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Racial Allies

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ARTICLES

RACIAL ALLIES

*Atinuke O. Adediran**

Racial allies are white individuals and institutions that actively work to dismantle systems of racial inequality and the consequences of poverty that disproportionately impact communities of color and that are willing to both confer and share power with members of subjugated groups. There is no other sector of the legal profession that professes to be racial allies more than individuals and institutions within the public interest law sector. Yet, these institutions that address structural racism and disproportionately serve communities of color appear not to share power with racial and ethnic minorities.

The public interest law sector has been at the forefront of economic and racial justice both historically and in modern times, including as abolitionist lawyers, civil rights lawyers, and lawyers challenging economic inequality, the eviction crisis, and immigration. Probably because of their perceived roles as racial allies, there has been scholarly and practitioner neglect to examine their allyship.

In this Article, I make a number of groundbreaking contributions to the literature. First, I conduct the first systemic investigation of race and ethnicity using the largest dataset of the individuals and groups with relative power in the public interest law sector—CEOs, boards of directors, and large-firm pro bono partners and counsel. The novel dataset contains 650 institutions and over 10,000 individuals. I also interviewed a subset of CEOs and board members. With these data, I show—for the first time—the lack of

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racial and ethnic diversity among the CEOs of public interest legal organizations (PILOs), PILO boards of directors, and pro bono partners and counsel who lead the public interest sector. Second, although there may be other reasons, I highlight five possible explanations for the problem. Third, I suggest potential policy responses for each of the identified theories. I also advance reasons why racial diversity in public interest law is important and highlight areas for further research on diversity in the sector.

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INTRODUCTION

Racial allies are committed to questioning perceived equality and are invested in addressing racial inequality.¹ In theory, a racial ally can be anyone from any racial group, but given existing power structures and distribution of resources, racial allies in America are often white individuals and predominantly white institutions.² A racial ally “must recognize the power and privilege conferred by White identity,” actively work to dismantle systems of oppression, and “be willing to both confer and share power with members of subjugated groups.”³

There is no other segment of the legal profession that is more focused on addressing racial inequality and that endeavors to be allies for racial justice than individuals and institutions within the public interest law sector. The public interest law sector has played an important role in American social and legal change.⁴ Abolitionist lawyers litigated fugitive slave cases that led to the formal end of slavery.⁵ Lawyers were important in the progressive movement of the late eighteenth and early twentieth centuries, the civil rights movement, and the War on Poverty.⁶ Public interest lawyers have also been key in contemporary struggles for social change, including challenges to economic inequality, employment discrimination, racial discrimination,

1. Kendrick T. Brown & Joan M. Ostrove, *What Does It Mean to Be an Ally?*, 43 J. APPLIED SOC. PSYCH. 2211, 2211 (2013).

2. See Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333, 1336–37 (2016).

3. Meredith D. Clark, *White Folks’ Work: Digital Allyship Praxis in the #BlackLivesMatter Movement*, 18 SOC. MOVEMENT STUD. 519, 523 (2019).

4. Scholars often define the field of public interest law to include lawyers who work in public interest legal organizations (PILOs) that represent low-income clients and engage in law reform strategies. See, e.g., Scott L. Cummings & Ingrid V. Eagly, *After Public Interest Law*, 100 NW. U. L. REV. 1251, 1251–52 (2006); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2032 (2008). But see Shauhin Talesh, *Insurance Law as Public Interest Law*, 2 U.C. IRVINE L. REV. 985, 986 (2012) (advocating for a broader definition of what constitutes public interest law). In this Article, public interest law is defined broadly as the provision of free legal services through PILOs, law reform and impact litigation by those institutions, and pro bono work administered by private lawyers. It also includes the structure and administration of those services.

5. See ALAN K. CHEN & SCOTT CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 47 (2013).

6. See *id.* at 62.

education inequality, the eviction crises, voter suppression, and the implications of poverty.⁷ These social and legal problems disproportionately impact communities of color. Yet, the public interest law sector appears not to share power with members of subjugated groups. These racial allies seem to harbor the same inequalities as other sectors of the legal profession and society at large.⁸

While scholars have conducted research on racial diversity in other sectors of the legal profession, including among judges,⁹ in law firms,¹⁰ in the criminal justice system,¹¹ and in legal academia,¹² there has been very little

7. See, e.g., Atinuke O. Adediran & Shaun Ossei-Owusu, *The Racial Reckoning of Public Interest Law*, 12 CALIF. L. REV. ONLINE 1, 1 (2021); Regina Garcia Cano, *A Fight to Guarantee Lawyers to Renters Facing Eviction Is Gaining Momentum*, HUFFPOST (Dec. 31, 2020, 10:38 AM), https://www.huffpost.com/entry/eviction-court-renters-guaranteed-lawyers_n_5fedec4ac5b6ec8ae0b1f4ef [<https://perma.cc/A6HD-HWDL>]; David Leonhardt, *The Trump Immigration Crisis Rolls On: What Would a Better Approach Look Like?*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/opinion/trump-immigration-border-migrants.html> [<https://perma.cc/AUL6-PC26>].

8. See generally Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081 (2005).

9. See, e.g., Gregory L. Acquaviva & John D. Castiglione, *Judicial Diversity on State Supreme Courts*, 39 SETON HALL L. REV. 1203, 1214–18 (2009); Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1122–29 (2009); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 128–32 (1997); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 417–49 (2000); Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 11–24 (2004); Rorie Spill Solberg, *Court Size and Diversity on the Bench: The Ninth Circuit and Its Sisters*, 48 ARIZ. L. REV. 247, 252–53 (2006); Geoff Ward et al., *Does Racial Balance in Workforce Representation Yield Equal Justice?: Race Relations of Sentencing in Federal Court Organizations*, 43 LAW & SOC'Y REV. 757, 783–90 (2009).

10. See, e.g., Atinuke O. Adediran, *The Journey: Moving Racial Diversification Forward from Mere Commitment to Shared Value in Elite Law Firms*, 25 INT'L J. LEGAL PRO. 67, 74 (2018); Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PRO. 1, 4 (2009); John M. Conley, *Tales of Diversity: Lawyers' Narratives of Racial Equity in Private Firms*, 31 LAW & SOC. INQUIRY 831, 837 (2006); Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005, 1007–11 (1997); David B. Wilkins, *From Separate Is Inherently Unequal to Diversity Is Good for Business: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1554 (2004); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis*, 84 CALIF. L. REV. 493, 501–14 (1996); Kevin Woodson, *Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms*, 83 FORDHAM L. REV. 2557, 2558 (2015). See generally Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1093 (2011).

11. See, e.g., Kenneth P. Troccoli, *I Want a Black Lawyer to Represent Me: Addressing a Black Defendant's Concerns with Being Assigned a White Court-Appointed Lawyer*, 20 LAW & INEQ. 1, 17–26 (2002). Public defenders are part of the broad umbrella of public interest lawyers. However, this research focuses specifically on civil legal services and advocacy. Adediran & Ossei-Owusu, *supra* note 7.

12. See, e.g., MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

research on racial and ethnic diversity in the public interest law sector.¹³ The limited available scholarship has focused mostly on the impact of race on the attorney-client relationship specifically in legal aid.¹⁴ This is a critical omission. This Article makes the gravity of this omission plain by making a number of moves.

The first is to show—with empirical data—the racial and ethnic diversity problem in public interest law leadership.¹⁵ This work is long overdue and has been called for in scholarship, as there is no real way to systematically show the negative impact of the lack of diversity or to address racial inequality without confronting data that indicates that there is, first and foremost, a diversity problem in the sector.¹⁶ As such, this study sets the stage for future studies to further recognize the impact of the lack of racial diversity on the public interest law sector and its institutions.

The public interest law sector encompasses both the nonprofit and private sectors of the legal profession through a network of public interest legal organizations (PILOs) and law firms engaged in pro bono work.¹⁷ The

13. Scholarship on public interest law has mostly addressed the structures, funding, strategies, and challenges experienced by organizations that use the legal system to advocate for the interests of less powerful groups and the organizations' relationships with the private sector. *See, e.g.*, Catherine Albiston et al., *Public Interest Law Organizations and the Two-Tier System of Access to Justice in the United States*, 1 LAW & SOC. INQUIRY 990, 998–99 (2016) (examining the variation in public interest organizations—in terms of services provided and geography—in relation to the amount of poverty experienced within geographical locations); Catherine Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 LAW & SOC. INQUIRY 62, 74–88 (2014) (investigating how public interest organizations obtain funding to support their work and represent their clients); CHEN & CUMMINGS, *supra* note 5, at 3–4; Jeffrey Kosbie, *Donor Preferences and the Crisis in Public Interest Law*, 57 SANTA CLARA L. REV. 43, 73–89 (2017) (studying individual donor preferences in one public interest organization); Rhode, *supra* note 4, at 2056–57 (studying the evolution of work performed by public interest organizations and the strategies and challenges they experience in providing legal services).

14. *See, e.g.*, Roland Acevedo et al., *Race and Representation: A Study of Legal Aid Attorneys and Their Perceptions of the Significance of Race*, 18 BUFF. PUB. INT. L.J. 1, 24 (2000) (examining the impact of race on the attorney-client relationship among attorneys of color and white lawyers in the Civil Division of the Legal Aid Society in New York City); Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, 18 CORNELL J.L. & PUB. POL'Y 1, 3 (2008) (arguing that “legal services organizations that serve large populations of African American clients should employ staff attorneys who are most likely to engender trust and facilitate communication with their clients”).

15. For a scholarly work that engages in a similar inquiry in the federal civil rulemaking context, see Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U. L. REV. ONLINE 52 (2018).

16. *See generally* Adediran & Ossei-Owusu, *supra* note 7.

17. These organizations also include a network of organizational sponsors—foundations, bar associations, and federal, state, and local grants; law school clinics; and private donors from firms, corporations, and individuals. Cummings & Eagly, *supra* note 4, at 1252; *see also* Jeffrey Selbin & Scott Cummings, *Poverty Law: United States*, in 18 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 733, 737 (J.F. Handler ed., 2d ed. 2015). For extensive research on pro bono legal services in the legal profession, see DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS* (2005); Atinuke O. Adediran, *Solving the Pro Bono Mismatch*, 91 U. COLO. L. REV. 1035

network is involved in law reform efforts through impact litigation and policy advocacy measures and in the provision of free legal services to underprivileged individuals and groups that are often racial and ethnic minorities.¹⁸ PILOs are the primary organizations that provide free legal services and engage in law reform efforts to address societal ills, but they are not the only institutions that do so.¹⁹ Law firms are also providers of legal services and advocacy to underprivileged groups. This Article focuses on the leaders in the public interest sector. These leaders include the executive directors or CEOs of PILOs, PILO boards of directors, and pro bono partners and counsel in large law firms.²⁰ This Article focuses on these groups because they shape the legal and organizational strategies that PILOs and law firm pro bono departments employ in addressing societal problems that disproportionately impact communities of color.

Second, this Article adduces five possible theories of why racial and ethnic diversity is lacking in public interest law leadership. This Article also makes recommendations for how to address the racial and ethnic diversity problem in public interest law leadership.

While this Article centers on those in charge of the public interest sector, it is important to acknowledge the general lack of data and knowledge on race and ethnicity among the lawyers who represent clients and engage in legal and policy reform.²¹ I have, however, made the choice to focus on the leaders in the public interest sector because of the important role they occupy in shaping institutional policies and strategies that can have sweeping effects

(2020) [hereinafter Adediran, *Pro Bono Mismatch*]; Atinuke O. Adediran, *The Relational Costs of Free Legal Services*, 55 HARV. C.R.-C.L. L. REV. 357, 393 (2020) [hereinafter Adediran, *Relational Costs*]; Jolie L. Justus, *Using Business Strategies and Innovative Practices to Institutionalize Pro Bono in Private Law Firms*, 72 UMKC L. REV. 365, 366–72 (2003); Deborah Rhode, *Profits and Professionalism*, 33 FORDHAM URB. L.J. 101, 108–16 (2005); Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Strategic Philanthropy and the Bottom Line*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 251, 257–58 (R. Granfield & L. M. Mather eds., 2009). In addition, there are private public interest law firms that are squarely private firms engaged in public interest work. See generally Scott L. Cummings, *Privatizing Public Interest Law*, 25 GEO. J. LEGAL ETHICS 1 (2012). Outside the legal profession, the boundaries between the private and nonprofit sectors have also become increasingly blurred. See Frances Tomlinson & Christina Schwabenland, *Reconciling Competing Discourses of Diversity?: The UK Non-Profit Sector Between Social Justice and the Business Case*, 17 ORG. 101, 107 (2010).

18. See Acevedo et al., *supra* note 14, at 19–24.

19. See generally Albiston & Nielsen, *supra* note 13.

20. To be sure, leadership can encompass a broader range of individuals and groups. This Article limits its inquiry to these three groups. Executive directors and board members are the ultimate decision-makers in PILOs, and pro bono partners and counsel manage their law firms' pro bono programs and have the information and authority to facilitate pro bono partnerships between law firms and PILOs.

21. See Adediran & Ossei-Owusu, *supra* note 7, at 5–11. Practitioners have also written about the lack of diversity among public interest lawyers. See, e.g., Caprice R. Jenerson, *INSIGHT: Pro Bono Cross-Cultural Training Needed for Race Equity, Access to Justice*, BLOOMBERG L. (June 12, 2020, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/insight-pro-bono-cross-cultural-training-needed-for-race-equity-access-to-justice-58> [<https://perma.cc/45TJ-46CJ>]. However, data is largely lacking.

on the legal representation provided by the lawyers within their institutions.²² Moreover, increasing racial and ethnic diversity is not simply a function of the lawyers who enter into public interest law. “It is also a function of who holds power within the profession and how that power is used when hiring [lawyers], providing them with development and promotion opportunities and, in turn, providing them with opportunities to use power to hire and develop [other lawyers].”²³

Research in other segments of society—criminal justice, the judiciary, and the private sector—has shown that racial diversity in white institutions benefits marginalized groups. Much like the criminal justice system—as in public interest law, where clients are disproportionately racial and ethnic minorities—it is conceivable that increasing racial and ethnic diversity in leadership would benefit clients. The perspectives of diverse leaders would not only help unveil the complex realities of racial dynamics that impact legal representation but also raise awareness about racial inequality and discrimination.²⁴

This Article proceeds in four parts. Part I discusses three important bodies of literature. The first is research on the impact of diversity—including among leaders—on outcomes that impact communities of color in a number of segments of society. The second is the important link between race and poverty. The third situates public interest lawyering in historical context. Part II first describes the data and methods used. It then provides an overview of PILO executive directors, PILO boards of directors, and law firm pro bono partners and counsel, systematically showing the lack of diversity among each group. Part III puts forth five theories for why diversity may be lacking in public interest law leadership, including whether there is a pipeline problem, whether low wages in public interest law is a contributing factor, the lack of racial and ethnic diversity in large law firms and its impact on public interest law leadership, implicit bias and its impact on race, and the concept of homophily. Part IV provides policy considerations for improving diversity in public interest law leadership with a focus on each type of leadership position. It also makes suggestions for integrating race into anti-poverty law and bias training and addressing homophily in professional relationships. Finally, it provides an agenda for further research to better recognize the impact of racial diversity on institutional processes and decision-making.

22. See, e.g., Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 129 (2020) (showing the importance of the chief public defender in the criminal legal context).

23. Lisa Webley, *The Sociology of Legal Professions*, in RESEARCH HANDBOOK ON THE SOCIOLOGY OF LAW 217 (Jiří Přibáň ed., 2020).

24. See generally Chew & Kelley, *supra* note 9 (showing the impact of race on judicial decision-making).

I. RACE, POVERTY, AND PUBLIC INTEREST LAW

Despite the importance of PILOs to American democracy and to principles of equality and justice, and despite a great deal of interest among scholars in studying issues of diversity in the legal profession,²⁵ to date, there has been no research focused exclusively on racial diversity in public interest law leadership.²⁶ This is surprising considering that issues of equity and justice are fundamental to public interest law. In addition, the work of public interest lawyers and organizations has protected fundamental rights, established legal principles, developed social policy, and raised awareness of social ills.²⁷

Nevertheless, there are three areas of research that are particularly relevant to the issue of diversity in public interest law leadership. The first is scholarship on how race impacts outcomes—especially for communities of color—in a number of spheres in American life. The second is the link between race and poverty in the United States. This link acknowledges that PILOs that serve low-income individuals and groups must necessarily confront issues of race and racial relations. The third is scholarship on public interest organizations and lawyering, especially in historical context. PILOs engage in individual client representation and law reform, among other strategies. In addition, public interest lawyering may take place in a number of different practice sites.²⁸ These available scholarly endeavors provide an important starting point for exploring the lack of racial and ethnic diversity in public interest law leadership.

A. Racial Diversity and Outcomes

We can conceive of the value of racial and ethnic diversity as instrumental or noninstrumental.²⁹ As instrumental, racial diversity is useful for achieving other ends. Most legal doctrine, research, and commentary on the effects of race on institutional outcomes would fall into this category.³⁰ Since the U.S. Supreme Court declared the importance of diversity in higher education in *Regents of the University of California v. Bakke*,³¹ researchers have embarked on empirical research to show the instrumental value of

25. See *supra* notes 10–12 and accompanying text.

26. For the limited scholarship on the impact of race and the attorney-client relationship in public interest lawyering, see *supra* note 14 and accompanying text. In studying the issue of diversity, some scholars have lumped the nonprofit sector with public defenders and legal academics in comparison to private lawyers in large law firms. See, e.g., Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 838 (1995).

27. See Rhode, *supra* note 4, at 2028. See generally Scott Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645; CHEN & CUMMINGS, *supra* note 5.

28. CHEN & CUMMINGS, *supra* note 5, at 125.

29. See Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1020 (2011).

30. See *infra* notes 32, 33 and accompanying text.

31. 438 U.S. 265 (1978).

diversity.³² In *Bakke*, the Supreme Court reasoned that universities might use race as one factor among others to promote the “robust exchange of ideas” that might flow from a racially diverse academic community.³³ That is, diversity serves an important purpose in education. Scholars have since empirically examined the relationship between diversity and educational outcomes.³⁴

Studies of racial diversity and outcomes have extended beyond higher education into other spheres of society, including public interest law and the criminal justice system. One study compared attorneys of color and white lawyers in legal aid and found that minority lawyers were more likely to perceive the advantages of being a minority in representing minority clients, while white lawyers were less likely to perceive the effects of race on their dealings with clients.³⁵

The criminal justice context has the most expansive research on the importance of racial diversity on outcomes. There is evidence that Black criminal defendants likely have a preference for Black public defenders because they are more likely to trust them.³⁶ In the past few decades, several studies have examined the lack of and gradual increase in racial and ethnic diversity in police departments across the country.³⁷ Research has also highlighted the lack of racial diversity among high-ranking police officers.³⁸

Recent studies have extended these trailblazing studies to examine how the lack of racial diversity impacts outcomes in policing. Research has shown that a racially diverse police force lowers the number and rate of officer-involved killings of Black civilians.³⁹ Scholars have also shown that

32. See, e.g., Uma M. Jayakumar et al., *Reclaiming Diversity: Advancing the Next Generation of Diversity Research Toward Racial Equity*, in HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH 11, 22 (M.B. Paulsen ed., 2018).

33. *Bakke*, 438 U.S. at 313; see Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 933 (2001).

34. See, e.g., Ernest Pascarella et al., *What Have We Learned from the First Year of the National Study of Student Learning?*, 37 J. COLL. STUDENT DEV. 182, 187–88 (1996). See generally Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330 (2002); Asad Raheem, *Race as Unintellectual*, 68 UCLA L. REV. 632 (2021).

35. Acevedo et al., *supra* note 14, at 65.

36. See generally Troccoli, *supra* note 11.

37. See, e.g., Salomon Alcocer Guajardo, *Measuring Diversity in Police Agencies*, 13 J. ETHNICITY CRIM. JUST. 1, 1 (2015); Salomon Alcocer Guajardo, *Workforce Diversity: Downsizing the NYPD and Its Effect on Minority Integration*, 16 INT'L J. POLICE SCI. & MGMT. 155, 161–62, 166 (2014); Ellen Hochstedler & John A. Conley, *Explaining Underrepresentation of Black Officers in City Police Agencies*, 14 J. CRIM. JUST. 319, 320 (1986); Ellen Hochstedler et al., *Changing the Guard in American Cities: A Current Empirical Assessment of Integration in Twenty Municipal Police Departments*, 9 CRIM. JUST. REV. 8, 9–11 (1984); David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1213 (2006).

38. See, e.g., Salomon Alcocer Guajardo, *Workforce Diversity: Ethnicity and Gender Diversity and Disparity in the New York City Police Department*, 12 J. ETHNICITY CRIM. JUST. 93 (2014).

39. Joscha Legewie & Jeffrey Fagan, *Group Threat, Police Officer Diversity and the Deadly Use of Police Force* 1, 8–9 (Colum. L. Sch. Working Paper No. 14-512, 2016).

relative to white officers, Black and Latinx police officers make far fewer stops and arrests and use force less often, especially against Black civilians.⁴⁰ Some studies have also examined the effects of racial diversity in leadership on institutional racial dynamics. One study found that police departments with Black police chiefs have “significantly lower per capita rates of civilian deaths caused by officer shootings than those with a white police chief.”⁴¹ Similarly, a study found that while Black male drivers are consistently subjected to more intensive police scrutiny than white drivers, all drivers are less likely to be subjected to highly discretionary searches if the police chief is Black.⁴²

In other areas of the criminal justice system, a study found that having a Black judge and Black prosecutor reduces the chances of a Black person being sentenced to prison, resulting in Black and white defendants facing equal odds of incarceration.⁴³ Studies also show that when exposed to racial disparities in criminal punishment, white individuals are generally less responsive to attempts to lessen the severity of punishment even when they agree that such policies are too punitive. In one study, support for the death penalty increased when white participants learned about its racially disparate impact on Black individuals.⁴⁴ Unlike white participants, exposure to the disparate impact of the death penalty did not increase support for the death penalty among Black participants.⁴⁵ In another study, while over 50 percent of white participants who were not exposed to the racial disparities of California’s three-strikes law supported reforming the law,⁴⁶ less than 28 percent of those exposed to the disparate impact of the law on racial minorities supported reform.⁴⁷ In other words, as the racial disparity increased, participants were less willing to change a law they found to be punitive.⁴⁸

Together, these findings indicate that an individual’s race impacts how the individual perceives racial disparities and makes decisions that impact racial minorities. Overall, white individuals are less likely to support addressing racial inequality than racial minorities.

