Discussion Paper Draft
Law, Economics, and Politics Center
Berkeley School of Law

Authentic Compliance with a Symbolic Legal Standard? How Critical Race Theory Can Change Social Science Studies on Diversity in the Workplace

Yael Plitmann

ABSTRACT

This essay introduces critical race theory to the organizational analysis of diversity in American corporations. One central finding of the social science literature examining diversity in corporations is the apparent failure of 'diversity,' as a value adopted by the organization, to transform practices of discrimination and exclusion in the workplace. Scholars' implicit assumption in this field accepts without challenge the narrative about diversity as a substantive and progressive legal standard, associating its presence with racial justice values. A critical doctrinal analysis of this legal concept inspired by the lessons of critical race theory, alternatively, highlights the problematic legal construction of diversity and its role in justifying and reinforcing racial hierarchies. Adding to existing institutionalist literature on American business corporations I suggest that, whether compliance with diversity prescriptions is authentic or not, the legal standard of diversity is a symbolic value that a-priori cannot promote racial equality.

> [T]he concept of diversity, far from a viable means of ensuring affirmative action … is a serious distraction in the ongoing efforts to achieve racial justice.
>
> – Derrick Bell[1]

> Those who create and re-create race today are not just the mob… or the people who join the Klan and the White Order… They are also… the academic 'liberals' and 'progressives' in whose version of race the neutral shibboleths *difference* and *diversity* replace words like *slavery*, *injustice*, *oppression* and *exploitation*, diverting attention from the anything-but-neutral history these words denote.
>
> – Barbara Jeanne Fields[2]

INTRODUCTION

The turn to diversity in organizations has gained significant attention in both critical race theory and empirical sociological research of organizations. In this paper, I bring these two bodies of scholarship into conversation, illustrating how critical race theory can change institutionalist studies on diversity in the workplace. Grounded in different disciplines and epistemological traditions, these schools seem to share little in common. Critical race theorists have been skeptical of quantitative empirical research, the main method employed by organizational theorists, rejecting it for both its troubling historical origins and its reduction of race into a measurable variable (Bonilla-Silva and Zuberi, 2008; Carbado and Roithmayr, 2014; Carbado, 2011). Critical scholars employ, instead, vastly different methods such as storytelling and textual analysis, aimed at challenging and destabilizing mainstream narratives about our legal and social worlds

[1] Derrick Bell. 2003. "Diversity's Distractions," 103 COLUM. L. REV. 1622, at 1622.

[2] Barbara Jeanne Fields, Slavery, Race and Ideology in the United States of America, New Left Review 95 (1990) at 181.

(Matsuda 1987; Abrams 1991; Haney López 2006). Nonetheless, it is my contention that organizational sociologists studying legal values in the workplace stand to benefit from a critical race theory analysis of such values, in both their theoretical framework and the interpretation of their findings. As others have argued regarding these parallel fields, facilitating a dialog between critical race theory and social science research can enrich both, allowing scholars to better understand racial discrimination in the United States (Obasogie 2013; Edelman et al. 2016). Such a conversation can be especially fruitful when it comes to examining diversity, as scholars in both fields share, in essence, a suspicion towards diversity as the be-all and end-all solution for organizational inequality and a commitment to promoting a more equitable workplace. The scarcity of dialog among them, then, might have more to do with interdisciplinary barriers than substantive disagreement.

Crossing these disciplinary lines, I will focus on a prominent strand in the institutionalist literature, one concerned with the observed failure of diversity, as a legal value adopted by organizations, to increase the share of African Americans in the workplace. This line of empirical research, I suggest, treats the legal standard of diversity as a substantive social justice value *a-priori*, even if an ineffective one *a-posteriori*. Scholars in the field do not question the limitations of the concept itself, taking for granted that it was meant to promote workplace equality. When diversity initiatives do not advance the workplace closer to these goals, the failure is then attributed to employers' inadequate compliance practices, which are presented as *strategic* and *symbolic* (Edelman et al. 2016; Edelman 2016; Edelman et al. 2011; Kalev et al. 2006; Edelman et al. 2001), or as *genuine* but *clueless* – corporate policy-makers seek out diversity sincerely but have no idea which initiatives are effective (Dobbin & Kalev 2017; Dobbin et al. 2011). This body of

scholarship curiously leaves the problematic legal concept of diversity unscathed.

A critical analysis of the legal vision of diversity, inspired by the lessons of critical race theory, exposes the limitations of the concept in meaningfully addressing systematic past and ongoing racial harms. Diffused, ahistorical and decontextualized, diversity was constructed in the Supreme Court's affirmative action jurisprudence as an individualistic value, unconcerned with entrenched structures of racial hierarchies that are hardwired into organizational fields. As critical race theorists have argued, by diverting attention away from a repudiation of racial oppression to a symbolic commitment to tolerance for a variety of cultures and backgrounds, diversity works to obscure racism and structural inequalities while reinforcing stereotypes (Ford 2002, 2005; Lawrence 2001; Bell 2003; Roithmayr 2004; Nunn 2008; Hutchison 2008; Bell & Hartman 2007; Leong 2013; Berrey 2015; Smith & Mayorga-Gallo 2017). Introducing the critique of diversity to this line of organizational research is not only a step towards understanding the self-evident failure of diversity practices in altering the racial composition of the workplace, but also how they work to produce and reinforce inequality in American organizations. This critique can explain the tenacity of racial inequality in organizations not only despite, but also in relation to, costly diversity programs and ubiquitous diversity training.

