A PARADIGM SHIFT IN RACE CONSCIOUSNESS DRIVES THE GROWING DEMAND FOR DIVERSITY, EQUITY, AND INCLUSION CONSULTATION

By Lisa Holder

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Today, a surging focus on systemic racism is sweeping across continents, creating dramatic changes in the Diversity, Equity, and Inclusion (DEI) landscape. The murder of George Floyd and countless predecessors could have simply been a trigger for reforming police practices specifically relating to black people in the U.S., but instead has turned into a tsunami exposing discrimination against all categories of *historically disenfranchised people*—women, non-binary, and BIPOC (black, indigenous, people of color)— "politely" and often *erroneously* referred to in professional services firms as "diverse" individuals.

DEI is workplace lingo for the process of cultivating a work environment that is varied in personnel and inclusive, holistic, and accepting in its culture and operations. Diverse personnel means staff that is eclectic in terms of race, gender, ethnicity, sexual orientation, physical ability/disability, and seamlessly reflective of the diversity in the broader society. Notably, an individual or a singular race of people cannot be "diverse," as diversity inherently requires multiples greater than one. Equity is targeted operations that appreciate and support the disparate needs of diverse personnel with different lived experiences. These operations sometimes treat employees differently based on their lived experiences and degrees of access, in order to level the playing field. An inclusive work culture is one that accepts and uplifts difference and embeds its diverse personnel equitably in the programmatic decision-making process. Holistic operations are workplace norms, structures, and procedures informed by diversity and equity principles. Like many holistic, non-binary visions in a binary world, the DEI workplace is aspirational, and achievable only through tireless and sincere commitment.

DEI has gone from being just part of the discourse and something companies and professional services firms acknowledged with a nod and an official title to being the primary issue for leadership teams across the country.[1] Amidst the current anti-racism protests, employers are flooding DEI consultants with requests for trainings and equity leadership coaching. Non-profits, industry leaders, and non-government organizations (NGOs) are specifically requesting "Anti-Racism" training—as opposed to DEI—a semantic change that signals a paradigm shift on matters of race. Furthermore, across the legal industry, a broad range of counter bias strategies are gaining traction—ranging from anti-bias jury instructions, re-invigorated race-conscious programming, and a feverish focus on DEI training and consultation that drives the search for technology to transcend the human tendency to lose momentum and recede back to status quo norms. Meanwhile, the coronavirus effect and the new virtual workplace intensifies the groundswell.

DEI consultants will play a critical role in harnessing the racial justice fervor of the moment and using dynamic coaching, training, and technology to translate that energy into workplace policy that eliminates homogenous workspaces and hostile work environments. The shift in the zeitgeist constitutes a recognition that institutional racism exists and thrives on complacency. This conclusion is supported by empirical evidence of a dramatic shift in White America's attitudes on race. New polling shows that whereas in previous years the majority of white people didn't believe that structural racism existed, today white people overwhelmingly believe that systemic racism is a pervasive problem that significantly impacts policy, especially policing.[2] Ultimately, society is transitioning to a new normative understanding that we as a people are not post-racial and cannot be color-blind until we have a protracted period of truth and reconciliation that embraces diversity and levels the playing field with equity programming.

The key to successful DEI training, in this moment, is to strive to reach the audience "where they are at" by empowering them to build and access supports for the institutional reform and self-transformation that they currently seek.

LAW, POLICY, AND THE ZEITGEIST CONVERGE

Post-civil rights jurisprudence and policy mandates have been dominated by a rigid notion of

equality that is not historically contextualized. This narrative only recognizes and remedies racism that manifests as overt bigotry against protected classes while ignoring the impact that subtle forms of bias manifested as disparate outcomes have on individuals and systems. That is why laws that guarantee equal protection on the basis of race require proof of racial animus and intentional discrimination and subvert disparate impact evidence.[3] Moreover, post-civil rights jurisprudence constructs a rigid color-blind consciousness narrative that will not tolerate race-conscious policies of any kind. Color-blind norms wrongly assume that all races and ethnicities are on a level playing field and that race consciousness is always synonymous with racism. This narrative creates a false equivalency between policy that seeks to remedy centuries of systemic discrimination against people of color and women and policies that replicate preferences for white people or wealthy people. Diversity suffers under this "master narrative"[4] because contextualized approaches that seek to remedy implicit bias and centuries of inequality through targeted outreach to underrepresented and systemically disadvantaged groups are presumptively discriminatory (i.e., reverse discrimination) and equal to preferences for systemically advantaged groups.[5]

