

EQUITY, DIVERSITY, AND INCLUSION PERPETUATE INEQUALITY: HOW DOMINATION SYSTEMS CO-OPT EVEN THE BEST OF INTENTIONS

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Abstract

Riane Eisler frames the social realities of individuals through a domination-partnership continuum, and Johan Galtung studies peace through the development of systems of violence – direct, cultural, and structural – in perpetuation of domination. In this paper, I argue that a synthesis of both systems helps us understand inequality and racism in the United States. As such, I propose narrating U.S. history as a system of capital extraction and production, locating it within the domination/partnership continuum and enforced by systems of violence. Through this narration and location, I identify law as a tool that transforms imagined social constructions and converts them into social realities that support systems of domination. Specifically, I propose that given the U.S. history of domination, attempts to implement Equity, Diversity and Inclusion strategies result in racial capitalism and perpetuate domination systems. Therefore, the undertaking of equity and inclusion requires a multi-disciplinary approach to reset the legal system and enforcement of justice grounded in values of healing and care.

Keywords: Equity; Diversity; Inclusion; Domination; Partnership; Violence; U.S. History; Law

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INTRODUCTION

In 2020, the United States was forced to grapple with high mortality rates that disproportionately impacted low-income Black and Brown communities during the COVID-19 pandemic (Centers for Disease Control and Prevention, 2020). In tandem, the police killing of George Floyd, a Black man, in Minneapolis in May 2020 during an arrest,

triggered anti-racism protests worldwide. These events made evident the different social realities that affect each person living in the United States. For some, they provided irrefutable evidence of institutional racism and its undeniable unequal impact. A *Washington Post* analysis of corporate pledges on racial justice after Floyd's death reported that the inquiry that followed, and the visibility of systems of inequality, moved top-earning U.S. corporations to express public support for the "Black Lives Matter" movement, followed by a \$50 billion pledge to combat inequality and racism (Jan et al., 2021). Fifty corporations promised to fund loans and grants, and to change their internal policy strategies by adopting 'Equity, Diversity, and Inclusion' (EDI) to address systems of inequality. However, the *Post* reporters found that these grand gestures accounted for less than 1% of the businesses' net income. Furthermore, many of these programs directly benefit the corporations extending mortgages and loans in Black and Brown communities. These gestures reveal a new scheme that commodifies non-whiteness as an asset for corporate exploitation and benefit. Leong (2013) explains that the mandate of corporations is to maximize returns for shareholders, and by adding non-white individuals through employment or board seats, they seek social legitimacy and approval predicated on the value that whites place on non-whiteness, thus creating racial capitalism (p. 2161).

This paper argues that domination, exercised as racism and subordination, was the primary thread weaving economic and legal systems as the United States organized as a new nation. Such systems of domination have evolved, but their basic framework has not changed despite centuries of attempts and some victories. This paper centers the inquiry in current corporate strategies of EDI. I suggest that given the long history of domination in this country, sustained by racism, inequality, and segregation, any changes necessitate the adoption of the partnership continuum to create the social realities of equity and inclusion, specifically in the legal and justice systems.

In a domination/partnership continuum, the social or lived realities of individuals serve as a barometer to measure where in the continuum a relationship stands (Eisler, 2002). Domination is recognizable by acts of violence – direct, structural, or cultural – that

protect and perpetuate a vertical, power-over hierarchy of exploitation, submission, and inequality (Galtung, 1969, 1990). Partnership relationships are recognized by horizontal, power-with engagements that seek and produce equality and mutual benefit (Eisler, 2002). In the US, the impact of those lived realities has reached the public's conscience. The new visibility of inequality presents an opportunity for change, and careful attention is warranted to avoid the mistakes of the past.

This paper argues that racism is one expression of domination systems (Eisler, 2002). Domination requires violence to exist (Galtung, 1969, 1996); this country, even before its independence as a nation state, adopted domination as the framework for the rule of law to guarantee economic success (Federici, 2018). In turn, the rule of law internalized domination and legitimized violence for self-preservation (Breton, 2005; Tuhiwai Smith, 2012; Rothstein, 2017). These dynamics create a self-reproducing system of needs-deficits, perpetuating systems that produce unequal and detrimental social realities for some (Galtung, 1969; Delgado & Stefancic, 2013). Corporations, in response to racism and inequality, are adopting strategies for EDI to be part of the solution. This paper argues that EDI strategies perpetuate domination in modern forms of racial exploitation.

Section 1 is a historical overview of domination systems in the US. Here, I highlight how efforts to dismantle racism and inequalities fail or become co-opted because of the embeddedness of domination in our governing and legal structures. This section narrates history from colonial times to the end of the first big effort ending with the Civil Rights Cases of 1875 and birth of the Jim Crow Era.

