



**Diversity and Inclusion,  
The Flaws of Implicit Bias –  
And the Need for Empirical  
Evidence in Legal  
Education**



# Diversity and Inclusion (cont.)



## 10 harmful principles advocated by current diversity and inclusion Advocates

1. **Narrow, race-based definition of diversity.** Diversity is defined based on race only – and often for the benefit of one race only.
2. **Prioritizing group identity and generalizations over individuality and nuance.**
3. **Perpetuating racism in theory and fact** (Ibram X. Kendi, *How to Be an Anti-Racist*; Robyn DiAngelo, *White Fragility: Why It's So Hard for White People to Talk About Racism* (\$25,000 and \$14,000 fee, respectively)
  - “Whiteness” is a problem (“people must learn to be less white”)
  - All whites are privileged
  - All whites are racist or benefit from a racist society
  - White fragility (whites are defensive when discussing race and incapable of acknowledging their racism)
  - To be anti-racist, one must also be anti-capitalism

# Diversity and Inclusion (cont.)



4. **Relying on undefined terms or buzzwords to oversimplify interpersonal dynamics and ignore societal progress**
  - “Institutional” or “structural racism”
  - “White privilege”
5. **Safe spaces -- intolerance for diverse perspectives in higher education**
6. **Beliefs that lack a logical and evidentiary foundation**
  - Hard work, self-reliance, and politeness are all products of a “white dominant culture”
  - Rational thinking is racist
  - Math is racist
  - Law enforcement is racist

# Diversity and Inclusion (cont.)

7. **Distortion of history and facts to further a political agenda**
  - *Claim:* Police officers target and are murdering scores black people
  - *Truth:* 95% of suspects who are murdered are armed and resisting arrest
  - *Truth:* 12 unarmed black suspects were killed by police in 2018, out of millions of encounters between black people and law enforcement.
  - *Truth:* Black police officers shoot black suspects at a rate equal to white police officers
  
8. **Division and disunity**
  - Safe spaces reserved for certain races
  - Dormitories on college campuses segregated by race
  - Overuse of the word “racist” or ‘racism’
  - Microaggressions (give examples)
  
9. **The disparate outcome fallacy**
  - Unequal outcomes are reducible to racism
  - Self-selection is irrelevant to race and sex-specific outcomes
  
10. **Inflammatory rhetoric that divides**
  - White fragility – “when white people say they are not racist, they are ignorant of their racism. In other words, to deny an accusation is to be guilty of that accusation”

# Diversity and Inclusion (cont.)

- 'Diversity and inclusion' advocates perpetuate discrimination and racism
  - **Discriminatory hiring in educational institutions based on race and ideology**
    - *See, e.g., Eric Kaufmann, We Have the Data to Prove It: Universities Are Discriminating Against Conservatives (March 3, 2021), available at: We Have the Data to Prove It: Universities Are Discriminating Against Conservatives | Opinion (newsweek.com); James C. Phillips, Why are there so few conservatives and libertarians in legal academia? An exploration of three hypotheses, 39 Harv. J. of Law and Public Policy 153, available at: Microsoft Word - Phillips\_F (harvard-jlpp.com)*
  - **Over racial discrimination in admissions**
    - Harvard University discriminates against Asian applicants (**Jeannie Suk Gersen, *The Uncomfortable Truth About Affirmative Action and Asian Americans* (August 10, 2017), available at: The Uncomfortable Truth About Affirmative Action and Asian-Americans | The New Yorker**)

White dominant culture, or **whiteness**, refers to the ways white people and their traditions, attitudes and ways of life have been normalized over time and are now considered standard practices in the United States. And since white people still hold most of the institutional power in America, we have all internalized some aspects of white culture — including people of color.



### **Rugged Individualism**

- The individual is the primary unit
- Self-reliance
- Independence & autonomy highly valued + rewarded
- Individuals assumed to be in control of their environment, *"You get what you deserve"*

### **Family Structure**

- The nuclear family: father, mother, 2.3 children is the ideal social unit
- Husband is breadwinner and head of household
- Wife is homemaker and subordinate to the husband
- Children should have own rooms, be independent



### **Emphasis on Scientific Method**

- Objective, rational linear thinking
- Cause and effect relationships
- Quantitative emphasis

### **History**

- Based on Northern European immigrants' experience in the United States
- Heavy focus on the British Empire
- The primacy of Western (Greek, Roman) and Judeo-Christian tradition



