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Desert in the Deluge: Using Data to Drive Racial Equity

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Desert in the Deluge: Using Data to Drive Racial Equity

Cover Page Footnote

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DESERT IN THE DELUGE: USING DATA TO DRIVE RACIAL EQUITY

Elizabeth J. Kennedy, J.D.[†]

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I. RACIAL INEQUITY IS ENDEMIC TO WORKFORCE DEVELOPMENT

Racial equity is defined as “the condition that would be achieved if one’s race no longer predicted, in a statistical sense, how one fares.”¹ How workers are currently faring in the American workplace recalls the parable of a village located along a river, in which a startling number of people were suddenly discovered drowning.² Villagers would pull victims from the water, and as the number of bodies increased, they would devise ever more elaborate strategies to rescue and revive them.³ So preoccupied were these heroic villagers with rescue and resuscitation that they never looked upstream to see who was pushing the bodies in. So too, across industries, occupations, and time zones, workers of color—especially African American workers—are drowning.

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1. Center for Assessment and Policy Development, *Racial Equity Tools Glossary*, 1, 7 (2013), http://www.racialequitytools.org/images/uploads/RET_Glossary913L.pdf.

2. This parable takes many forms and is often used in public health policy creation. Jim Tartar, *Some Live More Downstream than Others: Cancer, Gender and the Environmental Justice*, in THE ENVIRONMENTAL JUSTICE READER: POLITICS, POETICS, AND PEDAGOGY 216 (Joni Adamson, Mei Evans and Rachel Stein, 2002).

3. *Id.*

African American workers are largely employed in lower-wage industries and occupations, tend to earn less than their white counterparts, and experience higher job turnover.⁴ The median net worth of whites remains nearly ten times that of blacks.⁵ In fact, “[n]early 1 in 5 black families have zero or negative net worth—twice the rate of white families.”⁶ According to researchers, “[i]f average Black family wealth continues to grow at the same pace it has over the past three decades, it would take Black families 228 years to amass the same amount of wealth White families have today.”⁷

One downstream response to this stark inequality is to dismantle barriers to higher-wage, lower-turnover jobs, such as access to higher education, affordable childcare, and transportation.⁸ While this is necessary work, we must also look upstream. Workers of color are not concentrated in these industries and occupations accidentally, nor is it a coincidence that they are paid less, and experience higher turnover than their white counterparts.⁹ Historic patterns of discrimination have created, and continue to replicate, deep racial disparities in

4. Bob Salsberg & Angeliki Kastanis, *AP Analysis: Blacks Largely Left Out of High Paying Jobs*, THE BOS. GLOBE (Mar. 31, 2018), <https://www.boston.com/news/national-news/2018/03/31/ap-analysis-blacks-largely-left-out-among-high-paying-jobs> (reporting on an Associated Press analysis of government data, which found that black workers are chronically underrepresented compared with whites in high-salary jobs in technology, business, life sciences, architecture, and engineering, among other areas. Additionally, the AP found that many black workers are overrepresented in low-wage, less prestigious fields, such as food service or preparation, building maintenance, and office work.); see also Associated Press, *50 Years After King’s Death, High-Pay Jobs Elude Many Blacks*, THE SEATTLE TIMES (Mar. 31, 2018), <https://www.seattletimes.com/nation-world/50-years-after-kings-death-high-pay-jobs-elude-many-blacks/>; Jing Li & Richard Clinch, *Analysis of Patterns of Emp’t by Race in Balt. City and the Balt. Metro. Area*, ASSOCIATED BLACK CHARITIES 1 (2018) [hereinafter, *Patterns of Employment*].

5. Tracy Jan, *White Families have Nearly 10 Times the Net Worth of Black Families. And the Gap is Growing*, THE WASH. POST (Sep. 28, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/09/28/black-and-hispanic-families-are-making-more-money-but-they-still-lag-far-behind-whites/>.

6. *Id.*

7. Dedrick Asante-Muhammad, Chuck Collins, Josh Hoxie & Emanuel Nieves, *The Ever Growing Gap*, INST. FOR POL’Y STUD. 1, 5 (2016), https://ips-dc.org/wp-content/uploads/2016/08/The-Ever-Growing-Gap-CFED_IPS-Final-2.pdf.

8. See, e.g., Bruce Ormond Grant, *Reducing Barriers for Job-Seekers*, D.C. POL’Y CENTER (May 23, 2018), <https://www.dcpolicycenter.org/publications/reducing-barriers-for-job-seekers-in-d-c-and-the-metro-region/>; see also Algernon Austin, *A Jobs-Centered Approach to African American Community Development*, ECON. POL’Y INST. (2011), <https://www.epi.org/publication/bp328-african-american-unemployment/> (recommending that, given the intractability of high joblessness for African Americans, the federal government should support targeted job creation for communities experiencing persistently high unemployment).

9. See Darrick Hamilton, Algernon Austin & William Darity Jr., *Whiter Jobs, Higher Wages: Occupational Segregation and the Lower Wages of Black Men*, ECON. POL’Y INST. (2011), <https://www.epi.org/files/page/-/BriefingPaper288.pdf> (finding that labor market discrimination, and not a lack of “soft skills,” is at the root of black male unemployment and employment disparities between blacks and whites).

housing,¹⁰ transportation,¹¹ education,¹² healthcare,¹³ and economic development¹⁴ that reinforce racialized barriers in the workplace.¹⁵ The occupations and industries in which workers of color are concentrated tend to be

10. See, e.g., Matthew Desmond, *State of the Union 2017 Housing*, THE STAN. CENTER FOR POVERTY AND INEQ. (2017), https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_housing.pdf. The article states,

71 percent of white families live in owner-occupied housing, compared with 41 percent of black families and 45 percent of Hispanic families. These differences explain a large share of the racial wealth gap. In 2013, the average white household had a net worth of \$678,737, compared with \$95,261 for the average black household. Nearly a third of the racial wealth gap is explained by differences in homeownership rates.

Id.

See generally MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2017); see also Emily Badger & Quoc Trung Bui, *In 83 Million Eviction Records, a Sweeping and Intimate New Look at Housing in America*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/interactive/2018/04/07/upshot/millions-of-eviction-records-a-sweeping-new-look-at-housing-in-america.html>.

11. See, e.g., Algernon Austin, *To Move is to Thrive: Public Transit and Economic Opportunity for People of Color*, DEMOS (Nov. 15, 2017), <https://www.demos.org/publication/move-thrive-public-transit-and-economic-opportunity-people-color> (African Americans make up 10.8 percent of all workers, but 23 percent of all workers without a vehicle at home).

12. See Sean F. Reardon & Erin M. Fahle, *State of the Union: Education*, THE STAN. CENTER FOR POVERTY AND INEQ., 1 (2017), https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_education.pdf. It points to “[t]wo non-schooling factors—persistent racial and ethnic disparities in family resources and segregation patterns—are fundamental determinants of unequal educational opportunity for minority students.” *Id.* Direct grade differences have been found with “Hispanic students[, who] lag almost two grade levels, and black students lag roughly two to two-and-a-half grade levels behind whites.” *Id.*

13. See Rucker C. Johnson, *State of the Union: Health*, THE STAN. CENTER FOR POVERTY AND INEQ., 1 (2017), https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_health.pdf. Racial disparities in health remain profoundly large. *Id.* “For example, hypertension and diabetes are two to three times,” higher among African Americans than Caucasians, “which partly explains the greater burden of cardiovascular disease” *Id.* This is the leading cause of death. *Id.* The article points to disparities of “racial differences in childhood conditions, such as parental income, access to health care, neighborhood poverty rates, and other childhood family and neighborhood factors.” *Id.* It follows that public policies addressing these childhood differences can reduce health disparities. *Id.*

14. See, e.g., *Shortchanged: Racial Disparities in New York’s Economic Development Programs*, FISCAL POL’Y INST., 1, 6 (2018), http://fiscalpolicy.org/wp-content/uploads/2018/08/Shortchanged_Final.pdf.

15. Vickie M. Mays, Susan D. Cochran & Namdi W. Barnes, *Race, Race-Based Discrimination, and Health Outcomes Among African Americans*, 58 ANN. REV. OF PSYCHOL. 201, 201–25 (2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4181672/> (reviewing emerging research suggesting that African Americans’ continuing experiences with racism and discrimination may lie at the root of the many well-documented race-based physical health disparities that affect this population); see also Johns Hopkins Urban Health Inst., *Race, Racism and Baltimore’s Future: A Focus on Structural and Institutional Racism, 5th Annual Symposium on the Social Determinants of Health, Summary Report* (2016), http://urbanhealth.jhu.edu/_PDFs/SDH/SDH_2016_Summary_Report.pdf.

artificially—and at times legislatively or judicially—devalued because of implicit bias and overt discrimination.¹⁶ As is the work of rescuing individuals from a raging river, downstream efforts to improve the quality and compensation of jobs that African Americans occupy are critical. To be truly effective, however, this work must also include changing the systems that have pushed those workers into the river, rather than focusing exclusively on their inability to swim.

Corporations, governments, and research institutions have learned to harness the power of data to make strategic and operational decisions that drive profitability, efficiency, and efficacy.¹⁷ Such stakeholders have access to an unprecedented and expanding volume of high velocity, complex and variable data sets—so-called “big data”—that require advanced techniques and technologies to capture, store, distribute, manage, and analyze the information.¹⁸ Making meaningful use of the big data deluge is an opportunity heralded by the for-profit sector as well as those looking to solve social problems like human trafficking, homelessness, and climate change.¹⁹ Meanwhile, those engaged in the advancement of racial equity in workforce development operate in a data desert.