Section 2 reviews different forms of anti-discrimination strategies, beginning with the enactment of the Civil Rights Act of 1964. The section reviews the birth of affirmative action, the development of diversity and race as a commodity, and the creation of the multi-million-dollar industry seeking to cure racism and inequality, including the newest iteration of EDI strategies. Here, I argue that domination co-opted civil rights

goals and created capitalistic industries that continue to replicate domination. Specifically, I argue that EDI strategies perpetuate the domination paradigm.

Lastly, in the conclusion, I propose the need for additional multidisciplinary research that addresses the unequal social realities, the history of domination systems (structural violence) embedded in everyday life, and policy development that recognize human dignity, belonging, and social justice (Breton, 2005; Eisler, 2007; Tuhiwai Smith, 2012). Useful theories include peace-building theory (Galtung, 1996) and Indigenous knowledge of justice and ways of knowing (Breton, 2005; Tuhiwai Smith, 2012) combined with tools from transformational conflict theories (Miall, 2004; Taylor & Lederach, 2014). The goal for such an approach is to harness the opportunities brought by public outrage over inequality and racism to forge structural and cultural peace grounded in collaborative partnership systems that focus on “quality-of-life” indicators (Eisler, 2002, 2007; Narvaez, 2016; Taylor & Lederach, 2014). Such systems nurture power-with or horizontal power structures as opposed to the power-over hierarchies of domination.

THE HISTORY OF VIOLENCE AND DOMINATION

Peace theorist Johan Galtung (1969) and social systems theorist Riane Eisler (2002) suggest that systems of domination are difficult to recognize when they become embedded and normalized in day-to-day interactions. Systems based on domination depend on cultural, structural, and direct violence that are invisible to the dominant party (Galtung, 1969; Eisler, 2002). Critical race theorists recognize these forms of violence as imbalanced power dynamics that give rise to institutionalized racism and inequality in domination systems that shape social and cultural dynamics (Delgado & Stefancic, 2013).

In the US, modern systems of domination predate British American colonialism, and therefore, the formation of the nation state. Historian Silvia Federici (2018) recounts a European history in which economic systems based on “customary rights” was replaced

by capitalism. This process, grounded in a system of domination, necessitated a show and enforcement of violence to coerce cultural change. It required coordination between the church, the law, and public opinion that legitimized cruel and public punishment of women, “causing profound polarization in what had previously been communities structured by reciprocal bonds” (p. 16). This process of colonization, which began more than 300 years before Europeans colonized the Americas, provided the blueprint for our current systems of domination. Facing brutal forms of physical, emotional, and spiritual torture, women, the targets of such colonization, chose to comply rather than be subjected to torture and death. This process of domination reveals several factors that were later replicated for colonial control of Indigenous peoples and those forced into servitude: 1) use of extreme violence, from public shaming and torture to outright murder; 2) spiritual and moral value shifting: local healing traditions and practitioners are demonized and dehumanized to justify violence; 3) protesting or speaking against elites in the new system invites extreme violence; 4) social structures that create and define culture are built to support the new system, e.g. the church, which re-articulates morality and value systems; and 5) law sets parameters of acceptable social behavior and has the power of enforcement and punishment. All factors dehumanize the individuals involved, but grant moral and cultural privileges to the dominator in the system. One could argue that this sets a moral obligation to dominate.

By the time the English arrived in the Americas, domination was the internalized ruling system imported to colonial life. Historian Robert Beverley (1855) recounts that after the successful first expedition to British North America, by 1606, King James I had authorized two corporations to settle and administer the extraction of goods. With a mandate to maximize profits for its shareholders, these corporations enjoyed the support of the crown and were given rights to make “laws and regulations, subject only to the compatibility with English Law” as they saw fit (Beverley, 1855, Ch. 2, Sect 13). Colony managers realized very quickly that extraction could be complemented by production; laborers, however, were unavailable. The solution was the creation of a system of indentured servitude to satisfy labor needs in the new world (Bly & Haywood,

2015). Individuals, enticed by the promises of a new land, entered labor contracts to work for free for a predetermined time (two to seven years), in exchange for the costs of travel. In England, people convicted of felonies were given the option to face capital punishment in England or to be bound to servitude in the New World. Once they were under the control of the corporations, individuals experienced first-hand a brutal legal structure that ensured their obedience and compliant behavior. For example, in 1619, the Colony of Virginia passed a law legalizing whipping, dunking, and other forms of torture to “ensure the swift correction” of servants who “willfully neglected” their master’s commands (Bly & Haywood, 2015, pp. 4-5). By 1661, this form of public punishment was systematized with a mandate that every county adopt such practices. Indentured servants found that paying their debt and changing their status was difficult. Laws regulated their public and personal behavior. They were prohibited to marry, trade with local tribes, or engage in profit-making activities (Bly & Haywood, 2015). Any violations resulted in fines payable with tobacco leaves and extension of years of servitude (Bly & Haywood, 2015). This colonial system of exploitation proved highly profitable for European ruling elites. The need for increased hand labor gave way to the transatlantic slave trade, and as more people held in slavery arrived, indentured servitude contracts decreased, creating a racialized color-line marker of servitude. Within a few years, the vast majority of those in servitude were persons held as slaves (Bly & Haywood, 2015; Perea et al., 2007). Slavery in the United States, the ownership of one human being by another, was practiced in its most dehumanizing forms and required active systems of domination to sustain it.

