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## Ethnic Studies as Antisubordination Education: A Critical Race Theory Approach to Employment Discrimination Remedies

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**ETHNIC STUDIES AS ANTISUBORDINATION  
EDUCATION: A CRITICAL RACE THEORY  
APPROACH TO EMPLOYMENT DISCRIMINATION  
REMEDIES**

**THEANNE LIU\***

ABSTRACT

*This Note will use a critical race theory lens to argue that most trainings on equal employment opportunity (“EEO”), diversity, or implicit bias operate as a restrictive remedy to Title VII race discrimination violations, and that incorporating an ethnic studies framework into these trainings can further an expansive view of antidiscrimination law. A restrictive view of antidiscrimination law treats discrimination as an individual instead of structural or societal wrong and looks to addressing future acts of discrimination instead of redressing past and present injustices. An expansive view of antidiscrimination law sees its objective as eradicating conditions of racial subordination. Ethnic studies originated fifty years ago from the Third World Liberation Front strikes of 1968 led by coalitions of students of color protesting the lack of diversity in higher education. The discipline continues to challenge dominant Eurocentric academic paradigms, centers experiences and histories of marginalized groups in the United States, and fosters critical consciousness for social action. The incorporation of ethnic studies scholarship into the mandated workplace antidiscrimination remedies of diversity or EEO trainings presents an opportunity to further an expansive view of antidiscrimination law not only through addressing discrimination in the workplace, a traditional site of racialized economic subordination, but through the discipline itself which recognizes the historical, structural origins of discrimination.*

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## INTRODUCTION

Central tenets of critical race theory and concepts propelled by key scholars including Kimberlé Crenshaw and Derrick Bell will be utilized to explore the purpose of employment discrimination law and its remedies. Critical race theory's antistatutory<sup>1</sup> objectives are furthered by incorporating an ethnic studies framework into the existing race discrimination remedies of diversity and implicit bias trainings. Differing rhetorical visions for the objectives and purposes of antidiscrimination laws have been defined by Kimberlé Crenshaw as either an expansive view or restrictive view.<sup>2</sup> The expansive view "interprets the objective of antidiscrimination law as the eradication of the substantive conditions of Black subordination and attempts to enlist the institutional power of the courts to further the national goal of eradicating the effects of racial oppression."<sup>3</sup> The restrictive view seeks "to prevent future wrongdoing rather than to redress present manifestations of past injustice" and treats wrongdoing as individual acts instead of a structural or societal wrong.<sup>4</sup> Title VII of the Civil Rights Act of 1964, which made unlawful the practice of employment discrimination on the basis of an "individual's race, color, religion, sex or national origin," represents a site of continuing tensions between the expansive and restrictive vision of antidiscrimination laws and their remedies.<sup>5</sup>

This note will argue that most trainings on equal employment opportunity ("EEO"), diversity, or implicit bias operate as a restrictive remedy subject to critical race theory critique. Liberal conceptions of diversity and equality under the law reject race-conscious approaches to redressing inequality (e.g., equal treatment under the law) as neoliberal approaches to workplace diversity that tout the economic benefits of having employees from diverse backgrounds (minorities in race, gender, sexuality, etc.) but also minimize such initiatives by maintaining that "diversity" also refers to differences in life experiences or perspectives, impliedly removed from ties to marginalized identities.<sup>6</sup> Further, Derrick

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1. Subordination in this context refers primarily to the racial subordination of non-white groups in the United States by whites, as effected through the individual, community, and institutional levels.

2. Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1341 (1988).

3. *Id.*

4. *Id.* at 1342.

5. See 42 U.S.C.A. § 2000e-2(a) (West 2018). Unlawful employment discrimination practices include failing or refusing to hire on the basis of a protected class, and limiting, segregating, and classifying employees or applicants which deprive employment opportunity or adversely affect employment status.

6. For example, the web page on "inclusion" for Starbucks' website states "[o]ur partners are diverse not only in gender, race, ethnicity, sexual orientation, disability, religion and age, but also in

Bell's interest convergence theory explains the inherent ineffectiveness of workplace diversity trainings as they primarily serve employers' dual interests of legal compliance with Title VII and gaining capital from facial commitments to values of equality and diversity in the workplace.<sup>7</sup>

The popularity of diversity and EEO trainings<sup>8</sup> compels an exploration of an alternative framework to workplace education and trainings, which embody antisubordination principles. This is not to suggest that education is the primary means to countering workplace biases, discrimination, and inequality, but rather that education and trainings are longstanding components of preventing and redressing workplace discrimination and so preexisting approaches can be altered. One argument for changing existing models of diversity and implicit bias trainings points to findings of ineffectiveness in producing greater diversity and even detrimental results.<sup>9</sup> While effectiveness is central to considering the purpose of a remedy, another argument is that trainings about diversity and implicit biases should not ignore topics of structural and systemic discrimination. The incorporation of ethnic studies courses into existing EEO, diversity, and implicit bias training remedies furthers an expansive view of antidiscrimination law through ethnic studies' foundational "commitment to liberating and empowering the communities of color" as part of "movements for justice and equality."<sup>10</sup> The expansive view's approach to employment discrimination remedies is optimal because such discrimination is a manifestation of and further contributes to the persistence of structural and societal racism.

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cultural backgrounds, life experiences, thoughts and ideas." Inclusion at Starbucks, Starbucks, <https://www.starbucks.com/responsibility/community/diversity-and-inclusion> (last visited Jan. 25, 2018).

7. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 21 (3d ed. 2017).

8. Equal employment opportunity trainings are commonly ordered by the Equal Employment Opportunity Commission and found to be required 87% of the time; however, EEO trainings are merely peripheral remedies that "do not require any changes in how the employer carries on its usual business operation." Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519, 1574 (2014).

9. See Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV., July-Aug. 2016, at 52–60, <https://hbr.org/2016/07/why-diversity-programs-fail>.

10. Evelyn Hu-DeHart, *The History, Development, and Future of Ethnic Studies*, THE PHI DELTA KAPPAN INT'L, Sept. 1993, at 54.

## I. CRITICAL RACE THEORY AND ANTISUBORDINATION IDEOLOGY

Critical race theory is “a form of oppositional scholarship” which accounts for explicit and implicit racism in American law and seeks to eliminate racism and other forms of oppression.<sup>11</sup> Race itself is considered “a fluctuating, decentered complex of social meanings that are formed and transformed under the constant pressures of political struggle.”<sup>12</sup> While race is formed via dominant social constructions, these racial constructs justify hierarchies “allocat[ing] privilege and status” to “determine who gets tangible benefits, including the best jobs, the best schools, and invitations to parties in people’s homes.”<sup>13</sup> Leading critical race theorist Richard Delgado describes two contrasting factions of thought within critical race theory—idealists and realists.<sup>14</sup> Idealists perceive racism as “matters of thinking, mental categorization, attitude, and discourse” which can be addressed through “changing the system of images, words, attitudes, unconscious feelings, scripts, and social teachings.”<sup>15</sup> Realists recognize the significance of individual and societal biases but argue that addressing racism goes beyond undoing attitudes—“one needs to change the physical circumstances of minorities’ lives before racism will abate.”<sup>16</sup> These physical circumstances refer to entrenched racial disparities in education, employment, housing, healthcare access, policing and incarceration, and immigration, among others. While subordination also occurs within the cultural realm (such as media representation), antisubordination principles within critical race theory primarily align with the realist vision that addresses the material effects of racial subordination.

Antisubordination theory “argues that it is inappropriate for groups to be subordinated in society”<sup>17</sup> and “reflects a broad goal of social change to eliminate group-based status inequalities.”<sup>18</sup> While antisubordination ideology is found in multiple disciplines, it is central to critical race theory. Through a discussion of what embodies critical race ideology, John Calmore found that “almost all the critical race theory literature seems to embrace the ideology of antisubordination in some form” in reference to both racial subordination and intersecting axes of “class,

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11. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992).