40. Bocar A. Ba et al., *The Role of Officer Race and Gender in Police-Civilian Interactions in Chicago*, 371 SCI. 696, 698–700 (2021).

41. Stephen Wu, *Leadership Matters: Police Chief Race and Fatal Shootings by Police Officers*, 102 SOC. SCI. Q. 407, 415 (2021).

42. Kelsey Shoub et al., *Race, Place, and Context: The Persistence of Race Effects in Traffic Stop Outcomes in the Face of Situational, Demographic, and Political Controls*, 5 J. RACE, ETHNICITY, & POL. 481, 504 (2020).

43. See Ward et al., *supra* note 9, at 791–92.

44. See Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996, 1007 (2007).

45. See *id.*

46. The three-strikes law gives defendants a prison sentence of twenty-five years to life if they are convicted of three violent or serious felonies. Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCH. SCI. 1949, 1950 (2014).

47. *Id.* at 1950–51.

48. See Jonathan Feingold, *Civil Rights Catch 22’s*, CARDOZO L. REV. (forthcoming 2022) (manuscript at 5) (on file with author) (quoting Hetey & Eberhardt, *supra* note 46, at 1952).

Studies in the civil law context show similar results. Scholars have shown that federal and state judges are disproportionately white.⁴⁹ Plaintiff-employees—who are more likely to be Black—are more likely to win in racial harassment cases if their cases come before Black, rather than white, judges.⁵⁰ In a qualitative study of Asian American judges, there is support for the conclusion that “Asian American identity, especially experiences with racism and xenophobia, affects judicial decision-making.”⁵¹

There are also studies that show the advantages of racial diversity in the for-profit context; research suggests that increasing racial diversity can result in increased sales revenue and customers, greater market share, greater relative profits, and measurable performance benefits.⁵² Research on for-profit boards suggests that diversity impacts board cognition, dynamics, decision-making, and outcomes.⁵³ Research has also shown that, on average, law firms in the top quartile of diversity scores have higher profits per partner and generate more revenue per lawyer than the rest of the Am Law 200.⁵⁴

In the current context of public interest law leaders who are mostly white, despite good intentions to address racial inequality, the lack of racial diversity can influence institutional decision-making in a way that can be less beneficial to racial minorities. Research has shown that different racial groups perceive race relations and racial inequality differently.⁵⁵ For instance, Black individuals are far more likely to point to racial discrimination as an impediment to Black progress, while white individuals are more likely to point to family instability as a major obstacle for Black progress.⁵⁶ As such, instrumental reasons for increasing racial and ethnic diversity among PILO leaders might include reducing implicit bias as this Article discusses in Parts III and IV. Having racial and ethnic minorities in leadership may also mean that more racially and ethnically diverse lawyers would be hired. It may mean that diversity might bring together anti-poverty

49. See *supra* note 9 and accompanying text. See generally Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 Nw. U. L. REV. 587 (2011).

50. Chew & Kelley, *supra* note 9, at 1156.

51. Josh Hsu, *Asian American Judges: Identity, Their Narratives, & Diversity on the Bench*, 11 ASIAN PAC. AM. L.J. 92, 106 (2006).

52. See, e.g., Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOCIO. REV. 208, 215–16 (2009); Martha Lagace, *Racial Diversity Pays Off*, HARV. BUS. SCH. (June 21, 2004), <https://hbswk.hbs.edu/item/racial-diversity-pays-off> [<https://perma.cc/9R66-DXUY>].

53. See Scott G. Johnson et al., *Board Composition Beyond Independence: Social Capital, Human Capital, and Demographics*, 39 J. MGMT. 232, 239 (2013).

54. See Brayley & Nguyen, *supra* note 10, at 21.

55. See, e.g., Juliana Menasce Horowitz et al., *Race in America 2019*, PEW RSCH. CTR. (Apr. 9, 2019), <https://www.pewresearch.org/social-trends/2019/04/09/race-in-america-2019/> [<https://perma.cc/GTM3-WWUF>].

56. *Id.*; Atinuke Adediran, *Racial and Ethnic Diversity Is Lacking Among Nonprofit Leaders—But There Are Ways to Change That*, CONVERSATION (Jan. 13, 2022, 8:03 AM), <https://theconversation.com/racial-and-ethnic-diversity-is-lacking-among-nonprofit-leaders-but-there-are-ways-to-change-that-174490> [<https://perma.cc/8WVH-KTNH>].

and anti-racism work.⁵⁷ It may also include the fact that lived experiences from racial and ethnic minorities may result in prioritizing racial justice work. Other instrumental reasons may be to address racial discrimination or injustice, increase organizational legitimacy in communities served, or provide funding opportunities for PILOs.

In Part IV, this Article highlights future studies that can show the impact of racial and ethnic diversity on PILOs and other institutions that provide legal services and advocacy. For now, I note an example of how race can impact organizational decision-making as explained by a racial minority CEO who wanted to emphasize racial discrimination in litigation but received opposition from a white board member:

There was pushback from a board member who was also a pro bono lawyer in a case where people who can't afford fines are jailed and then they can work off the fines at \$25 a day rate. And one of the lawyers had correctly written that this is an extension of the things that happened in post-reconstruction South, where they would arrest people so that you could use them to pick cotton. So, she talked about this as being part of a legacy of racial discrimination. And the push back was we shouldn't really be talking about this as a sort of racial discrimination case. This is literally a 13th amendment case, but the idea is it's going to put the judge off or, it's going to be uncomfortable. This is where I felt a need to step in and say, "No, this is my vision. When I talk about incorporating racial justice, it is exactly calling out something as being racial injustice and not feeling compelled to discuss it as a somehow neutral practice that maybe has a disproportionate impact."⁵⁸

While a white CEO or board member can have a strong racial justice agenda, the above interview indicates the unique experience of a racial minority CEO who wanted to address racial inequality directly when a white board member did not see the need for that intervention. The CEO's approach made a significant difference in case strategy.

Therefore, we know that racial diversity—including in leadership—matters for outcomes that impact communities of color. This makes the lack of diversity among racial allies particularly troubling, because we might presume that racial allies are in the best position to ensure that communities of color reap the benefits of diverse leaders. Racial allies have been defined most often as white individuals—with the power and privilege conferred by white identity—who actively work to dismantle systems of white supremacy and are willing to both confer and share power with members of subjugated groups.⁵⁹ The last part of this definition—willingness to share power—is

57. See Adediran & Ossei-Owusu, *supra* note 7, at 12.

58. Interview with PILO132 (July 8, 2020) (on file with author).

59. Clark, *supra* note 3, at 523. The majority of the literature on allyship has focused on heterosexual allies to LGBTQIA+ communities. See, e.g., Terry D. Conley et al., *Gay Men and Lesbians' Experiences in and Expectations for Interactions with Heterosexuals*, 44 J. HOMOSEXUALITY 83 (2002). There is also some work on nondisabled allies to people with disabilities, see, e.g., Joan M. Ostrove et al., *Reflections on the K-12 Years in Public Schools: Relations with Hearing Teachers and Peers from the Perspective of Deaf and Hard-of-Hearing Adults*, 29 DISABILITY STUD. Q. 1 (2009), and men acting as allies to women

important because it involves white people divesting power to reinvest that power in others who are not considered white.⁶⁰ When it seems that the people and institutions that profess to be racial allies do little to transfer power to other racial and ethnic minorities, it is imperative to examine their allyship status. This Article begins that process by laying bare the lack of racial and ethnic diversity among the leaders in the sector and raising questions for future research to further explore these problems and make policy suggestions to address them.

While instrumental reasons are important, we can also conceive of racial diversity as noninstrumental in nature, that is, as an end in itself.⁶¹ In other words, we ought to diversify because it is the right thing to do; it is a matter of equality and fairness.⁶² This noninstrumental ideal is often taken for granted,⁶³ but can also be a powerful feature in determining how to achieve racial and ethnic diversity in public interest law leadership and the sector as a whole.

B. *The Link Between Race and Poverty in the United States*

Race and poverty are intricately linked in the United States.⁶⁴ Racial minorities—especially Black and Latinx individuals—are disproportionately likely to be poor and remain poor over many generations compared to their white counterparts.⁶⁵ The 2020 U.S. Department of Health and Human Services (HHS) federal poverty guideline for a household of three was \$21,720.⁶⁶ The federal poverty guideline is the official measurement of

concerning issues of gender discrimination and violence, see, e.g., Erin Casey & Tyler Smith, “How Can I Not?”: *Men’s Pathways to Involvement in Anti-Violence Against Women Work*, 16 VIOLENCE AGAINST WOMEN 953 (2010). There is also some work on white allies to people of color. See, e.g., UPROOTING RACISM: HOW WHITE PEOPLE CAN WORK FOR RACIAL JUSTICE (4th ed. 2002). Scholars in social psychology and other fields have already begun that expansion. See, e.g., Sabrina M. Rose-Smith, *Allyship—Growing from Mistakes in a Cancel Culture*, GOODWIN (July 20, 2020), https://www.goodwinlaw.com/publications/2020/07/07_20-allyship-growing-from-mistakes [<https://perma.cc/N82L-S6YF>].

60. See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2154 (2013).

61. See, e.g., Adediran, *supra* note 10; see also *supra* note 8 and accompanying text.

62. See Wilkins, *supra* note 10, at 1553.

63. See Jayakumar et al., *supra* note 32, at 11.

64. See, e.g., Walda Katz-Fishman & Jerome Scott, *Diversity and Equality: Race and Class in America*, 9 SOCIO. F. 569, 570 (1994). See generally Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies That We Tell About the Insignificance of Race*, 96 B.U. L. REV. 55 (2016); Jonathan Feingold, “All (Poor) Lives Matter”: *How Class-Not-Race Logic Reinscribes Race and Class Privilege*, U. CHI. L. REV. ONLINE (2020) (noting that class-conscious policies that frown upon race-conscious policies deny racism’s enduring presence or deem that reality constitutionally irrelevant or insufficient to justify even modest race-conscious remedies); William C. Kidder, *How Workable Are Class-Based and Race-Neutral Alternatives at Leading American Universities?*, 64 UCLA L. REV. DISCOURSE 100 (2016) (arguing that class cannot substitute for race).

65. Randall Akee et al., *Race Matters: Income Shares, Income Inequality, and Income Mobility for All U.S. Races*, 56 DEMOGRAPHY 999, 1014 (2019). See generally Deirdre Bloome, *Racial Inequality Trends and the Intergenerational Persistence of Income and Family Structure*, 79 AM. SOCIO. REV. 1198 (2014).

66. *2020 Poverty Guidelines*, OFF. OF THE ASSISTANT SEC’Y FOR PLAN. & EVALUATION, <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/prior-hhs->

poverty used by the federal government to determine financial eligibility for certain federal programs including civil legal assistance.⁶⁷ In general, only those who meet the poverty threshold at about 125 percent can obtain free legal services from PILOs and law firm pro bono programs.⁶⁸

According to the U.S. Census, white individuals comprise 60.1 percent of the population with only 8.1 percent living in poverty.⁶⁹ Black individuals make up 13.4 percent of the population, and 19.5 percent of Black people live in poverty.⁷⁰ Latinx individuals make up 18.5 percent of the population, and 17 percent of Latinx people live in poverty.⁷¹ Asian individuals make up only 5.9 percent of the population, and 11.4 percent of Asian individuals live in poverty.⁷² These percentages are likely to increase.⁷³

This means that legal services clients are disproportionately racial and ethnic minorities. To illustrate, in 2020, 44.1 percent of the clients of the Legal Services Corporation's⁷⁴ (LSC) grantees identified as white, 28 percent identified as Black, 17.6 percent identified as Hispanic or Latino, 2.8 percent identified as Asian or Pacific Islander, 2.1 percent identified as Native American, and 3.7 percent identified as other.⁷⁵ While the clients of LSC grantees were about 20 percent of PILOs in the United States, 56 percent of the clients were racial or ethnic minorities (or categorized as other), while 44 percent were white.⁷⁶ The data captures both rural and urban areas and is the most expansive data available on clients of LSC-funded PILOs.

poverty-guidelines-federal-register-references/2020-poverty-guidelines [https://perma.cc/6TBJ-TW88] (last visited Mar. 4, 2022).

67. *Id.*

68. *Civil Legal Aid 101*, U.S. DEP'T OF JUST. (Nov. 5, 2021), <https://www.justice.gov/olp/civil-legal-aid-101> [https://perma.cc/YVN6-VFAC]. Some PILOs with specialized programs for vulnerable individuals and groups represent clients regardless of income. *Id.* For example, programs that do not receive LSC funding and that serve older Americans, veterans, immigrants, people with disabilities, or domestic violence victims and survivors may do so regardless of income. *See* National Study (data on file with author). Civil rights and civil liberties matters may also be represented without an income threshold. *See id.*

69. *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/INC110219> [https://perma.cc/66W8-RWY4] (last visited Mar. 4, 2022); *Poverty Rate in the United States in 2020, by Ethnic Group*, STATISTA (Sept. 21, 2021), <https://www.statista.com/statistics/200476/us-poverty-rate-by-ethnic-group/> [https://perma.cc/XZP5-72MU].

70. *Poverty Rate in the United States in 2020, by Ethnic Group*, *supra* note 69.

71. *Id.*

72. *Id.*

73. The COVID-19 pandemic is likely to increase income inequality and disproportionately impact racial and ethnic minorities. *See* Legal Services Corporation, *LSC Briefing: The COVID-19 Health Crisis, Civil Legal Needs, and State Courts*, YOUTUBE (Apr. 20, 2020), <https://youtu.be/-7yAEZL8otY> [https://perma.cc/76W9-3UZS].

74. The LSC is an independent nonprofit corporation that provides grants for civil legal assistance to poor Americans. *See* LEGAL SERVS. CORP., <https://www.lsc.gov/> [https://perma.cc/6MQP-4B6E] (last visited Mar. 4, 2022). LSC grantees include 132 PILOs in the country, which is a small fraction of public interest law organizations. *See id.*

75. LEGAL SERVS. CORP., *LSC BY THE NUMBERS: THE DATA UNDERLYING LEGAL AID PROGRAMS* 63, 126 (2020).

76. *See id.*

Interview data are also illuminating. All thirty-two executive directors in the interview study reported that their clients are “predominantly people of color.”⁷⁷ The three examples below are illustrative. The first is from a law reform or litigation-type PILO, and the second and third are from PILOs that provide legal services to individual clients:

[Clients] are all Black and brown communities who have experienced long historical marginalization and we’ve added programs over the years. The driver is systemic racism and all the work that we do working with people with disabilities, immigrants, environmental justice community [sic].⁷⁸

So, I think where diversity is important at least as it relates to our mission and board leadership would be more along the lines of the cultural competency as the people we’re aiming to serve, right, so recognizing that our target audience is more likely to be Black or brown.⁷⁹

We have more people of color than not. High percentage are immigrants, very high percentage, whether they’re documented or undocumented. Our immigration unit handles the highest volume of cases in terms of every year. Just a huge number. But our other units providing other services, very often their clients are immigrants.⁸⁰

Therefore, race and poverty are linked, which means that PILO clients are disproportionately racial and ethnic minorities.

C. *Situating Public Interest Law in Historical Context*

This section discusses the history of the public interest law movement, including how race relations influenced PILO leadership in historical context.

1. The Public Interest Law Movement

Legal services for the poor originated in the late-nineteenth and mid-twentieth centuries with the development of legal aid societies, which were supported principally by charities.⁸¹ The initial founders of these organizations sought to assist newly freed slaves, immigrants, children, and women and expected legal aid to challenge the exploitive economic arrangements of the day.⁸²

77. See, e.g., Interview with PILO124 (June 1, 2020) (on file with author). Six of the thirty-two are funded by the LSC.

78. Interview with PILO130 (July 7, 2020) (on file with author).

79. Interview with PILO102 (Feb. 4, 2020) (on file with author).

80. Interview with PILO128 (June 17, 2020) (on file with author).

81. See Richard Abel, *The Paradoxes of Pro Bono*, 78 *FORDHAM L. REV.* 2443, 2443 (2010); Tigran W. Eldred & Thomas Schoenherr, *The Lawyer’s Duty of Public Service: More than Charity*, 96 *W. VA. L. REV.* 367, 369 (1993); Jack Katz, *Caste, Class, and Counsel for the Poor*, 10 *AM. BAR FOUND. RSCH. J.* 251, 263 (1985); Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 *WM. & MARY L. REV.* 737, 753 (2002).

82. CHEN & CUMMINGS, *supra* note 5, at 47.

Particularly, abolitionists relied on legal action, including litigation, legal research, and counsel in their efforts.⁸³ For instance, the Pennsylvania Abolition Society provided legal representation to thousands of Black people seeking legal aid during the early republic—from free Black people kidnapped into Southern slavery and former slaves illegally held by their masters to Southern runaways seeking shelter in Northern states.⁸⁴ One Maryland slave master complained that “Pennsylvania abolitionists had erected such an annoying maze of legal obstacles that he and his fellow slaveholders found it difficult to recover slaves.”⁸⁵

Beginning in the 1880s and through the 1930s, organizations like the National Association for the Advancement of Colored People (NAACP) and the National Civil Liberties Bureau (now the American Civil Liberties Union (ACLU)) addressed racial justice and civil liberties, respectively.⁸⁶ PILOs, organized through charitable contributions of money and service, expanded in the twentieth century.⁸⁷

The private sector also figured prominently in the development of public interest law. In 1916, Louis Brandeis, then a prominent lawyer in private practice, gave an influential speech arguing that elite American lawyers had “allowed themselves to become adjuncts of great corporations and . . . neglected the obligation to use their powers for the protection of the people.”⁸⁸ The speech called on private lawyers to join in public interest work, including law reform efforts and individual representation of indigent clients.⁸⁹ Private sector lawyers also provided free legal services to the poor through court appointment or by waiving payment for clients who were unable to pay.⁹⁰

The modern architecture of public interest law did not develop until the 1960s.⁹¹ Shortly after the Supreme Court extended the right to counsel in criminal cases in *Gideon v. Wainwright*,⁹² President Lyndon B. Johnson declared a “War on Poverty.”⁹³ Federal spending for legal assistance increased between 1964 and 1967, when Congress funded a number of social

83. See WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 85 (1977).

84. See RICHARD S. NEWMAN, *TRANSFORMATION OF AMERICAN ABOLITIONISM: FIGHTING SLAVERY IN THE EARLY REPUBLIC 60–61* (2002).

85. *Id.* at 60.

86. See SUSAN D. CARLE, *DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880–1915*, at 68 (2013); CHEN & CUMMINGS, *supra* note 5, at 49, 52.

87. See Eldred & Schoenherr, *supra* note 81, at 369.

88. Robert F. Cochran, Jr., *Louis D. Brandeis and the Lawyer Advocacy System*, 40 PEPP. L. REV. 351, 359 (2013).

89. See *id.*; CHEN & CUMMINGS, *supra* note 5, at 54.

90. See CHEN & CUMMINGS, *supra* note 5, at 56.

91. See *id.* at 60.

92. 372 U.S. 335 (1963).

93. See Kornhauser & Revesz, *supra* note 26, at 843–44.

programs through legislation as part of the War on Poverty under the auspices of the U.S. Office of Economic Opportunity (OEO).⁹⁴

Congress passed the Legal Services Corporation Act of 1974,⁹⁵ which established the Legal Services Corporation.⁹⁶ In 1965, the OEO launched the Legal Services Program, expanding the nation's annual expenditure on civil legal aid from less than \$5 million to more than \$300 million in fifteen years.⁹⁷ The LSC's major accomplishment was the expansion of federal legal services from a predominantly urban program to one providing legal assistance in virtually every city and county in the United States.⁹⁸

In addition to direct representation, public interest law expanded in the 1960s to include the use of legal institutions to advance social justice or social change through law reform.⁹⁹ In the late 1960s and 1970s, PILO lawyers won landmark Supreme Court victories on poverty issues, including in *Fuentes v. Shevin*¹⁰⁰ and *Goldberg v. Kelly*.¹⁰¹ These successes, coupled with the successes of lawyers during the civil rights movement—including the NAACP Legal Defense Fund's landmark success in *Brown v. Board of Education*¹⁰²—led other groups to see law as an instrument for social justice, leading to the further expansion of law reform efforts.¹⁰³

94. See DEBORAH L. RHODE, ACCESS TO JUSTICE 62 (2004); Michael A. Mogill, *Professing Pro Bono: To Walk the Talk*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 7 (2001); Weissman, *supra* note 81, at 754.

95. Pub. L. No. 93-355, 88 Stat. 378 (codified as amended in scattered sections of 42 U.S.C.).

96. *Id.*; see also Samuel D. Thurman, *The Legal Services Corporation*, 1976 UTAH L. REV. 103.

97. See Abel, *supra* note 81, at 2443; Eldred & Schoenherr, *supra* note 81, at 370.

98. See Eldred & Schoenherr, *supra* note 81, at 371; Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1217, 1220 (2002).