Domination systems depend on structural violence legitimized and enforced by laws that facilitate the submission and suppression of the dominated by the dominator (Galtung, 1969, 2002; Eisler, 2002, 2007). Perea et al. (2017) point out that in 1723, the Slave Laws of Virginia codified rules for the “Government of Negroes, Mulattos, and Indians, bond or freed.” The newly adopted rules allowed the county court to exert extreme forms of punishment including “... by dismembering, or any other way, not touching life, ...” (torture) of repeated runaways after receiving complaints from the slave owner. If death happened during the “dismembering... stroke or blow given during

his correction...” the owner and court were exonerated of all responsibility (pp. 117-118). In case a slave was “killed by any other person” the owner could sue to recover damages for loss of property (Perea et al., 2017, verbatim quotes pp. 115-118).

The law in both legislative language and judicial decisions delineated the legal contours of rights, privileges, and obligations of those inhabiting the region now known as the United States of America. This delineation created a structure of acceptable individual behavior which, if challenged by those forced into slavery, carried state-sanctioned torture and even death. In other words, law draws lines around acceptable and unacceptable behaviors; it creates social realities. As these behaviors are reinforced and recur, they become culture – that is, those lines shape the way individuals see themselves within the community and in relation to ‘others’ (Brand-Jacobsen, 2002, p.18).

The Slave Laws of Virginia demonstrate how law draws the lines to reinforce domination through structural and direct violence, beginning with human trafficking, torture, and the legal attempts to take bodily sovereignty away from those living under slavery. Aided by the legal system, slavery had become an immutable characteristic of non-whiteness. Winch (2014) stated that even the legal status enjoyed by a few free Black people during colonial times did not protect them from civic and social segregation and maltreatment. The Virginia law codes specifically stated that freed Black people could not enjoy the same benefits as the English, and most colonies enacted laws or practices that made freedom unattainable. People enjoying freedom could never lower their guard, as the default assumption was that all Black people were slaves and to prove otherwise would require “overwhelming proof” (Winch, p. 24). Winch (2014) adds that the situation did not improve for Black individuals after the adoption of the U.S. Constitution; in fact, it worsened with the enactment of the Fugitive Slave Act in 1793, and free Black people were kidnapped into slavery after being accused of being runaways.

Domination is Transferred to the U.S. Constitution

Since its beginning, the United States has carried out a colonial system of domination characterized by legalized racial segregation (structural violence), racist hierarchies of human value (cultural violence), and use of corporal punishment (direct violence), to enforce it. In fact, the unity of the new country has always depended on the maintenance of systems of domination. This system, so deeply embedded, conditioned the formation of this country on the adoption of slavery as a protected economic system (U.S. Const., Art. I, § 9, Cl. 1). This clause in the U.S. Constitution created the legal framework, and therefore the culture, that allowed states to practice and enforce slavery and segregation.

The economic needs of the new country were used to justify systems of domination to subjugate people and extract profits from the resources at hand. This made necessary the continued taking of lands and the limiting of Native American sovereignty (Wolfe, 2006), while controlling and subjugating enslaved individuals. As the new nation formed, legitimized violence was embedded in the structural and cultural governing systems. The new Constitution, a legal document, distributed legal rights and created a national culture tolerant of domination. It set up a governmental structure in which one race of people had the legal right to dehumanize another, using physical, moral, and emotional torture. The document was also explicit about the legal entitlements to use slave ownership to increase political and economic power. For example, Article I, Section 3, Clause 3 of the Constitution counts individuals held in slavery as “three-fifths of all other persons” for calculating the number of House Representatives from each state to serve in Congress and to calculate individuals’ property tax. The former increased representation and the later decreased tax liability. Article IV, Section 2, Clause 3, also known as the Fugitive Slave Clause, codified slavery as an immutable characteristic, making it a condition that follows the individual regardless of their regional jurisdiction. This clause also codifies direct violence when it takes away individuals’ sovereignty over their own bodies by imposing an obligation to return escaped individuals to their “owners.” It is worth pointing out that this clause mandated compliance even from those who opposed slavery. Furthermore, it created a culture of

domination in which individuals were forced participants in a system of slavery even if they opposed it. By defining these behavioral rules or ‘legal line drawing,’ the first Constitution institutionalized the structural violence of slavery and legitimized domination in its new government’s formation documents.