12. *Id.*

13. DELGADO & STEFANCIC, *supra* note 7, at 17.

14. *Id.*

15. *Id.*

16. *Id.* at 20.

17. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1003 (1986).

18. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 40 (2006).

gender, or sexual orientation.”<sup>19</sup> Crenshaw’s expansive view of antidiscrimination law speaks to antisubordination ideology by stressing racial equality as the eventual outcome of eliminating conditions that uphold racial subordination.<sup>20</sup> Countering antisubordination theory is the anticlassification or antidifferentiation principle, which “holds that the government may not classify people either overtly or surreptitiously on the basis of a forbidden category” even if the classification is taken into account to benefit a group.<sup>21</sup> While the anticlassification principle is not entirely parallel to the restrictive view of antidiscrimination law, it similarly “reflects a narrower objective of eliminating individual unfairness.”<sup>22</sup> Both the anticlassification principle and restrictive view represent liberalism’s neutral conceptions of equality, which stresses “equal treatment for all persons, regardless of their different histories of current situations.”<sup>23</sup> Critical race theory operates from a race-conscious framework, and thus critiques color-evasiveness.<sup>24</sup> Color-evasiveness permits redress for “only extremely egregious racial harms” thus sustaining the subordinate positions of minorities by ignoring the embeddedness of racism within “routines, practices, and institutions.”<sup>25</sup>

## II. EQUAL EMPLOYMENT OPPORTUNITY AND SUBORDINATION

### A. Racial and Economic Subordination

The labor market has been a critical site for the historic and ongoing domination and exploitation of non-white groups in the United States, beginning with chattel slavery as a foundation for antiblackness in America, and leaving lasting racial and economic disparities today. Race has significant effects on the probability of falling into poverty.<sup>26</sup> Racial

19. Calmore, *supra* note 11, at 2189.

20. Crenshaw, *supra* note 2, at 1341; *see also* Calmore, *supra* note 11, at 2189.

21. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10-11 (2003).

22. Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 958 (2012).

23. DELGADO & STEFANCIC, *supra* note 7, at 26.

24. “Color-evasiveness” is the term utilized in place of the popular term “color blindness.” Color blindness “conflates lack of eyesight with lack of knowing. Said differently, the inherent ableism in this term equates blindness with ignorance. However, inability to see is not ignorance; in fact, blindness provides unique ways of understand the world to which sighted people have no access.” Subini Ancy Annamma et al., *Conceptualizing Color-Evasiveness: Using Dis/ability Critical Race Theory to Expand a Color-blind Racial Ideology in Education and Society*, in RACE ETHNICITY AND EDUCATION 147, 154 (2015).

25. DELGADO & STEFANCIC, *supra* note 7, at 22.

26. MARK ROBERT RANK, ONE NATION, UNDERPRIVILEGED: WHY AMERICAN POVERTY AFFECTS US ALL (2004).

discrimination is institutionalized in policies, structures, and practices that shape economic conditions of racial minorities. In 2013, Blacks and Latinxs made up 41% of those in high poverty and high-income inequality areas, despite making up only 29% of the American population.<sup>27</sup> Access to education has been proposed as a potential equalizer across racial groups and a protector against the risk of poverty, and policies must address disparities in the quality of education that low-income minorities receive.<sup>28</sup> However, even poor students who are academically successful are less likely to graduate college and are still worse-off when they do graduate than less academically successful wealthy students.<sup>29</sup> Wealthy students have access to more elite institutions and their networks, along with their own personal networks.<sup>30</sup> Further, students of color face additional barriers in the classroom such as the psychological phenomena of stereotype threat,<sup>31</sup> potential alienation and lack of support within predominantly white institutions, and the limited family connections for many first generation students or second generation Americans.<sup>32</sup>

The economic subordination of racial minorities resulting in poverty, low-income, and economic instability have direct effects on the health and well-being of people, with findings showing that lower socioeconomic class affects one's quality of health. This includes elevated risk for a variety of diseases, a shorter life expectancy, and a death rate for those twenty-five to sixty-four years old that is three times higher than their affluent counterparts.<sup>33</sup> The lack of resources associated with poverty result in these health disparities, due to the lack of health insurance and access to health care, poor diet, and more stressful conditions.<sup>34</sup> Lower socioeconomic class is also associated with increased family complexities and instability, and negative financial, health, and personal effects are present.<sup>35</sup> Poverty is also cyclical, with conditions such as inadequate

27. Mark Mather & Beth Jarosz, *The Demography of Inequality in the United States*, 69 POPULATION BULLETIN, no. 2, 2014, at 6.

28. *Id.* at 12–13; RANK, *supra* note 26, at 67–71.

29. JOSEPH STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 19 (2012).

30. *Id.* at 18–19.

31. See *Stereotype Threat Widens Achievement Gap*, AM. PSYCHOL. ASS'N (July 15, 2006), <http://www.apa.org/research/action/stereotype.aspx>.

32. Although most research literature on educational attainment focuses on non-white groups, largely excluding Asians, the lack of data disaggregation by Asian ethnic group has largely obscured challenges facing certain populations and has contributed to the model minority myth of Asian American educational and economic attainment. See Sono Shah & Karthick Ramakrishnan, *Why Disaggregate? Big Differences in AAPI Education*, DATA BITS: A BLOG FOR AAPI DATA (Apr. 18, 2017), <http://aapidata.com/blog/countmein-aapi-education/>.

33. RANK, *supra* note 26, at 39.

34. *Id.* at 40.

35. Alicia G. Vanorman & Paola Scommegna, *Understanding the Dynamics of Family Change in the United States*, 71 POPULATION BULLETIN, no. 1, 2016 at 1, 16–17. Family structure complexity

transportation, predatory financial institutions, and food deserts preventing individuals from building assets simply due to the higher daily cost of living and working.<sup>36</sup> Further, poverty has been increasingly criminalized through practices such as debtors' prisons, cash bail systems, and anti-homeless ordinances, all of which further contribute to the prison-industrial complex that systemically disenfranchises Blacks and Latinxs.<sup>37</sup> Conditions of racial economic subordination maintain themselves by systemically denying people access and opportunity to financial security, and groups are further subordinated through practices (in the legal and political realm) targeting them specifically due to their economic vulnerability.

Employment discrimination is one factor out of many producing conditions of social and economic subjugation and subordination of non-whites in the United States. The Thirteenth and Fourteenth Amendments insured no substantive rights to equal economic opportunity. From the passage of the Thirteenth Amendment to the Civil Rights Act of 1964, Blacks were "relegated to an economic underclass that limited them to employment in agricultural or domestic service jobs," ninety percent were employed in low-income jobs in the early twentieth century, unemployment was significantly higher, and discrimination in hiring, firing, and pay was the dominant practice.<sup>38</sup> Although "hiring discrimination may have substantially dropped in the 1960s or early 1970s" following the passage of Title VII, studies have found that levels of hiring discrimination against Blacks has remained the same from 1989 to 2015 at a persistent and "distressingly uniform rate."<sup>39</sup> These hiring discrimination studies utilized fictional, identical resumes with differing racial names which produced different rates of callbacks, pointing to the direct role of blatant (or implicit) discrimination in hiring, independent of other factors which point to systemic discrimination (such as hiring qualifications that create disparate impact).

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and instability refers to the changing dynamics of family structures away from traditional heterosexual, nuclear families since the 1960s, which should not in and of itself be considered a problem. However, research has shown that family complexity is "concentrated among the disadvantaged" in families with lower incomes; fewer resources, through both time and money, affect children's outcomes in educational achievement, emotional well-being, and behavior.