The workforce ecosystem is a socio-economic community supported by organizations and individuals who educate, train, prepare, place, hire, and support workers on the job.²⁰ This ecosystem includes vocational programs, technical schools, and community colleges; not-for-profit training programs;

16. Hamilton, et al., *supra* note 9.

17. See, e.g., Andrew McAfee & Erik Brynjolfsson, *Big Data: The Management Revolution*, HARV. BUS. REV. (2012), <https://hbr.org/2012/10/big-data-the-management-revolution>; Bernard Marr, *Data-Driven Decision Making: 10 Simple Steps for Any Business*, FORBES (June 14, 2016), <https://www.forbes.com/sites/bernardmarr/2016/06/14/data-driven-decision-making-10-simple-steps-for-any-business/#6078e1b45e1e>; Walter Baker, Dieter Kiewell & Georg Winkler, *Using Big Data to Make Better Pricing Decisions*, MCKINSEY & CO. (June 2014), <https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/using-big-data-to-make-better-pricing-decisions> (“Harnessing the flood of data available from customer interactions allows companies to price appropriately—and reap the rewards.”).

18. Amir Gandomi & Murtaza Haider, *Beyond the Hype: Big Data Concepts, Methods, and Analytics*, 35 INT’L. J. OF INFO. MGMT. 137, 138 (2015). “Big Data” is commonly distinguished as having the “three V’s”: datasets of enormous *volume*, in an ever-increasing *variety* of formats, continuously collected at a rapid *velocity*. See, e.g., Exec. Office of the President, *Big Data: Seizing Opportunities, Preserving Values* (2014), http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_5.1.14_final_print.pdf.

19. See, e.g. Jake Porway, *Using Collaboration to Harness Big Data for Social Good*, STAN. SOC. INNOVATION REV. (June 14, 2017), https://ssir.org/articles/entry/using_collaboration_to_harness_big_data_for_social_good.

20. Lyn E. Haralson, *What is Workforce Development?*, FEDERAL RES. BANK OF ST. LOUIS (2010), <https://www.stlouisfed.org/publications/bridges/spring-2010/what-is-workforce-development>.

union apprenticeship programs;²¹ formerly incarcerated “returning citizen” reentry programs;²² and programs to retrain workers after losing their jobs to automation and free trade.²³ The ecosystem is fueled by federal, state, and local grants; private foundations; tuition and fee revenues; and individual donations.²⁴ Organizations engaged in workforce development can help dismantle racial barriers and promote equitable, sustainable economic growth. However, a system focused solely on placing workers into more of the same high turnover and low-wage jobs will not produce meaningful, systemic change.²⁵ To truly “move the needle” toward racial equity, racialized structural barriers to economic opportunities for workers of color must be eliminated.

II. THE BALTIMORE RACIAL EQUITY RESEARCH STUDY

During fall of 2017 and spring of 2018, this author conducted a qualitative research study²⁶ designed to measure the impact of ABC,²⁷ a Baltimore-based public policy organization, in its efforts to advance racial equity in Baltimore’s workforce development ecosystem.²⁸ Data was collected through semi-structured interviews with practitioners, employers, policymakers, and philanthropic foundations.²⁹ The researchers stated, “Questions were designed to measure how stakeholders are currently (if at all) [collecting, disaggregating and analyzing data related to racial equity, and] applying a racial equity lens to the development and implementation of their training programs, funding processes, and internal [workplace] policies and culture.”³⁰ The research

21. See U.S. DEP’T OF LABOR, APPRENTICESHIP TOOLKIT: ADVANCING APPRENTICESHIP AS A WORKFORCE STRATEGY, <https://www.dol.gov/apprenticeship/toolkit/toolkitfaq.htm> (last visited Sept. 9, 2019).

22. See U.S. DEP’T OF LABOR, ABOUT THE REENTRY EMPLOYMENT OPPORTUNITIES (REO) PROGRAM, <https://www.doleta.gov/REO/aboutREO.cfm> (last visited Sept. 9, 2019).

23. See U.S. DEP’T OF LABOR, TAA PROGRAM BENEFITS AND SERVICES UNDER THE 2015 AMENDMENTS, <https://www.doleta.gov/tradeact/benefits/2015-amendment-benefits.cfm> (last visited Sept. 9, 2019).

24. Kelly S. Mikelson, *Private Investment in Workforce Training*, THE URBAN INST. (2019), https://www.urban.org/sites/default/files/private_investment_in_workforce_training.pdf.

25. See, e.g., Caroline M. Francis, *What We Know About Workforce Development for Low-Income Workers: Evidence, Background and Ideas for the Future*, NAT’L POVERTY CTR. WORKING PAPER SERIES #13-09 (2013), <http://npc.umich.edu/publications/u/2013-09-npc-working-paper.pdf>.

26. Elizabeth J. Kennedy, *Changing the Future: Building Racial Equity Across Baltimore’s Workforce Ecosystem*, ABC (forthcoming 2019) [hereinafter “*Building Racial Equality*”].

27. ABC is a public foundation committed to an equity framework for transformative economic change for African Americans and other marginalized groups. The organization’s goal is to create measurably healthier and more prosperous communities through responsible leadership, the development of a racial equity lens, and philanthropic investment throughout the state of Maryland.

28. *Building Racial Equality*, *supra* note 26.

29. *Id.* at 1.

30. *Id.* at 5–6.

focused upon “identify[ing] gaps in the current understanding and application of a racial equity lens, as well as to uncover [and disseminate] emerging best practices and opportunities for leveraging strategic partnerships.”³¹ Specifically the article noted:

Together with the interview responses, additional quantitative and qualitative data were obtained and analyzed to measure the degree to which institutions and organizations . . . [had]:

- an accurate understanding of the concept of ‘racial equity’ . . . ;
- identified measurable outcomes consistent with racial equity goals;
- collected and disaggregated data to measure outcomes consistent with racial equity goals;
- implemented policies and practices intentionally designed to advance racial equity;
- fostered a workplace culture that is intentionally equitable and inclusive; and
- collaborated with other stakeholders in the workforce ecosystem around racial equity.³²

Key findings, described in more detail below, relate to the degree of awareness and assessment of racial equity indicators in the workplace; collection and disaggregation of data; and race-explicit policies and strategies for equity and inclusion.

A. Awareness of Racial Equity Indicators

“Folks just don’t talk about race as a barrier to workforce. They just don’t do it.” -Workforce practitioner³³

Of Baltimore’s 611,648 residents, 62.8% are Black or African American, and 30.3% are white.³⁴ The gap here between them is notable, “[i]n 2017, the average wage [in Baltimore] for African-Americans was \$33,798, while the average wage for white[s] was almost double at \$66,612.”³⁵ This gap persists across industries and occupations,³⁶ reflecting historical and contemporary structural and institutional discrimination. In the Baltimore metropolitan area,

31. *Id.* at 6.

32. *Id.* at 6.

33. *Id.* at 8.

34. U.S. Census Bureau, *Quick Facts*, <https://www.census.gov/quickfacts/fact/table/baltimorecitymaryland,US/RHI225217> (last visited Aug. 26, 2019).

35. *Building Racial Equity*, *supra* note 26, at 8; *see also* Prosperity Now, *The Racial Wealth Divide in Baltimore*, 1, 11 (2017) https://prosperitynow.org/files/PDFs/profiles/Racial_Wealth_Divide_in_Baltimore_RWDI.

36. Li, *supra* note 4, at 5.

“of the organizations examined in this study, only a small minority operate workforce programs that speak explicitly about race and the role that structural racism plays in the workplace.”³⁷ Workforce training curricula are increasingly focused on sector-based skills³⁸ and do not explicitly prepare participants to navigate issues of race in the workplace or to change racialized systems themselves.³⁹ As greater attention is paid to the impacts of systemic racism within our cities—including, but not limited to, police violence,⁴⁰ incarceration rates,⁴¹ school segregation,⁴² and educational attainment⁴³—the workforce ecosystem is slowly recognizing the role it can play in dismantling racialized barriers to opportunity, advancement, and equity.⁴⁴

A significant number of those engaged in workforce development reported an understanding that serving a majority of workers of color was not, alone, an

37. *Building Racial Equality*, *supra* note 26, at 8.

38. See Harry J. Holtzer, *Sector-Based Training Strategies: The Challenges of Matching Workers and their Skills to Well-Paying Jobs*, DEP’T. OF LABOR (2015), https://www.dol.gov/asp/evaluation/completed-studies/Future_of_work_sector_based_training_strategies.pdf.

39. *Building Racial Equity*, *supra* note 26, at 5.

40. See, e.g., Aldina Mesic, Lydia Franklin, Alev Cansever, Fiona Potter, Anika Sharma, Anita Knopov & Michael Siegel, *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, 110 J. NAT’L MED. ASS’N. 106, 108 (2018) (finding that states with a greater degree of structural racism, particularly residential segregation, have higher racial disparities in fatal police shootings of unarmed victims); see also Brentin Mock, *How Structural Racism is Linked to Higher Rates of Police Violence*, CITY LAB (Feb. 15, 2018), <https://www.citylab.com/equity/2018/02/the-role-of-structural-racism-in-police-violence/553340/>.

41. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 59–60 (2012); see also Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don’t Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 ASS’N PSYCHOL. SCI. 183, 183–86 (2018).

42. See Rita Kohli, Marcos Pizarro, & Arturo Nevárez, *The “New Racism” of K–12 Schools: Centering Critical Research on Racism*, 41 REV. RES. EDUC. 182, 182 (2017) (metastudy of current research that makes visible the normalized facets of racism in K–12 schools); see also Emma Brown, *Police in Schools: Keeping Kids Safe, or Arresting them for No Good Reason?* WASH. POST (Nov. 8, 2015), https://www.washingtonpost.com/local/education/police-in-schools-keeping-kids-safe-or-arresting-them-for-no-good-reason/2015/11/08/937ddfd0-816c-11e5-9afb-0c971f713d0c_story.html?noredirect=on&utm_term=.fc03486e8e8d; see also Melinda D. Anderson, *When School Feels Like Prison*, THE ATLANTIC (Sep. 12, 2016), <https://www.theatlantic.com/education/archive/2016/09/when-school-feels-like-prison/499556/>.

