HOW SEEKING AND SPEAKING THE TRUTH ABOUT RACISM CAN RADICALLY TRANSFORM INDIVIDUALS AND ORGANIZATIONS 248 (2021),

<sup>98</sup> Verna Myers, *Making Diversity and Inclusion Awareness Training Work in the Law Firm*, 49 ORANGE COUNTY LAWYER 18 (Feb. 2007).

<sup>99</sup> Cheryl R. Kaiser et al., *Presumed fair: Ironic effects of organizational diversity structures*, 104 J. OF PERS. & SOC. PSYCH. 504-19 (2013). *See also* Maryam Kouchaki, *Vicarious Moral Licensing: The Influence of Others’ Past Moral Actions on Moral Behavior*, 101 J. OF PERSONALITY & SOC. PSYCH. 702-715 (2011) (observing that a group’s identity as having an egalitarian moral position accords them a sense of absolutism that in turn can make discriminatory actions more likely); Srivastava, *The Moral and Emotional Regulation*, *supra* note 76, at 29 (describing how having pride in moral identity as an antiracist feminist can interfere with racial equity practices).



training encourages the attendees to “legitimize the status quo by becoming less sensitive to discrimination targeted at underrepresented groups and reacting more harshly toward underrepresented group members who claim discrimination.<sup>100</sup>” As the next section shall unpack, CRT offers a better frame for evidence-based DEI interventions.

#### IV. WHAT CRT OFFERS – CONCRETE MODELS FOR INSPIRATION

In assessing how CRT can effectively be included in DEI interventions, it is important to have clarity as to its key concern with structural racism. Unlike traditional notions of racism that view the social problem as solely caused by individual actors with explicit bad intent, structural racism is more expansive in its understanding of causation. Structural racism causality encompasses race neutral laws, policies, procedures, and programs that function to produce racial inequality and hierarchy.<sup>101</sup>

While “systemic racism” is often used as coterminous with structural racism, it can also more narrowly apply to policies and practices existing within an organization or institution that result in and support a continued unfair advantage to favored racial groups while harming others.<sup>102</sup> CRT examines structural racism as a political system “in the sense that it helps to determine differential access to employment, healthcare, education, and other important resources . . . as a distributional system that combines ideas about race with unequal access to social and material resources.<sup>103</sup>”

For the purposes of this Essay, a CRT informed DEI initiative need not be self-identified as such. What is important is the extent to which the DEI initiative is focused on structures with concrete programmatic policy changes to address systemic exclusion along with racial disparity and hierarchy. The CRT focus on structural dynamics is best articulated by civil rights icon Bayard Rustin, who

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<sup>100</sup> Kaiser et al, *supra* note 99, at 504.

<sup>101</sup> KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 148 (2019).

<sup>102</sup> *Systemic Racism Definition*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/systemic-racism> (last visited July 20, 2023).

<sup>103</sup> RAY, *supra* note 16, at 20.

in 1968 said “our job is not to get those people who dislike us to love us. Nor was our aim in the civil rights movement to get prejudiced white people to love us. Our aim was to try to create a kind of America, legislatively, morally, and psychologically, such that even though some whites continued to hate us, they could not openly manifest that hate” with inequitable access to education, employment, housing, public accommodations, political participation and administrative justice.<sup>104</sup>

CRT informed DEI training can include content regarding implicit bias that usefully connects the social psychology research to the relevance of structural racism. For instance, while individual IAT scores can vary widely over time, region-wide test scores are more strongly correlated with systemic racial patterns. This is apparent in how cities that show implicit associations between Black people and guns, have a larger disparity in the use of force by police.<sup>105</sup> Counties and states with the highest level of implicit bias as measured by the test scores of their residents, are the very regions that were most dependent on slavery and its racialized justifications in 1860 (before the Civil War began in 1861).<sup>106</sup> Psychologists who study the geographic patterns of regional implicit association test scores, conclude that because implicit biases reveal more about a person’s context than it does about the individual, interventions for mitigating bias are better focused on changing systems and structures.<sup>107</sup>

In short, while implicit bias-based DEI approaches have often been devoid of structural racism considerations with their singular focus on individual bias, it is not the case that implicit bias research is irrelevant to assessments of systemic and structural racism. In other words, although the concern that implicit bias DEI approaches are too individual bias focused to aid in the pursuit of racial justice is well-founded, it is also true that implicit bias insights can be deployed

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<sup>104</sup> TIME ON TWO CROSSES: THE COLLECTED WRITINGS OF BAYARD RUSTIN (Devon W. Carbado & Donald Weise eds., 2003).