99. See Robert W. Gordon, *Are Lawyers Friends of Democracy?*, in THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE 31, 45–46 (Scott L. Cummings ed., 2011); Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1592 (2006). The public interest law movement is related to, although not exclusively about, cause lawyering. Cause lawyering involves using litigation to mobilize a movement around a particular cause, such as civil rights or marriage equality. For an explanation, see Austin Sarat & Stuart A. Scheingold, *What Cause Lawyers Do for, and to, Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 1 (Austin Sarat & Stuart A. Scheingold eds., 2006).

100. 407 U.S. 67 (1972) (requiring due process before property is repossessed).

101. 397 U.S. 254 (1970) (holding that public aid recipients must be granted a pretermination evidentiary hearing before discontinuing their aid).

102. 347 U.S. 483 (1954).

103. See Albiston & Nielsen, *supra* note 13, at 64; Albiston et al., *supra* note 13, at 991. However, the LSC experienced some setbacks, including a high rate of turnover: over one third of the lawyers left the organization annually. Eldred & Schoenherr, *supra* note 81, at 371. In addition, the Reagan administration weakened the LSC by appointing a hostile board and decreasing its funding. *Id.* at 22 (“Congress continued to decrease LSC funding after Reagan, cutting it in 1996 to a level 50 percent below its peak in 1980. The final blow came with the imposition of congressional restrictions in 1996 banning LSC-funded organizations from redistricting challenges, lobbying, class action lawsuits, representing most aliens, prisoner representation, welfare reform activities, and defending public housing tenants evicted for drugs. Most drastically, this legislation prohibited lawyers in LSC-funded organizations from using non-LSC funds to engage in any of the banned activities.”);

Both LSC and non-LSC funded PILOs rely on state and local governments, state bar associations, private foundation grants, membership dues, and contributions or gifts from private individuals, law firms, corporations, and attorney's fees.¹⁰⁴ PILOs also use nonmonetary resources including pro bono legal services and in-kind contributions.¹⁰⁵ In 1981, the LSC mandated that its grantees use 12.5 percent of their funds to engage private attorney involvement.¹⁰⁶ This mandate expanded pro bono programs not just for LSC grantees but also for non-LSC-funded PILOs.¹⁰⁷ This expansion is evident in the commonplace private-nonprofit partnerships between large law firms and PILOs today.¹⁰⁸ In addition, many PILOs were established as private-nonprofit alliances primarily to engage the private sector in pro bono work.¹⁰⁹

2. Race and the Movement: The Example of Mobilization for Youth

Historically, public interest lawyers and leaders who engaged in remarkable individual legal representation and brought about enormous legal reform over the years have been disproportionately white.

Mobilization for Youth (MFY)—a PILO established in 1968—was one of the first legal services organizations funded by the LSC to provide legal assistance to poor people in Manhattan, New York.¹¹⁰ The founders of MFY came from social services agencies in New York City and from New York University and Columbia University.¹¹¹ These elite institutions organized as experts on the problems of poor youth who were often racial and ethnic minorities.¹¹² The poor were “seen as consumers, interpreters, constituents for social action, and subjects.”¹¹³ They were not seen as decision-makers

see also Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321; Houseman, *supra* note 98, at 1224. As a result, only non-LSC-funded PILOs could represent clients in the banned categories of legal representation.

104. *See* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 5, 23–24 (2004).

105. *See* Steven A. Butcher, *The Institutionalization of Pro Bono in Large Law Firms: Trends and Variation Across the AmLaw 200*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 135, 138 (R. Granfield & L.M. Mather eds., 2009); Albiston & Nielsen, *supra* note 13, at 74.

106. 5 C.F.R. § 1614.2 (2022); *see* Cummings, *supra* note 104, at 24; Houseman, *supra* note 98, at 1218.

107. *See* 5 C.F.R. § 1614.2 (2003).

108. *See generally* Adediran, *Relational Costs*, *supra* note 17.

109. *Id.* at 391.

110. Herbert Mitgang, *The Storefront Lawyer Helps the Poor*, N.Y. TIMES, Nov. 10, 1968, at SM34; *Our Mission and History*, MOBILIZATION FOR JUST., <https://mobilizationforjustice.org/about/about-mfy/> [https://perma.cc/MJ28-TENP] (last visited Mar. 4, 2022).

111. Joseph Helfgot, *Professional Reform Organizations and the Symbolic Representation of the Poor*, 39 AM. SOC. REV. 475, 479 (1974).

112. *Id.*

113. *Id.*

beyond serving as “guides who could explain the slum to the professional and explain [the professional’s] presence to the slum.”¹¹⁴

In its early years of existence, MFY’s board of directors—which was established to make decisions about the mission and direction of the organization—had no representative from the community.¹¹⁵ Over a number of years, the board brought in a handful of racial and ethnic minorities.¹¹⁶ At the highest level in 1971, 24 percent of the board was comprised of racial minorities.¹¹⁷ Despite including a small percentage of members of the community on the board, research suggests that representatives from communities of color lacked discretionary or decision-making power.¹¹⁸ MFY was certainly not unique. In its early years, the NAACP, an organization formed by prominent Black leaders like W.E.B. DuBois and white individuals, also had a mostly white board with one lone Black member.¹¹⁹

Indeed, Derrick Bell emphasized how the interests and strategies of civil rights lawyers who were determined to have “unconditional integration” of segregated schools may not have necessarily aligned with the needs and interests of their clients who were racial and ethnic minorities.¹²⁰ It is not surprising then that the civil rights movement was largely influenced by white leaders when the NAACP’s board was comprised mostly of white individuals.

II. LACK OF RACIAL AND ETHNIC DIVERSITY AMONG PUBLIC INTEREST LAW LEADERS

In this part, I first provide an overview of the data and methods for my research. I then systematically show the lack of diversity among PILO CEOs, boards of directors, and large law firm pro bono partners and counsel.

A. Data and Methods

Because of the novelty of the issues addressed, this Article uses multiple sources of data.¹²¹ The use of a range of data is a major strength of this study because it permits the capture of different dimensions of the problem. These data sources warrant some description.

The first source of data is a national demographic study (“National Study”) of all the executive directors and board members of PILOs and pro bono

114. *Id.*

115. *Id.* at 482.

116. *See id.*

117. *See id.*

118. *See id.* at 483.

119. *See* Megan Ming Francis, *The Price of Civil Rights: Black Lives, White Funding, and Movement Capture*, 53 *LAW & SOC’Y REV.* 275, 293 (2019).

120. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470, 471 (1976).

121. In the social sciences, the use of multiple sources of data is known as triangulation. *See* Neil J. Salkind, *Triangulation*, in *ENCYCLOPEDIA OF RESEARCH DESIGN* 1537–38 (2010).

partners and counsel across the United States.¹²² This Article provides the first systematic investigation, possibly the largest study of diversity in public interest law and certainly the most robust in recent times. I introduce a novel data set of 550 executive directors, 9010 board members, and 140 pro bono partners and counsel in Am Law 100 firms. Altogether, the data encompasses over 650 institutions and close to 10,000 individuals.

To generate this novel data, my team and I took several steps. We first compiled a list of all organizations that provide legal services either directly to clients or through litigation and policy advocacy in the United States. These organizations engage in purely legal services either through direct representation or law reform efforts. The exceptions were a few social services organizations with extensive legal services departments. By focusing on organizations that engage exclusively, or in large part, in legal services, we took a much narrower design approach than other empirical studies on PILOs.¹²³

This step was challenging because it required a state by state scouring of the internet and bar association websites using terms such as “public interest organizations,” “legal services organizations,” “volunteer lawyers,” and “pro bono organizations.” We then checked our lists against scholarly articles on public interest organizations to include any organization that we may have missed.¹²⁴ Next, we searched each organization’s website to code key demographic information including gender, race, ethnicity, occupation, title, and type of legal practice. We relied on professional websites, blogs, newsletters, and social media platforms, including LinkedIn and Facebook, to code individual demographic information. We limited the data for pro bono partners and counsel to only Am Law 100 firms because firms not on this list are generally less likely to hire full-time pro bono partners and counsel. For this group, we searched for pro bono partners and counsel at every Am Law 100 firm.

We encountered some challenges in obtaining information for some CEOs who are not lawyers and for board members who do not practice in law firms and corporations. This is particularly relevant for smaller cities or rural communities. We used social media profiles, such as LinkedIn and Facebook profiles, for those executive directors and board members who are not lawyers and who do not have professional profiles. Still, in some cases we could not find photographs, or when we found photographs, they were not sufficiently clear to allow us to determine an individual’s race or ethnicity.

122. Data for pro bono partners and counsel are limited to Am Law 100 firms.

123. For an example of a study that took a much broader approach to classify public interest organizations, see Nielsen & Albiston, *supra* note 99, at 1592. Even with the broad approach, there were only 270 PILOs that met the study’s criteria and only 221 were surveyed. *Id.* at 1605.

124. We checked our lists against Rhode, *supra* note 4. The Rhode study included only fifty PILOs and is not comprehensive. *See id.* It is therefore probable that we do not capture all PILOs in the United States. There has been a recent effort to compile data on public interest lawyers through the Justice Index. *See Justice Index*, NAT’L CTR. FOR ACCESS TO JUST., <https://ncaj.org/state-rankings/2021/justice-index> [<https://perma.cc/5A7D-8G8Q>] (last visited Mar. 4, 2022). However, the data excludes most law reform organizations. *See id.*

In those cases, we coded the data as missing. This resulted in usable race data for about 8000 board members and 520 executives or CEOs. All analyses are based on these usable data.

It is important to acknowledge important differences among the organizations in our database. 132 of the 550 organizations are funded by the LSC through congressional appropriations, while the rest are funded by state grants and private donations, including from law firms, corporations, and foundations. Some PILOs focus on law reform efforts—impact litigation, policy, and advocacy—while others primarily represent individuals. A third and growing group of PILOs engage in both individual representation and law reform work.¹²⁵ Some are staff-based organizations with small pro bono components, in that they represent clients mostly in-house.¹²⁶ Others are pro bono-focused organizations with small numbers of staff.¹²⁷ Some are generalists, while others specialize in particular areas of law. Some are large and have large boards of directors, while others are small. Some are in urban centers, while others are in small cities and rural areas. A handful were founded to serve a specific racial or ethnic community. Those organizations are significantly more racially and ethnically diverse in their leadership than the general population of PILOs. These differences are important in thinking about the role of racial and ethnic diversity in leadership. Still, almost all PILOs (except generally those specifically organized to serve racial and ethnic minorities) need some level of racial or ethnic diversification in their leadership.

The second source of data are sixty-two interviews (“interview data”) conducted between February 2020 and January 2021 with a small subset of the National Study: thirty-two executive directors and thirty board members. These interviews are used as illustrations of the experiences of some executive directors and board members and are not meant to be representative. Executive directors and board members are from PILOs in all regions of the United States, specifically fourteen states and the District of Columbia: Alabama, Arizona, California, District of Columbia, Florida, Georgia, Illinois, Louisiana, Massachusetts, Minnesota, North Carolina, New York, South Carolina, Pennsylvania, and Washington. Twenty-four of the sixty-two interviews were conducted in person and thirty-eight were conducted via Zoom. Interviews were in-depth and semi-structured, which entailed asking participants open-ended questions and using a protocol to ensure that I pursued a consistent set of themes and questions and explored additional topics as they arose.¹²⁸ I conducted all interviews.

I recruited participants through convenience and snowball sampling. For executive directors, I first contacted individuals I knew from prior studies. Some of these executive directors referred me to other executive directors.

125. See Adediran, *Relational Costs*, *supra* note 17, at 389.

126. See *id.* at 392.

127. See *id.*

128. See MICHAEL QUINN PATTON, *QUALITATIVE EVALUATION AND RESEARCH METHODS* 284–87 (2d ed. 1990).

In addition, I emailed about fifty executive directors from across the country who I had no prior contact with. Ten of the fifty agreed to participate in the study. For board members, I received referrals from law firm pro bono partners or counsel and other board members with knowledge of lawyers who sit on the boards of PILOs and might be interested in the study. I also directly contacted board members listed on PILOs' websites. Fifteen board members from the direct contact group agreed to participate.

The third source of data is the After the JD study ("AJD Study")—conducted by the American Bar Foundation and the National Association for Law Placement (NALP)—which provides the most comprehensive national data on the careers of lawyers in the United States.¹²⁹ The AJD Study is a longitudinal study of the career outcomes of a cohort of almost 5000 lawyers, "offering both a nationally representative picture of lawyer career trajectories and an in-depth portrait of the careers of women and racial and ethnic minority lawyers."¹³⁰ The study follows the careers of new lawyers over the first ten years after law school graduation.¹³¹ "[T]he first cohort of lawyers was surveyed in 2002, the second in 2007 [five years into law practice], and the third in 2012 [ten years into law practice]."¹³²

The fourth source of data is the Justice at Risk study, which was conducted in the state of California ("California Study").¹³³ The study was prepared by a consulting firm for the Legal Aid Association of California in January 2020.¹³⁴ The study included sixty-five PILOs that employed more than two-thirds of California's PILOs lawyers.¹³⁵ The goal of the 2020 study was to decipher why legal aid organizations in California have difficulty recruiting and retaining public interest lawyers.¹³⁶ The study also includes issues around diversity and inclusion in California.¹³⁷

129. See RONIT DINOVTZER ET AL., AM. BAR FOUND. & NALP FOUND. FOR L. CAREER RSCH. & EDUC., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS (2004); RONIT DINOVTZER ET AL., AM. BAR FOUND. & NALP FOUND. FOR L. CAREER RSCH. & EDUC., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS (2009); GABRIELE PLICKERT ET AL., AM. BAR FOUND. & NALP FOUND. FOR L. CAREER RSCH. & EDUC., AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS (2014).

130. *After the JD*, AM. BAR FOUND., <http://www.americanbarfoundation.org/research/project/118> [<https://perma.cc/U6T8-QL36>] (last visited Mar. 4, 2022).

131. *Id.*

132. *Id.*

133. CARMODY & ASSOCS., LEGAL AID ASSOCIATION OF CALIFORNIA, JUSTICE AT RISK: MORE SUPPORT NEEDED FOR LEGAL AID ATTORNEYS IN CALIFORNIA 49 (2020).

134. See generally *id.*

135. *Id.* at 1.

136. *Id.*

137. *Id.*

B. Overview: CEOs, Boards, and Pro Bono Partners and Counsel

Any well-functioning nonprofit organization should involve a partnership between the executive director and the board of directors.¹³⁸ The board's decisions are longer term ones often with some input from the executive director, while the executive director must make short-term decisions usually with the advice of one or more members of the board.¹³⁹ Boards may delegate much of their responsibility to the executive director, but the board has the authority to remove and replace the executive director when that person is not consistently accomplishing the duties of the job.¹⁴⁰ As such, the board holds the ultimate leadership responsibility for hiring and, if necessary, firing the executive director.¹⁴¹

Law firm pro bono partners and counsel are important parts of the partnership between executive directors and boards of directors because of the importance and prevalence of pro bono work provided by large law firms. In 2008, 80 percent of the PILOs in Deborah Rhode's study reported moderate or extensive collaboration with the private bar.¹⁴² Almost all of the large national PILOs in her study relied heavily on pro bono work for impact litigation and involved law firms in at least half of their major cases.¹⁴³ Based on my research of these organizations, today, all of them involve law firms in pro bono work. Pro bono partners and counsel who manage law firm pro bono programs are at the forefront of these collaborations.

The appendices at the end of this Article provide chi-square statistical analyses that compare the racial and ethnic diversity in the sector with the general U.S. population. They also compare the racial and ethnic diversity of PILO boards with the percentage of individuals living in poverty in the United States. For both analyses, I use the U.S. Census data.¹⁴⁴ The analyses show that in either case, white individuals are more likely than people of color to be PILO executive directors/CEOs, members of boards of directors, and law firm pro bono partners and counsel. The table below provides an overview of the National Study referenced throughout this Article.

138. See Robert F. Leduc & Stephen R. Block, *Conjoint Directorship: Clarifying Management Roles Between the Board of Directors and the Executive Director*, 14 J. VOLUNTARY ACTION RSCH. 67, 70 (1985).

139. *Id.*

140. *Id.*

141. *Id.*

142. Rhode, *supra* note 4, at 2070. "Moderate or extensive collaboration" means the private bar participated in 33 percent to 47 percent of the legal services provided by that PILO. *See id.*

143. *Id.*

144. *Income and Poverty in the United States: 2019*, U.S. CENSUS BUREAU (Sept. 15, 2020), <https://www.census.gov/library/publications/2020/demo/p60-270.html> [<https://perma.cc/2EPE-PBQ3>].

Table of National Study Descriptive Data

		ED/CEO		Board		Pro Bono	
Variable		N	%	N	%	N	%
Gender							
	Male	213	39.37%	4465	51.10%	31	22.63%
	Female	328	60.63%	4272	48.90%	106	77.37%
Race							
	White	391	75.78%	5830	72.68%	122	89.71%
	Black	42	8.14%	1113	13.88%	4	2.94%
	Asian	21	4.07%	463	5.77%	6	4.41%
	Hispanic/Latinx	50	9.69%	463	5.77%	3	2.21%
	Native American	3	0.58%	68	0.85%	0	0.00%
	Other	2	0.39%	6	0.07%	0	0.00%
	Middle Eastern	7	1.36%	78	0.97%	1	0.74%

In the following section, I show why racially homogenous public interest leadership is unacceptable because of the important role that CEOs, board members, and pro bono partners and counsel play in policy, strategy, and decision-making. I also describe the lack of racial and ethnic diversity among each of the leadership groups.¹⁴⁵

C. Executive Directors/CEOs

This section discusses the role of CEOs in PILOs and the lack of racial and ethnic diversity among them.

1. Executive/CEO Roles

PILO executive directors are tasked with fulfilling their organizations' missions. Executive directors have a large influence on legal strategies and what and how legal services are provided. An executive director described her role as providing "an agency wide perspective" by doing "a little bit of everything":

I work really closely with our head of operations and HR. I do a lot of work on hiring; I do a lot of work on program development via figuring out grants

145. A word about gender diversity. As is evident from the table above, women (mostly white women) make up 60 percent of all executive directors/CEOs in PILOs and about 49 percent of all board members. Mostly white women also make up 77 percent of Am Law 100 pro bono partners and counsel. See National Study (data on file with author). While these numbers might appear to celebrate gender diversity, they also point to the fact that women are overrepresented in the public interest law sector because of factors such as low salaries.

and staffing and determining strategically what types of programs we want to do. I work with our finance department, so I oversee our finance department, our operations department, our IT and then oversee the department overall that does volunteer work and our community engagement work.¹⁴⁶

Another executive director described the role as that of a “chief problem solver, the chief fundraiser. [You are in charge of] the final level of big-ticket strategies, decision making, to filing major complaints in policy efforts.”¹⁴⁷

Executive directors also have the crucial responsibility of staffing the organization and motivating subordinates.¹⁴⁸ In essence, they choose the lawyers that represent clients and engage in law reform litigation to provide legal assistance for clients who are often racial and ethnic minorities.

A board member of a PILO described how the executive director was obliged to step in to motivate his racially and ethnically diverse staff after the murder of George Floyd:

He knew that as the manager of these sixty people that if he didn’t get everybody together and start talking about what was going on in the community, how it was impacting employees individually and the work that they were doing, that we were not going to be able to get anything done. And what came out of those conversations was a desire by the staff to . . . look at how what we did was also addressing what we saw that the community needed. He brought that to the board and explained that what was going on fits right in line with what we have been doing in the organization all along. And so, we . . . are trying to find ways to support the staff and support the organization as it grows that way.¹⁴⁹

As is evident from the above quote, executive directors perform their functions in partnership with the board of directors.¹⁵⁰ The following executive director explained his role in starting a new program with the board’s approval:

[For] the grant money, I’ve been talking about that for a year with the board at every board meeting. The initial stage of talking about deciding to apply is a conversation in a board meeting. I’m saying, here’s why, if we can represent all these women in their custody dispute suit, there’s an attorney on the other side, that is an important service that we can provide.¹⁵¹

Thus, executive directors work in conjunction with the board of directors to establish the organization’s policies and programs. Executive directors also support the board’s strategic planning function, get the board involved in fundraising and public relations for the organization’s benefit, and support the board’s financial oversight functions.¹⁵²

146. Interview with PILO130 (Feb. 4, 2020) (on file with author).

147. Interview with PILO130 (July 7, 2020) (on file with author).

148. See Leduc & Block, *supra* note 138, at 70.

149. Interview with BD009 (July 10, 2020) (on file with author).

150. Kathleen B. Fletcher, *Effective Boards: How Executive Directors Define and Develop Them*, 2 *NONPROFIT MGMT. & LEADERSHIP* 283, 283 (1992).

151. Interview with PILO119 (March 6, 2020) (on file with author).

152. Fletcher, *supra* note 150, at 289–91.

The executive director of a large PILO in a small city described his role in staffing the organization and the importance of having the board's support:

I'm the one in control of the staff, hiring the staff. The board doesn't hire the staff, I do. But I think it helps to have support from your board when they see that what you're doing is consistent with the composition of not only the board, but the community. And they feel good about it. And when they feel good about it, they feel good about me and I feel good about it, and I think it makes us a better organization.¹⁵³

Executive directors are also involved in recruiting board members, orienting and socializing new board members on the organization's mission, and supporting board committee work.¹⁵⁴ All of the thirty-two executive directors in the interview data have been involved in recruiting new board members in different capacities. Many executive directors recommend individuals to the board's governance and nominating committees for approval. Others make recommendations and are also involved in the vetting process by interviewing potential board members. The executive director of a large PILO that engages in both individual representation and law reform efforts explained how she vets new board members before the nomination committee gets involved:

I'm primarily involved in the initial vetting of a candidate. No one would get to the nomination committee that I didn't think was a good idea. And then the nomination committee has a conversation that goes over the financial commitment and the pro bono commitment. But then more importantly, what it means to be on the board, what the organization is doing, what the issues that the organization is confronted with are likely to be.¹⁵⁵

Another executive director gets involved after the board has already nominated individuals for positions:

What we've found to be the most effective outreach is the peer does it first and we've got [a] nominating governance committee that mostly focuses on nominating people through the year. And we're always kind of looking at who can do that initial outreach and gauge the interest. And then I follow up with a more serious conversation about what the expectations are and get their commitment and it goes from there.¹⁵⁶

2. Lack of Diversity Among Executive Directors/CEOs

Despite the clear, important role that PILO executive directors play in establishing policies and strategies, hiring and motivating staff, deciding the

153. Interview with PILO129 (June 25, 2020) (on file with author); *see also* Interview with PILO101 (Feb. 4, 2020) (on file with author) (explaining the importance of board support); Interview with PILO111 (Feb. 27, 2020) (on file with author) (same).

