



# VCBA ADR SECTION AND THE PROBATE & ESTATE PLANNING SECTION

Present

## TRIBALISM AND THE POSSIBILITY OF CIVIL DISCOURSE IN A DIVERSE SOCIETY

*Why We Are So Hateful and What We Can Do About It.*

**Panelist:**  
LaVada English, MBA

**Panelist:**  
Tina Rasnow, Esq.

**Panelist:**  
Carmen Ramirez, Esq.

The panel will explore the evolutionary bases for xenophobic characteristics/behaviors, discuss the shortcomings of legislating away “hate,” and propose alternative strategies that are more likely to lead to civil discourse in a diverse society.

---

**Thursday, January 23, 2020**

12:00 – 1:30 p.m.

**Courtyard Marriott**

600 Esplanade Drive, Oxnard CA 93036

**Bias  
Credit**

**Bias  
Credit**

---

# Materials

## YOUR TRUSTED TEN

Your Trusted 10 (First Name or initials)	Gender	Age	Ethnicity/ Race	Education	Marital Status	Sexual Orientation	Other (i.e., Children, Income)
1							
2							
3							
4							
5							
6							
7							
8							
9							
10							

Notes:

---



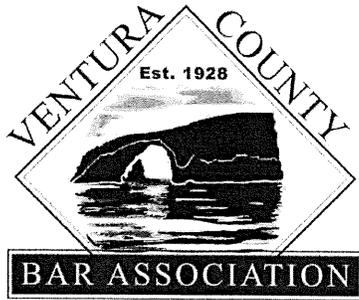
---



---



---



---

Intentionally  
Blank

---

**A NEW REPORT OFFERS INSIGHTS INTO TRIBALISM IN THE AGE OF TRUMP**

<https://www.newyorker.com/news/daily-comment/a-new-report-offers-insights-into-tribalism-in-the-age-of-trump>

**By George Packer, October 13, 2018**

*Away from the fun-house mirrors and the bullhorns of cable news and social media,  
Americans' views are more nuanced and less easy to caricature.*

We live in a time of tribes. Not of ideologies, parties, groups, or beliefs—these don't convey the same impregnability of political fortifications, or the yawning chasms between them. American politics today requires a word as primal as "tribe" to get at the blind allegiances and huge passions of partisan affiliation. Tribes demand loyalty, and in return they confer the security of belonging. They're badges of identity, not of thought. In a way, they make thinking unnecessary, because they do it for you, and may punish you if you try to do it for yourself. To get along without a tribe makes you a fool. To give an inch to the other tribe makes you a sucker.

Lonely dissent used to carry a certain prestige in politics, even if few people had the stomach for it. When Senator Wayne Morse, of Oregon, cast a nearly solitary vote against his Democratic President's Gulf of Tonkin Resolution, in 1964, he did not win the love of his fellow-senators, but he at least earned a grudging admiration. It was an honorable thing to stand on your own. Today, it's mocked as feckless, or reviled as near treason. Jeff Flake's Senate colleagues despise him—the Republicans for temporarily breaking with his tribe, the Democrats for being too weak to follow through.

Everything in American politics today entrenches tribalism: our winner-take-all elections, the dehumanizing commentary on cable news and social media, the people we choose to talk to and live among. The trends are not new, but they've dramatically accelerated and intensified under a President who rules by humiliation because he lives in fear of being humiliated.

I'm using "tribalism" to refer to what George Orwell, in an essay he wrote at the end of the Second World War, meant by "nationalism": "the habit of identifying oneself with a single nation or other unit, placing it beyond good and evil and recognising no other duty than that of advancing its interests. . . . The abiding purpose of every nationalist is to secure more power and more prestige, not for himself but for the nation or other unit in which he has chosen to sink his own individuality." Our tribes are competing for power over the state, the media, public opinion, the verbal battleground. When politics becomes a perpetual tribal war, ends justify almost any means and individuals are absolved from the constraints of normal decency. People who would never tolerate cruelty or lying or even ordinary impoliteness in their children cheer every excess of their leaders, none more so than President Trump's.

The Brett Kavanaugh hearing inflamed the tribes beyond anything since Trump's election. The weekend of the final Senate vote was all furious gloating in one camp and smoldering rage in the other. The winners seemed more gleeful at having inflicted a painful defeat on their devious foes than at the potential decisions of a conservative Supreme Court. Whenever the war comes to a head, it's the whirling forms of politics—the tactics and rhetoric and emotions—that consume us, not the policies. The dominant mood is anger—a state we perversely seek out and, at the same time, dread, or ought to.

One side has moved steadily leftward over the past decade, and many progressives are feverish with their own vision of tribal righteousness: identity politics. The escalation requires both sides to feed and perpetuate it. But only one side has turned a major political party over to an unapologetic leader who knows no limits. I could draw a pretty straight line from Newt Gingrich's radicalism and the government shutdowns of the nineteen-nineties to the opportunistic majority opinion of *Bush v. Gore*, in 2000; the unstoppable rightward lurch from Jesse Helms to Jim DeMint to Ted Cruz; the nomination of Sarah Palin, in 2008; Mitch McConnell's vow, in early 2009, to derail the Obama Presidency; the Senate Republicans' abuse of the filibuster to block all Democratic legislation and appointments; the unleashing of dark money with *Citizens United*; the extreme gerrymandering and attempted voter suppression in Republican state houses, after the 2010 midterms; the stonewalling of Merrick Garland, in 2016; Republican leaders' refusal to acknowledge Russian interference in that year's Presidential election; and the final takeover of the Party by Trump.