This paper adds to the institutionalist literature on workplace inequality by suggesting that diversity's inability to battle inequality lies not only with its practical implementation, but first and foremost with its theoretical construction. While institutionalists treat the legal concept of diversity as a substantive civil rights value hollowed out by organizational practices, the critical inquiry into diversity exposes it as a double legal standard, symbolic

in its very nature. Rather than an instance of 'symbolic compliance' with civil rights values adopted by organizations to win legitimacy (Meyer and Rowan 1977; Edelman 1990, 1992, 2016; Edelman & Suchman 1997; Dobbin 2009; Dobbin et al. 1993; Sutton et al. 1994; Edelman & Petterson 1999; Edelman et al. 1991, 1999, 2011; Kalev at al. 2006), the case of diversity is best described as *authentic* compliance with a *symbolic* legal standard. Even when organizational diversity programs are taken seriously and executed sincerely, they cannot bring about racial equality in the workplace. This is not because "diversity programs fail" as institutionalists conclude, but rather because they succeed. They work precisely in the ways their legal authors intended them to. Without the critical legal analysis of diversity, in other words, organizational theory on workplace inequality will not be able to fully explain why commitment to diversity in the workplace does not change what it was legally designed to preserve.

To make the case for such claims, this paper will proceed as follows: *Section 1* will survey the principal institutionalist studies on diversity, pointing out their main oversight, namely their uncritical stance towards the concept of diversity. *Section 2* will describe the legal construction of the notion of diversity and its analysis by critical race scholars and other scholars on the left. The subsections will specifically address the two main shortcomings of diversity which render it a symbolic legal standard. I will then summarize my position suggesting a different framing of diversity and its discontents in the workplace.

1. Institutionalist Studies on Diversity in Organizations

An abundance of empirical organizational studies, the notable of which are surveyed below, suggests that diversity programs and trainings do not change the racial composition of the American workplace (e.g., Dobbin and

Kalev 2018; Dobbin & Kalev 2017; Dobbin & Kalev 2016; Dobbin, Schrage & Kalev 2015; Dobbin, Soohan and Kalev 2011; Dobbin and Kalev 2007; Dobbin et al. 2007; Kalev et al. 2006; Naff and Kellough 2003; for a summary, see Nishii 2018).

Examining hundreds of employment organizations across time, this body of research concludes that diversity practices were largely found to have no effect on the racial demographics of the workplace and its management (Dobbin & Kalev 2018); that diversity training and diversity evaluations "are least effective at increasing the share of white women, black women, and black men in management" (Kalev et al. 2006, 589); and that diversity training "does not reduce bias, alter behavior or change the workplace" (Dobbin & Kalev 2018, 49; for an overview of these studies see Leslie 2019). "Overall, it appears that diversity programs do most for white women" prominent scholars in the field conclude, while "Black men gain significantly less" (Kalev et al. 2006, 604). Diversity training also had no demonstrable effect on the careers of racial minorities in federal agencies (Naff and Kellough 2003). Even studies claiming that diversity education is effective, do not claim that it alters the racial composition of the workplace. Their conclusions are restricted to the modest claim that such interventions are successful in improving "knowledge about diversity and overall attitudes toward diversity" (Kulik and Roberson 2008a, 314), and in helping employees work effectively in diverse organizations (Bendick et al. 2001; Kulik & Roberson 2008b).

While some diversity practices were shown to simply be ineffective, others were found to have negative effects on the representation of African Americans in the workplace (Kalev et al. 2006). More specifically, 'diversity trainings' are followed by an average of 7% decline in the odds that managers

are black women, and 'diversity evaluations' are followed by an average of 8% decline in the odds that managers are black men (id, 604). Over a period of five years, companies that make diversity training mandatory for managers witness an average of 10% decrease in the numbers of black women in management (Dobbin & Kalev 2017, 816; compare: King et al. 2012). Diversity report cards, similarly, show only negative effects for African Americans as well as white women (Dobbin & Kalev 2017, 821).

Which efforts towards a racially diverse workplace do work? "Some of the most effective solutions" Dobbin and Kalev admit "*aren't even designed with diversity in mind*" (2016, 54; emphasis added). Studies show, for instance, that mentoring has positive effects on the representation of white women and to a lesser extent on 'minorities' in management (Kalev et al. 2006, 604; Dobbin & Kalev 2018, 52). Special college recruitment programs, as well as "skill and management training with special nomination procedures for underrepresented groups" were also shown to be effective (Dobbin & Kalev 2017, 818). Policies that prompt 'social accountability,' such as 'equal opportunity' taskforces and 'affirmative action managers' who are charged with overseeing hiring and promotion of employees from underrepresented groups, were also shown to be effective, probably because of 'evaluation apprehension' (Dobbin et al. 2015; see also Richard et al. 2013). For the same reason, regulatory oversight of federal contractors yielded positive results throughout the years in which the Department of Labor conducted compliance reviews. Once enforcement was reduced during the Reagan administration and onwards, positive diversity metrics declined as well (Kalev et al., 2006; Dobbin & Kalev 2017). Whereas mentoring, equal opportunity accountability and regulatory oversight of affirmative action edicts were shown to sometimes promote a racially diverse workplace,

diversity training, diversity programs and diversity score cards, were not found to be effective (Dobbin & Kalev 2017).

Institutional scholars have suggested several hypothetical explanations for the documented failures of most diversity initiatives in the workplace. Dobbin and Kalev (2017 and 2018) postulate that short-term educational interventions, such as diversity training cannot change biases that workers have learned over a lifetime. They further posit that emphasizing the legal aspects of diversity works to its detriment. Not because they see the legal concept as flawed (a claim this paper makes, which organizational research has yet to address), but rather because legality "may lead employees to think that commitment to diversity is being coerced" causing a backlash (2018, 51). Lastly, in their well-known 2006 piece, Kalev et al. explain the failure of diversity programs, inter alia, as an instance of "window dressing" in which the program is adopted by employers "to inoculate themselves against liability, or to improve morale rather than to increase managerial diversity" (Kalev et al. 2006, 610; see also Edelman 2016, 149, 156-7; Edelman et al. 2016; Edelman et al. 2001; Edelman et al. 2011). A decade later, however, Dobbin and Kalev suggested that "employers could not have deliberately adopted ineffective diversity practices because they knew not which were effective" (Dobbin & Kalev 2017, 812). Diversity initiatives fail, according to this recent account, because the diversity innovations that are ultimately adopted are not necessarily the most effective ones, and their adoption is not based on empirical evidence (id, 814).