36. RANK, *supra* note 26, at 41.

37. See Peter Edelman, *In 2017, It's Still a Crime to be Poor*, THE NATION (Nov. 3, 2017), <https://www.thenation.com/article/the-price-of-justice/>; Editorial, *Ending Cash-Register Justice*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/opinion/ending-cash-register-justice.html>.

38. RAYMOND F. GREGORY, THE CIVIL RIGHTS ACT AND THE BATTLE TO END WORKPLACE DISCRIMINATION: A FIFTY-YEAR HISTORY 3 (2014).

39. Lincoln Quillian et al., *Meta-analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring Over Time*, 114 PROC. NAT'L ACAD. SCI. 10870, 10870 (2017).



*B. Antisubordination and Anticlassification Tensions in Title VII*

Title VII was enacted to “eliminate workplace discrimination, the basic cause of the disparities that developed between African American and white workers.”<sup>40</sup> Title VII is arguably oriented on an antisubordination framework, with its laws “designed to respond to a history of discrimination and incorporate many provisions that expressly take account of forbidden traits (through doctrines such as disparate impact and reasonable accommodation).”<sup>41</sup> Unlike the Equal Protection Clause of the Fourteenth Amendment, which only applies to cases of intentional discrimination, Title VII permits claims of disparate impact, which occur when “an employment policy or practice, appearing on its face to be nondiscriminatory, falls more harshly upon some workers than upon others.”<sup>42</sup> Disparate impact addresses discrimination on a broader and possibly systemic level, prohibiting tests that disproportionately favor one racial group or another or some usages of criminal background checks.<sup>43</sup> Prohibiting the usage of criminal background checks for employment in which criminal history lacks relevance to job duties can redress and account for the disproportionate ways in which people of color are arrested and convicted for criminal activity.<sup>44</sup> Bradley Areheart also points to the U.S. Supreme Court’s interpretation of Title VII “as a statute crafted to respond to past discrimination,” which justifies affirmative action policies “given the legislative history and text of Title VII.”<sup>45</sup> Reasonable accommodations for victims of racial harassment also require an employer “to take affirmative steps to curb the harasser’s behavior” in ways that stop the subordination, rather than an anticlassificationist perspective, which calls for equal treatment.<sup>46</sup>

Title VII has on its face appeared anticlassificationist, despite propelling antisubordination policies. However, Areheart notes that the landmark Supreme Court case *Ricci v. DeStefano*<sup>47</sup> “represents a turn by the Court away from the disparate impact doctrine.”<sup>48</sup> In *Ricci*, an

40. GREGORY, *supra* note 38, at 10.

41. Areheart, *supra* note 22, at 959.

42. GREGORY, *supra* note 38, at 28.

43. See EEOC Enforcement Guide: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, EEOC (Apr. 25, 2012), [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

44. *Report of The Sentencing Project to the United Nations Human Rights Committee: Regarding Racial Disparities in the United States Criminal Justice System*, THE SENTENCING PROJECT (Aug. 31, 2013), <http://www.sentencingproject.org/publications/shadow-report-to-the-united-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system/>.

45. Areheart, *supra* note 22, at 970–71.

46. *Id.* at 971–72.

47. 557 U.S. 557 (2009).

48. Areheart, *supra* note 22, at 993.

employer who had issued exams for hiring and promotion found that its exam had a disparate impact on Black and Hispanic candidates and thus chose not to certify the results, prompting white candidates who performed well to sue for intentional discrimination in violation of Title VII and the Fourteenth Amendment.<sup>49</sup> The Court found that the defendant employer's consideration of the disparate impact results "may in fact be evidence of its disparate treatment of others," showing a shift toward the anticlassification principle in Title VII jurisprudence.<sup>50</sup> Areheart describes the potential ramifications of *Ricci*; most notably, how employers are now disincentivized from voluntary compliance with disparate impact doctrine, because it no longer serves as a reliable shield from litigation challenges to antisubordination practices when perceived as having an effect of "reverse discrimination."<sup>51</sup>

### C. Structural Reform Approaches to Employment Discrimination Law

Implicit biases present an additional challenge to employment discrimination law, in which there first exists "some question whether existing antidiscrimination law even prohibits actions driven by unconscious bias" and second, the difficult task of proving unconscious biases.<sup>52</sup> Samuel Bagenstos argues for a "structural approach to employment discrimination law" to counter unconscious biases and the entrenched, discriminatory workplace structures such as wage disparities and barriers to employment and promotion, but also acknowledges that a structural approach is likely to fail due to limitations of employment discrimination law doctrine.<sup>53</sup> While Areheart argues that *Ricci* represents an anticlassificationist turn in the Court, Bagenstos finds that the "the Supreme Court has formally rejected a number of key elements of the antisubordinationist program" prior to *Ricci* and that judges are actually "hesitant to find liability under the disparate impact doctrine."<sup>54</sup>

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49. *Id.* at 990.

50. *Id.*

51. *Id.* The possibility of algorithmic decision-making to yield discriminatory outcomes in employment, and redressing that disparate impact through auditing the algorithm, is not necessarily precluded by *Ricci*. See Pauline T. Kim, *Auditing Algorithms for Discrimination*, 166 U. PA. L. REV. ONLINE 189, 191 (2017), <http://www.pennlawreview.com/online/166-U-Pa-L-Rev-Online-189.pdf> ("Fortunately, the law permits the use of auditing to detect and correct for discriminatory bias. . . . [Ricci] narrowly addressed a situation in which an employer took an adverse action against identifiable individuals based on race, while still permitting the revision of algorithms prospectively to remove bias. Such an approach is entirely consistent with the law's clear preference for voluntary efforts to comply with nondiscrimination goals.").

52. Bagenstos, *supra* note 18, at 8.

53. *Id.* at 3.

54. *Id.* at 41.

A structural approach to antidiscrimination law seeks “to develop rules that will empower workplace constituencies who will internalize and advance the correct vision of equality.”<sup>55</sup> While disparate impact doctrine and harassment law have embodied antisubordination principles addressing discrimination on a structural level, Bagenstos argues they “have been constrained by their focus on discrete, clearly adverse employment decisions.”<sup>56</sup> Structural reform approaches instead “direct the law’s attention to workplace structures that can facilitate or ameliorate bias.”<sup>57</sup> The bias itself stems from the organizational structure, warranting a remedy addressing that structure, with some scholars proposing litigation and remedies that account for workplace culture, collaborative problem-solving, self-regulation of antidiscrimination norms, and “heavy use of numbers to track the hiring, job assignments, and promotions of minority and female employees” to move toward proportional representation.<sup>58</sup> Ultimately, Bagenstos finds such proposals to be flawed because they do not effectively address problems of structural discrimination in the workplace, and because antidiscrimination law is not necessarily suited to account for how implicit biases shape intended or unintended actions, when antidiscrimination law is largely premised on fault.<sup>59</sup> Further, initial barriers to employment derived from “significant wealth disparities and environmental inequalities between whites and non-whites” are beyond the scope of most employers’ control.<sup>60</sup>

#### *D. Equal Employment Opportunity Commission Enforcement*

The Equal Employment Opportunity Commission (“EEOC”) was created by Congress to enforce Title VII and other employment discrimination laws.<sup>61</sup> Margo Schlanger and Pauline Kim argue that in employment discrimination litigation, the EEOC takes on a managerialist role rather than enforcing policies that address discrimination within workplace structures. Instead of “intense battles seeking to transform the heart and soul of complex organizations,” the EEOC implements “managerialist, bureaucratic responses to the legal prohibitions against discrimination.”<sup>62</sup> Consent decrees and court orders commonly “impose[] a fairly standardized set of terms, including simple, rule-based prohibitions

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55. Bagenstos, *supra* note 18, at 3.