Earlier this week, McConnell told Chris Wallace, of Fox News, that, if another Supreme Court seat became available in 2020, during the Presidential campaign, it would be completely proper for the Republicans to confirm another Trump nominee. Never mind that this makes nonsense of McConnell's excuse for refusing Garland a hearing during the previous Presidential race. The principle, McConnell said, is whether the same party controls the Senate and the White House. He turned this spurious claim into a "tradition" dating back to 1880, but he hardly disguised his real meaning: If we can do it, we will. Call me a hypocrite and see how far that gets you. The recurring theme of this anti-democratic tale is raw power as an end in itself. At every turn, Republicans have pushed the abuse of power further, while Democrats have had to react, often fecklessly. There's no equivalence, no both-sides-ism. And nothing will return the Republican Party to decency except, perhaps, two or three devastating electoral defeats.

I hear myself say this and think, A solid analysis. At the same time, I hear a Republican reply, Pure tribalism. You're just proving your own point. I want part of my brain, even a small part, to be always attuned to the frequency of other tribes, ready to pose the essential questions: How would this sound coming from them? How do they see you? I try to keep two thoughts in my head at the same time: the other tribe needs to be crushed, and I have to talk and listen to them. The first thrives on rage, the second on tolerance. These are contradictory states of being, and extremely difficult to maintain in tension, but a sane politics requires both. The alternative isn't victory but self-destruction. After all, we have to live together.

On Wednesday, More in Common, a research organization based in Europe and the United States, released a report called "Hidden Tribes: A Study of America's Polarized Landscape." It builds on the group's prior work in France, Germany, and Italy—an effort to understand and counteract rising populism and fragmentation in the Western democracies. Throughout the past year, the report's four authors surveyed eight thousand randomly chosen Americans, asking questions about "core beliefs": moral values, attitudes toward parenting and personal responsibility, perceptions of threats, approaches to group identity. The authors then sorted people, based on their beliefs and values, into seven "tribes": Progressive Activists, Traditional Liberals, Passive Liberals, Politically Disengaged, Moderates, Traditional Conservatives, Devoted Conservatives. Progressive Activists, as described by the report, tend to be "younger, highly engaged, secular, cosmopolitan, angry." The Politically Disengaged are "young, low income, distrustful, detached, patriotic, conspiratorial." Moderates are "engaged, civic-minded, middle-of-the-road, pessimistic, Protestant." Devoted Conservatives are "white, retired, highly engaged, uncompromising, patriotic."

More in Common found that "tribal membership predicts differences in Americans' views on various political issues better than demographic, ideological, and partisan groupings." In other words, whether or not you think creativity is more important than good behavior in children is a better indicator of your political views than is your gender, your race, your income, or your party affiliation. "Once we have the seven segments, their views on issues are highly correlated," Tim Dixon, an Australian political activist and a founder of More in Common, told me. He added, "We have too much opinion research and not enough value research."

This is why the seven tribes are hidden. We're used to seeing race, gender, region, religion, and other categories line up with political preferences in numbingly predictable ways. We rarely know the underlying world views that inform these opinions. The tribes in the report are different from the rigid and unchanging partisan monoliths of our national political debate. (For this reason, perhaps More in Common should have used a term other than "tribes.") They're less mutually incompatible than the two big blocs of red and blue America. Away from the fun-house mirrors and the bullhorns of cable news and social media, people's views are more nuanced and less easy to caricature. For example, eighty-one per cent of those interviewed believe that racism is a serious problem, but eighty-five per cent think that race should not be a factor in college admissions.

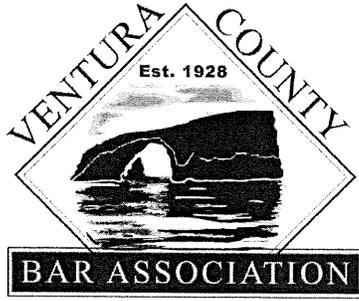
Dixon told me about one of the researchers who helped conduct follow-up interviews, a young woman with left-wing views. "She went in to an interview with a Traditional Conservative girded for battle, and after an hour she felt a transformational experience," he said. In asking about matters like family values and threats to the community, he said, "she had an appreciation that their views made sense." We all have this experience when we talk with a tribal enemy about something other than politics and are surprised to find a human being with much to like. It's easier to see the world through someone else's eyes when he or she is sitting at your kitchen table, rather than insulting you on Twitter. That insight would be a well-meaning commonplace—of course we're all human, but we still hate one another politically—were it not for the key conclusions of "Hidden Tribes."

Overwhelmingly, Americans feel that the country is more divided than at any time in their lives. Overwhelmingly, they are sick of the political divisions—often to the point of tears—and feel forgotten in the debate, especially as it's distorted by the media. The majority hates polarization and wants more compromise. The report calls this the "Exhausted Majority," a grouping of Traditional Liberals, Passive Liberals, Politically Disengaged, and Moderates, who together make up two-thirds of Americans.