Galtung notes that “the archetypal violent structure ... has exploitation as a centerpiece” (1990, p. 293). It is undeniable that from the time the English stole the land that became the United States and engaged in policies of extraction, up until the 1860s, the U.S. Constitution protected an economic system of exploitation dependent on human domination enforced through direct violence. It is also undeniable that not everyone agreed with this system, and as those held in slavery fought for their freedom, organized, escaped, and even revolted (Aptheker 1973, 10-16), whites who believed in abolition began to speak up against slavery, even if quietly and gradually (Boonshoft, 2012). Almost immediately after the election of abolitionist president Abraham Lincoln in 1860, seven of the southern slave-holding states sought to secede from the union, electing a president of their own and initiating the Civil War in 1861.

Legislative Actions of the U.S. Government – The Reconstruction Era

In 1863 President Lincoln issued the Emancipation Proclamation, which intensified the opposition of southern states to ending slavery. Following intense fighting, the end of the Civil War in 1865 gave way to the Reconstruction Era. In this period, the U.S. Congress took sweeping action, extending legal personhood and legal recognition of national rights to formerly enslaved individuals. However, this action did not change the status of other non-white individuals, namely Native Americans.

The North’s victory in the war resulted in a majority Republican representation in Congress following the voluntary withdrawal of representatives from the Confederate states after the war (39th Congress, 1867, pp. 151-153). In 1865, through the ratification of the 13th Amendment, Congress attempted to abolish the structural violence inherent in the system of slavery, and with it, the economic system that justified it. This amendment abolished slavery, “except as a punishment for crime

whereof the party shall have been duly convicted...” (U.S. Const. amend. XIII, § 1). It is worth noting how domination moves through time in self-preservation. Michele Alexander (2010) points out that the 13th Amendment did not completely abolish slavery, but rather only narrowed its application. The exception shifted the right to this application to the enforcement branch of the legal system, where that domination practices continue. This form of structural violence is present in modern policies that fuel mass incarceration and racialized direct violence against Black and Brown individuals.

In 1866, Congress passed the Civil Rights Act over President Andrew Johnson’s veto, recognizing formerly enslaved individuals as citizens of the United States. This Act extended access to legal and civic participation to those covered by the 13th Amendment, including the ability to enter contracts, own property, bring actions in the courts, and enjoy full protection under federal law (History, Arts, & Archives, n.d. (b)). The ratification of the 14th Amendment in 1868 furthered congressional attempts to deconstruct the structural violence of the prior Constitution by guaranteeing citizenship to persons born or naturalized in the United States, specifically addressing the status of formerly enslaved individuals. This amendment also prohibited states from depriving citizens of “life, liberty, or property without Due Process of law; nor deny any person within its jurisdiction the equal protection of the laws” (U.S. Const. amend. XIV, § 1). In 1870, the 15th Amendment extended voting rights to former male enslaved individuals (U.S. Const. amend. XV). Five years later, Congress passed the Civil Rights Act of 1875 criminalizing racial discrimination by private businesses, according to which the owners were deemed personally liable for racial discrimination. The war left the South with economic debt, a destroyed infrastructure, the loss of free means of production (slavery), and the one fact segregationists feared the most, according to W. E. B. Du Bois: the legal obligation to “conceive of Negroes as men; in their minds the word ‘Negro’ connotes ‘inferiority’ and stupidity’ lightened only by unreasoning gayety and humor” (1935, p. 726). Nationally, these amendments and legislative actions changed the structure of government so profoundly that historian Eric Foner (2019) calls

this the “second founding of the country,” where “republicans condemned slavery not simply as a violation of basic human rights but as an affront to the nation” (p. 31).

Cultural and Structural Domination Tarnished the First Great Attempt at Equity and Inclusion

Constitutional Amendments 13, 14, and 15 marked the first great attempt to change structural and cultural governance attitudes and frameworks away from a system of domination enforced and delivered as slavery. While these amendments succeeded in creating a different structural construction of rights, legislative power to dismantle cultural domination proved ill-equipped, resulting in targeted violence, such as lynching, directed at the newly freed individuals.

With the 13th Amendment in 1865, Congress drafted a new social contract adopting a Jeffersonian theory of government centering on the articulation that “all men are created equal” and on the recognition of the unalienable right to life, liberty, and the pursuit of happiness (Henkin, 1987). Within a few years, Congress had expanded the meaning of “We the People,” originally conceived to apply only to “those white males qualified for self-government by intelligence, ‘virtue,’ commitment (as manifested by ownership of sufficient property)” (Henkin, 1987, p. 263), to include formerly enslaved individuals. The 14th Amendment (1868) recognized the newly freed persons as citizens of the United States. This recognition of citizenship was followed by the 15th Amendment (1870) granting voting rights to Black males. This legal personhood created rapid change in the landscape of civic participation. The new citizens attempted to register to vote in large numbers. White individuals, accustomed to the hierarchical culture of racism, resented and feared their new peers. These new social constructions of equality resulted in the creation of Black Codes. McPherson (1871) recounts that these laws criminalized behaviors of non-white individuals, specifically targeting formerly enslaved individuals. Black Codes criminalized unemployment, and under these laws, those without proof of employment would be charged as “vagrants,” would be fined, and if unable to pay, would be turned over as laborers to whoever would pay the fine on their behalf. In addition, counties mandated an inventory of orphaned

minors who would be returned to their previous owner if they could not be placed with *someone suitable* [emphasis added] to care for them. Minors were placed in apprenticeships that they were prohibited to leave without the consent of their ‘keeper.’ Keepers could “pursue and recapture” minors who left without consent (McPherson, 1871, pp. 28-30).

