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Can CRT Save DEI?: Workplace Diversity, Equity & Inclusion in the Shadow of Anti-Affirmative Action

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ABSTRACT

Just four years after the nation's summer of 2020 protests—sparked by the murder of George Floyd—culminated in a racial reckoning in which many organizations across the country instituted racial equity measures and policies, legislators across the nation are enacting anti-Critical Race Theory (CRT) bans in a seeming backlash to this advocacy for racial justice. The bans simultaneously mischaracterize CRT as anti-White discrimination while strategically conflating it with workplace diversity, equity, and inclusion (DEI) initiatives. Further inflaming the racially hostile public discourse is the U.S. 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 for race-conscious, inclusive university admissions policies.

As a result, corporate actors are apprehensive about the continued viability of their multibillion-dollar investment in workplace DEI trainings. Moreover, given the significant role of DEI training as a remedy for antidiscrimination law violations, it is important for legal scholars to analyze the animating factors of the legal movement to outlaw workplace DEI trainings. This Article 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 Article 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. Social science research suggests that programs focused on systemic and structural issues make the difference between well-received and poorly received DEI interventions, yielding 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 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 Article concludes by providing concrete, evidence-based examples of what CRT DEI workplace training can be for antidiscrimination law remedies and beyond.



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TABLE OF CONTENTS

Introduction		. 284
I.	THE SILVER LINING OF THE ANTI-CRT BACKLASH AGAINST DEI	. 285
II.	THE ROLE OF DEI IN ANTIDISCRIMINATION LAW	. 290
III.	THE CONSTRAINED VISION OF CONTEMPORARY DEI FORMULATIONS	. 292
IV.	THE WORKPLACE OPPOSITION TO INDIVIDUAL BIAS-FOCUSED DEI	. 298
V.	WHAT CRT OFFERS - CONCRETE MODELS FOR INSPIRATION	. 304
Conclusion		

INTRODUCTION

Just four years after the nation's summer of 2020 protests—sparked by the murder of George Floyd—culminated in a racial reckoning in which many organizations across the country instituted racial equity measures and policies, legislators across the nation are now enacting anti–Critical Race Theory (CRT) bans in a seeming backlash to this recent wave of advocacy for racial justice. The bans simultaneously mischaracterize CRT as anti-White discrimination while strategically conflating it with workplace diversity, equity, and inclusion (DEI) initiatives. Further inflaming the racially hostile public discourse is the U.S. Supreme Court's recent decision in *Students for Fair Admissions v. Harvard*,¹ which greatly narrows the constitutional grounds for race-based affirmative action by questioning the coherence of diversity as a goal for race-conscious, inclusive university admissions policies. As a result, corporate actors are apprehensive about the continued viability of their multibillion-dollar investment in workplace DEI trainings.

Given the significant role of DEI training as a remedy for antidiscrimination law violations, it is important for legal scholars to analyze the animating factors of the legal movement to outlaw workplace DEI trainings. Unfortunately, worker frustration with individual bias-focused DEI trainings has dovetailed with the inaccurate depiction of CRT espoused by anti-CRT activists, threatening the pursuit of racial equality. This Article explores a counterintuitive path forward: a wholesale shift to CRT-framed trainings as a defense against DEI. It is an effort inspired by the racial justice activists who CRT theorist Mari J. Matsuda describes as "ahead of their time, in thinking they could run a freedom train in the darkest hour of slavery."

Part I of the Article details how the use of the CRT label has come to be weaponized against workplace DEI initiatives. Part II situates the historical importance of DEI trainings within antidiscrimination law. Part III then assesses how contemporary DEI trainings, as influenced by anti–affirmative action jurisprudence, have implemented a constrained vision of equality. Part IV examines the individual bias-focused content of widely used DEI trainings and the employee dissatisfaction this structure of DEI trainings generates. Part V

^{1. 600} U.S. 181 (2023).

^{2.} Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 WOMEN'S RTS. L. REP. 7, 10 (1989).

concludes the Article's analysis of DEI training with a set of evidence-based models for implementing CRT-informed DEI initiatives.

I. THE SILVER LINING OF THE ANTI-CRT BACKLASH AGAINST DEI

Diversity, equity, and inclusion (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 of all with consideration of the differential treatment a person's unique circumstances requires for true equality; and inclusion, as the degree to which an organization embraces all of its members and enables them to make meaningful contributions.³ After the nation's summer of 2020 post-George Floyd racial reckoning,⁴ institutions across the country began to consider, and implement or amplify, their existing DEI measures. Included were DEI workplace trainings, which are sessions for a workforce to be educated and sensitized to workplace DEI issues.⁵ But four years after the 2020 racial reckoning, the energy for pursuing DEI has seemingly waned, with many questioning its efficacy at the same time that corporate anxieties have been raised by the conservative attacks on DEI as objectionable "anti-White" measures. This declining interest in DEI has resulted in a wave of dismissals of corporate DEI directors (employees in charge of designing and monitoring an organization's DEI efforts and policies).⁶

^{3.} LILY ZHENG, DEI DECONSTRUCTED: YOUR NO-NONSENSE GUIDE TO DOING THE WORK AND DOING IT RIGHT 53–54 (2022).

^{4.} George Perry Floyd Jr. was a Black man murdered by Derek Chauvin, a White police officer in Minneapolis, Minnesota. Mr. Floyd's murder on May 25, 2020 occurred during his arrest for allegedly providing a store clerk with a counterfeit twenty-dollar bill. His death set off nationwide protests against police brutality and demands for racial justice triggered in part by the sheer brutality of Chauvin kneeling on Mr. Floyd's neck and back for nine minutes and twenty-nine seconds causing him to die from a lack of oxygen in the presence of three other police officers on the scene. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/9K5M-PYHR]; Ian Price, *Historical Reflections on the George Floyd Protests*, UCLA HIST.: PUB. HIST. INITIATIVE (June 2020), https://phi.history.ucla.edu/historical-reflections-on-the-george-floyd-protests-by-ian-price [https://perma.cc/4722-H73H].

^{5.} ZHENG, *supra* note 3, at 17.

Kiara Alfonseca & Max Zahn, How Corporate America is Slashing DEI Workers Amid Backlash to Diversity Programs, ABC NEWS (July 7, 2023, 3:26 AM), https://abcnews.go.com/US/corporate-america-slashing-dei-workers-amid-backlash-diversity/story?id=100477952 [https://perma.cc/4NRB-NRFZ].

While the substance of DEI efforts vary, they all share endemic questions about their efficacy and raise concerns with how to address the racial backlash they inspire. DEI efforts in the workplace are further complicated by growing corporate anxiety about their continued legal viability in the wake of the Supreme Court's 2023 affirmative action decision. In *Students for Fair Admissions v. Harvard*,⁷ the Court restricted 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 the University of North Carolina (UNC) filed lawsuits challenging various law firms' diversity fellowship programs aimed at diversifying the legal profession.⁸ Moreover, some states and localities have legislated outright bans on DEI workplace initiatives,⁹ in keeping with the Supreme Court's worldview that focusing on racial inclusion is itself racially and legally problematic.

Notably, these legislative attacks have been promoted as an effort to abolish Critical Race Theory (CRT) by banning DEI trainings and related policies, modeled after then President Trump's Executive Order 13950¹⁰ banning federal contractors and subcontractors from providing workplace diversity training (which was later overturned by President Biden).¹¹ In banning such trainings, Trump mischaracterized CRT as "toxic propaganda [that will] destroy our country."¹² Reiterating this message, those opposed to the growth of workplace DEI initiatives have continued to conflate DEI as synonymous with CRT in an

^{7. 600} U.S. 181 (2023).

^{8.} See generally Complaint, Am. All. Equal Rts. v. Perkins Coie LLP (N. D. Tex. Aug. 22, 2023) (No. 3:23-cv-01877); Complaint, Am. All. Equal Rts. v. Morrison & Foerster LLP (S. D. Fla. Aug. 22, 2023) (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, 5:30 AM), https://www.wsj.com/articles/diversity-equity-dei-companies-blum-2040b173 [https://perma.cc/8HYZ-RF3S] (detailing the anti-Diversity, equity, and inclusion (DEI) lawsuits filed against Comcast, Amazon, and Starbucks).

See, e.g., ARIZ. REV. STAT. ANN. § 41-1494 (West 2021); ARK. CODE ANN. § 25-1-904 (West 2022); FLA. STAT. ANN. § 760.10 (West 2022); GA. CODE ANN. § 20-1-11 (West 2022); IOWA CODE ANN. § 25A.1 (West 2024); N.H. REV. STAT. § 354-A:29 (West 2021); TEX. EDU. CODE ANN. § 51.3525 (West 2024); see also Legality of the Use of "Critical Race Theory" and "Antiracism" Programming, 58 Mont. Att'y Gen. Op. 1 (2021).

^{10.} Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020).