The members of the Exhausted Majority are politically diverse, but united by their desire for flexibility and compromise. In some ways, they have more in common with one another than with either extreme. The eight per cent of Progressive Activists on the left and the twenty-five per cent of Traditional and Devoted Conservatives on the right are less open to compromise, less ideologically flexible, more likely to think that those who agree politically should stick together and fight. Compared with Progressive Activists, Traditional Liberals place more value in authority and loyalty, are less likely to rate their ideological identity above being American, and are more likely to see political correctness as a problem. "Progressive Activists are not representative of most liberal Americans, Traditional and Devoted Conservatives are not representative of most conservative Americans," the report says. "Yet both sides have absorbed a caricature of the other."

A shrewd politician could take the findings of "Hidden Tribes" and create a winning constituency by appealing to the Exhausted Majority. The appeal would resist the litmus tests and the rhetoric of the base and instead speak to underlying values of fairness, compromise, inclusion, and citizenship, based on a vision of national rather than ideological or demographic identity. If elections are reactions to previous elections, such a politician would raise a powerful challenge to Trump and tribalism.

Until then, back to the field of rage.



---

Intentionally  
Blank

---

# Embracing Diversity: Overcoming Subconscious Biases and Their Effect on the Decision-Making Process

Tina Rasnow, Attorney Emerita

Who we are: The Us                      The Other                      How We Become One

**Stereotypes:** Exaggerated belief, image or distorted truth about a person or group; generalization that allows for little or no individual differences or social variation. Can be positive or negative.

**Prejudice:** An opinion, prejudgment or attitude about a group or its individual members. Can be positive, but generally refers to a negative attitude. Formed by complex psychological process. Often accompanied by ignorance, fear or hatred. Prejudice is often aimed at "out-groups."

**Discrimination:** Behavior that treats people unequally because of their group memberships; often begins with negative stereotypes and prejudices.

**Implicit Bias:** Hidden, unconscious, or automatic, biases helped early humans distinguish friend from foe. Categorization promotes order in everyday life. Foundation of stereotypes, prejudice and discrimination.

**How we learn prejudice:** As early as age 3 we start to form attachments with one's own group and develop negative attitudes about the "other."

**Reinforcement of Bias:** Once learned, stereotypes and prejudices resist change; we embrace anecdotes that reinforce our biases and disregard experience that contradict them.

**Perpetuating Bias:** Perpetuated by conformity with in-group attitudes; socialization by the culture at large; mass media and omission in popular culture.

**Hidden Bias:** Biases thought to be absent or extinguished remain as "mental residue." "Implicit Association Tests" (IATs) [Project Implicit](https://implicit.harvard.edu/implicit/)

**Bias Directing Behavior:** Hidden biases can motivate action, especially under stress. Unconscious beliefs and attitudes compel language and behavior and can affect differently those in same setting.

**Examples of Unconscious Bias Affecting Behavior:** DWB (Driving While Black or Brown); police shootings of unarmed African American males, jury deliberations, and judgment of human character. Prejudice outside our awareness can indeed be denied.

Less Discussed Bias: Size, geography, urban v. rural, economic class, physical “attractiveness”

#### Be the Change

Each day we can learn and grow  
Expose prejudice and bias  
Embrace our physical selves as we are  
Embrace the diversity among our fellow humans

#### Acknowledgements

My diverse family  
The many wonderful friends I have made near and far  
Southern Poverty Law Center’s Teaching Tolerance Program  
<http://www.tolerance.org>  
The Sentencing Project <http://www.sentencingproject.org>

#### Further Reading:

*The Case for Reparations* by Ta-Nahisi Coates  
[www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/](http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/)

Alexander, Michelle; *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*; The New Press, New York (2012)

Mooney, Chris; *Are You Racist? Science Has the Answer*. Cover Article in January + February 2015 issue of *Mother Jones Magazine*

Article *Conservatives are More Susceptible to Believing Lies—But Not Because They’re Stupid* by John Ehrenreich, Slate Nov. 12, 2017  
<https://amp.businessinsider.com/why-conservatives-are-more-susceptible-to-believing-lies-2017-11>

Films by Adam Curtis, produced by BBC, including *Century of The Self* and *The Power of Nightmares*  
<https://www.youtube.com/watch?v=eJ3RzGoQC4s>



---

Intentionally  
Blank

---

# THE THREE COMMITMENTS

## AFTER 400 YEARS, A RECIPE FOR WINNING THE FIGHT

**W**e need to transform our priorities for Black liberation in the United States of America. The next 400 years of Black life in America requires everyday people fighting for their liberation, along with leaders and organizations. We can no longer withstand the brutal and entrenched attacks from political, cul-

tural and corporate forces focused on trying to deny our humanity.

As I reflect on more than 15 years of my own Black feminist activism, I understand that there are three core commitments we must embrace to fortify transformative movements. These commitments are: 1) building many strong leaders; 2) adopting healing justice as a core value; and 3) combating liberalism through principled struggle. Each of these commitments requires consistent action, from the many, not the few.