Essentially placing the blame for diversity's failures on behaviors and attitudes of employers and employees, or on their illiteracy in empirical organizational research, this literature largely ignores the problematics of the legal concept of diversity in and of itself. Critical of organizational actors,

this approach does not extend the same exacting critique to the legal environment in which these actors operate. Responding to this oversight, I will now turn to the legal construction of diversity and its critique. Ignoring the legal vision of diversity, I suggest, can result in a flawed theoretical framing of empirical studies, in which the failure of diversity practices to achieve a more equitable workplace is attributed solely to faults in their implementation rather than to limitations inherent in the concept. Institutionalist scholarship would thus benefit from considering the skepticism of critical race theory regarding diversity, detailed in the next section.

2. The Legal Vision of Diversity and Its Critique

Diversity in the organizational field corresponds with the legal concept of diversity (Edelman et al. 2001). In fact, around 75% of corporate diversity programs cover legal content as part of the training (Dobbin & Kalev 2018). Furthermore, theories of law and organizations suggest that organizations are responsive to their legal environment and adopt different normative practices and structures responding to widely accepted legal ideas (Edelman 1990). Diversity is such an idea. I will turn now to a brief description of the notion of diversity as constructed by law and its critique.

Constitutional law scholars usually cite the 1978 case *Regents of The University of California v. Bakke*[3] as the first recognition by the Supreme Court of the benefits of diversity in educational organizations (Post 2003; Crocker 2007; Leong 2013). In the *Bakke* case, the Supreme Court struck down the use of quotas by UC Davis Medical School, applying the constitutional standards of 'strict scrutiny' to the university's consideration

[3] *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) (Powell, J., announcing the judgment of the Court).

of race in admissions. Although the majority opinion written by Justice Powell declared racial quotas a violation of the 14th Amendment, it nonetheless allowed for the consideration of race under the rationale of 'diversity' as a 'compelling state interest.'[4] Important for our purposes is Powell's holding that neither a remedial justification nor the imperative to correct societal discrimination are compelling governmental interests that allow for race-conscious affirmative action in admissions.[5] Instead, Powell championed "ethnic diversity" meant to ensure that universities could "select those students who will contribute the most to the 'robust exchange of ideas'" as the sole rationale for affirmative action policies.[6] He further emphasized that this consideration is "only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."[7]

Later on, in *Grutter v. Bollinger*[8] and *Gratz v. Bollinger*[9] the Supreme Court reaffirmed the distinction between restitution justifications and the diversity rationale, citing the latter as the sole reasoning for race-based university admission policies. Justice O'Connor, writing for the court, endorsed Justice Powell's position that "reducing the historic deficit of traditionally disfavored minorities … [is] an unlawful interest in racial balancing."[10] Similarly, "an interest in remedying societal discrimination" was also rejected, since "such measures would risk placing unnecessary burdens on innocent third parties 'who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have

[4] Id, at 313-4.
[5] Id, at 306-7.
[6] Id, at 313.
[7] Id, at 314.
[8] 539 U.S. 306 (2003).
[9] 539 U.S. 244 (2003).
[10] *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003).

suffered'."[11] Again, the only public interest deemed sufficiently compelling to pass the mandates of the constitutional test of strict scrutiny was the interest in a diverse student body, and only if that interest did not consider race *alone*. Racial diversity was presented on par with other diverse personality traits one may come to possess, as O'Connor's stated:

> Just as growing up in a particular region or having particular professional experience is likely to affect an individual's views, so too is one's own, unique, experience of being a racial minority in a society, like our own, in which race unfortunately still matters.[12]

More recently, in 2009, the Supreme Court struck down school assignment plans that considered race to assign students to oversubscribed public schools.[13] Determining that *de-jure* segregation was no longer present, the court rejected the interest in remedying harms traceable to segregation as a compelling state interest that could pass the strict scrutiny test. Any continued use of race-based school assignments, the court reasoned, must be justified on some other basis, such as diversity. That legal concept, as Chief Justice Roberts reiterated, cannot account only for race:

> the diversity interest [accepted in *Grutter*] was not focused on race alone but encompassed all factors that may contribute to student body diversity… [including] admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.[14]

---

[11] *Id*, 324. See also *Wygant v. Jackson Bd. of Educ*., 476 U.S. 267, 288 (1986).
[12] *Id*, 333.
[13] *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).
[14] *Id*, 2753 (internal quotation marks omitted).

Although the diversity rationale was never directly addressed by the Supreme Court in employment discrimination cases, the court upheld in such cases the same values and logic characterizing its affirmative action jurisprudence in education. Presented with challenges to affirmative action in the workplace, the Supreme Court allowed employers to consider race only to address discrimination in their particular organization, not to remedy historical injustices more generally.[15] Meanwhile outside the court, the legal vision of diversity as designed in *Bakke* gained wide acceptance in the business community and actors in both the educational and the employment fields today invoke diversity as the main rationale for their race conscious policies (Leong 2013; Nakamura & Edelman 2019; Wilkins 2004; Edelman et al. 2001).

This remarkable legal reconfiguration of affirmative action from a policy meant to tackle the historical injustices of race-based exclusions to one aimed at achieving some unspecified degree of 'diversity' that benefits 'all,' is evident in diversity practices across fileds. Curiously, institutionalists writing on diversity in organizations nonetheless ascribe the problematic version of diversity to its organizational, rather than legal, design. Edelman et al. (2001), for example, acknowledge that the organizational diversity rhetoric had "some roots" in judicial doctrine (p. 1627), but portray diversity practices applied by organizations as a *transfiguration* of the legal ideal of diversity (p. 1591). Criticizing the dissociation of diversity from civil rights values in the organizational field, they claim that "[managerial] diversity rhetoric replaced the legal vision of diversity, which is grounded in moral efforts to right historical wrongs" (p. 1626; see also p. 1632). Similarly, Edelman (2016)

[15] *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986); *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 493-94 (1989); and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 220-21 (1995).

describes the corporate discourse on diversity as "perhaps the most powerful form of managerialization [of law] that has occurred." (p. 149). And Edelman, Smyth, and Rahim (2016) posit that "managerial rhetoric reframes affirmative action and antidiscrimination policies as diversity management." (id, 408; see also Edelman et al. 2011; Nakamura and Edelman 2019).