^{11.} Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

^{12.} Cady Lang, President Trump Has Attacked Critical Race Theory. Here's What to Know About the Intellectual Movement, TIME (Sept. 29, 2020, 10:53 PM), https://time.com/5891138/critical-race-theory-explained [https://perma.cc/U8PF-VCEN].

effort to purposefully demonize it.¹³ 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—"[C]ritical [R]ace [T]heory"—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 "[C]ritical [R]ace [T]heory." We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans. 14

Rufo's anti-DEI conflation with CRT has fueled his attacks on DEI trainings at Disney, American Express, Bank of America, and Verizon, amongst others he labels as "CRT proponents." Across the nation, several jurisdictions have instituted public workplace DEI bans, 16 and copycat legislation is currently pending before federal and state legislatures. 17 An even larger number of CRT bans target public school curricular offerings and content. 18

In reality, CRT is the intellectual practice of examining race as a social construct and racism as systemically ingrained within institutions.¹⁹ CRT thus

- 13. See 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, 5–6 (2023).
- Laura Meckler & Josh Dawsey, Republicans, Spurred by an Unlikely Figure, See Political Promise in Critical Race Theory, SAN DIEGO UNION-TRIB. (June 20, 2021, 11:19 AM), https://www.sandiegouniontribune.com/news/politics/story/2021-06-20/republicans-spurred-by-an-unlikely-figure-see-political-promise-in-critical-race-theory [https://perma.cc/CXH2-S92K].
- 15. Bobbi K. Dominick, Critical Race Theory and Workplace Diversity Efforts, DIGITAL ADVOC. (July 1, 2022), https://isb.idaho.gov/blog/critical-race-theory-and-workplace-diversity-efforts/#:~:text=The%20debate%20suggests%20that%20practices,a%20form%20of%20rever se%20discrimination [https://perma.cc/D8BY-G9K9].
- 16. See, e.g., ARIZ. REV. STAT. ANN. § 41-1494 (West 2021); ARK. CODE ANN. § 25-1-904 (West 2022); FLA. STAT. ANN. § 760.10 (West 2022); GA. CODE ANN. § 20-1-11 (West 2022); IOWA CODE ANN. § 25A.1 (West 2024); N.H. REV. STAT. § 354-A:29 (West 2021); TEX. EDU. CODE ANN. § 51.3525 (West 2024); see also Legality of the Use of "Critical Race Theory" and "Antiracism" Programming, 58 Mont. Att'y Gen. Op. 1 (2021).
- 17. See, e.g., S. 968, 117th Cong. (2021); S. 2221, 117th Cong. (2021); S. 2346, 117th Cong. (2021); H.R. 3235, 117th Cong. (2021); H.B. 9 § 2, 2022 Reg. Sess. (Ala. 2022); H.B. 312 § 2, 2022 Reg. Sess. (Ala. 2022); S.B. 7 § 2, 2022 Reg. Sess. (Ala. 2022); S.B. 292, 2023 Reg. Sess. (Ala. 2023); S. 664, 221st Leg., Reg. Sess. (N.J. 2022); S.B. 2247, 68th Leg. Assemb., Reg. Sess. (N.D. 2023); H.B. 322, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); H.B. 1532 § 3, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021).
- 18. See Welcome to #TruthBeTold Campaign, AFR. AM. POL'Y F., https://www.aapf.org/truthbetold [https://perma.cc/78YN-G8RQ].
- CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT XIII (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

goes beyond the traditional interrogation of race and racism limited to focusing on badly intentioned individuals.²⁰ It instead seeks to reveal and transform the relationship between race, racism, and power with its examination of colorblind structural and systemic barriers to inclusion for the purpose of designing effective solutions.²¹ 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, which is a significant consumer of DEI training.²² This Article uniquely seeks to explore how CRT-informed DEI initiatives might be developed to combat the backlash against DEI.

Contemporary workplace diversity trainings have largely turned to focusing on concerns with implicit bias.²³ 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.²⁴ Leading diversity consultant Tanya Odom argues that too many diversity officers work in "vacuums" without linking their work to the historical contexts of systemic and structural racism.²⁵ Yet when a single plaintiff files a claim regarding the discrimination they have experienced, that claimant is authorized to request the equitable remedy of restructuring an entire institution's practices.²⁶ Doctrinally, this is a recognition that addressing structural racism is just as important as providing compensatory damages for an individual plaintiff who has suffered from discrimination.

Importantly, social science research suggests that programs focused on systemic and structural issues make the difference between well-received and

See VICTOR RAY, ON CRITICAL RACE THEORY: WHY IT MATTERS & WHY YOU SHOULD CARE 18– 20 (2022); Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049, 1052–53 (1978).

^{21.} Critical Race Theory: The Cutting Edge 2–3 (Richard Delgado & Jean Stefancic eds., 3rd ed. 2013).

^{22.} Michael Z. Green, (*A*) Woke Workplaces, 2023 WIS. L. REV. 811, 853–54 (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 in contrast to vast majority of scholars who rarely analyze DEI practices outside of the educational context).

^{23.} See generally Jennifer Y. Kim & Loriann Roberson, I'm Biased and So Are You. What Should Organizations Do? A Review of Organizational Implicit-Bias Training Programs, 74 CONSULTING PSYCH. J. 19 (2022).

^{24.} See JESSE SINGAL, THE QUICK FIX: WHY FAD PSYCHOLOGY CAN'T CURE OUR SOCIAL ILLS 193–94 (2021).

^{25.} PAMELA NEWKIRK, DIVERSITY, INC.: THE FAILED PROMISE OF A BILLION-DOLLAR BUSINESS 187 (2019).

^{26.} GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW 194 (5th ed. 2021).

poorly received DEI interventions.²⁷ They also yield better results in increasing workplace diversity, retaining employees of color, and addressing harmful, racially disparate systemic policies.²⁸ The focus on systemic and structural aspects of racism is the very heart of what CRT concerns itself with. Put together, this means what DEI actually needs is an infusion of CRT.

This may seem counterintuitive, given the huge legislative onslaught of efforts to ban CRT. These efforts, however, are based upon a faulty conception of CRT as focused on the implicit bias of individual mindsets and a call to reject personal racial 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 attacks have created a large-scale interest in learning what CRT is and what it has to offer.²⁹ Evident from the repeated satirical references on the popular television show Saturday Night Live, CRT opponents have made CRT more relevant to the public than at any time in its approximately three decades of formal existence.³⁰ In keeping with the old adage, "there's no such thing as bad publicity except your own obituary."³¹

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

^{27.} See Alexandra Kalev, Frank Dobbin & Erin Kelly, Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies, 71 AM. SOCIO. REV. 589 (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. 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).

^{28.} See infra Part V.

See generally Critical Race Theory: Cases, Materials, and Problems (Dorothy A. Brown ed., 3d ed. 2014) (providing concrete explanations of how CRT is relevant to the entire first year law school curriculum with chapters covering civil procedure, torts, contracts, criminal law, and property).

^{30.} Saturday Night Live: Season 47 Episode 1 (NBC television broadcast Oct. 2, 2021); Saturday Night Live: Season 47 Episode 5 (NBC television broadcast Nov. 6, 2021).

^{31.} DOMINIC BEHAN, MY BROTHER BRENDAN 158 (1965) (quoting Brendan Behan).

II. THE ROLE OF DEI IN ANTIDISCRIMINATION LAW

When plaintiffs win or settle antidiscrimination lawsuits, there is a range of remedies available to put 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 benefits.³² Title VII 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 Title VII remedies include the ability to recover attorney's fees, expert witness fees, and court costs. A similar range of remedies are available for instances of housing discrimination under the Fair Housing Act,³³ school-based discrimination,³⁴ public accommodations discrimination (except for monetary damages),³⁵ and healthcare discrimination (except for emotional harm monetary damages).³⁶

Institutions that discriminate are also responsible for stopping any discriminatory practices and taking steps to prevent discrimination in the future.³⁷ Consequently, consent decrees resolving discrimination lawsuits often include mandatory training of relevant stakeholders on matters of discrimination and require reforms of exclusionary institutional policies and practices.³⁸ Indeed, one study of U.S. Equal Employment Opportunity Commission (EEOC) class action consent decrees over an eight-year period tabulated that 89 percent required

^{32.} U.S. DEP'T JUST., TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, https://www.justice.gov/crt/laws-we-enforce [https://perma.cc/Y7M4-T7DG]; see Remedies for Employment Discrimination, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/remedies-employment-discrimination [https://perma.cc/NM2F-72ZE].

^{33.} Fair Housing Act, 42 U.S.C. § 3604; see Learn About FHEO's Process to Report and Investigate Discrimination, U.S. DEP'T HOUS & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process [https://perma.cc/94G5-5PT2].

^{34.} Civil Rights Act of 1964 tit. VI, 42 U.S.C §§ 2000d–2000d-7.

^{35.} Civil Rights Act of 1964 tit. II ,42 U.S.C. §§ 2000a-2000a-6.

^{36.} See Cummings v. Premier Rehab Keller PLLC, 596 U.S. 212, 218–19 (2022) (foreclosing private action access to financial compensation for emotional distress harm for discrimination pursuant to § 504 of the Rehabilitation Act of 1973 & § 1557 of the Affordable Care Act).

^{37.} See id. at 218.