154. *See* Leduc & Block, *supra* note 138, at 70.

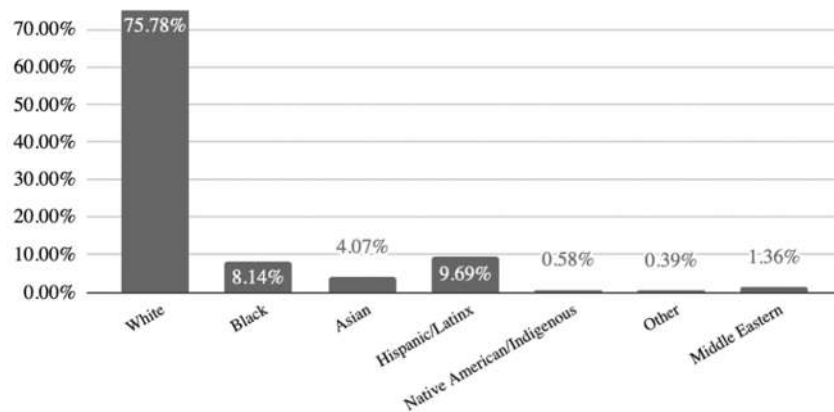
155. Interview with PILO121 (Mar. 6, 2020) (on file with author).

156. Interview with PILO130 (July 7, 2020) (on file with author); *see also* Interview with PILO125 (June 9, 2020) (on file with author) (discussing similar process); Interview with PILO128 (June 17, 2020) (on file with author) (same).

lawyers who represent clients, and engaging in law reform litigation to provide legal services and advocacy, these directors are disproportionately white.¹⁵⁷

The National Study data in Figure 1 below shows the racial and ethnic breakdown of PILO executive directors/CEOs in the United States. About 76 percent are white, which maps onto the California Study with 75 percent of the executive directors/CEOs in that study being white in 2019.¹⁵⁸ Black executive directors/CEOs comprise 8 percent, and Asian executive directors/CEOs comprise 4 percent. Latinx executive directors/CEOs are the largest minority group at about 10 percent of all executive directors/CEOs nationally.

Figure 1: Percent Race/Ethnicity for ED/CEOs



In addition to the influence of the executive director on policies and strategies, interview data suggests that the race or ethnicity of the executive director can influence diversity among the board of directors and staff. Executive directors who are racial and ethnic minorities in the interview data are overwhelmingly more likely to prioritize diversifying their boards rather than making it one of many priorities. Specifically, all thirty-two executive directors talked about the need for diversifying leadership, but few have taken concrete steps to do so. For example, a white executive director explained that it would likely take ten years for the board to become racially and ethnically diverse:

157. Similarly, the California Study shows that 75 percent of PILO executive directors and CEOs in that state were white in 2019. CARMODY & ASSOCS., *supra* note 133, at 49. The numbers are similar for nonprofit organizations in general—90 percent in 2017. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1169–70 (2012); Ward et al., *supra* note 9, at 792.

158. CARMODY & ASSOCS., *supra* note 133, at 49.

So, I've been at [this PILO] for about five-plus years and one of the things I'm trying to do is turn the board into a board that looks a little different than it has looked. Which is a big challenge. It was an organization that most of its board members were white, Jewish, males. Ten years from now I imagine it might be quite different, meaning, I just think we're going to get to that point where it reflects who we serve and that movement towards having people on the board who might actually know something about the kinds of services that are needed, might really make sense. But I just can't picture it right now.¹⁵⁹

Six of the thirty-two executive directors are racial and ethnic minorities. Four of the six have taken important steps to diversify the racial makeup of their leadership and staff by actively engaging in recruiting new board members and making sure that diversifying leadership is part of their organizations' strategic plans. A racial minority executive director who was promoted from deputy director explained that when she "was deputy director for twenty-one years, she worked with the then executive director" to push for a diverse board.¹⁶⁰ Since she "became executive director in September of last year, she has been recruiting for the board."¹⁶¹ Another executive director who is a racial minority has taken specific steps toward training board members on diversity and inclusion and worked to institute a kind of Rooney Rule in board recruitment:

We are in the process of looking at what training is required and how we can take steps to make the organization a more inclusive one going forward. And we will then move on to the board and help them do that same sort of self-reflection. In the meantime, there were things built into the strategic plan that created interim steps so that we would come up with procedures for hiring and for adding board members. But that in the interim, before those procedures were put in place, we instituted something like a Rooney Rule, that required that before doing hiring that we have an adequate [number]. We brought in recently four board members all who were people of color¹⁶²

Nevertheless, taking concrete steps is not limited to racial and ethnic minorities alone. Some white executive directors have also taken important steps to transform their boards, as explained by the executive director below:

At the time that our board started working on diversity and inclusion, we said, you know what? We're going to prioritize bringing in lawyers of color that show that you can do this. And over two years, every single candidate [was a minority]. These were amazing lawyers. I mean, lawyers at major law firms, corporations, people with lived experience. And we basically brought on 100 percent . . . lawyers of color. And our . . . board looks completely different. They're all coming in with diverse perspectives in

159. Interview with PILO128 (June 17, 2020) (on file with author).

160. Interview with PILO125 (June 9, 2020) (on file with author).

161. *Id.*

162. Interview with PILO132 (July 8, 2020) (on file with author).

terms of their world experience. So, I look at that and they are high octane. That group is like firing on all cylinders.¹⁶³

In sum, executive directors have important roles to guide and direct a PILO's mission, programs, and direction of legal services. Executive directors also motivate staff and influence board composition. Yet, they are mostly white.

D. PILO Boards of Directors

This section discusses the role of boards of directors in PILOs and the lack of racial and ethnic diversity on PILO boards.

1. Board Roles

In nonprofit organizations, the board is the legally constituted leadership body that works to carry out the organization's mission.¹⁶⁴ A nonprofit's board of directors is responsible for the management of the activities and affairs of the nonprofit.¹⁶⁵ The legal source of the nonprofit board's obligation lies in state nonprofit corporation statutes, which typically provide that a nonprofit corporation shall be "managed under the direction of" its board of directors.¹⁶⁶ This means that the board "hires, fires, evaluates, and sets compensation for the executive director."¹⁶⁷ Additionally, it "reviews and gives input on the organization's strategic plan, oversees the organization's budget and programs, and reviews the organization's financial statements."¹⁶⁸ Importantly, the board must be involved in establishing the parameters of the organization's mission and services, as well as participating in efforts to raise financial resources.¹⁶⁹ As discussed above, many of the most important leadership roles and program functions are shared by the board and executive director.¹⁷⁰

Like all nonprofits, PILO boards of directors are fiduciaries.¹⁷¹ Board directors are guardians and policy makers responsible for PILOs' missions and resources and for establishing strategies and policies.¹⁷² Board members

163. Interview with PILO122 (Mar. 23, 2020) (on file with author).

164. See Leduc & Block, *supra* note 138, at 67.

165. See REVISED MODEL NONPROFIT CORP. ACT § 8.01 (2019).

166. *Id.*; see, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW § 701 (McKinney 2021) ("[A] corporation shall be managed by its board of directors.").

167. Michael Klausner & Jonathan Small, *Failing to Govern?: The Disconnect Between Theory and Reality on Nonprofit Boards, and How to Fix It*, INT'L. J. NOT-FOR-PROFIT L. (June 2005), <https://www.icnl.org/resources/research/ijnl/failing-to-govern-the-disconnect-between-theory-and-reality-in-nonprofit-boards-and-how-to-fix-it> [https://perma.cc/AR9Y-BQHR].

168. *Id.*

169. See Leduc & Block, *supra* note 138, at 70.

170. To be sure, there are other management staff members, such as deputy directors and program directors, that also share in management. See *id.* at 67.

171. Paul E. Furrh, *The Role of the Board of Directors in Legal Services Programs*, 22 CLEARINGHOUSE REV. 1275, 1275 (1989).

172. See Candace Widmer, *Role Conflict, Role Ambiguity, and Role Overload on Boards of Directors of Nonprofit Human Service Organizations*, 22 NONPROFIT & VOLUNTARY SECTOR Q. 339, 341 (1993).

ensure that their organizations' activities are in agreement with their missions, oversee the organizations' programs, choose and monitor the executives, manage relationships with other organizations and funding sources, and monitor their boards' membership and performance.¹⁷³

All PILO executive directors and board members in the interview data spoke about the important role of their boards of directors.¹⁷⁴ One board member explained the role of the board in managing the executive director:

I think a board is critical because it's the place the executive director can go to confirm their thinking or to get a sense of how the community at large might respond to what they're thinking. So, in that case, I do think first of all, paying attention to the finances, making sure that the executive director is fulfilling the mission of the organization, to be a nonprofit you have to make sure that the money is being used for the purposes that people gave the money so that there's no inappropriate behavior like spending money the wrong way or not being careful or whatever. So, the fiduciary duty of board members is critical, and I do think that boards do play that role.¹⁷⁵

An executive director explained the role of the board in shaping the overall culture of the organization:

Boards . . . heavily influence decision making, the leadership, the direction, the culture of the organization, even though they're not there every day, because corporations are set up with this hierarchy, with board [sic] having the legal responsibility to the organization. And so, a poor performing board puts the organization at risk and a high performing board amplifies and strengthens the organization.¹⁷⁶

Another executive director described boards as "involved in broadly setting policy. They [identify] priority areas for us to focus on. They are signing off on policies that we develop."¹⁷⁷ Another explained that the board "votes on policies. And they vote on bylaws and they actually draft the bylaws."¹⁷⁸

Boards also have the important role of establishing or helping to create PILOs' strategic plans. A board member described a strategic plan as "looking at the current state of the organization, what the strengths and weaknesses are, and what path it should invest its time and energy in for the next five years."¹⁷⁹ An executive director explained how a board can use the strategic planning process to narrow an organization's focus:

A few years ago, the board of directors had a strategic planning session, and they got very specific about what the scope of services was going to

173. *Id.*

174. To be sure, not all board members are active participants, and some boards are much more engaged in strategy and decision-making than others. *See* Rhode, *supra* note 4, at 2050–52. However, interviews in the National Study revealed that even less active boards have an impact on organizations' long-term strategies.

175. Interview with BD001 (June 22, 2020) (on file with author).

176. Interview with PILO122 (Mar. 23, 2020) (on file with author).

177. Interview with PILO115 (Mar. 5, 2020) (on file with author).

178. Interview with PILO127 (June 17, 2020) (on file with author).

179. Interview with BD001 (June 22, 2020) (on file with author).

be. Because at one point we did do housing. We did all kinds of different types of legal services I applaud the board because I think they were very specific that we wanted to be an organization that serves survivors. And so that's when we stopped doing the other things.¹⁸⁰

Typically, boards of directors work with staff to establish organizational strategies, which staff and the executive director implement. The board then takes an oversight role to ensure that the organization follows the plan, as explained by the executive director quoted below:

Strategic planning was completely led by a board committee. Our board chair was the driving force behind that. It ended up with a written document and then it was not shelved. The next phase was the implementation of it. And the implementation was by staff. So, we have been implementing that strategic planning, we have standing meetings, we have standing reports to the board to ensure that it's happening. That we're implementing the strategic planning. So, I would say that they were instrumental. And our board chair was a significant contributor, and not just contributor but leader in assuring that it happened.¹⁸¹

Thus, the strategic planning process sets the tone for smaller scale decisions and processes within PILOs.

2. Lack of Diversity on PILO Boards of Directors

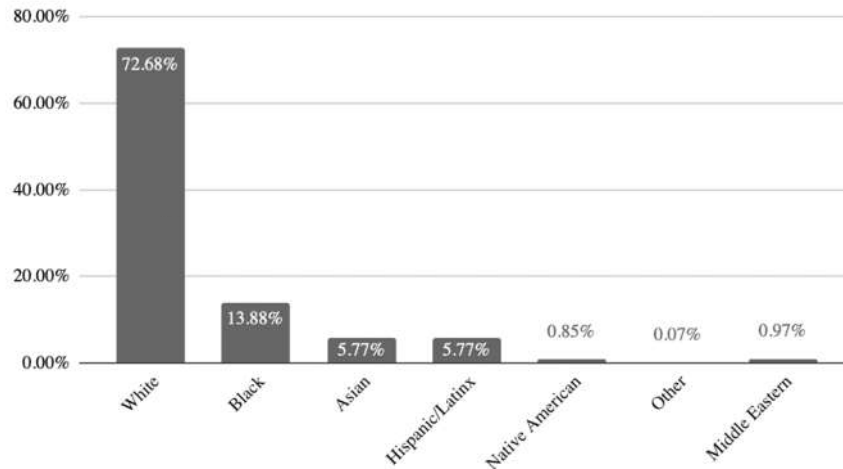
Despite the important role of PILO boards in hiring the executive director, establishing policies, and shaping organizational strategy, culture, and direction, board members are overwhelmingly white.¹⁸² As shown in Figure 2 below, the National Study reveals that about 73 percent of board members are white.

180. Interview with PILO118 (Mar. 6, 2020) (on file with author).

181. Interview with PILO125 (June 9, 2020) (on file with author).

182. Social science and policy research have revealed that nonprofit boards are comprised mostly of white individuals—82 percent in one study. Kathleen Buse et al., *The Influence of Board Diversity, Board Diversity Policies and Practices, and Board Inclusion Behaviors on Nonprofit Governance Practices*, 133 J. BUS. ETHICS 179, 187 (2016). A more recent 2017 study found boards to be 84 percent white. BOARDSOURCE, LEADING WITH INTENT: 2017 INDEX OF NONPROFIT BOARD PRACTICES 10 (2017). Only 2 percent, or about four nonprofits in the study's sample of 214 organizations, reported engaging in civil rights, social action, and advocacy-related work. *Id.* at 61. And while boards and chief executives express dissatisfaction with the level of board diversity, a majority of board chairs and chief executives in at least one study reported diversity recruitment as a low priority. *Id.* at 13–14.

Figure 2: Percent Board Members by Race



Several executive directors pointed out the problem of having mostly white board members from law firms serving clients that are poor and often racial and ethnic minorities. An executive director explained: “A big part of them coming from these law firms that have so many resources and for most of the board members, because they don’t have a personal experience that connects with the fundamental nature of the work that they’re doing, it’s hard to break that divide.”¹⁸³

A diverse board is also more likely to understand the importance of hiring an executive director who is a racial or ethnic minority. An executive director who is an ethnic minority explained the key role of diverse board members in the hiring process:

So, I’m the first woman of color to run [the organization]. And I think that happened because at the time they chose me . . . there was a very strong woman of color, half Asian, half white, who was just pushing And there was a then president at the time [who] was also a woman. [They were] very forceful in what do we look like. They wanted someone to run the organization well but also looking for that diversity. And I think it’s important because they make those types of decisions.¹⁸⁴

In addition, having mostly white board members is inconsistent with the results of research on small group decision-making that shows that diverse groups fare better than all-white homogenous groups.¹⁸⁵ Research has shown

183. Interview with PILO130 (July 7, 2020) (on file with author).

184. Interview with PILO120 (Mar. 6, 2020) (on file with author).

185. See, e.g., Christopher Fredette & Ruth Sessler Bernstein, *Ethno-racial Diversity on Nonprofit Boards: A Critical Mass Perspective*, 48 *NONPROFIT & VOLUNTARY SECTOR Q.* 931, 946 (2019); Poppy Laurretta McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 *SMALL GRP. RSCH.* 248 (1996); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury*

a positive correlation between racially diverse *and* inclusive boards and board governance practices.¹⁸⁶

The value of heterogeneous groups goes beyond the board context. One study on jury selection finds that a diverse jury deliberated longer and considered a wider range of information than did an all-white jury.¹⁸⁷ White jurors cited more case facts, made fewer errors, and were more amenable to discussions of racism when in diverse versus all-white groups.¹⁸⁸ Even before jury deliberations, white individuals in diverse groups were more lenient toward a Black defendant.¹⁸⁹ In another study, researchers found that racial diversity among group members “triggers expectations that informational differences may be present in groups, making it more expected and legitimate for group members to raise and discuss unique information that may be critical for group performance.”¹⁹⁰

A PILO’s board is integral to the short- and long-term goals of the organization, and its decisions have an impact on the organization’s direction. For organizations servicing the legal needs of disproportionate numbers of poor racial and ethnic minorities, having diversity of thought and experiences—including lived experiences—that are related directly or indirectly to racial and ethnic backgrounds on the board is important for ensuring that clients’ needs remain integral to the organization’s decision-making.¹⁹¹ An executive director explained:

When we talk about challenges in communities and challenges in the clients that we’re serving, it’s a difficult balance because the board’s responsibility—they have the fiduciary responsibility, they have the fundraising responsibility. So, you want to make sure that you have board members that have resources or talents to share. But at the same time, you want them to understand the work that we do so that as they’re setting the vision for the organization, that it is connected and reflective and it reflects the needs of our clients.¹⁹²

In sum, board members influence organizational strategies, culture, policies, and direction through their choice of an executive director, the strategic planning process for PILOs, or board decision-making. Yet, PILO boards lack racial and ethnic diversity.

Deliberations, 90 J. PERSONALITY & SOC. PSYCH. 597, 598 (2006). This argument is also being made about diversifying corporate boards. See, e.g., Garnet Roach, *Investors Focus on Board Diversity for 2019 Proxy Season*, CORP. SEC’Y (Feb. 18, 2019), <https://www.corporatesecretary.com/articles/shareholders/31512/investors-focus-board-diversity-2019-proxy-season> [https://perma.cc/ZV75-LV24].

186. See Buse et al., *supra* note 182, at 187. See generally Ruth Bernstein & Diana Bilimoria, *Diversity Perspectives and Minority Nonprofit Board Member Inclusion*, 32 EQUAL., DIVERSITY & INCLUSION: INT’L J. 636, 648 (2013).

187. Sommers, *supra* note 185, at 606–07.

188. *Id.*

189. *Id.*

190. Katherine W. Phillips et al., *Surface-Level Diversity and Decision-Making in Groups: When Does Deep-Level Similarity Help?*, 9 GRP. PROCESSES & INTERGROUP RELS. 467, 477 (2006).

191. See Coleman, *supra* note 15, at 71.

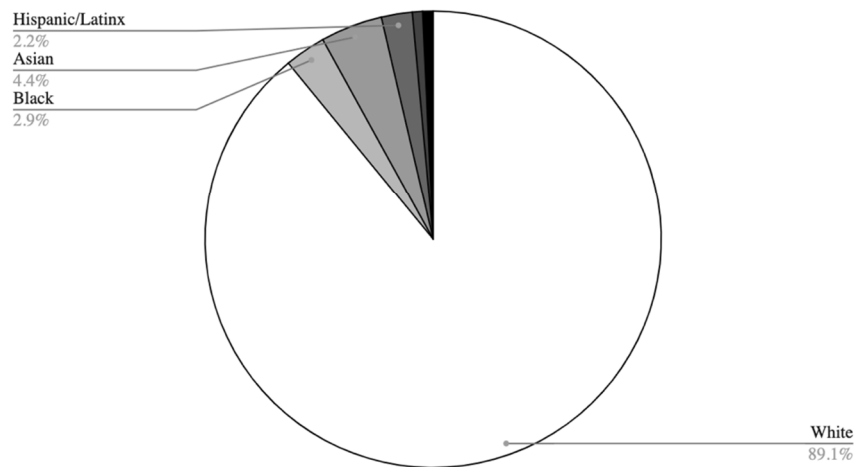
192. Interview with PILO118 (Mar. 6, 2020) (on file with author).

E. Large Law Firm Pro Bono Partners and Counsel

Large law firm pro bono partners and counsel are lawyers in charge of the global full-time management of their firms' pro bono practices.¹⁹³ Pro bono partners and counsel "straddle the world of legal services and corporate firms," serving as brokers that bridge the gap between corporate law firms and PILOs.¹⁹⁴ Pro bono partners and counsel facilitate the process that makes it easier for large law firms to represent poor clients and to engage in law reform efforts at the scale and rate at which they currently do. For example, in 2017, the top 129 law firms conducted over five million pro bono hours.¹⁹⁵ A pro bono counsel who also sits on a PILO's board described pro bono partners and counsel as "the gatekeepers of making sure that [law firm] resources are being used . . . for the community."¹⁹⁶

Pro bono partners and counsel are present in most large firms today. As shown in Figure 3, as of the summer of 2020, seventy-two of the top one hundred law firms had lawyers in charge of their firms' pro bono practices. Thirty-four of the seventy-two firms had between two and seven lawyer pro bono partners and counsel across multiple offices. There were 136 lawyers with pro bono partner and counsel roles across all seventy-two firms. Of these 136, only 11 percent were racial and ethnic minorities, as shown in Figure 3 below. Only four were Black and three were Latinx pro bono partners or counsel.¹⁹⁷

Figure 3: Racial Demographics of Pro Bono Partners and Counsel



193. Adediran, *Relational Costs*, *supra* note 17, at 363.

194. *Id.* at 364.