<sup>105</sup> Eric Hehman, Jessica K. Flake & Jimmy Calachini, *Disproportionate Use of Lethal Force in Policing Is Associated With Regional Racial Biases of Residents*, 9 SOC. PSYCH. & PERSONALITY SCI. 393 (2018).

<sup>106</sup> B. Keith Payne, Heidi A. Vuletich & Jazmin L. Brown-Iannuzzi, *Historical Roots of Implicit Bias in Slavery*, 116 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 11693-8 (2019).

<sup>107</sup> NATIONAL RESEARCH COUNCIL, THE SCIENCE OF IMPLICIT BIAS: IMPLICATIONS FOR LAW & POLICY: PROCEEDINGS OF A WORKSHOP IN BRIEF 6 (2021)

to illuminate structural racism dynamics.<sup>108</sup> In fact, when CRT luminary Charles Lawrence considered the literature on implicit bias, he did so for systemic reasons. His principal interest was the desire to enhance the anti-discrimination law project of identifying and addressing discrimination.<sup>109</sup>

Furthermore, to qualify as a CRT DEI intervention, the goal of the training must be rooted in concerns with structural racism. When training is framed as pertaining to systemic problems and then coupled with complementary measures that engage decision-makers in seeking structural interventions for those systemic problems, workplace diversity is markedly increased as a matter of hiring, retention, and promotion.<sup>110</sup> When companies implement CRT DEI trainings with content providing concrete examples of systemic policies that have worked, this gives employees a sense of the practical value of the session and in turn incentivizes them to support the complementary systemic policy changes.

Systemic policies of racial transparency have proven particularly useful in advancing DEI metrics by creating an organizational implementation of accountability and equitable change. This is what motivates the momentum for recommending corporate diversity disclosures.<sup>111</sup> For example, a company that had a demonstrated pattern of giving Black employees smaller raises than White employees, despite having identical job titles and performance ratings, transformed its unjust practices with a systemic racial transparency policy.<sup>112</sup> The company posted each unit's average performance ratings and pay raise by race. With that systemic change for racial transparency whereby the entire company would have knowledge of any inequitable disparities, the managers felt a new accountability for racial equality. As a result the gap in raises all but disappeared.

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<sup>108</sup> Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009) (criticizing the use of implicit bias discourse to pursue racial justice because of its misguided preoccupation with individual mental states).

<sup>109</sup> Lawrence III, *supra* note 85, at 317.

<sup>110</sup> Dobbin & Kalev, *Why Doesn't Diversity Training Work?*, *supra* note 67.

<sup>111</sup> Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 VA. L. REV. 307 (2023); Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.F. FORUM 869 (2021).

<sup>112</sup> Dobbin & Kalev, *Why Diversity Programs Fail*, *supra* note 67, at 8.1

Another example of the benefit of instituting a systemic change for racial transparency that could be included for consideration in a DEI training session, comes from the context of individuals enrolled in a teacher trainee program with a mandate for racial fairness once employed as teachers. In an experiment in Israel, teachers in training were provided identical writing samples with half attributed to Jewish students with Ashkenazic names (that are socially racialized as primarily of European heritage) and the other half Jewish students with Sephardic names (that are socially racialized as primarily of African or Asian heritage).<sup>113</sup>

What became immediately apparent, was that the teacher trainees perceived the two groups of identical compositions radically differently. Those labeled as emanating from the Ashkenazic named Jewish students received B grades on average. In contrast, the Sephardic named Jewish students received D grades on average. Remarkably, the differences evaporated when the teacher trainees were told that they would have to discuss the justifications for their grading evaluations with their fellow trainees. With the systemic policy change that indirectly provided for racial transparency, the rating differences disappeared. Having to systematically explain their rating differences led them to judge based on merit rather than stereotypes.

Yet DEI need not be solely about employment diversity metrics, it can also include a concern with ensuring that the practices of a company do not cause or sustain societal racial injustice. Some companies explicitly reference this factor by adding a “J” for Justice to their DEI mission.<sup>114</sup> A justice related DEI example that captured national attention provides a useful illustration. On April 18, 2018, Starbucks employees called the Philadelphia police emergency line to request aid.<sup>115</sup> The cause? Two Black men sitting at a table without placing an order as they waited for the third member of their party to arrive for a meeting. The police arrested the men for “trespassing” and escorted them out of Starbucks in handcuffs. No other White patrons sitting at tables received the same treatment. After cell phone footage of the incident caused a public uproar, Starbucks issued a

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<sup>113</sup> *Id.* at 8.