Despite the ongoing attempts at domination and subordination, a record number of Black men were elected to prominent positions in the U.S. Senate and House of Representatives (History, Arts, and Archives, n.d.(a)), state legislatures, and even governorships (History.com Editors, 2021). Congress passed the Civil Rights Acts of 1866 and 1875 mandating desegregation and providing legal instruments for its enforcement. However, these victories proved fleeting, and within a few years, these civic gains were lost. By 1883, the system of domination was re-established when the U.S. Supreme Court held unconstitutional the Civil Rights Acts of 1866 and 1875 (Civil Rights Cases, 1883).

Not surprisingly, 200 years of entitlements received through domination, and the dehumanization it required, created a culture in which racial identifiers became the determinants of power-over hierarchical human value. The legal system was once again a tool to enforce a system of domination, exploitation, and dehumanization during the Jim Crow Era (1875-1964).

Black peoples’ electoral success in congressional terms shortly after the Civil War demonstrates Congressional attempts and success at challenging the structural violence of slavery. However, the short-lived success and rapid return of racial exclusion demonstrate how decades of domination expressed in structural and cultural violence had been internalized by individuals who, unaccepting of the human equality of those formerly enslaved, resorted to acts of direct violence as an acceptable and normal response at the mere threat of losing their dominant status. This internalization was self-evident when the Civil Rights Act of 1875 was deemed unconstitutional, and private citizens, affirming the myth of white supremacy, publicly tortured, terrorized, and

murdered Black citizens during the Jim Crow Era, a period extending from 1883 to 1964. In this period of U.S. history, we find evidence that recognition of legal personhood is key to civic participation; it is also evident that laws and legislation are not enough to change domination systems once they are culturally normalized and internalized. Structural challenges to inequality fall short because, through the internalization of domination, power-over structures are seen as the only legitimate power relationship; therefore, whiteness, as a construction of white supremacy, cannot conceive of itself in any other role other than dominant. This internalization then normalizes, justifies, and legitimizes violence to maintain the orderly power-over structure.

NEW EFFORTS TOWARD EQUITY AND INCLUSION: AFFIRMATIVE ACTION

During the Jim Crow Era, U.S. presidents, aware of the discrimination based on race, attempted to break cycles of racism by promoting anti-discrimination federal laws using the legislative process, but their efforts were frequently derailed by segregationist congressmen (MacLaury, 2010). To overcome this opposition, Presidents Franklin Roosevelt (1933-1945), Harry Truman (1945-1953), and Dwight Eisenhower (1953-1961) used “limited Executive Orders barring discrimination by government contractors or federal employers” (MacLaury, 2010, p. 44). Seeking to institutionalize anti-discrimination efforts, Roosevelt’s Executive Order 8802 formed the Fair Employment Practices Committee (FEPC) as an enforcement agency (MacLaury, 2010). This agency would later evolve into the Equal Employment Opportunity Commission (EEOC). Overall, these presidential executive orders positively impacted desegregation, but were short-lived and were easily challenged and changed by segregationists in Congress (MacLaury, 2010).

Litigation as a Strategy for Equity and Inclusion

Despite experiencing brutal violence, African Americans led the way to make true the aspirational promises expressed in the Jeffersonian constitutional amendments. In 1954, inclusion and equality were articulated as the law of the land. The Supreme Court of the United States, in *Brown v. Board of Education* (347 U.S. 438), overruled the

“separate but equal” doctrine that had been adopted in 1896 in *Plessy v. Ferguson* (163 U.S. 537), a decision which had co-opted the Reconstruction-Era amendments and codified a system of racial segregation. Resistance to the *Brown v. Board of Education* ruling required the court to rule a second time in *Brown v. Board of Education II*, to reaffirm its mandate to desegregate, this time “with all deliberate speed” (349 U.S. 294, 1955).

Just as legislative changes had proven to be ill-equipped a century earlier, structural changes using the judiciary branch proved ineffective and the court’s ruling insubstantial. School districts in the South defied the court’s ruling and resisted desegregation. Virginia issued the Massive Resistance doctrine, which included “a new state law... mandating that the schools would be closed rather than integrated” (Lechner, 1988, p. 635). Even more, during the 84th U.S. Congress, 19 Senators, representing 11 States, and 77 House Members presented a Declaration of Constitutional Principles and debated in front of congress an initiative to override the Supreme Court’s decision in *Brown v. Board of Education*, claiming that states have a constitutional right to segregation (The Decision of the Supreme Court in the School Cases, 1956, pp. 4459-4460). This level of resistance to desegregation reveals a culture of domination, embedded racism, and inequality at the core of U.S. society. However, despite these challenges, the decisions in *Brown I* and *II* cases changed the law and opened the door for bigger fights; increased acts of resistance, protests, and acts of civil disobedience became more visible. With a legal mandate to desegregate, African Americans led the charge to dismantle old social constructions of race.