^{38.} See, e.g., Consent Decree at 8–11, EEOC v. Prewett Enters., Inc. (N.D. Miss. Mar. 18, 2020) (No. 3:18-cv-00213) (mandating training of employees in consent decree resolving workplace race harassment lawsuit).

diversity training.³⁹ Similarly, Fair Housing Act remedies include fair housing training when housing providers are found to discriminate,⁴⁰ and Title II of the Civil Rights Act remedies for discrimination in public accommodations include diversity training for service providers.⁴¹

Early iterations of DEI training date back to the passage of this aforementioned legislation, the Civil Rights Act of 1964. They were formulated as liability circumvention devices, and their primary focus was on educating institutions about legal prohibitions and avoiding lawsuits. 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.

Strikingly absent from many consent decrees are any specifics about what the content of the discrimination training should contain, and whether or how their efficacy should be measured. This omission is especially consequential because of the significant role judges are entrusted with in antidiscrimination law. While all of the aforementioned civil rights statutes name racial discrimination as prohibited, they fail to provide much guidance on what that exactly means. For instance, Title VII defines employment discrimination as taking adverse action against an employee "because of such individual's race" or other protected categories of identity.⁴⁵ What "because of race" means has been left to judicial

^{39.} Theanne Liu, Note, Ethnic Studies as Antisubordination Education: A Critical Race Theory Approach to Employment Discrimination Remedies, 11 WASH. U. JURIS. REV. 165, 175 (2018).

Fair Housing Act Remedies, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice/eviction-resources/fair-housing-act-module/fair-housing-act-remedies [https://perma.cc/KA24-VBMZ].

^{41.} U.S. DEP'T OF JUST. CIV. RTS. DIV., KNOW YOUR RIGHTS: TITLE II OF THE CIVIL RIGHTS ACT OF 1964, https://www.justice.gov/d9/2024-03/title_ii_flyer_english.pdf [https://perma.cc/7BAG-XSBN]; see, e.g., Jeff Leeds, Denny's Restaurants Settle Bias Suits for \$54 Million, L.A. TIMES (May 25, 1994, 12:00 AM), https://www.latimes.com/archives/la-xpm-1994-05-25-mn-61982-story.html [https://perma.cc/KQZ5-S6XZ].

^{42.} Rohini Anand & Mary-Frances Winters, A Retrospective View of Corporate Diversity Training from 1964 to the Present, 7 Academy of Mgmt. Learning & Educ. 356, 356 (2008).

^{43.} See generally Lauren B. Edelman, Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law, 97 AM. J. SOCIO. 1531 (1992).

^{44.} LAUREN B. ÉDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 164–65, 173–77 (2016).

^{45. 42} U.S.C. § 2000e-2(a) (Title VII precludes employment discrimination "because of" of race, color, religion, sex, or national origin).

interpretation in adjudicating cases.⁴⁶ Absent judicial elaboration in caselaw or consent decrees, litigants have little planning guidance as to what DEI training should include and how a training's efficacy in ameliorating inequality should be judged.

Moreover, in an effort to gain specialized expertise in designing its content, most institutions outsource the implementation of antidiscrimination training. 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.

III. 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.⁴⁷ One estimate suggests that DEI has now become a multibillion-dollar industry.⁴⁸ The demand for DEI trainings certainly increased when CEOs nationwide committed to implement workplace bias trainings as part of the C.E.O. Action for Diversity initiative.⁴⁹ Many online and offline programs for diversity training have emerged, along with national diversity organizations and targeted conferences in fields like law and higher education.⁵⁰ Firms have been created to assist large corporations enhance the diversity of its

^{46.} RUTHERGLEN, *supra* note 26, at 6–7, 12 (noting the prominent role of judges in elaborating what discrimination means beyond the basic statutory formulations).

^{47.} 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. *Our History*, PEOPLE'S INST. FOR SURVIVAL & BEYOND, https://pisab.org/our-history [https://perma.cc/T44N-ZM29].

^{48.} NEWKIRK, *supra* note 25, 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 Training Is Doing More Harm Than Good?*, N.Y. TIMES (Jan. 17, 2023), https://www.nytimes.com/2023/01/17/opinion/dei-trainings-effective.html [https://perma.cc/7JK8-PYSF] (noting that the U.S. DEI market reached an estimated \$3.4 billion in 2020 alone).

^{49.} See Camille A. Olson, Gina R. Merrill, Kaitlyn F. Whiteside & Needhy Shah, *Implicit Bias Theory in Employment Litigation*, 63 PRAC. LAW. 37, 38 (2017).

^{50.} See, e.g., Workplace Diversity, PRACTICING L. INST., https://www.pli.edu/search/subject/?id=1672 [https://perma.cc/EE25-25WN].

workforce, global companies devoted to diversity have appeared, and a multitude of diversity journals and magazines have been published.⁵¹

Remarkably, the lucrative industry of diversity is flourishing, even though diversity, for the most part, is not.⁵² In order to better understand the mismatch between the contemporary investment in corporate DEI trainings and the slow pace of progress in actual DEI metrics, it is helpful to consider what has influenced the development of DEI trainings. As with any big business, there is variation in the content DEI professionals provide for different institutions.⁵³ Nevertheless, there are identifiable trends endemic to the industry.

As previously discussed, early iterations of DEI trainings were formulated as liability circumvention devices largely unconcerned with transforming institutions to be more diverse and inclusive. But changing economic needs shifted the perceived utility of DEI. Over time, the increased concern with remaining competitive in a globalized economy where cross-cultural competence is valued inspired the inclusion of interpersonal cultural awareness into training formats. This was accompanied by a surge in social science research detailing how diversity enhances innovation and efficiency, making a compelling case for businesses. The studies show that diverse teams, with the inclusion of different perspectives, are more rigorous and thoughtful in their decision-making deliberations. The business case for diversity was also supported by data that "corporations with the most ethnically diverse executive teams are 33 [percent] more likely to outperform corporations than the least ethnically diverse teams in terms of profitability." Additionally, companies in the top quartile for both gender and ethnic diversity are 12 percent more likely to be more profitable than

^{51.} Newkirk, *supra* note 25, at 195.

^{52.} See, e.g., Newkirk, supra note 25, at 5 & 153 (detailing how despite the sizeable corporate investment in diversity initiatives few result in increasing diversity such as Coco-Cola's 2002 diversity initiative maintaining racial disparities between Black and White employees receiving promotions in the first few months of 2003).

^{53.} See, e.g., Services and Solutions, PGE CONSULTING GRP., https://www.paulaedgar.com/speaker [https://perma.cc/A62L-A7XD] (offering bespoke DEI training for each client).

^{54.} See Iain D. Macpherson, Cultural Differences Matter, and They Don't: Transcending Polarized and Polarizing Cultural Stereotypes in Diversity Training, 2 IAFOR J. Bus. & MGMT. 51, 55, 58 (2017) (describing the cultural awareness focus of DEI trainings); Emma Kowal, Hayley Franklin & Yin Paradies, Reflexive Antiracism: A Novel Approach to Diversity Training, 13 ETHNICITIES 316, 320–21 (2013).

^{55.} Roger C. Mayer, Richard S. Warr & Jing Zhao, *Do Pro-Diversity Policies Improve Corporate Innovation?*, 47 FIN. MGMT. 617, 627–29 (2018).

^{56.} JULIET BOURKE, WHICH TWO HEADS ARE BETTER THAN ONE? HOW DIVERSE TEAMS CREATE BREAKTHROUGH IDEAS AND MAKE SMARTER DECISIONS 14–15 (2016).

^{57.} Chris Brummer & Leo E. Strine, Jr., Duty and Diversity, 75 VAND. L. REV. 1, 28 (2022).

companies in the lower quartiles.⁵⁸ The gap increased by 36 percent when compared to companies in the fourth quartile.⁵⁹ The studies found 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."⁶⁰

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 were all particularly attractive to the corporate sector.⁶¹ In addition, the Supreme Court cases historically upholding diversity as a constitutionally valid justification for affirmative action programs bolstered the idea of diversity within the public discourse and the importance of DEI training to enhance communication across diverse workers.⁶² In turn, DEI trainings further entrenched the focus on cross-cultural understanding and interpersonal communication with reflections on one's personal identity.⁶³

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 has noted, the common diversity training curriculum was primarily designed "to increase awareness of one's own cultural lens ... and to increase one's skills in working effectively in a diverse team." Nor should this be surprising, given the narrow construction of the Supreme Court's vision of diversity. As scholar Yael Plitmann details, the

^{58.} *Id*.

^{59.} *Id.*

^{60.} Id. at 29.

^{61.} See Shelby R. Buckman, Laura Y. Choi, Mary C. Daly & Lily M. Seitelman, The Economic Gains From Equity 17 (Fed. Rsrv. Bank S.F., Working Paper No. 2021–11, 2021); see generally 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).

^{62.} See Regents Univ. Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003); Wilkins, supra note 61, at 1552 (detailing how law firms and prominent corporations wrote amicus briefs in support of race-conscious affirmative action in *Grutter*, a significant change in position from when similar organizations opposed affirmative action in *Bakke*).

^{63.} See Kowal, Franklin & Paradies, *supra* note 54, at 319–21 (critiquing cultural awareness DEI training as focused on emotions in a manner counter-productive to antiracism pursuits).