I first wrote about these three commitments in my book *Unapologetic: A Black, Queer and Feminist Mandate for Radical Movements*. While these concepts are not new, they are each woefully under-resourced and undervalued in movement spaces. These are meant to be aspirational goals, life and generations-long practices.

Our movements are weakened and deemed much smaller than they are because of a lack of consistent investment in building strong leaders. Ella Baker, then the NAACP director of branches, was well-known for saying “strong people don’t need strong leaders.” This is often misunderstood as an argument against leadership. Baker was making a clear statement against organizations that favored exclusive models of leadership where the few, not the many, were developed. She practiced group-centered leadership, which is often practiced by women, disabled people and Lesbian, Gay, Bisexual, Transgender, Queer and Questioning (LGBTQ+) collectives as well as other groups marginalized in Black communities. This type of leadership is deemed less valuable and is erased or under-recognized.

Building many strong leaders includes investing in rigorous political education and relationship-building. These efforts should have multiple entry points so that learning becomes a practice rooted in joy, not intimidation or condescension. Our people understand complex ideas, and our

movement groups have a responsibility to create such learning spaces for all.

Those spaces created for leadership development can also be used for our collective healing. If everyone who shows up to do movement work is expected to be fully healed individuals, we would have no one to do the work. We have a duty to address our trauma, our pains and our hurt, alongside those of our ancestors. We need healing justice as a core organizing value.

As defined by Cara Page and the Kindred Southern Healing Justice Collective, healing justice “identifies how we can holistically respond to and intervene on generational trauma and violence, and to bring collective practices that can impact and transform the consequences of oppression on our bodies, hearts and minds.” This isn’t a passive set of practices. According to Prentis Hemphill, past Black Lives Matter Global Network Healing Justice director, “healing justice is active intervention in which we transform the lived experience of Blackness in our world.”

Healing justice includes self-work that is coupled with community care. While no single organization can facilitate our individual healing, all organizations can devote resources (even if limited) to creating communities of care (group therapy, wellness services and healing-practitioner training). Many of us can take cues from addiction and recovery groups that consistently host meetings with the expectation that individual people still have to show their work.

Like trauma, healing can be passed down through generations. Fannie Lou Hamer was forcibly sterilized. Other Black women who have been forcibly sterilized and their remaining families require healing justice. The living relatives of Black people killed by police officers and vigilantes require healing justice. And those who showed up to demand justice, only to be met with more police violence, require healing justice.

Securing any level of justice requires struggle among human beings with varied backgrounds, values and ways of being. With struggle, there is conflict that can sow discord and has even led to violence.

To fortify our relationships, organizations and movements must engage in principled struggle by combating liberalism.

I write in *Unapologetic* that liberal-



**THE NEXT 400 YEARS**  
people fighting

GETTY IMAGES (3)

ism "requires no specific commitment to collective work, justice, or transformation. It's a breeding ground for indirect approaches and politics that are identity-neutral (unless you're a cisgender White man) politics. Liberalism requires no ideological struggle for the sake of peace, and it means, if anything, pursuing moderate change [in order] to not to ruffle the feathers of too many people." Liberalism in our movements creates chaos when we:

1. "Let things slide for the sake of peace and friendship when a person has clearly gone wrong, and refrain from principled argument."
2. "Indulge in irresponsible criticism in private instead of actively putting forward one's suggestions to the organization."
3. "Say nothing to people to their faces but gossip behind their backs, or say nothing at a meeting but to gossip afterwards."

Black feminist and LeftRoots leader NTanya Lee created a framework for principled struggle that includes a central idea that our struggle must be for the sake of deepening our collective understanding. Her guidance:

1. Be honest and direct while holding compassion.
2. Have side conversations and one-on-ones to help us get better and build us up, not to break us down.
3. Be responsible for our own feelings and actions.
4. Seek deeper understanding. (We ask and read first).
5. Consider that this (meeting, gathering etc.) may not be the container to hold what you need to bring.