56. *Id.* at 17.

57. *Id.* at 18.

58. *Id.* at 38.

59. *Id.* at 40–42.

60. *Id.* at 43–44.

61. 42 U.S.C. § 2000e-4.

62. Schlanger & Kim, *supra* note 8, at 1526.

of discrimination,” and the EEOC also emphasizes peripheral remedies such as EEO trainings which don’t “alter[] the firm’s core functions,” which are often the causes of structural discrimination.<sup>63</sup> Eighty-nine percent of 502 class-action consent decrees issued between 2000 and 2008 required diversity training.<sup>64</sup>

Considering the challenges of implementing internal structural reform measures to combat discrimination and the Court’s anticlassification interpretation of Title VII, peripheral remedies such as EEO trainings or other mandatory or voluntary diversity trainings present another opportunity to introduce an expansive approach to antidiscrimination efforts in the workplace. Reconfiguring existing diversity or EEO trainings enforced and even offered by the EEOC targets one aspect of many to confront conscious or unconscious biases leading to discrimination.

### III. RESTRICTIVE REMEDIES: EEO, DIVERSITY, AND IMPLICIT TRAININGS

Diversity, equal employment opportunity, and implicit bias trainings, which primarily target individuals in the workplace, exist as a common and widely used remedy and preventative measure to curb and redress claims of racial discrimination in the workplace. These trainings are peripheral remedies the EEOC enforces in lieu of a structural reform litigation approach “premised on the theory that discriminatory outcomes . . . occur because the overarching structure of work permits bias to operate in an organization.”<sup>65</sup> Diversity trainings are also contextualized within larger corporate diversity initiatives that “do not directly seek to realize Title VII’s remedial goal of redressing workplace inequality” and exist primarily for their own economic interests.<sup>66</sup>

The nature of diversity trainings focus on heightening cultural awareness, and to a lesser extent, on antiracism.<sup>67</sup> Cultural awareness training has been criticized for “contribut[ing] to heightened stereotyping and the entrenchment of racial identities in static immutable forms” and

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63. *Id.* at 1572.

64. Frank Dobbin & Alexandra Kalev, Try and Make Me!: Why Corporate Diversity Training Fails 15 (Mar. 16, 2015) (unpublished manuscript) (on file with Institute for Work and Employment Research – MIT), <http://iwer.mit.edu/wp-content/uploads/2016/11/AATraining-3-16-2015-clean.pdf>.

65. Schlanger & Kim, *supra* note 8, at 1575.

66. Stacy L. Hawkins, *The Long Arc of Diversity Bends Towards Equality: Deconstructing the Progressive Critique of Workplace Diversity Efforts*, 17 U. MD. L.J. RACE, RELIG., GENDER & CLASS 61, 69 (2017). Hawkins offers a more optimistic perspective through “situating workplace diversity efforts within the context of their equal opportunity origins and by highlighting their beneficial effects for women and racial minorities.” *Id.* at 61.

67. Emma Kowal, Hayley Franklin, & Yin Paradies. *Reflexive Antiracism: a Novel Approach to Diversity Training*, 13 ETHNICITIES 316, 316 (2013).

also “reinforc[ing] power imbalances by emphasizing those who tolerate and those who are ‘tolerated,’ granting power to those who choose to provide or withhold toleration.”<sup>68</sup> Antiracism training, which aligns more closely to antisubordination concepts and ethnic studies scholarship, are programs “that reflect upon the sources and impacts of racism on society” and “encourag[e] participants to examine their own experience of race, become aware of themselves as racial beings, and further develop their racial identity when acquiring knowledge about cross-cultural interactions.”<sup>69</sup> Antiracism training is implemented across American workplaces, but the extent to which is uncertain.<sup>70</sup> Such trainings face criticisms primarily due to negative emotions they invoke from white participants, which are “discomfort, distress, guilt, fear, anxiety, anger, inaction and withdrawal.”<sup>71</sup> A counterpoint to criticisms of white discomfort is that such outcomes are to be expected. In a blog post criticizing mandating workplace diversity training for people of color, ShaRhonda Knott Dawson writes:

Being anti-racist is a lot of self-work and reflection; probably a lifetime of self-work and reflection. It's a really, really, painful, guilt-inducing, soul-searching, privilege-acknowledging realization that all white people are benefiting from racist structures and institutions at that expense of POC. And most are participating in those structures and institutions with little-to-no awareness of those benefits.<sup>72</sup>

Apart from legitimate criticisms of both themes found in these workplace diversity trainings is the broader issue of the lack of uniformity across workplace trainings. Diversity training itself “is a catchall title that encompasses many types of activities, from lectures to movies to role-plays.”<sup>73</sup> These trainings can be either instructional, providing employees with “information and rais[ing] awareness of the problems associated with misunderstanding or mishandling diversity, or conversely, the benefits of ‘diversity friendly’ behaviors and policies,” or experiential, involving group discussions on diversity or visiting culturally or socioeconomically

68. *Id.* at 320.

69. *Id.* at 321.

70. *Id.* The article from which antiracism training is cited is Australian, while the majority of the literature found criticizing diversity trainings in the American context rarely discuss antiracism within the trainings.

71. *Id.* at 318.

72. ShaRhonda Knott Dawson, *Please Stop Requiring Anti-Racism and Diversity Trainings for POC in the Workplace*, THE EXTRAORDINARY NEGROES BLOG (June 19, 2017), <http://www.theextraordinarynegroes.com/theblog/no-more-diversity-trainings>.

73. Elizabeth Levy Paluck, *Diversity Training and Intergroup Contact: A Call to Action Research*, 62 J. SOC. ISSUES 577, 581 (2006).

different areas.<sup>74</sup> Calls for increased research on evaluating diversity trainings also highlight that “organizations that are forced to conduct diversity training under threat of or following a discrimination lawsuit” are understudied sites, due to reluctance to allow researchers access.<sup>75</sup> However, it is sites with documented workplace discrimination that would require the most scrutiny of their diversity trainings’ effectiveness.

### *A. Neoliberal Workplace Diversity and Racial Capitalism*

Among businesses and law firms across the United States, diversity is often touted as a central value, often for the actual purposes of engaging broader, multicultural, and diverse markets.<sup>76</sup> Diversity itself is a term “usually traced back to the mid-1980s, when demographic projections in the *Workforce 2000* Report published by the Hudson Institute . . . showed that by the year 2000 the U.S. labour force would become more heterogeneous.”<sup>77</sup> The report’s response to this increasing racial, ethnic, and gender diversity in the workplace “urged policy makers and organizations . . . to maintain its economic dominance in the 21st century” by framing non-white, non-male employees “as a set of rare, valuable and difficult to imitate resources” to “better service increasingly diverse markets.”<sup>78</sup> Modern workplace diversity initiatives continue this neoliberal response to an increasingly non-white labor force, using “instrumental business terms such as: (1) ensuring responsiveness to culturally diverse markets, (2) improving performance through innovation; and (3) signaling the openness of the workplace to both internal (employees) and external (customers/other stakeholders) audiences.”<sup>79</sup>

Nancy Leong describes the incorporation and exchange of nonwhiteness in predominantly white institutions, such as some workplaces, as “racial capitalism.”<sup>80</sup> Social capital is derived from the affiliation of nonwhites in status markets of “nonracism” and “nonwhite

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74. *Id.*

75. *Id.* at 586.

76. See David A. Thomas, *Diversity as Strategy*, HARV. BUS. REV., Sept. 2004, <https://hbr.org/2004/09/diversity-as-strategy> (“We made diversity a market-based issue. . . . It’s about understanding our markets, which are diverse and multicultural.”); Shalini Shankar, Advertising Diversity 15 (2015) (“Diversity is not to be good, diversity is not to be fair, diversity is not to be liked by different people. Diversity is for business. And if you want to conduct business with people, you can’t ignore them”).