^{64.} Should You Be Offering Diversity Training?, 34 QUINLAN SCH. L. BULL. 13 (Sept. 1, 2007).

jurisprudential construction of diversity was a symbolic legal standard that "was never designed to revise the racial makeup of institutions." 65

This is because, starting with Justice Lewis Powell's 1978 plurality opinion in *Regents of the University of California v. Bakke*⁶⁶, and continuing with later Supreme Court decisions, diversity was divorced from the civil rights and antidiscrimination values, which were grounded in efforts to address historical wrongs.⁶⁷ Rather, diversity has been a thin theoretical legal construction to authorize race as only one component among a number of factors that a university can consider in the 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 by equating race with any "diverse" personality trait an individual may hold (hometowns, professional experiences, etc.).⁶⁸

The Supreme Court's most recent reconsideration of the constitutionality of university affirmative action plans has further constrained the law's and the public's vision of what diversity means. In *Students for Fair Admissions v. Harvard*,⁶⁹ the Supreme Court assessed whether the college admissions systems used by Harvard College and UNC were lawful under the Equal Protection Clause of the Fourteenth Amendment. The Court decided that the general goal of diversity, primarily to train future leaders, could no longer be used to justify inclusive college admissions decisions because it was too elusive to be sufficiently measurable and permit judicial review.⁷⁰ In other words, the Court is now demanding a one-to-one correspondence tabulation between a college admissions policy and the enhanced leadership capacity of its graduates.⁷¹

Students for Fair Admissions 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 body and deferred to the Law School's educational expertise and view that diversity was essential to its educational mission.⁷² *Grutter* lauded the educational benefits that diversity was

^{65.} Yael Plitmann, Authentic Compliance With a Symbolic Legal Standard? How Critical Race Theory Can Change Institutionalist Studies on Diversity in the Workplace, 47 LAW & Soc. INQUIRY 331, 338 (2022).

^{66. 438} U.S 265 (1978).

^{67.} Id. at 337.

^{68.} See Grutter, 539 U.S. at 333.

^{69. 600} U.S. 181 (2023).

^{70.} Id. at 230.

^{71.} Id. at 214-15.

^{72.} Grutter, 539 U.S. at 341, 328-29.

designed to produce, including cross-racial understanding to better prepare students for a diverse workforce and global marketplace.⁷³ Conversely, *Students for Fair Admissions*, 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."⁷⁴ The Court's newfound concern with metrics which measure the benefits of diversity rejects *Grutter*'s deference to a university's assessment that diversity provides tangible value. Now, universities are required to furnish empirical evidence demonstrating how diversity aids students in gaining new knowledge by being introduced to varied perspectives, equipping them for success in the global marketplace and leadership roles, in addition to providing proof of a clear endpoint date of when the goals have been definitively accomplished no longer necessitating affirmative action.⁷⁵

To be clear, the Court's decision refrains from explicitly outlawing race-based affirmative action. But it implicitly does so, by expressing a deep-seated suspicion of any university's articulation of a diversity justification, which must now be proven like an accountant showing ledgers for a contentious audit. The value of 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." 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 Article, thereby limiting diversity to a matter of individual perspective. In contrast, a university's collective pursuit of diversity through race-conscious affirmative action programs, 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.⁷⁷ While the decision is only applicable to the university educational

^{73.} Id. at 330-31.

^{74.} Students for Fair Admissions, 600 U.S. at 214.

^{75.} *Id.* at 214–15.

^{76.} Id. at 230.

See, e.g., Alison Durkee, Supreme Court Gets Rid of Affirmative Action in College Admissions, (June 29, 2023, 10:08 AM), https://www.forbes.com/sites/alisondurkee/2023/06/29/supreme-court-gets-rid-ofaffirmative-action-in-college-admissions/?sh=1f827eb32857 [https://perma.cc/B6NZ-XMJY]; Nina Totenberg, Supreme Court Guts Affirmative Action, Effectively Ending Race-(June Conscious Admissions, NPR 29, https://www.npr.org/2023/06/29/1181138066/affirmative-action-supreme-court-decision

context, the Court's shift towards viewing the goal of diversity as incoherent, especially if not sufficiently measurable, stands to chill the corporate pursuit of DEI policies, despite corporate law duties impelling and authorizing corporate attention to diversity. Like a ripple effect, the media mischaracterizing *Students for Fair Admissions* as abolishing affirmative action has heightened current corporate concern with the viability of their DEI training programs and initiatives. In fact, the decision has already caused commentators to reconsider the continued viability of their corporate DEI initiatives. Such corporate reticence around DEI is not new. It has long been noted that workplace DEI initiatives are much less ambitious than what appears permitted by Title VII jurisprudence. The program is incoherent, especially in the corporate reticence around DEI is not new.

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 will oppose any training regardless of its specific content, and no investment in optimal program design will alter their view. But a majority of U.S. workers report that focusing on DEI in the workplace is a good thing. Significantly, studies show that the type of DEI training deployed influences the participants' perceived utility of the session. 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

- [https://perma.cc/2K74-2GK9]; Mark Sherman, Divided Supreme Court Outlaws Affirmative Action in College Admissions, Says Race Can't be Used, ASSOCIATED PRESS (June 29, 2023, 7:10 AM), https://apnews.com/article/supreme-court-affirmative-action-college-race-f83d6318017ec9b9029b12ee2256e744 [https://perma.cc/7KUJ-YLHQ].
- 78. Brummer & Strine, Jr., *supra* note 57, at 1–2 (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 Nw. U. L. Rev. 1455 (2024) (observing that in the wake of *Students for Fair Admissions v. Harvard* employers are still legally authorized to use voluntary DEI hiring goals as part of their compliance with Title VII antidiscrimination).
- 79. See 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/ßwhat-scotuss-affirmative-action-decision-means-for-corporate-dei [https://perma.cc/4STT-JCNP].
- 80. Zachary McCoy, Workplace Diversity, Equity, and Inclusion Programs: Inclusive Environments and Diversity Promotion Programs, 55 U.S.F. L. Rev. 153, 155 (2021).
- 81. Rachel Minkin, *Diversity, Equity and Inclusion in the Workplace*, PEW RSCH. CTR. (May 17, 2023) https://www.pewresearch.org/social-trends/2023/05/17/diversity-equity-and-inclusion-in-the-workplace [https://perma.cc/2MQM-83RW].
- 82. 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 v (June 2022) (Ph.D. dissertation) (on file with City University of New York, Graduate Center).

together with DEI-rejecters form 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 the opposition.

IV. THE WORKPLACE OPPOSITION TO INDIVIDUAL BIAS-FOCUSED DEI

Contemporary workplace diversity trainings have largely turned toward focusing on concerns with individual mindsets and, particularly, implicit bias. This is a marked contrast from the systemic-focused DEI sessions informed by the social justice movements that predated the explosion in resources allocated to corporate DEI professionals. Today's corporate DEI trainings, for the most part, emphasize the centrality of individual identity and the relevance of implicit bias for the individual. The implications of implicit bias for structural racism are rarely discussed. Moreover, 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 minimal effect on levels of implicit bias. Yet such training "remains the go-to solution for corporate executives and university administrators facing public relations crises, campus intolerance and slow progress on diversifying the executive and faculty ranks." Unfortunately, DEI has long embodied the perspective that individualized self-help can resolve racism.

The self-help perspective is magnified by DEI's ubiquitous use of the work of Robin DiAngelo, author of the book *White Fragility*. Indeed, DiAngelo aims for her work to create person-by-person consciousness raising that contributes to social change. Both the book and the DEI workshops based on the book seek to

^{83.} See Kim & Roberson, supra note 23, at 3.

^{84.} See, e.g., Racial Justice Trainings, RACE FORWARD https://www.raceforward.org/racial-justice-trainings [https://perma.cc/J6FP-57KL].

^{85.} *See* SINGAL, *supra* note 24, at 193–94.

^{86.} See Frank Dobbin & Alexandra Kalev, Why Doesn't Diversity Training Work? The Challenge for Industry and Academia, 10 ANTHROPOLOGY NOW 48, 49 (2018).

^{87.} Id.

^{88.} See Anthony Conwright, The Trouble With White Fragility Discourse, AFR. AM. POL'Y F. (May 12, 2022), https://www.aapf.org/theforum-white-fragility-discourse [https://perma.cc/P2N5-MCTY].

^{89.} ROBIN DIANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM (2018).

^{90.} See Conwright, supra note 88 (discussing DiAngelo's book White Fragility).

address racism with individual reflection and self-administered correctives.⁹¹ 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 PowerPoint slides and photographs. Once the generalized 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?" 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. This creates a visual impact of how racial privilege arrays itself.