<sup>114</sup> THE DIVERSITY CENTER OF NORTHEAST OHIO, *JEDI Frequently Asked Questions* (July 27, 2023, 1:06 AM), <https://www.diversitycenterneo.org/jedi-frequently-asked-questions/>.

<sup>115</sup> Matt Stevens, *Starbucks C.E.O. Apologizes After Arrests of 2 Black Men*, N.Y. TIMES, Apr. 15, 2018, at B5.

public apology and closed more than 8,000 U.S. stores for an afternoon of racial bias training for 175,000 employees.<sup>116</sup>

Notably, the training was accompanied by a structural policy to resolve the biased outcomes. The new policy states that “any customer is welcome to use Starbucks spaces, including our restrooms, cafes and patios, regardless of whether they make a purchase.<sup>117</sup>” Including concerns about systemic racism into the Starbucks implicit bias training helped create company support for the structural change with the greatest efficacy for containing the harm of implicit bias. As such it is a model for how consumers of implicit bias training should encourage program facilitators to speak to systemic and structural issues.

Various law enforcement agencies have also implemented implicit bias training as a device for reducing the violation of civil rights of people of color and the violence against unarmed people of color.<sup>118</sup> But the implicit bias training alone has not curtailed racialized policing rates at the same rates as implicit bias informed structural interventions have.<sup>119</sup> When law enforcement bias trainings are part of a set of systemic changes in policies and practices, real racial change is possible.

Scholars who have been directly engaged in law enforcement reform efforts, note that what decreases racial disparities in policing is systemically limiting law enforcement discretion. For example, in 1998, the U.S. Customs Department shortened its list of indicators of

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<sup>116</sup> Dominic Rushe, *Starbucks to close 8,000 US Stores for racial-bias training*, THE GUARDIAN, Apr. 17, 2018, <https://www.theguardian.com/business/2018/apr/17/starbucks-racism-training-close-stores-may-us>.

<sup>117</sup> *New Starbucks Policy: No purchase needed to sit in cafes*, NBC NEWS, May 19, 2018, <https://www.nbcnews.com/news/us-news/new-starbucks-policy-no-purchase-needed-sit-cafes-n875736>.

<sup>118</sup> LORI A. FRIDELL, PRODUCING BIAS-FREE POLICING: A SCIENCE-BASED APPROACH (2017) (designing implicit bias training programs to law enforcement agencies around the country); Elizabeth Chuck, *Can ‘Implicit Bias’ Training Stop Police Officers From Acting on Hidden Prejudice?* NBC NEWS, Oct. 1, 2016, <https://www.nbcnews.com/news/us-news/can-implicit-bias-training-stop-police-officers-acting-hidden-prejudice-n656071>.

<sup>119</sup> Calvin K. Lai & Jaelyn A. Lisnek, *The Impact of Implicit-Bias-Oriented Diversity Training on Police Officers’ Beliefs, Motivations, and Actions*, 34 PSYCH. SCI. 424, 431 (2023).

Jillian K. Swencionis & Phillip Atiba Goff, “*The Psychological Science of Racial Bias and Policing*” 23 PSYCHOLOGY, PUBLIC POLICY, AND LAW 389 (2017).

suspiciousness from 43 down to 6, thereby drastically diluting a Customs Agent's terrain for exercising discretion to search passengers based upon their implicit or explicit biases. This systemic change resulted in a 75 percent reduction in the number of searches and their racial disparities, while contraband finds were quadrupled.<sup>120</sup>

Sometimes CRT DEI interventions can be a matter of life or death. Oakland, California police force experienced a reduction in police shootings when their implicit bias training sessions were accompanied by structural interventions.<sup>121</sup> They did this by adjusting their foot pursuit policy so that officers were provided an alternative to the problematic system of automatically rushing to follow suspects into backyards and blind alleys, that had them rely upon their racial implicit biases of viewing unarmed people of color as warranting police armed responses. The foot pursuit policy change instituted as an outgrowth of the officers' implicit bias training, was a mandate to first call for officer backup, set up a perimeter and pause to plan before closing in on a person suspected of committing a crime. As a result, fewer civilians have been shot. Specifically, officer-involved shootings fell dramatically from an average of eight every year to a total of eight in five years of the policy implementation.<sup>122</sup> The reduction occurred even while arrest rates held steady and crime levels fell.