43. Rita Tate, *Graduation Rates and Race*, INSIDER HIGHER EDUC. (Apr. 26, 2017), <https://www.insidehighered.com/news/2017/04/26/college-completion-rates-vary-race-and-ethnicity-report-finds>; see, e.g., Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, THE BROOKINGS INST. (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/>; see also Claude M. Steele, *Race and the Schooling of Black Americans*, THE ATLANTIC (Apr. 1992), <https://www.theatlantic.com/magazine/archive/1992/04/race-and-the-schooling-of-black-americans/306073/>.

44. See Sean Thomas-Breitfeld, *Working While Black: The State of Black Worker Organizing in the U.S.*, DISC. FOUND. NEIGHBORHOOD FUNDERS GROUP (May 2015), www.buildingmovement.org/pdf/Working_While_Black_Excerpt_%283%29.pdf.

effective strategy for advancing racial equity.⁴⁵ The majority of those engaged in workforce development, however, were not currently applying, “a racial equity lens when designing or implementing programs, or to their own internal workplace policies, practices, and cultures.”⁴⁶ The study found, “[o]nly a minority of workforce practitioners, funders and employers have implemented policies and practices intentionally designed to advance racial equity.”⁴⁷ More reported “individual and institutional interest in creating such policies and practices but cite[d] the need for additional technical assistance and leadership for implementation.”⁴⁸

B. Data Collection and Disaggregation

“Most workforce practitioners, funders and partner employers,” reported that they were not systematically collecting and disaggregating data by race (or, in the case of funders and governmental agencies, did not require the reporting of such data) to analyze the impact of their programs, policies, and practices on racial equity.⁴⁹ Major problems arise based upon, “[t]he competitive environment for workforce programming reinforces these ‘data deserts,’ as organizations are reluctant to share outcome-level data that may harm their chances of obtaining funding from other sources.”⁵⁰ While 100% of recently surveyed Baltimore-based workforce organizations reported that they “‘frequently’ collected data on the race and ethnicity of their program participants, only half as many ‘frequently’ disaggregated the data to look for differences” in participation by race, and only 30% disaggregated the data to look for differences in outcomes (such as job retention, average wages, and advancement over time) based on race.⁵¹ The organizations noted,

[r]easons cited for the disparity between collection and disaggregation ranged from a lack of staff capacity, to limitations in database technology, to a lack of managerial will. Likewise, an overwhelming majority of respondents reported a desire for technical assistance on data collection and disaggregation, as well as help ‘convincing

45. *Building Racial Equity*, *supra* note 26, at 7.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

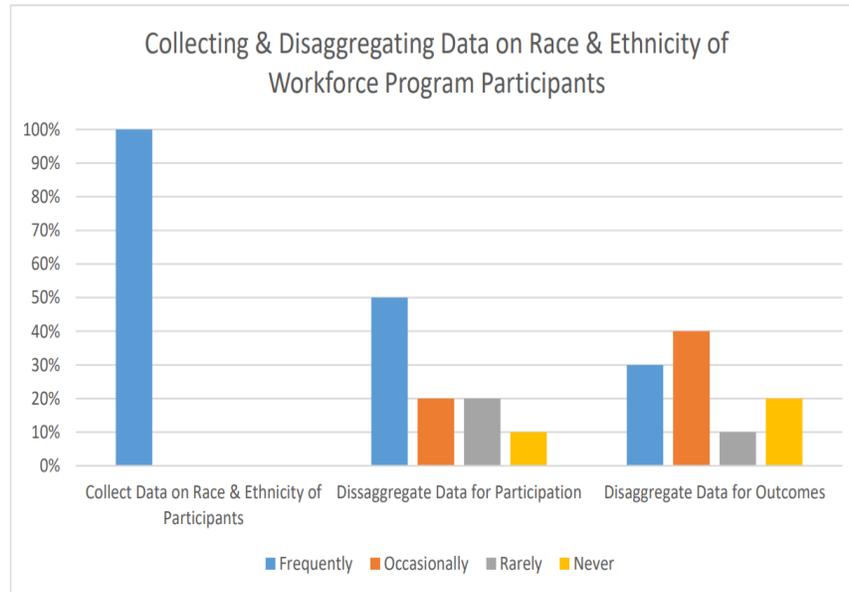
50. *Id.* As one funder explained:

Funding is the biggest challenge since that is where decisions are going to be made, such as by requiring common performance measures. We need to create a space where training providers can be transparent about their outcomes Right now, everyone wants to make their outcomes look as good as possible so that they can get more funding; that makes it difficult to be data-driven.

Id. at 16.

51. *Id.* at 13.

leadership and staff why this data is important and how it can be used to improve program performance.’⁵²



Data can help an organization or employer engage in strategic decision-making and develop operational solutions that are focused on the root causes of inequity, rather than on the perceived deficits of an individual employee. As one practitioner explained,

Prior to systematically collecting data on our graduates, we could only raise issues they encountered in the workplace episodically. It was a very individualized conversation, and the employer would almost always characterize the employee’s issues as performance related. It

52. *Id.* at 13. One example of an effective use of technical assistance to spur more data collection and analysis is the Measure4Change initiative. *Id.* at 15. Led by the Urban Institute, with funding from the World Bank, Measure4Change has provided intensive technical assistance to increase the performance measurement capacity of competitively selected nonprofits in Washington, D.C.

In 2017, the Annie E. Casey Foundation provided funding for a cohort of workforce development grantees in Baltimore to participate in the program, which is guided by a curriculum but tailored to meet the individual needs of each nonprofit. In collaboration with ABC, the work in Baltimore has strived to integrate a race equity and inclusion (REI) throughout the training and curricula. The five Baltimore nonprofits received training and technical assistance specific to their data needs with many of the grantees requesting help in using data to improve their REI objectives, and creating and applying logic models and theories of change to REI goals, such as addressing structural and systemic barriers to employment.

Id.

made the individual—and their alleged deficits—the focus of the conversation, rather than the racialized workplace culture.⁵³

Using data to contextualize the experience of an individual worker helps to shift the focus away from “fixing broken people to fixing broken systems.”⁵⁴ Having data that illustrates the experience of multiple workers in a workplace “allows us to have a nuanced conversation with the employer about continuous improvement. If we can show an employer that he or she can reduce the costs associated with high turnover by changing the workplace culture, that’s a real value to the employer.”⁵⁵

Large employers and federal contractors must already report employee demographic data in the form of annual EEO-1 reports.⁵⁶ In an effort to improve EEOC investigations into pay discrimination based on gender, race, and ethnicity, the federal government announced plans during the Obama administration to require covered employers to report pay data.⁵⁷ That requirement was suspended in 2017 by the Trump administration.⁵⁸ The study has shown, “[V]ery few Baltimore organizations involved in workforce development are systematically collecting, disaggregating, analyzing and using data on the race and ethnicity of their program participants.”⁵⁹ One provider that had begun to do this analysis explained,

We are looking to see how we can collect data at all these points in service delivery process. Then we will look at that data annually to see where we are in achieving population level outcomes. Then we will disaggregate that data to see who our services are currently working for and who are they not working for. We can use data to determine the strategic changes we need to make to get better at serving that population that we are not doing well with, so that we can address where we are falling short.⁶⁰

Furthermore,

[d]ata can help confirm what, anecdotally, practitioners [and other stakeholders] suspect to be true. One provider explained, “*I haven’t broken it down*, but I know that . . . a larger percentage of those that are not doing well, who didn’t complete the program, who are having really major issues, *without running any numbers* I know more of them

53. *Id.* at 14 (internal quotations omitted).

54. *Id.* (internal quotations omitted).

55. *Id.* (internal quotations omitted).

56. *Id.*; see EEOC, MILESTONES IN THE HISTORY OF THE U.S. EQUAL EMP’T, <https://www.eeoc.gov/eeoc/history/35th/milestones/1966.html>.

57. Lisa Nagelle-Piazza, *New EEO-1 Form Requires Companies to Report Pay Data*, SHRM (Sept. 30, 2016), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eo-1-pay-data-.aspx>.

58. *Id.*

59. *Building Racial Equity*, *supra* note 26, at 14.

60. *Id.* at 14–15 (internal quotations omitted).

are black than white. I know the white individuals are advancing at a higher rate. *I can't back this up with data since I haven't broken it down*, but I really think there is more opportunity for people who are not people of color who come through our program.⁶¹

Having a data analytics framework would help that provider “break it down,” “run the numbers,” and “back this up with data.”

It is clear that, “[p]rograms with significant numbers of white and non-white workers can conduct meaningful data analysis to assess measurable outcomes disaggregated by race.”⁶² This work requires technical capacity, resources, and leadership support. For other organizations, which serve clients that are almost exclusively African American, disaggregating outcome measures by race can be more challenging.⁶³ There are many benchmarks, “against city, state and federal wage, retention and advancement measures can provide valuable insights.”⁶⁴ Moreover, disaggregating the data by race and comparing it with other intersecting criteria, such as gender, age, educational attainment, and zip code can help to identify disparities and suggest solutions.⁶⁵

C. Race-Explicit Policies and Practices

The workforce ecosystem is the result of, and contributor to, a racially stratified U.S. labor market.⁶⁶ Likewise, workforce practitioners have been focused on preparing workers for employment and on tackling individual barriers that those workers must overcome, whether in the form of childcare,⁶⁷ transportation, criminal records,⁶⁸ education and training, or soft skills. They have focused so much energy on lowering the ceiling that they have not fully

61. *Id.* at 15 (emphasis added).

62. *Id.*

63. *Id.*

64. *Id.* at 15–16; see also Barbara Frankel, *How Companies are Achieving Pay Equity*, DIVERSITY BEST PRACTICES (Apr. 9, 2018), <https://www.diversitybestpractices.com/how-companies-are-achieving-pay-equity>.