77. Patrizia Zanoni et al., *Unpacking Diversity, Grasping Inequality: Rethinking Difference Through Critical Perspectives*, 17 ORG. EDITORIAL 9, 11 (2010).

78. *Id.*

79. Hawkins, *supra* note 66, at 67.

80. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2152 (2013).

cultural competence”<sup>81</sup> in an era in which blatant racism is subject to more public criticism.<sup>82</sup> Leong also describes race as Marxian capital to account for the commodification, capitalization, and exploitation of race when one’s racial identity is commodified as a product for a firm to sell to customers who share that identity or value diversity.<sup>83</sup> Finally, racial capital itself is defined as both “the economic and social value derived from an individual’s racial identity, whether by that individual, by other individuals, or by institutions” and racial capitalism is the process in which racial capital is exchanged.<sup>84</sup> Diversity and the promotion of diversity in the workplace through training sessions is a function of racial capitalism that workplaces seek to derive benefits from.

Leong describes these neoliberal justifications as “the ‘thin’ version of the diversity objective . . . exclusively concerned with improving the superficial appearance of diversity” compared to the “‘thick’ version” that “views diversity as a prerequisite to cross-racial interaction, which fosters inclusivity and improves cross-racial relationships, thereby benefiting institutions and individuals of all races.”<sup>85</sup> The latter version requires “meaningful institutional efforts of inclusion” to progress racial equality while “the former assumes that benefits will result from the mere presence of nonwhite people.”<sup>86</sup> Without meaningful efforts of inclusion, racial capitalism results in harms to nonwhite employees, as it “requires and reinforces the commodification of race, it results in alienation of racial identity in the sense that identity may be bought and sold on the market. It also results in alienation of racial identity in the sense that individuals are distanced from that aspect of their personhood.”<sup>87</sup>

Further, “nonwhiteness is a valued commodity, but only if performed according to a script approved by majority identity groups in the workplace.”<sup>88</sup> Workplace policies that mandate nonwhite conformation to whiteness also remain legally protected.<sup>89</sup> Employment policies “which

81. *Id.* at 2178.

82. Blatant racism is not so much “less acceptable” these days, as often previously described, as white nationalism and white supremacy have explicitly surfaced into the mainstream beyond their previous, less explicit iterations.

83. Leong, *supra* note 80, at 2183–88.

84. *Id.* at 2190.

85. *Id.* at 2169.

86. *Id.* at 2170.

87. *Id.* at 2205.

88. *Id.* at 2208.

89. *See, e.g.,* Equal Emp’t Opportunity Comm’n v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016) (holding that Title VII precedent for disparate treatment claims only covered immutable, biological characteristics associated with race, and that because dreadlocks were manipulated or created as a part of one’s culture—not one’s biology and thus was not a protected characteristic required to prevail on a disparate treatment claim.); Equal Emp’t Opportunity Comm’n v. United Va. Bank/Seaboard Nat’l, 615 F.3d 147 (4th Cir. 1980).

exclude Black hairstyles because they are ‘unprofessional’ or ‘messy’ or ‘not neat,’ are simply an expression of biases”<sup>90</sup> historically rooted in slave owners’ verbal and physical degradation of Black hair, where some would “cut the hair of unruly slaves or shaved women’s heads to castigate and demean them.”<sup>91</sup> In addition to being practices rooted in discrimination, conformation to whiteness “demand time, money, and psychological resources,” to which white employees are rarely subjected.<sup>92</sup> The various ways in which nonwhite employees are commodified for diversity yet still subject to discrimination demonstrate the failures of neoliberal rationales for workplace diversity.

### *B. The Interest Convergence of Diversity Training in the Workplace*

Interest convergence is a central tenet of critical race theory developed by Derrick Bell who argues that the self-interests of whites have dictated civil rights gains for people of color rather than motives of “[s]ympathy, mercy, and evolving standards of social decency and conscience.”<sup>93</sup> Like workplace diversity initiatives, their current diversity and sensitivity training programs have been criticized for primarily “serv[ing] the interests of employers by making them appear to be invested in achieving workplace equality”<sup>94</sup> and working as base-line signals of compliance with federal Equal Employment Opportunity law.<sup>95</sup> These interests of employers converge with the interests of members of marginalized groups who seek to work in a diverse, inclusive environment free from discrimination. However, the self-interest driving the implementation of these minimal but sometimes mandatory trainings translates into negative results, with the majority of diversity training programs ineffective at delivering actual change or even resulting in backlash against marginalized groups.<sup>96</sup> A common characteristic of these ineffective diversity-training programs is the negative messaging used by companies to indicate their own interests of preventing costly, adverse legal action.<sup>97</sup>

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90. Imani Gandy, *Black Hair Discrimination is Real – But Is It Against the Law?*, REWIRE (Apr. 17, 2017, 4:58 PM), <https://rewire.news/abl/2017/04/17/black-hair-discrimination-real-but-is-it-against-law/>.

91. A.B. Wilkinson, *No Dreadlocks Allowed: An Outdated, Hazy Understanding of Race Led a Federal Court to Approve of Workplace Bans on the Hairstyle*, THE ATLANTIC (Nov. 3, 2016), <https://www.theatlantic.com/business/archive/2016/11/no-dreadlocks-allowed/506270/>.

92. Leong, *supra* note 80, at 2209.

93. DELGADO & STEFANCIC, *supra* note 7, at 22; *see also* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

94. Bagenstos, *supra* note 18, at 29.

95. Schlanger & Kim, *supra* note 8, at 1535.

96. *See* Dobbin & Kalev, *Why Diversity Programs Fail*, *supra* note 9.

97. *See id.*



A second interest of companies is to promote values of diversity and equality as a form of racial capitalism that is “the process of deriving social and economic value from the racial identity of another person” via commodification of nonwhite identities rather than genuine actions to address inclusion and inequality.<sup>98</sup>

### *C. Diversity Trainings as Legal Compliance*

Diversity training programs and other initiatives are commonly used as remedies in consent decrees and “are predictably ineffective in combatting discrimination and serve the corporation’s interests, rather than fundamentally altering its crucial personnel practices.”<sup>99</sup> Threats of employment discrimination lawsuits and large settlements have shaped the negative messaging in diversity trainings, with three-fourths of 800 U.S. firms’ programs using language that asks employees not to discriminate in fear of large payouts to plaintiffs.<sup>100</sup> These diversity trainings also occur as remedial measures following complaints, producing resistance if individuals feel they are singled out.<sup>101</sup> When employers’ self-interests to implement diversity trainings are driven by their motives of preventing expensive lawsuits, these often mandatory trainings fail to prove greater diversity in management, with findings further showing decreases in the percentage of black women and Asian American men and women.<sup>102</sup>

### *D. Individual Implicit Biases*

Implicit biases are described as the unconscious biases or prejudices individuals hold, shaped by socialization from family, friends, community, the larger society, and media. Jerry Kang defines implicit biases as “the form of stereotypes and attitudes that we are unaware of, do not consciously intend, and might reject upon conscious self-reflection” that have “wide-ranging behavioral consequences.”<sup>103</sup> While implicit biases are shaped by socialization within families, communities, and larger society, they are primarily addressed on the individual level. Addressing implicit biases as occurring on merely an individual level operates within the restrictive view of antidiscrimination law, seeking to prevent implicit biases from manifesting as outwardly discriminatory, albeit supposedly

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98. Leong, *supra* note 80, at 2152.