A close analog of the popular *White Fragility* trainings are what sociologist Sarita Srivastava terms "Let's Talk" DEI sessions.⁹⁷ The Let's Talk approach is centered on encouraging the disclosure of personal feelings, stories, and experiences. 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 also rely on. Specifically, the therapeutic model is seen as a way of dealing with divisions, but it does so by side-stepping a discussion of the

- 91. *Id*.
- 92. See, e.g., Unitarian Universalist Assoc., White Fragility Discussion Guide Questions https://www.uua.org/sites/live-PROMPTS, new.uua.org/files/white_fragility_disc_guide_slides.pptx [https://perma.cc/XY8C-SBM5]; EDUCATORS, Brown, WHITE Fragility Discussion GUIDE FOR https://beacon.org/assets/pdfs/DiAngelo-EducatorsProfDevGuide.pdf [https://perma.cc/2SSU-AZ7A]; see also, THE LITERACY LAB, VIEWING THE WORLD THROUGH AN EQUITY LENS: DIVERSITY, EQUITY AND INCLUSION TRAINING SERIES, https://www.slideshare.net/eward018/dei-slides. [Perma cannot capture source. It's also behind. Paywall to download a copy.
- 93. Daniel Bergner, 'White Fragility' Is Everywhere. But Does Antiracism Training Work?, N.Y. TIMES (Aug. 6, 2021), https://www.nytimes.com/2020/07/15/magazine/white-fragility-robin-diangelo.html [https://perma.cc/9XX8-C77P].
- 94. Kafi D. Kumasi, *Teaching Race in Cyberspace: Reflections on the "Virtual Privilege Walk" Exercise, in* Teaching for Justice: Implementing Social Justice in the LIS Classroom 195, 200–01, 215–16 (Nicole A. Cooke & Miriam E. Sweeney eds., 2017).
- 95. *Id.* at 215–16; *see* Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE & FREEDOM MAG. (1989) https://nationalseedproject.org/images/documents/ Knapsack_plus_Notes-Peggy_McIntosh.pdf [https://perma.cc/Z7BR-F85Q].
- 96. Kumasi, *supra* note 94, at 203.
- 97. SARITA SRIVASTAVA, "ARE YOU CALLING ME A RACIST?": WHY WE NEED TO STOP TALKING ABOUT RACE AND START MAKING REAL ANTIRACIST CHANGE 12 (2024).

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.⁹⁸ Nevertheless, DEI trainers report that therapeutic discourse actually obstructs organizational change. After engaging in such sessions, participants perceive themselves as more moral for having reflected on their emotions and absolved from considering systemic reforms.⁹⁹

Along with *White Fragility*-focused DEI trainings, implicit bias-related content accounts for a lion's share of contemporary DEI sessions.¹⁰⁰ 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.¹⁰¹

Implicit bias-focused trainings first introduce the social psychology research that reveals that individuals rely on implicit attitudes to process information and have biases that they do not know they have. ¹⁰² 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. ¹⁰³ These implicit 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. ¹⁰⁴ When those implicit attitudes attribute particular qualities to members of a specific social category, they are then implicit stereotypes. ¹⁰⁵ Most people do not see their own implicit bias, which can appear spontaneously as intuition, a gut

^{98.} Sarita Srivastava, "You're Calling Me a Racist?" The Moral and Emotional Regulation of Antiracism and Feminism, 31 SIGNS: J. WOMEN CULTURE & SOC. 1, 54 (2005) ("By remaining focused on the self rather than on organizational practice, these individualized discourses of therapy and moral progression make a broader antiracist analysis difficult.").

^{99.} See SRIVASTAVA, supra note 97, at 6, 11, 32.

^{100.} See SINGAL, supra note 24, at 193–94.

^{101.} Mahzarin R. Banaji & Anthony G. Greenwald, Blindspot: Hidden Biases of Good People 90 (2013).

^{102.} See Russell H. Fazio, Jeaw-Mei Chen, Elizabeth C. McDonel & Steven J. Sherman, Attitude Accessibility, Attitude-Behavior Consistency, and the Strength of the Object-Evaluation Association, 18 J. EXPERIMENTAL SOC. PSYCH. 339, 341 (1982) (stating an attitude is "an association between a given object and a given evaluative category"); R. B. Zajonc, Feeling and Thinking: Preferences Need No Inferences, 35 Am. PSYCH. 151, 156–57 (1980) (noting that humans can control the way emotions are expressed, but not the fact that they exist).

See Anthony G. Greenwald & Mahzarin R. Banaji, Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes, 102 PSYCH. REV. 4, 7 (1995).

^{104.} See Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1199–200 (1995) (describing the relationship between implicit bias and schemas).

^{105.} Greenwald & Banaji, supra note 103, at 14–17.

feeling, or a vague doubt about a person. 106 This is why discriminatory actions rooted in racial implicit bias are referred to as "unconscious racism" by some legal scholars. 107

After introducing the 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 to detect the extent of an individual's implicit biases. The IAT studies how quickly individuals associate a group of people, shown in photographs on one side of the screen, with either positive or negative words, such as good versus bad, smart versus dumb, as compared with how quickly they make the same associations for a different group of people shown on the opposite side of the screen. The test is rooted in the very simple hypothesis that people will find it easier to associate pleasant words with the faces of socially favored groups than with socially disfavored groups. Ease of association, measured by judgment speed, is taken as evidence of an implicitly held attitude toward that social group.

For example, when respondents are instructed to click on one side of the screen each time a positive word appears, in addition to when a photograph of a White person appears, most test takers complete the task much more quickly than when presented with the same list of positive words but also instructed to click the opposite side of the screen when a non-White photograph is shown. When the test then instructs respondents to instead click on one side of the screen each time a negative word appears and when a photograph of a White person appears, most test takers struggle to complete the task quickly and accurately. In contrast, when the instruction is to click on the opposite side of the screen each time a negative word is shown and when a photograph of a non-White person appears, most test takers are quick and accurate. In short, the IAT measures an individual's strength of associations between concepts, like particular racial groups, and positive or negative evaluations or stereotypes about that concept as shown by their ease in speed and accuracy in following the test instructions. Once the test is completed,

^{106.} See id. at 8 ("[I]mplicit attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects.").

^{107.} 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).

^{108.} See Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, Measuring Individual Differences in Implicit Cognition: The Implicit Association Test, 74 J. Personality & Soc. Psych. 1464, 1465–66 (1998) (providing a model for administration of the implicit association test).

^{109.} Banaji & Greenwald, supra note 101, at 149.

test takers receive ratings like "neutral," "slight," "moderate," or "strong" preference for a particular group as a measure of their implicit bias. 110

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.¹¹¹ This also includes time dedicated to exploring various questions like the following.¹¹² 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? 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 some have gone so far as to sue employers for being obligated to participate in ways they found discriminatory. Notably, legislative challenges to workplace DEI programming have, more often than not, specifically identified *White Fragility*-structured trainings as what perturbs them about DEI. 114

Of greater relevance to the inquiry of this Article 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," and "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." Even the diversity directors of a hosting institution articulated the organizational goal of the sessions as simply "to get conversations started," but these sessions were not followed up with the tracking of diversity employment and promotion numbers. A similar institutional lack of follow-up often accompanies implicit bias-focused training. Worse still, after following a facilitator's recommendation to take the free ten-minute online IAT, an employee may feel that they are addressing implicit bias simply by taking the test with no need to take any other tangible actions. 117

^{110.} Frequently Asked Questions, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/faqs.html [https://perma.cc/Z2X3-23R8].

^{111.} Interview with Jesus Paulino, Compliance Officer & Unconscious Bias Lecturer, Settlement Health, in N.Y.C., N.Y. (July 20, 2023).

^{112.} Id.

See, e.g., Amended Verified Complaint, Chislett v. NYC Dep't Educ., No. 1:21-cv-09650, 2024
WL 1118852 (S.D.N.Y. Mar. 14, 2024).

^{114.} Conwright, supra note 88.

^{115.} Bergner, supra note 93.

^{116.} Id.

^{117.} SINGAL, *supra* note 24, at 198.

Significantly, the reliance on the IAT as the anchor for DEI training is opposed by both the designers of the IAT themselves and other social psychologists. What these social psychologists recommend is that training programs instead be designed to use the IAT 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. Yet, few organizations follow that advice.

Human Resources specialist Dannie Lynn Fountain attributes the lack of DEI training follow-up action to organizational leaders who are only interested in the expediency of a DEI session to make a showing of corporate engagement. ¹²¹ 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, which will in turn transform the workplace and foster greater inclusion and equity. ¹²²

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. This may even cause them to be more likely to discriminate based on prideful hubris that what they do is no longer animated by bias. This is because participation in a training encourages the attendees to "legitimize the status quo by becoming less sensitive to discrimination targeted at underrepresented groups and reacting more harshly

^{118.} Greenwald et al., supra note 27, at 9.

^{119.} Id. at 30.

^{120.} Id.

^{121.} DANNIE LYNN FOUNTAIN, ENDING CHECKBOX DIVERSITY: REWRITING THE STORY OF PERFORMATIVE ALLYSHIP IN CORPORATE AMERICA 11–12 (2023).

^{122.} Vernā Myers, Making Diversity and Inclusion Awareness Training Work in the Law Firm, 49 Orange Cnty. Law. 18, 19 (2007).