In her striking expose' of racialized mass incarceration, *The New Jim Crow*, scholar Michelle Alexander prosecutes the case against colorblindness, declaring as follows:

> Far from being a worthy goal, however, colorblindness has proved catastrophic for African Americans. It is not an overstatement to say the systematic mass incarceration of people of color in the United States would not have been possible in the post-civil rights era if the nation had not fallen under the spell of a callous colorblindness. . . . Saying that one does not care about race is offered as an exculpatory virtue, when in fact in can be a form of cruelty. . . . [W]e have allowed our criminal justice system to create a new racial undercaste.[6]

In admonishing against the judicial perspective that overemphasizes intentional discrimination and ignores implicit bias, nationally recognized expert on judicial and legal decision making, Kimberly Papillon, argues that, "an approach to civil rights work that focuses exclusively on identifying the consciously-biased actors in a government institution or private company will overlook most of the biased decisions that occur in our society on a daily basis."[7]

Consistent with this scholarship, this year California has enacted laws that push back on the master narrative and lay the groundwork for a structural equity build-out in the public domain that is perfectly timed to optimize the increasing public support for racial justice, diversity, and equity.

On the legislative front, thanks to progressive leadership from state legislators and visionary grassroots stakeholders, a spate of new laws now facilitates workplace diversity and inclusion by recognizing the role of unconscious bias in workplace decision-making and its impact on disparate outcomes. Specifically, this year California enacted a plethora of laws recognizing and combating implicit bias in the workplace and in the courthouse. AB241[8] and AB242[9], both of which passed in late 2019, require all healthcare providers, lawyers, judges, and judicial staff to undertake a continuous course of implicit bias training. AB 3070[10], scheduled to take effect in 2021, adopts new steps to guarantee non-biased juror strikes and to shore up the compromised *Batson* process.[11] Under this provision, lawyers and judges can disrupt dubious juror strikes without first showing *Batson*-required intentional discrimination; now, there need only be a showing that a reasonable person would perceive stereotype-based thinking as part of the reasoning for the strike. This departure from the intentional discrimination standard in lieu of a disparate impact standard is significantly more likely to curb juror bias

Then, there is Proposition 16[12], the November 2020 ballot initiative to enact a constitutional amendment that will restore affirmative action in government hiring and contracting and allow diversity consideration in public university admissions. Twenty-four years ago, pursuant to Proposition 209[13], California banned affirmative action. California is one of only eight states to prohibit the government from considering diversity in any of its programming.[14] This equity ban is also out of step with Supreme Court precedent that permits diversity consideration in government programs.[15] This policy marks the rare instance when California is behind the rest of the nation. Accordingly, it should come as no surprise that Assembly Constitutional Amendment No. 5[16] recently passed through both State Houses with more than the required supermajority of votes before making it onto this year's ballot. If the measure passes, it will not *require* race-conscious programming and it will not deploy quotas, as quotas were banned by the Supreme Court in 1978[17]; it will, however, *permit* the state to take affirmative steps to remedy discriminatory policies that have a validated disparate impact on protected classes. Like the aforementioned implicit bias-informed laws, Proposition 16 marks a shift from an intentional discrimination construct that undermines workplace diversity and equity to a disparate impact construct that facilitates diversity and equity.

