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Racial Reckoning with Economic Inequities: Board Diversity as a Symptom and a Cure

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ESSAY

RACIAL RECKONING WITH ECONOMIC INEQUITIES

BOARD DIVERSITY AS A SYMPTOM AND PARTIAL CURE

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INTRODUCTION

In response to the racial reckoning sparked by the police killings of George Floyd, Breonna Taylor and other unarmed Black men and women during the summer of 2020, many corporations publicly expressed their commitment to not only grapple with racial inequities in the economic sphere, but also increase racial diversity on their board, with particular emphasis on Black directors.[1] Most notably, on September 9, 2020, The Board Challenge (founded by business leaders with at least one Black director) launched an initiative encouraging every U.S. company to sign a pledge agreeing to appoint at least one Black director to their board within the next twelve months.[2] As a result, several companies have committed to

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1 *See* Kevin LaCroix, *Growing Number of Companies Pledge to Address Board Diversity Issues*, THE D&O DIARY, Sept. 10, 2020, https://www.dandodiary.com/2020/09/essays/corporate-governance/growing-number-of-companies-pledge-to-address-board-diversity-issues/ [https://perma.cc/2VZJ-GNUG] ("[A] number of public and private companies have committed to adding a Black director to their boards within the next year.").

2 *See The Board Challenge Launches Pledge For Companies to Add a Black Director to their Boards*, BLACK ENTERPRISE, Sept. 9, 2020, https://www.blackenterprise.com/the-board-challenge-launches-pledge-for-companies-to-add-a-black-director-to-their-boards/ [https://perma.cc/S235-EWJK] ("Founding Pledge Partners commit to adding at least one Black director to their respective boards in the next 12 months); *see also* THE BOARD CHALLENGE, https://theboardchallenge.org/ [https://perma.cc/9H8C-C88N] (last visited on

adding a Black director within the year.[3]

The racial reckoning of the 2020 summer also spurred the adoption of new board diversity regulations. California became the first state in the country to require publicly held corporations in California to have a minimum number of directors from an "underrepresented community" on their board.[4] The law defines a "director from an underrepresented community" as "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender."[5] Additionally, Nasdaq recently adopted new listing rules requiring all Nasdaq listed companies to publicly disclose diversity statistics regarding their board, and requiring such companies to have, or explain why they do not have, at least two diverse directors, including one who self-identifies as female and one who self-identifies as LGBTQ or an underrepresented minority, defined similarly to the California law.[6]

Embedded in these commitments and regulations is an

Sept. 6, 2021) ("The Board Challenge is a movement to improve the representation of Black directors in corporate U.S. boardrooms by challenging companies to take the pledge to appoint a Black director within the next year.").

3 LaCroix, *supra* note 1; Anne Steele, *Zillow, Nextdoor and Other Companies Pledge to Add Black Directors*, WALL ST. J., Sept. 9, 2020, https://www.wsj.com/essays/zillow-nextdoor-and-other-companies-pledge-to-add-black-directors-11599649200?mod=itp_wsj&ru=yahoo [https://perma.cc/2WJB-DWTD] (listing companies that pledge to add a Black director in the next year); Catherine Thorbecke, *More than a Dozen Companies Pledge to Add a Black Director to their Boards*, ABC NEWS, Sept. 9, 2020, https://abcnews.go.com/Business/dozen-companies-pledge-add-black-director-boards/story?id=72900675 [https://perma.cc/2MBY-N8A9].

4 A.B. 979, 2019-2020 Gen. Assemb., Reg. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB979 [https://perma.cc/7Y4Z-VSWW]. *See also* David Bell, *New Law Requires Diversity on Boards of California-Based Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE, Oct. 10, 2020, https://corpgov.law.harvard.edu/2020/10/10/new-law-requires-diversity-on-boards-of-california-based-companies/ [https://perma.cc/6EBM-2GM4] (explaining the new California bill signed by Governor Gavin Newsom requiring public companies headquartered in California to have at least one member from an underrepresented community on their board).

5 *A.B. 979, supra* note 4.

6 *See* Alexander Osipovich, *Nasdaq Board-Diversity Proposal Wins SEC Approval,* WALL ST. J. (Aug. 6, 2021), https://www.wsj.com/articles/nasdaqs-board-diversity-proposal-faces-sec-decision-11628242202 [https://perma.cc/B597-EYL6]; *see also Nasdaq to Advance Diversity through New Proposed Listing Requirements*, NASDAQ, Dec. 1, 2020, https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01 [https://perma.cc/YDT6-8VQ7] (explaining the new listing requirements).

implicit presumption that board diversity advances the call to promote racial equity in the economic sphere, particularly with respect to Black people. Confirming this presumption, one supporter of Nasdaq's proposal proclaimed that Nasdaq was "heeding the call of the moment."[7] This essay examines this presumption and argues that board diversity is a necessary though far from sufficient component of the movement to achieve racial equity in the economic sphere.[8] This essay then argues that, notwithstanding promising momentum, there remain several significant roadblocks to achieving meaningful progress related to board diversity. Importantly, this essay argues that many of these roadblocks involve racial bias that is implicit but too often unchallenged, and hence insists that these roadblocks will remain unless there is intentional reckoning with this bias.

Part I maintains that board diversity is a critical aspect of racial equity for Black people in the economic arena. After highlighting the ways in which current reforms may advance the board diversity effort, Part II pinpoints the limits of reforms alongside the very real racial biases that continue to impede realistic progress in this area.

Because the 2020 summer's racial reckoning related specifically to the mattering of Black lives, this essay focuses primarily on Black people—though its insights can be applied to other people of color.

I
WHY BOARD DIVERSITY MATTERS

America's boards lack racial and ethnic diversity. One recent study indicated that about a dozen of the largest corporations in the S&P 500 company has no Black directors.[9] Another 2019 study found that 37% of S&P 500 boards did not have any Black directors.[10] By comparison, in 2019, for the

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[7] *Id.*

[8] *See* HEIDRICK & STRUGGLES, BOARD MONITOR US 2020 5 (2020), https://www.heidrick.com/Knowledge-Center/Publication/Board_Monitor_US_2020 [https://perma.cc/HC9Y-QT2H] [hereinafter Board Monitor 2020] ("Of course, simply ensuring a board has an appropriate mix of perspectives is just the start.")

[9] Jeff Green, *After Adding More Women to Boards, Companies Pivot to Race*, BLOOMBERG, Aug. 19, 2020, https://www.bloomberg.com/news/essays/2020-08-19/companies-seek-more-black-directors-after-adding-women?srnd=premium [https://perma.cc/9V7W-6PW6].