It is my contention, conversely, that legal rhetoric of Supreme Court Justices initially divorced diversity from civil rights, antidiscrimination values and affirmative action rationales. To be sure, processes of managerialization and other occurrences in the organizational arena obviously affect diversity practices. But it is not only its application within organizations that reframed antidiscrimination values as 'diversity management.' Affirmative action jurisprudence was originally responsible for that. Relying on critical race scholarship I suggest that there never existed a "legal vision of diversity, which is grounded in moral efforts to right historical wrongs." (Edelman et al. 2001, 1626). Not business corporations, but the Supreme Court in *Bakke,* was the first to explicitly reject grounding racial diversity in a public interest in "reducing the historic deficit of traditionally disfavored minorities," as an unlawful attempt at racial balancing.[16] The consideration of race was allowed in order to advance only one interest "the attainment of a diverse student body"[17] defined as "ethnic diversity" whose impetus, as we will see, is institutional and professional success, not racial justice causes.[18] This framing, exacerbated and entrenched in precedents since 1978, refuses the notion that diversity was ever meant to address historical wrongs or current racial injustices. It codified diversity as an individualistic concept, one grounded in a nonstructural, ahistorical

[16] *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), at 306-7. See also *Grutter v. Bollinger*, 539 U.S. 306 (2003) at 323-4.
[17] *Id*, at 311.
[18] *Id*, at 311-4.

approach to social ills that emphasizes nonracial aspects of institutional diversity on the expense of a meaningful consideration of structurally created identities, such as race.

Main themes within critical race literature detailed below make this point, exposing the legal version of diversity as a symbolic value from the onset. Paying attention to this literature can lead sociological research on diversity to (a) better understand the diversity rationale and its scope in order to adopt a more accurate definition of diversity as an empirical object of observation and measurement; and (b) distinguish diversity from equality, making the theoretical framework of their studies more precise. I will turn now to these objectives.

A. The scope of Diversity

Institutionalist studies on the effectiveness of diversity practices in organizations take for granted that diversity agendas are designed to alter the racial composition of organizations. This implicit assumption is the basis for their research design which ties the presence of a 'diversity program,' their independent variable, with the dependent variable, e.g., the odds of increasing the share of black Americans in management (Dobbin and Kalev 2018; Dobbin & Kalev 2017; Dobbin & Kalev 2016; Dobbin; Kalev et al. 2006). But the concept of diversity was never designed to revise the racial makeup of institutions. It is neither confined to nor does it require, a consideration of race or other legally protected statuses, for that matter.

Sociological writings on diversity initiatives that take a more critical approach make this point clear. Edelman, Fuller, and Mara-Drita (2001) for example, demonstrate how corporate rhetoric frames the concept of diversity to include "diversity of thought, lifestyle, culture, dress, and numerous other

attributes," which "appear on a par with diversity of sex and race" (p. 1590). They point out, moreover, that over 10% of the managerial articles they have examined "offered a construction of diversity that explicitly mentioned inclusion of or attention to whites and males" (2001, 1617). Executives of *fortune* 1000 companies were shown to exclude race and gender from their definition of diversity altogether (Embrick 2011), and white Americans from the general public understand diversity in race-neutral ways, too (Bell and Hartmann 2007). Even in federal agencies, diversity programs stress a focus on all elements of diversity, such as "different backgrounds, customs, beliefs, religions, languages, knowledge, superstitions, values, social characteristics, etc." (Kellough & Naff 2004, 66).

Whereas institutionalists view this broad definition of diversity as employing "nonlegal" dimensions of difference, such as "culture, geographic location, dress style, and lifestyle" (Nakamura and Edelman 2019, 2645; Edelman, et al. 2001, 1606-7), I argue that these dimensions are indeed part and parcel of the *legal* view of diversity. Diversity was forged from the onset as a wide-ranging 'cultural diversity,' or an even broader 'diversity of backgrounds,' aimed at fostering a general sense of accommodation for the varying 'traits' individuals might come to possess, among which race is only one consideration. Within this scheme, the distinction between lifestyle choices and idiosyncratic traits (e.g., personalities, tastes, hobbies), and structurally-based identities (e.g., race, gender, disability) is eroded. This diffused definition allows for an organization to boast its diversity policies without addressing racial diversity whatsoever. As one critical scholar's bitter irony suggests, even "being ideologically opposed to affirmative action could make one diverse" (Nunn 2008, p. 721). Legally designed in this broad way, diversity encompasses everyone and anyone as to become a meaningless

concept. Its invocation in a specific context, does not indicate, let alone guarantee, *racial* diversity in the organization.

But even if a diversity plan has made explicit racial diversity as its goal (by itself an unverified supposition), it is still necessary to determine whether we are witnessing meaningful racial diversity. By evaluating diversity as mere increases in numbers of underrepresented workers and nothing more, institutionalist studies move closer to measuring what Nancy Leong (2013) termed "the 'thin' version of the diversity objective," which relies on numbers and "is exclusively concerned with improving the superficial appearance of diversity" (id, 2169). Critical diversity studies offer a parallel critique of this approach calling it "diversity as acceptance" (Smith & Mayorga-Gallo 2017, 895). According to this concept, the presence of underrepresented groups is often equated with their integration in the workplace, despite enduring organizational inequalities. The 'thick' version of diversity, on the other hand, calls for an evaluation of the workplace's racial environment, the presence of segregation within the workplace and other measures of inequality (Leong 2013). Such an evaluation can also allow one to determine whether the implementation of the 'thin' version of diversity amounts to mere *tokenism*. As critical race theorists have argued, where insignificant numbers of African Americans are hired and promoted, meaningful change in organizational practices regarding race discrimination will not follow. Tokenism, in fact, makes things worse. Sociologists and critical race scholars alike have suggested that tokenism makes it harder for underrepresented employees to succeed and cannot alter existing power dynamics in institutions (Carbado & Gulati 2013; Nunn 2008; Kanter 1977).