195. *Id.* at 359.

196. Interview with BD001 (June 22, 2020) (on file with author). This pro bono counsel sits on the board of a PILO.

197. These numbers are overinclusive because the data also includes pro bono fellows who are not partners or counsel.

The lack of racial and ethnic diversity among pro bono partners and counsel is problematic because pro bono partners and counsel are a key aspect of pro bono participation among law firm lawyers.¹⁹⁸ Pro bono partners and counsel can be instrumental in the selection of the pro bono matters law firms choose to adopt and in establishing long-term institutional relationships between law firms and PILOs. This has an impact on the kinds of legal matters law firms ultimately choose to adopt or support. Pro bono partners and counsel also approve matters that law firms adopt; supervise associates on pro bono matters; review work product; provide consultation, advice, and expertise on legal matters; and represent poor clients who are disproportionately racial and ethnic minorities.¹⁹⁹

Pro bono partners and counsel also indirectly influence PILOs' strategies on client representation. Pro bono partners and counsel communicate the pro bono interests of lawyers in their firms to PILOs.²⁰⁰ Finally, some pro bono partners and counsel sit on PILO boards.²⁰¹ Pro bono partners and counsel influence policies that impact racial and ethnic minorities through the Association of Pro Bono Counsel (APBCo).²⁰² Indeed, some current and former leaders of APBCo recently launched the Law Firm Antiracism Alliance to combat systemic racism.²⁰³ As of February 2020, the Alliance had grown to 240 law firms with representatives in every U.S. state.²⁰⁴

Having racial and ethnic minorities among pro bono partners and counsel can be helpful for understanding the lived experiences of communities of color. It can be helpful in APBCo's work to combat systemic racism. In addition, racial and ethnic minorities may be able to influence the choice of legal matters and communicate to their firms the importance of engaging communities of color in legal strategy.

III. POSSIBLE REASONS FOR LACK OF DIVERSITY

Before endeavoring to address the problem of the lack of racial and ethnic minorities among executive directors, board members, and law firm pro bono partners and counsel, it is important to adduce theories that can potentially explain why the problem exists.²⁰⁵ None of these theories provides a complete explanation for the problem, but taken together, they are relevant

198. Atinuke O. Adediran, *Negotiating Status: Pro Bono Partners and Counsels in Large Law Firms*, 47 *LAW & SOC. INQUIRY* 635, 664 (2022).

199. *Id.*

200. See Adediran, *Pro Bono Mismatch*, *supra* note 17, at 1050–53.

201. See, e.g., Interview with BD011 (July 13, 2020) (on file with author); Interview with BD002 (June 22, 2020) (on file with author); Interview with BD001 (June 22, 2020) (on file with author).

202. See, e.g., Letter from Ass'n of Pro Bono Couns. to U.S. Sens. on Behalf of Immigrants (June 4, 2013), <https://apbco.org/wp-content/uploads/2018/11/Letter-to-Senators-re-S744.pdf> [<https://perma.cc/UV26-2GW5>].

203. Carolina Bolado, *240 Law Firms Hold Summit to Address Systemic Racism*, *LAW360* (July 29, 2020, 7:17 PM), <https://www.law360.com/articles/1294480/240-law-firms-hold-summit-to-address-systemic-racism> [<https://perma.cc/C3PM-Y8ZV>].

204. *Id.*

205. For a similar approach, see Wilkins & Gulati, *supra* note 10, at 506.

in thinking about the problem. I discuss five theories below. The first is whether there is a CEO pipeline problem in PILOs. The second is the concept of homophily, or the tendency for people to have sustained relationships with others on the basis of shared interests and experiences—in this case, on the basis of race or ethnicity.²⁰⁶ The third is the lack of resources and low wages in public interest law and whether it impacts the retention of racial and ethnic minorities in PILOs. The fourth is the lack of racial and ethnic minorities in law firms, since PILO boards often comprise a large number of firm partners, and law firm pro bono partners and counsel are not diverse. The fifth is research on implicit bias and its overall impact on hiring, retaining, and choosing racial and ethnic minorities to lead.

A. *Is There a Pipeline Problem?*

When scholars and others discuss the lack of racial and ethnic diversity in many contexts, they often claim that there is likely a pipeline problem that prevents diversity from taking shape.²⁰⁷ The argument is often that the numbers of diverse candidates are so few that little can be done to diversify.²⁰⁸ In the context of public interest law leadership, the AJD Study provides the most comprehensive data to explore this possibility.²⁰⁹

In general, leadership positions tend to become available to people as they progress in their careers—usually after gaining “accumulated experiences, reputation, and access to internal and external networks.”²¹⁰ Lawyers who practice public interest law for ten or more years are more likely than lawyers who exit public interest law early in their career or mid-career to be promoted to leadership positions.²¹¹ It is therefore important to consider whether racial and ethnic minorities tend to exit public interest law careers early in their career or mid-career more than white lawyers tend to, creating a potential leadership pipeline problem.

The National Study found that the majority of executive directors in PILOs (62 percent) were either founders of their organizations or were hired internally. Many were promoted from staff attorney up to the executive director position. Since most executive directors were internal hires, the diversity of the lawyers who practice in PILOs should directly impact the diversity of the executive directors.

206. See Woodson, *supra* note 10, at 2560.

207. See, e.g., Wald, *supra* note 10, at 1117; Megan Rose Dickey, *Examining the ‘Pipeline Problem’: AI Now Researcher Analyzes the History Behind the Excuse for the Lack of Diversity in Tech*, TECHCRUNCH (Feb. 14, 2021, 12:30 PM), <https://techcrunch.com/2021/02/14/examining-the-pipeline-problem/> [<https://perma.cc/F598-3LZW>] (discussing the pipeline problem argument in the tech field).

208. *Id.*

209. See *supra* note 130.

210. Claartje J. Vinkenburg et al., *Arena: A Critical Conceptual Framework of Top Management Selection*, 39 GRP. & ORG. MGMT. 33, 38 (2014).

211. PILOs also hire executive directors from the private sector.

The table below presents the first wave of the AJD Study in 2002.²¹² It shows that a majority (52.7 percent) of lawyers who entered public interest law practice were racial minorities and 45.5 percent were white.²¹³

Wave 1 Practice Setting by Race/Ethnicity					
Wave 1 Practice Setting		Race/Ethnicity			Total
		Racial/Ethnic Minority	White	Other	
Solo Practice	n	83	135	5	223
	% within practice setting	37.22	60.54	2.24	100
	% within race/ethnicity	7.64	5.29	11.63	6.06
Private Law Firm	n	735	1,962	30	2,727
	% within practice setting	26.95	71.95	1.1	100
	% within race/ethnicity	67.62	76.88	69.77	74.06
Federal Government	n	75	128	3	206
	% within practice setting	36.41	62.14	1.46	100
	% within race/ethnicity	6.9	5.02	6.98	5.59
State Government	n	165	302	4	471
	% within practice setting	35.03	64.12	0.85	100
	% within race/ethnicity	15.18	11.83	9.3	12.79
Public Interest	n	29	25	1	55
	% within practice setting	52.73	45.45	1.82	100
	% within race/ethnicity	2.67	0.98	2.33	1.49
Total	n	1,087	2,552	43	3,682
	% within practice setting	29.52	69.31	1.17	100
	% within race/ethnicity	100	100	100	100

By the third wave of the study, conducted in 2012—when the lawyers had practiced for ten years—the numbers had reversed, with 42.8 percent of public interest lawyers being racial and ethnic minorities, while 57.1 percent were white.²¹⁴ This data is shown in the table below.

Wave 3 Practice Setting by Race/Ethnicity					
Wave 3 Practice Setting		Race/Ethnicity			Total
		Racial/Ethnic Minority	White	Other	
Solo Practice	n	87	193	7	287
	% within practice setting	30.31	67.25	2.44	100
	% within race/ethnicity	15.7	15.03	43.75	15.48
Private Law Firm	n	262	751	6	1,019
	% within practice setting	25.71	73.7	0.59	100
	% within race/ethnicity	47.29	58.49	37.5	54.96
Federal Government	n	73	111	1	185
	% within practice setting	39.46	60	0.54	100
	% within race/ethnicity	13.18	8.64	6.25	9.98
State Government	n	117	209	2	328
	% within practice setting	35.67	63.72	0.61	100
	% within race/ethnicity	21.12	16.28	12.5	17.69
Public Interest	n	15	20	0	35
	% within practice setting	42.86	57.14	0	100
	% within race/ethnicity	2.71	1.56	0	1.89
Total	n	554	1,284	16	1,854
	% within practice setting	29.88	69.26	0.86	100
	% within race/ethnicity	100	100	100	100

212. The AJD Study data were provided by the American Bar Foundation and are on file with the author.

213. The study included 1087 racial and ethnic minorities and 2552 white individuals in the first wave.

214. Adediran & Ossei-Owusu, *supra* note 7, at 8. The study was much smaller in wave three, with only 554 racial and ethnic minorities and 1284 white individuals.

The first and third waves of the AJD studies taken together suggest that within a ten-year period, the percentage of white lawyers in public interest law increased from 45 percent to 57 percent, while the percentage of racial and ethnic minorities shrank from 52 percent to 45 percent.²¹⁵

Still, 45 percent of public interest lawyers were racial and ethnic minorities ten years into law practice. We therefore cannot conclude that there is a serious pipeline problem for executive directors. However, it is clear that only a tiny fraction of minorities is promoted to lead their organizations. It is useful to consider other theories.

B. Homophily and Social Networks

“Homophily is the principle that a contact between similar people occurs at a higher rate than among dissimilar people.”²¹⁶ “It reflects the [fact] that people generally find it easier to develop and enjoy relationships with others who share similar interests, tastes, and life experiences.”²¹⁷ The pervasive fact of homophily means that information that flows through networks of people with similar interests and experiences will tend to be localized because people tend to have significant contact with others like themselves.²¹⁸

The tendency for people to develop relationships and networks with others like themselves has meant that homophily disproportionately disadvantages racial minorities—particularly Black individuals.²¹⁹ This is because race and ethnicity are the biggest divides in social networks in the United States, and they play a major part in structuring networks.²²⁰ Cross-race relationships tend to be weaker than same-race ties, and informal social relations (friendship ties) tend to develop between people of the same race.²²¹ For example, research has found that racial differences can be an obstacle for white individuals in identifying with Black individuals in mentorship relationships.²²² A full 75 percent of white individuals in America have entirely white social networks without any minority presence.²²³

215. Like the AJD Study, the California Study found that 47 percent of PILO lawyers are racial or ethnic minorities. The two largest groups are Latinx attorneys (19 percent) and Asian/Pacific Islander attorneys (17 percent). CARMODY & ASSOCS., *supra* note 133, at 15.

216. Miller McPherson et al., *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOCIO. 415, 415 (2001). *See generally* Woodson, *supra* note 10.

217. Woodson, *supra* note 10, at 2562.

218. McPherson et al., *supra* note 216, at 415–16.

219. *See* Woodson, *supra* note 10, at 2560.

220. *See* McPherson et al., *supra* note 216, at 416.

221. Herminia Ibarra, *Race, Opportunity, and Diversity of Social Circles in Managerial Networks*, 38 ACAD. MGMT. J. 673, 676 (1995).

222. *See generally* David A. Thomas, *The Impact of Race on Managers' Experiences of Developmental Relationships (Mentoring and Sponsorship): An Intra-organizational Study*, 11 J. ORG. BEHAV. 479 (1990).

223. Christopher Ingraham, *Three Quarters of Whites Don't Have Any Non-White Friends*, WASH. POST (Aug. 25, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/25/three-quarters-of-whites-dont-have-any-non-white-friends/> [https://perma.cc/B559-CL6A].

Homophily and social networks among PILO boards of directors mean that they are more likely to replicate themselves. Board members are often members of the same social circles and recommend people they know for board positions.²²⁴ One board member explained that she joined the board of a law reform organization because she was introduced to the organization during a social event with a family member:

I went to the annual dinner or fundraiser quite frankly with my then brother-in-law . . . because his boss . . . was on the board and he had extra tickets for this event. It was this great event and [the executive director] stood up and she was so inspiring about how this is really going to make systemic change . . . and I just remember being just overwhelmed at that point like, yes, that's what we need to do! So, I set up a meeting with [her] and basically, it was, like, "I want to join your board." And so, I did. And then, this is my second year as a board chair.²²⁵

Another board member explained the importance of having connections to the executive director or other board members:

That's just sort of how I got my foot in the door. Certainly, it's helpful to get yourself in that position. But whether you know some executive director or member of the nominating committee or there's somebody else who knows somebody in the nominating committee, . . . they're constantly looking for new board members and new people to be involved.²²⁶

Social networks can also have a profound effect on the selection of the executive director who the board hires. If the concept of homophily applies in this context, then board members—who are mostly white—are more likely to choose another white individual who shares similar interests and experiences as themselves and who is part of the same networks as the executive director of a PILO.

To illustrate the power of homophily, I conducted a chi-square analysis using the National Study data to show the correlation between the diversity of CEOs and boards of directors. See the table below.

224. See *infra* notes 225, 226.

225. Interview with BD012 (July 24, 2020) (on file with author).

226. Interview with BD007 (July 8, 2020) (on file with author).

Correlation Between CEO and Board Diversity

CEO Minority	Twenty Percent Board Minority		
	Less than 20% Minorities	20% or more Minorities	Total
White CEO	169	163	332
	50.90	49.10	100.00
	89.89	66.26	76.50
Minority CEO	19	83	102
	18.63	81.37	100.00
	10.11	33.74	23.50
Total	188	246	434
	43.32	56.68	100.00
	100.00	100.00	100.00
Pearson chi2(1) = 33.1054 P = 0.000			

For each category, the first row has *frequencies*, the second row has *row percentages*, and the third row has *column percentages*.

In the analysis, I define board diversity as having 20 percent or more people belonging to racial and ethnic minorities on the board of a PILO.²²⁷ The data indicate that minority CEOs are more likely to have a diverse board (81.37 percent) compared to white CEOs (49.1 percent).²²⁸ These percentages are statistically significant. This signifies a network tie between CEOs and boards of directors, which has been documented in other contexts.²²⁹

C. Low Wages in PILOs

Another theory that can be adduced about the lack of executive directors who are racial and ethnic minorities is whether the lack of resources and low wages in PILOs compel lawyers to exit early career in a way that disproportionately impacts racial and ethnic minorities.

227. I used 20 percent as the threshold because about half of all PILOs fall within the 20-percent-or-greater category.

228. For example, hiring a powerful female partner who changes the culture and policies of a firm can lead to the recruitment and promotion of women in law firms. *See, e.g.,* Katie Buehler, *How a Female Partner Increased Diversity at Her Texas Firm*, LAW360 (Mar. 22, 2021, 8:26 PM), <https://www.law360.com/articles/1353878/how-a-female-partner-increased-diversity-at-her-texas-firm> [<https://perma.cc/PV8V-GRP7>]. It should be noted that in this sample, since there are many more white CEOs than minority CEOs, white CEOs have more diverse boards than minority CEOs even though white CEOs are less likely to have diverse boards. It is interesting to note the intersectionality between race and gender in this regard. Female minority CEOs have the highest likelihood of having a diverse board (83.8 percent), while male minority CEOs have 76 percent diverse board members.

229. *See, e.g.,* Marc-David L. Seidel & James D. Westphal, *Research Impact: How Seemingly Innocuous Social Cues in a CEO Survey Can Lead to Change in Board of Director Network Ties*, 2 STRATEGIC ORG. 227 (2004).

Like many nonprofit organizations, PILOs struggle with funding and often rely on the largesse of the private sector for assistance in cash and kind.²³⁰ This lack of funding has a major impact on the income of PILO lawyers across the country. The AJD Study provides comprehensive data of public interest lawyers' income.²³¹ The AJD Study table below combines all three waves of the study and provides data on salary by practice setting for full-time lawyers.²³²

	AJD1			Percentile AJD2			AJD3			% change in median (AJD2-3)	AJD1	N	
	25 th	50 th	75 th	25 th	50 th	75 th	25 th	50 th	75 th			AJD1	AJD2
Solo	40,000	50,000	70,000	45,000	80,000	120,000	0	50,000	86,000	-37.5%	119	168	186
Firm 2-20 lawyers	45,000	55,000	70,000	68,000	90,000	122,000	61,000	100,000	150,000	11.1	789	434	351
Firm 21-100 lawyers	62,500	78,000	94,000	88,000	110,000	145,000	109,000	150,000	200,000	36.4	411	236	166
Firm 101-250 lawyers	85,000	98,000	125,000	101,000	125,000	151,000	150,000	189,000	230,000	51.2	259	125	68
Firm 251+ lawyers	105,000	135,000	150,000	130,000	180,000	250,000	120,000	225,000	340,000	25.0	664	311	176
Firm size unknown	-	-	-	-	-	-	0	38,000	115,000	N/A	-	-	18
Government – federal	54,275	63,000	70,500	84,000	100,000	115,000	98,000	122,744	139,000	22.7	163	163	142
Government – state	40,000	44,500	52,000	55,000	65,000	80,000	59,800	78,000	96,000	20.0	367	310	259
Legal Services or Public Defender	36,000	39,000	43,000	50,000	60,000	83,000	58,000	79,000	100,000	31.7	98	55	62
Public Interest	35,000	40,000	48,000	48,000	65,000	74,000	44,000	77,000	100,000	18.5	38	26	19
Nonprofit or education	43,000	50,000	70,000	54,000	71,000	100,000	50,000	80,000	125,000	12.7	62	114	116
Business—inside counsel	64,000	90,000	110,000	98,000	150,000	195,000	115,000	183,000	255,000	22.0	141	288	273
Business—not practicing	60,000	75,000	100,000	72,100	100,000	151,000	50,000	110,000	165,000	10.0	140	189	154
Other	40,500	67,400	75,000	60,000	80,000	97,000	60,000	100,000	140,000	25.0	8	25	72
TOTAL	50,000	70,000	100,000	70,000	98,000	145,000	60,000	106,000	171,000	8.2	3,259	2,444	2,062

Note: Using national sample. Income includes salary, bonus, and profit sharing.

The data reveals that public interest lawyers are some of the lowest paid lawyers across all practice settings. The fiftieth percentile of public interest lawyers earn less than lawyers in any other practice setting, except in wave three (ten years into practice), when public interest lawyers earn \$27,000 more than solo practitioners.

The low wages in public interest law have an impact on retention.²³³ One important finding from the California Study is that about one third of lawyers

230. See generally Boutcher, *supra* note 105, at 138; I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221 (2013); Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2367–68 (2010). There are variations of this statement in the literature. See, e.g., *id.* at 2427 (explaining that pro bono work is designed first to maximize training opportunities for associates); Adediran, *Relational Costs*, *supra* note 17, at 359; Cummings, *supra* note 104, at 129–30; see also Adediran, *Pro Bono Mismatch*, *supra* note 17, at 1041.

231. See PLICKERT ET AL., *supra* note 129, at 45.

232. See *id.*

233. CARMODY & ASSOCS., *supra* note 133, at ii–iii.

employed in January 2017 had left their PILOs by the end of 2018.²³⁴ The median length of employment for those who left during 2017–2018 was just two years.²³⁵ This indicates that there is generally a high turnover rate in PILOs.

The California Study further revealed that over 60 percent of lawyers reported financial pressure due to low salary as one of the primary reasons they may leave their PILOs in the near future.²³⁶ Large student debt further exacerbates this financial pressure for PILO lawyers.²³⁷ Over the past four decades, the cost of legal education has increased drastically.²³⁸ For instance, while it cost \$12,386 to attend Harvard Law School in 1971, it cost \$50,880 to do so in 2012, controlling for inflation.²³⁹ Since the mid-1980s, private law school tuition has increased by 156 percent in real, inflation-adjusted terms, while public law school resident tuition has increased by 428 percent over inflation.²⁴⁰

Research has shown that debt burdens have a major influence on lawyers' career choices.²⁴¹ An experimental study of New York University School of Law's financial aid program found that "[l]aw school graduates who received tuition waivers had a significantly higher rate of first job placement" in PILOs.²⁴²

The AJD Study found that compared to white and Asian lawyers, Black lawyers were least likely to report zero educational debt ten years out of law school.²⁴³ Only 23 percent of Black lawyers reported zero debt, compared to 30 percent of Latinx lawyers, 48 percent of white lawyers, and 60 percent of Asian lawyers.²⁴⁴ Thus, racial and ethnic minorities are more likely to have a large amount of student debt.

A lack of family resources likely accounts for the difficulty Black and Latinx lawyers experience in paying off their education debt.²⁴⁵ High debt

234. *Id.* at 2.

235. *Id.* at 3.

236. *Id.* at 21.

237. *Id.* at 22.

238. Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 178 (2012).

239. Campos, *supra* note 238, at 180.

240. *Id.* at 181.

241. See, e.g., AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION REPORT 24 (2020) (showing that about 37 percent of recent survey participants "said they chose a job that pays more instead of a job they really wanted" and that 17 percent "said they chose a job that qualifies for loan forgiveness instead of a job they really wanted"); John Bliss, *From Idealists to Hired Guns?: An Empirical Analysis of "Public Interest Drift" in Law School*, 51 U.C. DAVIS L. REV. 1973 (2018); Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, 1 AM. ECON. J.: APPLIED ECON. 1 (2009).

242. Field, *supra* note 241, at 2, 19.

243. PLICKERT ET AL., *supra* note 129, at 80.

244. *Id.*

245. *Id.*; see also Acevedo et al., *supra* note 14, at 31 (finding in a survey of legal aid lawyers in New York City that the percentage of attorneys raised in "poor" or "below poverty" economic environments was approximately 5 percent for white attorneys, both men and women, 22 percent for male attorneys of color, and 20 percent for female attorneys of color);

ten years into legal practice likely has an impact on whether racial and ethnic minorities remain in public interest law or transition to other practice areas. Research shows that ten years into practice, lawyers that remain in public interest law have the least amount of debt of any other practice group.²⁴⁶ And the research suggests that debt disproportionately burdens Black and Latinx lawyers,²⁴⁷ who are therefore more likely to leave public interest law practice. Despite these low wages and limited resources, some racial and ethnic minorities—majority Black and Latinx lawyers—still remain in public interest law.