^{123.} Cheryl R. Kaiser, Brenda Major, Ines Jurcevic, Tessa L. Dover, Laura M. Brady & Jenessa R. Shapiro, *Presumed Fair: Ironic Effects of Organizational Diversity Structures*, 104 J. PERSONALITY & SOC. PSYCH. 504, 516–17 (2013); *see also* Maryam Kouchaki, *Vicarious Moral Licensing: The Influence of Others' Past Moral Actions on Moral Behavior*, 101 J. PERSONALITY & SOC. PSYCH. 702 (2011) (observing that a group's identity as having an egalitarian moral position accords them a sense of absolution that in turn can make discriminatory actions more likely); Srivastava, *supra* note 98, at 29 (describing how having pride in moral identity as an antiracist feminist can interfere with racial equity practices).

toward underrepresented group members who claim discrimination."¹²⁴ The mere existence of DEI sessions can create "an illusion of fairness" that influences participants to conclude that any later claims of discrimination lack merit. ¹²⁵ As the next Part unpacks, CRT offers a better frame for evidence-based DEI interventions.

V. 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 the theory's key concern with structural racism. Unlike traditional notions of racism that view racism 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. 127

While "systemic racism" is often used as coterminous with structural racism, it can 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. CRT examines not only systemic racism but also 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." ¹²⁹

"CRT DEI" is a concept that does not currently exist as a formal DEI training offering. It is a vision borne from my own experiences crafting DEI trainings. As a CRT scholar whose teaching and research was early in exploring what social psychology implicit bias research could offer for the enforcement of antidiscrimination law, ¹³⁰ various entities approached me to design their DEI

^{124.} Kaiser et al., *supra* note 123, at 504.

^{125.} Id.

^{126.} RAY, *supra* note 20, at 18–22.

^{127.} KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 148 (2019).

^{128.} Systemic Racism Definition, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/systemic-racism [https://perma.cc/X4N3-KS4Q].

^{129.} RAY, supra note 20, at 20.

^{130.} In no way am I suggesting that I was the first or only legal scholar to explore what social psychology research could offer the legal system's advancement of civil rights. See, e.g., Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489 (2005) (considering the wealth of social cognition research for the pursuit of racial equality); john powell & Rachel Godsil, Implicit Bias Insights as Preconditions to Structural Change, 20 POVERTY & RACE, Sept./Oct. 2011, at 3.

sessions beginning in 2012.¹³¹ I worked with state bar associations, public defender offices, prosecutor offices, employment lawyer associations, law firms, and many others in the private sector. Bringing my research to bear with a direct application outside the confines of academia caused me to reflect not only on how CRT could be infused into DEI, but also on what was counter to CRT objectives in existing DEI trainings.

For example, in the early 2000s, before I had the opportunity to design my own DEI sessions, I had the experience of joining some other academics in consulting for the New Jersey (NJ) State Troopers. At the time, the Troopers were under a 1999 federal consent decree to address the racial discrimination of their problematic racial profiling policies. They retained the academic consultants to create a set of antibias training sessions. Despite the efforts by the academic consultants to shape the curriculum to include concerns with systemic racism, the Troopers only approved a cultural awareness framework.

Alarmingly, the Troopers expressed enthusiasm for how the cultural awareness curriculum could help them be more precise in their racial profiling by now understanding, for instance, the difference between a Sikh and a Muslim. This was completely counter to what the consultants had wanted to achieve. That negative experience showed me the dangers of individual cultural awareness DEI, and thus what I did not want to replicate as I was being sought out for "implicit bias training." In fact, by 2022, New Jersey state investigators reported that certain State Police Training Practices were directly inconsistent with the requirements of the federal consent decree. Moreover, despite the fact that there were 4.29 times more White, non-Hispanic residents in New Jersey in 2021 than any other race, Blacks and Latinx (of all races) made up 46.28 percent of all New Jersey State Trooper stops in that year. That percentage was a steady increase from being

^{131.} See generally Tanya Katerí Hernández, One Path for "Post-Racial" Employment Discrimination Cases—The Implicit Association Test Research as Social Framework Evidence, 32 L. & INEQ. 309 (2014) (assessing ability of incorporating implicit bias research into the litigation of employment discrimination cases).

^{132.} Press Release, U.S. Dep't Just., New Jersey Settles Allegations of Discrimination by State Police Under Justice Department Agreement (Dec. 22, 1999), https://www.justice.gov/archive/opa/pr/1999/December/607cr.htm [https://perma.cc/W8NC-3W7W].

^{133.} Press Release, N.J. Off. State Comptroller, OSC Finds Certain New Jersey State Police Training Practices Inconsistent With Requirements of Federal Consent Decree (Nov. 10, 2022), https://nj.gov/comptroller/news/2022/20221110.shtml [https://perma.cc/T5QH-NPLP].

^{134.} MATHEW B. ROSS, NEW JERSEY STATE POLICE TRAFFIC STOPS ANALYSIS, 2009–21 (2023), https://bpb-us-w2.wpmucdn.com/sites.northeastern.edu/dist/1/1046/files/2023/11/C2C-2023-2_MBRos-NJOAG-Report.pdf [https://perma.cc/FXU9-8AWE].

35.34 percent in 2009 when the consent decree was dissolved. ¹³⁵ In 2023, the New Jersey Office of the Attorney General announced that a new traffic stop pilot program would be instituted to address the continuing racial disparity in policing. ¹³⁶ Clearly, the individual cultural awareness DEI approach that the N.J. State Troopers favored did very little to effectively change their discriminatory practices.

Heeding that lesson, I found that the more I structured the implicit bias sessions to address systemic racism, the more an organization's non-White and White members found it of value. Conceptualizing the sessions as "CRT DEI" only occurred after sharing my insights with groups of other DEI trainers and leaders I taught in annual CRT Summer School Workshops starting in 2021. All of which is to say, that this Article's endeavor to detail what CRT DEI is, is my effort to build a world that does not yet self-consciously exist. As a result, there are no perfect examples of CRT DEI to draw from. Instead, this is a project of drawing lessons from imperfect institutions aiming to reduce racial harms in small ways. The hope is that by bringing together the existing evidence-based examples of imperfect institutions reducing racial harm, even in small ways, they can together spur a vision of what a full-blown CRT DEI approach could entail.

Importantly, 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 and accompanied by a search for 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 in 1986 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

^{135.} *Id.*; *DataUSA: New Jersey, Population & Diversity*, https://datausa.io/profile/geo/new-jersey#:~:text=Race%20and%20Ethnicity&text=1.92M%20people-,In%202021%2C%20there%20were%204.29%20times%20more%20White%20(Non%2D,thi rd%20most%20common%20ethnic%20groups [https://perma.cc/4M4T-DTUN].

^{136.} Press Release, N.J. Off. Att'y Gen., AG Platkin Announces Pilot Program to Reduce Racial and Ethnic Disparities in Motor Vehicle Enforcement Actions Taken by New Jersey State Police, and Fatal Motor Vehicle Crashes (July 11, 2023), https://www.njoag.gov/ag-platkin-announces-pilot-program-to-reduce-racial-and-ethnic-disparities-in-motor-vehicle-enforcement-actions-taken-by-new-jersey-state-police-and-fatal-motor-vehicle-crashes [https://perma.cc/35BL-ULCE].

^{137.} CRT Summer School, AFR. AM. POL'Y F., https://www.aapf.org/crtsummerschool [https://perma.cc/A5FS-SPUM].

education, employment, housing, public accommodations, political participation, and administrative justice. 138

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 weapons have a larger racial disparity in the use of force by police. 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. 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 they do about the individual, interventions for mitigating bias are better focused on changing systems and structures. Interventions for mitigating bias are better focused on changing systems and structures.

In short, while implicit bias-based DEI approaches are often 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 still true that implicit bias insights can be deployed to illuminate structural racism dynamics. In fact, when CRT luminary Charles Lawrence considered the literature on implicit bias, he did so for systemic reasons.

^{138.} TIME ON TWO CROSSES: THE COLLECTED WRITINGS OF BAYARD RUSTIN 273 (Devon W. Carbado & Donald Weise eds., 2003).

^{139.} Eric Hehman, Jessica K. Flake & Jimmy Calanchini, *Disproportionate Use of Lethal Force in Policing Is Associated With Regional Racial Biases of Residents*, 9 SOC. PSYCH. & PERSONALITY Sci. 393, 397 (2018).

B. Keith Payne, Heidi A. Vuletich & Jazmin L. Brown-Iannuzzi, Historical Roots of Implicit Bias in Slavery, 116 PROC. NAT'L ACAD. SCIENCES 11693, 11697 (2019).

^{141.} SARAH CARTER, VERN DUNN, STEVEN KENDALL & ANNE-MARIE MAZZA, THE SCIENCE OF IMPLICIT BIAS: PROCEEDINGS OF A WORKSHOP IN BRIEF 6 (Jordan Axt et al. eds., 2021), https://nap.nationalacademies.org/cart/download.cgi?record_id=26191 [https://perma.cc/XCB6-2FF2]; Goodwin Liu et al., *Understanding Implicit Bias: Insights & Innovations*, 153 DAEDALUS (SPECIAL ISSUE) (Winter 2024) (dedicating the entire winter issue to analysis of implicit bias).

^{142.} See Ralph Richard Banks & Richard Thompson Ford, (How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality, 58 EMORY L.J. 1053, 1072 (2009) (criticizing the use of implicit bias discourse to pursue racial justice because of its misguided preoccupation with individual mental states).

His principal interest was the desire to enhance the antidiscrimination law project of identifying and addressing discrimination.¹⁴³

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 decisionmakers in seeking structural interventions for those systemic problems, workplace diversity is markedly increased as a matter of hiring, retention, and promotion.¹⁴⁴ 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 complementary systemic policy changes designed for their own institution.