The scope of diversity does not only pertain to the countless non-racialized diverse groups, but also to groups included within the sought out

racial diversity. The last consideration in this section thus asks who exactly are the racial groups a workplace diversity initiative is geared towards. A program aimed at the inclusion of African Americans in the workplace is not the same as one concerned with black employees more generally, or the yet larger pool of 'employees of color' and 'minorities.' Such overexpansive racial categories can include, inter alia, Native Americans, Asian Americans, Indian foreign workers, middle eastern immigrants, and arguably even American Jews. Only some of these groups share a history of oppression and exclusion in *American* workplaces. The recent incidents of police killing of unarmed African Americans, brought to public attention in the past few months, have proven these distinctions to be even more consequential. Critical thinkers of race have recently pointed out that "'racism' fails to fully capture what black people in this country are facing. The right term is 'anti-blackness'." (Ross, 2020). In this regard, the broad categories of 'people of color' and 'minorities' do little to address the unique and pervasive forms of discrimination endured almost entirely by African Americans in the American workplace and beyond.

The institutionalist studies mentioned above, although accounting for some intersectional identities (e.g., black women), largely lump together the various non-white racialized groups. According to such metrics, a workplace in which the percentage of 'black workers' in management has increased would be considered a diverse workplace and its diversity program a success, even if its ranks were comprised of, for example, black-Canadian visiting workers, first generation African immigrants and practically no African American employees (for a parallel critique of this approach in the education context see Brown & Bell 2008; Massey et al. 2007). Such an outcome neatly coincides with the legal vision of diversity, which is not preoccupied with repairing the racial harms perpetrated against African Americans. According

to the shaping of this value, there is no separate justification for the admission or the promotion of African Americans in comparison to other minority groups, as all similarly contribute to an organization's heterogeneity. African Americans employees and managers can thus be underrepresented in, or even absent from, an organization without harming its reputation as a diverse workplace.

By the same token, it is worth considering who are the African American workers eventually represented among the ranks of American organizations in the intersection of race and class (Crenshaw 1989). Derrick Bell cautioned that they are most likely "the children of wealth and privilege" (Bell 2003, 1632). And other critical race theorists have pointed out that black workers who fail to 'perform whiteness' by behaving in ways that are consistent with what are perceived to be 'white norms' are penalized in the workplace for being 'too black' (Carbado & Gulati 2013). Performing whiteness can be a costly endeavor. Lauren Rivera (2012) for example, showed that 'cultural homogeneity,' which determines who will eventually be hired by elite firms, is signaled by class markers and extracurricular activities associated with the upper-middle class. Ellen Berrey (2015) has similarly shown how diversity discourse allows for the "selective inclusion" of few carefully chosen members of oppressed groups. These empirical accounts suggest that the diversity rationale may facilitate a denial of access to working class African Americans in comparison to their affluent peers.

To summarize, the diffused legal vision of diversity, which insists on deemphasizing race, treating it as one 'personality trait' among many, did not pass over the organizational field. Because diversity's scope is so broad, its relation to race so tenuous, and its potential for remedying past injustices principally denied, the institutionalists' hypothesis that an organizational

diversity program, if only authentically followed, could alter the racial composition of an institution, begs reexamining. The intersectional, intra-racial quandaries mentioned here problematize this assumption further. Whether followed sincerely or ceremonially, this section suggested, the current legal vision of diversity, despite its celebratory rhetoric is not aimed at increasing the share of African Americans in the workplace, let alone at striving for more substantial aspects of racial equality. It is, in that sense, the paradigmatic symbolic legal value.

B. Diversity Versus Racial Equality

The uncritical view of the legal concept of diversity in institutionalist empirical studies becomes glaring when scholars use the diffused and unspecified ideal of 'diversity' interchangeably with more robust concepts such as *antidiscrimination* (Dobbin & Kalev 2018, 52), *integration* (Kalev, Dobbin & Kelly 2006, 611), *equal opportunity* (Dobbin & Kalev 2017, 811; Nakamura & Edelman 2019, 2648), and the *redress of inequality* (Kalev et al. 2006, 589-591, 610-612; Dobbin, Schrage & Kalev 2015, 1014). Kalev et al. (2006), for instance, refer to diversity programs as practices that "address social–psychological and social–relational sources of inequality" (p. 611). Yet nowhere in that study, or equivalent studies, have researchers shown that diversity initiatives were meant to address the sources of inequality at all. To the contrary: critical race scholars have underscored how the legal idea of diversity excludes the meaningful remediation of inequality as part of its rationale.

Diversity, claims prominent critical race scholar Derrick Bell, is "a serious distraction in the ongoing efforts to achieve racial justice." (Bell 2003, 1622). Not only is diversity not meant to promote racial equality, the critique goes, but it was introduced by the Supreme Court as a competing

rationale for affirmative action precisely because it does not espouse a vision of racial equality that might threaten current racial hierarchies (Nunn 2008, 726; Ford 2005, 52). This critique holds true from a historical perspective as well. Drawing on archival materials Asad Rahim recently suggested that Justice Powell's turn to diversity in *Bakke* "was motivated, at least in part, by a desire to deradicalize college campuses" not by a racial justice imperative (Rahim 2020, 1424).

By equating racial diversity with cultural and ethnic pluralism, Richard Ford explains, the Supreme Court in *Bakke* underscored "the innocent 'fact' of cultural difference over the politically imposed wrongs of status hierarchy." (2005, 45). Diverting attention away from a necessary disavowal of racial oppression to a seemingly neutral plea for tolerance, diversity discourse "mangles the historical record, softens the diagnosis of social injustice and as a result prescribes a palatable placebo in place of a badly needed, if bitter, pharmaceutical." (Ford 2005, 53; Ford 2002). Critical diversity scholars have similarly argued that 'diversity ideology' "both constructs [racial] difference as natural and disavows its negative impact on the lives of those who are so constructed" (Bell and Hartmann 2007, 910; see also Andersen 1999; Embrick 2011).

