Nonprofit Board Composition

ATINUKE O. ADEDIRAN[*]

This Article addresses a critical gap in the literature and current debates about the composition of nonprofit boards. The law of fiduciary duties and nonprofit governance best practices do not provide sufficient guidance on how to compose boards to empower the communities they serve. And even as the corporate sector is seizing on current important moments to debate the inclusion of employees and racial and ethnic minorities on corporate boards, nonprofit boards are largely left out of these debates. The Article introduces the concept of board capital, which originated from the for-profit management literature, but has gained a stronghold in the nonprofit boards' literature, to provide guidance on how to compose boards of nonprofit organizations that serve vulnerable, often minority communities. Board capital comprises financial, social, and human capital and highlights the importance of having board directors who as a group, possess the skills, knowledge, and professional and personal experiences to not only provide legal and finance expertise, and funding, but also provide strategic advice informed by knowledge of the client population. The Article supports its normative assertions with the empirical example of the 9000+ boards of directors of public interest legal organizations (PILOs). Empirical findings show that boards in these legal nonprofit organizations are largely assembled to focus on legal expertise and fundraising at the expense of social capital affinity with communities served, and human capital skills and characteristics to understand the needs of the client population and be racially and ethnically diverse. A majority of the boards comprise law firm and corporate lawyers who can be far removed from the legal and social issues the organizations represent. For other nonprofit organizations, many board members come from the business sector. This misplaced emphasis may be undercutting nonprofits' abilities to serve their stated mission effectively. Board members are more likely to hew to their own expertise and abilities to raise financial capital. Boards of directors also tend to replicate themselves, which undermines human capital knowledge of the client population and racial and ethnic diversity. The Article makes

[*] Associate Professor of Law, Fordham University School of Law; J.D., Columbia Law School; Ph.D., M.A. (Sociology), Northwestern University. I am grateful to Jeremy Bearer-Friend, Guy Uriel Charles, Madison Condon, Scott Cummings, Lisa Fairfax, Hiba Hafiz, Claudia Haupt, Renee Jones, Veronica Root Martinez, Lloyd Hitoshi Mayer, Ray Madoff, Diane Ring Blaine Saito, Natalya Shnitser, Jessica Steinberg, and Shu-yi Oei for their comments and suggestions. This project benefited from thoughtful feedback from faculty workshops at George Washington University Law School and Northeastern University Law School. I thank David Calahan, Cinque Carson, Ayomikun Idowu, and Rebecca Langsam for excellent research assistance. Thanks also to the CEOs and board members who participated in this study.

suggestions for increasing human capital, particularly expertise on the client population and racial diversity on nonprofit boards. It also addresses board capital implications for for-profit boards.

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I. INTRODUCTION

Nonprofit organizations that serve low income and other disadvantaged populations are some of the most important institutions in American life.[1] These institutions have become even more important during the COVID-19 pandemic as inequality continues to widen along economic, gender, and racial lines.[2] The work of distributing federal pandemic aid from the CARES Act and other programs, such as the eviction moratorium, has largely fallen to nonprofits.[3] Since 1964 when President Lyndon Johnson declared a "War on Poverty" and established programs such as Medicare and Medicaid, Food Stamps, the Job Corps, VISTA, Head Start, the Elementary and Secondary Education Act, and Legal Services Programs, nonprofit organizations have been instrumental in administering social and legal services and advocacy to alleviate or lift people out of poverty.[4]

Explicit and implicit in the implementation of these social and legal programs is an overarching initiative to empower communities to speak for themselves, ensuring that disadvantaged citizens have a voice in how change is structured through the leaders of nonprofit organizations.[5]

As such, the composition of the boards of directors of these important American institutions matters considerably for a number of reasons. First,

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[1] *See* STEVEN RATHGEB SMITH & MICHAEL LIPSKY, NONPROFITS FOR HIRE: THE WELFARE STATE IN THE AGE OF CONTRACTING 3 (1993).

[2] *See* Sarah Ford, *The Critical Ways America's Charities' Nonprofit Members Are Helping Communities Respond to the COVID-19 (Coronavirus) Pandemic*, AM.'S CHARITIES (Mar. 18, 2020), https://www.charities.org/news/critical-ways-america%E2%80%99s-charities%E2%80%99-nonprofit-members-are-helping-communities-respond-covid-19 [https://perma.cc/2FHR-BPCJ].

[3] *See* Conor Dougherty, *Pandemic's Toll on Housing: Falling Behind, Doubling Up*, N.Y. TIMES (Sept. 10, 2021), https://www.nytimes.com/2021/02/06/business/economy/housing-insecurity.html?referringSource=articleShare [https://perma.cc/4TC2-TZ7C].

[4] *See* John J. Corbin, *A Study of Factors Influencing the Growth of Nonprofits in Social Services*, 28 NONPROFIT & VOLUNTARY SECTOR Q. 296, 297 (1999); Michael J. Austin, *The Changing Relationship Between Nonprofit Organizations and Public Social Service Agencies in the Era of Welfare Reform*, 32 NONPROFIT & VOLUNTARY SECTOR Q. 97, 98 (2003). *See generally* Michael L. Gillette, LAUNCHING THE WAR ON POVERTY: AN ORAL HISTORY (2d ed. 2010).

[5] *See* Anthony V. Alfieri, *Inner-City Anti-Poverty Campaigns*, 64 UCLA L. REV. 1374, 1458 (2017); NOEL A. CAZENAVE, IMPOSSIBLE DEMOCRACY: THE UNLIKELY SUCCESS OF THE WAR ON POVERTY COMMUNITY ACTION PROGRAMS 1 (2007); EARL JOHNSON JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 63 (2014); Kelly LeRoux, *Paternalistic or Participatory Governance? Examining Opportunities for Client Participation in Nonprofit Social Service Organization*s, 69 PUB. ADMIN. REV. 504, 505 (2009); Rick Cohen, *Coming Full Circle: The War on Poverty's Invaluable Contribution to Today's Nonprofit Sector*, NONPROFIT Q. (Jan. 9, 2014), https://nonprofitquarterly.org/coming-full-circle-the-war-on-poverty-s-invaluable-contribution-to-today-s-nonprofit-sector/ [https://perma.cc/DLN2-2Q9K]. Scholars like Alfieri argue that these initiatives have not been collaborative but have largely been paternalistic in nature. Alfieri, *supra*, at 1397.

boards of directors establish the parameters of the social and legal changes the organizations choose to engage and are instrumental in determining the mission of the organizations.[6] Second, boards of directors ensure that the nonprofits' activities are in agreement with their missions, choose and monitor the CEO, manage relationships with other constituents outside the organization, and raise funds.[7] Third, boards of directors critically impact whether and how low income and vulnerable people are included in shaping the direction of services and structural changes, since current board directors choose future board members.[8]

However, like the boards literature whose primary focus has largely been on the role of independent board directors to prevent fraud and mismanagement,[9] the focus of most of the literature on nonprofit boards has

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[6] *See* Robert F. Leduc & Stephen R. Block, *Conjoint Directorship: Clarifying Management Roles Between the Board of Directors and the Executive Director*, J. VOLUNTARY ACTION RSCH., Oct. 1985, at 67, 70.

[7] *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).

[8] *See id.* at 352.

[9] *See, e.g.*, Stephen M. Bainbridge & M. Todd Henderson, *Boards-R-Us: Reconceptualizing Corporate Boards*, 66 STAN. L. REV. 1051, 1053–55 (2014); Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1271–72, 1274 (2017); Thomas W. Joo, *Corporate Governance and the "D-Word,"* 63 WASH. & LEE L. REV. 1579, 1579 (2006); Lynne L. Dallas, *The Multiple Roles of Corporate Boards of Directors*, 40 SAN DIEGO L. REV. 781, 782 (2003); Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1262 (1982); William Q. Judge & Carl P. Zeithaml, *An Empirical Comparison Between the Board's Strategic Role in Nonprofit Hospitals and in For-Profit Industrial Firm*s, 27 HEALTH SERVS. RSCH. 47, 50–51 (1992); Nicola Faith Sharpe, *The Cosmetic Independence of Corporate Boards*, 34 SEATTLE U. L. REV. 1435, 1435 (2011); Urska Velikonja, *The Political Economy of Board Independence*, 92 N.C. L. REV. 855, 857 (2014); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 301, 311 (1983); MONIQUE CIKALIUK, LJILJANA ERAKOVIĆ, BRAD JACKSON, CHRIS NOONAN & SUSAN WATSON, CORPORATE GOVERNANCE AND LEADERSHIP: THE BOARD AS THE NEXUS OF LEADERSHIP-IN-GOVERNANCE 3 (Thomas Clarke ed., 2020); William B. Stevenson & Robert F. Radin, *Social Capital and Social Influence on the Board of Directors*, 46 J. MGMT. STUD. 16, 17 (2009); James D. Westphal, *Collaboration in the Boardroom: Behavioral and Performance Consequences of CEO-Board Social Ties*, 42 ACAD. MGMT. J. 7, 8 (1999); Lloyd Hitoshi Mayer, *Fiduciary Principles in Charities and Other Nonprofits*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 103, 103–04 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2018); Lumen N. Mulligan, *What's Good for the Goose Is Not Good for the Gander: Sarbanes-Oxley-Style Nonprofit Reforms*, 105 MICH. L. REV. 1981, 1986 (2007); Kathleen M. Boozang, *Does an Independent Board Improve Nonprofit Corporate Governance?*, 75 TENN. L. REV. 83, 84 (2007); Amy J. Hillman & Thomas Dalziel, *Boards of Directors and Firm Performance: Integrating Agency and Resource Dependence Perspectives*, 28 ACAD. MGMT. REV. 383, 385 (2003). *See generally* Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937 (2004); John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123 (2010); Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 GA. L. REV. 1113 (2007).

centered around how to prevent mismanagement by nonprofit managers and hardly includes how to compose boards to inclusively address nonprofit antipoverty and other efforts.[10]

And even though the for-profit sector has recognized and seized on recent important moments to address board composition outside of mismanagement by debating the inclusion of employees, women and racial and ethnic minorities on corporate boards—including by legislation[11]—nonprofit boards have received little to no attention outside of previous familiar debates about preventing mismanagement.[12] Neither the law of fiduciary obligations, nor nonprofit corporate governance scholarship and best practices sufficiently address how to compose nonprofit boards to consist of a diverse range of directors who—as a collective—have the skills, knowledge, networks, experience, and personal backgrounds to fulfill their roles, which includes providing strategic advice grounded in knowledge or experience about the client population.[13]

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[10] *See, e.g.*, Brody, *supra* note 9, at 938; Eason, *supra* note 9, at 126; Mark Sidel, *Law, Philanthropy and Social Class: Variance Power and the Battle for American Giving*, 36 U.C. DAVIS L. REV. 1145, 1148 (2003); Jenkins, *supra* note 9, at 1115; Boozang, *supra* note 9, at 84; Hillman & Dalziel, *supra* note 9, at 383; Fama & Jensen, *supra* note 9, at 311.

[11] *See, e.g.*, Kimberly D. Krawiec, John M. Conley & Lissa L. Broome, *The Danger of Difference: Tensions in Directors' Views of Corporate Board Diversity*, 2013 U. ILL. L. REV. 919, 919; David A. Bell, Dawn Belt & Jennifer J. Hitchcock, *New Law Requires Diversity on Boards of California-Based Companies*, 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/SS44-NU27]; Lisa M. Fairfax, *All on Board? Board Diversity Trends Reflect Signs of Promise and Concern*, 87 GEO. WASH. L. REV. 1031, 1032 (2019); Michal Barzuza, *Proxy Access for Board Diversity*, 99 B.U. L. REV. 1279, 1281 (2019). In 2018 and 2020 respectively, California enacted laws requiring publicly traded companies headquartered in the state to appoint female directors and directors from underrepresented communities respectively, dictating the gender and racial makeup of boards of directors to make their workforces more closely reflect society. S.B. 826, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (enacted and codified at CAL. CORP. CODE §§ 301.3, 2115.5); Assemb. B. 979, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (enacted and codified at CAL. CORP. CODE §§ 301.3, 301.4, 2115.6). Assembly Bill 979 requires a minimum of one minority director by the end of 2021, and larger boards must have a minimum of two or three by the end of 2022. Assemb. B. 979. The law followed S.B. 826 requiring similar minimums of female representation on boards. S.B. 826; Assemb. B. 979. Noncompliance with either law can result in significant fines. Assemb. B. 979. Indeed, as of November 2020, at least a dozen states are weighing statutes to address the lack of diversity in corporate boardrooms. Jaclyn Jaeger, *Emerging State Board Diversity Laws Encourage Proactive Approach*, COMPLIANCE WEEK (Nov. 3, 2020), https://www.complianceweek.com/boards-and-shareholders/emerging-state-board-diversity-laws-encourage-proactive-approach/29681.article [https://perma.cc/6QUP-EUTK]. For discussions about including employees on corporate boards, see Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419, 2422 (2020) (discussing the inclusion of employees on corporate boards). *See also* Accountable Capitalism Act, S. 3348, 115th Cong. (2018); Reward Work Act, S. 2605, 115th Cong. (2018).

[12] *See supra* note 11 and accompanying text.