Systemic policies of racial transparency have proven particularly useful in advancing DEI metrics and are thus ideal examples for DEI curricular content. For instance, 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. 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. Such results motivate the push for more corporate diversity disclosures. It is thus sensible to include in DEI curricular materials and programming such inspiring examples of what generates concrete structural change. The examples not only enable participants to understand that real change is feasible, but it can also help generate their own creative thinking about what might be structurally possible within their own institutions.

Another concrete example comes from the context of individuals enrolled in a teacher trainee program. 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)

^{143.} Lawrence III, supra note 107, at 321.

^{144.} Dobbin & Kalev, supra note 86, at 52.

^{145.} Frank Dobbin & Alexandra Kalev, Why Diversity Programs Fail, HARV. BUS. REV. (July–Aug. 2016), https://hbr.org/2016/07/why-diversity-programs-fail [https://perma.cc/R94Q-BR82].

See, e.g., Atinuke O. Adediran, Disclosing Corporate Diversity, 109 VA. L. REV. 307 (2023);
Veronica Root Martinez & Gina-Gail S. Fletcher, Equality Metrics, 130 YALE L.J. FORUM 869 (2021).

and the other half Jewish students with Sephardic names (that are socially racialized as primarily of African or Asian heritage).¹⁴⁷ Notably, the experiment did not include Israeli citizens who are Palestinian and also known to be racialized in Israel.¹⁴⁸ Moreover the experiment was conducted prior to the current crisis in Gaza.¹⁴⁹ Despite that glaring omission, this imperfect experiment provides an important insight.

What became immediately apparent from the experiment 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.¹⁵⁰ In contrast, the Sephardic named Jewish students received D grades on average.¹⁵¹ 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.¹⁵² With the systemic policy change that indirectly provided for racial transparency, the grading differences disappeared.¹⁵³ Having to systematically explain their rating differences led them to judge based on merit rather than stereotypes.¹⁵⁴

Yet DEI need not be solely about an organization's diversity metrics, it can also be concerned 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. Sa justice-related DEI example from Starbucks that captured national attention provides a useful illustration. Starbucks may seem like an unlikely source for DEI insights given the ongoing critique of consumers boycotting in opposition to the company's dealings with its employee union and its stance with regards to the crisis in Gaza. But as with other faulty

^{147.} Dobbin & Kalev, *supra* note 145.

^{148.} David G. Embrick & Johnny Eric Williams, *Alienation, Racial Capitalism, and the Racialization of Palestinians*, 49 CRITICAL SOCIO. 939 (2023) (describing how settler colonialism racializes Palestinians).

^{149.} The Israel Gaza War: History of the Conflict Explained, BBC NEWS (Apr. 5, 2024), https://www.bbc.com/news/newsbeat-44124396 [https://perma.cc/4HMD-AK4N].

^{150.} Dobbin & Kalev, *supra* note 145.

^{151.} Id.

^{152.} Id.

^{153.} *Id*.

^{154.} Id.

^{155.} *JEDI Frequently Asked Questions*, DIVERSITY CTR. OF NE. OHIO, https://www.diversitycenterneo.org/jedi-frequently-asked-questions [https://perma.cc/MHJ2-2LK2].

See Omar Mohammed, Are McDonald's, Starbucks Boycotts Working?, NEWSWEEK (Nov. 17, 2023, 6:32 PM), https://www.newsweek.com/mcdonalds-starbucks-boycotts-israel-hamaswar-1844933 [https://perma.cc/68VR-2XYV].

institutions, one can still value the merit of specific DEI interventions and at the same time acknowledge the public demand for continued reform regarding other matters.

The Starbucks example of relevance to this Article's DEI focus arose from a 2018 employee action. On April 12, 2018, a Starbucks employee called the Philadelphia police emergency line to request aid. 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 White patrons sitting at tables received the same treatment. After cell phone footage of the incident caused a public uproar, Starbucks issued a public apology and closed more than 8000 U.S. stores for an afternoon of racial bias training for nearly 175,000 employees. The starbucks is the same treatment of the incident caused a public uproar, Starbucks issued a public apology and closed more than 8000 U.S.

Notably, the training provided information about the history and systemic effects of public accommodation discrimination. Moreover, the training was designed to be accompanied by an overhaul of Starbucks policies. Thereafter, a structural policy was instituted 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." Including concerns about systemic racism into Starbucks's implicit bias training helped create company support for the structural change with the greatest efficacy for containing the harm of implicit bias. As such, this particular effort can serve as a model for how consumers of implicit bias training should encourage program facilitators to speak to systemic and structural issues.

- 157. Matt Stevens, *Starbucks C.E.O Apologizes After Arrests of 2 Black Men*, N.Y. TIMES, (Apr. 15, 2018), https://www.nytimes.com/2018/04/15/us/starbucks-philadelphia-black-men-arrest.html?unlocked_article_code=1.kk0.GmLJ.56G2tc_Ff0SM&smid=url-share [https://perma.cc/M4XG-3NBD].
- 158. See Jenny Gathright & Emily Sullivan, Starbucks, Police and Mayor Respond to Controversial Arrest of 2 Black Men in Philly, NPR NEWS (Apr. 14, 2018, 11:56 PM), https://www.npr.org/sections/thetwo-way/2018/04/14/602556973/starbucks-police-and-mayor-weigh-in-on-controversial-arrest-of-2-black-men-in-ph [https://perma.cc/VK7S-FSUT].
- 159. Dominic Rushe, *Starbucks to Close 8000 U.S. Stores for Racial-Bias Training*, THE GUARDIAN (Apr. 17, 2018, 2:13 PM), https://www.theguardian.com/business/2018/apr/17/starbucks-racism-training-close-stores-may-us [https://perma.cc/ASK6-55MZ].
- Emily Stewart, What Starbucks Is Teaching Its Employees During Anti-Bias Training, VOX (May 29, 2018, 3:10 PM), https://www.vox.com/identities/2018/5/29/17405338/starbucks-racial-bias-training-why-closed [https://perma.cc/EPW8-2TXW].
- 161. *Id*.
- 162. Jacey Fortin, *A New Policy at Starbucks: People Can Sit Without Buying Anything*, CNBC NEWS (May 21, 2018, 8:49 AM), https://www.cnbc.com/2018/05/21/a-new-policy-at-starbucks-people-can-sit-without-buying-anything.html [https://perma.cc/NL99-2DUV].

Various law enforcement agencies have also implemented implicit bias training as a device for reducing civil rights violations and violence against unarmed people of color.¹⁶³ But the implicit bias training alone has not curtailed racialized policing rates at the same rates as implicit bias-informed structural interventions.¹⁶⁴ When bias trainings are part of a set of systemic changes in law enforcement policies and practices, real racial change is possible.

Scholars engaged in law enforcement reform efforts note that what decreases racial disparities in policing is systemically limiting law enforcement discretion. It is important to note however that the internal reforms made by law enforcement entities are not the equivalent of the external reforms that those who advocate for police abolition promote, inasmuch as internal reforms do not reduce the imprint of police and shift resources to affected communities directly. Nevertheless, limiting the discretion that allows for law enforcement bias to operate is a systemic reform when it is an institution-wide automatic constraint rather than an appeal for individual officers to rely upon their own willingness and efforts to disrupt the bias. The reduction in fatalities and harm to non-White bodies that internal reforms can provide is vitally important to acknowledge at the same time that broader external reforms are pursued.

The U.S. Customs Service provides a useful example. Despite their physical and emotional harm, strip searches of travelers at the U.S. border are authorized based on law enforcement "suspicion"¹⁶⁶ that has historically been deployed in a racially biased manner.¹⁶⁷ The racial disparity of border strip searches and luggage searches was effectively addressed when in 1998, the U.S. Customs Service

^{163.} See generally Lorie A. Fridell, Producing Bias-Free Policing: A Science-Based Approach (Cynthia Lum & Christopher Koper ed., 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, 2:06 AM), https://www.nbcnews.com/news/us-news/can-implicit-bias-training-stop-police-officers-acting-hidden-prejudice-n656071 [https://perma.cc/MSC7-HPGD].

^{164.} See Calvin K. Lai & Jaclyn 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 PSYCH. PUB. POL'Y & L. 398, 404–05 (2017).

^{165.} See Paul Butler, The System is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform, 104 GEO. L.J. 1419, 1468 (2016); Amna A. Akbar, Non-Reformist Reforms and Struggles Over Life, Death, and Democracy, 132 YALE L.J. 2497, 2519–20 (2023).

Gregory L. Waples, Notes, From Bags to Body Cavities: The Law of Border Search, 74 COLUM. L. REV. 53 (1974).