In these ways, not only does diversity fail as a racial justice concept, but it also works to obscure and conceal racism, while creating an appearance of inclusivity and accommodation (Ford 2005; Hutchison 2008; Bell and Hartmann 2007). In so doing the notion of diversity has also pushed aside more radical and substantive solutions for inequality, which "focus on the need to remedy past discrimination, address present discriminatory practices,

and reexamine traditional notions of merit..." (Lawrence III 2001, 931; see also Roithmayr 2004; Delgado 1991).[19]

This legal design of diversity leads Derrick Bell to portray diversity objectives as first and foremost an interest of white Americans facing an increasingly diverse job market and global economy. The race-conscious admission policy in the *Grutter* case gained Justice O'Connor's vote, he suggests, only because it "minimizes the importance of race while offering maximum protection to whites." (id, 1625; Hutchison 2008). In that sense, organizational diversity efforts fit neatly with Bell's famous 'interest convergence theory,' according to which "the interest of Blacks in achieving racial equality will be accommodated only when it converges with the interests of whites" (Bell 1980, 523). Black Americans who gain access to an organization because of its diversity policy, he argues, simply happen to be "the fortuitous beneficiaries of a ruling motivated by other interests." (Bell 2003, 1625). As another critical race theorist put it, "the reason the Supreme Court found a compelling state interest in *Grutter* was that people of color could be used as a means to white ends." (Nunn 2008, 724; Fair 2004; Smith & Mayorga-Gallo 2017). This idea is closely tied to the critical notion of the commodification of race as part of the diversity discourse, a process through which nonwhiteness is assigned a market value and tokenistic racial representations are favored (Leong 2013). By focusing on the advantages that diversity creates for whites, nonwhite people are commodified and "used by

[19] Some of these critiques were grounded empirically. Ellen Berrey demonstrated how diversity discourse is "a mechanism of containing and co-opting racial justice" that relieves organizations of their responsibility for inequality in their midst (Berrey 2015, 272). And psychologists have shown in experiments how the presence of diversity structures in organizations conceals and legitimizes racist and sexist institutional practices (Kaiser et al., 2013; Brady et al., 2015).

whites as objects that serve to benefit, entertain, or color the lives of whites" (Smith & Mayorga-Gallo 2017, 897).

Understanding that the legal version of diversity is not tantamount to, and is largely at odds with, racial equality, can produce research that is more critically theorized. Before concluding that diversity initiatives fail, institutional sociologists should consider whether they in fact play out in the ways they were meant to from the start. To suggest, like institutionalists do, that the problem with diversity lies with certain ill-conceived diversity initiatives or the ways by which they are carried out by organizational actors, is to miss a critical point about the *a priori* theoretical incapability of the diversity concept, as a symbolic legal standard, to address inequality.

CONCLUSION: WHEN THE LEGAL STANDARD IS SYMBOLIC

Institutionalist studies on diversity are impressive quantitative analyses of organizational practices. As we have seen, however, these studies treat the presence of diversity practices in organizations as proxy for efforts to alter the racial composition of organizations and as synonymous with equality. When their findings show a tenuous relation between the two variables, scholars conclude that diversity programs do not work, whether because of inauthentic or incomplete compliance by employers. In that, these studies are part of the institutionalist tradition demonstrating how employers' compliance with civil rights legislation is often a facial commitment to equality and antidiscrimination in the workplace, which is symbolic and strategic in nature (Meyer and Rowan 1977; Edelman 1990, 1992, 2016; Edelman & Suchman 1997; Dobbin 2009; Dobbin et al. 1993; Sutton et al. 1994; Edelman & Petterson 1999; Edelman et al. 1991, 1999, 2011; Kalev at al. 2006). When it comes to diversity in organizations, however, explaining diversity's failure as another instance of "window dressing" by uncommitted

employers (Kalev et al. 2006, 610; Edelman et al. 2001; Nakamura & Edelman 2019) is an indictment of employers that indefensibly leaves the problematic concept of diversity unscathed.

Relying on critical conceptions of diversity, this paper suggested that institutionalist studies on diversity should consider the symbolic nature of the legal standard of diversity and its inherent theoretical limitations. Replacing the original rationale for affirmative action policies meant to urgently address past and present racial injustices, the concept of diversity was severed from substantive goals of racial equality by the Supreme Court. Cast in all but colorblind terms of 'diversity of backgrounds,' in which race plays only a limited role if any, the legal commitment to diversity already lacked any meaningful substance capable of combating pervasive racial discrimination. It was broadly defined by the court to include many tastes and backgrounds thus diluting the salience of race within that scheme, and it obscured institutional racism under the guise of celebrated cultural differences.

While institutionalists treat the legal concept of diversity as a substantive legal standard hollowed out by organizational practices, the critical inquiry into diversity exposes it as a double legal standard, symbolic in its very nature. Superficially speaking the language of racial inclusion, the diversity discourse maintains the current hierarchical social structure. Its legal scope was carefully demarcated to exclude any attempt at addressing the root causes of racial discrimination and inequality. Organizational actors who implement that ideal may do so authentically or ceremonially, but diversity's failings cannot be ascribed to employers' hypocrisy or incompetence alone. Rather than an instance of symbolic compliance with civil rights norms, the case of diversity in organizations is best described, in light of critical race theory, as

authentic compliance with a *symbolic* legal standard that by its very definition cannot deliver on law's promise of racial equality.

When social scientists demonstrate that organizational diversity programs do not increase the share of African Americans in high level positions in organizations, they are painfully right. Such findings, however, do not demonstrate that "diversity programs fail," but rather that they succeed. As I have argued throughout this paper, the legal concept of diversity in the American workplace works precisely in the ways its legal authors intended it to.

BIBLIOGRAPHY

Abrams, Kathryn. 1991. "Hearing the Call of Stories." *Cal. L. Rev.* (79): 971-1004.

Andersen, Margaret L. 1999. "Diversity without Oppression: Race, Ethnicity, Identity and Power." Pp. 5-20 in *Critical Ethnicity: Countering the Waves of Identity Politics*, edited by M. Kenyatta. Maryland: Rowman & Littlefield.

Bell, Derrick. 1980. "Brown v. Board of Education and the Interest-Convergence Dilemma," *Harv. L. Rev*. (93) 518–533.