The Beginnings of Diversity Strategies

After a century of physical and emotional struggle, and standing on the legal framework provided in the *Brown* rulings, the Civil Rights Act of 1964 (CRA) marked a time of social responsibility and anti-discrimination strategies. The CRA specifically codified desegregation and expressly prohibited discrimination based on race, color, religion, sex, or national origin in voting rights, public accommodations, employment, public

education, and more. It also formed the Commission on Civil Rights and the Community Relations Services to assist with complaints, education, and dispute resolution in cases of discrimination. Most significantly, the CRA provided a pathway for filing complaints and legal remedies for actions proven to be discriminatory (Civil Rights Act, 1964). As a result, employers turned to their human resources departments to create hiring and employment policies to comply with the new law.

The CRA marked a victory for those challenging the structural violence embedded in restrictive access to equal enjoyment of life. The Act criminalized discrimination based on race and sex by federal and state governments as well as private enterprises. It codified President John F. Kennedy's 1961 executive order 10925 to take "affirmative action" to desegregate employment in the federal government and gave it a broader impact by declaring it the law of the land. Ever since its enactment, segregationists have continued to challenge and co-opt the ideals and intentions of the law.

With a congressional mandate prohibiting discriminatory practices, especially in the workplace, diversity scholars Anand and Winters (2008) report that human resources departments were charged with developing non-discriminatory workplace policies and procedures focused on the Act's compliance. The new law empowered individuals facing discrimination to file lawsuits. In addition, trainings became a hallmark of the era, not without controversy:

If the EEOC or state agencies found 'probable cause' for discrimination, one of the remedies was typically a court-ordered mandate for the organization to train all employees in anti-discriminatory behavior. Because the training[s] focused primarily on treating historically underrepresented minorities and women fairly and equitably in White male-dominated environments, ... nonmembers of these groups resented their exclusion and felt that preferential treatment was being afforded to the targeted groups. (Anand & Winters, 2008, p. 357)

The CRA increased women and minority participation in all areas of civic life. It made racial discrimination illegal and incentivized rapid desegregation. Such gains, according

to Anand and Winters (2008) slowed down when President Reagan appointed Clarence Thomas as head of the EEOC in 1982. With less governmental scrutiny, many employers shifted their focus away from domestic concerns of equality and more in to issues of transnational competition (p. 358).

The CRA triggered important changes in admission policies in public institutions of higher education. Universities, responding to the CRA, implemented different strategies to comply with the new law and increase enrollments of women and minority students. One strategy utilized by the medical school at the University of California, Davis was to reserve 16 seats (of 100) in each entering class for qualified minorities in order to “reduc[e] the historic deficit of traditionally disfavored minorities in medical schools and the medical profession” and “counter the effects of societal discrimination” (*Regents of Univ. of California v. Bakke*, 1978, p. 306). This strategy was challenged by a white student who was denied admission to the medical school twice. This case challenged the goals and application of the CRA, reframing and reinterpreting the desegregation goals of the Act. The *Bakke* case cut short affirmative action attempts at rectifying historical wrongs. Dissenting voices in *Bakke* stated that “where there is a need to overcome the effects of past racially discriminatory or exclusionary practices engaged in by a federally funded institution, race conscious action is not only permitted, *but required*, [emphasis added] to accomplish the remedial objectives of Title VI” (p. 334). However, the court’s ruling in *Bakke* placed limitations on programs that sought reparations to undo the effects of segregation. With this case, the court rejected quota-based desegregation strategies, and reparations-based strategies were deemed unconstitutional as a “measure of inequity in forcing innocent persons [...] to bear the burdens of redressing grievances not of their making” (p. 298).

Once again, human resource departments were challenged to create new strategies to balance the requirements of the CRA and the newly articulated constitutional requirements of affirmative action according to *Bakke*. Gilbert et al. (1999) reported on results of several studies that point to issues disfavoring affirmative action. These

studies reported dissatisfaction with affirmative action, with perceptions that people who “have never experienced discrimination are reaping benefits at the expense of white males”, that “lower hiring and performance standards have been applied to minorities”, that “minorities have achieved their professional goals and no longer need affirmative action”, and that “those hired under the auspices of affirmative action are perceived as less competent than majority workers” (pp. 62-63). Gilbert et al., however, stressed the importance diversity as a competitive advantage, and called for organizations to organize “their own programs to *capitalize* [emphasis added] on an increasingly heterogenous workforce” (p. 64). In their analysis, these authors found two ways that corporations capitalize from diversity programs: One, increased profit, increase market share, and increased price; and two, the benefits of diversity for public recognition. This recognition was quantified through public acknowledgment and receipt of awards, specifically the Office of Federal Contract Compliance Program Inclusion Award, the Glass Ceiling Award, and regional and local awards (p. 67).