[13] *See* Linda Sugin, *Resisting the Corporatization of Nonprofit Governance: Transforming Obedience into Fidelity*, 76 FORDHAM L. REV. 893, 895 (2007); Dominic

This Article fills this important gap in the literature and urges scholars, legislatures, and practitioners to seize the current moment to address important board composition problems in the nonprofit sector that is so consequential to the well-being of millions of Americans.

The Article's central thesis is that the boards of directors of nonprofit organizations that serve disadvantaged people—who are often racial and ethnic minorities—should possess professional or personal backgrounds that reflect knowledge of populations served, or through their inclusiveness, empower vulnerable communities.

The Article introduces the concept of board capital to address the lack of guidance on board composition. Board capital is a well-established concept in management studies that originated in the context of for-profit boards but is now often applied to both for-profit and nonprofit boards.[14] It encompasses the skills, experiences and backgrounds boards of directors ought to possess to perform their roles towards meeting an organization's goals.[15] Board capital consists of *financial capital* (funds), *social capital* (networks to external constituents), and *human capital* (education, knowledge, skills, expertise in law and finance, industry-specific, and identity factors, such as gender, race and ethnicity).[16] The larger literature on boards in law and management show that boards of directors do not only have to uphold the fiduciary duties of care, loyalty, and obedience.[17] In practice, boards also: (1) monitor management; (2) provide advice and counsel; and (3) provide resources to an organization.[18] The fiduciary duties

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Mwenja & Alfred Lewis, *Exploring the Impact of the Board of Directors on the Performance of Not-for-Profit Organizations*, 10 BUS. STRATEGY SERIES 359, 361 (2009); *see also* Amy J. Hillman, Michael C. Withers & Brian J. Collins, *Resource Dependence Theory: A Review*, 35 J. MGMT. 1404, 1404 (2009) (explaining that the resource dependence theory has become one of the most influential theories in organizational theory and strategic management); Peggy Sasso, Comment, *Searching for Trust in the Not-for-Profit Boardroom: Looking Beyond the Duty of Obedience to Ensure Accountability*, 50 UCLA L. REV. 1485, 1545 (2003) (noting that studies in organizational behavior provide an important avenue for understanding nonprofit boards of directors); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 902 (1993) (similar argument in the context of human capital in employee/firm relations); James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C. L. REV. 901, 909 (2011); Hillman & Dalziel, *supra* note 9, at 384. *See generally* JEFFREY PFEFFER & GERALD R. SALANCIK, THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE (1978).

[14] *See* William A. Brown, Amy J. Hillman & Morris A. Okun, *Factors That Influence Monitoring and Resource Provision Among Nonprofit Board Members*, 41 NONPROFIT & VOLUNTARY SECTOR Q. 145, 146 (2012); Hillman & Dalziel, *supra* note 9, at 383.

[15] *See* Hillman & Dalziel, *supra* note 9, at 383.

[16] *See id.*

[17] *See* Sasso, *supra* note 13, at 1509.

[18] *See* Dallas, *supra* note 9, at 782 (referring to the roles as manager-monitoring, relational, and strategic management); Katalin Takacs Haynes & Amy Hillman, *The Effect of Board Capital and CEO Power on Strategic Change*, 31 STRATEGIC MGMT. J. 1145, 1146 (2010).

tend to reflect the monitoring role much more clearly than the other two roles.[19] Each form of board capital—financial, social and human—plays a part in how the board performs its monitoring, advice, and resource provision roles to meet an organization's mission.[20]

To highlight the importance of having nonprofit directors who have the knowledge, skills, and backgrounds to not only prevent mismanagement and provide financial capital, but also provide knowledgeable advice about the client population, the Article presents empirical data from a novel dataset of Public Interest Legal Organizations (PILOs). PILOs are nonprofit charities under Treasury Regulation section 1.501(c)(3).[21] PILOs are some of the most important institutions of American democracy and have been at the forefront of legal and social strategies to address economic inequality, employment discrimination, racial discrimination, education inequality, the eviction crisis, voter suppression, and the implications of poverty.[22] The dataset includes 550 PILO CEOs,[23] and 9,010 board directors of the same PILOs in all 50 states and the District of Columbia.[24] In addition to the dataset, I also conducted 62 interviews of a subset of CEOs and board members. Both sources of data are original.

The Article operationalizes financial, social, and human capital and shows how these types of capital can be represented on the boards of nonprofit charities. The composition of PILO boards makes clear that there is an imbalanced reliance on financial capital and particular kinds of social and human capital that mostly capture the monitoring and resource provision roles of the board to the detriment of the advice role of the board. The interview data illustrate the experiences of CEOs and board members in providing and utilizing financial, social and human capital.

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[19] *See, e.g.*, Sasso, *supra* note 13, at 1507 n.74.

[20] For further discussions about the utility of board capital as a construct, see Haynes & Hillman, *supra* note 18, at 1147. Human capital as used here differs from the human capital theory in labor economics that corresponds to characteristics a worker has (either innate or acquired) that contributes to productivity, or the pattern of individuals' lifetime earnings, as developed by Gary Becker. *See generally* GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION (2d ed. 1975).

[21] Treas. Reg. § 1.501(c)(3)-1 (as amended in 2017). In this Article, nonprofit organizations refers to public charities as opposed to private foundations, and generally excludes organizations engaged in educational, literary, scientific, or public works, such as universities and hospitals. Based on a report that uses 2016 IRS data released in 2018, there were about 600,000 nonprofit organizations in this category in the United States. NAT'L COUNCIL OF NONPROFITS, NONPROFIT IMPACT MATTERS: HOW AMERICA'S CHARITABLE NONPROFITS STRENGTHEN COMMUNITIES AND IMPROVE LIVES 4, 6 (2019), https://www.nonprofitimpactmatters.org/ [https://perma.cc/A42H-BKQW]. This is likely an underestimate. *Id.*

[22] Atinuke O. Adediran, *Racial Allies*, 90 FORDHAM L. REV. 2151, 2155–56 (2022) [hereinafter Adediran, *Allies*].

[23] CEOs are also called Executive Directors.

[24] *See infra* Part III.A.

The lack of guidance on board composition may be undercutting the ability of nonprofit charities like PILOs to serve their stated mission. For example, most PILOs' missions focus broadly on anti-poverty initiatives and addressing social problems.[25] A mission statement can state, for example that an "organization provides free civil legal assistance to low-income people in [a city]," or that an organization has a "mission to achieve social justice, prioritizing the needs of people who are low-income, or disenfranchised."[26] Each of these mission statements have two common elements. The first is that they are focused on providing a service—in this case legal services. The second is that the population served are low income or vulnerable groups. Board composition is related to both elements. It's important to have board members who are equipped to ensure that an organization can readily meet both dimensions of that mission, that is, providing legal services and advocacy, while also considering the needs of low-income, often minority groups.

In PILOs and other nonprofit charities, it is often the case that few board members have professional expertise, personal connections or lived experiences with the clients to whom services are being provided.[27] In the case of PILOs, boards comprise mostly of lawyers—many of whom are members of law firms and corporations—who tend to focus on their own expertise and tangible roles that can easily be measured by the amount of money raised or attentiveness to an organization's budget and other financial documents.[28] PILO boards skew towards generating human capital that favors legal and finance expertise, and financial capital that favors obtaining resources from law firms and corporations.[29] PILO boards mostly lack human capital in other dimensions, particularly as a source of industry expertise related to the client population, and racial and ethnic diversity.[30] The data also reveal that PILOs social capital is focused on generating financial capital and less as a target of experience and expertise related to the client population.[31] Prior research related to other nonprofit charities show how boards can comprise of mostly business owners and managers who also do not have personal connections or professional expertise related to the social problems their organizations seek to address.[32] For those boards, the resource provision role is often emphasized over and above the monitoring role, but like PILOs, there can be a lack of human capital related to expertise on the populations served.

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25 *See generally* Atinuke O. Adediran, *The Relational Costs of Free Legal Services,* 55 HARV. C.R.-C.L. L. REV. 357 (2020) [hereinafter Adediran, *Relational Costs*].

26 These mission statements are adapted from actual PILO missions. *See infra* Part IV.A.

27 *See* Adediran, *Relational Costs*, *supra* note 25, at 371–72.

28 *See id.*

29 *See id.* at 372–73.

30 *See infra* notes 272–262 and accompanying text.

31 *See infra* Parts III(A), IV(C)–(D)(1).

32 *See* Adediran, *Relational Costs*, *supra* note 25, at 371–72.

The Article makes policy suggestions to aid PILOs and other similar nonprofit organizations in targeting not only financial capital, and human capital in law and finance, but also social and human capital that can generate community participation and legitimacy, lead to vital information and advice from board members with professional or personal expertise related to the client population, or that relate to the causes the organizations represent. The Article also highlights areas for further research that would provide a deeper dive into the experiences of clients and community members who currently sit on a small fraction of PILO boards. Further research should increase scholarly and practical understanding of how boards might operate to maximize the contribution of community members on boards.

The Article proceeds as follows. Part II provides an overview of the important role of nonprofit organizations, their boards, and scholarship on board composition, highlighting the limitation of focusing on the board's monitoring role. It also discusses the three roles of boards of directors. As part of the monitoring role, it discusses directors' fiduciary obligations of care, loyalty, and obedience. Next, it addresses directors roles as providers of advice and resources, which are two roles that are often underemphasized in legal scholarship. Part III is dedicated to providing an in-depth discussion of the concept of board capital—financial, social and human. Part IV lays out the empirical data and the current landscape of PILO boards. It first discusses the data and methods used. It then shows how PILO boards are composed to focus on financial capital, which is tangible and can be easily measured, social capital as a means of leveraging financial capital, and human capital in law and finance that focuses on directors' monitoring role. It also shows what's lacking on PILO boards: social capital as a source of information about the client community, human capital expertise on the client population, and race and ethnic diversity. Part V addresses future directions and provides policy suggestions targeted at expanding professionals and individuals with expertise and experience on the client population that PILOs serve. It also notes areas for future research related to increasing client related expertise. Part V also highlights how private foundations, corporations, and term limits can all be helpful mechanisms to spur changes towards increasing racial and ethnic diversity.

Finally, two related caveats and an application. First, this Article's empirical data come from legal nonprofit charities and may not be representative of all nonprofit charities, and other organizational forms. Nevertheless, an understanding of board capital can be relevant to other nonprofit charities and organizations, for-profit companies, and hybrids—such as benefit corporations—since board directors in all kinds of organizations are engaged in monitoring, as well as providing advice and resources to their organizations. Second, while for-profit boards are different from nonprofit boards in their purpose and structures—goal of maximizing profit versus mission attainment, non-volunteer versus voluntary members, etc.[33]—Part V offers considerations for applying the board capital concept—specifically, social and human capital—to for-profit boards.

II. NONPROFIT STRUCTURE, BOARD COMPOSITION AND LAW'S LIMITATIONS

A. *Nonprofit Structure*

For-profit organizations are distinguishable from nonprofits in that for-profit businesses have private owners, such as the shareholders, who hold equity in the firm.[34] For-profit organizations exist primarily to generate value for the owners, and the firm distributes profits to them through devices like dividends or shares of stock.[35] Nearly all tax-exempt nonprofits on the other hand are subject to the prohibition against private inurement, which forbids such distributions.[36]

The prevailing consensus in the literature is that nonprofit organizations emerged because of gaps left by market and government failures.[37] Nonprofit organizations that serve the needs of low income and other vulnerable people have historically assumed an important role in helping people access social and legal services.[38]

> For political and other reasons, government has financed the relief of economic distress largely by directly subsidizing nonprofit agencies to deliver the services. In addition, nonprofits are given a tax exemption as well as an income tax deduction for charitable contributions. These subsidies are intended to help nonprofit agencies finance their antipoverty programs; otherwise, a socially

[33] *See generally* Marc J. Epstein & F. Warren McFarlan, *Nonprofit vs. For-Profit Boards: Critical Differences*, STRATEGIC FIN., Mar. 2011, at 28, 30.

[34] Bruce R. Hopkins & Virginia C. Gross, *The Legal Framework of the Nonprofit Sector in the United States*, *in* THE JOSSEY-BASS HANDBOOK OF NONPROFIT LEADERSHIP AND MANAGEMENT 43, 44 (David O. Renz ed., 4th ed. 2016).

[35] *See id.*

[36] *See id.*; Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980); Hopkins & Gross, *supra* note 34, at 44.

[37] *See, e.g.*, Patricia Bromley, *The Organizational Transformation of Civil Society*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 123, 123 (Walter W. Powell & Patricia Bromley eds., 3d ed. 2020); Edward T. Walker & Yotala Oszkay, *The Changing Face of Nonprofit Advocacy: Democratizing Potentials and Risks in an Unequal Context*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK, *supra*, at 512. Some scholars have cast doubt on this economic reasoning for nonprofit existence. *See, e.g.*, SMITH & LIPSKY, *supra* note 1, at 28 (explaining that the theory cannot explain why the government would want to partner with nonprofits to provide services).

[38] Corbin, *supra* note 4, at 297.

> optimal level of such services might not be provided if the government relied totally on the market to produce them.[39]

In addition to government funding, nonprofit organizations are also funded by private sources.[40] "[T]he quest for private sources of income"—through the overrepresentation of people with the highest levels of income and education—"may serve to distract nonprofit charities from their missions."[41] Private donors can influence the direction of the mission of nonprofit organizations.[42] Previous research in the PILO context has shown that law firms and the interests of law firm lawyers influence the kinds of legal services and advocacy organizations provide to low income individuals and groups.[43]

It is therefore important to pay attention to how the private sector influences nonprofit entities that serve vulnerable people through the composition of their boards.