65. See, e.g., Miranda Beggin, *Race and Data: Identifying Race-Based Disparities*, THIRD SECTOR CAPITAL PARTNERS (Oct. 30, 2018), <https://www.thirdsectorcap.org/blog/identifying-race-based-disparities/>.

66. Derek Thompson, *The Workforce Is Even More Divided By Race Than You Think*, THE ATLANTIC (Nov. 6, 2013), <https://www.theatlantic.com/business/archive/2013/11/the-workforce-is-even-more-divided-by-race-than-you-think/281175/> (“[T]he [U.S.] labor economy isn’t merely stratified at the macro level. It’s stratified at the job-by-job level. Different races and ethnicities cluster in different sectors.”).

67. See, e.g., *Detours on the Road to Employment: Obstacles Facing Low-Income Women*, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES (1999), <http://www.nationalpartnership.org/our-work/resources/more/economic-security/detours-road-employment.pdf> (“Inadequacies in three primary support services—education and training, child care, and transportation—are the most common barriers to low-income women’s employment.”).

68. See Jennifer Billock, *How Clearing Criminal Records Puts People to Work*, CITYLAB (Jan. 10, 2017), <https://www.citylab.com/life/2017/01/why-states-are-expunging-old-criminal-records/512414/>.

leveraged their collective power to raise the floor. By having difficult conversations with partner employers about implicit bias or insisting on higher minimum standards and accountability in the partner's workplace, or by collecting and disaggregating and analyzing data, practitioners can help improve the industries and occupations into which they are placing participants.

Interviewees described a "shift toward understanding that a mission of placing workers in jobs is not, alone, enough to change underlying systems that perpetuate racial inequity."⁶⁹ Citing a lack of internal expertise, "[a] significant number had sought the assistance of an outside organization to conduct an institutional self-assessment and develop a racial equity plan."⁷⁰ Others have put forth specific characteristics, specifically, "[a]ccording to Race Forward, the Center for Social Innovation, racial equity strategies must be systemic, race-explicit, and outcome-oriented."⁷¹ This study found that, "[t]o be effective, these strategies must not only tackle the effects of systemic racism, in the form of racialized barriers, but also its root causes, in the ways systems create and perpetuate racialized outcomes."⁷² They must actually be integrated into the organization, "[t]hese strategies cannot simply be embodied in an organization's mission statement; they must be specific, strategic and measurable."⁷³

At the individual level it seems there is support, however, "[w]hile practitioners, program officers, and workplace managers express[ed] strong commitments to racial equity, few [are] serv[ing] organizations that have made racial equity an explicit goal in their mission statements, strategic plans, or marketing materials."⁷⁴ There is a lack of data, in part because, "[m]ost providers, as well as the private foundations that support their work, have not identified measurable outcomes consistent with racial equity goals."⁷⁵ Without these clear goals, "it [is] difficult to measure an organization's progress on these goals, or to hold them accountable when no meaningful progress is made."⁷⁶

69. *Building Racial Equity*, *supra* note 26, at 8.

70. *Id.*

71. *Id.* at 8–9 (citing Race Forward, *Race Explicit Strategies for Workforce Equity in Healthcare and IT* 1, 5 (2017), https://www.raceforward.org/system/files/pdf/reports/RaceForward_RaceExplicitStrategiesReport_ExecSummary.pdf).

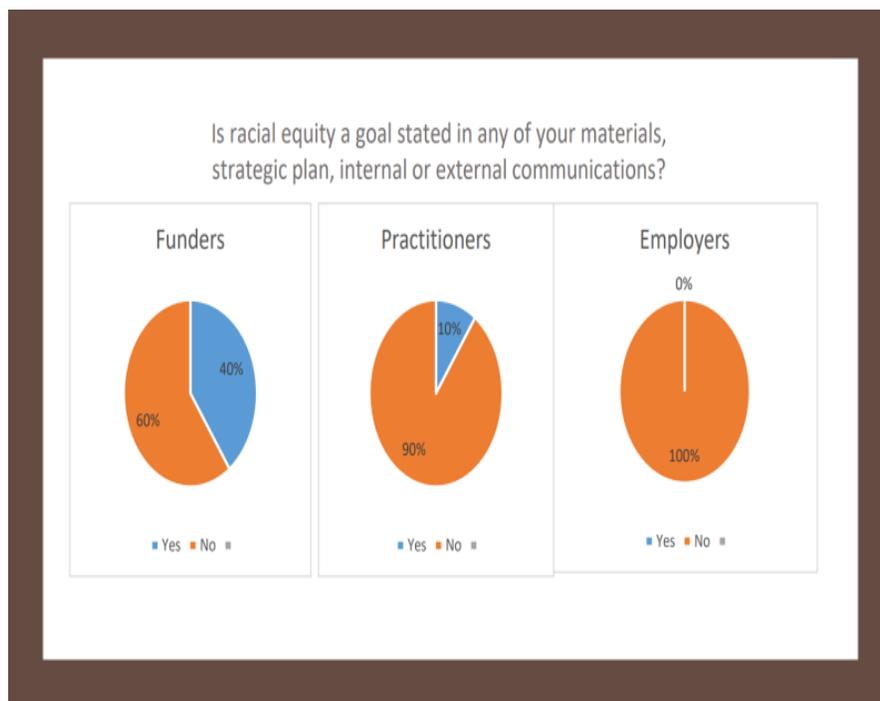
72. *Id.* at 9 (emphasis omitted).

73. *Id.*

74. *Id.* at 7.

75. *Id.*

76. *Id.*



Multiple interviewees stated “their materials and curricula did not include any discussion of the realities of systemic racism and implicit bias that their participants would likely encounter in the workplace.”⁷⁷ One individual, “explained, ‘[i]n trying to send a message that participants can be successful through our program, we may have overemphasized individual effort and personal responsibility.’”⁷⁸ “While the majority of those interviewed reported a desire to make strategic changes to their programs, internal workplace policies,” and data analytics, only two had made such changes.⁷⁹ Others reported limited resources left them “mission-bound to tackle barriers they had the ability to dismantle, such as by helping workers with transportation, child care, or expunging criminal records.”⁸⁰ The parties began to realize that it was supposed to be more than just “getting in the door,” but “in fact it was just the beginning.”⁸¹ These “findings are consistent with a recent national scan of nonprofit and philanthropy serving organizations, in which a majority had stated

77. *Id.* at 9.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

a commitment to racial equity work, but less than a third had developed strategies or strategic frameworks to guide that work.”⁸²

Workers and individuals looking for jobs, “can provide meaningful assessment data, yet most programs reported maintaining only minimal long-term contact with their program graduates.”⁸³

Explained one provider, “[w]e think we are providing our participants with the support they need. But are we? We need more formal and ongoing feedback from our graduates—as well as those who still can’t access our program—to know if what we are offering is meeting the genuine need out there.”⁸⁴

One even found “a strong bias among grant funders for workforce programs that can guarantee job placements within 30, 60 or 90 days, which creates a disincentive for developing long-term supports and ongoing engagement.”⁸⁵

III. RECONCILING SUPREME COURT JURISPRUDENCE

Most employers in the study reported a belief that any attempt to advance racial equity must be undertaken through “race-neutral” measures.⁸⁶ Yet Baltimore, like nearly every American city, does not have a “race-neutral” history. Reporting on the city’s 1910 segregation law, the *New York Times* observed, that,

‘[n]othing like it can be found in any statute book or ordinance record of this country’ It is unique in legislation, Federal, State, or municipal—an ordinance so far-reaching in the logical sequence that must result from its enforcement that it may be said to mark a new era in social legislation.⁸⁷

When the Supreme Court struck down that law in 1917, the city’s landed classes devised a new strategy, one which required home purchasers to sign private contracts restricting their ability to ever sell the property to persons of color.⁸⁸ That strategy continued until it, too, was struck down by the Supreme Court in 1947,⁸⁹ to be replaced by a legal system of racialized lending practices known as “redlining,” which continued to maintain segregated neighborhood boundary

82. *Id.* (citing David Maurrasse, *Advancing Racial Equity in Philanthropy: A Scan of Philanthropy-Serving Organizations*, UNITED PHILANTHROPY F. 1, 11, 21 (July 2018), <https://www.unitedphilforum.org/sites/default/files/Forum%20Racial%20Equity%20Scan%20Report%20Final.pdf>).

83. *Building Racial Equity*, *supra* note 26, at 10.

84. *Id.*

85. *Id.*

86. *See id.*, at 7–8.

87. ANTHONY PIETILA, NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY 23, (Ivan R. Dee ed.) (2010).

88. *Id.* at 36.

89. *Shelley v. Kraemer*, 334 U.S. 1, 40 (1948).

lines.⁹⁰ One hundred years later, Baltimore’s neighborhoods largely—if now legally—replicate these patterns of racial segregation and are among the worst in the nation for which a child born in poverty has any chance of escaping.⁹¹

A. Race in Higher Education Admissions

For many employers or workforce training organizations that lack an in-house counsel, understanding of the legal parameters surrounding racial equity is often shaped by media coverage of legal decisions by the U.S. Supreme Court. In the arena of race and affirmative action, most of the decisions issued and covered in the popular and social media have concerned higher education admissions policies.⁹² The Supreme Court has consistently reaffirmed the priority of “race-neutral measures” in these cases. For example, in *Regents of the University of California v. Bakke*, the Court held that race can be considered “as a factor” in admission, but that racial quotas are a *per se* violation of the Equal Protection Clause.⁹³ In that case, which dealt with quotas for racial minorities at the University of California, Davis Medical School, the Court extended a strict scrutiny standard to policies that were created to *include* more racial minorities—as opposed to the kind of policies historically struck down on equal protection grounds that sought to *exclude* racial minorities.⁹⁴ By doing so, the Court equated efforts to advance equity for African Americans and other marginalized populations with efforts that could be discriminatory against whites.⁹⁵

In *Bakke*, the Court acknowledged that public institutions that have been found to engage in racial discrimination cannot bring themselves into compliance with the Equal Protection Clause “simply by ending its unlawful acts and adopting a neutral stance.”⁹⁶ In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court reiterated that “[r]acially neutral” assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation

90. Richard Rothstein, *What Have We—De Facto Racial Isolation or De Jure Segregation?*, AMERICAN BAR ASS’N (July 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_3_poverty/racial_isolation_or_segregation/.