### **Protestant Work Ethic**

- Hard work is the key to success
- Work before play
- *"If you didn't meet your goals, you didn't work hard enough"*

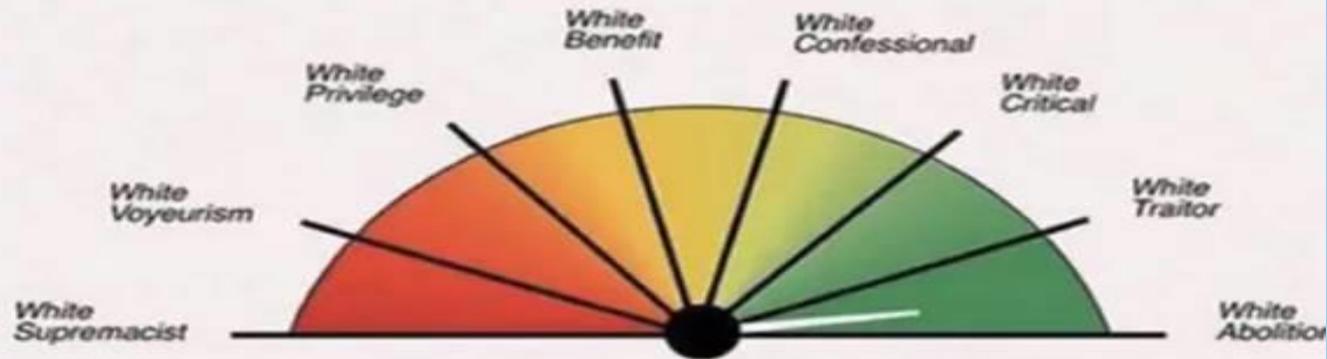
# Diversity and Inclusion (cont.)

## The 8 White Identities

By Barnor Hesse

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*"There is a regime of whiteness, and there are action-oriented white identities. People who identify with whiteness are one of these. It's about time we build an ethnography of whiteness, since white people have been the ones writing about and governing Others."*

**Slow Factory**  
Foundation

# Diversity and Inclusion (cont.)

Don't shy away from language like "whiteness," "racism," "white supremacy" and "allyship." There was a time when education, talks, and references to these topics might have been seen as inflammatory, or generating negative responses, especially from White people. Our times now are requiring us to sit in the discomfort that these notions could cause, and to be willing to address our own growth and responsibility.

It is imperative at this time that people who are White invest in race-based growth development on topics such as systemic racism, civil rights history, unconscious bias, and contemporary ideology such as anti-racism, intersectionality, White privilege, and White fragility. Learn the history. For example, when did the state that you live in...

- Don't task for emotional energy from the group you're allying with. Your feelings do matter, but this is not the space to get your feeling validated. The group is not obligated to like you, thank you, feel sorry for you, or forgive you.

One of the most important anti-racist actions you can take, regardless of your identity, is to talk to your children about race. Bias begins to take shape in our brains around 3 years old. Having parents or care-givers begin to positively language identity groups other than their own is a critical step in their own actions.

## Diversity and Inclusion (cont.)

for skills, subjects or software

Home My Learning Me EN

To be less white is to:

- be less oppressive
- be less arrogant
- be less certain
- be less defensive
- be less ignorant
- be more humble
  - listen
  - believe
- break with apathy
- break with white solidarity

Overview Q&A Notebook Transcript

## Diversity and Inclusion (cont.)

Hi students. Today, our WPS Office of Diversity, Equity and Inclusion will host a Healing Space for Asian and Asian American students (grades 6-12), faculty/staff, and others in the BIPOC (Black, Indigenous, People of Color) community who wish to process recent events.

It will be held on zoom TODAY from 3:30-4:30.

ID: 84252554966

Passcode:

\*Note: This is a safe space for our Asian/Asian-American and Students of Color, \*not\* for students who identify only as White. If you identify as White, and need help to process recent events, please know I'm here for you as well as your guidance counselors. If you need to know more about why this is not for White students, please ask me!

\* Kids in Periods 2&3, we will be discussing and reflecting on Tuesday night's hate crime against members of the Asian community in Atlanta tomorrow in class.