[10] Cydney Posner, *Addressing the Challenge of Board Racial Diversity*, COOLEY PUBCO, Aug. 25, 2020, https://cooleypubco.com/2020/08/25/board-

first time in history, every S&P 500 corporation had at least one female director.[11] Importantly, the overall percentages of Black directors are relatively small. Thus, 10% of directors at the 200 largest S&P 500 companies are Black.[12] Only 9% of board members at Fortune 500 companies are Black.[13] Less than 1% of directors in the S&P 500 are Black.[14]

Moreover, the available evidence indicates that the number of Black corporate directors has "stalled or even declined."[15] One study concluded that the number of white directors "hasn't budged for decades,"[16] suggesting that Blacks and other nonwhite directors have experienced difficulty changing the status quo. Still other surveys highlight a downward trend, revealing that the percentage of Blacks joining boards went from 13% in 2019 to 11% in 2020.[17] The 2020 Heidrick & Struggles study of *Fortune* 500 found that in 2019, appointments of Black directors to *Fortune* 500 companies decreased to 10% of all appointments, dropping from 11% in 2017 and 2018, both of which were record highs.[18] Spencer Stuart's report examining the top 200 S&P 500 companies and Heidrick &Struggles' study both conclude that "little progress" had been made with respect to racial and ethnic diversity on large boards.[19]

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racial-diversity/ [https://perma.cc/66TF-7XHR]; Companies without Black Directors, BLACK ENTERPRISE, https://www.blackenterprise.com/lists/2019-companies-without-black-directors/ [https://perma.cc/5SMD-NSEG] (last visited Sept. 6, 2021).

11 Green, *supra* note 9.

12 *Id.*

13 *The Board Challenge Launches Pledge For Companies to Add a Black Director to their Boards*, *supra* note 2.

14 Posner, *supra* note 10; Companies without Black Directors, *supra* note 10.

15 Green, *supra* note 9.

16 Stefanie Johnson and David Hekman, *Women and Minorities are Penalized for Promoting Diversity*, HARV. BUS. REV., Mar. 23, 2016, https://hbr.org/2016/03/women-and-minorities-are-penalized-for-promoting-diversity [https://perma.cc/DR3U-DWB4].

17 Green, *supra* note 9.

18 Sherly Estrada, *More Women Selected as Fortune 500 board directors, but racial diversity lags*, FORTUNE, Sept. 23, 2020, https://www.hrdive.com/news/women-fortune-500-board-directors-racial-diversity/585738/ [https://perma.cc/QK6V-WGZX].

19 BOARD MONITOR US 2020, *supra* note 8, at 4, 11; SPENCER STUART, 2019 U.S. SPENCER STUART BOARD INDEX 1 (2019), https://www.spencerstuart.com/-/media/2019/ssbi-2019/us_board_index_2019.pdf [https://perma.cc/R2UC-JB3Y]. Peter Eavis, *Diversity Push Barely Budges Corporate Boards to 12.5%, Survey Finds*, N.Y. TIMES, Sept. 15, 2020, https://www.nytimes.com/2020/09/15/business/economy/corporate-boards-black-hispanic-directors.html [https://perma.cc/35WV-Q94P].

Of course, the 2020 summer has encouraged companies to "recommit" to enhancing racial equity, with a specific emphasis on Blacks.[20] This recommitment in the economic realm often includes focusing on board diversity. Such focus begs an important question: how does board diversity advance the call to promote racial equity for Black people?

A. Linking Board Diversity and Efforts to Dismantle Workforce Discrimination

One extremely important reason why board diversity matters is because the lack of board diversity is a visible reflection of the racial discrimination and inequities in the broader labor market, signaling the significant extent to which discrimination impedes the ability of Black people to achieve upward mobility and prosperity. Black people account for 13.4% of the U.S. population,[21] and 12.1% of the U.S. workforce.[22] However, Blacks only account for 8% of managers and 4.3% of chief executives.[23] Then too, there are only three Black CEOs of *Fortune* 500 companies—meaning 99.4% of *Fortune* 500 CEOs are white.[24] Since 1999, there have been

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20 *See e.g., CEO Charlie Scharf Reinforces Commitment to Diversity and Inclusion,* BUS. WIRE, Sept. 23, 2020, https://www.businesswire.com/news/home/20200923005604/en/CEO-Charlie-Scharf-Reinforces-Commitment-to-Diversity-and-Inclusion [https://perma.cc/Y9KK-S2XM] [hereinafter Market Insider] (outlining Wells Fargo's CEO Charlie Scharf's commitment to meaningful progress).

21 Geri Stengel, *Black Lives Matter Protests Moves Corporate D&I Initiatives Center Stage*, FORBES, June 17, 2020, https://www.forbes.com/sites/geristengel/2020/06/17/black-lives-matter-protests-moves-corporate-di-initiatives-into-the-spotlight/#df5fdc17a0d0 [https://perma.cc/3WQF-J7F3].

22 Mitra Toosi & Leslie Joyner, *Blacks in the Labor Force, in Spotlight on Statistics*, U.S. BUREAU OF LABOR STATISTICS (Feb. 2018), https://www.bls.gov/spotlight/2018/blacks-in-the-labor-force/pdf/blacks-in-the-labor-force.pdf [https://perma.cc/Q3CT-6B3N]; *see also* *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LABOR STATISTICS (Jan.22, 2021), https://www.bls.gov/cps/cpsaat11.htm [https://perma.cc/NY3Y-5678]; Laura Roberts and Anthony Mayo, *Toward A Racially Just Workplace*, HARV. BUS. REV., Nov. 14, 2019, https://hbr.org/cover-story/2019/11/toward-a-racially-just-workplace [https://perma.cc/Q9XV-RUY8].

23 *Labor Force Statistics from the Current Population Survey*, *supra* note22.

24 Roberts & Mayo, *supra* note 22; Grace Donnelly, *The Number of Black CEOs at Fortune 500 Companies Is at Its Lowest Since 2002*, FORTUNE, Feb. 28, 2018, https://fortune.com/2018/02/28/black-history-month-black-ceos-fortune-500/ [https://perma.cc/V2HS-4P6R]; Dominic-Madori Davis, *One of the only 4 Black Fortune 500 CEOs just stepped down—here are the 3 that remain,* BUS. INSIDER, July 21, 2020, https://www.businessinsider.com/there-are-four-black-fortune-500-ceos-here-they-are-2020-2 [https://perma.cc/8V9P-QZV2].

just 16 Black *Fortune* 500 CEOs.[25] Moreover, only 2 of the more than 1800 companies listed in the *Fortune* 500 since 1955 have had a Black woman CEO.[26] Mary Winston, the second Black woman to serve as *Fortune* 500 CEO, served as interim CEO of Bed Bath and Beyond for 7 months until a white man replaced her.[27] These numbers highlight the reality that Black people have been excluded from advancing within corporate America. The lack of board diversity is a continuation of the exclusion of Black people's advancement into the highest realms of corporate America, and thus one of the signals of racial inequities in the economic sphere.

Because racial bias and discrimination taint this exclusion, the lack of board diversity is a visible symptom of the problem associated with racial discrimination, bias and inequity throughout the corporate sphere. A robust array of studies confirms that the lack of Blacks in leadership positions is the result of bias and discrimination in corporate employment practices that is pervasive and has not declined in the decades since the passage of legislation seeking to eradicate racial employment discrimination.[28] These studies

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25 Donnelly, *supra* note 24.

26 *See* KORN FERRY, THE BLACK P&L LEADER: INSIGHTS AND LESSONS FROM SENIOR BLACK P&L LEADERS IN CORPORATE AMERICA 27 (2019), https://www.kornferry.com/content/dam/kornferry/docs/pdfs/korn-ferry_theblack-pl-leader.pdf [https://perma.cc/8DZW-SYPA] [hereinafter Korn Ferry Insights] (noting that only one Black woman has served as a Fortune 500 CEO). *See also* Donnelly, *supra* note 24. These articles do not include Mary Winston who served as interim CEO. *See* Davis, *supra* note 24.