91. Raj Chetty & Nathaniel Hendrin, *The Impacts of Neighborhoods on Intergenerational Mobility II: County-Level Estimates*, 133 THE Q. J. OF ECON. 1163, 1204–05 (2018).

92. Karen Miksch & Mark Pedelty, *Affirmative Action and the Media: A Mixed Methods Analysis of News Coverage of U.S. Supreme Court Cases*, UNIV. OF HOUS. LAW CTR. 1, 3 (2010), file:///Users/maryturgeon/Desktop/Law%20Review/Kennedy%20Paper/Pull%201/EN%2099/Kennedy%20EN%2099_Affirmative%20Action%20and%20the%20Media_Source%20NA.pdf.

93. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978).

94. *Id.* at 361–62; *Brown v. Bd. Of Educ.*, 347 U.S. 483, 494 (1954) (striking down segregated schools); *Sweatt v. Painter*, 339 U.S. 629, 635–36 (1950) (striking down a separate “law school for negroes”).

95. *Bakke*, 438 U.S. at 305.

96. *Id.* at 362; *see also*, *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 439–40 (1968).

resulting from discriminatory location of school sites or distortion of school size in order to achieve.”⁹⁷ In each of those cases, the creation of public school systems in which the effects of past discrimination had been “eliminated root and branch”⁹⁸ was recognized as a compelling social goal justifying the overt use of race.⁹⁹

In another widely followed case, *Grutter v. Bollinger*,¹⁰⁰ the Court held that, to legally consider race, higher education institutions must give “serious, good faith consideration of workable race-neutral alternatives,”¹⁰¹ and that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative.”¹⁰² In that case, the Court upheld the use of race as a consideration in the admissions process to the University of Michigan Law School.¹⁰³ These requirements, which reinforce the illusion of color blindness based on an assumption that policies can be “race-neutral,” move institutions further away from being able to consider the systemic and societal ways in which race affects educational opportunity. Such discussions of systemic and structural reasons for disparities in education would be helpful in the context of understanding workplace racial inequity, and in targeting solutions to it.

More recently, in *Fisher v. University of Texas*,¹⁰⁴ the Court narrowed the permissible intention of a university’s race-based admission policies.¹⁰⁵ In that case, following the Court’s direction in *Grutter*, the University of Texas adopted a process that considered race as one of many “plus-factors” in admission.¹⁰⁶ The majority asserted that a compelling interest is not merely an interest “in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groupsThe diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics”¹⁰⁷ The dissenting opinion of Justice Ginsburg rejects the

97. *Swan v. Charlotte-Mecklenburg*, 402 U.S. 1, 28 (1971); *see also, Bakke*, 438 U.S. 265, 362 (1978) (stating that it “reiterated that racially neutral remedies for past discrimination were inadequate where consequences of past discriminatory acts influence or control present decisions.”); *Davis v. Sch. Comm’rs of Mobile Cty.*, 402 U.S. 33, 37 (1971); *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971); *N.C. Bd. of Educ. v. Swann*, 402 U.S. 43, 45–46 (1971).

98. *Green*, 391 U.S. at 438.

99. *Bakke*, 438 U.S. at 363.

100. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that the law school had a compelling interest in attaining a diverse student body and the admissions program was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body, and thus did not violate the Equal Protection Clause.)

101. *Id.* at 339.

102. *Id.*

103. *Id.* at 343.

104. *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297 (2013).

105. *Id.* at 314.

106. *Id.* at 305.

107. *Id.* at 308 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978)); *see also Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198, 2210 (2016) (“[T]he compelling interest that justifies consideration of race in college admission is not an interest in enrolling a certain

assertion that a university turn a blind eye to “the lingering effects of ‘an overtly discriminatory past’”¹⁰⁸ and the legacy of “centuries of law-sanctioned inequality.”¹⁰⁹ She explains that “Texas’ percentage plan was adopted with racially segregated neighborhoods and schools front and center stage It is race consciousness, not blindness to race, that drives such plans.”¹¹⁰ Ginsburg argued that, “only an ostrich could regard the supposedly neutral alternatives as race unconscious.”¹¹¹ Following *Fisher*, courts will apply strict scrutiny to university policies that consider race in admissions policies and procedures and require a showing by the university that “race-neutral alternatives” would not produce the same result.¹¹²

In each of these cases, the Supreme Court reaffirmed the positive qualities of a diverse student body, while restricting the ability of public universities to use race as a means of achieving that diversity. For many stakeholders in the workforce ecosystem, the net impact of these university cases has been to chill, or utterly dissuade, efforts to collect, analyze and use workers’ racial demographic data to advance racial equity in the workplace.

B. Affirmative Action in the Workplace

Considering race in the workplace, either for hiring, promotion, or creating a diverse and inclusive workplace culture, is even more legally challenging than in higher education.¹¹³ The *Bakke* court framed the value of diversity in higher education as one inuring to all students, or at least implicitly, to white students.¹¹⁴ Classroom discussions, the *Bakke* rationale embraced, would be “livelier, more spirited, and simply more enlightening and interesting”¹¹⁵ if the participants had diverse backgrounds and perspectives. Although certainly many in the workplace would arguably benefit from more interesting and diverse

number of minority students. Rather, a . . . race-conscious admissions program [is permitted] as a means of obtaining ‘the educational benefits that flow from student body diversity.’”) (quoting *Fisher I*, 570 U.S. at 310).

108. *Fisher I*, 570 U.S. at 336 (Ginsburg, J., dissenting) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003)).

109. *Id.* (Ginsburg, J., dissenting) (quoting *Gratz*, 539 U.S. at 298).

110. *Id.* at 335 (Ginsburg, J., dissenting).

111. *Id.* (Ginsburg, J., dissenting).

112. See Cheryl I. Harris, *Fisher’s Foibles: From Race and Class to Class Not Race*, 64 UCLA L. REV. DISC. 648, 650 (2017) (class-based approaches that favored the socioeconomic disadvantaged would be evaluated under rational basis review, as distinct from racially conscious remedial plans which are tested under strict scrutiny).

113. Kenneth R. Davis, *Wheel of Fortune: A Critique of the “Manifest Imbalance” Requirement for Race-Conscious Affirmative Action Under Title VII*, 43 GA. L. REV. 993, 1057 (2009) (arguing that the manifest imbalance requirement serves no legitimate purpose, and that it should be abandoned along with the requirement that affirmative action be limited to traditionally segregated job categories where minorities have been underrepresented).

114. *Id.* at 1043.

115. See *Grutter*, 539 U.S. at 330.

co-workers, it is harder for most employers to rationally link such an environment to its core mission.¹¹⁶

Indeed, public employers, constrained by the equal protection analysis of *Wygant v. Jackson Board of Education*,¹¹⁷ have found no firm support for anything other than a remedial argument, “some showing of prior discrimination by the governmental unit involved” was required to justify even “limited use of racial classifications.”¹¹⁸ Much like the rejection in *Bakke* of “societal discrimination” as a basis for giving preference to racial minorities in university admission, the Court in *Wygant* held that awarding seniority to non-white teachers in the case of layoffs to address societal inequity was “too amorphous a basis for imposing a racially classified remedy.”¹¹⁹

Private employers, governed by Title VII of the Civil Rights Act of 1964, have somewhat greater flexibility for preferential hiring or promotion of minorities or women where there is a “manifest imbalance” reflecting underrepresentation of the relevant group in “traditionally segregated job categories.”¹²⁰ Affirmative-action policies are generally prohibited by Title VII, which Congress passed, “to open employment opportunities for Negroes in occupations which have been traditionally closed to them.”¹²¹ However, depending on the nature of the case, Title VII affords a prevailing plaintiff a range of remedies including declaratory relief, injunctive relief, reinstatement and hiring of employees, back pay, other equitable relief, attorney’s fees, compensatory and punitive damages, and “such affirmative action as may be appropriate.”¹²² Unlike civil actions seeking relief for individual victims of racial discrimination, affirmative action, as Professor Davis notes, “seeks to provide a broad-based remedy for a protected class. It

116. Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 21 (2005).

117. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

118. *Id.* at 274.

119. Estlund, *supra* note 116, at 9.

120. See 42 U.S.C. § 2000e (2012); *Johnson v. Transp. Agency*, 480 U.S. 616, 628 (1987). Among the many intended beneficiaries of affirmative action plans are veterans, those with physical and intellectual disabilities, gays and lesbians, athletes and children of university alumni. See SEX, RACE & MERIT: DEBATING AFFIRMATIVE ACTION IN EDUCATION AND EMPLOYMENT 2 (Faye J. Crosby & Cheryl VanDeVeer, eds., 2000) (discussing how affirmative action refers to plans sought to benefit workers of color).

121. 110 CONG. REC. 6,548 (1964) (remarks of Sen. Humphrey). Introducing the proposed Civil Rights Act to Congress, President Kennedy explained: “There is little value in a Negro’s obtaining the right to be admitted to hotels and restaurant if he has no cash in his pocket and no job.” 109 CONG. REC. 11,159 (1963). Congress was concerned, in 1964, not only with the history of injustices inflicted by racial discrimination, but also with the widening gap between black and white unemployment. 110 CONG. REC. 7,220 (1964) (remarks of Sen. Clark) (“The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and social situation which we should not tolerate.”), cited by Kenneth R. Davis, *Undo Hardship: An Argument for Affirmative Action as a Mandatory Remedy in Systemic Racial Discrimination Cases*, 107 DICK. L. REV. 503, 509 n.28 (2003).