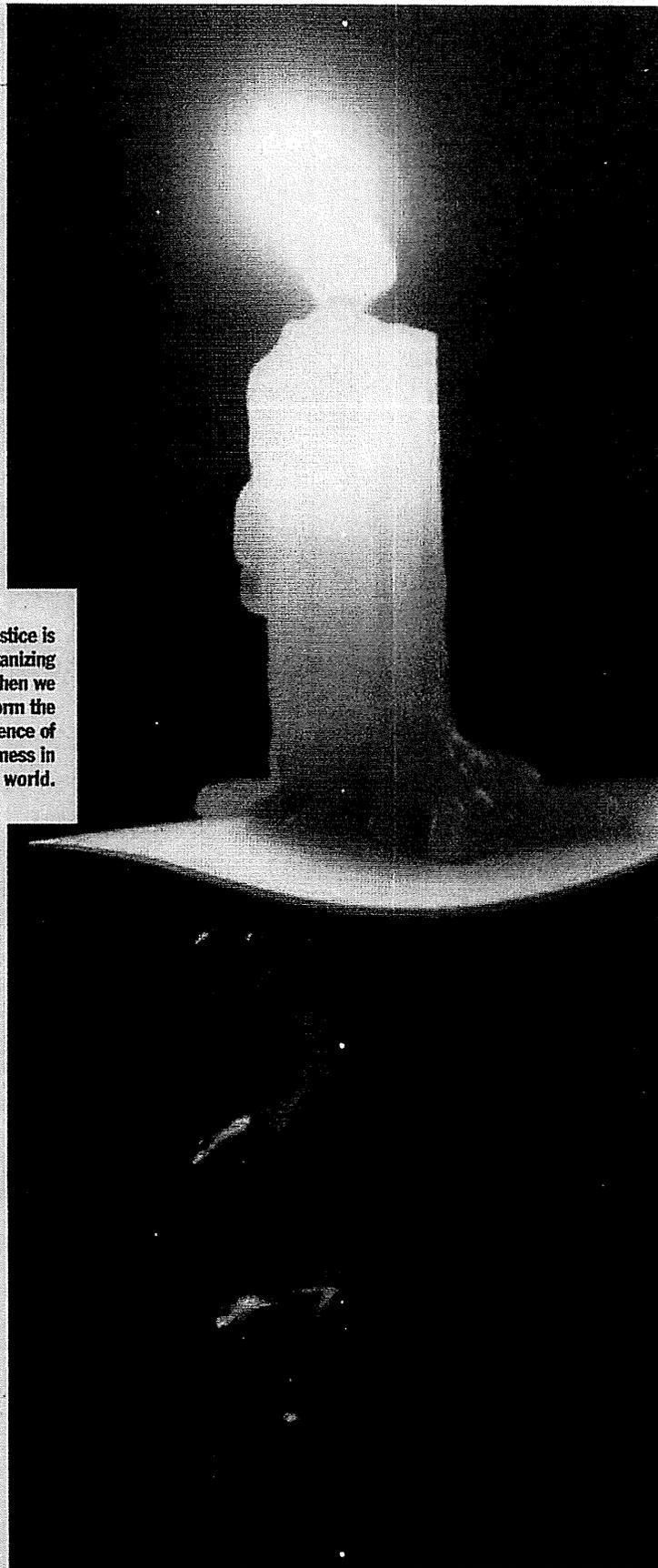
It will take a village, consistent time and skill-building to achieve mastery in any of these practices. But it is possible to build the collective muscle needed for principled struggle.

The question we must ask ourselves is: What do I want liberation to look like? If many hands played a role in sowing the resistance, those many hands will also be poised to build the world we want. If our people are well, they can show up with more joy and within their full dignity. And if we engage in principled struggle, the pervasive fragility stoked by internal and external forces will lose their strength.

Black people will exist 400 years from now. The task before us, as inheritors and actors within 400 years of struggle, resistance and resilience, is to chart a course so that future generations can live on different terrains. Each of us has a role in making that happen. My deepest desire is that our people will have more freedom and advance the global struggle for liberation so that joy becomes our birthright. In taking up these three commitments, we will be well-positioned to transform our world, honor the struggles and resistance of our ancestors, and create the world as it should be for generations to come.

— Charlene Carruthers

Healing justice is a core organizing value. It's when we transform the lived experience of Blackness in our world.



**of Black life in America requires everyday  
for their liberation, along with leaders and organizations.**



---

Intentionally  
Blank

---

# **Creating a Respectful and Open World for Natural Hair.**

The CROWN Act ensures protection against discrimination based on hairstyles by extending statutory protection to hair texture and protective styles in the Fair Employment and Housing Act (FEHA) and state Education Codes.

Questions to ponder:

1. Does this type of emphasis on hair detract attention from other racial issues, like the gutting of voting rights?  
([https://news.vice.com/en\\_us/article/kz58qx/how-the-gutting-of-the-voting-rights-act-led-to-closed-polls](https://news.vice.com/en_us/article/kz58qx/how-the-gutting-of-the-voting-rights-act-led-to-closed-polls))
2. What can be done to ensure that core civil rights are protected while expanding rights on peripheral issues? Are they peripheral issues?



**SB-188 Discrimination: hairstyles.** (2019-2020)

SHARE THIS:



Date Published: 07/04/2019 04:00 AM

**Senate Bill No. 188**

**CHAPTER 58**

An act to amend Section 212.1 of the Education Code, and to amend Section 12926 of the Government Code, relating to discrimination.

[ Approved by Governor July 03, 2019. Filed with Secretary of State July 03, 2019. ]

**LEGISLATIVE COUNSEL'S DIGEST**

SB 188, Mitchell. Discrimination: hairstyles.

Existing law states the policy of the State of California to afford all persons in public schools, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other specified characteristic, equal rights and opportunities in the educational institutions of the state, and states that the purpose of related existing law is to prohibit acts that are contrary to that policy and to provide remedies therefor. Existing law defines race or ethnicity for these purposes.

Under the California Fair Employment and Housing Act, it is unlawful to engage in specified discriminatory employment practices, including hiring, promotion, and termination based on certain protected characteristics, including race, unless based on a bona fide occupational qualification or applicable security regulations. The act also prohibits housing discrimination based on specified personal characteristics, including race. The act also prohibits discrimination because of a perception that a person has one of those protected characteristics or is associated with a person who has, or is perceived to have, any of those characteristics. Existing law defines terms such as race, religious beliefs, and sex, among others, for purposes of the act.