B. *Board Composition*

Board composition has been top of mind for scholars in both the for-profit and nonprofit contexts over the past few decades.[44] Most of the scholarship has centered around having board members with financial and psychological independence from managers to prevent management encroachment on shareholder value, or to prevent mismanagement by nonprofit managers.[45] In the for-profit sector, scholars have also addressed securities law mandates requiring board independence and financial expertise for members of the audit committee to act as securities monitors.[46] There have also been debates about

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[39] *Id.* at 300 (citations omitted); *see also* Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation*, 49 U.C. DAVIS. L. REV. 1719, 1721, 1737–38 (2016).

[40] Corbin, *supra* note 4, at 301.

[41] *See id.* at 301; *see also* Burton A. Weisbrod, *The Nonprofit Mission and Its Financing: Growing Links Between Nonprofits and the Rest of the Economy*, *in* TO PROFIT OR NOT TO PROFIT: THE COMMERCIAL TRANSFORMATION OF THE NONPROFIT SECTOR 1, 1–2 (Burton A. Weisbrod ed., 1998); Walker & Oszkay, *supra* note 37, at 513–14. *See generally* Adediran, *Relational Costs*, *supra* note 25.

[42] *See* CAZENAVE, *supra* note 5, at 31–32; Emily Barman, *With Strings Attached: Nonprofits and the Adoption of Donor Choice*, 37 NONPROFIT & VOLUNTARY SECTOR Q. 39, 39 (2008).

[43] *See* Adediran, *Relational Costs*, *supra* note 25, at 378; Atinuke O. Adediran, *Solving the Pro Bono Mismatch*, 91 U. COLO. L. REV. 1035, 1041, 1047 n.44 (2020) [hereinafter Adediran, *Solving*].

[44] *See, e.g.*, sources cited *supra* note 9.

[45] *See* sources cited *supra* note 10; *see also* Boozang, *supra* note 9, at 84; Hillman & Dalziel, *supra* note 9, at 383; Fama & Jensen, *supra* note 9, at 311.

[46] *See, e.g.*, Hillary A. Sale, *Independent Directors as Securities Monitors*, 61 BUS. LAW. 1375, 1376 (2006); Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1058 (2019). *See generally* Lawrence A. Cunningham, *Rediscovering Board Expertise: Legal Implications of the Empirical Literature*, 77 U. CIN. L. REV. 465 (2008).

the kinds of backgrounds and skills board directors ought to have to be well equipped to monitor management, or maximize shareholder value.[47] For example, Bernard Sharfman, Steven Toll, and Marc Goldstein raise board composition problems in the corporate context.[48] They argue that Enron's board, which included mostly corporate executives, should have been composed differently to prevent fraudulent actions by top executives.[49]

However, boards do more than monitor managers or prevent mismanagement. Boards of directors, particularly in nonprofit organizations, have other roles, such as providing resources and advice to organizations to make strategic decisions, important policies, or enhance public image or legitimacy.[50] These roles require skills and knowledge about governance, finance and the law, but also an understanding of social problems and the particular client population.

Empirical studies have drawn attention to whether the actual skills and backgrounds of board members match a nonprofit organization's industry.[51] For example, in the article, *Why Do Universities Have Endowments?*, Henry Hannsman argues that university board members tend to come overwhelmingly from the corporate world and are often poorly equipped to address intangible objectives that are not easily measured, such as academic activities.[52] Instead, boards tend to focus on the size and growth of endowments, which hews more closely to their areas of expertise and can be more tangibly and easily measured.[53] Directors may also consider the university's academic activities as a constraint on maintaining a large endowment, which can stymie the pursuit of other goals.[54]

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[47] *See, e.g.*, Bernard S. Sharfman & Steven J. Toll, *Dysfunctional Deference and Board Composition: Lessons from Enron*, 103 NW. U. L. REV. COLLOQUY 153, 154 (2009); Marc Goldstein, *Mitigating Dysfunctional Deference Through Improvements in Board Composition and Board Effectiveness*, 103 NW. U. L. REV. COLLOQUY 490, 491 (2009); Lawrence J. Trautman, *Who Sits on Texas Corporate Boards? Texas Corporate Directors: Who They Are & What They Do*, 16 HOUS. BUS. & TAX L.J. 44, 46 (2016); Bernadette A. Minton, Jérôme P. Taillard & Rohan Williamson, *Financial Expertise of the Board, Risk Taking, and Performance: Evidence from Bank Holding Companies*, 49 J. FIN. & QUANTITATIVE ANALYSIS 351, 352 (2014); Ryan Krause, Matthew Semadeni & Albert A. Cannella Jr., Commentary, *External COO/Presidents as Expert Directors: A New Look at the Service Role of Boards,* 34 STRATEGIC MGMT. J., 1628, 1628 (2013). *See generally* A. Burak Güner, Ulrike Malmendier & Geoffrey Tate, *Financial Expertise of Directors*, 88 J. FIN. ECON. 323 (2008).

[48] Sharfman & Toll, *supra* note 47, at 154; Goldstein, *supra* note 47, at 491.

[49] Sharfman & Toll, *supra* note 47, at 154. *But see* Goldstein, *supra* note 47, at 491.

[50] *See infra* Part II.C; *see also supra* notes 10–13 and accompanying text.

[51] Henry Hansmann, *Why Do Universities Have Endowments?*, 19 J. LEGAL STUD. 3, 37 (1990); Julie I. Siciliano, *The Relationship of Board Member Diversity to Organizational Performance*, 15 J. BUS. ETHICS 1313, 1318 (1996).

[52] Hansmann, *supra* note 51, at 37.

[53] *See id.*

[54] *See id.*

A study of 200+ YMCAs with majority board members from the business sector showed that charities with a broader range of professionals were better able to keep their missions central to their activities than those with majority of directors from the business sector who were more focused on finances than mission.[55]

A sixty-year longitudinal study of fifteen nonprofit organizations found that nonprofit organizations are dominated by a large percentage of managerial professionals and fewer individuals from identity groups.[56] The research found that directors from privileged backgrounds "bring skills and expertise to the boardroom and legitimacy to the organization, [and] they also bring their interests and identities" representing class and racial interests.[57]

Scholars in both the for-profit and nonprofit sectors have recognized that diverse groups—especially women and racial and ethnic minorities—enhance performance and organizational decision and policymaking that go beyond the bottom-line.[58] Yet, policymakers have focused attention on the for-profit sector to address the composition of corporate boards beyond the traditional monitoring role.[59] Legislatures have seized the current moment to legally mandate gender and racial diversity in corporate board rooms.[60] And while it has not yet garnered support among lawmakers and shareholders, academics are also debating the inclusion of employees on corporate boards.[61]

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[55] *See* Siciliano, *supra* note 51, at 1318.

[56] *See* Rikki Abzug & Joseph Galaskiewicz, *Nonprofit Boards: Crucibles of Expertise or Symbols of Local Identities?*, 30 NONPROFIT & VOLUNTARY SECTOR Q. 51, 52, 68 (2001).

[57] *See id.* at 68–70.

[58] *See* Sabina Tasheva & Amy J. Hillman, *Integrating Diversity at Different Levels: Multilevel Human Capital, Social Capital, and Demographic Diversity and Their Implications for Team Effectiveness*, 44 ACAD. MGMT. REV. 746, 747 (2019); Jennifer S. Fan, *Innovating Inclusion: The Impact of Women on Private Company Boards*, 46 FLA. ST. U. L. REV. 345, 386–91 (2019); *see also* Ruth Sessler Bernstein & Diana Bilimoria, *Diversity Perspectives and Minority Nonprofit Board Member Inclusion*, 32 EQUAL., DIVERSITY & INCLUSION 636, 648 (2013); Fanto, Solan & Darley, *supra* note 13, at 917–18, 933–34; Barbara Black, *Stalled: Gender Diversity on Corporate Boards*, 37 U. DAYTON L. REV. 7, 20 (2011); Giuliana Birindelli, Antonia Patrizia Iannuzzi & Marco Savioli, *The Impact of Women Leaders on Environmental Performance: Evidence on Gender Diversity in Banks*, 26 CORP. SOC. RESP. & ENV'T. MGMT. 1485, 1487, 1496 (2019); Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 393–94, 400 (2014).

[59] *See supra* note 11. There has so far been no state or federal legislation requiring diversity on nonprofit boards.

[60] *See supra* note 11.

[61] *See* Hayden & Bodie, *supra* note 11, at 2420; *see also* Ross Kerber, *JP Morgan's Board Rejects Switch to Stakeholder-Focused Entity*, REUTERS (Feb. 9, 2021), https://www.reuters.com/business/jp-morgans-board-rejects-switch-stakeholder-focused-entity-2021-02-09/ (on file with the *Ohio State Law Journal*) ("[S]ome activists have urged companies to add workers to their boards of directors. But of ten shareholder resolutions filed in 2020 on the topic, none won more than 8% support of votes cast . . . .").

A well-functioning board should be equipped to fulfill its objectives. However, there is insufficient guidance on how to compose boards of directors that can fulfill their roles in monitoring management, providing resources, and also advice in nonprofit organizations, particularly those that serve vulnerable populations. This Article offers that guidance by introducing the concept of board capital to legal scholarship. Below, I address the roles of boards of directors, which highlights the importance of their composition. I also show law's limitations in providing guidance on how to compose boards that can accomplish all three roles.

C. *Board Roles and Law's Limitations*

"In nonprofit organizations, the board is the legally constituted leadership body and shares actively in fulfilling the mission of the organization."[62] "[T]he broader literature on boards generally discusses three tasks: monitoring management . . . , providing advice and counsel to management . . . , and providing resources to the organization to meet its mission."[63]

A nonprofit's board of directors is therefore responsible for the management of the activities and affairs of the nonprofit.[64] The nonprofit board's obligation derives from state nonprofit corporation statutes, which generally use language indicating that the nonprofit must be "managed under the direction of" its board.[65] This means that the "board hires, fires, evaluates, and sets compensation for the" CEO.[66] Moreover, "[t]he board also . . . gives input on the organization's strategic plan, oversees the organization's budget and programs, and reviews the organization's financial statements."[67] The board must help to establish the organization's mission and engage in efforts to raise financial resources.[68]

Boards of directors are fiduciaries.[69] Board directors are "guardians and policy makers . . . responsible for . . . mission and resources" and establish

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62 Leduc & Block, *supra* note 6, at 67.

63 Yangmin Kim & Albert A. Cannella, Jr., *Toward a Social Capital Theory of Director Selection*, 16 CORP. GOVERNANCE 282, 285 (2008); *see also* Jonathan L. Johnson, Catherine M. Daily & Alan E. Ellstrand, *Boards of Directors: A Review and Research Agenda*, 22 J. MGMT. 409, 411 (1996); PFEFFER & SALANCIK, *supra* note 13, at 162; Stevenson & Radin, *supra* note 9, at 17.

64 MODEL NONPROFIT CORP. ACT § 801 (AM. BAR ASS'N, Expansion Draft 2021).

65 *See* Michael Klausner & Jonathan Small, *Failing to Govern? The Disconnect Between Theory and Reality in Nonprofit Boards, and How to Fix It*, STAN. SOC. INNOVATION REV., Spring 2005, at 42, 44; *see, e.g.*, N.Y. NOT-FOR-PROFIT CORPORATION LAW § 701(a) (McKinney 2015) ("[A] corporation shall be managed by its board of directors.").

66 Klausner & Small, *supra* note 65, at 44.

67 *Id.*

68 Leduc & Block, *supra* note 6, at 70.

69 Paul E. Furrh, Jr., *The Role of the Board of Directors in Legal Services Programs*, 22 CLEARINGHOUSE REV. 1275, 1275, 1277 (1989).

strategies and policies.[70] Board members "ensur[e] that the activities of the organization are in agreement with its mission, mak[e] long-range plans, oversee[] the organization's programs, choos[e] and monitor[] the executive . . . , manage the organization's relationship with [other organizations and funding sources], and monitor[] the board's membership and performance."[71]

Many of these roles and program functions are shared by the board and CEO.[72] The CEO works in conjunction with the board of directors to establish the organization's policies and programs. CEOs 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.[73] CEOs are also involved in recruiting board members, orienting and socializing new board members on the organization's mission, and supporting board committee work.[74]

Even though the board has a wide range of activities in monitoring and providing advice and resources, legal scholars have mostly focused on the monitoring role and the fiduciary duties of care, loyalty and obedience prescribed by the law.[75] The law too narrowly defines the duties of boards and contributes to their compositions and their abilities to effectively fulfill all of the duties that they should be understood to undertake. Below, I first address the literature on monitoring and fiduciary obligations before addressing the other two roles that are underexplored in legal scholarship.

1. *Monitoring*

Most theories and scholarship on corporate and nonprofit governance "identify the board of director's [monitoring] role as conceptually and normatively important."[76] Academic perspectives relevant to monitoring include scholarship in law, management, and finance.[77] In legal scholarship, "the primary purpose of the board is as a fiduciary charged with monitoring management for the benefit of the organization."[78] Monitoring involves articulating stakeholders' objectives, and performing fiduciary and strategic

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[70] Widmer, *supra* note 7, at 341.