On the judicial front, DEI is on the move in the state court apparatus. Whereas just a few years ago, courts were ignorant or skeptical of the validity and feasibility of counter-bias trainings, now we see a growing consensus among jurists

that all people have implicit racial bias and concrete steps being taken to minimize its harm on the systems of civil and criminal justice. Indeed, the California Supreme Court recently commissioned a task force to consider standardized instructions to counter juror bias.[18] Whereas previously equal protection jurisprudence coalesced exclusively around post-racial, color-blind ideology that demanded proof of overt, intentional discrimination, in recent years, courts in this jurisdiction have begun to permit evidence of implicit bias as part of the quantum of proof for establishing juror bias in the *Batson* context, to prove hostile work environment claims in employment discrimination litigation, and to show disparate impact and treatment in class actions.[19]

In this transformative moment, the people have the political will to capitalize on this emerging structural foundation in the public domain and to uplift it in the private sector.

COVID 19: A RARE OPPORTUNITY FOR A SUSTAINABLE DEI FRAMEWORK

The devastating coronavirus creates unique opportunities for building virtual workspaces around DEI values and principles. Nearly all industries have been forced to rapidly evolve their norms and technologies. Across the board, companies have had to re-imagine the physical plan for work and the metrics for productivity. Businesses have adapted to the virtual workplace that offers robust possibilities for engagement, recruitment, hiring, and diversifying personnel. Professionals, through necessity, have adopted flexible attitudes and expanded their work-life values. This flexible new normal creates expansive pathways and entry points for DEI innovations.

In this fertile landscape, DEI training, counseling, and collaboration for maximum impact should be customized and industry-specific, grounded in core justice principles, and measured for fidelity.

Effective DEI should be informed by the specific industry and its historical context. That means a cosmetic company and a construction company may receive different training and consultation services, because each of those industries have a unique history of racial inequity and gender bias that poses unique challenges and requires unique DEI solutions. Although a customized solution requires more resources and labor, it is vastly superior to a one-size fits all DEI approach.

DEI is an emerging discipline and DEI consulting is, arguably, in its "cottage industry" phase. As such, practitioners have to be intentional about measuring the efficacy of their strategies by tracking outcomes, collecting client feedback and anecdotal evidence of diversity's benefits, and adopting fidelity measures (i.e. best practices, standardized teaching modules, and assessment tools) that create consistency across the discipline. Without supporting data and analytics measuring DEI's tangible and qualitative benefits, this relative newcomer to the behavioral sciences will be vulnerable to the attack that it is untenable and ineffective.

Consultation and training benchmarked to established social science and justice principles will bring uniformity and credibility to the DEI industry that will help to sustain this equity-building moment. Specifically, DEI should be centered around core, cognitive principles ("first principles") ordered as follows:

1. Bias is often an unconscious process that runs counter to our conscious values. Implicit bias or unconscious bias is a theory to explain why discrimination persists, even though people oppose it. Although implicit bias cannot be eliminated, it can be unlearned and managed.

2. Implicit and explicit bias is informed by historical forces that manifest as current stereotypes, and lived experience that fluctuates from person to person according to their privileged and underprivileged identities and their systemic advantages and disadvantages.

3. It should be acknowledged that in the U.S., we all have racial bias, and varying degrees of privilege/disadvantage that informs our workplace decision-making.

4. Our biases affect decision-making at many levels and create racially disparate outcomes at many levels. It is helpful to think of these layers as different dimensions that are dynamic to the extent that they sometimes overlap. The four dynamic dimensions of bias are structural, institutional, interpersonal, and personal.

5. Post-civil rights racial ideology is centered around racial tolerance with a goal toward assimilation into the dominant Eurocentric culture. This ideology organically constructs workplace cultures around tolerance of the diverse workforce as opposed to engineering work cultures that embrace difference and strive to sustain diversity. DEI classifies the former as work cultures of civility or "nice," and the latter as inclusive work cultures. Whereas work cultures of "nice" grounded in tolerance are insufficient to stave off workplace bias, workplace micro-aggressions, and hostile work environment claims, work cultures grounded in empathy and inclusivity can disrupt bias, eliminate hostile work environments, and sustain diversity.