99. Schlanger & Kim, *supra* note 8, at 1537.

100. Dobbin & Kalev, *Why Diversity Programs Fail*, *supra* note 9.

101. *Id.*

102. *Id.*

103. Jerry Kang, *Implicit Bias and Pushback from the Left*, 54 ST. LOUIS U. L. J. 1139, 1139 (2010).

unintentional acts. Idealists within critical race theory would applaud the incorporation of implicit bias trainings in the workplace for the ways in which these trainings can make those previously unaware of their biases more cognizant of how their personal attitudes can affect minorities in the workplace, while realists would advocate for concrete methods of addressing that bias when it does manifest, especially if it occurs on a structural level.<sup>104</sup>

Implicit biases leading to workplace discrimination have made employment discrimination more difficult to prove, especially as Title VII disparate treatment claims require a showing of *intentional* discrimination. Efforts to reduce implicit biases have been incorporated into workplace diversity trainings to bring to light biases which people may hold. Police departments' use of implicit bias trainings as one of the sole methods for addressing racially discriminatory policing has been criticized for failing to account for "explicit biases, systemic or institutional biases, and other issues that are likely to swamp any effects of implicit bias awareness-raising."<sup>105</sup> The proliferation of using implicit bias trainings as a universal way to address diversity and bias has been criticized by even the creators of the Implicit Association Test.<sup>106</sup> Issues of explicit, systemic, and institutional biases and discrimination exist in workplaces, yet diversity and implicit bias trainings explicitly focus on individual, and sometimes relational issues of discrimination.

#### *E. Successful Prejudice Reduction Interventions*

Successful diversity trainings primarily involved voluntary participants—individuals already motivated to address issues of diversity in the workplace.<sup>107</sup> With these findings, the difficult problem to address is how to successfully implement remedies to reduce discrimination, when workplaces are inclined to abide by settlements or consent decrees. One intervention addressing long-term reduction in implicit bias did so through a twelve-week long study that dramatically reduced implicit race bias and increased concern of discrimination and awareness of bias that endured for at least two months.<sup>108</sup> Strategies involved asking participants to replace stereotypical answers for non-stereotypical ones, utilizing counter-

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104. See DELGADO & STEFANCIC, *supra* note 7, at 17.

105. Destiny Peery, *Implicit Bias Training for Police May Help, But It's Not Enough*, NW. NOW (Mar. 14, 2016), <https://news.northwestern.edu/stories/2016/03/opinion-huffpo-police-bias/>.

106. *Id.*

107. Dobbin & Kalev, *Why Diversity Programs Fail*, *supra* note 9.

108. Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1277 (2012).

stereotypical images of marginalized people, individuation to personalize members of marginalized groups, perspective taking of a member of a marginalized group, and increasing contact.<sup>109</sup> Findings of successful prejudice reduction interventions or diversity trainings are few, and again, such methods focus primarily on addressing individual behavior. However, they reveal the effectiveness of continued interventions beyond the standard offered in the workplace.

#### IV. CRITICAL RACE THEORY AND ETHNIC STUDIES

Ethnic studies in higher education is closely intertwined with the objectives of critical race theory, in that its interdisciplinary scholarship focuses on the centrality of race and ethnicity “in the construction of American history, culture, and society.”<sup>110</sup> Antisubordination ideology is interwoven across the history and scholarship of ethnic studies. The year 1968 saw the beginning of the nationwide movement for ethnic studies in higher education, starting at San Francisco State University, UC Berkeley, and UC Santa Barbara.<sup>111</sup> Seeking the creation of ethnic studies programs, “[s]tudents of color demanded better access to higher education, changes in the curriculum, [and] the recruitment of more professors of color.”<sup>112</sup> The origins of activism for ethnic studies, demonstrated through protests, sit-ins, and hunger strikes from the 1960s up to the present, have been rooted in addressing systemic inequality in higher education, with ethnic studies departments self-described as “insurgent programs” with “a subversive agenda from the outset.”<sup>113</sup> Like critical race theory’s function as oppositional scholarship that “challenges the dominant discourses on race and racism as they relate to law,”<sup>114</sup> most ethnic studies scholars view the nature of the discipline as a way to “pose a fundamental challenge to the dominant paradigms of academic disciplines” that “challenges Western imperialism and Eurocentrism, along with their claims of objectivity and universalism.”<sup>115</sup>

Revisionist history is another signature theme of critical race theory, which “reexamines America’s historical record, replacing comforting majoritarian interpretations of events with ones that square more accurately with minorities’ experiences.”<sup>116</sup> Ethnic studies coursework

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109. *Id.*

110. Hu-DeHart, *supra* note 10, at 52.

111. *Id.* at 50.

112. *Id.* at 50–51.

113. *Id.* at 52.

114. Calmore, *supra* note 11, at 2161.

115. Hu-DeHart, *supra* note 10, at 52.

116. DELGADO & STEFANCIC, *supra* note 7, at 25.

offer in-depth explorations of the histories of marginalized groups in the United States, disrupting dominant narratives often present in Eurocentric curricula in education. Access to ethnic studies and the revisionist histories they offer further individuals' critical consciousness, which is the "process by which oppressed and socially marginalized people critically analyze their social and economic conditions and take action to improve them."<sup>117</sup> Revisionist history has been described as being "materialist in thrust, holding that to understand the zigs and zags of black, Latino, and Asian fortunes, one must look to things like profit, labor supply, international relations, and the interests of white elites."<sup>118</sup> As critical race theory materialists ultimately seek to change existing modes of oppression, ethnic studies serves as a vehicle for furthering antistubordination actions on the part of people of color seeking to change current social conditions.

#### *A. Ethnic Studies and Diversity Education Outcomes*

Mandatory diversity course requirements in colleges and universities have increasingly been implemented to propel institutions' educational goals "to foster better communication of socio-cultural differences so that students can improve their chances for contributing to communality and for succeeding in an increasingly diverse society."<sup>119</sup> Diversity requirements often incorporate curricula from departments such as ethnic studies that directly speak to intersecting issues of race, ethnicity, gender, and class. Educational institutions' interests in promoting diversity curriculum (much like workplaces) largely mismatch the intentions of student activists who advocate for such curricula on behalf of increasing student body knowledge about societal inequities within the United States.<sup>120</sup> Similarly, ethnic studies departments would critique the notion that their courses exist for the purposes of preparing students for the increasingly diverse world. Introductory courses for white students that "focus on raising consciousness among White students" can have detrimental effects on students of color, who "often do not find their own understanding stretched."<sup>121</sup> Blackwell has argued that students of color

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117. Roderick J. Watts & Carlos P. Hipolito-Delgado, *Thinking Ourselves to Liberation?: Advancing Sociopolitical Action in Critical Consciousness*, 47 THE URB. REV. 847, 848 (2015).

118. DELGADO & STEFANCIC, *supra* note 7, at 20.

119. Mitchell J. Chang, *The Impact of an Undergraduate Diversity Course Requirement on Students' Social Views and Attitudes*, 51 J. GEN. EDUC. 21, 22 (2002).

120. Olivia Exstrum, *Student Petition Recommends US-centric Diversity Curriculum Requirement*, DAILY NW. (Feb. 17, 2015), <https://dailynorthwestern.com/2015/02/17/campus/student-petition-recommends-us-centric-diversity-curriculum-requirement/>.