This bill would provide that the definition of race for these purposes also include traits historically associated with race, including, but not limited to, hair texture and protective hairstyles, and would define protective hairstyles for purposes of these provisions.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

**THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:**

**SECTION 1.** The Legislature finds and declares all of the following:

(a) The history of our nation is riddled with laws and societal norms that equated "blackness," and the associated physical traits, for example, dark skin, kinky and curly hair to a badge of inferiority, sometimes subject to separate and unequal treatment.

(b) This idea also permeated societal understanding of professionalism. Professionalism was, and still is, closely linked to European features and mannerisms, which entails that those who do not naturally fall into Eurocentric norms must alter their appearances, sometimes drastically and permanently, in order to be deemed professional.

(c) Despite the great strides American society and laws have made to reverse the racist ideology that Black traits are inferior, hair remains a rampant source of racial discrimination with serious economic and health consequences, especially for Black individuals.

(d) Workplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists, and locks, have a disparate impact on Black individuals as these policies are more likely to deter Black applicants and burden or punish Black employees than any other group.

(e) Federal courts accept that Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, and therefore protects against discrimination against afros. However, the courts do not understand that afros are not the only natural presentation of Black hair. Black hair can also be naturally presented in braids, twists, and locks.

(f) In a society in which hair has historically been one of many determining factors of a person's race, and whether they were a second class citizen, hair today remains a proxy for race. Therefore, hair discrimination targeting hairstyles associated with race is racial discrimination.

(g) Acting in accordance with the constitutional values of fairness, equity, and opportunity for all, the Legislature recognizes that continuing to enforce a Eurocentric image of professionalism through purportedly race-neutral grooming policies that disparately impact Black individuals and exclude them from some workplaces is in direct opposition to equity and opportunity for all.

**SEC. 2.** Section 212.1 of the Education Code is amended to read:

**212.1.** (a) "Race or ethnicity" includes ancestry, color, ethnic group identification, and ethnic background.

(b) "Race" is inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.

(c) "Protective hairstyles" includes, but is not limited to, such hairstyles as braids, locks, and twists.

**SEC. 3.** Section 12926 of the Government Code is amended to read:

**12926.** As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) "Affirmative relief" or "prospective relief" includes the authority to order reinstatement of an employee, awards of backpay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.

(b) "Age" refers to the chronological age of any individual who has reached a 40th birthday.

(c) Except as provided by Section 12926.05, "employee" does not include any individual employed by that person's parent, spouse, or child or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(d) "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows:

"Employer" does not include a religious association or corporation not organized for private profit.

(e) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(f) "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired based on expertise or the ability to perform a particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's judgment as to which functions are essential.

- (B) Written job descriptions prepared before advertising or interviewing applicants for the job.
- (C) The amount of time spent on the job performing the function.
- (D) The consequences of not requiring the incumbent to perform the function.
- (E) The terms of a collective bargaining agreement.
- (F) The work experiences of past incumbents in the job.
- (G) The current work experience of incumbents in similar jobs.
- (g) (1) "Genetic information" means, with respect to any individual, information about any of the following:
  - (A) The individual's genetic tests.
  - (B) The genetic tests of family members of the individual.
  - (C) The manifestation of a disease or disorder in family members of the individual.
- (2) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.
- (3) "Genetic information" does not include information about the sex or age of any individual.
- (h) "Labor organization" includes any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.
- (i) "Medical condition" means either of the following:
  - (1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer.
  - (2) Genetic characteristics. For purposes of this section, "genetic characteristics" means either of the following:
    - (A) Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or that person's offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder.
    - (B) Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or that person's offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.
- (j) "Mental disability" includes, but is not limited to, all of the following:
  - (1) Having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:
    - (A) "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.
    - (B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.
    - (C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working.
  - (2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.
  - (3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.
  - (4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.
  - (5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental

disability as described in paragraph (1) or (2).

"Mental disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(k) "Military and veteran status" means a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard.

(l) "On the bases enumerated in this part" means or refers to discrimination on the basis of one or more of the following: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or military and veteran status.

(m) "Physical disability" includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:

(i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

(6) "Physical disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(n) Notwithstanding subdivisions (j) and (m), if the definition of "disability" used in the federal Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (j) or (m), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (j) and (m).

(o) "Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or military and veteran status" includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

(p) "Reasonable accommodation" may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies,

the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(q) "Religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. "Religious dress practice" shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of an individual observing a religious creed. "Religious grooming practice" shall be construed broadly to include all forms of head, facial, and body hair that are part of an individual observing a religious creed.

(r) (1) "Sex" includes, but is not limited to, the following:

(A) Pregnancy or medical conditions related to pregnancy.

(B) Childbirth or medical conditions related to childbirth.

(C) Breastfeeding or medical conditions related to breastfeeding.

(2) "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(s) "Sexual orientation" means heterosexuality, homosexuality, and bisexuality.

(t) "Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(u) "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) The nature and cost of the accommodation needed.

(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.

(3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity.

(5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.

(v) "National origin" discrimination includes, but is not limited to, discrimination on the basis of possessing a driver's license granted under Section 12801.9 of the Vehicle Code.