[71] *Id.*

[72] *See* Leduc & Block, *supra* note 6, at 67.

[73] *See* Kathleen B. Fletcher, *Effective Boards: How Executive Directors Define and Develop Them*, 2 NONPROFIT MGMT. & LEADERSHIP 283, 289–91 (1992).

[74] *See id.* at 289.

[75] *See, e.g.*, Sugin, *supra* note 13, at 897; DANIEL L. KURTZ, BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS 21 (1988).

[76] *See* Johnson, Daily & Ellstrand, *supra* note 63, at 411; Judith L. Miller, *The Board as a Monitor of Organizational Activity: The Applicability of Agency Theory to Nonprofit Boards*, 12 NONPROFIT MGMT. & LEADERSHIP 429, 430 (2002).

[77] *See* Johnson, Daily & Ellstrand, *supra* note 63, at 410.

[78] *Id.* at 412; *see* Miller, *supra* note 76, at 430; CIKALIUK, ERAKOVIĆ, JACKSON, NOONAN & WATSON, *supra* note 9, at 3.

governance.[79] Corporate board members monitor when they engage in executive selection, executive performance appraisal, and legal and financial management operations.[80] The general consensus in the law and scholarship is that independent directors are the most equipped to ensure this monitoring role in for-profit organizations.[81]

For nonprofit organizations where donors—rather than shareholders—provide funds, board monitoring involves ensuring that management does not squander resources and that donations are used for the purposes for which they were allocated.[82] An important mechanism for monitoring is the imposition of fiduciary duty obligations on board directors.[83]

Nonprofit corporate law requires boards of directors to exercise the fiduciary obligations of care, loyalty and, obedience.[84] Directors' fiduciary duties "are derived from a century of litigation principally involving business corporations."[85] The fiduciary obligations are meant to assure proper fiscal oversight and managerial supervision, such as "engaging auditors and other professionals and authorizing significant financial transactions and new

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[79] *See* Kristina Jaskyte, *Boards of Directors and Innovation in Nonprofit Organizations*, 22 NONPROFIT MGMT. & LEADERSHIP 439, 440–41 (2012).

[80] *See* William A. Brown, Amy J. Hillman & Morris A. Okun, *Factors that Influence Monitoring and Resource Provision Among Nonprofit Board Members,* 41 NONPROFIT & VOLUNTARY SECTOR Q. 145, 153 (2012); Miller, *supra* note 76, at 430.

[81] The core of agency theory is that "independent . . . directors are more effective than inside directors in monitoring management and protecting shareholder interests." Jie (Jenny) Tian, Jerayr (John) Haleblian & Nandini Rajagopalan, *The Effects of Board Human and Social Capital on Investor Reactions to New CEO Selection*, 32 STRATEGIC MGMT. J. 731, 731 (2011). Some scholars have cast doubt on this premise. *See, e.g.*, Sandra Cavaco, Patricia Crifo, Antoine Rebérioux & Gwenael Roudaut, *Independent Directors: Less Informed but Better Selected than Affiliated Board Members?*, 43 J. CORP. FIN. 106, 108 (2017); Frederick Tung, *The Puzzle of Independent Directors: New Learning*, 91 B.U. L. REV. 1175, 1176 (2011).

[82] Miller, *supra* note 76, at 430; Jeffery L. Callen, April Klein & Daniel Tinkelman, *Board Composition, Committees, and Organizational Efficiency: The Case of Nonprofits*, 32 NONPROFIT & VOLUNTARY SECTOR Q. 493, 494 (2003); *see also* Henry Bradford, Alexander Guzmán, José Manuel Restrepo & María-Andrea Trujillo, *Who Controls the Board in Non-Profit Organizations? The Case of Private Higher Education Institutions in Colombia*, 75 HIGHER EDUC. 909, 911 (2018).

[83] Arthur R. Pinto, *Corporate Governance: Monitoring the Board of Directors in American Corporations*, 46 AM. J. COMPAR. L. (SUPP.) 317, 330 (1998).

[84] *See* Sugin, *supra* note 13, at 897; KURTZ, *supra* note 75, at 21, 23. For-profit board directors are generally expected to adhere to the duties of care and loyalty. *See* Sugin, *supra* note 13, at 897.

[85] Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 J. CORP. L. 631, 638 (1998) (internal quotation marks omitted) (quoting AM. BAR ASS'N, COMM. ON NONPROFIT CORPS., GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 21 (2d ed. 1993)); *see also* Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. PA. J. BUS. L. 347, 375, 381 nn.171–73 (2012).

program initiatives."[86] The duties describe the standards which guide director's actions. The duties are owed to the organization and may be enforced by the organization or someone acting on its behalf, such as an employee or director.[87]

a. *Duty of Care*

The duty of care requires board members to act with the "care that an ordinarily prudent person would exercise in a like position and under similar circumstances."[88] The duty of care is generally understood to require directors to be informed and remain diligent and attentive to the affairs of the organization.[89] "Diligence' implies an active interest in the organization's activities."[90] "Directors must spend enough time on the organization's affairs to be reasonably acquainted with matters demanding their attention."[91] Directors should attend meetings, and review and comprehend materials submitted to the board.[92] Attention involves directors evaluating potential problems if and when they arise.[93] It may also involve asking questions about particular matters if concerns and issues arise.

Usually, diligence and attention are directly related to the financial affairs of the organization.[94] An example that has been provided for a violation of the duty of care is failure to address shortcomings in an auditor's review of the organization, and to ensure internal financial controls.[95] "A majority of states [also] require public reports from some charities, and federal tax law requires the filing of annual information returns" that are publicly available.[96] Generally, adhering to legal obligations is understood to fall under the duty of care.[97]

Board directors can delegate some of their responsibilities or rely on committees, staff, other directors, or outside experts for information.[98] Directors must however comply with the standards of care in the selection and ongoing supervision of those on whom they have relied for information or to whom they

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86 WEIL, GOTSCHAL & MANGES LLP, GUIDE TO NONPROFIT GOVERNANCE 2019, at 21-4 (May 2019), https://www.weil.com/~/media/guide-to-nonprofit-governance-2019.pdf [https://perma.cc/MQE8-WCLW]; *see also* Miller, *supra* note 76, at 437, 441.

87 KURTZ, *supra* note 75, at 22.

88 *Id.* at 21; Laura B. Chisolm, *Accountability of Nonprofit Organizations and Those Who Control Them: The Legal Framework*, 6 NONPROFIT MGMT. & LEADERSHIP 141, 144–45 (1995).

89 *Id.* at 145; Hazen & Hazen, *supra* note 85, at 375.

90 KURTZ, *supra* note 75, at 26.

91 *Id.*

92 *Id.*

93 *Id.*

94 *See id.*

95 *Id.*; CHARITIES BUREAU, OFF. OF THE N.Y. STATE ATT'Y GEN., RIGHT FROM THE START: RESPONSIBILITIES OF DIRECTORS OF NOT-FOR-PROFIT CORPORATIONS 6 (May 2015).

96 Mayer, *supra* note 9, at 118.

97 *Id.*

98 KURTZ, *supra* note 75, at 28–29.

have delegated board authority.[99] Directors can assume that delegated activities are being carried our responsibly unless they should know otherwise.[100]

Like the business judgment rule that applies to corporate directors, nonprofit directors are evaluated by the best judgment rule.[101]

> The best judgment rule ends the duty of care inquiry when a nonprofit fiduciary has acted on an informed basis, in good faith, and in the reasonable belief they were doing so in the best interests of the nonprofit, absent any conflicts of interests that would implicate the duty of loyalty.[102]

However, there seems to be little difference between how courts interpret the duty of care and the best judgment rule for nonprofits.[103] Simply, the board will likely satisfy its duty of care if it acts with common sense and informed judgment even though its assessment is fundamentally flawed.[104] The rationale for this rule is similar to that of the business judgment rule in the for-profit context on the basis that managers and leaders are better equipped than courts to make decisions regarding the nonprofit and should not be deterred by liability concerns.[105]

b. *Duty of Loyalty*

"The duty of loyalty requires the director's faithful pursuit of the interests of the organization . . . rather than the financial or other interests of the director or of another person or organization" when using the power of the position or information concerning the organization.[106] "The duty of loyalty is implicated when a board member has a conflict of interest" with the organization, such as pursuing personal financial gain or the financial interests of a third party.[107] The duty of loyalty focuses on directors' motives and goals.[108] "The duty of loyalty, among other things, forbids many self-dealing contracts and transactions . . . ."[109] These transactions require careful scrutiny. Some of them are explicitly illegal, while others are simply unethical and still others are permissible if the best interest of the organization and certain procedures are

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[99] *Id.* at 28.
[100] *Id.*
[101] Mayer, *supra* note 9, at 115.
[102] *Id.*
[103] KURTZ, *supra* note 75, at 51.
[104] *See* Sasso, *supra* note 13, at 1524.
[105] Mayer, *supra* note 9, at 115.
[106] KURTZ, *supra* note 75, at 21, 59.
[107] Hazen & Hazen, *supra* note 85, at 356, 380; KURTZ, *supra* note 75, at 59–60.
[108] Hazen & Hazen, *supra* note 85, at 381.
[109] *Id.*

followed.[110] The purchase of goods or services by nonprofits from board members or their companies can be problematic.[111] Some state attorneys general caution against entering such transactions unless the board determines that the transaction is fair and reasonable.[112]

c. *Duty of Obedience*

Academics debate whether there is a separate duty of obedience for nonprofit directors that is different from the universally accepted duties of loyalty and care.[113] The duty of obedience requires that a director remains faithful to the organization's purpose and mission as expressed in documents like its charter, by-laws, and other legal documents, such as Internal Revenue Service filings and grant proposals.[114] This requirement can be subsumed under the duty of care. However, the duty of obedience also includes "honoring donors' intent in the administration of the organization's assets."[115] "[P]art of the explanation for this lies in the perception that 'donations . . . are made in reliance on the fulfillment of those charitable purposes,' and that diversions of . . . resources to other goals, no matter how laudable, are not legally justifiable."[116]

Although nonprofits can and do change their missions, they place a lot of emphasis on how their missions are defined, which underscores the importance of the duty of obedience.[117] Nonprofit directors must adhere closely to their orgainzations' stated purpose.[118] However, directors have considerable latitude to determine how such purposes can be met.[119] Directors can also initiate significant changes in the activities of an organization.[120]

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[110] INDEP. SECTOR, PANEL ON THE NONPROFIT SECTOR, STRENGTHENING TRANSPARENCY, GOVERNANCE, AND ACCOUNTABILITY OF CHARITABLE ORGANIZATIONS: A FINAL REPORT TO CONGRESS AND THE NONPROFIT SECTOR 82 (2005).

[111] FRANCIE OSTROWER, URB. INST., NONPROFIT GOVERNANCE IN THE UNITED STATES: FINDINGS ON PERFORMANCE AND ACCOUNTABILITY FROM THE FIRST NATIONAL REPRESENTATIVE STUDY 7 (2007).

[112] *See, e.g.*, CHARITIES BUREAU, *supra* note 95, at 7.

[113] *See* Sugin, *supra* note 13, at 897. Indeed, only a few courts have mentioned the duty of obedience as a separate duty from the duty of care and loyalty. *See* Mayer, *supra* note 9, at 117; *In re* Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 186 Misc. 2d 126, 152 (N.Y. Sup. Ct. 1999).

[114] KURTZ, *supra* note 75, at 21, 85.

[115] Hazen & Hazen, *supra* note 85, at 389–90.

[116] KURTZ, *supra* note 75, at 85; *see, e.g.*, Queen of Angels Hosp. v. Younger, 66 Cal. App. 3d 359, 365 (Cal. Ct. App. 1977) (addressing the duty of obedience in claim brought by the state attorney general where nonprofit used funds for medical clinics instead of operating a hospital).

[117] KURTZ, *supra* note 75, at 85.

[118] *Id.*

[119] *Id.*

[120] *Id.*

The fiduciary duties of care and loyalty therefore primarily address financial accountability. The duty of obedience is partly focused on financial accountability to donors, but also requires board members to honor the organization's mission.

These fiduciary duties are well defined to address legal and financial accountability monitoring and concerns. However, as described below, nonprofit board directors also provide advice and resources to help meet their organizations' missions. The fiduciary duties of care, loyalty and obedience do not provide sufficient guidance on how to compose boards to provide the advice and counsel necessary to fulfill an organization's purpose.[121] Legal scholarship relies on these fiduciary duties as the expected roles of board members with limited analyses of whether the law is enough to address the lack of board capital. As discussed above, legal scholars and courts often downplay or combine the duty of obedience—which specifically imposes accountability on the board for fidelity to its organization's mission—with the duties of care and loyalty. The law is clearly insufficient for this purpose.

2. *Advice and Counsel*

The advice and counsel role of boards involves providing advice and counsel to the CEO and other top managers.[122] In this role, board members are active participants in determining the organization's mission and purpose, engaging in strategic planning, formulation, and implementation.[123] There is empirical support for the prevalence and importance of board members' role in providing advice and counsel to an organization, which may be distinct to the advice and counsel role of for-profit board members. Nonprofit directors "devote a considerable proportion of their board-related time and effort to contributing to . . . decision making."[124] Research shows that "boards impact the strategic management process through their review of strategic initiatives, and in some cases their involvement in strategy formulation."[125] In a study of 121 CEOs of a community foundation, 46% talked about the importance of board members in strategy and planning, while many talked about the need for boards to set the direction and lead the organization.[126] The CEOs looked to the

[121] *See generally* Renee M. Jones, *Law, Norms, and the Breakdown of the Board: Promoting Accountability in Corporate Governance*, 92 IOWA L. REV. 105 (2006) (arguing that law and norms are insufficient to hold board directors accountable for wrongdoing).