This was also accompanied by a structural change to address the civil rights violations brought about by racial profiling practices. Before its collaboration with implicit bias experts from Stanford University, the Oakland police department employed a practice of racial profiling whereby in 2014 alone 60% of police stops were of Black residents, despite the fact they only comprised 28% of the population.<sup>123</sup> Moreover, Black residents were searched and handcuffed at three times the rate of White residents. That changed, when the form that officers are required to fill out when performing a

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<sup>120</sup> JACK GLASER, SUSPECT RACE: CAUSES AND CONSEQUENCES OF RACIAL PROFILING 158-9 (2014).

<sup>121</sup> JENNIFER L. EBERHARDT, PHD, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO 1-5, 298-99 (2019).

<sup>122</sup> *Id.* at 298.

<sup>123</sup> Douglas Starr, *Meet the psychologist exploring unconscious bias – and its tragic consequences for society*, SCIENCE, Mar. 26, 2020, <https://www.science.org/content/article/meet-psychologist-exploring-unconscious-bias-and-its-tragic-consequences-society>.



stop was modified to include an additional question of – “was this stop Intelligence led, Yes or No?”<sup>124</sup> Intelligence-led refers to whether an officer has evidence that the person being detained is involved in specific criminal activity rather than minor violations like broken tail lights, double parking, etc. This structural reform resulted in a 43% reduction in traffic stops of Black residents and a 50% reduction in overall traffic stops from 2016 to 2018.<sup>125</sup>

The Las Vegas, Nevada police department was also able to reduce the use of force against residents of color when it reformed its foot pursuit rule to bar officers from handling suspects when the chase ends.<sup>126</sup> In Seattle, Washington the use of force by police was up to 40% less when they used implicit bias training and experts to reform their stop policies.<sup>127</sup>

Like police departments, Family Courts have also combined implicit bias training with structural changes to decrease racial disparities in routing children into the foster care system. Courts in Los Angeles County; Omaha, Nebraska; Portland, Oregon; and Mecklenburg County, North Carolina have done this.<sup>128</sup> Rather than relying on judges to individually initiate the mitigation of the operation of their own biases based on what they learned in implicit bias DEI sessions, these jurisdictions created a systemic tool of a “judicial bench card” with a checklist of questions that alert the judge of tools to limit biased outcomes.<sup>129</sup> These questions include the practice of flipping the script in which a decision maker is asked to consider whether they would make the same decision if it involved someone of a different race; considering a list of alternatives to foster

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<sup>124</sup> Lara O’Reilly, *How Oakland police cut traffic stop numbers by 40% with a simple checkbox*, YAHOO FINANCE, July 1, 2019, <https://sports.yahoo.com/finance/video/oakland-police-cut-traffic-stop-070000160.html>.

<sup>125</sup> Starr, *supra* note 123.

<sup>126</sup> Zara Abrams, *What works to reduce police brutality: Psychologists’ research is pinpointing the factors that lead to overly aggressive, biased policing – and intervention that can prevent it*, 51 MONITOR ON PSYCHOLOGY, <https://www.apa.org/monitor/2020/10/cover-police-brutality>.

<sup>127</sup> *Id.*

<sup>128</sup> Rachel D. Godsil, *Promoting Fairness? Examining the Efficacy of Implicit Bias Training in the Criminal Justice System*, in *BIAS IN THE LAW* 189, 201 (Joseph Avery & Joel Cooper eds., 2020).

<sup>129</sup> Pamela M. Casey et al., *Helping Courts Address Implicit Bias: Resources for Education*, NATIONAL CENTER FOR STATE COURTS (2012), <https://nsc.contentdm.oclc.org/digital/collection/accessfair/id/246>.

care placement, listing instances where defendants should have public defenders present, amongst other items. Having a routine and systematized judicial bench card has been empirically documented to curb the racially disproportionate outcomes of foster care placements for youth of color.<sup>130</sup>

Of course there will be times when it is not immediately apparent what sort of systemic policy should complement the DEI training. United Airlines provides a helpful case study. Like many other U.S. airline companies, United Airlines long struggled with hiring a racially diverse cohort of pilots. It instituted DEI trainings across the company.<sup>131</sup> But that alone did not increase the racial diversity of its pilot ranks.