122. 42 U.S.C. § 2000e-5(g)(1) (2012).

offers an enhanced opportunity for the historically disadvantaged to overcome obstacles to employment.”¹²³

C. The Need for a Racial Equity Safe Harbor

Though “affirmative action” is a stated remedy for violations of Title VII, the Supreme Court has generally rejected the constitutionality of voluntary employer plans that provide preference to workers of a certain race, even when the intention is to create a more diverse and inclusive workplace.¹²⁴ There are, however, two exceptions. The first, as articulated in *United Steelworkers v. Weber*¹²⁵ and *Johnson v. Transportation Agency*,¹²⁶ are voluntary affirmative action policies created to remediate past discrimination by that employer.¹²⁷ In *Weber*, a collectively bargained agreement at Kaiser Aluminum designed to reverse conspicuous racial imbalances established an affirmative action program to train unskilled, incumbent workers for craft-worker jobs.¹²⁸ The plan reserved fifty percent of the training slots for racial minorities.¹²⁹ In upholding the plan, the Supreme Court noted, “It would be ironic indeed if a law triggered by a Nation’s concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.”¹³⁰ However, rigid “racial preferences,” would, the Court continued, violate Title VII.¹³¹

While declining to define with precision an affirmative action plan that would be upheld as constitutional, the Court in *Weber* laid out three elements that must be present for any such plan to be permissible. First, a valid affirmative action plan may seek to enlist minority employment only in traditionally closed job

123. Davis, *supra* note 121, at 510.

124. See, e.g., *Janowiak v. Corp. City of South Bend*, 750 F.2d 557 (7th Cir. 1984) (holding both that statistical evidence of underrepresentation of African Americans in the South Bend Fire Department was insufficient to justify a voluntary affirmative action program). An employer must produce additional evidence of past discrimination in order to defend against a Title VII discrimination suit brought by a nonminority plaintiff. *Id.* at 562.

125. *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

126. *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (holding that statistical evidence of entrenched underrepresentation of women in the Santa Clara County Transportation Agency’s skilled craft positions was sufficient to justify voluntary implementation of an affirmative action program).

127. *Id.* at 628. To be permitted, affirmative action plans must apply only to job categories in which minorities are traditionally underrepresented. *Id.*

128. *Weber*, 443 U.S. at 197–98.

129. *Id.* at 197.

130. *Id.* at 204; see also H.R. REP. NO. 88-914, at 18 (1963), as reprinted in 1964 U.S.C.C.A.N. 2391, 2393 (“No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.”).

131. *Weber*, 443 U.S. at 201.

categories.¹³² Second, such a plan may not “unnecessarily trammel the interests of the white employees.”¹³³ Third, a plan must be temporary, such as the Kaiser plan, which provided for its termination when the percentage of skilled craft positions held by African Americans at Kaiser plants approximated the percentage of African Americans in the labor force.¹³⁴

In *Johnson*, the Supreme Court further refined the parameters for workplace affirmative action plans. The Court held that statistical evidence of entrenched underrepresentation of women in the Santa Clara County Transportation Agency’s skilled craft positions was sufficient to justify voluntary implementation of an affirmative action plan.¹³⁵ First, the Court considered whether the Agency’s plan sought to correct a “manifest imbalance” reflecting the underrepresentation of women in “traditionally segregated job categories.”¹³⁶ Though the Agency cited no industry-wide statistics, the Court was satisfied with proof of the Agency’s lopsided employment figures, which showed that no women held any of the Agency’s 238 skilled craft jobs.¹³⁷ Second, the Court examined whether the plan unnecessarily trammelled the rights of male workers, which it did by adopting flexible goals over rigid quotas.¹³⁸ In determining whether the plan was temporary, the Court referred back to the plan’s goal of “attaining” (rather than “maintaining”) a balanced workforce, which, even in the absence of a termination date, is implied.¹³⁹

The second exception to the general rule that voluntary affirmative action plans violate Title VII is hiring pursuant to Executive Order 11246, which covers certain government contractors who are required to have an affirmative action

132. *Id.* at 208.

133. *Id.*

134. *Id.*

135. *Johnson v. Transp. Agency*, 480 U.S. 616, 631–32, 634 (1987).

136. *Id.* at 631 (quoting *Weber*, 443 U.S. at 197). Although the Court seemed to require a showing of traditional underrepresentation in the job category in question, the Court was satisfied with a recital of such underrepresentation in the Agency’s affirmative action plan. *Id.* at 634.

137. *Id.* at 636.

138. *Id.* at 637–38.

139. *Id.* at 639–40.

plan in place.¹⁴⁰ If they are not hiring qualified workers of color,¹⁴¹ the contractor must take affirmative steps to diversify its workforce.¹⁴² Outside of

140. Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,324 (Sept. 28, 1965), 1965 WL 98356 (Pres.). Sec. 301 states:

Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 203 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

Exec. Order 11246, 30 Fed. Reg. at 12324.

141. 41 C.F.R. §§ 60-1.1, 1.40(a)(1), 2.10(a)(1) (2018) (requiring all federal contractors and subcontractors to develop and maintain an affirmative action plan and features needed in such plans); see *Sharkey v. Dixie Elec. Membership Corp.*, 262 Fed. App'x. 598, 599 (5th Cir. 2008); see also *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319, 1333-34, 1343-44 (9th Cir. 1979) (affirming that federal contractor failed to comply with regulation in developing and maintaining an affirmative action plan when not hiring potentially qualified black candidates for food industry jobs on the basis of racial or gender discrimination); *W. Watersheds Project v. Bureau of Land Mgmt.*, 629 F. Supp. 2d 951, 966-67 ("[P]rovisions of Executive Order No. 11246 were subject to judicial review under the APA because . . . the provisions were 'sufficiently rooted in a grant of authority from Congress to have the force of law'" (quoting *Brennan*, 608 F.2d at 1330)); see generally Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,320 (provides background information regarding the purpose of affirmative action plans and the requirements imposed on federal contractors).

142. *Sharkey*, 262 Fed. App'x. 598, 599 (5th Cir. 2008) (holding that employer took legitimate and valid steps in implementing company's affirmative action plan when hiring African American candidate instead of white candidate); Exec. Order No. 11,246, 30 Fed. Reg., 12,319-20, 12,324 (Sept. 28, 1965) (amended in 32 Fed. Reg. 14303 (1967)). See Exec. Order No. 10,925, 26 Fed. Reg. 1,977 (Mar. 8, 1961) (establishing the President's Committee on Equal Employment Opportunity to analyze employment practices and impose measures on contractors and subcontractors to develop and maintain affirmative action plans); cf. *Aponte Rodriguez v. U.S. Marshal Serv.*, No. 04-2195, 2005 U.S. Dist. LEXIS 19516, at *24-26 (D.P.R. Sept. 8, 2005) (dismissing employee's claim under Executive Order No. 11,246 since the Order nor its subsequent provisions require a federal court to rule on a private cause of action for alleged violations of

these two exceptions, employers are understandably reluctant to be explicit about race for fear of generating legal liability, especially in the absence of any documented history of past discrimination.¹⁴³ While the corporate world has shifted toward a rhetoric of diversity and equity as a “business case,”¹⁴⁴ rather than as a “remedial measure,” there is no legal safe harbor to make hiring decisions to advance that business case. While courts have drawn clear lines in the sand prohibiting the use of race-based hiring to advance diversity and equity in the workplace, they have been reluctant to recognize implicit bias as pretext for discrimination in *McDonnell-Douglas* burden shifting cases.¹⁴⁵ Likewise, in what has been portended as an “existential threat” to the future of disparate impact litigation, the Supreme Court’s ruling in *Ricci v. DeStefano* rejected the argument by the defendant employer that it was acting in good faith to advance racial equity when it tossed out the results of an examination that yielded no passing workers of color.¹⁴⁶ This puts a thumb on the scale of racial justice in

affirmative action); see generally *Bell v. Woodward Governor Co.*, No. 03 C 50190, 2005 U.S. Dist. LEXIS 18859, at *3–4 (N.D. Ill. Aug. 31, 2005) (describing the purpose of Executive Order 11246 and requirements placed on federal employers).

143. Estlund, *supra* note 116, at 4 (“In the private sector as in the public sector, there has been no reliable defense of affirmative action for employers who are unwilling or unable to suggest their own complicity in past segregation and current inequities. Few employers have chosen to go down that road.”).

144. Juliet Bourke, Christie Smith, Heather Stockton & Nicky Wakefield, *From Diversity to Inclusion*, DELOITTE, (Mar. 8, 2014), <https://www2.deloitte.com/us/en/insights/focus/human-capital-trends/2014/hc-trends-2014-diversity-to-inclusion.html> (“[D]iversity is no longer a ‘program’ to be managed—it is a business imperative.”); see, e.g., Vivian Hunt, Sara Prince, Sundiatu Dixon-Fyle & Lareina Yee, *Delivering through Diversity*, MCKINSEY & COMPANY, 8 (Jan. 2018), https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Organization/Our%20Insights/Delivering%20through%20diversity/Delivering-through-diversity_full-report.ashx (confirming that having gender and race based diversity is statistically significant to better financial performance); see also Vivian Hunt, Dennis Layton & Sara Prince, *Why Diversity Matters*, MCKINSEY & COMPANY, (Jan. 2015), <https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters> (“Companies in the top quartile for racial and ethnic diversity are 35 percent more likely to have financial returns above their respective national industry medians.”).

145. Circuits are split on allowing a “mixed-motive” showing of implicit bias to defeat summary judgment. See generally David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 918–19 (2010) (describing the multiple approaches taken across federal circuits).