27 Davis, *supra* note 24.

28 *See* Korn Ferry Insights, *supra* note 26, at 6 ("Organizations have made strides to create more welcoming and inclusive cultures, and yet the number of senior Black executives. . .continues to decline."); Roberts & Mayo, *supra* note 22; Everett J. Mitchell & Donald Sjoerdsma, *Black Job Seekers Still Face Racial Bias in Hiring Process*, LIVECAREER, Sept. 2, 2020, https://www.livecareer.com/resources/careers/planning/black-job-seekers-face-racial-bias-in-hiring-process [https://perma.cc/C7N7-UPRD] (stating that minorities receive fewer responses to applications when they have comparable qualifications); Lincoln Quillian, Devah Pager, Arnfinn H. Midtboen & Ole Hexel, *Hiring Discrimination Against Black Americans Hasn't Declined in 25 Years*, HARV. BUS. REV., Oct. 11, 2017, https://hbr.org/2017/10/hiring-discrimination-against-black-americans-hasnt-declined-in-25-years [https://perma.cc/V73M-W7HQ] (describing how there had been no change in hiring rates over 25 years); Eva Zschirnt & Didier Ruedin, *Ethnic Discrimination in Hiring Decisions: A Meta-Analysis of Correspondence Tests 1990-2015*, 42 J. ETHNIC AND MIGRATION STUDIES 1115, 1128 (2016) (explaining high rates of discrimination against minority applicants); Dina Gerdeman, *Minorities Who "Whiten" Job Resumes Get More Interviews*, HARV. BUS. REV., May 17, 2017 ("[C]ompanies are more than twice as likely to call minority applicants for interviews if they submit whitened resumes. . ."); Sonia K. Kang, Katherine De Celles, Andras Tilcsik, & Sora Jun, *Whitened Resumes: Race and Self Preservation in the Labor Market*, 61 ADMIN. SCI. Q. 469–502 (2016), https://www-

make clear that the lack of Black leaders, including CEOs and board members, is a reflection of this pervasive bias and discrimination. As one study concluded, "according to both quantitative and qualitative data, working African-Americans—from those laboring in factories and on shop floors to those setting C-suite strategy—still face obstacles to advancement that other minorities and white women don't."[29] In this regard, the "painfully slow" advancement of Black professionals once they enter the workforce along with the "especially bleak" underrepresentation of Black professionals in the "highest echelon of corporate America" is a reflection of the persistent discrimination in hiring and promotion practices.[30] Another study notes, the pervasive race-based discrimination in the employment market, particularly with respect to the hiring process, "substantially contributes to labor market inequalities by blocking racial minorities' access to career opportunities."[31] This access includes the opportunity to serve on corporate boards. Corporations heavily rely on the C-suite to fill board seats.[32] This reliance means that the discrimination that impedes Blacks' progress into the C-suite also impedes their progress into boardrooms. Then too, the racial bias and discrimination that impact the hiring process also impact the board nomination and selection process.[33] Promoting board diversity therefore is an integral part of the broader effort to eradicate racial bias and discrimination in employment patterns, and thus to respond to inequities in the labor market.

B. Credibility

Board diversity is important as a visible sign of corporate commitment to racial equity and inclusion, setting an important tone at the top about the corporation's commitment to workforce diversity and equity more broadly.[34] To put it

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2.rotman.utoronto.ca/facbios/file/KangDecellesTilcsikJun2016ASQ.pdf [https://perma.cc/8HAB-J8AF].

29 Roberts & Mayo, *supra* note 22.

30 J. Yo-Jud Cheng, Boris Groysberg, & Paul M. Healy, *Why Do Boards Have So Few Black Directors?*, HARV. BUS. REV., Aug. 13, 2020, https://hbr.org/2020/08/why-do-boards-have-so-few-black-directors [https://perma.cc/YHM8-KNZ3]; *see also* Kang, *supra* note 28at 470.

31 *Id.*

32 *Infra* note 85 and accompanying text.

33 *Infra* note 96 and accompanying text.

34 *See* Jamie C. Smith, *Four ESG Highlights from the 2020 Proxy Season*, E&Y, July 28, 2020, https://www.ey.com/en_us/board-matters/four-esg-highlights-from-the-2020-proxy-season [https://perma.cc/CT5T-MFHG]

bluntly, corporate commitments to racial diversity and equity lack credibility if entities making the commitment do not have diverse boards.[35] At the very least, the lack of board diversity suggest that corporations are not committed to such diversity and the racial equity it reflects. As one set of researchers note, the lack of racial and ethnic board diversity "speaks for itself, and likely sends a stronger signal to investors, employees and other stakeholders than the company's messaging in this area.[36]

C. The Limits and Benefits of the Seat at the Table

Board diversity matters because it gives Blacks—and by extension the Black community—an invaluable seat at the corporate table. This seat not only represents an opportunity for Blacks to be heard, but also increases the likelihood that perspectives related to the Black experience will be considered and will influence important corporate decisions, particularly decisions involving racial issues. To this end, some suggest that racial/ethnic directors can promote racially equitable workplace policies and practices while reducing the amount or severity of race-based employment discrimination.[37] Others suggest that Black directors increase the likelihood that corporations better market their goods and services to Black consumers and customers, or will be better equipped to identify and develop new products and services that address the needs of Black communities.[38] Giving Blacks a seat at the board table also ensures that corporations consider differing perspectives with respect to all decisions.[39]

Of course we must be careful not to overpromise in this area. First, it is problematic to suggest that all Black people

[hereinafter Four Highlights] ("[D]iversity in the boardroom and C-suite often speaks for itself, and likely sends a stronger signal to investors, employees and other stakeholders than the company's messaging in this area.").

35 *See* DELOITTE INSIGHTS, THE INCLUSION IMPERATIVE: REDEFINING BOARD RESPONSIBILITIES TO SUPPORT ORGANIZATIONAL INCLUSION 3 (2019), https://www2.deloitte.com/content/dam/insights/us/articles/4987_the-inclusion-imperative-for-boards/DI_The-inclusion-imperative-for-boards.pdf [https://perma.cc/P3KH-XYXN]

36 Four Highlights*, supra* note 34, at 8.

37 Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 825 (2005).

38 *See id.*, at 820 ("[C]orporations that employ diverse individuals will reach a broader range of customers and clients, thereby increasing their sales performance and ultimate profitability.").

39 *See id.*, at 831-32 ([H]aving directors of color enhances the quality of a board's decision-making and monitoring functions.").

think alike or necessarily share the same perspective and experiences. Indeed, Black directors often share socio-economic traits that are similar to their white counterparts.[40] However, research indicates that there are certain experiences and perspectives common to people of the same racial group irrespective of social or economic similarities with other groups.[41] Research also indicates that people within the same racial group are more likely to identify along racial lines when the issues they confront relate to race.[42] As one set of researchers notes, race represents a "key" determinant[] of a person's experiences, attitudes, frame of reference, and point of view."[43] This research suggests that it is likely that Black directors will understand and share common perspectives with members of the Black community, particularly when compared to other directors. Hence, while it is important not to overstate this benefit, adding Black directors certainly has the strong potential to increase the possibility that corporations will consider experiences and perspectives of Black community members, particularly with respect to issues involving race and equity.