Attachments

 Launch Meeting - Zoom

# Diversity and Inclusion (cont.)

# Diversity and Inclusion (cont.)

## Anti-racism training

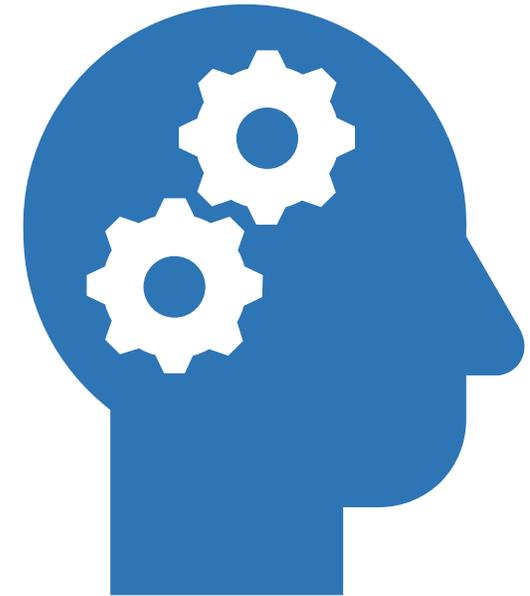
- *Google*: anti-racism training tells Google staffers that Americans are “raised to be racist, and to be raised to be racist is to be raised to almost be addicted to racist ideas; For me, the heartbeat of racism is denial, and the sound of that denial is ‘I’m not racist’” (Caroline Downey, *Google Launches Antiracism Program Teaching That America is a ‘System of White Supremacy,’* (Sep. 8, 2021), available at: [Google Launches Antiracism Program Teaching That America Is a ‘System of White Supremacy’ \(yahoo.com\)](#))
- *American Express*: In diversity training, told workers that capitalism is ‘racist,’ and were asked to rank themselves on a hierarchy of privilege (Brittany Bernstein, *American Express Employees Were Told Capitalism is Racist in Diversity Training* (Aug. 11, 2021), available at: [American Express Employees Were Told Capitalism is Racist in Diversity Training: Report \(msn.com\)](#))

## Does diversity and inclusion training work?

- “Diversity training doesn’t extinguish prejudice. It promotes it.” (Peter Bregman, *Diversity Training Doesn’t Work*, *Harv. Business Rev.* (March 12, 2012), available at [Diversity Training Doesn’t Work \(hbr.org\)](#))

# Implicit Bias

- Implicit bias – the new “it” factor for diversity and inclusion
  - The claims
    - The Implicit Association Test (“IAT”) reveals that individuals harbor implicit biases and prejudices
    - Implicit biases cause biased behavior and discrimination (by whites) based on, for example, race, ethnicity, gender, and sexual orientation.
    - Implicit biases result in whites discriminating against black people.



# Implicit Bias (cont.)

- The facts

- **The Implicit Association Test**

- **(IAT) is hopelessly flawed, its effects cannot be quantified, and it cannot be distinguished from explicit bias**

- The test's creators admit that the test is flawed and of limited utility
- People score differently when taking the test multiple times
- “The IAT is impacted by explicit attitudes, not just implicit attitudes,” . . . “It is impacted by people’s ability to process information quickly on a general level. It is impacted by desires to want to create a good impression. It is impacted by the mood people are in. If the measure is an amalgamation of many things (one of which is purportedly implicit bias), how can we know which of those things is responsible for (weak) correlation with behavior?” (German Lopez, For Years, This Popular Test Measured Anyone’s Racial Bias. But It Might Not Work After All., VOX (Mar. 7, 2017, 7:30 AM), <https://www.vox.com/identities/2017/3/7/14637626/implicit-association-test-racism> (quoting New York University Professor James Jaccard))



# Implicit Bias (cont.)

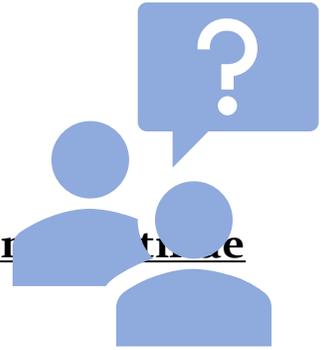
- Implicit bias is not predictive of biased behavior
  - Researchers from the University of Virginia examined 499 studies over 20 years involving 80,859 participants that used the IAT and other, similar measures. They discovered two things: One is that the correlation between implicit bias and discriminatory behavior appears weaker than previously thought. They also conclude that there is very little evidence that changes in implicit bias have anything to do with changes in a person's behavior. These findings, they write, “produce a challenge for this area of research” (Tom Bartlett, *Can We Really Measure Implicit Bias? Maybe Not*, CHRON. OF HIGHER EDUC. (Jan. 5, 2017), <https://www.chronicle.com/article/Can-We-Really-Measure-Implicit/238807>)
  - Likewise, “63 studies that explicitly considered a link between changes in bias and changes in actions . . . [but] they found no evidence of a causal relationship” Brandie Jefferson, *Change the Bias, Change the Behavior? Maybe Not*, WASH. UNIV. IN ST. LOUIS NEWSROOM (Aug. 1, 2019), <https://source.wustl.edu/2019/08/change-the-bias-change-the-behavior-maybe-not/>)