D. Lack of Racial and Ethnic Diversity in Large Law Firms

The general consensus in the literature is that racial and ethnic diversity is lacking in the nation's largest law firms.²⁴⁸ The percentage of racial minority lawyers varies by location, with the overall minority presence largest in the West and smallest in the Midwest.²⁴⁹ Previous research indicates a slow but steady increase in the percentage of racial minorities in large law firms from 10.7 percent in 2003 to 16.7 percent in 2015²⁵⁰ and 16.8 percent in 2018.²⁵¹ There has also been a small increase in the percentage of partners who are racial or ethnic minorities from 9.1 percent in 2018 to 9.5 percent in 2019.²⁵²

Scholars have attributed the lack of racial diversity in law firm management to several factors, including the lack of mentorship or sponsorship opportunities in lawyers' early careers and senior lawyers judging mistakes more harshly for minority lawyers than for white lawyers.²⁵³ Professors David Wilkins and G. Mitu Gulati have observed that

Richard Delgado, Commentary, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929, 1929 n.1 (1990) (explaining that poor white individuals are less likely to experience intergenerational poverty in comparison to racial and ethnic minorities).

246. PLICKERT ET AL., *supra* note 129, at 84.

247. *Id.* at 80–81.

248. See generally Adediran, *supra* note 10; Brayley & Nguyen, *supra* note 10; Luis J. Diaz & Patrick C. Dunican Jr., *Ending the Revolving Door Syndrome in Law*, 41 SETON HALL L. REV. 947 (2011); Monique R. Payne-Pikus et al., *Experiencing Discrimination: Race and Retention in America's Largest Law Firms*, 44 LAW & SOC'Y REV. 553 (2010); Deborah L. Rhode & Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 FORDHAM L. REV. 2483 (2015); Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755 (2006); Wilkins & Gulati, *supra* note 10; Woodson, *supra* note 10.

249. Elizabeth H. Gorman & Fiona M. Kay, *Racial and Ethnic Minority Representation in Large U.S. Law Firms*, in LAW FIRMS, LEGAL CULTURE, AND LEGAL PRACTICE 211, 219 (Austin Sarat ed., 2010).

250. Adediran, *supra* note 10, at 74.

251. VAULT & MINORITY CORP. COUNS. ASS'N, 2018 VAULT/MCCA LAW FIRM DIVERSITY SURVEY EXECUTIVE SUMMARY 6 (2018).

252. NAT'L ASS'N FOR L. PLACEMENT, INC., 2019 REPORT ON DIVERSITY IN U.S. LAW FIRMS 5 (2019).

253. Fiona M. Kay & Elizabeth H. Gorman, *Developmental Practices, Organizational Culture, and Minority Representation in Organizational Leadership: The Case of Partners in Large U.S. Law Firms*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 91, 108–09 (2012). See generally Woodson, *supra* note 10.

racial minority partners in large firms often have less power, status, and income than white partners and are therefore disproportionately more likely to leave their firms.²⁵⁴

While this diversity problem may appear to be a problem for the private sector, the lack of racial and ethnic minorities in the leadership ranks of large law firms affects the lack of racial and ethnic diversity in public interest law leadership.²⁵⁵ This is because public interest law leadership comprises members of large law firms—partners who sit on PILO boards and pro bono partners and counsel.²⁵⁶

Most PILOs fill a portion of their boards with large law firm lawyers—mostly white partners—for two related reasons. The first is that large firms essentially make demands for pro bono work for their lawyers and board seats for their partners. The second is because PILOs need law firm pro bono labor and also need partners to sit on their boards to generate funding.

Regarding the first reason, large law firms' interests in particular kinds of pro bono matters and in board positions for their partners have become prerequisites for PILOs to obtain monetary support from law firms.²⁵⁷ To obtain and retain law firm financial support, PILOs tend to provide large law firms with pro bono matters that interest their lawyers and board positions for their partners.²⁵⁸ Previous research suggests that the need for financial support from the private sector is an important determinant of the composition of PILO boards.²⁵⁹

Regarding the second and related reason, PILOs have become dependent on law firms for pro bono work, which has become an important avenue by which PILOs provide legal representation to poor clients.²⁶⁰ PILOs rely on large law firms to provide labor resources to meet the increasing demand for legal services in the face of limited funding from Congress.²⁶¹ The dependence of PILOs on large law firms has advantaged firms over PILOs in structuring pro bono relationships.²⁶²

The lack of diversity among large law firm partners necessarily impacts the lack of diversity on PILO boards since most PILOs fill their boards with large firm partners to gain access to law firm funding and labor resources.²⁶³ Thus, the strong private-nonprofit relationship between PILOs and firms has inadvertently resulted in a racial and ethnic diversity problem in public interest law leadership.

254. Wilkins & Gulati, *supra* note 10, at 583–84.

255. See National Study (data on file with author).

256. See *id.*

257. See Adediran, *Relational Costs*, *supra* note 17, at 373.

258. See *id.*

259. See *id.*; Atinuke O. Adediran, *Nonprofit Board Composition*, 83 OHIO STATE L.J. (forthcoming 2022) (manuscript at 30) (on file with author).

260. See generally Adediran, *Relational Costs*, *supra* note 17; Cummings, *supra* note 104; Cummings & Rhode, *supra* note 230.

261. Adediran, *Relational Costs*, *supra* note 17, at 358–59.

262. *Id.* at 359.

263. See *id.* at 360.

This problem raises a larger concern about PILOs' overreliance on fundraising from large law firm board members. Fundraising is an important aspect of the survival of any nonprofit organization.²⁶⁴ Since PILOs lack resources, there is often an overemphasis on the fundraising role of board members. PILOs seek board members that are more likely to become donors for their organizations.

Therefore, while law firm funding comes with many advantages—including the fact that it is often unrestricted and can be a significant source of funding for some PILOs—the overreliance on law firms has important drawbacks affecting the diversification of public interest leadership, specifically board members and pro bono partners and counsel.

In addition to board members, law firm pro bono partners and counsel are mostly white. One possible reason why most pro bono partners and counsel are white may involve law firm hiring practices for these positions. Starting in the late 1980s and 1990s and continuing into the early 2000s, many pro bono partners and counsel—who are currently in their original positions today—obtained their positions through proposals made directly to law firm management.²⁶⁵ Some were also hired through networks with influential partners.²⁶⁶ As a result, most people in pro bono partner or counsel positions likely have connections to law firm management or have knowledge about the hiring process through other law firm networks.

Research has shown that racial minorities in law firms—particularly Black lawyers—are unlikely to have ties or networks with law firm leadership, and few enjoy close social relationships with their white colleagues.²⁶⁷ The lack of ties or networks can foreclose racial minorities from the pool of applicants for these positions.

Therefore, hiring practices and lack of diversity in large law firms likely impacts the lack of diversity among pro bono partners and counsel in law firms.

E. Implicit Bias

In addition to the research on the impact of race on outcomes, extensive research on implicit bias is relevant to show how significantly race can impact unconscious decision-making by individuals. Implicit bias can impede the selection of racial and ethnic minorities for executive director positions in PILOs, for PILO board rooms, and even as pro bono partners and counsel.²⁶⁸

264. See generally Adediran, *Relational Costs*, *supra* note 17.

265. See Adediran, *supra* note 198, at 646–47; Cummings & Rhode, *supra* note 230, at 2425.

266. See Adediran, *supra* note 198, at 647.

267. See Woodson, *supra* note 10, at 2563–64.

268. See Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 839 (2019).

For decades, social and cognitive psychologists have studied these implicit or automatic biases.²⁶⁹ Researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects.²⁷⁰ These findings have since made their way into law reviews and popular discourse and now have an impact on shaping the law's fundamental understandings of discrimination and fairness.²⁷¹

Cognitive psychologists explain that human beings have “a need to ‘categorize in order to make sense of experience.’”²⁷² “Too many events occur daily” and human beings categorize to cope.²⁷³ Humans categorize individuals and groups using traditional stereotypes—for example, the belief that Black people are lazy, prone to criminal behavior, or ignorant.²⁷⁴ These categories are further reinforced by popular culture, such as television, which often depicts Black individuals and other racial minorities based on stereotypes.²⁷⁵

“Implicit attitudes are manifest as actions or judgments that are under the control of automatically activated evaluation, without the performer's awareness of that causation.”²⁷⁶ In other words, a person engaging in discriminatory behavior may be unaware of the discriminatory action.²⁷⁷

Recent research suggests that implicit bias can be measured through the Implicit Association Test (IAT).²⁷⁸ “The IAT assesses associations between two concepts (e.g., *Black people* and *white people*) and two attributes (e.g., *good* and *bad*).”²⁷⁹

The race IAT has shown that individuals have an implicit and unconscious bias against members of traditionally disadvantaged groups, especially Black people.²⁸⁰ One large study revealed that approximately 68 percent of people have an implicit attitude that favors white people over Black people, and 72

269. See John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RSCH. ORG. BEHAV. 39, 40 (2009).

270. Kang et al., *supra* note 157, at 1126.

271. *Id.*; see, e.g., Tom James, *Can Cops Unlearn Their Unconscious Biases?*, ATLANTIC (Dec. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/12/implicit-bias-training-salt-lake/548996/> [<https://perma.cc/8S3W-YRXG>].

272. Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1561 (1989) (quoting Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 337 (1987)).

273. *Id.* (quoting Lawrence, *supra* note 272, at 337).

274. *Id.* at 1561–62.

275. *Id.*

276. Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464, 1464 (1998).

277. See Marianne Bertrand et al., *Implicit Discrimination*, 95 AM. ECON. REV. 94, 94 (2005).

278. See Greenwald et al., *supra* note 276, at 1464.

279. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCH. 36, 43 (2007) (citation omitted); see also Efen O. Perez, *Explicit Evidence on the Import of Implicit Attitudes: The IAT and Immigration Policy Judgments*, 32 POL. BEHAV. 517, 528 (2010).

280. See generally Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 971 (2006).

percent of people have an implicit stereotype that associates weapons more strongly with Black people than with white people, and only 9 percent of people associate white people with weapons.²⁸¹

The race IAT has also shown implicit bias at play in managerial decision-making concerning callback interviews.²⁸² These studies indicate that individuals “possess attitudes, stereotypes, and prejudices in the absence of intention, awareness, deliberation, or effort.”²⁸³ Individuals will automatically categorize and make conclusions about individuals and groups using ingrained racial stereotypes.²⁸⁴ “The fact is that many people are sincere in holding egalitarian ideals and yet harbor implicit biases.”²⁸⁵

In Black/white race IAT studies, Black people are the only racial group that does not show an implicit pro-white preference.²⁸⁶ White people, Native American people, Asian people, Latinx people, and multiracial people all show a preference for white people when the comparison is with Black people.²⁸⁷ However, in a Pew race IAT study testing white/Asian preferences, half of all white people had a preference for white people over Asian people, while Asian people were about as likely to show preference for white people over Asian people as they were to regard Asian people more favorably than white people.²⁸⁸ White people also show a preference for white people over Latinx individuals,²⁸⁹ while Latinx individuals do not exhibit pro-white preference.²⁹⁰ Therefore, white people are unique in that they are the only racial group that almost always prefer only white people over racial and ethnic minorities. In addition, studies have shown that white people are more likely to exhibit racial apathy than racial and ethnic minorities.²⁹¹ This suggests that racial minorities may be more responsive to racial inequality.²⁹²

Putting available research on implicit bias together with the studies discussed in Part I.A on the impact of race on outcomes, we can conclude that members of public interest law leadership—who are mostly white—are probably more likely to show preference for white individuals over Asian, Black, or Latinx individuals even when they do not want or intend to. In turn, Asian, Black, and Latinx individuals—who are members of public

281. See Nosek et al., *supra* note 279, at 52, 55; see also Russell G. Pearce et al., *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 *FORDHAM L. REV.* 2407, 2424 (2015).

282. See Jost et al., *supra* note 269, at 47–48.

283. *Id.* at 42–43.

284. *Id.*

285. *Id.* at 54.

286. See, e.g., Nosek et al., *supra* note 279, at 52.

287. See *id.*

288. See PEW RSCH. CTR., *EXPLORING RACIAL BIAS AMONG BIRACIAL AND SINGLE-RACE ADULTS: THE IAT*, at 5 (R. Morin ed., 2015).

289. See, e.g., David Raden, *Ingroup Bias, Classic Ethnocentrism, and Non-ethnocentrism Among American Whites*, 24 *POL. PSYCH.* 803, 814 (2003).

290. See David S. March & Reiko Graham, *Exploring Implicit Ingroup and Outgroup Bias Toward Hispanics*, 18 *GRP. PROCESSES & INTERGROUP RELS.* 89, 96–97 (2015).

291. See Ward et al., *supra* note 9, at 770–71.

292. See *id.* at 771.

interest law leadership—are more likely than their white counterparts to show preference for or interest in racial and ethnic minorities. For instance, one study found that balance in racial group representation among court authorities relates to greater equity in outcomes and that imbalances in racial group representation among court authorities may favor each group alike.²⁹³

Thus, it is important to ensure that groups that make decisions that impact the lives of low-income racial and ethnic minorities include racial and ethnic minorities who are more likely to have the race consciousness to experience the world like their minority clients. This will likely make the decision-making process less biased and perhaps lead to better outcomes.

IV. OPPORTUNITIES FOR REFORM AND AGENDA FOR FURTHER RESEARCH

This part provides policy recommendations that can be implemented to improve diversity in public interest law leadership among PILO executive directors, board members, and law firm pro bono partners and counsel. It also addresses policy suggestions that apply to all public interest law leaders, including incorporating racial discourse into anti-poverty advocacy.

The ultimate goal of public interest law leadership is for PILO executive directors, board members, and pro bono partners and counsel to begin the process of reflecting the client population.²⁹⁴ The process will likely require several adjustments in the current structure of leadership in the sector because the legal profession is simply not racially diverse enough to accomplish this goal. Data from the American Bar Association reveals that in 2019, with forty-four states reporting, 85 percent of lawyers in the United States were white, 5 percent were Black, 5 percent were Latinx, and only 2 percent were Asian.²⁹⁵ This means that only about 15 percent of the legal profession comprises racial and ethnic minorities. And the 15 percent are dispersed across different practice areas, including in public interest law.²⁹⁶

And since the majority of PILO executive directors, board members, and law firm pro bono partners and counsel are lawyers, increasing racial and ethnic diversity in the legal profession is certainly the starting point. However, even within the current levels of racial and ethnic diversity in the legal profession, more can be done to diversify public interest law leadership by looking for expertise outside the legal profession.

For the process of diversification to have an impact, however, it is important to have a critical mass of racial and ethnic minorities on PILO

293. *See id.* at 759. There are a few studies that have suggested that the correlation between implicit bias and discriminatory behavior can be weak. *See, e.g.*, Patrick S. Forscher et al., *A Meta-Analysis of Procedures to Change Implicit Measures*, 117 J. PERSONALITY & SOC. PSYCH.: ATTITUDES & SOC. COGNITION 522, 544–54 (2019). Also, it is not clear that changes in implicit bias impact changes in a person's behavior. *See id.*

294. *See* National Study (data on file with author).

295. *See* AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION SURVEY: 10-YEAR TREND IN LAWYER DEMOGRAPHICS (2019), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2009-2019.pdf [<https://perma.cc/Y8ZB-7FAQ>].

296. *See id.*

boards, among pro bono partners and counsel, and among PILO executive directors.²⁹⁷ A critical mass would allow racial and ethnic minorities to exercise influence and motivate change.²⁹⁸ A critical mass in a board room is not the same as a critical mass in a professional organization like APBCo or among PILO executive directors.²⁹⁹ It is important to not engage in tokenism—that is, having one or two racial minorities—which is unlikely to provide the full benefits of having racial and ethnic minorities in leadership roles to influence the provision of legal services to poor clients who are often racial and ethnic minorities. One executive director compared the experiences of a white male board member to that of a token racial minority board member:

I would sit down with my majority member, white male Jewish . . . [and separately] with [a] woman of color, only woman of color partner at her entire law firm probably And I'm like, my God, these two people are having the exact same experience. But one of them thinks that [he's] not doing enough. And the other one thinks that [she doesn't] belong.³⁰⁰

It is interesting to note that scholars and policy makers have defined diversity broadly to include not just legal categories—such as race—but also nonlegal categories such as cultural experiences, geography, and professional experiences and skills.³⁰¹ There is considerable value in the diversity of experiences and skills and finding common ground among seemingly different individuals and groups. However, a diversity of experiences cannot replace racial and ethnic diversity. In fact, highlighting diversity of experiences alone—rather than racial and ethnic diversity in groups—can undermine the value of the unique perspectives of racial and ethnic minorities.³⁰²

297. See Fredette & Bernstein, *supra* note 185, at 946.

298. See *id.* at 946.

299. I do not define what a critical mass would look like because the concept can be nuanced. For example, a critical mass in corporate boardrooms is likely different from nonprofit boardrooms, and a critical mass among racial and ethnic minorities is also likely different from a critical mass among women. See, e.g., Vicki W. Kramer et al., *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance* iv (Wellesley Ctrs. for Women Working Paper Series, Report No. WCW 11, 2006) (explaining qualitative empirical study on women in corporate boardrooms); Lissa L. Broome et al., *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 767, 770 (2011) (relying mostly on a sample of women to make arguments regarding the critical mass theory in corporate boards). See generally Mariateresa Torchia et al., *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 J. BUS. ETHICS 299 (2011) (testing the critical mass theory among women in corporate boardrooms).

300. Interview with PILO121 (Mar. 6, 2020) (on file with author).

301. See Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1608, 1617 (2001); see, e.g., Broome et al., *supra* note 299, at 778.

302. See Edelman et al., *supra* note 301, at 1609; Phillips, *supra* note 190, at 477 (explaining that research suggests that managers who highlight the impact of diversity of experience on group decision-making—in an effort to increase levels of attraction and diminish social categorization effects—may undermine the benefits of individuals who are racial and ethnic minorities in groups that must share unique information for effective performance).

The sections below first address specific changes that can be applied to diversify each type of leadership position. Then I make suggestions about how to combat implicit bias and homophily in public interest law leadership that applies to all three groups of public interest law leaders and to other sectors of the legal profession.

A. Executive Directors

It is important to reestablish that boards of directors hire PILO executive directors.³⁰³ Board members also evaluate executive directors and have the power to remove the executive director.³⁰⁴ At the same time, executive directors recruit board members and have a major influence on board decision-making.³⁰⁵ As such, diversifying the executive director position is directly related to the process of diversifying the board, and vice versa.

The most common career trajectory for PILO executive directors is to begin as staff attorneys and move up the ranks within their organizations.³⁰⁶ Despite low wages, racial and ethnic minorities make up between 42 percent and 47 percent of PILO staff attorneys, according to the AJD Study and the California Study.³⁰⁷ These numbers suggest that it is unlikely that there is a real pipeline problem with the path from staff attorney to executive director. Yet, white people are promoted to executive director positions at disproportionately higher rates than racial and ethnic minorities across the country.³⁰⁸ Therefore, to diversify executive director positions, PILO boards of directors must be intentional about the promotion process.

One way to become intentional is for PILOs to establish internal mentorship programs in which staff attorneys are paired with management to cultivate and deepen relationships that can create a succession plan when promotions happen. For instance, it is not uncommon for PILOs to promote deputy directors to executive director positions.³⁰⁹ Deputy directors are often prior staff attorneys.³¹⁰ A mentorship program in which management serve as mentors to early career racial minority staff attorneys can help establish relationships that can add minorities to the pool of executive director candidates.

Another avenue for diversifying executive directors is for board members to be deliberate in the hiring pathways for executive directors. Boards generally conduct both internal and external searches for executive

303. *See supra* notes 141, 167 and accompanying text.

304. *See supra* notes 140–41, 167 and accompanying text.

305. *See supra* Part II.C.1.

306. *See* National Study (data on file with author).

307. *See supra* notes 214–15 and accompanying text. Still, low wage is a major problem and should be addressed. For further insight on the impact of debt and low wages on the choice of careers for lawyers, see generally Bliss, *supra* note 241.

308. *See* National Study (data on file with author).

309. *See id.*

310. *See, e.g.*, Interview with PILO120 (Mar. 6, 2020) (on file with author).

directors.³¹¹ As shown in Part II, the National Study reveals that most executive directors are hired as internal candidates.

As indicated in the table below, the National Study shows that within each race, white and Latinx CEOs are more likely to be hired internally than externally—55 percent and 74 percent, respectively. Black CEOs have a slightly higher chance of being hired externally at 50 percent. Asian CEOs are also slightly more likely to be hired externally at 41 percent, although many Asian CEOs (more than any other racial group) are also founding members of their own PILOs.

Hiring Pathway	White	Black	Asian	Latinx
External	38.51%	50.00%	41.18%	25.58%
Internal	54.63%	44.74%	35.29%	74.42%
Founder	6.87%	5.26%	23.53%	0.00%
Totals	100%	100%	100%	100%

Remarkably, five out of the six racial and ethnic minority CEOs in the interview study were external hires rather than internal promotions. Interestingly, two of the five are not lawyers. Both the National Study and the small sample of minorities in the interview data suggest that external hiring may more likely yield the hiring of Black and Asian CEOs. The five external hires reported that their boards were deliberate in hiring them to occupy their current positions for both their skills and expertise in understanding the client population and also because of their diverse experiences.³¹² The one internal hire was the deputy director for many years.