———. 2003. "Diversity's Distractions," *Colum. L. Rev.* (103): 1622–1633.

Bell, Joyce M. and Douglas Hartmann. 2007. "Diversity in Everyday Discourse: The Cultural Ambiguities and Consequences of 'Happy Talk.'" *American Sociological Review* 72(6): 895–914.

Bendick, M., Mary L. Egan and Suzanne M. Lofhjelm. 2001. "Workforce diversity training: From anti-discrimination compliance to organizational development." *Human Resource Planning* (24): 10–25.

Berrey, Ellen. 2015. *The Enigma of Diversity: The Language of Race and the Limits of Racial Justice*. Chicago: Chicago University Press.

Bonilla-Silva, Eduardo and Tukufu Zuberi. 2008. "Toward a Definition of White Logic and White Methods." in *White Logic, White Methods: Racism and Methodology*. Maryland: Rowman & Littlefield Publishers: 3-30.

Brady Laura M., Cheryl R. Kaiser, Brenda Major and Teri A. Kirby. 2015. "It's Fair for Us: Diversity Structures Cause Women to Legitimize Discrimination," *Journal of Experimental Social Psychology* (57): 100–110.

Brown, Kevin and Jeannine Bell. 2008. "Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions," 69 *Ohio St. L. J.* 1229–1283.

Carbado, Devon W. 2011. "Critical what what?" *Conn. Law Rev.* 43: 1593–643.

Carbado, Devon W. and Mitu M. Gulati. 2013. *Acting White? Rethinking Race in Post-Racial America*. Oxford: Oxford University Press.

Carbado, Devon W., and Daria Roithmayr. 2014. "Critical Race Theory Meets Social Science." *Annu. Rev. Law Soc. Sci.* 10:149–67.

Crenshaw, Kimberly. 1989. "Demarginalizing The Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics." *Univ. Chic. Legal Forum* 1989(1):139–167.

Crocker, Thomas P. 2007. "Envisioning the Constitution," *Am. U. L. Rev.* (57): 1–72.

Delgado, Richard. 1991. "Affirmative Action as a Majoritarian Device: Do You Really Want to Be a Role Model?" *Mich. L. Rev.* (89): 1222–1231.

Dobbin Frank. 2009. *Inventing Equal Opportunity*. Princeton, NJ: Princeton Univ. Press.

Dobbin, Frank and Alexandra Kalev. 2007. "The Architecture of Inclusion: Evidence from Corporate Diversity Programs." *Harvard Journal of Law & Gender* (30): 279-301.

———. 2016. "Why Diversity Programs Fail: And what works better." *Harvard Business Review* (July-August 2016): 52–60.

———. 2017. "Are Diversity Programs Merely Ceremonial? Evidence-Free Institutionalization." in *The Sage Handbook of Organizational Institutionalism* (Roystone Greenwood, Christine Oliver, Thomas B. Lawrence and Renate E. Meyer, eds.) (London: Sage): 808–828.

———. 2018. "Why Doesn't Diversity Training Work? The Challenge for Industry and Academia." *Anthropology Now* 10(2): 48–55.

Dobbin, Frank, John Sutton, John Meyer, and Richard Scott. 1993. "Equal Employment Opportunity Law and the Construction of Internal Labor Markets." *American Journal of Sociology* 99(2): 396–427.

Dobbin, Frank, Alexandra Kalev and Erin Kelly. 2007. "Diversity Management in Corporate America," Contexts (6): 21–28.

Dobbin, Frank, Soohan Kim, and Alexandra Kalev. 2011. "You Can't Always Get What You Need: Organizaitonal Determinants of Diversity Programs," *American Sociological Review* 76(3): 386–411.

Dobbin, Frank, Daniel Schrage, and Alexandra Kalev. 2015. "Rage Against the Iron Cage: The Varied Effects of Bureaucratic Personnel Reforms on Diversity." *American Sociological Review* 80(5): 1014–1044.

Edelman, Lauren B. 1990. "Legal Environments and Organizational Governance: The Expansion of Due Process in the Workplace." *American Journal of Sociology* 95(6): 1401–40.

———. 1992. "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law." *American Journal of Sociology* 97 (6): 1531–76.

———. 2016. *Working Law: Courts, Corporations, and Symbolic Civil Rights*. Chicago: Univ. Chicago Press

Edelman, Lauren B., Stephen Petterson, Elizabeth Chambliss, and Howard S. Erlanger. 1991. "Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma." Law and Policy 13:73–97.

Edelman, Lauren B., and Mark C. Suchman. 1999. The legal environments of organizations. Annu. Rev. Sociol. 23:479–515

Edelman, Lauren B., and Stephen Petterson. 1999. "Symbols and Substance in Organizational Response to Civil Rights Law." Special issue, The Future of Affirmative Action. Research in Social Stratification and Mobility 17:107–35.

Edelman, Lauren B., Christopher Uggen, and Howard S. Erlanger. 1999. "The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth." American Journal of Sociology 105 (2): 406–54.

Edelman, Lauren B., Sally Riggs Fuller and Iona Mara-Drita. 2001. "Diversity Rhetoric and the Managerialization of Law," *American Journal of Sociology* 106(6): 1589–1641.

Edelman, Lauren B., Linda H. Krieger, Scott R. Eliason, Catherine R. Albiston and Virginia Mellema. 2011. When organizations rule: judicial deference to institutionalized employment structures. *American Journal of Sociology* 117(3):888–954

Edelman Lauren B., Aaron C. Smyth, and Asad Rahim. 2016: "Legal Discrimination: Empirical Sociolegal and Critical Race Perspectives on Antidiscrimination Law." *Annu. Rev. Law Soc. Sci.* 12: 395–415.

Embrick, David G. 2011. "The Diversity Ideology in the Business World: A New Oppression for a New Age." *Critical Sociology* 37(5): 541–56.

Fair Bryan K. 2004. "Taking Educational Caste Seriously: Why Grutter Will Help Very Little." *Tul. L. Rev*. (78): 1843–1875.