6. Equality and equity are different paradigms for understanding and engaging the social order. An equality

approach can only work if everyone starts from the same place. An equity approach acknowledges that there are systemic and institutional differences in how people have been treated historically and currently, and builds structures to level the playing field in order to help us reach the end goal of equality. The distinction between equity and equality reveals that equity is the precedent for equality. Equity is the essential building block for equal opportunity, equal access, and sustainable workplace equality and should inform workplace operations that seek to enhance diversity and fairness.

7. Equity, empathy, inclusion, transparency, and restorative justice are interconnecting philosophies and ordering principles for building a diverse workplace.

As a practical matter, training and consultation should provide concrete tools for unlearning and managing personal bias and offer institutional protocols for curtailing discretion and enhancing uniform operations.[20] Accordingly, the DEI toolkit "must-haves" include the following:

1. an IAT (Implicit Association Test)[21];
2. in-person, sequential (as opposed to one-off) training and leadership coaching;
3. take-home exercises for enhancing mindfulness and habit reshaping around issues of bias;
4. a cultural competence resource kit; and
5. equity-informed management tools that create supports for expanding recruitment and hiring networks, improving retention rates for BIPOC personnel, conducting balanced, uniform performance appraisals, incentivizing inclusion, tracking data to measure ongoing disparities, and tracking the tangible and qualitative benefits of diversity solutions.[22]

Additionally, leadership-focused coaching is an essential catalyst for institutional reform. Consultants can enhance DEI outcomes by targeting management level professionals and industry leaders and coaching a skill-set that empowers entrepreneurs, supervisors and managers to become equity innovators in their institutions and industries.

Finally, strong leadership and "buy-in" are the keys to sustainable DEI solutions. Employees are encouraged to view themselves as valued stakeholders in their workplace evolution and should be incentivized to not only participate in the DEI process, but to take ownership of it. Consultants should always be mindful of the buy-in dynamic and implement DEI programs at a pace that is sensitive to that dynamic. In order to effectively facilitate this dynamic, some consultants style themselves as "Collaborators," rather than Experts[23], to make the process seem friendlier and more inviting. Ultimately, DEI consultants must illuminate the path by curating a client experience that is engaging, relatable, and enlightening, while building and leveraging relationships with the professionals they coach to gain buy-in. Inspiring people to acknowledge and relinquish unfair systemic advantages for the benefit of equal opportunity for all requires focused leadership.

Despite the pandemic and protest-inspired cultural shift and the increasing demand for equity, categorical and consistent buy-in is neither swift nor guaranteed. Implicit bias and white supremacist norms are deeply embedded in American culture. For many, DEI constitutes, at best, just another daunting occupational learning curve or, at worst, an existential threat. As one writer reporting on equity policy puts it: "Deeply held convictions about race and opportunity may not be easily swayed."[24] Accordingly, it will take time and resources to obtain robust consensus around advancing core equity principles in the workplace.

The murder of Mr. Floyd may prove to be the cataclysmic event that triggered real change. But no silver bullet exists to reverse the effects of centuries of pernicious racial/gender bias in the workplace. These entrenched attitudes and systemic challenges call for layered solutions. In the case of bias and discrimination, solutions on the streets and in the boardrooms must include structural change, institutional reform, education, training, and personal commitments to transformative change—all aided by state-of-the-art technology. The question is whether this moment too shall pass, or whether DEI leaders and stakeholders will build DEI systems that harness momentum and ensure through innovation and commitment that Mr. Floyd's sacrifice engenders abiding equality in the workplace.