There are a few challenges to implementing either of these considerations. Mentorship programs can create formal processes that are not always effective in propelling racial and ethnic minorities to leadership. Sponsorship relationships—which often develop organically rather than as part of formal structures—are generally better at creating career-expanding relationships than mentorship programs.³¹³ A prime example are the mentorship programs established in law firms in which junior associates are paired with partner mentors.³¹⁴ These programs are often symbolic rather than actual avenues for propelling the careers of junior lawyers or diversifying law firm leadership.³¹⁵

311. See National Study (data on file with author).

312. See, e.g., Interview with PILO132 (July 8, 2020) (on file with author); Interview with PILO118 (Mar. 6, 2020) (on file with author); Interview with PILO107 (Feb. 26, 2020) (on file with author).

313. See Woodson, *supra* note 10, at 2567 n.67.

314. See, e.g., Kate Reder Sheikh, *Law Firms Can Do Better with Their Mentoring Programs*, LAW360 (June 12, 2019, 1:56 PM), <https://www.law360.com/articles/1167269> [<https://perma.cc/295X-YVXB>].

315. See Payne-Pikus et al., *supra* note 248, at 558; Woodson, *supra* note 10, at 2567 n.67, 2572.

Nevertheless, mentorship relationships can become sponsorship relationships and are a starting point toward diversifying PILOs.³¹⁶ Future empirical research of staff attorneys in PILOs can reveal whether minorities are passed up for executive director positions in a systemic manner. Anecdotal evidence from this research suggests that minorities are often interested in these positions but are sometimes not offered the position when they are internal candidates. When they are external candidates, racial tension within PILOs can preclude minorities from being hired or taking executive director positions.

A concern with external hires is that internal relationships can be important for staff morale. In addition, an internal executive director hire is more likely to understand organizational culture, structure, and systems in a way that an external hire may not. Nevertheless, boards have successfully hired, internally and externally, lawyers who are racial and ethnic minorities.

Considering potential hires outside of the legal profession can also be challenging. Hiring someone who is not a lawyer to head a PILO may be problematic because of a potential power difference between the executive director and attorney subordinates, and between the executive director and the board. It is, however, possible to overcome educational power differentials with prior significant executive director experience.³¹⁷

In sum, establishing mentorship programs in which staff who are racial and ethnic minorities are paired with leaders who are thoughtful about diversifying their leadership can be beneficial. Interview data also suggests that considering external hires for executive directors—and perhaps outside the legal profession—can yield racially and ethnically diverse executive directors.

B. Boards of Directors

The largest PILOs in the country can have between twenty-five and fifty or more board members. Small PILOs can have boards ranging between seven and thirty members. Boards of directors are comprised mostly of lawyers: law firm partners, in-house corporate counsel, lawyers in midsized and small firms, solo practitioners, judges, and PILO lawyers. Although small, about 35 percent of PILO boards also include members of other professions, members of the community, and individuals who are eligible for PILO services based on income.

In discussing the lack of racial and ethnic diversity among PILO board members, it is important to distinguish between PILOs that are funded by the LSC and those that are not. About 20 percent of PILOs in the United States are funded by the LSC.³¹⁸

316. See Payne-Pikus et al., *supra* note 248, at 560 (“Partner mentorship further provides sponsorship and visibility and may thereby improve prospects for advancement.”).

317. See Interview with BD002 (June 22, 2020) (on file with author).

318. See *Our Grantees*, LEGAL SERVS. CORP., <https://www.lsc.gov/grants/our-grantees> [<https://perma.cc/2SED-GXN8>] (last visited Mar. 4, 2022) (listing 132 grantees out of the 550 in this study). 20 percent is only an estimate. The percentage is likely lower.

The LSC requires its 132 grant recipients to fill one third of their boards with eligible clients.³¹⁹ Eligible clients are defined as “any person financially unable to afford legal assistance.”³²⁰ This provision is further specified in 45 C.F.R. § 1607, setting forth the requirements for governing bodies of LSC recipients.³²¹ Section 1607.2(c) defines an eligible client member as “a board member who is financially eligible to receive legal assistance under the Act.”³²² By this provision, 33.3 percent of the board members of LSC-funded PILOs must be individuals who are eligible for free legal services. The client-eligible board member requirement dates back historically to government social welfare policies that placed a premium on ensuring that disadvantaged citizens have a voice in how their services are provided.³²³ This tradition dates to the mandate for “maximum feasible participation” of participants in the 1960s War on Poverty programs.³²⁴

Consistent with the LSC’s guidelines, the National Study reveals that 33.4 percent of the board members in LSC-funded organizations are client-eligible. Only 1.5 percent of board members in non-LSC-funded organizations are client-eligible. Client-eligible individuals are disproportionately racial and ethnic minorities, which is reflected in the racial and ethnic diversity of LSC-funded organizations’ boards. As such, the most racially and ethnically diverse PILOs are those that are funded by LSC.

The National Study in Figure 4 below shows the distribution of board members between races. When racial minorities—especially Black people and Native American people—sit on PILO boards, a large proportion are client-eligible board members. So, while only about 2.9 percent of white board members are client-eligible, 19.5 percent of Black board members are client-eligible, 23.5 percent of Native American board members are client-eligible, and 14.7 percent of Latinx board members are client-eligible.

319. See 42 U.S.C. § 2996f(c).

320. *Id.* § 2996a(3).

321. 45 C.F.R. § 1607.2(c) (2022).

322. *Id.*

323. See Kelly LeRoux, *Paternalistic or Participatory Governance?: Examining Opportunities for Client Participation in Nonprofit Social Service Organizations*, 69 PUB. ADMIN. REV. 504, 505 (2009).

324. *Id.*

Figure 4: Client Eligible (N=470) and Non-Client Eligible Board Members (N=7500) by Race

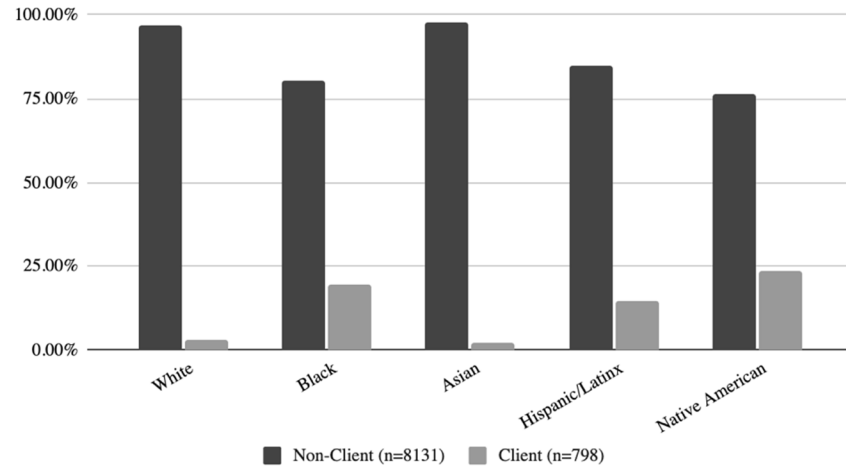
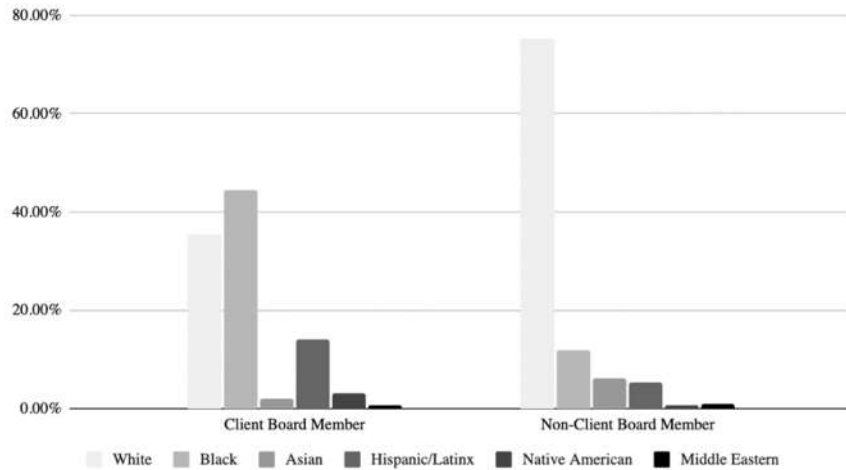
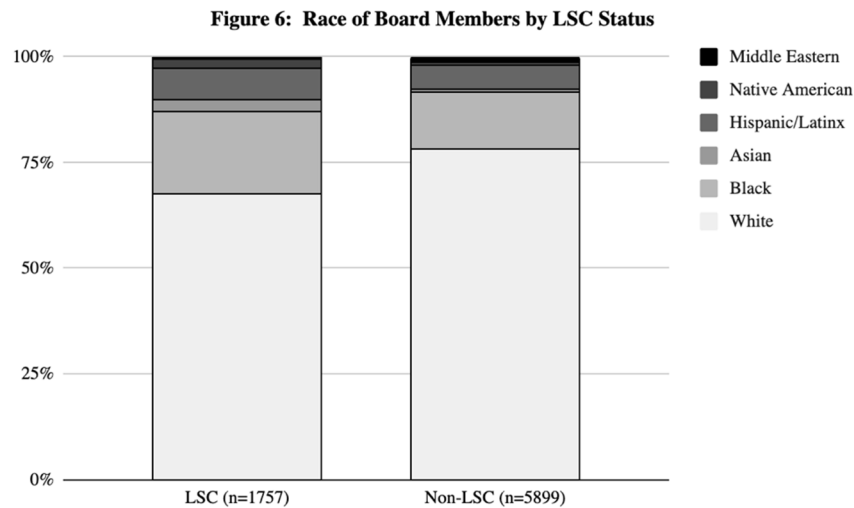


Figure 5 below looks even more specifically at the difference between races. It shows that 64.5 percent of all client-eligible board members in the United States are racial and ethnic minorities. Strikingly, 45 percent of all client-eligible board members in the United States are Black. That is the highest of any racial or ethnic group.

Figure 5: Percent Client and Non-Client Eligible Board Members by Race



Thus, LSC-funded PILOs are relatively more racially diverse than non-LSC-funded PILOs as indicated in Figure 6 below. In LSC-funded organizations, white individuals make up 68 percent of the board. In non-LSC-funded PILOs, white individuals make up 78.6 percent of the board. While one could access the data and conclude that LSC-funded PILOs are more racially and ethnically diverse than non-LSC-funded PILOs, the reality is much more nuanced and complicated. There is often a clear racial and class divide between lawyer board members who are mostly white and client-eligible board members who are mostly racial and ethnic minorities.



Interview data from executive directors and lawyer board members reveal that many client-eligible board members are not full participants of their boards. Many do not attend board meetings. Many who attend remain silent during meetings, feel intimidated, or do not participate in governance.³²⁵ Future research should explore the role and experiences of client-eligible board members and the ways they can add value to PILOs. Future research should also examine whether all PILOs should have eligible clients on their boards who can add community perspective to board rooms. For now, we can forecast that PILOs would need to take important steps to better integrate client-eligible board members into their boards.

In addition, and critically, it is important that the racial and ethnic minorities on PILO boards are not primarily eligible clients. Lawyers make up 64 percent of PILO boards—both LSC and non-LSC-funded. For LSC-funded PILOs, the Legal Services Corporation Act has another requirement that at least 60 percent of the board “consists of attorneys who

325. See, e.g., Interview with BD006 (July 8, 2020) (on file with author); Interview with PILO122 (Mar. 23, 2020) (on file with author); Interview with PILO101 (Feb. 4, 2020) (on file with author).

are members of the bar of a State in which the legal assistance is to be provided.”³²⁶

While this provision does not specifically require those attorneys to be members of law firms, 55 percent of lawyers on these boards practice in law firms and corporations. As discussed in Part III above, law firms want their partners to sit on PILO boards.³²⁷ PILOs also need the financial support that attaches to having a law firm partner on their boards. For easier access to these resources, PILOs often prefer to have influential partners on their boards. Executive directors know that “all partners are not equal.”³²⁸ So they endeavor to get partners with influence. Two executive directors explained what influence entails. According to one, “It’s basically who can get decisions made from the law firm. So, a lot of them are philanthropic decisions. Some of them are pro bono decisions. So, if certain people ask for things, apparently they are more likely to be listened to than other people.”³²⁹ Another provided a more concrete definition of an influential board member:

Sometimes they’re founding partners, or managing partners, they’re the head of their departments. The litigation heads. Sometimes it just means that they’ve got the power in the law firm to do what they need to do. There’s a whole range of leadership. Or they’re leaders of the bar. In the private sector, they’re acknowledged as people who bring others together across law firms. So, each in their own individual way they’re able to make things happen within their firms.³³⁰

The preference for influential law firm partners that can draw in resources for PILOs has made it difficult to increase racial and ethnic diversity on PILO boards. Large law firms lack diversity among their partner ranks.³³¹ NALP’s comprehensive data of law firms indicates that in 2019, only 9.5 percent of partners in law firms were racial and ethnic minorities.³³² In addition, racial minorities are more likely to be nonequity partners—10.7 percent—in comparison to white partners.³³³ Only 7.6 percent of racial and ethnic minorities are equity partners.³³⁴ Nonequity partnership is a lower tier that does not afford a share in the profits of the firm.³³⁵ A lower tier of partnership comes with less influence and stature among the partnership. As such, the few influential partners that are racial minorities are by consequence in high

326. 42 U.S.C. § 2996f(c). Per interviews with CEOs and board members in this study, for LSC-funded PILOs, once requirements for client-eligible and attorney board members are met, there is often little room for additional board members.

327. See generally Adediran, *Relational Costs*, *supra* note 17.

328. Interview with PILO106 (Feb. 26, 2020) (on file with author).

329. *Id.*

330. Interview with PILO130 (July 7, 2020) (on file with author).

331. See NAT’L ASS’N FOR L. PLACEMENT, NALP 2019 REPORT ON DIVERSITY IN U.S. LAW FIRMS 11 (2019).

332. See *id.*

333. See *id.* at 17.

334. See *id.*

335. See Adediran, *supra* note 198, at 641.

demand by many PILOs. A board member explained the competition for influential diverse partners:

We have a really hard time retaining board members of color because . . . we don't have enough lawyers of color in the profession and so they get pulled in so many different—they're getting recruited all the time like oh, come be on our board, . . . because people realize we need to have better representation on our boards and in our leadership And so the pool is only so big.³³⁶

Therefore, if PILOs remain dependent on firms for resources through board members and if law firms do not diversify their partnership ranks, it will likely remain challenging to diversify PILO boards. Law firms have begun pledging to make changes that would impact the delivery of legal services to racial and ethnic minorities.³³⁷ In addition to this, law firms should also become intentional about diversifying their partnership ranks.

There are important policy changes that PILOs can institute to improve racial and ethnic diversity on their boards. PILOs can adopt a policy that would require large law firms to replace, or at least take concrete steps to replace, vacant board seats with racial minorities. After board terms end, board members are typically asked to make recommendations for their successors, as the executive director quoted below explained:

The traditional way that's been done . . . is that when a board member terms off they have been asked to recommend somebody to replace them. But what that has resulted in is not any diversity. So, we have the same sort of voices and the same representation on the board even though the leadership has changed.³³⁸

PILO executive directors who are intentional about diversifying their boards can require that recommendations for replacements include racial and ethnic minorities. Requiring recommendations from law firms interested in board seats would likely be more effective than the soft asks that most PILOs currently utilize. This does not mean that PILOs must fill their board seats with every racial minority a law firm or corporate counsel recommends. However, it provides an opportunity to improve board diversity in a more predictable manner and is more likely to yield results.

It is important to note several challenges to implementing this policy. There is a general belief among executive directors and board members that diversifying PILO boards may result in fewer fundraising opportunities. As such, many PILO executive directors may be concerned about potentially jeopardizing their funding sources if some law firms are unable to find replacements and therefore leave their boards entirely. This applies particularly to PILOs that like to have board representation from "all the big

336. Interview with BD002 (June 22, 2020) (on file with author).

337. See, e.g., Kathryn Rubino, *What Biglaw Is Saying About the Unrest Sweeping the Nation*, ABOVE THE L. (June 2, 2020, 12:12 PM), <https://abovethelaw.com/2020/06/biglaw-george-floyd/6/> [<https://perma.cc/9PRC-78X8>].

338. Interview with PILO102 (Feb. 4, 2020) (on file with author).

law firms in town.”³³⁹ An executive director who is a racial minority explained:

I think that for a long time—because it’s the easiest way to think—the board thought that we’ll get racial representation from the community members and then we’ll get money from our friends who are white law firm partners. Obviously there are insufficient numbers of partners of color at law firms. But there are some and there are people But part of it is just the idea that the only way you can raise money . . . is to have the people with whom the board members are familiar.³⁴⁰

Diversifying a PILO board should not be a zero-sum game. It is important for executive directors and board members to innovate around fundraising rather than focusing fundraising on particular sectors of the legal profession, namely law firms and corporations. There are racial and ethnic minorities in other professions that can bring value to addressing the legal and social issues that impact low-income minorities. PILOs should seriously consider seeking racial and ethnic minority board members in medicine and health services, technology, media, sports and entertainment, finance, education, social services, foundations, community groups that serve low-income individuals, and groups in other capacities outside of the legal profession. These individuals can bring racial and ethnic diversity in addition to diversity of experiences, skills, and knowledge about the experiences of racial and ethnic minorities.

Nevertheless, PILOs should still require law firms and corporate counsel that want to sit on their boards to recommend minorities. To be sure, they are likely to be more successful with corporations than law firms since in-house counsel generally tend to be more racially diverse than law firm lawyers.³⁴¹ Nonetheless, this strategy can be successful.

Because of institutional power dynamics between law firms and PILOs,³⁴² PILOs can work in conjunction with other funders—especially foundations—to put pressure on their boards to diversify. This would be similar to how law firms are often incentivized by client pressure to diversify.³⁴³ Twenty-five of the thirty-two executive directors spoke about the value of foundation funding. Funders, like the Open Society Foundations and the Ford Foundation, have begun establishing racial diversity requirements for funding.³⁴⁴ Donations from foundations tend to be higher than funds raised through board member fundraising and have a significant impact on the financial strengths of some PILOs. The executive director quoted below explained the emerging process:

339. Interview with PILO110 (Feb. 26, 2020) (on file with author).

340. Interview with PILO132 (July 8, 2020) (on file with author).

341. See Melanie Lasoff Levs, *Call to Action—Sara Lee’s General Counsel: Making Diversity a Priority*, MINORITY CORP. COUNS. ASS’N (Oct. 24, 2004), <https://www.mcca.com/call-action-sara-lees-general-counsel-making-diversity-priority/> [https://perma.cc/TF96-A6PQ].

342. See generally Adediran, *Relational Costs*, *supra* note 17.

343. See Adediran, *supra* note 10, at 69.

344. Interview with PILO111 (Feb. 27, 2020) (on file with author).

Large global foundations . . . have a level of sophistication where they are not only going to . . . question you about it, [but also] not fund you because of it. Especially if you're operating in [a city]. Ford, Gates, Kresge, even our bigger local foundations are getting this too. They are going to look at your board composition. Some ask because that's the current convention . . . and some ask because it's really important and because if they ask, it will force us to do it differently and I embrace that pressure. I use that pressure to try to get those changes on our board That's much bigger than the individual gift individual board member can write. I think there can be over-focus on the individual check that can be written [by board members] as opposed to how we're going to be viewed by larger funders. I think that's super important and as it should be those funders are pushing that for the right reasons.³⁴⁵

Therefore, PILOs can seek foundation funding, which may require racially diverse board compositions. However, PILOs should ensure that client-eligible board members are not the only or primary racial minorities on their boards.

C. *Pro Bono Partners and Counsel*

As lawyers who manage the process of using law firm resources to help communities of color, having racial and ethnic minorities among pro bono partners and counsel is important. Pro bono partners and counsel can influence legal services priorities and shape the interest in particular areas of law within and outside of their law firms.

To increase diversity among pro bono partners and counsel, law firms should change their hiring practices to be more inclusive of individuals who may lack social or professional connections. As with associate or partner hiring, law firms can engage recruiting and search agencies to fill lawyer pro bono professional positions with the goal of including racial and ethnic minorities in the pool.³⁴⁶

Law firms already do this in their hiring practices of diversity managers who are overwhelmingly racial and ethnic minorities. Seven of the eight board members—87.5 percent—of the Association of Law Firm Diversity Professionals (ALFDP) are racial and ethnic minorities.³⁴⁷ Contrast this with APBCo, whose board of seventeen has only three racial and ethnic minorities—17.6 percent.³⁴⁸ Both ALFDP and APBCo are professional associations established for individuals who occupy diversity or pro bono management roles in mostly large firms.³⁴⁹ Diversity managers develop and

345. *Id.*

346. Some law firms already post positions on job search websites. However, this practice does not seem to be widely embraced.

347. *See About Us*, ASS'N OF L. FIRM DIVERSITY PROS., <https://alfdp.com/about/> [<https://perma.cc/UBR4-S7FX>] (last visited Mar. 4, 2022). All eight are members of Am Law 100 firms. *Id.*

348. *See Leadership*, ASS'N OF PRO BONO COUNS., <https://apbco.org/about/leadership/> [<https://perma.cc/3BAQ-2KCN>] (last visited Mar. 4, 2022).

349. *See Adediran, Relational Costs*, *supra* note 17, at 394 n. 179.

promote broad diversity goals and strategies in law firms.³⁵⁰ Pro bono partners and counsel are tasked with providing pro bono opportunities for associates and partners, as well as access to justice for poor, disproportionately racial minority individuals and groups. These roles, while distinct, share a similarity in their ultimate goal: to address societal inequality in law firms or outside of firms in collaboration with other organizations.