Ford, Richard T. 2002. "Beyond 'Difference': A Reluctant Critique of Legal Identity Politics" in *Left Legalism/Left Critique* (Wendy Brown and Janet Halley eds.) Durham: Duke University Press: 38–79.

———. 2005. *Racial Culture*. Princeton, NJ: Princeton University Press.

Hartmann, Heidi I. 1987. "Internal labor markets and gender: a case study of promotion." In *Gender in The Workplace* (C. Brown, JA Peckman ed.) Washington, DC: Brookings Institution: 59–105.

Hutchison, Harry G. 2008. "Moving Forward? Diversity as a Paradox? A Critical Race View." *Cath. U. L. Rev.* 57: 1059–1098.

Kaiser Cheryl R., Brenda Major, Ines Jurcevic, Tessa L. Dover, Laura M. Brady and Jenessa R. Shapiro. 2013. "Presumed Fair: Ironic Effects of Organizational Diversity Structures," *Journal of Personality and Social Psychology* 104(3): 504–519.

Kalev, Alexandra, Frank Dobbin, and Erin Kelly. 2006. "Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies," *American Sociological Review*, 71: 589–617.

Kanter, Rosabeth Moss. 1977. *Men and Women of the Corporation*. New York: Basic Books

Kellough Edward J. and Katherine C. Naff. 2004. "Responding to a Wake-up Call: An Examination of Federal Agency Diversity Management Programs," *Administration & Society* (36): 62–90.

King, Eden B.. Jeremy F. Dawson, David A. Kravitz And Lisa M. V. Gulick. 2012. "A multilevel study of the relationships between diversity

training, ethnic discrimination and satisfaction in organizations in organizations." *Journal of Organizational Behavior*, 33(1): 5–20.

Kirschenman, Joleen and Kathryn M. Neckerman. 1991. "We'd love to hire them, but …": the meaning of race for employers." in *The Urban Underclass* (C Jencks, PE Peterson eds.) Washington, DC: Brookings Institution: 203–232.

Kulik, Carol T. and Loriann Roberson. 2008a. "Common Goals and Golden Opportunities: Evaluations of Diversity Education in Academic and Organizational Settings," *Academy of Management Learning and Education* (7): 309–31.

———. 2008b. "Diversity Initiative Effectiveness: What Organizations Can (And Cannot) Expect from Diversity Recruitment, Diversity Training, And Formal Mentoring Programs." 265–317 *In Diversity at Work* (A. P. Brief ed.), Cambridge: Cambridge University Press.

Lawrence, Charles R. III. 2001. "Two Views of the River: A Critique of the Liberal Defense of Affirmative Action" *Colum. L. Rev.* (101): 928–975.

Leong, Nancy. 2013. "Racial Capitalism," *Harv. L. Rev.* (126): 2151–2226.

Leslie, Lisa M. 2019. "Diversity Initiative Effectiveness: a Typological Theory of Unintended Consequences" *Academy of Management Review* 44 (3): 538–563.

López, Ian Haney. 2006. "Introduction: On the Necessity and Challenges of Race Scholarship." in *Race, Law and Society*: xi–xxii.

Matsuda Mari J. 1987. "Looking to The Bottom: Critical Legal Studies and Reparations." *Harv. C.R.-C.L. L. Rev.* 22: 323–99.

Massey, Douglas S., Margarita Mooney, Kimberly C. Torres and Camille Z. Charles. 2007. "Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States," *American Journal of Education* 113: 243–271.

Meyer, John W. and Brian Rowan. 1977. "Institutionalized organizations: Formal structure as myth and ceremony." *American Journal of Sociology*, 83(2): 340–363.

Moss, Phillip and Chris Tilly. 2001. *Stories Employers Tell: Race, Skill, And Hiring in America* (New York: Russell Sage Found).

Naff, Katherine C. and Edward J. Kellough. 2003. "Ensuring Employment Equity: Are Federal Diversity Programs Making a Difference?" *International Journal of Public Administration* 26:1307–36.

Nakamura, Brent K. and Lauren B. Edelman. 2019. "Bakke at 40: How Diversity Matters in the Employment Context" *U.C. Davis Law Review*, Vol. 52, No. 5: 2627–2680.

Nishii, Lisa H., Jasmien Khattab, Meir Shemla, & Rebecca M. Paluch. 2018. "A Multilevel Process Model for Understanding Diversity Practice Effectiveness." *Academy of Management Annals* 12, No. 1: 37–82.

Nunn, Kenneth B. 2008. "Diversity as a Dead-End." *Pepp. L. Rev.* 705 (35): 705–732.

Obasogie, Osagie K. 2013 "Foreword: Critical Race Theory and Empirical Methods." *UC Irvine Law Rev.* 3:183–86.

Post Robert C. 2003. "Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law," *Harv. L. Rev.* 117(4): 4–112.

Rahim, Asad. 2020. "Diversity to Deradicalize" *California Law Review* 108 no. 5: 1423–1486.

Richard, Orlando C., Hyuntak Roh, And Jenna R. Pieper. 2013. "The Link Between Diversity and Equality Management Practice Bundles and Racial Diversity in the Managerial Ranks: Does Firm Size Matter?" *Human Resource Management* 52(2): 215–242.

Rivera, Lauren A. 2012. "Hiring as Cultural Matching: The Case of Elite Professional Service Firms." *American Sociological Review* 77(6): 999–1022.

Roithmayr, Daria. 2004. "Tacking Left: A Radical Critique of Grutter," *Const. Comment.* (21): 191–220.

Ross, Kihana M. 2020. "Call It What It Is: Anti-Blackness When Black People Are Killed by The Police, 'Racism' Isn't the Right Word." *NYTimes* (June 4, 2020).

Sutton, John R., Frank Dobbin, John W. Meyer, and W. Richard Scott. 1994. "Legalization of the Workplace." *American Journal of Sociology* 99 (4): 944–71.

Wilkins, David B. 2004. "From 'Separate Is Inherently Unequal' to 'Diversity Is Good for Business': The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar." *Harvard Law Review* 117, No. 5: 1548–161.