# Implicit Bias (cont.)

- **Conclusion: Implicit bias is hopelessly flawed**

- “Almost everything about implicit bias is controversial in scientific circles. It is not clear, for instance, what most implicit bias methods actually measure; their ability to predict discrimination is modest at best; their reliability is low; early claims about their power and immutability have proven unjustified” (Lee Jussim, *Mandatory Implicit Bias Training Is a Bad Idea*, PSYCH. TODAY (Dec. 2, 2017), <https://www.psychologytoday.com/us/blog/rabble-rouser/201712/mandatory-implicit-bias-training-is-bad-idea>)

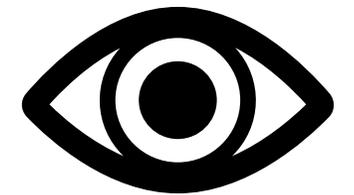
# Disregarding the Evidence



- **Scholars (particularly in legal education), corporations, the government disregard this evidence and continue to advocate for misguided policies**
  - **American Bar Association nonetheless supports flawed bias training**
    - Proposed requiring anti-racism and bias training for law schools
    - Significant pushback from law professors disregarded
  - **Corporations include implicit bias training for employees**
  - **Police training instructs recruits on implicit bias**
- **The bottom line: implicit bias and diversity training doesn't work**
  - “[T]o date, none of these interventions has been shown to result in permanent, long-term reductions of implicit bias scores or, more importantly, sustained and meaningful changes in behavior (i.e., narrowing of racial/ethnic clinical treatment disparities). Even worse, there is consistent evidence that bias training done the “wrong way” (think lukewarm diversity training) can actually have the opposite impact, inducing anger and frustration among white employees. What this all means is that, despite the widespread calls for implicit bias training, it will likely be ineffective at best; at worst, it’s a poor use of limited resources that could cause more damage and exacerbate the very issues it is trying to solve” (Tiffany L. Green, *The Problem With Implicit Bias Training* (Aug. 8, 2020), available at: [The Problem with Implicit Bias Training - Scientific American](#))
  - “A number of recent studies of antibias training used the implicit association test (IAT) before and after to assess whether unconscious bias can be affected by training. A meta-analysis of 426 studies found weak immediate effects on unconscious bias and weaker effects on explicit bias.”
- **Why is implicit bias training not effective, and why do corporations and the government insist on implicit bias training the evidence of its flaws?**

# What's Really Going On

- Disregard for ideological diversity and discrimination against conservatives
  - Disregard for ideological diversity
    - It was not until 2015 that a robust analysis of law school ideological diversity was published (hereinafter “2015 study”). Before this, it was already well known that law school professors were disproportionately liberal—both when compared to the public at large and when compared to the overall legal profession. A study using 2013 data found that only 11% of law school professors were Republicans, compared to 82% who were Democrats. Not only do conservatives find it difficult to gain admittance into legal academia, but those who do find that they are effectively barred from the more prestigious topics, such as constitutional law and federal courts, and are instead relegated to topics such as law and economics (Michael Conklin, *Political Ideology and Law School Rankings: Measuring the Conservative Penalty and Liberal Bonus*, 2020 U. ILL. L. REV. ONLINE 178, 179 (2020) (emphasis added)).



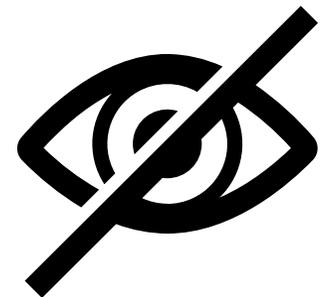
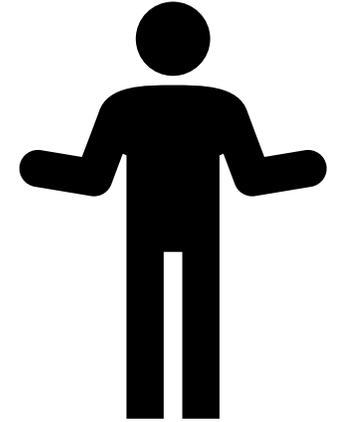
# What's Really Going On (cont.)