ENDNOTES

1. *See* Daniel Culbertson, *Diversity and Inclusion Jobs Grow Briskly* (Mar. 26, 2018), https://www.hiringlab.org/2018/03/26/diversity-and-inclusion-grows-briskly/.
2. For polling results, see https://apnews.com/728b414b8742129329081f7092179d1f?utm_source=piano&utm_medium=email&utm_campaign=morningwire&pnespid=m7F3_elDDQmNWUqv26Gg727ay-3ATfOcZl34KMnix.
3. In Washington v. Davis, 426 U.S. 229 (1976), the Supreme Court ruled that laws or government policies that disproportionately harm Black people do not violate the Constitution's equal protection guarantee, and decided that courts can only find that a law or governmental action

violates the equal protection clause when a plaintiff can show that a state actor intended to discriminate, and that this intention, in turn, caused a discriminatory result. McCleskey v. Kemp, 481 U.S. 279 (1987), reaffirmed *Davis* and concluded that even overwhelming evidence of systemic disparate impact was insufficient to show a constitutional violation without solid evidence of intentional racial animus.

4. A term coined by Pulitzer, Medal of Freedom, and Nobel Prize-winning author Toni Morrison during a 1990 PBS conversation with journalist Bill Moyers. Morrison explained, "The master narrative is whatever ideological script that is being imposed by the people in authority on everybody else. The master fiction. History . . . it has a certain point of view." See https://billmoyers.com/content/toni-morrison-part-1/.
5. *See*, *e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); C&C Construction, Inc. v. Sacramento Mun. Utility Dist., 122 Cal. App. 4th 284 (2004); Hi-Voltage v. City of San Jose, 24 Cal. 4th 537 (2000).
6. Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 28. (2010).
7. Kimberly Papillon, *The Hard Science of Civil Rights: How Neuroscience Changes the Conversation* [Implicit Bias Primer White Paper 5 (2020),https://equaljusticesociety.org/law/implicitbias/primer/.
8. *See* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB241.
9. *See* https://legiscan.com/CA/text/AB242/id/2055624.
10. *See* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB3070
11. Batson v. Kentucky, 476 U.S. 79 (1986).
12. *See* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200ACA5
13. *See* https://ballotpedia.org/Article_I,_California_Constitution#Section_31
14. The other seven states include Washington (1998), Florida (1999), Michigan (2006), Nebraska (2008), Arizona (2010), New Hampshire (2012), and Oklahoma (2012). Drew DeSilver, *Supreme Court Says States Can Ban Affirmative Action; 8 Already Have*, Pew Research Ctr. (Apr. 22, 2014), http://www.pewresearch.org/fact-tank/2014/04/22/supremecourt-says-states-can-ban-affirmative-action-8-already-have/.
15. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
16. *See* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200ACA5.
17. *See Bakke*, 438 U.S. at 301, 304.
18. *See* https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20200/SupCt20200129.pdf.
19. *See*, *e.g.*, Samaha v. Washington State Dept. of Transp., No. CV-10-175, 2012 U.S. Dist. LEXIS 190352 (E.D. Wash. Jan. 3, 2012); State v. Meredith, 306 P. 3d 942 (Wash. 2013), *cert. denied*, 2014 U.S. LEXIS 1390 (U.S. Feb. 24, 2014); Burrell v. County of Santa Clara, No. 11-CV-04569, 2013 U.S. Dist. LEXIS 70555 (N.D. Cal. May 17, 2013).
20. The consensus among behavioral psychologist including IAT creator, Anthony Greenwald, is that discretionary functions that allow for subjectivity increase biased decision-making. *See* https://www.knowablemagazine.org/article/mind/2020/how-to-curb-implicit-bias.
21. *See* https://implicit.harvard.edu/implicit/takeatest.html. The IAT test is a peer-reviewed diagnostic test administered through Harvard University. The test measures the test-taker's implicit racial and gender biases, among other biases.
22. *See* https://news.ncsu.edu/2018/01/diversity-boosts-innovation-2018/; https://onlinelibrary.wiley.com/doi/full/10.1111/fima.12205.
23. *See* https://www.linkedin.com/pulse/consulting-model-obsolete-age-innovation-nish-bhutani/.
24. *See* https://www.nytimes.com/2020/08/21/upshot/00up-affirmative-action-california-study.html.