From Affirmative Action to Diversity as a Commodity

The *Bakke* ruling rejected desegregation policies based on reparations because of the possible impacts on whiteness. Instead, it conditioned the constitutional use of “diversity” to strategies that benefit white students (whiteness) at the expense of non-whiteness to comply with the CRA. This theory of interest convergence was first articulated by Derrick Bell (1980) regarding the 1954 *Brown v. Board of Education* case (p. 523). Bell observed that any benefits bestowed on Black and Brown individuals are contingent on the resulting benefits for white individuals. The *Bakke* ruling may appear to have struck a racially neutral decision, but on closer inspection, its deliberate protection of whiteness entrenches the system of domination within the legal system, perpetuates uneven distribution of benefits, and does nothing to repair the harms of segregation. Even further, I interpret the case as one that conditioned the entrance of Black and Brown individuals to white spaces on the value that whiteness is willing to give to Black and Brown existence in those spaces. This is how Leong (2013) describes

her theory of racial capitalism: “a system of racial commodification and subsequent exploitation that spans society” (p. 2175).

The *Bakke* case impacted corporate affirmative action programs and introduced the notion that diversity goals were constitutional strategies for compliance with the CRA. Institutional claims about the benefits of diversity began proliferating, and by the early 1990s, diversity management had become a recognized industry (Gilbert et al., 1999). This new industry touted the economic benefits of diverse workplaces, under the theory that diversity would foster profitability through competitive advantage, thus increasing social goodwill, and would provide worldwide market access (Gilbert et al., 1999). To everyone’s surprise, diversifying the workplace was difficult, the expected economic benefits were elusive, and human resources departments leaned on diversity trainings to solve the issues (Gilbert et al., 1999).

By the 2000s, equality as a moral value was the new argument justifying diverse workplaces; it became a measurement of success and was used as an attempt to increase organizations’ social capital (Kollen et al., 2018). It is now well documented that fifty years of diversity trainings have failed to promote equality or inclusion; Dobbin and Kalev’s (2018) review of research concluded that the millions of dollars spent in diversity trainings have not ended racism. While some success has been reported with retention of diversity in the workplace, there are still questions that have not been answered. Organizations continue to measure success by their number of people of color but not the organization’s cultural change or shift of priorities (Dobbin & Kalev, 2018). It is worth remembering that diversity management promises competitive advantage and increased social capital, where goodwill is monetized as an asset of the corporation, contributing to its net worth. New research points out that diversity strategy efforts have been implemented to the detriment of people of color and have resulted in their exploitation; in-depth critiques are found in the literature of racial capitalism (Leong, 2013; Melamed, 2015; Robinson, 1983).

The definition of ‘competitive advantage’ is industry-dependent (for-profit v. not-for-profit status, domestic v. international), but when filtered through a diversity lens, the constant factor is the commodification of race that facilitates the continued exploitation of Black and Brown individuals. While diversity goals may seem egalitarian and progressive, they codify violence. A simple overview of the language reveals embedded social constructions. First, they suggest that diverse workers will bring ‘differences.’ Hence, diverse workers are ‘different,’ a coded conceptualization for ‘other.’ Second, the language is quite explicit in its objective of exploitation. It recognizes the goal of using those differences (at the expense and labor of those who are deemed different) to gain competitive advantages – that is, capitalize the ‘other’ for the benefit of the business. This use is the action of commodification in purely Marxian terms. Marxist theory states that acquisition of competitive advantage is not for the benefit of diverse workforces (those who create the competitive advantage), but instead its goal is capital accumulation to benefit shareholders, stockholders, and owners. Those who sell their labor to produce added value rarely benefit proportionally to their output. Corporations who adopt EDI without critically questioning their motivations for these strategies are focused on the profits created by market expansion, increased goodwill (Kollen, 2018), and new social relevancy. As Leong states, “The process of deriving social and economic value from the racial identity of another person” embeds an actual monetization in non-white skin color. Leong summarizes these underlying power dynamics when she argues that:

The value of nonwhiteness is contingent on its worth to white people and predominantly white institutions. So even when white people and predominantly white institutions highly value nonwhiteness, they retain control over the assignment of value and may increase or diminish that value at will (2013, p. 2172).

This represents a continuation of cultural violence and the permanence of power-over relationships that perpetuate domination systems. Therefore, true equity and inclusion

initiatives require intentionally challenging domination systems – that is, dismantling power-over relationships and supporting desegregation.