- **Discrimination against conservatives**

- Study in 2015 showed that conservative law professors are, on average, substantially more qualified than their liberal peers. **They are 68.2% more likely to be former Supreme Court clerks, 24.1% more likely to have graduated from higher-ranked schools, and 5.4% more likely to have served on law review than their liberal counterparts.** Conservative law professors also publish significantly more. Over the course of ten years, a conservative professor publishes, on average, four to eight more articles than liberal professors. Additionally, the scholarship from conservative law faculty is significantly more likely to be cited to, which is a leading measure of scholarly significance. These findings make a strong case that the best explanation for the ideological inequalities in law schools are the result of discrimination and not an alternative, benign explanations [sic] such as diminished qualifications, abilities, or desire to join academia on the part of conservatives (Michael Conklin, *Political Ideology and Law School Rankings: Measuring the Conservative Penalty and Liberal Bonus*, 2020 U. ILL. L. REV. ONLINE 178, 179 (2020) (emphasis added).

- **Disregard for empirical evidence in legal scholarship**

- Law reviews and other legal scholarship are ideologically driven and not evidence-based.



# Where Do We Go From Here?

## *10 Principles for True Diversity and Inclusion*

### 1. Individuality over identity

- View people as individuals with individual experiences and not as members of a group, as the latter promotes stereotyping and prejudice.

### 2. Nuance, not simplicity and generalities. Generalizations about people based on their race is racism *per se*

- “All white people are privileged”
- “The United States is systemically racist”
- “All minority groups are oppressed”

### 3. Recognize and respect all types of diversity



# Where Do We Go From Here?

## *10 Principles for True Diversity and inclusion*

### 4. Stop race-based shaming

- Most white people are not privileged
- Most white people are not racist
- Many white people are poor
- Many white people are marginalized and discriminated against due to, among other things, sexual orientation, transgendered status, and religion

### 5. Recognize that disparity is not equivalent to discrimination, and that not everything is reducible to race.

- Differences in educational opportunities
- Disparate outcomes do not always suggest discriminatory practices.
- Single-parent families
- Choice



# Where Do We Go From Here?

## *10 Principles for True Diversity and Inclusion*

### 6. Stop overusing the words 'racist' and 'racism'

- New York City mayor Bill DeBlasio vaccine mandate was branded 'racist' by Black Lives Matter
- Math has been deemed 'racist'

### 7. Increase ideological diversity in the social sciences and law

- "Schools champion diversity yet their faculties are overwhelmingly liberal
- Evidence suggests law schools discriminate against conservatives in hiring

### 8. Intellectual honesty and evidence-based arguments



# Where Do We Go From Here?

## *10 Principles for True Diversity and Inclusion*

9. Increase the number of peer-reviewed law journals and emphasize empirical research in legal scholarship

10. Strive for compromise and recognize common values

- Liberty
  - Equality
  - Self-determination
  - Fairness
  - Dignity of all persons
  - Decency
  - Compassion
  - Honesty



# Resources

- Adam Bonica et al., *The Legal Academy's Ideological Uniformity*, 47 J. LEGAL STUD. 1, 3 (2018).
- Patrick S. Forscher et al., *A Meta-Analysis of Procedures to Change Implicit Measures*, 117 J. PERSONALITY & SOC. PSYCH. 522 (2019);
- Jonathan Kahn, *Race on the Brain: What Implicit Bias Gets Wrong About the Struggle for Racial Justice* (Columbia University Press, 2017)
- Scott O. Lilienfeld, *Microaggressions: Strong Claims, Inadequate Evidence*, 12 PERSPS. PSYCH. SCI. 138 (2017)
- John McWhorter, *Losing the Race: Self-Sabotage in Black America* (Harper Perennial, 2001)
- Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006)
- Jason L. Riley, *Please Stop Helping Us: How Liberals Make It Harder for Blacks to Succeed* (Encounter Books, 2016)
- Thomas Sowell, *Discrimination and Disparities* (Basic Books, 2018)
- Thomas Sowell, *Intellectuals and Race* (Basic Books, 2013)

# Questions