A second reason to be cautious about the ability of Black directors to influence corporate decision-making is that such ability may only be realized if boards have a critical mass of diverse directors. Research suggests that without critical mass, directors may not feel comfortable voicing different experiences and perspectives, particularly around sensitive

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40 *See id.*, at 835 ("Typically, the only significant difference between directors of color and white directors is their race or ethnicity.").

41 *See* Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1236–37 (2003) (explaining issues where African Americans agree regardless of class situation); Lani Guinier, *The Pigment Perplex: The Complexity of Race Reveals the Inefficacy of Conventional Admissions Criteria and Demonstrates the Vital Importance of Diversity*, AM. LAW, Aug. 2002, at 61. *See also* MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN – AMERICAN POLITICS 55, 115-117, 182 (1994); PATRICIA GURIN, JACKSON SHIRLEY & JAMES S. JACKSON, HOPE AND INDEPENDENCE: BLACKS' RESPONSE TO ELECTORAL AND PARTY POLITICS 75–81, 109 (1989) *and* DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS, 27–33 (1996) (explaining how the racial divide persists even controlling for factors such as class or status).

42 *See* Charles *supra* note 41, at 1236-37 ("These findings clearly demonstrate that on racial and social welfare issues, African Americans are very to relatively liberal and whites are very conservative.").

43 *See*, DELOITTE, SEEING IS BELIEVING: 2017 BOARD DIVERSITY SURVEY (2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-about-board-diversity-survey-seeing-is-believing.pdf [https://perma.cc/B4WP-XQMF] (citing study).

racial issues.[44]

Third, the focus on the impact of Black directors may inappropriately relieve whites of their responsibility to engage around racial equity.[45] Indeed, it is unfair to suggest that Black people bear the burden of eradicating racial inequities.

Finally, it is important to be mindful of the limited role directors play in the corporate sphere. Boards have a governance and oversight role, but do not get involved with the corporation's daily activities.[46] Hence, many activities impacting critical racial equity concerns occur outside of the board's purview.

Nonetheless, and with the abovementioned caveats in mind, directors in general, and Black directors in particular, can have an influential role in ensuring that corporations expand their decision-making and prioritize racial equity. First, tone and people at the top matter.[47] Thus directors, particularly Black directors who often have important perspective on these issues, can help set an expectation around diversity, equity and inclusion within the corporation and beyond.[48] Indeed, tone at the top may set expectations around the importance of diversity within the entire corporation. Studies demonstrate a high correlation between board diversity and diversity in the C-suite, suggesting that having Black directors may influence diverse representation in other high level positions.[49] Some also suggest that having Blacks on the board serves as an important signal about the

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44 *See* Diana C. Nicholls Mutter, *Crashing the Boards: A Comparative Analysis of the Boxing Out of Women on Boards in the United States and Canada*, 12 J. BUS. ENTREPRENEURSHIP & L. 286, 299 (2019) (explaining how the impacts of diversity cannot be seen until a critical mass is reached); Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make*?, 39 DEL. J. CORP. L. 377, 390-92 (2014) ("The failure to include a critical mass of women or minorities may in some cases prevent the potential benefits of diversity."); Alison M. Konrad, Vicki W. Kramer, & Sumru Erkut, *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance,* 37 ORGANIZATIONAL DYNAMICS No. 2 145, 146 (2008); Fairfax, *supra* note 37, at 837.

45 *See* Fairfax, *supra* note 37, at 827 (explaining that directors of color cannot be the only source of responding to diverse perspectives).

46 *See* Jill Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265, 269-275 (1997) ("Recent developments in corporate practice have emphasized the monitoring aspects of the board's role.").

47 DELOITTE INSIGHTS, *supra* note 35 and accompanying text.

48 DELOITTE, BOARD PRACTICES REPORT: COMMON THREADS ACROSS BOARDROOMS (2018), https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/us-board-practices-report-common-threads.html[https://perma.cc/E8KE-A4LH].

49 SPENCER STUART, *supra* note 19, at 21.

priorities around workforce diversity more broadly.[50] Second, boards can shape policy and practice through asking strategic questions or highlighting particular perspectives.[51] This means that boards can influence diversity practices in their governance role by asking questions about DEI practices related to customers and clients or about the workplace culture.[52] Third, boards can hold management accountable for issues impacting racial equity not only by tracking information and progress, but also by ensuring concrete consequences for failures or successes in this area.[53] While by no means a guarantee, having Black directors on the board not only increases the likelihood that these measures will be taken, but also increases the likelihood that they will be prioritized and appropriately engaged.

D. Corporate Purpose

Board diversity matters because corporations control significant resources and boards exercise discretion over how those resources are deployed. It is undeniable that corporations have engaged in discriminatory practices that have negatively impacted communities of color while both creating and exacerbating racial inequities. Based on this fact, some may believe that we should not focus our efforts on seeking to reform the corporation and thus should not embrace proposals like board diversity aimed at reforming the corporation.[54] This misses the mark. Corporations, individually and collectively, control vast resources. Corporate boards and executives also have significant discretion that external regulations do not penetrate.[55] Given this reality, it

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50 Four Highlights*, supra* note 34, at 6.

51 *See* Matt Krentz, Ulrike Schwarz-Runer, & Frances Brooks Taplett, *Diverse Boards Haven't Led to Diverse Leadership Teams (Yet)*, BCG, Apr. 22, 2020, https://www.bcg.com/en-us/publications/2020/diverse-leadership-teams [https://perma.cc/4GNE-TYWY] ("Directors have the ability to shine a light on the underlying problems, ask the tough questions, and decide on leadership incentives.").

52 DELOITTE INSIGHTS, THE INCLUSION IMPERATIVE: REDEFINING BOARD RESPONSIBILITIES TO SUPPORT ORGANIZATIONAL INCLUSION, *supra* note 35.

53 *Id.*

54 For a particularly scathing critique of corporate response to the Black Lives Matter protest and the need to focus on dismantling rather than reform, *see e.g*, Tithi Bhattacharya, *Fuck Mindfulness Workshops: We need to Return to the Summer of BLM Uprising*, SPECTRE J., Mar. 24, 2021, https://spectrejournal.com/fuck-mindfulness-workshops/?fbclid=IwAR1gQNXfQp5fJNiJrfSTwNPm1t4GV0ca26gLEdECWojrwnIhi89AzU3J5UM [https://perma.cc/6ZDF-73R8].

55 *See e.g.*, Stephen Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. Rev. 83, 84-90 (2019); Stephen Bainbridge, *Director*

would be a mistake *not* to develop strategies that better ensure Black representation within the corporate sphere because those strategies may serve to increase the likelihood that the vast amount of corporate resources and discretion will be used in a manner that benefits the Black community.

Then too, a more equitable corporate purpose aligns with board diversity. Recently there has been a growing consensus (at least rhetorically) around the view that corporations should not focus solely on profit, but must embrace a corporate purpose that promotes the interests of all stakeholders.[56] While this view of corporate purpose does not mention equity explicitly, it does insist that corporations focus on issues impacting equity such as more equitable and inclusive policies associated with employees, customers, clients, and consumers.[57] Moreover, board diversity is a core issue for advocates within the corporate community that embrace the stakeholder theory of corporate purpose because of what such diversity reflects and signals about a corporation's commitment to equity.[58] Hence, board diversity

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Primacy: The Means and Ends of Corporate Governance, 97 NW. U. L. REV. 547, 600-05 (2003).