121. CHRISTINE E. SLEETER, THE ACADEMIC AND SOCIAL VALUE OF ETHNIC STUDIES: A RESEARCH REVIEW 18, Nat'l Educ. Ass'n (2011).

are further marginalized “by being positioned as cultural expert” and instead, “home spaces” for students of color to engage deeper with concepts of race, ethnicity, and culture are necessary.<sup>122</sup>

For adolescents of color, ethnic studies produce deeper engagement, increased motivation, and better achievement. Decolonizing the curriculum also helps students “develop a sense of empowerment and self-efficacy that persist[s], as well as a life commitment to diversity and multiculturalism.”<sup>123</sup> Halagao’s Pinoy Teach curriculum for Filipino American college students was developed through a “decolonization framework with the aim to emancipate students from ignorance and ignite a commitment to social change.”<sup>124</sup> This decolonization framework, grounded in “multicultural educational theory, ethnic studies, critical pedagogy, [and] community-based” practices for the purposes of initiating commitment and acting for social change speaks directly to steps in the phases of critical consciousness and critical action development.<sup>125</sup> Halagao found one-third of Pinoy Teach participants were directly influenced to pursue teaching careers, “which by its very nature has the potential to influence social change,” and implemented pedagogy that “did not perpetuate the status quo,” making them “activist teachers who promoted a multicultural doctrine.”<sup>126</sup>

Beyond the inherent value of ethnic studies, which serves as a site for the production of oppositional knowledge from the margins, ethnic studies when incorporated as a diversity requirement have been studied for their potential effects of reducing racial prejudice. One study found that following the course of a diversity requirement, a substantial decrease in prejudice toward Blacks occurred as students neared completion of their course.<sup>127</sup> Curricula which “teach[es] directly about racism have a stronger positive impact than curricula that portray diverse groups but ignore racism” on affecting white students’ racial attitudes.<sup>128</sup> This finding is consistent with the widespread ineffectiveness of workplace diversity trainings that do not address the systemic nature of racism. For white students, ethnic studies curriculum also has the most consistent impact on “democracy outcomes,” which are defined as a:

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122. Deanne M. Blackwell, *Sidelines and Separate Spaces: Making Education Anti-Racist for Students of Color*, 13 RACE ETHNICITY & EDUC. 474 (2010).

123. SLEETER, *supra* note 121, at 14.

124. Patricia Espiritu Halagao, *Liberating Filipino Americans Through Decolonizing Curriculum*, 13 RACE ETHNICITY & EDUC. 495 (2010).

125. *Id.* at 509.

126. *Id.* at 507.

127. Chang, *supra* note 119, at 32.

128. SLEETER, *supra* note 121, at viii.

[C]ommitment to promoting racial understanding, perspective taking, sense of commonality in values with students from different racial/ethnic backgrounds, agreement that diversity and democracy can be congenial, involvement in political affairs and community service during college as well as commitment to civic affairs after college.<sup>129</sup>

The Pinoy Teach curriculum also impacted white participants, who found that the curriculum had taught them how to be activists, and even influenced one to “becom[e] the editor for a large educational publisher, so that she could influence textbooks [*sic*] content positively.”<sup>130</sup>

Despite the positive effects of an ethnic studies curriculum in public education for adolescents, the majority of public school students across the United States are taught Eurocentric American histories and only first encounter ethnic studies within higher education, if at all. Further, states such as Arizona have attempted to enforce bans upon Mexican American Studies in school, but they were found to be unconstitutional as they were “motivated by racial animus.”<sup>131</sup> Universities also remain reluctant to institute ethnic studies programs for students who seek the curriculum, and existing programs and departments face significant challenges in retaining adequate funding and institutional support.<sup>132</sup> Students of color have reported grievances associated with the lack of diversity in the student body and faculty, racism exhibited by students and faculty, racial exclusion in coursework representation and attitudes of disparagement toward ethnic studies departments, and the lack of action universities take to address diversity issues and racism.<sup>133</sup>

129. *Id.* at 17 (quoting Patricia Y. Gurin, Eric L. Dey, Gerald Gurin, & Sylvia Hurtado, *How Does Racial/Ethnic Diversity Promote Education?*, 27 WESTERN J. BLACK STUD. 20, 25 (2003)).

130. Halagao, *supra* note 124, at 507.

131. Valeria Strauss, *Arizona’s Ban on Mexican American Studies Was Racist, U.S. Court Rules*, WASH. POST (Aug. 23, 2017), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/08/23/arizonas-ban-on-mexican-american-studies-was-racist-u-s-court-rules/>.

132. See, e.g., Carla Rivera, *Cal State’s Ethnic Studies Programs Falter in Changing Times*, L.A. TIMES (Oct. 30, 2013), <http://articles.latimes.com/2013/oct/30/local/la-me-college-ethnic-20131031#axzz2jHG8es1y>; Colleen Flaherty, *Troubled Icon*, INSIDE HIGHER ED (Mar. 3, 2016), <https://www.insidehighered.com/news/2016/03/03/iconic-ethnic-studies-college-san-francisco-state-says-it-cant-pay-its-bills>; Jaime Gordon, *Faculty Question Viability of Asian American Studies Major at Duke*, THE CHRONICLE, (Mar. 29, 2016), <http://www.dukechronicle.com/article/2016/03/faculty-question-viability-of-asian-american-studies-major-at-duke>; Emma Newburger, *Ethnic Studies Program Funding Concerns Remain Unresolved by Deans*, THE CORNELL DAILY SUN (May 9, 2017), <http://cornellsun.com/2017/05/09/ethnic-studies-program-funding-concerns-unresolved/>.

133. Paula J. Caplan & Jordan C. Ford, *The Voices of Diversity: What Students of Diverse Races/Ethnicities and Both Sexes Tell us About Their College Experiences and their Perceptions About Their Institutions’ Progress Toward Diversity*, 6 APORIA 30, 54 (2014).

The lack of state and institutional support for ethnic studies also reflects anticlassificationist principles that consider the recognition or attention to any particular racial or ethnic group as a sign of discrimination against the dominant group. For students of color, demands for developing ethnic studies or a mandatory diversity curriculum stem from an antisubordination desire to change racist conditions within the university. To point to a few examples, from 2015 to 2016, Concerned Student 1950 at the University of Missouri issued demands that included the creation and enforcement of “comprehensive racial awareness and inclusion curriculum throughout all campus departments and units, mandatory for all students, faculty, staff, and administration.”<sup>134</sup> A coalition of students at Northwestern University in 2015 also demonstrated in solidarity with students at the University of Missouri and in protest of their own campus conditions, also issuing demands calling for the implementation of an Asian American Studies major and a U.S. centric diversity requirement.<sup>135</sup> Upon news that the San Francisco State University’s College of Ethnic Studies’ budget would be cut after already being “chronically underfunded,” students launched a successful ten-day long hunger strike to protest the perception “that the administration undervalued the cultures and experiences of students of color.”<sup>136</sup> As these actions for ethnic studies have demonstrated, the purposes of such programs are antisubordinate and largely reactionary to conditions and practices that marginalize students of color and ethnic studies as an academic discipline.

#### V. ETHNIC STUDIES AS RESTORATIVE JUSTICE

The use of ethnic studies curricula outside of formal institutions of education as a method of addressing discrimination has also been documented in at least one incident. In early 2017, Dyne Suh, who is Asian American, made an AirBnb reservation a month in advance of her February trip for a cabin owned by Tami Barker, who is white.<sup>137</sup> Suh had

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134. Bill Pollock, *Concerned Student 1950 Re-issues Demands to the University of Missouri*, MISSOURINET (Feb. 24, 2016), <https://www.missourinet.com/2016/02/24/concerned-student-1950-re-issues-demands-to-the-university-of-missouri/>.

135. Mariana Alfaro, *Northwestern Student Activists Release List of Demands for Racial Inclusivity*, DAILY NW. (Nov. 28, 2015), <https://dailynorthwestern.com/2015/11/28/campus/northwestern-student-activists-release-list-of-demands-for-racial-inclusivity/>.

136. Jack Herrera, *10-Day Hunger Strike = Victory for SFSU Students*, USA TODAY COLLEGE (May 22, 2016), <http://college.usatoday.com/2016/05/22/10-day-hunger-strike-victory-for-sfsu-students/>.