To date, corporations are spending millions of dollars on EDI trainings that focus on the history of racism, individual engagement with history, or cultural understanding of differences. Unfortunately, these trainings center the problem on racism as the cause for inequality but ignore altogether the embeddedness of domination systems in the development of access to and distribution of wealth. I suggest that racism is only a symptom and expression of domination. Without dismantling domination, the violence of racism will perpetuate itself and may even morph into different forms of inequality and oppression, such as the racial capitalism that Leong (2013) suggests.

The historical examination of legislative, judicial, executive, and organizational strategies to address inequality in the US demonstrates the challenges in changing internalized domination. This culture is expressed in structural and cultural systems that result in direct violence that perpetuates frameworks of oppression of minoritized individuals. Sixty years after the CRA and other structural changes, billions of dollars spent in EDI and hundreds of studies of EDI strategies have taught us that ‘checklist’ approaches are expensive and useless. They have been proven ineffective, as they ignore the depths at which domination systems are embedded in all civil and civic structures in our society. These laws and policies have failed to repair the history of racism and oppression while relieving the status quo of responsibility for restoring balance to a deeply hurt and unequal society. These policies point to the conflicts that arise when society is asked to grapple with its history of creating human suffering while at the same time urged to adopt perspectives that restore human dignity and alleviate the pain caused. Dismantling a domination paradigm is difficult and complex, especially because it is embedded within everyday systems, and it has normalized the dynamics of the violence it needs for survival. So entrenched is its grip that individuals respond with violence whenever the power-over structure is threatened. In the concluding section, I suggest some perspectives that may be useful in considering the dismantling of the domination paradigm.

CONCLUSION

This country's violent past based on domination systems will continue to co-opt efforts towards equity and inclusion until new systems are adopted in the partnership continuum. As this paper presented, systems of domination were intentionally adopted during the formation of the United States. These systems have taken different forms, expressed as structural and direct violence – from controlling the right to vote, to direct infliction of physical harm based on racial hierarchies, to institutional choices in distribution of benefits and in social expenditures.

Overt racism and inequality as tools for dehumanization are expressions of domination that we have learned to spot and that spark community outrage when we recognize them. However, internalization of domination is more difficult to identify, and its impact can be devastating, as evidenced by COVID-19's disproportionate and systematized impact on people of color. Therefore, single-approach strategies and goals such as EDI that articulate racism as a lack of diversity fail because they ignore the underlying domination systems that support it. Further, these strategies distract from the systems that make racism and inequality possible. In fact, these strategies move us away from notions of justice and further into domination through interest convergence and racial capitalism, rather than shifting the frameworks used to sustain our systems. Acts of direct violence such as the murder of George Floyd and the structural violence unveiled by COVID-19 necessitate deep cultural change at all levels of social consciousness, and most importantly legal and economic systems. While Eisler (2007) has already developed a framework for a caring economy, I suggest that we need a framework for the legal system based on healing and caring. This is the focus of my next paper (in progress), *Framing the Law as Caring: Movement Towards a Partnership Framework for the Law*. I propose that a legal system that intentionally moves towards outcomes that support healing and human development, and that foster a caring society, is a necessary next step to support life in this planet.

Legal Systems that Care: From Healing Domination to Building Partnerships

To begin, I propose moving away from single-approach solutions and toward multi-disciplinary approaches grounded in collaborative partnership and healing theories. In recognition of the deep level of harm, pain, and trauma caused by internalized historical violence, I suggest the use of a combination of peacebuilding tools provided by transformational conflict literature (Brand-Jacobsen, 2002; Miall, 2004), and by trauma and niche development theories (Narvaez, 2016), to understand and prepare for the work needed to engage in national healing.

Such approaches would allow us to better quantify and qualify the impact of trauma and harm, and to begin developing solutions that facilitate healing and that move towards partnership and collaboration as responses. We must re-center the role of law in organizing institutions and governance as serving the people through community wellbeing goals that prioritize investment in the structures that maximize individuals' "somatic and mental realizations" (Galtung, 1969, p. 168; Eisler, 2007). We must move away from domination, coercion, and violence. Because the work is so profound, we can start small in communities, organizations, and businesses. We must nurture the next generation of leaders with knowledge of a system that supports life over profits. And, in the words of Riane Eisler:

We need an economic system that takes us beyond communism, capitalism, and other old isms. We need economic models, rules, and policies that support caring for ourselves, others, and our Mother Earth. ... It is not realistic to expect changes in uncaring economic policies and practices unless caring and caregiving are given greater value (2007, p. 9).

Along with these economic goals, as this paper demonstrates, we need a legal system that can build those frameworks with laws that support them. Therefore, we must return to systems, strategies, and approaches as multi-generational beings with a long-term vision for the future of our descendants – knowledge found in Indigenous systems of knowing (Tuhiwai Smith, 2012). Future research on these approaches is needed.

However, the wisdom and knowledge that we need to create a balanced and complete community are already available to us all. Domination has distorted our notions of humanness by normalizing and legitimizing violence. However, we have the tools we need to make a lasting change through empathy and love, respect for humanity, and above all, love for life.

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