146. See *Ricci v. DeStefano*, 557 U.S. 557, 562–63 (2009). “Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics.” *Id.* at 566. The top ten candidates were eligible to fill eight vacant lieutenant positions. *Id.* All ten candidates were white. *Id.* “Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics.” *Id.* The top nine candidates were eligible to fill seven vacant captain positions. *Id.* Seven of the candidates were white, and two were Hispanic. *Id.*

favor of employers, both in relieving them of any obligation to take affirmative steps toward equity, as well as shielding them from liability for failing to act.¹⁴⁷

By labeling the awareness of race as “racist,” a color-blind framework, whether in higher education or employment, equates any consideration of race with harmful discrimination.¹⁴⁸ This includes intentional efforts by employers to counter the implicit bias that mounting social science evidence suggests is present among decision-makers in the workplace,¹⁴⁹ as well as an intention by employers to comprise a more diverse workplace.¹⁵⁰ Taking any affirmative steps in furtherance of either of these goals is treated as a preference for people of color and as reverse discrimination of white workers, rather than as one that seeks to counteract cumulative advantages that inure to dominant white populations. What the Supreme Court jurisprudence fails to recognize is that racial equity should be a shared goal of government and its citizens. Indeed, the government, including public employers and universities, has a compelling interest in advancing racial equity—not in violation of the Equity Protection Clause, but in furtherance of it.¹⁵¹ Likewise, a correct interpretation of Equal Protection is that private employers may (and arguably, should) take affirmative steps to advance racial equity, such as by using data to drive diversity, and if taking such steps in good faith should do so in safe harbor, without fear of legal retribution.

147. Analogizing the effects of disabilities to the effects of racial bias, Professor Davis has argued that affirmative action, like the duty to make reasonable accommodations under the Americans with Disabilities Act (ADA), should be mandatory under appropriate circumstances to afford African-Americans the same level of civil rights protection provided to persons with disabilities. Davis, *supra* note 121, at 509.

148. Liliana M. Garces & Cynthia Gordon da Cruz, *A Strategic Racial Equity Framework*, 92 *PEABODY J. OF EDUC.*, 322, 329 (2017).

149. See, e.g., Devah Pager, Bruce Western & Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 *AM. SOC. REV.* 777, 778–79 (2009); see also Keith Payne, Laura Niemi & John M. Doris, *How to Think About “Implicit Bias”*, *SCI. AM.* (Mar. 27, 2018), <https://www.scientificamerican.com/article/how-to-think-about-implicit-bias/>.

150. See, e.g., OFFICE OF DISABILITY EMP. POL’Y, U.S. DEP’T OF LABOR, *Diversifying Your Workforce*, https://www.dol.gov/odep/documents/Flip%20Guide_FINAL_3%2030_508%20compliant2.pdf (last visited Aug. 26, 2019).

151. The dissenting opinion in *Parents Involved in Community Schools v. Seattle School District* articulates this idea as a “democratic element” of compelling interest, in that case “an interest in producing an educational environment that reflects the ‘pluralistic society’ in which our children will live. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 840 (2007) (Breyer, J., dissenting) (internal citations omitted). The opinion goes on to state, “[i]t is an interest in helping our children learn to work and play together with children of different racial backgrounds . . . in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation.” *Id.* (Breyer, J., dissenting).

IV. DEVELOPING A DATA ANALYTICS FRAMEWORK

To be effective, racial equity strategies must be systemic, race-explicit, and outcome-oriented.¹⁵² They must not only tackle the *effects* of systemic racism, in the form of racialized barriers, but also its *root causes*, in the ways systems create and perpetuate racialized outcomes.¹⁵³ Lastly, such strategies must be specific, strategic, and measurable, and not simply part of an organization's mission statement.¹⁵⁴ As the amount, depth, and breadth of available data increases, advanced analytical tools are necessary to guide the creation, implementation, and evaluation of workplace equity strategies.

A racial equity data analytics framework requires:

1. Collecting, disaggregating, and analyzing data related to race and ethnicity;¹⁵⁵
2. Identifying racial disparities in workforce outcomes;¹⁵⁶
3. Naming race explicitly when talking about disparities;¹⁵⁷
4. Investigating structural causes of racial disparities;¹⁵⁸ and
5. Developing strategies to eliminate policies, practices, and cultural messages that reinforce differential outcomes by race.¹⁵⁹

This framework can help guide organizations through a process of uncovering internal and external racialized barriers for their workers.¹⁶⁰ The majority of

152. Race Forward, *Executive Summary: Race-Explicit Strategies for Workforce Equity in Healthcare and IT* 1, 5 (2017), https://www.raceforward.org/system/files/pdf/reports/RaceForward_RaceExplicitStrategiesReport_ExecSummary.pdf.

153. See, e.g., *Race and Social Justice Initiative: Our Approach*, CITY OF SEATTLE, 1, 2, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiJiK3goq3fAhWJInwKHTm5Ce8QFjAAegQIChAC&url=https%3A%2F%2Fwww.seattle.gov%2FDocuments%2FDepartments%2FRSJI%2FRSJI-Our-Approach.docx&usg=AOvVaw2f5yg1FO74wCp9oRUljUO2> (last visited Aug. 26, 2019) (“To achieve equity, however, we must focus on root causes. Ending institutional racism involves more than simply developing programs to help people of color. RSJI is Seattle’s effort to change the underlying system that perpetuates racial and social inequities.”).

154. Annie E. Casey Foundation, *Embracing Equity: Race, Equity & Inclusion Action Guide*, 1, 9 (2014), https://www.aecf.org/m/resourcedoc/AECF_EmbracingEquity7Steps-2014.pdf.

155. See, e.g., Erika Bernabei, *Racial Equity: Getting to Results*, LOCAL AND REG’L GOV’T ALL. ON RACE & EQUITY, 1, 6, https://www.racialequityalliance.org/wp-content/uploads/2017/09/GARE_GettingtoEquity_July2017_PUBLISH.pdf. (last updated July 2017).

156. *Id.* at 9–11.

157. See *Moving a Racial Justice Agenda: Naming and Framing Racism*, (2001) <http://www.racialequitytools.org/resourcefiles/westernstates1.pdf>.

158. Bernabei, *supra* note 155, at 10.

159. PROINSPIRE, *Awake to Woke to Work: Building a Race Equity Culture*, 1,4, <https://static1.squarespace.com/static/56b910ccb6aa60c971d5f98a/t/5adf3de1352f530132863c37/1524579817415/ProInspire-Equity-in-Center-publication.pdf> (last visited Aug. 26, 2019).

160. See, e.g., MULTNOMAH CTY., OFF. OF DIVERSITY AND EQUITY, *Equity and Empowerment Lens* 1, 113–20, (2012), http://www.racialequitytools.org/resourcefiles/ee_lens_final-portland.pdf.

participants in the Baltimore Racial Equity Research Study reported that their organizations “were not being intentional about racial equity, and that they needed to conduct a more thorough self-assessment of their programs, policies, and workplace cultures.”¹⁶¹ Only a small minority of the organizations and institutions included in the RERS implemented such specific, strategic, and measurable policies and practices, and even fewer regularly collected and analyzed data to measure whether those policies and practices were having any real impact.¹⁶²

While still quite nascent in the workforce arena, sources of so-called “big data,” including the collection of GPS tracking information, biometric feedback, SMS messages, and social media posts, allow for the collection of unprecedented amounts of potentially useful information. Disaggregating this data by race is central to an analytic framework that seeks to reduce racial inequality and advance equity. Analyzing this data can take many forms, from a descriptive analysis of rates of program completion, job placement, starting wages, and advancement over time. To be effective, this framework also requires diagnostic analytics to help understand the root causes of present disparities, such as redlining or school segregation. Predictive analytics can be used for benchmarking outcomes related to specific workplace policies, while prescriptive analytics—determining what should be done given the data available—is central to managerial decision-making.

Analyzing data from the RERS produced three key recommendations for the construction of a this racial equity framework: (1) data must be used to drive diversity; (2) qualitative data can be as valuable as quantitative data; and (3) data must be used constantly and consistently to close the loop on racial equity.¹⁶³ In using data to advance racial equity, however, one should not presume that all data is neutral, objective, and free from embedded racial bias. As one practitioner expressed:

One thing I struggle with is that the data we are collecting is affected by larger systems of racism. There’s no easy way to tell that story, but it is there in the numbers. Having the data helps us to have a conversation about this—numbers don’t lie. You can’t address racialized outcomes without addressing the underlying structures that have created those outcomes.¹⁶⁴

161. *Building Racial Equity*, *supra* note 26, at 9.

162. *Id.* at 13–14.

163. *Id.* at 13–15.

164. *Id.* at 14.

A. Use Data to Identify Racialized Outcomes

For-profit businesses have learned to harness the power of data to make informed decisions that drive profitability.¹⁶⁵ Likewise, the not-for-profit workforce ecosystem must use data to drive outcomes that advance mission and racial equity.¹⁶⁶ While most workforce providers reported collecting data on the race and ethnicity of their program participants, few were using that data to make decisions that generate better outcomes and reduce racial inequities.¹⁶⁷ It is not enough to have data; the data must be used to track the impact of specific policy changes and actions.

However, impact on racial equity advancement can be difficult to measure. To be effective, data should be collected, disaggregated for race¹⁶⁸ (as well as age, gender, educational attainment, zip code, and criminal background), and analyzed to measure outcomes against common metrics of placement, retention, wages, and advancement.¹⁶⁹ One practitioner cautioned against drawing incomplete conclusions from participation data:

89% of the people who we serve self-describe as a person of color, so you think, “That’s good!” But what is it really telling us? What’s happening with them? We need to disaggregate *outcomes*. What do we consider success? And would we consider that success if we were serving mostly white people?¹⁷⁰

Establishing common metrics enables such organizations to align inputs and outputs with strategic equity outcomes.