137. Amy B. Wang, *Airbnb Host Who Stranded Guest Because of Race Ordered to Take Class in Asian American Studies*, WASH. POST (July 14, 2017), <https://www.washingtonpost.com/news/business/wp/2017/07/14/airbnb-host-who-stranded-guest-because-of-race-ordered-to-take-class-in-asian-american-studies/>.

initially booked the cabin for herself and her fiancé, but had asked and received permission from Barker to add two friends and two dogs onto the reservation. As Suh and her group made their way to the cabin during a winter storm on February 17, 2017, Barker canceled their reservation after Suh messaged to ask how to pay for the additional guests. In the message exchange between Suh and Barker, Barker told Suh “If you think 4 people and 2 dogs ate [*sic*] getting a room fir [*sic*] \$50 a night on big bear mountain during the busiest weekend of the year . . . . You are insanely high.”<sup>138</sup> Barker also stated “I wouldn’t rent to u [*sic*] if you were the last person on earth . . . . One word says it all. Asian.” Barker referenced President Trump and then added “[a]nd I will not allow this country to be told what to do by foreigners.”<sup>139</sup>

In July 2017, a settlement was reached between Suh and Barker through the California Department of Fair Employment and Housing (“DFEH”). Barker was required to pay \$5000 in damages, issue a personal apology, comply with antidiscrimination laws, participate in a community education panel and volunteer with civil rights organizations, and report four years of rental data to the California Department of Fair Housing. Most notably, in addition to the other provisions, the settlement required Barker to take an Asian American studies college course.<sup>140</sup> In Suh’s press statement about the settlement, she expressed, “I am very glad that the outcome of this case includes taking an Asian American studies course. I believe that the more people learn about and understand our history and our struggles, the more they can feel empathy towards us and treat us as equals.”<sup>141</sup>

Mark Tseng-Putterman, a writer and scholar of Asian American movements and former social media coordinator for the Asian American/Pacific Islander civic engagement organization 18 Million Rising tweeted soon after the announcement of the settlement, “[r]eparations and ethnic studies as restorative justice. Let this be the new normal.”<sup>142</sup> Restorative justice “is a theory of justice that emphasizes repairing the harm caused by criminal behavior . . . best accomplished through cooperative processes that include all stakeholders” with goals of “lead[ing] to transformation of people, relationships and communities.”<sup>143</sup>

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Mark Tseng-Putterman (@tsengputterman), TWITTER (July 13, 2017, 10:30 AM), <https://twitter.com/tsengputterman/status/885521721964371968>.

143. Centre for Justice & Reconciliation, *Tutorial: Introduction to Restorative Justice*, PRISON FELLOWSHIP INT’L, <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial->



While Barker's discriminatory act was not criminal, the concept of restorative justice can translate to productive resolutions and remedies to racial discrimination. California DFEH director Kevin Kish, in a statement on the settlement, said, "[t]he real story is how a charged and painful encounter led to an opportunity for reconciliation between the people involved, and to an opportunity for them to enhance the public's understanding of discrimination and civil rights in California." In addition to the opportunity for reconciliation the settlement brought, Kish also points to enhanced *public* understanding of discrimination and civil rights that speaks to an expansive approach to antidiscrimination law which, compared to the restrictive view, would consider Barker's actions as individual rather than as a singular manifestation of a larger societal issue. Further, focusing on repairing the harm of Barker's discrimination through measures such as formal and community education is congruent to the expansive approach's goal of "eradicating the effects of racial oppression."<sup>144</sup> While arguably a restrictive remedy, focusing on Barker as an individual and education's purpose of preventing future harm, the ethnic studies coursework embody antisubordination principles to ultimately further the expansive view.

#### VI. ETHNIC STUDIES AS WORKPLACE ANTIDISCRIMINATION EDUCATION

The settlement between Suh and Barker presents an opportunity to apply elements of that settlement, mainly mandating Barker's take an ethnic studies course, into other cases of discrimination. Employers' usage of education via diversity or implicit bias trainings provides existing grounds for changing the rhetoric of addressing workplace discrimination. Again, an ethnic studies education itself is not the sole means through which diversity can be increased nor is it the sole vehicle to reducing prejudice and discrimination. However, because employment discrimination settlements "frequently allocate the lion's share of the budget for remedial action to training" and largely remain ineffective but mandatory, despite findings showing that the voluntary nature of trainings make them more effective, these proposed changes to existing remedies focus on the content of information presented rather than procedures of the trainings' implementation.<sup>145</sup>

Ethnic studies courses, taken mandatorily or voluntarily, have yielded positive outcomes for both white students and students of color and further

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intro-to-restorative-justice/#sthash.OvHfKYwF.dpbs.

144. Crenshaw, *supra* note 2, at 1341.

145. Dobbin & Kalev, "Try and Make Me!," *supra* note 64, at 15.

influence engagement in social action or civic participation.<sup>146</sup> While providing employees such a comprehensive education would be impractical, there are of primary themes and concepts from introductory ethnic studies coursework which can realistically be incorporated or reshape current diversity and implicit bias training messaging. As many diversity trainings have been criticized for being “based on implicit assumptions about the value of overcoming ignorance, expressing one’s hidden assumptions, or feeling empathy for an oppressed group or individual” instead of being “explicitly based on established theories about prejudice reduction or social inclusion,” the findings on ethnic studies’ effects on adolescents and college students warrant an inquiry into extending the scholarship into workplace diversity and antidiscrimination efforts.

While there are obvious differences between college students in four-year often predominantly white higher education institutions and employees, undergoing diversity trainings actually presents an opportunity for ethnic studies scholarship to reach broader audiences. Sixty-six percent of U.S. employers in 2005 instituted diversity training, which makes it uniquely “positioned to impact thousands of people and workplaces in a positive way.”<sup>147</sup> The institution of ethnic studies curricula in diversity trainings faces practical barriers, considering the plethora of businesses and consulting firms offering diversity training services and employers’ ability to choose what programs fit best for their company. However, in formulating settlements or consent decrees, the EEOC or other employees’ attorneys can play a role in making diversity or EEO trainings follow certain guidelines in what information is presented. Increasing accessibility to ethnic studies is itself another goal, by providing people with the access to curricula that was previously denied, unavailable, or more commonly, undesired. While there is a concern of corporatizing ethnic studies or oversimplifying its material to fit the context of workplace antidiscrimination or diversity training, the alternative perspective is that the discipline itself may further its subversive agenda of liberation through workplace education.

#### CONCLUSION

Addressing race discrimination in employment requires efforts beyond Title VII enforcement, as antidiscrimination legal approaches reflect a restrictive view and anticlassification perspective which fails to recognize

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146. SLEETER, *supra* note 121, at vii.

147. Paluck, *supra* note 73, at 579.

that literally applying equal treatment under the law maintains inequality, as created by centuries of political, institutional, and economic power held by whites. Cornel West describes critical race theory as “a gasp of emancipatory hope that law can serve liberation rather than domination.”<sup>148</sup> Ethnic studies’ origins and themes of liberation provide a critical race theory basis for imbuing its scholarship into common, yet ineffective workplace diversity trainings. Solely attempting to alter individual attitudes do little to eliminate societal racism unless combined with changing material conditions of inequality. The workplace is one of such sites through which individual and organizational racial biases create economic inequality within and outside the place of employment. The restrictive approach of diversity and EEO trainings, driven by employers’ interests in the capital derived from appearing diverse as well as legal compliance, do little to effectively address both blatant discrimination as well as structural biases. The incorporation of ethnic studies scholarship into the mandated workplace antidiscrimination remedies of diversity or EEO trainings presents an opportunity to further an expansive view of antidiscrimination law not only through addressing discrimination in the workplace, a traditional site of racialized economic subordination, but through the discipline itself which recognizes the historical, structural origins of discrimination.

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148. KIMBERLÉ CRENSHAW, ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xii (1995).