[122] Kim & Cannella, *supra* note 63, at 285; Westphal, *supra* note 9, at 8–9; Myles L. Mace, *Directors: Myth and Reality—Ten Years Later*, 32 RUTGERS L. REV. 293, 294 (1979).

[123] Kim & Cannella, *supra* note 63, at 286; Miller, *supra* note 76, at 430.

[124] Johnson, Daily & Ellstrand, *supra* note 63, at 427.

[125] *Id.*

[126] William A. Brown & Chao Guo, *Exploring the Key Roles for Nonprofit Boards*, 39 NONPROFIT & VOLUNTARY SECTOR Q. 536, 540 (2010).

board to help negotiate the organization's position in a complex environment in answering questions such as "[w]hich constituency should we prioritize?"[127]

Thus, "[a]dvice and counsel from the board can help ensure that diverse perspectives are considered in the decision-making process, faulty or obsolete assumptions are challenged, and an optimal strategic decision is reached."[128] The board works with the CEO "and other stakeholders . . . to understand the circumstances facing the organization . . . and presenting new issues and opportunities in ways that may require changes in values, beliefs, and behaviors."[129] Board directors bring forth their expertise in a range of areas important to the nonprofit's mission, including industry experience, financial and legal expertise, and life experiences that can inform the organization's goals.[130] Notably, research suggests that board directors who work in an organization's industry and therefore have expertise in the organization's focus areas are better equipped to provide advice and counsel than those who do not.[131]

3. *Resource Provision*

The primary sources of revenue for nonprofit charities that serve low income people are (1) government grants; and (2) private contributions such as donations from individuals, corporate gifts, and foundation grants.[132] "[E]ach revenue source offers a different set of advantages and disadvantages . . . ."[133] Government funding is the most stable and often the most restrictive revenue source that nonprofit organizations earn by successfully completing grant applications.[134] Unlike government funding, "[p]rivate contributions . . . can generally be used at the CEO's discretion and do not typically require strict reporting mandates or strict resource distribution."[135] "[O]rganizations that are entirely dependent on private contributions can accept donations with few stated restrictions on how funds should be used."[136] Funding through government and

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127 *Id.*

128 Whitney Douglas Fernandez, Yannick Thams & Mark Lehrer, *What Does Board Capital Really Bring to the Table?*, 34 AM. J. BUS. 134, 137 (2019).

129 Jaskyte, *supra* note 79, at 441.

130 *See* Erica E. Harris, *The Impact of Board Diversity and Expertise on Nonprofit Performance*, 25 NONPROFIT MGMT. & LEADERSHIP 113, 115 (2014).

131 *Id.* at 115–16.

132 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).

133 *Id.*

134 *Id.*

135 *Id.* The IRS still requires reporting for tax-exempt purposes.

136 *Id.*

private sector payments can be robust but can also lead to mission displacement, or mission compromise in the interest of revenue.[137]

The board's resource dependence role entails raising and donating money and time to the organization and linking the organization to sources of funding to support the organization's mission.[138]

Like the advice role of nonprofit board directors, the resource provision role has received limited attention in legal scholarship probably because it is unique to nonprofit directors. Monitoring is only one aspect of the board's role and implicates both advice and resource provision. It would be difficult to sufficiently address board composition without a holistic assessment of all three board roles.

III. BOARD CAPITAL

As detailed in Part II, the legal literature is mostly focused on understanding boards' legal regimes. However, that analysis has yet to incorporate the rich literature outside of law examining how the composition of boards as capital directly impacts the board's ability to maximize its effectiveness to address an organization's mission. Board capital is particularly useful in legal scholarship because both the literature and the law are skewed towards the monitoring role of boards, which generally applies to only human capital. Since board capital encompasses financial, social and human capital, the concept pushes legal scholarship (and the law) to also consider board directors' other roles.[139]

The active engagement of board members in support of an organization's mission is a major strategic action for any CEO.[140] When an organization appoints a board member, the individual is expected to support the

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137 *See* Adediran, *Relational Costs*, *supra* note 25, at 382–83; Adediran, *Solving*, *supra* note 43, at 1041, 1047; *see also* Hodge & Piccolo, *supra* note 132, at 174–75; Burton A. Weisbrod, *Modeling the Nonprofit Organization as a Multiproduct Firm: A Framework for Choice*, *in* TO PROFIT OR NOT TO PROFIT, *supra* note 41, at 47, 57.

138 *See* Kim & Cannella, *supra* note 63, at 286; Fernandez, Thams & Lehrer, *supra* note 128, at 135; Jaskyte, *supra* note 79, at 440; Miller, *supra* note 76, at 430; Adediran, *Relational Costs*, *supra* note 25, at 372; Johnson, Daily & Ellstrand, *supra* note 63, at 427–28.

139 This raises the question of why the law is skewed towards the monitoring role. A partial answer is that lawmakers and regulators are primarily concerned with preventing bad actions, particularly private inurement or other diversions of charitable assets to benefit private interests, and are less concerned with ensuring good results probably because of sharp disagreements about which results are good.

140 Hodge & Piccolo, *supra* note 132, at 173; *see also* Brian Boyd, *Corporate Linkages and Organizational Environment: A Test of the Resource Dependence Model*, 11 STRATEGIC MGMT. J. 419, 419 (1990).

organization.[141] The board's role in monitoring, providing advice, and resources is directly related to an organization's processes, outcomes, and performance.[142]

To effectively perform these functions, organizations ought to be strategic about how the board is composed to meet the needs of the organization.[143] The board should be composed to readily access board capital to properly address all three roles.[144] Board capital—financial, human, and social—is a well understood conceptualization in both the for-profit and nonprofit contexts in management, finance, sociology, and economics.[145]

Board capital is the cumulative effect of the financial, human and social capital of any given board of directors.[146] Financial capital is the most visible resource and encompasses funding and donations.[147] Social capital refers to "the sum of the actual and potential resources embedded within, available through, and derived from the network of relationships possessed by an individual or social unit."[148] Human capital refers to board directors' education, expertise, reputation, experiences, knowledge, skills, gender, race, and ethnicity.[149] Financial, social, and human capital work in concert to help an organization meet its goals.[150]

Board capital has been used in various contexts in the corporate governance literature, including to show the effects of board composition on earnings

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[141] PFEFFER & SALANCIK, *supra* note 13, at 163; Hillman, Withers & Collins, *supra* note 13, at 1408–09.

[142] *See* Hillman & Dalziel, *supra* note 9, at 386; Hodge & Piccolo, *supra* note 132, at 172; Jeffrey Pfeffer, *A Resource Dependence Perspective on Intercorporate Relations*, *in* INTERCORPORATE RELATIONS: THE STRUCTURAL ANALYSIS OF BUSINESS 25, 26 (Mark S. Mizruchi & Michael Schwartz eds., 1987); Hillman, Withers & Collins, *supra* note 13, at 1408.

[143] Hillman, Withers & Collins, *supra* note 13, at 1408–09.

[144] *See* Amy J. Hillman, Christine Shropshire & Albert A. Cannella Jr., *Organizational Predictors of Women on Corporate Boards*, 50 ACAD. MGMT. J. 941, 942 (2007); Hillman & Dalziel, *supra* note 9, at 386–87.

[145] *See* Hillman & Dalziel, *supra* note 9, at 386–87.

[146] *See id.* at 383.

[147] *See* Arnold Cooper, F. Javier Gimeno-Gascón & Carolyn Y. Woo, *Initial Human and Financial Capital as Predictors of New Venture Performance*, J. PRIV. EQUITY, Winter 1997, at 13, 13. *See generally* Adediran, *Relational Costs*, *supra* note 25.

[148] Janine Nahapiet & Sumantra Ghoshal, *Social Capital, Intellectual Capital, and the Organizational Advantage*, 23 ACAD. MGMT. REV. 242, 243 (1998).

[149] *See* Hillman & Dalziel, *supra* note 9, at 386; Cooper, Gimeno-Gascón & Woo, *supra* note 147, at 13; Jaskyte, *supra* note 79, at 443. Other identity factors may also be included in this category, including sexual orientation, age, disability and religion. *See* Scott G. Johnson, Karen Schnatterly & Aaron D. Hill, *Board Composition Beyond Independence: Social Capital, Human Capital, and Demographics*, 39 J. MGMT. 232, 238 (2013). While these other factors have received limited attention in the literature, they are nonetheless important.

[150] *See generally* Haynes & Hillman, *supra* note 18.

quality and investments,[151] and examine the board's resource provision role and effectiveness,[152] levels of disclosure,[153] board citizenship behavior,[154] and innovation.[155] In the nonprofit governance literature, board capital has been studied in the context of overall board monitoring and resource provision,[156] collaboration with other nonprofits, businesses, and government agencies,[157] and innovation.[158]

Board capital does not currently exist in legal scholarship on corporations or nonprofit organizations. To the extent that the concept of "capital" is used in legal scholarship, it is often narrowly conceived as financial capital to analyze investments and funds.[159] Outside of financial capital, a handful of legal scholars have used capital with a limited scope, typically focusing on a single type of capital, such as social or human capital outside of the board context.[160]

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[151] *See generally* Maria Kontesa, Andreas Lako & Wendy Wendy, *Board Capital and Earnings Quality with Different Controlling Shareholders*, 33 ACCT. RSCH. J. 593 (2020); Jung-Ho Lai, Li-Yu Chen & Sangcheol Song, *How Outside Directors' Human and Social Capital Create Value for Corporate International Investments*, 54 J. WORLD BUS. 93 (2019).

[152] *See generally* Fernandez, Thams & Lehrer, *supra* note 128.

[153] *See generally* Mohammad Badrul Muttakin, Arifur Khan & Dessalegn Getie Mihret, *The Effect of Board Capital and CEO Power on Corporate Social Responsibility Disclosures*, 150 J. BUS. ETHICS 41 (2018) (corporate social responsibility disclosures); Janice Hollindale, Pamela Kent, James Routledge & Larelle Chapple, *Women on Boards and Greenhouse Gas Emission Disclosures*, 59 ACCT. & FIN. 277 (2019) (gas emission disclosures).

[154] *See generally* Toru Yoshikawa & Helen Wei Hu, *Organizational Citizenship Behaviors of Directors: An Integrated Framework of Director Role-Identity and Boardroom Structure*, 143 J. BUS. ETHICS 99 (2017) (exploring the effect of board capital on directors' willingness to engage in hard to measure duties such as helping other board members, volunteering on extra duties, etc.).

[155] *See generally* Emmanuel Zenou, Isabelle Allemand, Bénédicte Brullebaut & Fabrice Galia, *Board Recruitment as a Strategic Answer: Do Companies' Strategies for Innovation Influence the Selection of New Board Members?*, 29 STRATEGIC CHANGE 127 (2020).

[156] *See generally* Brown, Hillman & Okun, *supra* note 80 (examining how directors' human and social capital predicts their engagement in monitoring and resource provision).

[157] *See generally* Jennifer Ihm & Michelle Shumate, *How Does a Board of Directors Influence Within- and Cross-Sector Nonprofit Collaboration?*, 29 NONPROFIT MGMT. & LEADERSHIP 473 (2019).

[158] *See generally* Kristina Jaskyte, *Board Attributes and Processes, Board Effectiveness, and Organizational Innovation: Evidence from Nonprofit Organizations*, 29 VOLUNTAS 1098 (2018).

[159] *See, e.g.*, Dana M. Warren, *Venture Capital Investment: Status and Trends*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 1, 1 (2012) (referring to capital in the context of venture capital and capital gains).

[160] *See generally* Nicole S. Dandridge, *Racial Etiquette and Social Capital: Challenges Facing Black Entrepreneurs*, 32 W. NEW ENG. L. REV. 471 (2010) (examining social capital in the context of black entrepreneurs); Louis Kaplow, *The Income Tax Versus the Consumption Tax and the Tax Treatment of Human Capital*, 51 TAX. L. REV. 35 (1995) (exploring the tax treatment of human capital); Robert E. Suggs, *Bringing Small Business Development to Urban Neighborhoods*, 30 HARV. C.R.-C.L. L. REV. 487 (1995) (looking at human and social capital in urban entrepreneurship); Marleen A. O'Connor, *The Human*

A. *Financial Capital*

Financial capital largely addresses the resource provision role of boards of directors. For charitable nonprofit organizations, financial capital—also known as economic capital[161]—encompasses a range of funding sources, including grants, cash donations, money in the bank, in kind donations, and investment income.[162] Financial capital is critical for operations.[163] Sources of board financial capital include donors of cash and labor, such as members of large firms and corporations, but can also include investment experts and directors with grant writing expertise.[164]

Funding is a major concern for many nonprofit organizations.[165] Nonprofit CEOs tend to tilt in favor of composing their boards as sources of financial capital and less towards other forms of capital, particularly human capital outside of legal and finance expertise.[166]

Members of corporations and large firms are frequently included as directors to facilitate the solicitation of corporate gifts in cash and kind.[167] In a study of 123 nonprofit organizations in New York in a variety of areas, including health, foundations, social welfare, cultural, and public policy, the second largest single category of board members were major donors at an average of 26% of all board members.[168] The numbers are even higher in PILOs as shown in the next section. CEOs in PILOs have referred to major donors on boards as the "richer avenue" for obtaining funding from law firms.[169]

Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation, 78 CORNELL L. REV. 899 (1993) (addressing human capital in the context of labor relationships between employees and firms).