(w) "Race" is inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.

(x) "Protective hairstyles" includes, but is not limited to, such hairstyles as braids, locks, and twists.



# California

## LEGISLATIVE INFORMATION

Home | Bill Information | California Law | Publications | Other Resources | My Subscriptions | My Favorites

**SB-826 Corporations: boards of directors.** (2017-2018)

*currently stayed*

SHARE THIS:



Date Published: 10/01/2018 09:00 PM

### Senate Bill No. 826

#### CHAPTER 954

An act to add Sections 301.3 and 2115.5 to the Corporations Code, relating to corporations.

[ Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018. ]

#### LEGISLATIVE COUNSEL'S DIGEST

SB 826, Jackson. Corporations: boards of directors.

The General Corporation Law provides for the formation of domestic general corporations by the execution and filing of articles of incorporation with the Secretary of State. Under that law, the business and affairs of these corporations are generally managed by, and all corporate powers exercised by or under, the direction of their boards of directors, and each director is elected by shareholder vote, with certain exceptions, as specified. That law also allows foreign corporations to transact intrastate business by obtaining certificates of qualification from the Secretary of State and requires foreign corporations that meet certain criteria to comply with specified provisions applicable to domestic general corporations to the exclusion of the law of the jurisdiction in which the foreign corporation is incorporated.

This bill, no later than the close of the 2019 calendar year, would require a domestic general corporation or foreign corporation that is a publicly held corporation, as defined, whose principal executive offices, according to the corporation's SEC 10-K form, are located in California to have a minimum of one female, as defined, on its board of directors, as specified. No later than the close of the 2021 calendar year, the bill would increase that required minimum number to 2 female directors if the corporation has 5 directors or to 3 female directors if the corporation has 6 or more directors. The bill would require, on or before specified dates, the Secretary of State to publish various reports on its Internet Web site documenting, among other things, the number of corporations in compliance with these provisions. The bill would also authorize the Secretary of State to impose fines for violations of the bill, as specified, and would provide that moneys from these fines are to be available, upon appropriation, to offset the cost of administering the bill.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

#### THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.** The Legislature finds and declares as follows:

(a) More women directors serving on boards of directors of publicly held corporations will boost the California economy, improve opportunities for women in the workplace, and protect California taxpayers, shareholders, and retirees, including retired California state employees and teachers whose pensions are managed by CalPERS and CalSTRS. Yet studies predict that it will take 40 or 50 years to achieve gender parity, if something is not done proactively.

(b) In September 2013, Senate Concurrent Resolution 62 urged that by December 31, 2016, all public companies in California increase the number of women on their boards of directors ranging from one to three, depending

upon the size of their boards. California was the first state in the United States to adopt such a resolution, followed by five other states that passed similar resolutions urging more women directors on corporate boards in their states.

(c) Numerous independent studies have concluded that publicly held companies perform better when women serve on their boards of directors, including:

(1) A 2017 study by MSCI found that United States' companies that began the five-year period from 2011 to 2016 with three or more female directors reported earnings per share that were 45 percent higher than those companies with no female directors at the beginning of the period.

(2) In 2014, Credit Suisse found that companies with at least one woman on the board had an average return on equity (ROE) of 12.2 percent, compared to 10.1 percent for companies with no female directors. Additionally, the price-to-book value of these firms was greater for those with women on their boards: 2.4 times the value in comparison to 1.8 times the value for zero-women boards.

(3) A 2012 University of California, Berkeley study called "Women Create a Sustainable Future" found that companies with more women on their boards are more likely to "create a sustainable future" by, among other things, instituting strong governance structures with a high level of transparency.

(4) Credit Suisse conducted a six-year global research study from 2006 to 2012, with more than 2,000 companies worldwide, showing that women on boards improve business performance for key metrics, including stock performance. For companies with a market capitalization of more than \$10 billion, those with women directors on boards outperformed shares of comparable businesses with all-male boards by 26 percent.

(5) The Credit Suisse report included the following findings:

(A) There has been a greater correlation between stock performance and the presence of women on a board since the financial crisis in 2008.

(B) Companies with women on their boards of directors significantly outperformed others when the recession occurred.

(C) Companies with women on their boards tend to be somewhat risk averse and carry less debt, on average.

(D) Net income growth for companies with women on their boards averaged 14 percent over a six-year period, compared with 10 percent for companies with no women directors.

(d) Other countries have addressed the lack of gender diversity on corporate boards by instituting quotas mandating 30 to 40 percent of seats to be held by women directors. Germany is the largest economy to mandate a quota requiring that 30 percent of public company board seats be held by women; in 2003, Norway was the first country to legislate a mandatory 40 percent quota for female representation on corporate boards. Since then, other European nations that have legislated similar quotas include France, Spain, Iceland, and the Netherlands.

(e) One-fourth of California's public companies in the Russell 3000 index have NO women on their boards of directors; and for the rest of the companies, women hold only 15.5 percent of the board seats. A 2017 report being prepared by Board Governance Research LLC, conducted by University of San Diego professor Annalisa Barrett, found the following:

(1) As of June 2017, among the 446 publicly traded companies included in the Russell 3000 index and headquartered in California, representing nearly \$5 trillion in market capitalization, women directors held 566 seats, or 15.5 percent of seats, while men held 3,089 seats, or 84.5 percent of seats.