56 *See* Letter from Larry Fink, Chairman and Chief Executive Officer of BlackRock, to CEOs, *A Fundamental Reshaping of Finance* (Jan. 14, 2020) https://www.blackrock.com/hk/en/insights/larry-fink-ceo-letter [https://perma.cc/9LKS-ZAFT] (outlining several areas that corporations should emphasize over profits); *Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy that Serves All Americans,"* BUS. ROUNDTABLE, Aug. 19, 2019, https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/6Z3W-7E9X] [hereinafter *Business Roundtable Statement*] (detailing the "essential role corporations can play in improving" society); *All Stakeholders Not Just Shareholders*, INDUSTRY WEEK, Aug. 20, 2019, https://www.industryweek.com/leadership/article/22028107/corporations-new-purpose-to-serve-all-stakeholders-not-just-shareholders [https://perma.cc/P6NR-YZRV] [hereinafter *All Stakeholders*] ("It seems the corporate world is all in."); ERNST & YOUNG, EY CENTER FOR BOARD MATTER: FIVE TAKEAWAYS FROM THE 2019 PROXY SEASON 5 (2019), https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/cbm/ey-cbm-2019-proxy-season-preview.pdf [https://perma.cc/743N-ACHB] [hereinafter *Board Matters*].

57 *See Business Roundtable Statement, supra* note 56 (corporate commitment to "foster diversity and inclusion" and "[d]ealing fairly and ethically" with suppliers); Letter from Larry Fink, *supra* note 56.

58 *See* Sarah Krouse, *BlackRock: Companies Should Have at Least Two Female Directors*, WALL. S. J., Feb. 2, 2018, https://www.wsj.com/articles/blackrock-companies-should-have-at-least-two-female-directors-1517598407 [https://perma.cc/YZ7Q-FGPK] ("We believe that a lack of diversity on the board undermines its ability to make effective strategic decisions."); Cydney Posner, *BlackRock Advocates that at Least Two Women be on Each Company Board*, COOLEY PUBCO, Feb. 6, 2018,

matters for what it represents to the growing emphasis on a corporate purpose beyond strict short-term profit-making, and towards a more equitable vision.

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It is important not to overstate the ability of board diversity to be a cure-all. Boards have limits. Directors have limits. Moreover, adding Black directors without meaningfully changing corporate culture, practices, and policies, will not address the racial inequities within the board market. However, board diversity matters first and foremost as a component of the broader response to the racial bias in employment that has fostered both the lack of board diversity and inequities in the labor market and the broader economy. Board diversity also has the potential to increase corporate focus on meaningfully addressing inequitable policies and practices within the corporate sphere. In this regard, it is a necessary, though far from sufficient, response to the problem of racial inequity in the economic sphere.

II
ROADBLOCKS TO SUCCESS

A. Regulatory Reform and its Limits

1. *Promising Signals*

The new regulatory initiatives could significantly impact board diversity based solely on the number of companies potentially impacted by those initiatives. There are some 761 publicly traded companies headquartered in California.[59] This represents about 20% of all publicly traded corporations.[60] Under California's law, any publicly held

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https://cooleypubco.com/2018/02/06/blackrock-advocates-that-at-least-two-women-be-on-each-company-board/ [https://perma.cc/Q6GH-SVJM] (explaining BlackRock's policy of encouraging companies to have a minimum of two women on their boards); STATE STREET GLOBAL ADVISORS, 2108 PROXY VOTING AND ENGAGEMENT GUIDELINES: NORTH AMERICA (2018); F. William McNabb III, *An Open Letter to Directors of Public Companies Worldwide*, VANGUARD, Aug. 31, 2017, https://about.vanguard.com/investment-stewardship/governance-letter-to-companies.pdf [https://perma.cc/C268-RUYV] (describing the four pillars of corporate governance including a diverse board).

59 Richard Vernon Smith, *California Mandates Female Representation on Public Company Boards*, FORBES, Oct. 1, 2018, https://www.forbes.com/sites/allbusiness/2018/10/01/california-mandates-female-representation-public-company-boards/#6fb4e2f81775 [https://perma.cc/FR5J-C7VW].

60 Jason M. Thomas, *Where Have All the Public Companies Gone?*, WALL ST. J., Nov. 16, 2017, https://www.wsj.com/articles/where-have-all-the-public-companies-gone-1510869125 [https://perma.cc/4AE8-D7NE]. This figure

corporation with principal offices in California must have at least one director from an underrepresented community by the end of 2021.[61] By the close of 2022, a covered corporation with between five and eight directors must have at least two directors from underrepresented communities, and a covered corporation with nine or more directors must have at least three directors from underrepresented communities.[62] The lack of board diversity suggest that many corporations would be out of compliance with the law. Hence, if corporations comply with the law, it could have a considerable impact on increasing board diversity. Importantly, California's gender diversity law has had a significant impact on its gender diversity numbers. From 2019-2020, the number of companies with 20% women on their board went from 236 to 349, increasing by 113 companies.[63] To put that in perspective, only five other states had increases in the double digits (34, 27, 21, 11 and 12), every other state only saw single-digit increases.[64] Then too, more than half of America's publicly traded companies are listed on Nasdaq.[65] If corporations comply with the Nasdaq rule, it could have a meaningful impact on diversity efforts.

The Nasdaq rule is especially promising because it requires disclosure of diversity data. Neither federal nor state law requires corporations to report information about their board's demographic characteristics.[66] There also is very little voluntary disclosure. A 2016 survey found that only 18% of large-cap and 9% of medium-cap companies disclosed such information.[67] A 2020 report found only 10% of S&P

represents a decline from the 1990s in which there were some 7,322 public companies. *See id.*

61 *A.B. 979, supra* note 4; Bell, *supra* note 4.

62 *A.B. 979, supra* note 4; Bell, *supra* note 4.

63 2020 WOMEN ON BOARDS, GENDER DIVERSITY INDEX 6 (2020).

64 *Id.*

65 *See Leading Stock Exchanges in the Americas in 2019, by number of listed companies*, STATISTA (Nov. 2020), https://www.statista.com/statistics/265285/number-of-listed-companies-on-stock-exchange-in-the-americas/ [https://perma.cc/6NSR-2LF6] (noting that roughly 3,140 companies are listed on Nasdaq); Spencer Israel, *The Number of Companies Publicly Traded in the US is Shrinking—Or is it?*, MARKETWATCH, Oct. 30, 2020, https://www.marketwatch.com/story/the-number-of-companies-publicly-traded-in-the-us-is-shrinkingor-is-it-2020-10-30?mod=investing [https://perma.cc/4DMD-B8KV] (noting that some 6,000 companies are listed on Nasdaq and the NYSE).

66 Green, *supra* note 9.

67 *See* SEEING IS BELIEVING: 2017 BOARD DIVERSITY SURVEY, *supra* note 43, at 7 (citing study).

500 companies disclosed demographic board data.[68] Without numbers, it is difficult to measure diversity and hold corporations accountable for their diversity efforts.