[161] *See* PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE 114 (Richard Nice trans., 1984).

[162] *See* RONALD S. BURT, STRUCTURAL HOLES: THE SOCIAL STRUCTURE OF COMPETITION 8 (1992); Grace L. Chikoto-Schultz & Daniel Gordon Neely, *Exploring the Nexus of Nonprofit Financial Stability and Financial Growth*, 27 VOLUNTAS 2561, 2563–64 (2016).

[163] *See* BURT, *supra* note 162, at 9.

[164] *See* Fama & Jensen, *supra* note 9, at 319. *See generally* Adediran, *Relational Costs*, *supra* note 25.

[165] *See, e.g.*, Adediran, *Relational Costs*, *supra* note 25, at 389.

[166] *See* Katherine O'Regan & Sharon M. Oster, *Does the Structure and Composition of the Board Matter? The Case of Nonprofit Organizations*, 21 J.L., ECON., & ORG. 205, 208 (2005); Jack C. Green & Donald W. Griesinger, *Board Performance and Organizational Effectiveness in Nonprofit Social Services Organizations*, 6 NONPROFIT MGMT. & LEADERSHIP 381, 391 (1996).

[167] Karen A. Froelich, *Diversification of Revenue Strategies: Evolving Resource Dependence in Nonprofit Organizations*, 28 NONPROFIT & VOLUNTARY SECTOR Q. 246, 253 (1999).

[168] Callen, Klein & Tinkelman, *supra* note 82, at 500, 503. Individuals with professional skills—human capital—were the largest group at an average of 37%. *Id.* at 503.

[169] Adediran, *Relational Costs*, *supra* note 25, at 373.

B. *Social Capital*

Social capital is important for virtually all aspects of nonprofit goals, including community relations, fundraising, board development, strategic planning, and advocacy.[170] Social capital is "the sum of the actual and potential resources embedded within, available through, and derived from the network of relationships" an individual possesses.[171] Social capital is essentially connections to networks both inside and outside an organization, including other board members, professionals in other fields, potential clients, community contacts, business leaders, political figures, and philanthropists.[172] "Nonprofits and their leaders must foster social capital in order to recruit and develop board members, raise philanthropic support, develop strategic partnerships, engage in advocacy, enhance community relations, and create a shared strategic vision and mission within the organization and its employees."[173]

Social capital has several important characteristics. "First, it is both an individual-level and a group-level asset that includes both relations and potential resources arising from the relations."[174] Social capital includes social networks, "the content of social relations such as trust, liking, obligation, and respect," and "outcomes from social relations such as information, influence, and solidarity."[175] Second—and this is not unique to social capital—connections to "friends, colleagues, and more general contacts . . . [are] opportunities to use [one's] financial and human capital" for monitoring, advice, and resource provision.[176] In other words, social capital can be converted to financial and human capital. Third, social capital can have some costs. For example, social capital can impact and narrow the selection of new board members.[177] In other words, social capital can predict which candidates are more likely to be chosen to join a board, which can be limited to individuals who already have internal or external social capital connections with the board or organization.[178] Nevertheless, the potential costs are not inevitable as external pressures may ensure that board directors select those who are best suited for the organization's

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[170] *See* Nancy K. King, *Social Capital and Nonprofit Leaders*, 14 NONPROFIT MGMT. & LEADERSHIP 471, 471–72 (2004).

[171] Nahapiet & Ghosal, *supra* note 148, at 243; *see also* Paul S. Adler & Seok-Woo Kwon, *Social Capital: Prospects for a New Concept*, 27 ACAD. MGMT. REV. 17, 23 (2002).

[172] *See* Kim & Cannella, *supra* note 63, at 287; Stevenson & Radin, *supra* note 9, at 17–18; Jaskyte, *supra* note 79, at 443. *See generally* Ajay Mehra, Andrea L. Dixon, Daniel J. Brass & Bruce Robertson, *The Social Network Ties of Group Leaders: Implications for Group Performance and Leader Reputation*, 17 ORG. SCI. 64 (2006).

[173] King, *supra* note 170, at 471.

[174] Kim & Cannella, *supra* note 63, at 283.

[175] *See id.*; Rebecca L. Sandefur & Edward O. Laumann, *A Paradigm for Social Capital*, 10 RATIONALITY & SOC'Y 481, 485, 489, 491 (2000); Adler & Kwon, *supra* note 171, at 21.

[176] BURT, *supra* note 162, at 9; *see also* Adler & Kwon, *supra* note 171, at 21.

[177] Kim & Cannella, *supra* note 63, at 283.

[178] *See id.*

context, rather than those to whom current directors are already closely connected.[179]

"Nonprofits and their leaders must foster social capital in . . . recruit[ing] and develop[ing] board members, rais[ing] philanthropic support, develop[ing] strategic partnerships, engag[ing] in advocacy, enhanc[ing] community relations, and creat[ing] a shared strategic vision" for the organization and its employees.[180]

C. *Human Capital*

Human capital is required in the board's monitoring and advice roles. Human capital is the education, expertise, experiences, knowledge, skills, gender, race, and ethnicity that individual directors bring to the decision-making process.[181] These can include industry knowledge related to the kinds of services an organization provides, legal experience in a range of capacities, financial expertise—having an understanding of generally accepted accounting principles and financial statements—experience with hiring a CEO, familiarity with the client population, life experiences that can provide valuable information for the services provided, and life experiences based on gender, race, or ethnicity.[182] Such knowledge, skills, expertise, and experiences affect how directors process information, what directors pay attention to, how they frame decisions, and organizational performance.[183]

There are a number of studies on board human capital. A study of 240 YMCA organizations suggests that heterogenous boards with a variety of member backgrounds helped to keep their mission as a social agency in the forefront of their decision-making processes.[184] One executive from the study recalled a situation involving a long-standing YMCA program where having multiple viewpoints was particularly salient.[185]

> The program had not been cost effective for several years and was beginning to drain on other sources of revenue. Several board members with business backgrounds were strongly opposed to its continuance. However, viewpoints of other board members tended to stress the program's benefit of building family relationships. After hearing both sets of arguments, the board voted to

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[179] *See id.* at 287–88.

[180] *See* King, *supra* note 170, at 471.

[181] *See, e.g.*, Johnson, Schnatterly & Hill, *supra* note 149, at 240; Ronald C. Anderson, David M. Reeb, Arun Upadhyay & Wanli Zhao, *The Economics of Director Heterogeneity*, 40 FIN. MGMT. 5, 6 (2011). Some scholars have also defined board independence as a form of human capital. *See* Stevenson & Radin, *supra* note 9, at 22.

[182] *See, e.g.*, Johnson, Schnatterly & Hill, *supra* note 149, at 240; Harris, *supra* note 130, at 115.

[183] Johnson, Schnatterly & Hill, *supra* note 149, at 240; *See* Anderson, Reeb, Upadhyay & Wanli, *supra* note 181, at 6.

[184] Siciliano, *supra* note 51, at 1313, 1318.

[185] *Id.* at 1318.

> continue the program for another year. As the [CEO] noted, "This was one of our most difficult decisions, since it dealt with the organization's mission but was strongly influenced by our limited revenue base. Having a variety of viewpoints helped the board consider all aspects of the decision."[186]

Research also shows that gender diversity affects board cognition, dynamics, decision-making, and firm outcomes.[187] For example, one study found that having three or more women on a board seems to create a positive association with corporate social responsibility.[188] Similarly, research on racial and ethnic diversity on boards indicates that "diversity brings different cognitive perspectives and affects group dynamics and decision making, which in turn impacts [organizational] outcomes."[189]

Human capital is therefore about board heterogeneity in exhibiting a range of professional and life experiences and expertise. Boards with a range of human capital bring multiple perspectives to board oversight, and the level and kinds of resources provided to an organization that benefit an organization's mission through improved mission utilization, problem solving, and strategy formulation.[190]

IV. OPERATIONALIZING BOARD CAPITAL IN PILOS

Part III described board financial, social, and human capital as they relate to board roles. Financial capital is important for obtaining resources. Social capital is connected to monitoring, advice, and resources. Human capital is related to monitoring and advice. Part IV applies those concepts to PILOs as an example of the relationship between board composition and board roles.

Public Interest Legal Organizations (PILOs) are some of the most important institutions for American democracy.[191] They have been critical in historical and contemporary struggles for civil rights, economic inequality, racial justice, environmental justice, the eviction crisis, and immigration,[192] which disproportionately impact communities of color across the country.[193]

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[186] *Id.*

[187] *See* Johnson, Schnatterly & Hill, *supra* note 149, at 239.

[188] *See id.*; Corinne Post, Noushi Rahman & Emily Rubow, *Green Governance: Boards of Directors' Composition and Environmental Corporate Social Responsibility*, 50 BUS. & SOC'Y 189, 205 (2011).

[189] Johnson, Schnatterly & Hill, *supra* note 149, at 239.

[190] *See* Anderson, Reeb, Upadhyay & Wanli, *supra* note 181, at 8–9.

[191] Previous works have referred to these organizations as nonprofit legal services organizations. *See, e.g.*, Adediran, *Relational Costs*, *supra* note 25. PILO more accurately captures a broad range of organizations that provide individual representation and law reform and policy advocacy.

[192] *See generally* Adediran, *Relational Costs*, *supra* note 25.

[193] *See* Atinuke O. Adediran & Shaun Ossei-Owusu, *The Racial Reckoning of Public Interest Law*, 21 CALIF. L. REV. ONLINE 1, 2 (2021). *See generally* Deena Greenberg, Carl

Most PILOs' missions focus broadly on anti-poverty initiatives and addressing social problems.[194] Their mission statements are often broad and focus on at least two elements. The first is that they are focused on providing a service—in this case legal services and advocacy. The second is that the population served are low income or vulnerable groups. Board composition is related to both elements. It's important to have board members who are equipped to ensure that an organization can provide legal services and advocacy. At the same time, it is important to have board members who are equipped to ensure that the needs of low-income, often minority groups are being met from the perspective of those clients and vulnerable groups.

Previous research has shown that PILOs are beholden to the private sector for financial capital and respond to law firm interests for access to the possibility of secure funding sources.[195] As such as indicated below, PILO boards are dominated by private sector lawyers.[196] Yet, PILO clients are disproportionately poor and low income.[197] PILO clients are also disproportionately racial and ethnic minorities.[198] This fact is critical in thinking about whether and how PILOs compose their boards to monitor, provide advice, and resources.

A. *Data and Methods*

Prior to this research, there was no available dataset to show the composition of PILO boards of directors. This Article is the first to provide such data to illuminate the role of board capital in performing board roles. In addition to this original dataset, I also use interview-based data to provide additional context for the statistics. Both sources of data show the contemporary board capital landscape in PILOs in the United States. The first source of data is a national dataset of PILO board members.[199] The study contains 9,010 individuals who represent 550 organizations across the United States in all fifty states and the District of Columbia. This is the largest study of PILOs in the United States. Generating this novel dataset necessitated several steps. First, my research assistants and I compiled a list of all organizations that provide legal services and advocacy to individuals and groups either through the direct representation of individuals, litigation, or policy advocacy and law reform efforts, defined broadly. We included a few social services organizations with extensive legal services departments or programs. By focusing on organizations

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Gershenson & Matthew Desmond, *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. C.R.-C.L. L. REV. 115 (2016).

194 *See* Adediran, *Relational Costs*, *supra* note 25, at 360.

195 *See id.* at 373.

196 *See id.*

197 *See id.* at 360.

198 Adediran, *Allies*, *supra* note 22, at 2164–65.

199 Data for pro bono partners and counsels are limited to Am Law 100 firms.

that engage exclusively, or in large part, on legal services, we took a much narrower approach than other empirical studies on similar organizations.[200]

Generating this data was particularly challenging because it required a state by state search of the internet and bar association websites using terms such as "public interest organizations," "legal services organizations," "volunteer lawyers," "pro bono organizations," etc. We then checked our lists against scholarly articles on public interest organizations to include any organization that we may have missed.[201] Next, we searched each organization's website for its board members to code key demographic information including gender, race, ethnicity, occupation, title, firm type, type of legal practice, etc. We relied on professional websites, blogs, newsletters, and social media platforms, including LinkedIn and Facebook, to code individual demographic information.

We encountered some challenges in obtaining information for some 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 for those board members who are not lawyers and who do not have professional profiles. Still in some cases, we could not find photographs, or relevant information, or when we found photographs or information, they were not sufficiently clear. In those cases, we coded the data as missing and did not include them in our analyses.