(2) More than one-quarter, numbering 117, or 26 percent, of the Russell 3000 companies based in California have NO women directors serving on their boards.

(3) Only 54, or 12 percent, of these companies have three or more female directors on their boards.

(4) Smaller companies are much more likely to lack female directors. Among the 50 California-based companies with the lowest revenues, with an average of \$13 million in 2015 revenues, only 8.4 percent of the director seats are held by women, and nearly half, or 48 percent, of these companies have NO women directors. Among the 50 largest California companies, with an average of nearly \$30 billion in 2015 revenues, 23.5 percent of the director seats are held by women. All of the 50 have at least one woman director.

(f) If measures are not taken to proactively increase the numbers of women serving on corporate boards, studies have shown that it will take decades, as many as 40 or 50 years, to achieve gender parity among directors, including:

(1) A 2015 study conducted by the United States Government Accountability Office estimated that it could take more than 40 years for the numbers of women on boards to match men.

(2) The 2017 Equilar Gender Diversity Index (GDI) revealed that it will take nearly 40 years for the Russell 3000 companies nationwide to reach gender parity — the year 2055.

(3) Nearly one-half of the 75 largest IPOs from 2014 to 2016 went public with NO women on their boards. Many technology companies in California have gone public with no women on their boards, according to a 2017 national study by 2020 Women on Boards.

(g) Further, several studies have concluded that having three women on the board, rather than just one or none, increases the effectiveness of boards, including:

(1) (A) According to the study entitled "Women Directors on Corporate Boards From Tokenism to Critical Mass," by M. Torchia, A. Calabrò, and M. Huse, published in the Journal of Business Ethics in 2011, and a report entitled "Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance," attaining critical mass, going from one or two women directors to at least three women directors, creates an environment where women are no longer seen as outsiders and are able to influence the content and process of board discussions more substantially.

(B) Boards of directors need to have at least three women to enable them to interact and exercise an influence on the working style, processes, and tasks of the board, in turn positively affecting the level of organizational innovation within the firm they govern.

(2) (A) A 2016 McKinsey and Company study entitled "Women Matter" showed nationwide that companies where women are most strongly represented at board or top-management levels are also the companies that perform the best in profitability, productivity, and workforce engagement.

(B) Companies with three or more women in senior management functions score even more highly, on average, on the organizational performance profile, than companies with no women on boards or in the executive ranks. When there are at least three women on corporate boards with an average membership of 10 directors, performance increases significantly.

**SEC. 2.** Section 301.3 is added to the Corporations Code, to read:

**301.3.** (a) No later than the close of the 2019 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in California shall have a minimum of one female director on its board. A corporation may increase the number of directors on its board to comply with this section.

(b) No later than the close of the 2021 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in California shall comply with the following:

(1) If its number of directors is six or more, the corporation shall have a minimum of three female directors.

(2) If its number of directors is five, the corporation shall have a minimum of two female directors.

(3) If its number of directors is four or fewer, the corporation shall have a minimum of one female director.

(c) No later than July 1, 2019, the Secretary of State shall publish a report on its Internet Web site documenting the number of domestic and foreign corporations whose principal executive offices, according to the corporation's SEC 10-K form, are located in California and who have at least one female director.

(d) No later than March 1, 2020, and annually thereafter, the Secretary of State shall publish a report on its Internet Web site regarding, at a minimum, all of the following:

(1) The number of corporations subject to this section that were in compliance with the requirements of this section during at least one point during the preceding calendar year.

(2) The number of publicly held corporations that moved their United States headquarters to California from another state or out of California into another state during the preceding calendar year.

(3) The number of publicly held corporations that were subject to this section during the preceding year, but are no longer publicly traded.

(e) (1) The Secretary of State may adopt regulations to implement this section. The Secretary of State may impose fines for violations of this section as follows:

(A) For failure to timely file board member information with the Secretary of State pursuant to a regulation adopted pursuant to this paragraph, the amount of one hundred thousand dollars (\$100,000).

(B) For a first violation, the amount of one hundred thousand dollars (\$100,000).

(C) For a second or subsequent violation, the amount of three hundred thousand dollars (\$300,000).

(2) For the purposes of this subdivision, each director seat required by this section to be held by a female, which is not held by a female during at least a portion of a calendar year, shall count as a violation.

(3) For purposes of this subdivision, a female director having held a seat for at least a portion of the year shall not be a violation.

(4) Fines collected pursuant to this section shall be available, upon appropriation by the Legislature, for use by the Secretary of State to offset the cost of administering this section.

(f) For purposes of this section, the following definitions apply:

(1) "Female" means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth.

(2) "Publicly held corporation" means a corporation with outstanding shares listed on a major United States stock exchange.

**SEC. 3.** Section 2115.5 is added to the Corporations Code, to read:

**2115.5.** (a) Section 301.3 shall apply to a foreign corporation that is a publicly held corporation to the exclusion of the law of the jurisdiction in which the foreign corporation is incorporated.

(b) For purposes of this section, a "publicly held corporation" means a foreign corporation with outstanding shares listed on a major United States stock exchange.