These initiatives are also promising because they define board diversity to specifically include race. Studies indicate that the failure to specifically include race in board diversity definitions has negative repercussions for meaningful progress. The SEC approved a rule, which took effect in 2010, requiring public companies to disclose whether and to what extent their nominating committee considers diversity in their board nomination process.[69] The rule allowed companies to define diversity "in ways that they consider appropriate."[70] Studies reveal that the SEC's failure to define board diversity enabled corporations to portray boards comprised entirely of white people or white men as diverse.[71] This is because such corporations focused their board diversity definition on experiences, expertise or background, all of which can theoretically be achieved without racial diversity.[72] By contrast, when companies define diversity with a specific criteria, they are much more likely to enhance their numbers related to that criteria.[73] Thus, the specific reference to race in the California and Nasdaq rules bodes well for efforts to enhance racial diversity.

Finally, these regulations, combined with the current climate, could spur the embrace of board diversity more broadly, encouraging companies in other states or otherwise not covered by these laws to diversify.

2. *Some Headwinds*

Companies can satisfy the California and Nasdaq rules

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68 Matteo Tonello, *Corporate Board Practices in the Russell 3000 and S&P 500*: 2020 Edition, HARV. L. SCH. F. ON CORP. GOVERNANCE, Oct. 18, 2020, https://corpgov.law.harvard.edu/2020/10/18/corporate-board-practices-in-the-russell-3000-and-sp-500/ [https://perma.cc/KJE6-G3G5].

69 *See* Proxy Disclosure Enhancements, Exchange Act Release No. 33-9089, FR Doc. 2010-4006 (Dec. 16, 2009) (explaining the amendments to Item 407© of Regulation S-K regarding requiring disclosure of whether a nominating committee considers diversity).

70 *Id.*, at 39.

71 *See* Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L. J. 145, 185-86 (2019) ("Emcor disclosed under the SEC requirements that it considers diversity in its nomination process but indicated that its focus is on obtaining a diversity of professional expertise rather than a diversity of personal characteristics.").

72 *Id.*

73 *See id.*, at 186-87 (giving the example of Children's Place as increasing gender diversity).

without increasing Black or racial/ethnic board diversity because both rules broadly define "underrepresented minorities" to include a range of people of color and members of the LGBTQ community. While promoting all under-represented communities is laudable, it is distinct from the emphasis on Black (or even racial/ethnic) lives that sparked the summer of racial reckoning.

The "comply or explain" aspect of the Nasdaq rule could undermine its effectiveness. The SEC's rule has a similar "comply or explain" provision. Unfortunately, studies reveal that some corporations rejected compliance in favor of "explaining" why diversity was not relevant to their board nomination practices.[74]

The Nasdaq rule gives companies four—and for some five—years before they must have at least two diverse directors. An extremely generous timeline that could slow the pace of meaningful reform.

Both regulations also run the risk of being challenged, particularly on equal protection grounds, and ultimately found unlawful.[75] Hence, there is no guarantee that the regulations will result in increased racial/ethnic directors, let alone Blacks.

Even if current reforms survive anticipated challenges, they have potentially problematic loopholes and do not capture the entire corporate world. Thus, board diversity remains dependent on voluntary efforts. The next sections highlight some roadblocks for those efforts, many of which reflect racial biases that pervade board policies and practices.

B. Diversity By Any Other Name. . .

The reluctance to define diversity to include race clearly favors a racially-biased status quo, and thus serves as a stumbling block. This reluctance has enabled corporations to embrace diversity while avoiding race and any change to their board's racial makeup.[76] To be sure, many voluntary efforts to

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74 *See* CALVERT ASSET MANAGEMENT COMPANY, CORPORATE BOARD DIVERSITY DISCLOSURE SCORECARD 6 (2010); *See* Lisa M. Fairfax, R*evising Justifications for Board Diversity,* THE CONFERENCE BOARD, Nov. 2011, at 4 (citing scorecard).

75 *See* Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826* 2 (Stanford L. Sch. & The Rock Ctr. for Corp. Governance, Working Paper No. 232, 2018) ("SB 862 would likely be challenged on equal protection grounds and the means that the bill uses, which is essentially a quota, could be difficult to defend.").

76 *See* Nili, *supra* note 71, at 186-187 and accompanying text; Thomas Lee Hazen & Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure*, 37 U. DAYTON L. REV. 39, 59-66 (2011); Tamara S. Smallman, Note, *The Glass*

promote diversity specifically incorporate race in their definition, and often prioritize Black people.[77] However, reluctance in this area persists. The SEC's most recent guidance on its diversity rule—which covers all public companies—continues to fall short of defining diversity.[78] Unfortunately, race-blind diversity efforts and criteria run the risks of impeding any serious efforts at promoting board diversity with respect to race.

Particularly problematic is the effort to shift diversity definitions from race to experiences and backgrounds. One survey demonstrated that 95% of respondents believed that boards need diversity while 90% believed that such diversity could not be achieved through racial and gender diversity.[79] This contrarian view is both racially biased and inaccurate. Empirical research reveals that racial and gender board diversity dramatically increases diversity of experiences and backgrounds because all white boards reflect a narrower range of professions and experiences.[80] Research also reveals that race and gender enhance diversity of experiences and perspectives because they are key determinants of perspective, experience and frame of reference.[81] It is therefore extremely unlikely to achieve diversity of perspective, experiences and backgrounds without racial and gender diversity.

C. The CEO Pipeline

The corporate reliance on CEO status as a criteria for board service automatically eviscerates the number of available Black candidates. Corporations almost always focus their board search on people who serve or have served as CEOs

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Boardroom: The SEC's Role in Cracking the Door Open So Women May Enter, 801 COLUM. BUS. L. REV. 801, 817 (2013); AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY 19 (2015); CALVERT INVESTMENTS, EXAMINING THE CRACKS IN THE CEILING: A SURVEY OF CORPORATE DIVERSITY PRACTICES OF THE S&P 100 7 (2015), http://www.ebony.com/wp-content/uploads/2013/04/BR10063.pdf [https://perma.cc/2TN4-YXCC].

77 *See supra* notes 2, 3, 20 and accompanying texts.

78 *See Regulation S-K: Questions and Answers of General Applicability Section* 116.11, 133.13, SEC.GOV (last updated Sept. 21, 2020), https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm [https://perma.cc/8ND3-9LEZ] (explaining how a board can still define diversity for itself).

79 *See* SEEING IS BELIEVING: 2017 BOARD DIVERSITY SURVEY, *supra* note 43, at 7, 26.

80 *See* SPENCER STUART, *supra* note 19, at 2-3 (women and directors of color are much more likely to have diverse professional experiences and backgrounds than their white counterparts).

81 *See* SEEING IS BELIEVING: 2017 BOARD DIVERSITY SURVEY, *supra* note 43, at 7.

or have C-suite experiences.[82] With only three Black CEOs of *Fortune* 500 companies,[83] and fewer than 10% of Black people holding jobs most likely to lead to the C-suite,[84] experts agree that the hyper-focus on appointing CEOs and people who serve in C-suite positions continues to be one of the biggest roadblocks to achieving board diversity.[85]

As Part I revealed, the persistence of employment discrimination has resulted in very few people being promoted to the C-suite. Hence, when corporations rely on that suite as a pipeline into the board, they perpetuate existing patterns of discrimination.