There are important differences among the organizations in our database. One hundred thirty-two of the 550 organizations are largely funded by the Legal Services Corporation (LSC) through congressional appropriations, while the rest are not funded by LSC but by other federal grants, state and local grants, and private donations—including from law firms, corporation and private foundations.[202] The PILOs include a mix of young and old, large, medium and small, local, statewide, and national. Some PILOs focus on law reform efforts—impact litigation, policy, and advocacy—while others primarily represent individuals. A third and growing group engage in both individual representation and law reform work.[203] Some are staff-driven organizations with small pro bono components, in that they represent clients mostly in-house.[204] Others are pro bono focused organizations with small numbers of staff.[205] Some are generalists, while others specialize in particular areas of law. Some have large

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200 For an example of a study that took a much broader approach to classifying public interest legal organizations, see generally Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591 (2006). Even with the broad approach, there were only 270 PILOs that met the study's criteria and only 221 were included in that study. *Id.* at 1605.

201 We checked our lists against Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027 (2008). The Rhode study included only fifty PILOs and is not comprehensive. *Id.* at 2029–32. It is therefore probable that we do not capture all PILOs in the United States.

202 LSC funded PILOs receive funds from these other sources as well.

203 *See* Adediran, *Relational Costs*, *supra* note 25, at 390.

204 *See id.* at 391.

205 *See id.*

boards of directors, while others have smaller boards. Some are in urban centers, while others are in small cities and rural areas. These differences are important in thinking about board capital. Nevertheless, the Article is mostly concerned with the general landscape of PILOs except where important variations are noted.

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 CEOs and thirty board members. These interviews are not meant to be representative of the entire population of the 9,000+ board members. Instead, they are used as illustrations of the experiences of some board members, or to provide context for specific ideas that numbers alone cannot provide. CEOs provide the management side of board experiences, and those interviews are important alongside those of board members. Lawyers comprise 66% of PILO board members. Thirty of the thirty-two board members interviewed are lawyers. Two are legal academics. CEOs and board members are from PILOs in all regions, 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 state. Notably, these locations capture the majority of PILO board directors in the United States—71% of all the board members in the dataset. 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 all interviews uniformly pursued a consistent set of themes and questions, but also explored additional topics as they arose.[206] Each interview lasted for approximately one hour.

I recruited participants through referrals and by contacting them directly. For CEOs, I first contacted individuals I knew from prior studies. Some of these CEOs referred me to other CEOs. In addition, I emailed about fifty CEOs that I had no prior contact with across the country. Ten agreed to participate in the study. For board members, I received referrals from contacts in other studies. I also individually contacted about 100 board members listed on PILOs' websites. Of the thirty-two interviews, eleven were board members that I recruited directly rather than through referrals.

Table 1 below shows the descriptive statistics of board members across all 550 PILOs.

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[206] *See* MICHAEL QUINN PATTON, QUALITATIVE EVALUATION AND RESEARCH METHODS 174 (2d ed. 1990).

Table 1: *Descriptive Statistics of Composition Variables*

		N	%
Gender			
	Male	4449	51.1%
	Female	4255	48.9%
	Other	5	0.01%
Race			
	White	5838	73.1%
	Black	1095	13.7%
	Asian	453	5.7%
	Hispanic/Latinx	452	5.7%
	Indigenous	66	0.8%
	Other	4	0.1%
	Middle Eastern	76	0.95%
Board Member Types			
	Client-Eligible	727	8.4%
	Community Member	528	6.1%
	Accountant/Financial Manager	371	4.3%
	Company Executives and Owners	302	3.5%
	Medical/Psychology/Social Work	179	2.1%
	Foundations/Philanthropists	86	0.99%
	Religious Leaders	20	0.2%
	Government Employees	89	1.0%
	Lawyers	5767	66.5%
	Educators	186	2.2%
	Retired Professionals	129	1.5%
	Media/Technology/Marketing	287	3.3%
Lawyers' Practice Settings			
	Am Law 200	1500	16.9%
	Corporate Counsel	675	7.6%
	Other Law Firm	809	20.4%
	Government	268	3.0%
	Nonprofit	302	3.4%
	Judge	96	1.1%
	Solo Lawyer	554	6.3%
	Other Lawyer	425	4.8%
Total		7984[207]	

[207] This N omits individuals with missing data.

As Table 1 indicates, about 66% of PILO boards nationally are lawyers. Lawyers are trained in legal doctrine and understand their monitoring role quite well. In addition, 45% of all PILO board members come from law firms or corporations,[208] which means that they also understand their role as resource providers. The board member of a large PILO in the West explained the general mindset of most PILO boards of directors:

> Most people on the board did not have to participate in the programs. They were just very astute business and legal leaders who wanted to make sure programs were able to run, wanted to make sure funds were raised so that we have enough money to keep them running, the people knew about them, that there was education so that people who knew those services were going to them. That the funds that were coming to support were adequately used and not overspent or underspent.[209]

The above statement indicates that this PILO director—like many others—is focused on human capital expertise in law and finance and financial capital on the boards. Below, I discuss in greater detail the current landscape of PILO financial, social, and human capital and what is underemphasized on PILO boards.

B. *Financial Capital*

In meeting the resource provision role of boards, board financial capital is a major and indispensable source of resources for PILOs much like other nonprofit charities.[210] PILO boards are composed to target financial capital, and for CEOs, financial capital is often the most salient form of capital.[211] Lawyers make up the majority of PILO board members at 66%.[212] Forty-five percent of all PILO board members and 71% of the lawyers on PILO boards are members of law firms of varying sizes, or in-house corporate lawyers.[213] Indeed, 55% practice in Am Law 200 firms or as in-house corporate counsels.[214] For instance, the board president of a PILO in the Northeast explained that "one reason that the [organization] likes people who are the heads of major law firms on the board is because these law firms are giving, $200,000, $300,000, $400,000 a

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208 *See supra* Table 1 (7.6% corporate counsel, 16.9% Am Law 200, and 20.4% other law firm, totaling 44.9% of board members).

209 Interview with BD025 (Nov. 30, 2020) (on file with author).

210 *See generally* Adediran, *Relational Costs*, *supra* note 25.

211 This is not unique to PILOs. In a study of 121 community foundations for example, 55% of the executives said that raising financial capital was a role of board members. *See* Brown & Guo, *supra* note 126, at 539.

212 *See supra* Table 1.

213 *See supra* Table 1.

214 *See supra* Table 1.

year. It's that large—it's for [many] the largest single contribution."[215] Another board member of a large PILO in the South explained that the organization's CEO "targets key partners at firms and that's who is going to sit on [the] board because they are automatically going to bring in the dough. It is all about money."[216]

There are two related mechanisms at play to explain why PILO boards are filled with law firm and in-house lawyers. The first is that law firms want partners to sit on PILO boards to raise firms' prestige and legitimacy among other law firms, corporate clients, and law students.[217] Indeed, the relationship between law firms and PILOs is constructed around law firm interests, which includes having seats on PILO boards.[218] The CEO of a large PILO in the Northeast explained that firms "consider it a nice thing to be on [our] board. So, the firms never have problems finding someone of stature from their law firm who wants to be on our board. I think that law firms are very proud of their connection and support to us."[219] In addition to firm interests, individual law firm partners sit on PILO boards for a number of reasons, including to make a difference in their communities, for personal prestige and networking opportunities, especially with corporate clients.[220]

A second and related mechanism is that PILOs are reliant on law firms and corporations for cash and in-kind resources regardless of whether they are funded by LSC or largely by other grants and private philanthropy.[221] Law firm and corporate lawyers can also raise the profile of PILOs and grant them legitimacy in the legal community.[222] The CEO of a large PILO explained the mechanism that drives the reliance on law firms for financial capital:

> Every now and then we'll get a firm that will articulate that we need a partner on the board in order to give you larger dollars. When they're trying to discern who they're going to give two of the thousands of requests that they get every year, if they've got a partner on the board, they're likely to give more. When I got here, we had a lot of associates on the board. And I made a real push to try and get partners on the board. And if I can, managing partners. They have more control and more say and they're the decision makers oftentimes. And so, I want to have the decision maker at the firm. I want to have access to them.[223]

This dependence is so strong that PILOs respond to law firm demands for board seats to secure law firm funding even if they receive LSC funding.[224] It is

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[215] Interview with BD005 (July 7, 2020) (on file with author).
[216] Interview with BD014 (Aug. 5, 2020) (on file with author).
[217] *See* Adediran, *Relational Costs*, *supra* note 25, at 385–86.
[218] *See id.* at 371.
[219] Interview with PILO124 (June 1, 2020) (on file with author).
[220] *See* Adediran, *Relational Costs*, *supra* note 25, at 371 n.75.
[221] *See id.* at 406.
[222] *See* Abzug & Galaskiewicz, *supra* note 56, at 53.
[223] Interview with PILO115 (Mar. 5, 2020) (on file with author).
[224] *See generally* Adediran, *Relational Costs*, *supra* note 25.

not surprising then that PILO boards are composed to target both cash and in-kind financial capital. LSC funded PILOs tend to have fewer law firm and corporate lawyers on their boards and have more solo lawyers than non-LSC funded organizations, as indicated in the figure below but they still have a sizable percentage.

The CEO of a large PILO explained:

> We do need them—we are hoping for them to be influential within their firms. The way the law firm community works [is that] all partners are not equal even if they're technically in name title equal. And so, we don't always succeed but we are endeavoring to get [certain] people. And then their organization will give anywhere from another 10,000 to another 200,000.[225]

The CEO of a medium-sized PILO in the Northeast explained:

> Legal services organizations typically went after major partners in major firms. That's why you want them. Because they're the movers and shakers. If you have to put together something and you need more money every year in order to survive, who are you going after? Do you know what $10,000 means to a major firm in this city? That's lunch.[226]

The CEO of a PILO in the West explained that board members from law firms are an important source of in-kind financial capital:

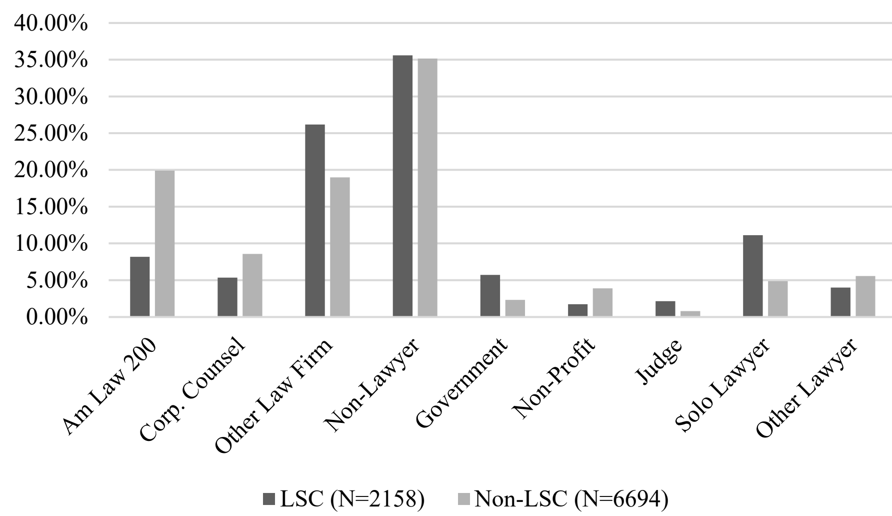
> There's been situations where we've needed pro-bono representation. For example, you have a contract that a vendor provider didn't do what they were supposed to do. We will have one of our board members from the big firms then provide pro bono counsel. Could be them or could be an associate in their office. But when a demand letter goes out on the letterhead of the big firm it makes a difference. So, I can't tell you how many times I've leveraged that. I can't tell you how many times I've leveraged research on things that are corporate related. I've had research done on just a number of matters that we as a non-profit corporation has needed.[227]

It is important to distinguish between LSC and non-LSC funded PILOs here. The LSC Act has important requirements for the board of its 132 grantee organizations. The first is that they must fill one-third or 33.3% of their boards with eligible clients.[228] Eligible clients are defined as "any person financially unable to afford legal assistance."[229] The client-eligible board member requirement "dates back to the mandate for 'maximum feasible participation' of participants in the 1960s War on Poverty programs" seeking to ensure that

[225] Interview with PILO106 (Feb. 26, 2020) (on file with author).
[226] Interview with PILO107 (Feb. 26, 2020) (on file with author).
[227] Interview with PILO125 (June 9, 2020) (on file with author).
[228] 42 U.S.C. § 2996f(c).
[229] 42 U.S.C. § 2996a(3).

disadvantaged citizens have a voice in how services are provided to them.[230] The second is that the Act also requires at least 60% of LSC grantee boards to "consist[] of attorneys who are members of the bar of a State in which the legal assistance is to be provided."[231] The attorney requirement does not however require attorneys to be members of law firms or corporations.[232] Still, both LSC and non-LSC funded PILOs strive to fill their boards with law firm partners and corporate counsels for access to financial capital.

Figure 1: *Proportion of Board Member Type in LSC and Non-LSC*



Therefore, PILO boards of directors are composed to target financial capital from law firms and corporations for resources. PILO board members fully understand their role as resource providers.[233]

C. *Social Capital*

"The central proposition of social capital . . . is that networks of relationships constitute a valuable resource . . . ."[234] Social capital provides access to other key resources, such as financial capital or human capital.[235] For example, "directors accumulate . . . valuable information from the social

230 LeRoux, *supra* note 5, at 505.

231 42 U.S.C. § 2996f(c). For LSC funded PILOs, once the requirements for client eligible and attorney board members are met, there is often little room for additional board members.