Diversifying pro bono partner and counsel roles would provide positive results. However, it is important to acknowledge that diversifying the role can exacerbate the inequality experienced by lawyers in law firms. Research has shown that pro bono counsel—as opposed to partners—are ascribed low status and differing levels of autonomy depending on internal firm policies.³⁵¹ Pro bono partners tend to be ascribed higher status and autonomy than pro bono counsel.³⁵² Pro bono partners are typically given seats at the proverbial decision-making table as other partners, while counsel do not usually have the same level of autonomy.³⁵³ As such, having pro bono counsel—rather than partners—who are minorities can mean that pro bono counsel are ascribed lower status. Therefore, firms should be intentional about how they title the role of the minority pro bono professional.³⁵⁴ It can mean the difference between the authority to influence a law firm’s pro bono program and not having the authority.

In sum, to diversify pro bono professional roles, law firms must be intentional. Firms should modify hiring practices to ensure that racial and ethnic minorities—who are less likely to have relationships with law firm partners and management—are included in the pool. In addition, having pro bono partner titles would imbue the role with status and empower the pro bono partner to lead and influence the law firm’s pro bono program.³⁵⁵

D. Addressing Homophily in Public Interest Law Leadership

Racial homophily is the tendency for people to affiliate with people who are racially and ethnically similar to them. Homophily permeates all aspects of American life.³⁵⁶ It is therefore beyond the scope of this Article to attempt to make suggestions that would dismantle it. Nevertheless, it is critical for individuals and groups who often engage with racial and ethnic minorities in their professional lives to reject the tendency to develop relationships with only people they deem similar.

In a 2020 interview with Kara Swisher and Scott Galloway on the Pivot podcast about the oft discussed pipeline problem in diversifying

350. See Virginia Grant, *The Dawn of an Emerging Position: The Law Firm Diversity Manager*, MINORITY CORP. COUNS. ASS’N (May/June 2006), <https://www.mcca.com/mcca-article/the-dawn-of-an-emerging-position/> [https://perma.cc/WSK4-CCMW].

351. See Adediran, *supra* note 198, at 649.

352. See generally *id.*

353. See generally *id.*

354. See generally *id.*

355. See *id.* at 29.

356. Adediran, *supra* note 56.

corporations, John Rice, the founder and CEO of Management Leadership for Tomorrow—a nonprofit organization dedicated to transforming leadership positions in institutions—explained why many leadership positions are not often filled with racial and ethnic minorities:

So, you ask a leader, ‘Well, how many people of color were at your wedding, or at one of your kids’ weddings so far?’ . . . You have to invest in cultivating . . . relationships with talent of color. What you see right now is a focus on identifying jobs and trying to find people of color to fit those jobs. And the reality is, what you have to do is invest in cultivating [relationships], find people of color, great, talented folks, and then find jobs for them—take a longer-term approach.³⁵⁷

Mr. Rice’s comments speak to the reality of American life where segregation along racial lines is the norm.³⁵⁸ There are often limited strong professional network ties between white individuals and racial and ethnic minorities.³⁵⁹

It is therefore important for those in leadership positions to be intentional about creating strong professional (if not social) networks with people from different racial and ethnic groups. The mentorship program between managers and staff attorneys, as discussed above, can cultivate relationships and training opportunities toward breaking the homophily barrier.

Board members and pro bono partners and counsel must also be intentional about how they approach their professional relationships with potential board members or potential pro bono partners and counsel in their law firms, corporations, or elsewhere. One of the executive directors in the interview study provided examples of how to be intentional in addressing homophily, including hiring a consulting firm, asking questions about the board recruiting process, and seeking out people who are outside of their networks:

So much of our work is around the people we know and that we recruited from our existing networks So, what’s our process? How are we doing this? We are using our internal networks. What else could we be doing in order to expand the networks and get people that are not on our radar, who are not connected to our networks, how do we find those people? So, we had a conversation with one of these recruiting firms, . . . and we said, “Can you help us identify people that we don’t know who might be a

357. *The Pipeline Isn’t the Problem*, N.Y. MAG. (June 23, 2020), <https://nymag.com/intelligencer/2020/06/the-pipeline-isnt-the-problem.html> [<https://perma.cc/YME4-PDP9>].

358. See generally BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?” AND OTHER CONVERSATIONS ABOUT RACE (2017); Robert Adelman, *Neighborhood Opportunities, Race, and Class: The Black Middle Class and Residential Segregation*, 3 CITY & CMTY. 43 (2004); Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOCIO. 167 (2003); Kucheva Yana & Richard Sander, *Structural Versus Ethnic Dimensions of Housing Segregation*, 40 J. URB. AFFS. 329 (2017).

359. See, e.g., Trond Petersen et al., *Offering a Job: Meritocracy and Social Networks*, 106 AM. J. SOCIO. 763, 810 (2000) (finding that racial and ethnic minorities are disadvantaged in hiring in the precontact stage because they lack access to the social networks that lead to high success in getting hired).

good fit for our board?” So, . . . thinking about people beyond the universe that we know in order to expand our horizons and make sure that we are also getting more diverse candidates than we might otherwise know.³⁶⁰

As described above, law firms in hiring pro bono partners and counsel, board members in hiring executive directors, and executive directors and board members engaged in the board recruitment process, should be intentional about how homophily shapes racial and ethnic diversity and should take steps to mitigate its effects.

E. Beyond Bias Training: Integrating Race into Anti-Poverty Law

Diversity and implicit bias trainings have become commonplace in companies and firms.³⁶¹ While bias training can be helpful, it has important limitations that are documented in the literature, including weak effects on improving bias against racial minorities³⁶² and creating an illusion of fairness toward racial and ethnic minorities.³⁶³

However, an integrated approach to bias training may be more successful if knowledge about systemic racism is integrated into anti-poverty advocacy. Race and poverty are intertwined and should be incorporated in scholarship and practice.³⁶⁴

The Shriver Center on Poverty Law launched the Racial Justice Institute (RJI) in 2014 in recognition of the link between poverty and race.³⁶⁵ RJI has cultivated over 200 advocates from eighty-one organizations in twenty-eight states and the District of Columbia.³⁶⁶ “The first four cohorts of RJI brought together advocates from many different parts of the country” who then served as catalysts to bring a race equity lens to their respective organizations.³⁶⁷ In 2018, RJI partnered with Legal Services of New York City to launch a pilot program that aimed to equip the entire organization to advance racial equity in their advocacy roles.³⁶⁸ Skilled coaches and faculty taught participants who were expected to apply new concepts—implicit bias, debiasing, systems

360. Interview with PILO131 (July 8, 2020) (on file with author).

361. See Adediran, *supra* note 10, at 77–78; Edelman et al., *supra* note 301, at 1590.

362. See Alexandra Kalev et al., *Best Practices or Best Guesses?: Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOCIO. REV. 589, 610–11 (2006).

363. See Adediran, *supra* note 10, at 84.

364. For examples of scholarship that examine race and poverty, see generally Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049 (2017) (critiquing class-based affirmative action because of its ideological division between the deserving and underserving poor); Bridges, *supra* note 64 (arguing that class-based affirmative action denies that race is a significant feature of American life); Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016).

365. Janerick Holmes et al., *The Racial Justice Institute: Bringing a Race Equity Lens to Legal Services Advocacy*, 32 MGMT. INFO. EXCH. J. 46, 46 (2018).

366. *Id.*

367. *Id.*

368. *Id.*

thinking, racial impact statements, and racial disparity mapping—to racial equity issues in their local communities.³⁶⁹

Following the summer 2020 protests, the National Legal Aid & Defender Association (NLADA) has encouraged PILOs to develop a “Racial Justice Action Plan” that encourages member organizations to “speak with clarity about poverty and racial equity,” improve internal governance to reflect racial equity, and support a purpose-driven practice that employs strategic advocacy to advance racial justice in our communities.³⁷⁰ NLADA has also begun to aggregate tools for advancing racial justice in the legal aid community and designed a Fight Against Implicit Bias and Racial Inequality Pledge that calls on advocates to confront implicit bias and actively promote racial justice.³⁷¹

Empirical research is needed to determine the efficacy of the RJI and similar programs and the effect of NLADA’s encouragement on the diversification of PILOs and the public interest sector in general. It is, however, worth thinking about how to train public interest law leaders about the intersection of race and poverty. It is unacceptable that no PILO requires its board members to undergo racial bias training as a prerequisite for membership. I am also not aware of a requirement for PILO executive directors or pro bono partners and counsel to undergo racial bias training.³⁷²

At a minimum, these leaders should be familiar with the role of implicit bias on decision-making. Board members, executive directors, and pro bono partners and counsel should be required to undergo training on the interconnectedness of race and poverty to better understand the legal and social experiences of the communities they serve.

F. Agenda for Further Research

As the first of its kind, this study provides important grounding for future studies on the impact of racial diversity on institutional outcomes in public interest law. The need for additional research is immense and follow-up studies can answer some of the questions this study raises.

First, further research is needed to show the macro-level impact on the organizations themselves of the lack of racial and ethnic diversity among PILO CEOs and boards of directors. There are many possible ways to empirically study this question. One particularly consequential way is to examine the relationship between racial and ethnic diversity and access to funding for PILOs.

369. *Id.* at 47.

370. Press Release, Nat’l Legal Aid & Defender Ass’n, NLADA Statement on the Killing of George Floyd and Standing Up with Communities to Defeat Racist Violence (June 1, 2020), <https://www.nlada.org/node/32531> [<https://perma.cc/Y7ST-AH3J>].

371. *Id.*

372. It is possible that society’s revival of anti-racist initiatives would naturally spur these changes.

Funding constraints are one of the most fundamental challenges PILOs, like other nonprofits, experience.³⁷³ PILOs are funded by a variety of sources, including federal, state, and local government grants, and a range of private sources, including foundations, corporations, law firms, and individuals.³⁷⁴ Private funding sources are highly coveted and revered as they often provide not only financial support but also a show of support for an organization's mission.³⁷⁵ Some private sources of funding can also come "without strings attached so that the organization can use the funds totally at its own discretion."³⁷⁶ This favored status may help explain why the constraints imposed by private contributions are often overlooked.³⁷⁷

Research suggests that the need to access private funding is one of the most important reasons why PILO boards of directors may lack racial and ethnic diversity.³⁷⁸ PILO CEOs and boards of directors have cited the need to have major donors—particularly from law firms and corporations—on their boards to maintain access to highly coveted private funding. Law firm partners are majority white, which can hamper diversity on PILO boards. A future study should test the prevailing assumption that racially diversifying PILO boards might result in the loss of private funding.

More micro-level research is also needed to better understand how racially diverse CEOs and boards of directors make decisions in comparison to their white counterparts. In Part II, I provide an example of how a minority CEO's litigation strategy emphasizing racial discrimination differed from the strategy of a white board member who wanted to deemphasize race.³⁷⁹ Additional qualitative research can shed further light on these processes. Interviews with minority and white CEOs and board members can strengthen our understanding of how race influences decision-making. Embedding in a PILO that provides access to observe day to day interactions—such as private board meetings and other communication among PILO leaders—can also be illuminating. This micro-level study can show how the lack of racial and ethnic minorities in leadership may impact hiring, recruiting board members, organizational policies, litigation strategies, and relationships with racial minority communities the organizations serve.

Another important area of inquiry is how race and ethnicity impact the decision-making processes of pro bono partners and counsel. As of early 2021, there were only eleven large law firm pro bono partners and counsel

373. Adediran, *Relational Costs*, *supra* note 17, at 389; Rhode, *supra* note 4, at 2056.

374. See Adediran, *Relational Costs*, *supra* note 17, at 405; Cummings, *supra* note 104, at 11 n.46, 23–24; Matthew M. Hodge & Ronald F. Piccolo, *Funding Source, Board Involvement Techniques, and Financial Vulnerability in Nonprofit Organizations: A Test of Resource Dependence*, 16 *NONPROFIT MGMT. & LEADERSHIP* 171, 174 (2005).

375. Karen A. Froelich, *Diversification of Revenue Strategies: Evolving Resource Dependence in Nonprofit Organizations*, 28 *NONPROFIT & VOLUNTARY SECTOR Q.* 246, 250 (1999).

376. *Id.*

377. See generally Adediran, *Relational Costs*, *supra* note 17.

378. See generally Adediran, *supra* note 259.

379. See *supra* note 58 and accompanying text.

who are racial or ethnic minorities.³⁸⁰ These numbers are so small that a national study on the impact of race on decision-making may not be feasible. However, as pro bono partners and counsel become more diverse, further research can be conducted through surveys, case studies, or interviews to explore potential differences between how white and minority pro bono partners and counsel view their roles and make decisions.

As organizations and institutions experience a racial reckoning, we may expect these questions and many others to begin to be addressed.

CONCLUSION

There is racial reckoning happening across multiple spheres of society except, oddly enough, in public interest law, which is the area of law most associated with addressing structural inequality. Ironically, it is also an area affected by unacknowledged inequalities. *Racial Allies* addresses this issue in a thoughtful and systematic way by using both theory and social science evidence to diagnose and solve the problem. The public interest law sector is comprised of PILOs and law firms through pro bono and philanthropy, among other constituents. This Article focuses on leaders—executives/CEOs, boards of directors, and pro bono partners and counsel in large law firms. These categories of leaders are tasked with establishing the strategies, policies, and management processes involved in providing legal services and advocacy through law reform to both clients and causes that disproportionately impact racial and ethnic minority clients and non-clients. Yet, public interest law leadership comprises mostly white lawyers. This Article uses demographic and interview data to show the prevalence of the lack of racial and ethnic diversity in public interest law leadership, theorizes about why racial and ethnic diversity is lacking in the sector, and provides policy considerations to begin to address the problem. This Article also notes further studies that would examine the impact of racial and ethnic inequality on outcomes in public interest law.

APPENDIX A: CEOS

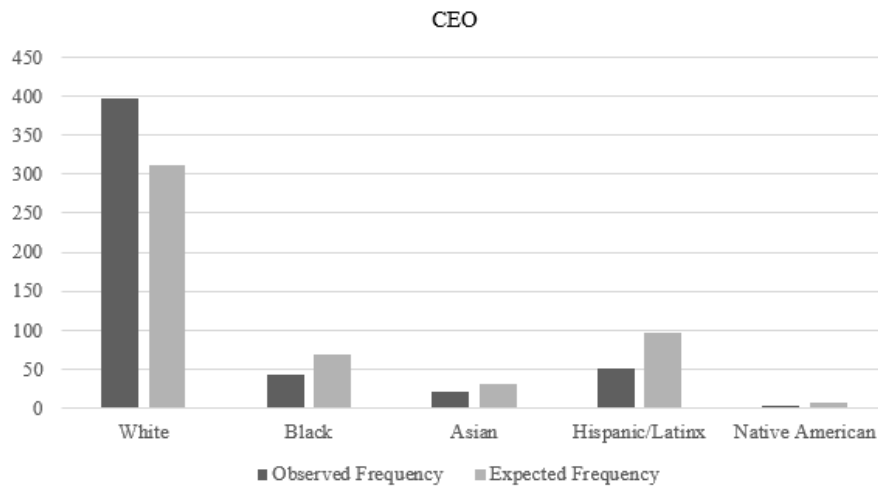
Chi-square analysis suggests that the racial distribution of CEOs did not match the expected distribution based on the population of the United States. Specifically, white individuals were overrepresented in the sample: 398 (75.8 percent) white individuals observed, 31.4 (60.1 percent) white individuals expected. Racial and ethnic minorities were underrepresented: fifty (9.7 percent) Latinx individuals observed, 95.9 (18.7 percent) Latinx individuals expected; forty-two (8.2 percent) Black individuals observed, 69.4 (13.5 percent) Black individuals expected.³⁸¹ These observations are at statistically significant levels.

380. See National Study (data on file with author).

381. Chi-square analysis does not include missing data.

CEO

Race	Observed Frequency	Expected Frequency
White	398	31.4
Black	42	69.4
Asian	21	30.6
Hispanic/Latinx	50	95.9
Native American	3	6.7
Total	514	
Chi-Square	61.923	
Degree of Freedom	4	
P value	.000	

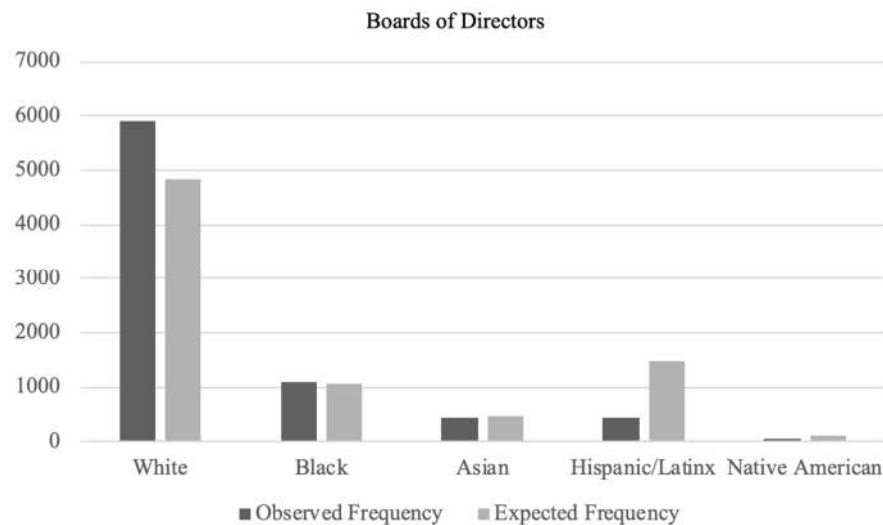


APPENDIX B: BOARDS OF DIRECTORS

Chi-square analysis suggests that the racial distribution of the boards of directors of PILOs did not match the expected distribution based on the population of the United States. Specifically, white individuals are overrepresented in the sample: 5918 (73.1 percent) white individuals observed and 4838.3 (62 percent) white individuals expected. Meanwhile, Latinx individuals are underrepresented: 453 (5.7 percent) observed and 1489.3 (18.5 percent) expected. Black individuals are slightly represented at a higher rate than expected: 1096 (13.7 percent) observed and 1078.8 (13.4 percent) expected. This is because of the large number of Black individuals among client-eligible and community board members. These observations are at statistically significant levels.

Boards of Directors

Race	Observed Frequency	Expected Frequency
White	5918	4838.3
Black	1096	1078.8
Asian	453	475
Hispanic/Latinx	453	1489.3
Native American	66	104.7
Total	7986	
Chi-Square	977.627	
Degree of Freedom	4	
P value	.000	



In addition to the general U.S. population, I also conducted chi-square tests using census data to determine whether PILO board members are representative of individuals who meet the federal poverty guideline.³⁸²

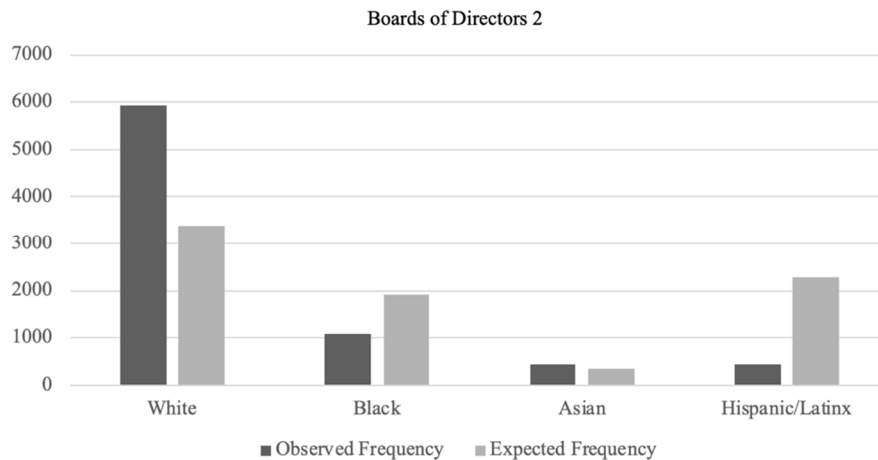
The chi-square analysis suggests that the racial distribution of people on the boards does not match the expected distribution based on the population of the United States that is in poverty. Specifically, white individuals are overrepresented in the sample: 5918 (74.7 percent) white individuals observed and 3373.9 (42.6 percent) white individuals expected. Meanwhile, there are 1096 (13.8 percent) Black individuals observed and 1924.6 (24.3

382. There is no race and ethnicity data for using the federal poverty guideline of 120 percent, which is what most PILOs use to determine service eligibility. The data here uses the federal poverty guidelines of 100 percent of the federal poverty line.

percent) Black individuals expected. There are 453 (5.7 percent) Latinx individuals observed and 2273 (28.7 percent) Latinx individuals expected.

Boards of Directors 2

Race	Observed Frequency	Expected Frequency
White	5918	3373.9
Black	1096	1924.6
Asian	453	348.5
Hispanic/Latinx	453	2273
Total	7920	
Chi-Square	3763.72	
Degree of Freedom	3	
P value	.000	



APPENDIX C: PRO BONO PARTNERS AND COUNSEL

Chi-square analysis suggests that the racial distribution of pro bono partners and counsel does not match the expected distribution based on the population of the United States. Specifically, white individuals are overrepresented in the sample: 123 (89.1 percent) white individuals observed and 83.5 (60.1 percent) white individuals expected. Meanwhile, there are three (2.2 percent) Latinx individuals observed and 25.7 (18.9 percent) expected. There are four (2.9 percent) Black individuals observed and 18.6 (13.7 percent) expected. There are six Asian individuals observed and 8.2 expected.

Pro Bono Partners

Race	Observed Frequency	Expected Frequency
White	123	83.5
Black	4	18.6
Asian	6	8.2
Hispanic/Latinx	3	25.7
Total	136	
Chi-Square	50.811	
Degree of Freedom	3	
P value	000	