Corporations have been encouraged to extend their board searches and criteria beyond CEOs and the C-suite.[86] In response, there are many more new directors who are not CEOs.[87] Moreover, most of these directors are women and people of color.[88]

Nonetheless, the hyper-focus on C-suite roles remains a significant stumbling block. In a June 18, 2020 company-wide memo, Charles Scharf, the CEO of Wells Fargo, the largest U.S. bank employer, blamed the bank's failure to achieve its diversity goals on "the unfortunate reality" "that there is a very limited pool of Black talent."[89] Wells Fargo is often praised for its diversity,[90] and the goal of its memo was

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82 *See* Imani Moise, Jessica DiNapoli, & Ross Kerber, *Exclusive: Wells Fargo CEO Ruffles Feathers with Comments about Diverse Talent*, REUTERS, Sept. 22, 2020, https://www.reuters.com/essay/us-global-race-wells-fargo-exclusive/exclusive-wells-fargo-ceo-ruffles-feathers-with-comments-about-diverse-talent-idUSKCN26D2IU [https://perma.cc/54A6-QF75] ("Experts said one reason board rooms and C-suites lack diversity is that such jobs are often filled by people who have managed businesses, while many people of color have tended to be stuck in roles that lack a direct connection to profits.").

83 Roberts & Mayo, *supra* note 22; Donnelly, *supra* note 24; Dominic-Madori Davis, *supra* note 24.

84 *See Korn Ferry Insights, supra* note 26, at 8; Posner, *supra* note 10.

85 *See Korn Ferry Insights, supra* note 26 and accompanying text; Gabriel Perna, *Six Tips for Improving Diversity in the Boardroom*, CORP. BOARD MEMBER, https://boardmember.com/six-tips-improving-diversity-boardroom/ [https://perma.cc/3P6K-QQMP] ("[B]oards continue to focus on appointing CEOs."); Moise, DiNapoli, & Kerber, *supra* note 82.

86 SPENCER STUART , *supra* note 19, at 2.

87 *Id.*

88 *Id.*

89 Jemima McEvoy, *Wells Fargo CEO Apologizes for Saying There's A 'Limited Pool of Black Talent'*, FORBES, Sept. 23, 2020, https://www.forbes.com/sites/jemimamcevoy/2020/09/23/wells-fargo-ceo-apologizes-for-saying-theres-a-limited-pool-of-black-talent/#5f1f8aa64622 [https://perma.cc/97RD-KH9U]; Moise, DiNapoli, & Kerber, *supra* note 82 and accompanying text.

90 McEvoy, *supra* note 89; Moise, DiNapoli, & Kerber, *supra* note 82.

to announce Wells Fargo's new diversity initiatives.[91] Scharf's comments reveal the strength of the talent excuse even in this era and even among strong advocates of diversity.[92]

The corporate focus on CEOs and the C-suite also reflects a form of bias. To be sure, being a director requires certain skillsets that may vary by company. However, narrow and untested presumptions around who qualifies as board-ready undermine the ability of Black professionals to secure board seats. For example, to the extent corporations have zeroed-in on CEOs and C-suite professionals based on the theoretical proposition that such experience has a positive impact on corporate performance and thus reflects a necessary criterion for board service, the proposition is both empirically untested and unsupported. A 2017 survey found that more than 94% of respondents would see a candidate without executive experience as unqualified, while 87% believe that current or retired CEOs are the most effective board members.[93] There exist very little empirical research testing the connection between CEO status and impact on board or corporate performance, and the limited available research fails to find an empirical link between CEO status and firm performance.[94] Then too, the available research suggests significant downsides to focusing on CEOs, particularly active CEOs.[95] However, many have used the fact that there are not sufficient CEOs or C-suite level Black executives to suggest that there are not enough Black executives with the requisite skills to be qualified board members.[96] Alas, it is an excuse that reflects a form of bias that too often goes unchallenged. When his comments were published in *Reuters*, Scharf "quickly" apologized for what he referred to as an "insensitive comment" reflecting his "own unconscious bias."[97] However, when Scharf

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91 McEvoy, *supra* note 89; Moise, DiNapoli, & Kerber, *supra* note 82.

92 Moise, DiNapoli, & Kerber, *supra* note 82.

93 SEEING IS BELIEVING: 2017 BOARD DIVERSITY SURVEY, *supra* note 43, at 9.

94 *See* MYLES MACE, DIRECTORS: MYTH AND REALITY 90, 92 (Harv. Bus. School, 1971) (citing a two-year study in 1990s, finding no connection between CEO status and performance); Rudiger Fahlenbrach, Angie Low, & Rene M. Stulz, *Why Do Firms Appoint CEOs as Outside Directors?*, 97 J. FIN. ECON. 12, 12 (2008) (evaluating data from 1988 to 2005 on more than 10,000 firms, concluding that CEO directors "do not affect the appointing firm's operating performance, decision-making, and CEO compensation."); Stanford Staff, *Do CEOs Make the Best Board Members*, BOARDSPAN, https://boardspan.com/users/0/library/do-ceos-make-the-best-board-members [https://perma.cc/J22C-W67P].

95 *See* MACE, *supra* note 94, at 107-108; Fahlenbrach, Low, & Stulz, *supra* note 94, at 34; Stanford Staff, *supra* note 94

96 *See Korn Ferry Insights, supra* note 26 and accompanying text.

97 *Reuters* published Scharf's comments on Tuesday, September 22, and he

made his initial comments some three months before his apology, many failed to find it offensive.[98] The lack of initial reaction underscores the extent to which the pipeline excuse remains an acceptable and accepted narrative for failed diversity efforts.

D. Diversity and Presumptions of Racial Incompetence

Another very important stumbling block to enhanced board diversity efforts is the differential treatment afforded the board focus on CEOs, on the one hand, and the desired board focus on diversity, on the other hand. When it comes to a criterion that impedes racial diversity (i.e., CEO status), the corporate community has been willing to embrace the criteria without any meaningful empirical evidence. However, the corporate community has been unwilling to embrace board diversity without empirical evidence. There is a virtual deluge of studies seeking to demonstrate a link between board diversity and corporate performance.[99] These studies exist *because* the corporate community was unwilling to embrace board diversity without empirical support.[100] The corporate community also has been willing to embrace a racially exclusionary criteria (i.e., CEO status) even when evidence undermines the value of that criteria while simultaneously refusing to embrace racial diversity despite a growing body of evidence revealing that such diversity does add value.[101] To be sure, some have criticized the empirical research on board diversity as mixed or weak.[102] However, the evidence on CEO

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issued an apology on Wednesday, September 23—3 months after the original company-wide message. *See* McEvoy, *supra* note 89 and accompanying text; Market Insider, *supra* note 20.

98 *See* Moise, *supra* note 82 and accompanying text.

99 *See Does Gender Diversity on Boards Really Boost Company Performance?*, KNOWLEDGE @ WHARTON (May 18, 2017), https://knowledge.wharton.upenn.edu/essay/will-gender-diversity-boards-really-boost-company-performance/ [https://perma.cc/7V6W-QHCN] (citing over 100 studies); Jie Chen, Woon Sau Leung, Wei Song, & Marc Goergen, *Research: When Women on Boards, Male CEOs are Less Overconfident*, HARV. BUS. REV., Sept. 12, 2109, https://hbr.org/2019/09/research-when-women-are-on-boards-male-ceos-are-less-overconfident?ab=at_articlepage_whattoreadnext [https://perma.cc/29K3-Y5FV]; *Report: The Bottom Line: Connecting Corporate Performance and Gender Diversity*, CATALYST, Jan. 15, 2004, https://www.catalyst.org/research/the-bottom-line-connecting-corporate-performance-and-gender-diversity/ [https://perma.cc/9U8D-AT7H].

