

“Implicit bias” has become a popular topic in legal circles, as “diversity” has begun to wane. Unfortunately, the way both these topics are discussed in our legal community does not genuinely challenge our behavior and assumptions enough to meaningfully address the persistent inequities that bias and lack of diversity implicate.

In part, the disconnect I’m perceiving is simply what happens with concepts that aim to address challenging problems; before long the concepts become so watered down that they cease being useful. “Implicit bias” and “diversity” seem headed the way of “equality” and “affirmative action” as ideas that were briefly challenging but became less and less meaningful.

But “implicit bias” and “diversity” are also fundamentally too limited as means for addressing persistent inequities. Both concepts allow us to make minimal efforts toward that end without dealing with the root causes for those inequities. Our diversity efforts, for example, likely will, at best, motivate us to allow a few people from under-represented backgrounds into privileged spaces, without dealing with the racism, sexism, heterosexism, homophobia, ableism, and other biases that have caused our structures to function to exclude and to assign value in ways that disadvantage people who do not fit into our dominant paradigms. And without dealing with those biases, we will tend to allow in only those who fit into and justify those paradigms, leaving our biases unchallenged.

“Implicit bias,” likewise, frames the concept of bias too narrowly. As currently discussed in every program I have seen on the topic, the focus is on persuading participants (typically using the Harvard Implicit Association Test) that everyone has unconscious biases and encouraging us to “eliminate” them. However, bias is not exclusively or primarily manifested in individuals, and addressing bias as purely a problem of personal perception spares us the work of understanding what fuels, feeds, and reinforces our biases, work that is necessary if we are to address the problem of bias in any significant way.

As Robin DiAngelo has expressed very helpfully in discussing racism (the form of bias we, arguably, most resist addressing), the notion that racism consists primarily of individual acts of cruelty virtually guarantees that attempts to name and address racism will be met with predictable outrage. Under that conception, to name racism is to insult an individual.

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By Judge Darleen Ortega
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Such a conception “functions beautifully to protect racism by making it impossible to engage in the necessary dialogue and self-reflection that can lead to change.”¹

In reality, racism and other biases are primarily structural. All institutions have a dominant culture; all institutions function with deference to the comfort and needs of the privileged members of that dominant culture. As Ms. DiAngelo explains, “A structural understanding recognizes racism as a default system that institutionalizes an unequal distribution of resources and power between white people and people of color. This system is historic, taken for granted, deeply embedded, and it works to benefit whites.”² Most of the ways that racial and other biases are perpetuated are cultural and structural; meaningful change is not possible without addressing structures.

In most ways, the legal system is terrible at addressing institutional racism and other forms of structural bias; it mostly doesn’t attempt to do so. But the legal system does contain a good example of a sound effort at addressing structural bias. Inside the appellate court system, we understand that every appellant is at a structural disadvantage because a prior judge or agency has already concluded that the appellant should lose her case. For corresponding reasons, a respondent on appeal has a structural advantage. As a consequence, we allow appellants to file the opening brief, wherein they identify the issues on appeal. In a sense, the appellant sets the agenda. The respondent’s answering brief engages within

the framework conceived by the appellant, and then the appellant is allowed to reply. A similar thing happens at oral argument: the appellant argues first; the respondent then



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answers; and finally the appellant may make a rebuttal argument. This way of proceeding does not entirely correct structural bias, but it is a sound way to structure the proceedings so as to undercut structural bias.

What if, instead, the judges went into a private room with the respondent, talked through the case with him, came to a tentative resolution, and then called in the appellant and asked her what she thought about that tentative resolution? No matter how articulate and careful the appellant were to be in that scenario, she would not have much chance of affecting the outcome of the case.