^{167.} André Keeton, *Strip Searching in the Age of Colorblind Racism: The Disparate Impact of* Florence v. Board of Chosen Freeholders of the County of Burlington, 21 MICH. J. RACE & L. 55 (2015) (describing the racial disparities in law enforcement strip searches).

shortened its list of indicators of suspiciousness from forty-three down to six.¹⁶⁸ The new policy drastically limited a Customs Agent's ability to exercise their discretion in passenger searches and therefore limited the effect of 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 discoveries quadrupled.¹⁶⁹

Sometimes CRT DEI interventions can be a direct matter of life or death. The police force of Oakland, California, experienced a reduction in police shootings when their implicit bias training sessions were accompanied by structural interventions. They did this by adjusting their foot pursuit policy. This is because the decision to pursue is often influenced by the racial implicit bias of viewing unarmed people of color as warranting armed responses. To Officers were provided an alternative to the problematic practice of automatically pursuing suspects into backyards and blind alleys. Importantly, the change to the foot pursuit policy was an outgrowth of the officers' implicit bias training. The new policy requires officers to call for 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's implementation. 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 percent of police

^{168.} Jack Glaser, Suspect Race: Causes and Consequences of Racial Profiling 158–59 (2015).

^{169.} Jack Glaser, Disrupting the Effects of Implicit Bias: The Case of Discretion & Policing, 153 DAEDALUS, Winter 2024, at 151, 164.

^{170.} Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, Seeing Black: Race, Crime, and Visual Processing, 87 J. Personality & Soc. Psych. 876, 876 (2004).

^{171.} Jennifer L. Eberhardt, Biased: Uncovering the Hidden Prejudice That Shapes What We See, Think, and Do 298–99 (2019).

^{172.} *Id.* at 1–5 (detailing the implicit bias training for Oakland police that preceded the crafting of a new foot pursuit policy); Douglas Starr, *The Bias Detective*, SCIENCE (Mar. 26, 2020), https://www.science.org/content/article/meet-psychologist-exploring-unconscious-bias-and-its-tragic-consequences-society [https://perma.cc/589F-X6ZD] (describing how implicit bias trainers were brought in assist the Oakland police department with its unlawful racial profiling practices).

^{173.} EBERHARDT, *supra* note 171, at 298.

^{174.} *Id*.

^{175.} Id.

stops were of Black residents, despite the fact they only comprised 28 percent of the population. Moreover, Black residents were searched and handcuffed at nearly three times the rate of White residents. That changed when the form that officers are required to fill out when performing a stop was modified to include an additional question—"Was this stop Intelligence-led: Yes or No?" 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 percent reduction in traffic stops of Black residents and a nearly 50 percent reduction in overall traffic stops from 2016 to 2018. The decrease continued with a 71 percent drop from 2017 to 2020. 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. In Seattle, Washington, the use of force by police decreased by 40 percent when they used implicit bias training and experts to reform their stop policies.

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 Omaha, Portland, Los Angeles County, and Mecklenburg County, North Carolina, have done this. Rather than relying on judges to individually apply 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. These questions, amongst other items, include considering a list of alternatives to foster care

^{176.} Starr, *supra* note 172.

^{177.} Id.

^{178.} Liana Brinded, *How Oakland Police Cut Traffic Stop Numbers by 40% With a Simple Checkbox*, YAHOO FIN. (July 1, 2019, 2:00), https://sports.yahoo.com/finance/video/oakland-police-cut-traffic-stop-070000160.html.

^{179.} See id.

^{180.} Starr, supra note 172.

^{181.} OAKLAND POLICE DEP'T, OAKLAND POLICE DEPARTMENT STRATEGIC PLAN 2021–2024, at 10 (2021).

^{182.} Zara Abrams, What Works to Reduce Police Brutality, 51 MONITOR ON PSYCH. 30 (2020), https://www.apa.org/monitor/2020/10/cover-police-brutality [https://perma.cc/GTP6-ZEQ8].

^{183.} *Id*.

^{184.} See 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).

^{185.} See Pamela M. Casey, Roger K. Warren, Fred L. Cheesman II & Jennifer K. Elek, Nat'l Ctr. for State Cts., Helping Courts Address Implicit Bias G-9 (2012).

placement, listing instances where defendants should have public defenders present, and the practice of flipping the script. Flipping the script asks judges to consider whether they would make the same decision if it involved someone of a different race. Having a routine and systematized use of a judicial bench card has been empirically documented to curb the racially disproportionate outcomes of foster care placements for youth of color. 188

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. ¹⁸⁹ It instituted DEI trainings across the company, but that alone did not increase the racial diversity of its pilot ranks. ¹⁹⁰

United's follow-up study to assess whether the goals of the DEI training were being met revealed that inclusive hiring practices alone could not address the racially disproportionate structural barriers that exist. These barriers include an applicant having to pay approximately \$100,000 in training expenses and having to dedicate two years of unremunerated training hours to qualify as a commercial airline pilot. While gaining flight experience through military service is less expensive, that path is still riddled with structural barriers. For example, it is

- 186. See id. at G-8–G-9 (describing "perspective-taking exercise[s]" and "cloaking exercise[s]" that "direct people to adopt specific implementation intentions to control for potential bias" which provide the foundation for the development of flip-it-to-test-it approaches).
- 187. See Janine Milne, 'Flip It to Test It' Lessons on Battling Bias From Roche, DIGINOMICA (Mar. 18, 2018), https://diginomica.com/flip-it-to-test-it-lessons-on-battling-bias-from-roche [https://perma.cc/DFZ9-WVVL] (describing how former Global Head of Roche Diagnostics developed the idea of flip-it-to-test-it); see also Joanne Lockwood, Flipping the Script on Bias: Identifying and Overcoming Everyday Discrimination in Business, SEECHANGEHAPPEN, https://seechangehappen.co.uk/flipping-the-script-on-bias-identifying-and-overcoming-everyday-discrimination-in-business [https://perma.cc/UQ7B-374T] (detailing how flip-it-to-test-it can be used for bias awareness).
- 188. See Casey, Warren, Cheesman II & Elek, supra note 185.
- 189. Diversity, Equity and Inclusion (DEI) in Action, UNITED AIRLINES, https://www.united.com/ual/en/us/fly/company/global-citizenship/DEI-in-action.html [https://perma.cc/R3JJ-EB4J].
- 190. Id
- 191. Niraj Chokshi, *The End of the All-Male, All-White Cockpit*, N.Y. TIMES (Apr. 23, 2022), https://www.nytimes.com/2022/04/23/business/pilots-diversity.html [https://perma.cc/MPU6-CT7G].
- 192. See ÎNSPECTOR GEN., U.S. DEP'T AIR FORCE, REPORT OF INQUIRY (S8918P): DISPARITY REVIEW 114–32 (2021), https://www.af.mil/Portals/1/documents/2021SAF/09_Sept/DR_ROI_Baseline.pdf. [https://perma.cc/T5CD-TGMB].

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. 193

United is now addressing the racially disparate structural barriers to becoming a pilot with the operation of a United Airlines-owned flight school, purchased in 2020.¹⁹⁴ 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. Still, 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 non-White or women.¹⁹⁵

What all the above examples demonstrate is that there are evidence-based interventions that can serve as useful curricular content for CRT DEI training. The examples can also provide the impetus for innovating workplace-specific systemic policies to complement the training. In turn, antidiscrimination law consent decree mandates for DEI training that are implemented guided by a CRT DEI model will enhance the enforcement of civil rights. Rather than the status quo delivery of ineffective individual bias framed training, CRT DEI will provide more robust structural discrimination content. Moreover, the crafting of consent decrees can be improved with the inclusion of efficacy measures tied to an organization's efforts to develop systemic-based policy reforms. In effect, the proposed model for CRT DEI embodies the foundational purpose of CRT—connecting theory to practical work aimed at transforming institutions for racial justice. 196

CONCLUSION

This Article'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 banned race-based quotas in college admissions, the civil rights community

^{193.} See John A. Tirpak, Air Force Flying Hours Decline Again After Brief Recovery, AIR & SPACE FORCES MAG. (June 1, 2022), https://www.airandspaceforces.com/air-force-flying-hours-decline-again-after-brief-recovery [https://perma.cc/W5J7-RE4J] (pilot flying hours across all types of airfract in the Active duty force fell in 2021).

^{194.} Chokshi, supra note 191.

^{195.} Id.

^{196.} CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 21, at 741.

understood the decision as a significant loss. Explicit numerical quotas had provided the most direct way to hold an institution accountable. 197

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." That work transformed *Bakke* and other workplace-related court decisions barring direct racial quotas, into a metamorphosis of "diversity" as a tool for racial inclusion. Now we need to confront the Supreme Court's evisceration of diversity as well. Still, as CRT luminary Patricia J. Williams has said about Black civil rights warriors, "blacks believed in [rights] so much and so hard that we gave them life where there was none before; we held onto them, put the hope of them into our wombs, mothered them." With that ancestral history, it is not necessarily illogical to seek to transfigure the public spotlight 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. On the case of the cas

^{197.} See Mary C. King, Are African-Americans Losing Their Footholds in Better Jobs?, 32 J. ECON. ISSUES 641, 655–56 (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. 269, 280–82 (1984) (providing statistics of Black worker advancement from racial quotas).

^{198.} Martin Luther King, Jr., Where Do We Go From Here?, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES 245, 252 (James M. Washington ed., 2003).

^{199.} See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–98 (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); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 202 (1995) (extending strict scrutiny review to federal statutory use of racial quotas as well).

^{200.} PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 163 (1991).

^{201.} *Id.* at 163.