Further study revealed that inclusive hiring practices could not address the racially disproportionate structural barrier of an applicant having to pay approximately \$100,000 and dedicating two years of unremunerated training hours to qualify as a commercial airline pilot.<sup>132</sup> Even the less-expensive applicant path of having armed forces flight experience, is itself riddled with structural barriers. It is difficult to log the requisite flight time to show flight readiness as an Air Force pilot candidate without the resources to access private flight instructors.<sup>133</sup>

United is now addressing the racially disparate structural barrier with the operation of a United Airlines-owned flight school that United purchased in 2020. While United is the first U.S. Airline to own its own flight school, this is a model that is more common outside of the United States. United Airlines is unique in promoting the flight school as a complement to its DEI initiatives. As of April 2022, 78 percent of the enrolled students were nonwhite or women.<sup>134</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> UNITED AIRLINES, *Diversity, Equity and Inclusion (DEI) in action* (July 25, 2023, 2:25 PM), <https://www.united.com/ual/en/us/fly/company/global-citizenship/DEI-in-action.html>

<sup>132</sup> Niraj Chokshi, *Diversifying Cockpits: A Change Driven by Necessity*, N.Y. TIMES, Apr. 4, 2022, at Sunday Bus. 1, 5.

<sup>133</sup> INSPECTOR GENERAL, U.S. DEPT OF AIR FORCE, REPORT OF INQUIRY (S8918P) DISPARITY REVIEW 43 (2020), [https://www.af.mil/Portals/1/documents/2021SAF/09\\_Sept/DR\\_ROI\\_Baseline.pdf](https://www.af.mil/Portals/1/documents/2021SAF/09_Sept/DR_ROI_Baseline.pdf).

<sup>134</sup> Chokshi, *supra* note 132, at 5.

What all the above examples demonstrate is that there are evidence-based interventions that can serve as useful curricular content for CRT DEI training. Moreover, the examples can also provide the impetus of inspiration for innovating workplace-specific systemic policies to complement the training. Put together they embody the CRT praxis foundational purpose of CRT - connecting theory to practical work aimed at transforming concrete institutions for racial justice.<sup>135</sup>

## CONCLUSION

This Essay's proposal for the expansion of DEI CRT inspired approaches may seem incongruous during a time when CRT itself is under attack in legislatures and the public discourse. Nonetheless, the entire history of civil rights is one in which inauspicious conditions and outright losses have been transmuted into human rights advances. Consider, that at the time the 1978 *Bakke* decision banning race-based quotas was issued, the civil rights community understood it as a significant loss. Explicit numerical quotas had provided the most direct way to hold an institution accountable.<sup>136</sup>

However, after the *Bakke* decision, the unwavering commitment to the pursuit of racial equality, inspired racial justice lawyers and activists "to make a way out of no way."<sup>137</sup> That work transformed *Bakke* and its workplace related court decisions barring direct racial quotas, into a metamorphosis of "diversity" as tool for racial inclusion.<sup>138</sup> Imperfect, yes. But as CRT luminary Patricia J.

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<sup>135</sup> CRITICAL RACE THEORY, *supra* note 17, at 741.

<sup>136</sup> Mary C. King, *Are African-Americans Losing Their Footholds in Better Jobs*, 32 J. ECON. ISSUES 641, 655 (1998) (detailing how workplace quotas lead to a dramatic change in the labor market with a demonstrated increase in the number of Blacks in almost every job niche); James P. Smith & Finis Welch, *Affirmative Action & Labor Markets*, 2 J. LAB. ECON. 280 (1984) (providing statistics of Black worker advancement from racial quotas).

<sup>137</sup> Martin Luther King, Jr., *Where Do We Go From Here? Address to the Southern Christian Leadership Conference on August 16, 1967*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR., 245, 252 (James Melvin Washington ed., 2003).

<sup>138</sup> *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) (applying constitutional strict scrutiny review to government workplace affirmative action plans thereby curtailing use of outright racial quotas without current statistical evidence demonstrating specific overt discriminatory practices and their ongoing effects);

Williams has said about Black civil rights warriors – “we believed in [rights] so much and so hard that we gave them life where there was none before. . . We nurtured rights and gave rights life.<sup>139</sup>” With that ancestral history, it is not necessarily illogical to seek to transfigure the notoriety of the attack on CRT into the very source for saving workplace DEI. In the past, “the making of something out of nothing took immense alchemical fire,” and such a fire can be set again.<sup>140</sup>

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Adarand v. Peña, 515 U.S. 200 (1995) (extending strict scrutiny review to federal statutory use of racial quotas as well).

<sup>139</sup> PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 163 (1991).

<sup>140</sup> *Id.* at 163.