100 *See* Fairfax, *Bottom Line, supra* note 37, at 840 (top corporations "immediately reject[]" the notion that they should advance diversity boards without some business case).

101 *See* LaCroix, *supra* note 1 and accompanying text.

102 *See* Nili, *supra* note 71, at 161. *See also Report: The Bottom Line:*

directors is at best non-existent and at worst mainly negative. The status of the research is not the issue—the differential treatment is.

Research confirms that this differential treatment is a form of racial bias that is especially prevalent when Blacks and people of color seek leadership positions. Such research identifies this form of bias as the presumption of incompetence.[103] The presumption of incompetence refers to the notion that our society presumes that Blacks and other people of color are incompetent, and thus demands that they demonstrate their value in ways that are not demanded of white people in general and white men in particular.[104] Instead, white men enjoy a presumption of competence whereby they are automatically viewed as having and adding value.[105] Importantly, society is willing to assume the competence and worth of white people, even when studies suggest that assumption may be without merit.[106] Research reveals that this presumption pervades the workforce,[107] and is especially pronounced when Black people achieve some success and are seeking to move up the corporate ladder.[108]

Connecting Corporate Performance and Gender Diversity, *supra* note 99 (indicating over 100 studies related to board diversity); Renee Adams & Daniel Ferriera, *Women in the Boardroom and their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 291-309 (2009) (explaining that female board members have a positive impact on corporate governance, but a negative impact on firm performance); Kathleen A. Farrell & Philip L. Hersch, *Additions to Corporate Boards: The Effect Of Gender*, 11 J. CORP. FIN. 85, 86 (2005); NORDEN, A NORDIC PERSPECTIVE ON CORPORATE BOARD DIVERSITY (2006) (gender, age and nationality diversity have no significant impact on stock market performance or returns on equity within the 500 largest companies in Denmark, Norway, and Sweden); Caspar Rose, *Does Female Board Representation Influence Firm Performance? The Danish Evidence*, 15 CORP. GOVERNANCE: INT'L REV. 404, 404 (2007).

103 *See* GABRIELLA GUTIERREZ Y MUHS, PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (2012); Derrick A. Bell & Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. CR-CL L. REV. 349, 349 (1989); Derrick A. Bell, *Diversity and Academic Freedom*, 43 J. LEGAL EDUC. 371, 377 (1993); Albert T. Quick & Kent Lollis, *Retention of Minority Professors: Dealing with Failure to Presume Competence*, 10 ST. LOUIS U. PUB. L. REV. 361, 363 (1991); Pamela J. Smith, *When Sapphire Meets Socrates*, 10 UCLA WOMEN'S L. J 373, 394-97 (2000); Don Williamson, *Racism Lurks in Presumption of Incompetence*, SEATTLE TIMES, Apr. 12, 1992.

104 *See supra* note 103 and accompanying text.

105 *Id.*

106 *See* RODNEY COATS, COVERT RACISM: THEORIES, INSTITUTIONS, AND EXPERIENCES 12 (Brill, 2011); William Y. Chin, *The Age of Covert Racism in the Era of the Roberts Court*, 16 RUTGERS RACE & L. REV. 1, 29-31 (2015).

107 *See* Chin, supra note 106, at 31-32 (explaining a study where participants rated a white man's performance the highest despite the setting being the same).

108 Williamson, *supra* note 103.

A recent Korn/Ferry study vividly captured these racial presumptions, highlighting the manner in which they translate into differential treatment of Black and white executives. According to the study, presumptions of Black people's lack of qualifications and capability force them to "work harder to demonstrate—and validate—their value."[109] The study found that Black leaders often exceed expectations, but nevertheless have to "repeatedly perform well in tough assignments before they could climb the corporate ladder."[110] In sharp contrast, many of their white coworkers, "seemed to be judged on potential and given opportunities based on that perceived potential."[111] The study makes clear that these presumptions are a form of racial bias that create headwinds for Black executives ability to achieve success.[112]

The differential treatment related to the board diversity empirical studies aligns with the presumption of incompetence that pervades expectations of Blacks in corporate America and on that basis should be viewed as a form of racial bias. CEOs, almost all of whom are white, are judged on their potential and afforded board membership based on that potential. Blacks and other candidates of color are not afforded these same presumptions, but instead have been asked to prove their value or risk being excluded from the pool of available candidates.

E. Racially Exclusive Networks

Another clear stumbling block is the heavy reliance on personal and professional networks in the board search and recruitment process. Research reveals that the vast majority of director candidates come to the attention of the board through informal social and professional relationships and networks.[113] Unfortunately, research also confirms that these networks remain insular and largely closed to Black people.[114] Moreover research reveals that only 8% of companies rely on

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109 *Korn Ferry, Insights, supra* note 26, at 23.

110 *Id.*

111 *Id.*

112 *Id.*, at 24.

113 *See* Posner, *supra* note 10 ("The *HBR study* also found that social networks were the primary method of introduction."); Cheng, Groysberg, & Healy, *supra* note 30; BOARD PRACTICES REPORT: COMMON THREADS ACROSS BOARDROOMS, supra note 48, at 8.

114 *See* Moise, DiNapoli, & Kerber, *supra* note 82 ("[M]any people of color have tended to be stuck in roles that lack a direct connection to profits."); Posner, *supra* note 10 ("[O]nly about 1% of board members in the S&P 500 were Black directors, and 37% of boards did not have any Black directors.").

organizations focused on diversity when seeking to diversify their boards.[115] As one article noted, "the recruiting process has been heavily reliant on white, male boards members' personal networks, which often don't include minority executives."[116] The reliance on these networks serves to perpetuate racial homogeneity on boards.[117] By contrast, research and experience suggest that when corporations prioritize diversity and focus their recruitment efforts beyond these networks they achieve results. Unfortunately, while diversity advocates have long complained about the insular nature of these networks, corporations continue to rely on them.[118] Such continued reliance significantly undermines the extent to which boardroom diversity can be achieved.

CONCLUSION

The lack of board diversity is a visible symptom of a significant problem that corporate America has failed to solve. Board diversity matters because eradicating racial bias and discrimination matters. Board diversity matters because it not only sets an important tone at the top, but also may help corporations address important racial matters within the corporate sphere. While both voluntary efforts and new regulations reveal promising signs, there remain areas of concern that must be intentionally addressed in order to achieve meaningful progress with respect to board diversity.

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115 BOARD PRACTICES REPORT: COMMON THREADS ACROSS BOARDROOMS, supra note 48, at 8.

116 Jeanna Sahadi, *There's no Excuse for not Having Racially Diverse Boards. Here's How to do it*, CNN, Aug. 12, 2020, https://www.cnn.com/2020/08/12/success/board-diversity/index.html [https://perma.cc/EL9S-QPEB].

117 Mitchell & Scjoerdsma, *supra* note 28; Posner, *supra* note 10; Cheng, Broysberg, & Healy, *supra* note 30; *Korn Ferry Insights, supra* note 26, at 28.

118 *See supra* note 113 and accompanying text.