Unfortunately, the way we address structural bias of other kinds—like, for example, institutional racism—is to function as though no structural adjustment is needed, because we believe ourselves individually to lack racist intent. Consequently, a person who is at a structural disadvantage—as people of color demonstrably are in the legal system, for example—is likely to experience the legal system much like the appellant would in my hypothetical scenario. In fact, the hypothetical seems like a pretty good metaphor for what it feels like to function—not just to raise issues of bias but also to prove oneself at all, to achieve anything of significance—from a position at the margins.

No system—including the legal system—will address its structural biases

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without looking beyond individual bias and beginning the work of understanding how such biases manifest. Such work will take significant energy and resources and is likely to challenge us. A casual interest in implicit bias will not get us there, nor will incremental efforts at diversity that are aimed at finding “diverse” candidates who fit well into our existing systems. We need to begin to understand how structural bias works and to alter our ways of doing things to account for and begin to address it.

A problem is that structural bias is very hard to see if you are a beneficiary of it. A white person attempting to perceive how racism affects structures, for example, is like a fish attempting to perceive water. Addressing structural bias will necessarily involve recognition that the people most adept at recognizing structural bias are those at the margins, who are on the losing end of structural bias—the very people who are least likely to be setting the agenda, deciding what issues are important, and making the final call when a matter is in dispute. Addressing structural bias will involve giving priority to the voices that we are least inclined

to listen to.

We are not likely to undertake any of this work—including addressing implicit bias or meaningfully diversifying the judiciary and other places of privilege and leadership—without a sense of urgency. The work is too costly and difficult, and it is too difficult for those with privilege to imagine the upsides (though those upsides certainly exist). So, in the near term, here are some things to do to build an appropriate sense of urgency:

1. Acquire some education about racism. Participate in an Undoing Racism Workshop with the People's Institute (<http://pinwseattle.org/register.php>) or a Reframing Racism workshop or Reframing Equity e-course with the Center for Equity and Inclusion (<http://ceipdx.org/whatwedo/>).

2. Learn about white fragility: <http://www.alternet.org/news-amp-politics/11-ways-white-america-avoids-taking-responsibility-its-racism>.

3. Learn about moral licensing: <http://revisionisthistory.com/episodes/01-the-lady-vanishes>.

4. Read *The New Jim Crow*, by Michelle Alexander.

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5. Explore some of the ways that racism is bad for our bodies: <https://www.theatlantic.com/health/archive/2013/03/how-racism-is-bad-for-our-bodies/273911/>.

6. Explore Christena Cleveland's work on listening well as a person of privilege: <http://www.christenacleveland.com/blogarchive/2013/05/listening-well-as-a-person-of-privilege-the-complete-series>.

7. Watch *Get Out*: <http://portlandobserver.com/news/2017/mar/28/film-seep-your-consciousness/>.

8. Watch *I Am Not Your Negro* and read the work of James Baldwin. Mr. Baldwin said, for example:

I don't know if white Christians hate Negroes or not, but I know . . . the most segregated hour in American life is high noon on Sunday. That says a great deal for me about a Christian nation. It means I can't afford to trust most Christians, and I certainly cannot trust the Christian church. I don't know whether the labor unions and their bosses really hate me—that doesn't matter—but I know I'm not in their union. I don't know whether the real estate lobby has anything against black people, but I know the real estate lobby is keeping me in the ghetto. I don't know if the board of education hates black people, but I know the textbooks they give my children to read and the schools we have to go to. Now, this is the evidence. You want me to make an act of faith, risking myself, my wife, my woman, my sister, my children on some idealism which you assure me exists in American, which I have never seen.³

Endnotes

1. Robin DiAngelo, “11 Ways White America Avoids Taking Responsibility for Its Racism,” <http://www.alternet.org/news-amp-politics/11-ways-white-america-avoids-taking-responsibility-its-racism>.

2. *Id.*

3. James Baldwin, as transcribed in *I Am Not Your Negro: A Companion Edition to the Documentary Film Directed by Raoul Peck*, by James Baldwin and Raoul Peck (Vintage Books, 2017). Mr. Baldwin made these remarks during an interview on the Dick Cavett Show in 1968.



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