Comparing local outcomes to those on a larger, national level also helps reveal racialized outcomes and disparities.¹⁷¹ Practitioners face an additional challenge in disaggregating data by race when they primarily serve an African American population.¹⁷² As one practitioner explained, “It’s a task because we don’t have much data on non-African Americans in Baltimore; they are 90-95% of our

165. See, e.g., McAfee & Brynjolffson, *supra* note 17; Marr, *supra* note 17; Baker et al., *supra* note 17.

166. See, e.g., Porway, *supra* note 19.

167. *Building Racial Equity*, *supra* note 26, at 13–14.

168. See *Tools and Tips for Collecting and Analyzing Racial and Ethnic Data*, ANNIE E. CASEY FOUND., (Dec. 7, 2017), <https://www.aecf.org/blog/tools-and-tips-for-collecting-and-analyzing-racial-and-ethnic-data/>.

169. See, e.g., Center for Law and Social Policy, *A Framework for Measuring Career Pathways Innovation* (February 2013), <https://www.clasp.org/sites/default/files/public/resources-and-publications/files/CLASP-AQCP-Metrics-Feb-2013.pdf> (outlining a system’s framework for measuring the performance of career pathways programs that disaggregates data on participants’ outcomes by race and gender, among other characteristics).

170. *Building Racial Equity*, *supra* note 26, at 19 (internal citations omitted) (emphasis added).

171. See, e.g., PolicyLink and the Univ. of S. Cal. Program for Env’tl. and Reg’l Equity, *National Equity Atlas* (2016), www.nationalequityatlas.org.

172. *Building Racial Equity*, *supra* note 26, at 19.

caseload. However, when we look to state and national salary data, we can see that [the wages of our workers] are very much under those.”¹⁷³

However, “by benchmarking data on advancement, retention and raises to state and federal rates . . . statistical diversity within” a particular jobsite is not necessary “to conclude that [its] workers are having disparate experiences in the workplace.”¹⁷⁴

B. Harness the Power of Qualitative Data

While quantitative data can help identify gaps in participation, outcomes, wages, retention, and advancement, qualitative data can shed light on the experiences of workers on the job.¹⁷⁵ Developing a meaningful process for capturing qualitative data helps organizations identify trends and patterns. This data can be just as powerful, if not more so, than quantitative data, because it captures workers’ lived experiences.¹⁷⁶ As one provider explained, “We don’t need a lot of people to . . . put together qualitative data. For a small organization with only 10 employees, we could tell a lot of interesting stories by capturing the right amount of information.”¹⁷⁷ Once enough data has been gathered, it can be used to strategically identify additional services needed. Cutting data across other demographic intersections, such as age, gender, educational attainment, zip code, and criminal backgrounds can provide a more comprehensive understanding of who an organization is serving, as well as the unique challenges they face.¹⁷⁸

Including qualitative data in decision-making can also help guard against the potential negative impacts of using big data in employment. Big data has been touted as an antidote to the implicit biases that may discriminate against the best candidates.¹⁷⁹ Algorithms that consider experience and skills that are known to correlate with success can help identify applicants who might otherwise be

173. *Id.* at 19 (internal quotations omitted).

174. *Id.*; see, e.g., U.S. DEP’T OF COMMERCE AND THE NAT’L PARTNERSHIP FOR REINVENTING GOV’T, *Best Practice in Achieving Workforce Diversity* (Oct. 2000), <https://govinfo.library.unt.edu/npr/library/workforce-diversity.pdf>.

175. See, e.g., Marianne Daher, David Carré, Andrea Jaramillo, Himmblar Olivares & Alemka Tomicic, *Experience and Meaning in Qualitative Research: A Conceptual Review and a Methodological Device Proposal*, 18 F.: QUALITATIVE SOCIAL RES. 1, 19 (Sept. 2017) (noting qualitative research theory proposes that experience is “the necessary and sufficient piece of knowledge in the human sciences”).

176. Tricia Wang, *Why Big Data Needs Thick Data*, MEDIUM (Jan. 20, 2016), <https://medium.com/ethnography-matters/why-big-data-needs-thick-data-b4b3e75e3d7>.

177. *Building Racial Equity*, *supra* note 26, at 19.

178. See, e.g., *Forum Guide to Collecting and Using Disaggregated Data on Racial/Ethnic Subgroups*, NAT’L F. ON EDUC. STATI. (Sept. 2016), <https://nces.ed.gov/pubs2017/NFES2017017.pdf>.

179. *The Importance of Collecting Data and Doing Social Scientific Research on Race*, AM. SOCIOLOGICAL ASS’N (2003), http://www.asanet.org/sites/default/files/savvy/images/press/docs/pdf/asa_race_statement.pdf.

overlooked due to “affinity bias” or “like-me bias.”¹⁸⁰ In this way, large-scale data systems can help combat the kinds of implicit and explicit bias that can give rise to legal liability for employment discrimination.¹⁸¹ Similarly, the use of objective data to drive employment decisions can also help mitigate against wage disparities or occupational segregation once on the job. However, rather than counter racial biases, big data sets can also perpetuate them, effectively teaching machines to discriminate when scanning resumes.¹⁸² Critics have warned against the potential for algorithms that factor in race-neutral “proxies” for race¹⁸³ and correctly observe that “data are not neutral” and can merely replicate racial biases.¹⁸⁴ In the workforce development context, care should be taken to ensure that big data does not systematically disadvantage workers of color, whether inadvertently or intentionally.¹⁸⁵ Such uses threaten to reverse gains already made with respect to civil rights protections in employment.¹⁸⁶

C. Use Longitudinal Data to Continuously Close the Loop

Data should not be viewed as a static statistical snapshot. Demographic data can be used to identify racialized barriers in the workplace, which can serve as a starting point of discussion with employers to reduce those barriers and biases.¹⁸⁷ To be meaningful, this data should be collected over longer periods than is currently by most practitioners and funders. Employers in the study reported frustration that workforce programs are not training workers for current sector-based needs.¹⁸⁸ According to one, “It’s felt like for the last six months [the workforce provider] may have been training people for jobs that might not be there in a year. They’ve spent a while building this program and have spent a lot of foundation’s money; no one wants to hear that.”¹⁸⁹ Another individual stated, “An employer’s need is not six months from now. It’s now. And it’s

180. See generally Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857 (2017).

181. Michael Housman, *Robots are Color Blind*, <http://michaelhousman.com/robots-are-color-blind/>.

182. Science Friday, *Why Machines Discriminate—and How to Fix Them* (Nov. 20, 2015) <https://www.sciencefriday.com/segments/why-machines-discriminate-and-how-to-fix-them/>.

183. Tal Z. Zarsky, *Understanding Discrimination in the Scored Society*, 89 WASH. L. REV. 1375, 1389 (2014) (citing Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 4 (2014)).

184. Kim, *supra* note 180, at 860; Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CAL. L. REV. 671, 673 (2016).

185. EXEC. OFF. OF THE PRESIDENT, *BIG DATA: A REPORT ON ALGORITHMIC SYSTEMS, OPPORTUNITY, AND CIVIL RIGHTS* (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf.

186. EXEC. OFFICE OF THE PRESIDENT, *BIG DATA AND PRIVACY WORKING GROUP REVIEW* (2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/05/01/fact-sheet-big-data-and-privacy-working-group-review>.

187. See Am. Sociological Ass’n, *supra* note 179.

188. *Building Racial Equity*, *supra* note 26, at 20.

189. *Id.* (internal citations omitted).

always changing.”¹⁹⁰ Collecting and analyzing data on workers after they leave a training program, and for the duration of their employment, not only allows providers to better measure impact; it allows them to collect valuable industry- and employer-specific information they can then use to refine their curricula and develop longer term supports.¹⁹¹

V. CONCLUSION

While advancing racial equity requires a focus on workers of color, structural, and systemic changes inure to the local and national economies in which those workers reside.¹⁹² The elimination of racial inequity is critical to the country’s long-term economic growth; our collective success as a nation hinges on changing the prospects for workers of color.¹⁹³ In the absence of stronger legal and political systems that could compel racial equity through top-down regulation, judicial rulings, and executive orders, the workforce ecosystem must serve as a bottom-up change lever.

Big data has tremendous potential to advance social change and spur creative innovation. Those engaged in workforce development—a seemingly data desert at present—must quickly adapt to what has become a permanent fixture in the employment landscape. Arriving late to the big data party does have its advantages. While the expansion of data analytic technology has, in many other arenas, outpaced the ability and acumen of regulators to guard against potential abuse in many other arenas, the workforce ecosystem has an opportunity to make the road by walking it at its own pace. While big data may very well hold the key to reversing two hundred years of racial discrimination and oppression, there is a real and valid concern that “algorithmic decisions raise the specter of “redlining” in the digital economy—the potential to discriminate against the most vulnerable classes of our society under the guise of neutral algorithms.”¹⁹⁴ Organizations and institutions engaged in educating, training, funding, and supporting workforce development must lead by example by collecting, disaggregating, and sharing data that holds all stakeholders accountable in the collective mission of dismantling racial inequity.

190. *Id.*

191. *Id.*

192. Julie Nelson, *Racial Equity: The Responsibility and Opportunity for Local Governments*, CITIESPEAK (Mar. 3, 2014), <https://citiesspeak.org/2014/03/03/racial-equity-the-responsibility-and-opportunity-for-local-governments/>.

193. See Ani Turner & Beth Beaudin-Seilin, *The Business Case for Racial Equity: A Strategy for Growth* 1 (2018), https://altarum.org/sites/default/files/uploaded-publication-files/WKKellogg-MI-Business-Case-for-Racial-Equity-Report_2018.PDF.

194. EXEC. OFFICE OF THE PRESIDENT, BIG DATA AND PRIVACY WORKING GROUP REVIEW (2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/05/01/fact-sheet-big-data-and-privacy-working-group-review>.