232 *Id.*

233 *See* Adediran, *Relational Costs*, *supra* note 25, at 374.

234 Nahapiet & Ghoshal, *supra* note 148, at 243.

235 Fernandez, Thams & Lehrer, *supra* note 128, at 139–40.

networks that enhance their ability to offer strategic advice and counsel" to a nonprofit.[236]

PILOs tend to have a narrow view of social capital and often treat it simply as a source of financial capital. When I asked the CEO of a large PILO in the West about who the ideal board member is, she described the individual in terms of social capital that provides ready access to financial capital:

> Not only is he earning a high salary and can make a gift himself, but he is also proximate to other people who are doing the same. And most importantly, he is a general counsel of a large publicly-traded company that is routinely hiring all kinds of legal service providers as vendors, including large law firms who are also great donors to [us]. So, for that example, this is extremely mercenary. He is in an ideal position to raise dollars.[237]

The CEO of a large PILO in the Northeast provided a similar explanation for how social capital helps to access financial capital:

> When we have a board member come in, it is often because we want to make sure that we're solidifying a connection and a relationship with a particular law firm or a corporate law department. The need to create great relations on the pro bono side, and volunteerism . . . and also solidifying the fundraising [be]cause it's such a big part of our model which enables us to be really flexible and look at the long-term impact on the community.[238]

However, social capital can also connect an organization with valuable information from networks to offer counsel to the organization. PILOs in the study reported investing limited resources in cultivating social capital for this purpose. In serving poor, mostly minority individuals, there is a wealth of information about the population served that can be garnered from social networks but are currently mostly untapped.

When speaking about social capital as a form of connection that is not meant to generate financial capital, the CEO of a large PILO in the West highlighted how her organization "leveraged connections to top elected leaders."[239] The CEO of another large PILO in the West deemphasized the importance of social capital for connecting to the local community while emphasizing social capital to the business community:

> We talk about industry diversity because we are asking board members to serve as ambassadors of the organization, into the larger [local] community and business community, in particular, to put us in rooms and conversations that [we] wouldn't naturally be in by itself. And so, the more diverse the board is

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[236] *Id.* at 138.
[237] Interview with PILO121 (Mar. 6, 2020) (on file with author).
[238] Interview with PILO130 (July 7, 2020) (on file with author).
[239] Interview with PILO125 (June 9, 2020) (on file with author).

> in all of those respects, the better a job they're going to do as a group of getting us into all of the places we obviously need to be.[240]

From the above CEO's perspective, the value of social capital remains confined to the need to make financial capital connections. However, social capital should also be a source of intangible resources to the client community as explained below.

D. *Human Capital*

Human capital is the cumulative effects of board directors' education, expertise, knowledge, skills, experience, and identity factors such as gender, race, and ethnicity.[241] Board capital in PILOs includes legal expertise, financial expertise, experience related to the client population, and life experience related to directors' race and gender.[242] However, generally, PILO CEOs and board members tend to view board human capital to largely focus on expertise in law and finance coming mostly from lawyers.[243]

1. *Expertise in Law and Finance*

Because of the law's focus on the board's monitoring and fiduciary obligations, the overall mission of PILOs to provide legal advocacy, and the large number of lawyers on PILO boards, PILOs tend to emphasize legal and finance expertise and skills in board composition.[244] When I asked CEOs and board members about the role of a PILO board member, responses were overwhelmingly geared towards providing legal and finance expertise to meet the board's monitoring role. The CEO of a large PILO in the Northeast described the board's role in these terms:

> They do a deeper dive into our books mostly through the treasurer but also through the monthly reporting and conversations about that. And then they do a much deeper dive on our budget, but the budget is approved by the board and that's like the biggest decision the board makes every year. The board does do an evaluation of me every year. It makes all sort of compensation decisions. It does help the strategic priorities mostly through how do we grow, or if we're

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[240] Interview with PILO121 (Mar. 6, 2020) (on file with author).

[241] *See supra* note 181.

[242] *See* Harris, *supra* note 130, at 115; Johnson, Schnatterly & Hill, *supra* note 149, at 240–46.

[243] *E.g.*, Interview with PILO106 (Feb. 26, 2020) (on file with author).

[244] *E.g.*, Interview with PILO112 (Feb. 27, 2020) (on file with author); Interview with PILO118 (Mar. 6, 2020) (on file with author); Interview with PILO119 (Mar. 6, 2020) (on file with author).

> in a position to retract, how would we get smaller? . . . They approve the audit every year—all the normal governance stuff they do.[245]

Other CEOs and board members provided similar responses. A CEO explained that the board is "drawn primarily from the legal sector. Though that's not a requirement. And so, they are typically very accomplished lawyers, either members of firms or corporate legal departments."[246] In explaining the focus on legal expertise on the board of a large PILO, a board member who is a partner in a law firm explained:

> It is not really a diverse board. . . . [W]e are all lawyers. We are all partners in . . . law firms; whereas, at [non-PILO], you have people coming from the educational industry, people who are from a prosecutorial background. You have general counsels of companies. You have people from accounting firms. . . . Substantive diversity brings creativity, and you can pressure test better – let me put it that way. We [would] have more to bear on things like strategic plans.[247]

The board director above contrasted his PILO board to a non-PILO board where he is also a member. According to the board member, the non-PILO board is better able to provide strategic advice because it has a range of professionals skills on the board than the PILO board.[248]

In addition to legal expertise, finance expertise is also a major board human capital for PILOs. Indeed, when CEOs talked about the need to expand their human capital outside of legal expertise, finance expertise was often the go to. For instance, the CEO of a midsized PILO in the South talked about the need to expand expertise outside of the law but quickly brought in a board member who is an expert in finance to become the only member who is not a lawyer:

> I was getting questions about we have all lawyers on the board. So, our lack of diversity is in terms of skills set and I thought there was an opportunity to expand that to not just lawyers. And so, the obvious one is a banker because lawyers don't necessarily like to be the treasurer. And she has a great skill set that we really needed.[249]

Another CEO of a midsized PILO in the Midwest talked about the need for human capital expertise in finance:

> There are some lawyers who can be CPAs too, but we want a real finance, independent finance expert who can hold us to account. And so, we created these positions after I started really just knowing that it was going to be hard

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[245] Interview with PILO106 (Feb. 26, 2020) (on file with author).
[246] Interview with PILO121 (Mar. 6, 2020) (on file with author).
[247] Interview with BD011 (July 13, 2020) (on file with author).
[248] *Id.*
[249] Interview with PILO112 (Feb. 27, 2020) (on file with author).

> to find that kind of expertise in lawyers and it's a way to get those communities involved too.[250]

In sum, PILOs currently emphasize mostly legal—but also have a strong interest in financial expertise—in board human capital. In terms of legal expertise, there is generally little variation between LSC funded PILOs with board composition restrictions and non-LSC funded PILOs with no board restrictions.[251] On average, both PILO types fill majority of their boards with lawyers.

2. *Industry Expertise: Client Population*

In addition to legal advocacy, virtually all PILOs provide social services or address societal problems that go beyond legal services. Therefore, PILOs are generally underemphasizing a vital form of human capital related to industry expertise in the client population. The client population would vary across PILOs but expertise on the client population can come from at least two sources: (1) professionals from industries that coalesce with legal services and advocacy and touch the lives of PILO clients or impact the client experience, such as healthcare, the criminal justice system, education, social and human services, and community agencies; and (2) the clients who receive legal services and advocacy that PILOs provide.

Virtually all CEOs described the lack of expertise related to the client population on their boards. The CEO of a large Northeast PILO went as far as to describe the overemphasis on the monitoring role of the board and lack of expertise on the client population as detrimental to the organization:

> [The board] comes from a completely different world. And their personal background—they live in the law firm world, a lot of money—they see non-profits as a place not to spend money. Their fiscal caution is just to stop spending in a way that hurts us in the short and medium-term, not to mention the long term. And it's hard for them to change into an investment model of thinking of non-profits. That is a big part of them being lawyers. 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. Being able to have those strategic conversations in a really meaningful way can be challenging when you have a board composition like ours.[252]

The description above highlights the importance of human capital that is connected with the fundamental nature of the activities of PILOs. This is because in addition to monitoring and resource provision, boards are deeply

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250 Interview with PILO103 (Feb. 6, 2020) (on file with author).

251 *See supra* Table 1.

252 Interview with PILO130 (June 7, 2020) (on file with author).

involved in providing strategic advice—determining their organizations' mission and direction, strategy formulation, and implementation.[253]

In theory and scholarship, providing advice and counsel on strategy formulation and implementation is an intangible role and often seems unimportant and is typically addressed in passing; but in practice, these processes can determine the kinds of legal services and advocacy PILOs pursue.[254] Fiduciary obligations alone do not capture this important board role. Afterall, determining organizational strategy includes the following activities described by the CEO of a medium-sized PILO in the West:

> Everything from fundraising to technology to recruiting and retaining staff's talent, identifying real goals that [are] realistic and achievable, [determining] our clients' needs—are we serving them, are our resources focused in those areas of great need?, how many lawyers and how many cases we'll be placing in our pro bono program, specifically how many training sessions per year will we offer, and whether to "find a client to be on the board . . . that more closely represents the population we serve rather than the population we raise money from."[255]

Another CEO described the board's advice and counsel role as focused on determining "what we want to change in the world," as elaborated below:

> The goal is . . . focused on what we want to change in the world. We are trying to obtain civil justice for our client community leading to a variety of positive outcomes for those clients. And so, there was discussion about each component of the theory of change. What are our activities, how do we hold ourselves accountable?[256]

Two other CEOs talked about the board's central involvement in setting the organization's vision and strategic plan:

> We adopted our current strategic plan . . . after a year of analysis and discussion and decision making and vision setting. And the board was centrally involved in that. So, we spent a year collecting data about the impact of our services in the community, the need for our and other services in the community, and then the reputation of our work in the community.[257]
>
> We did strategic planning [that] 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

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[253] *See* Johnson, Daily & Ellstrand, *supra* note 63, at 411.

[254] *See* Interview with BD001 (June 22, 2020) (on file with author).

[255] Interview with PILO125 (June 9, 2020) (on file with author); Interview with BD009 (July 8, 2020) (on file with author); *see also* Interview with BD010 (July 13, 2020) (on file with author).

[256] Interview with PILO106 (Feb. 26, 2020) (on file with author).

[257] Interview with PILO121 (Mar. 6, 2020) (on file with author).

> of it. And the implementation was by staff. We have standing reports to the board to ensure that we're implementing the strategic planning.[258]

This is not to say that PILO boards do not seek input from industry experts, clients, management, and staff in the process of making these critical decisions. PILOs readily consult clients and other constituents using formats such as "client surveys, focus groups with board members, conversations amongst staff, focus groups with staff."[259] Others consult clients because federal and state grants strongly encourage needs assessments from the client community, as explained by the CEO of an LSC funded PILO in the Northeast.

> So, we also have to do a needs assessment, both the federal and the state government funding urge people to do needs assessment which is where you reach out to the community organizations and to the clients and try to figure out what the most pressing needs are in the community to make sure that we prioritize the most pressing needs. The board reviews the results of the needs assessment and sets its priorities. But candidly we sort of know going in what the big needs are. The benefits of the needs assessments typically are the kinds of things that are not a huge need but are still needed, and we learn about them.[260]

However, consultation is certainly not the same as having decision-making power. And as described below, the literature in management and the interview data in this Article suggest that these consultations are not always meaningful without the decision-making power that being on a board affords. Still, some PILOs—especially those who concentrate on narrow and specialized areas of law—have a handful of board members with expertise in that area of service. The CEO of a large PILO in the Northeast that focuses on a particular area of law explained:

> [About] half [are lawyers], and then the rest are either executives in the entertainment industry and particularly in television. . . . And then some of them also are like [area] advocates and are connected to that work in some way. So, there's some representation in our assessments matter.[261]

When I asked the above CEO for additional information about how prevalent "area advocates," are on the board, she revealed that there are really only a few of those individuals "who have an understanding of the universe the organization addresses. We have somebody who is a commissioner in the

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

259 *E.g.*, Interview with PILO106 (Feb. 26, 2020) (on file with author); *see also* Interview with PILO121 (Mar. 6, 2020) (on file with author); Interview with PILO128 (June 17, 2020) (on file with author); Interview with BD007 (July 8, 2020) (on file with author); Interview with BD011 (July 13, 2020) (on file with author).

260 Interview with PILO129 (June 25, 2020) (on file with author).

261 Interview with PILO105 (Feb. 20, 2020) (on file with author).

probation department. And then we have another one . . . who is the superintendent of the school district where there's a lot of fostered youth."[262]

In the end, industry experts on PILO boards—when they exist—are relatively few. This is however not unique to PILOs.[263] To ensure continued access to financial capital, many nonprofit boards are overrepresented by professionals who have limited industry expertise or knowledge of the client population.[264] This is the case even though research and best practices suggest that board directors working in the industry have better institutional knowledge, and are better able to address non-financial goals.[265] Without industry related expertise, a PILO runs the risk of losing its connections and legitimacy with the communities served.[266] As two nonprofit scholars have remarked, "[A]n organization may claim that it represents or serves particular identities or interests, but its claim would be hollow if those that it claims to represent do not see it as their legitimate spokesperson."[267]

For legitimacy and for information that can mean better awareness and service to the client population, board human capital expertise related to the client population is important.

There is a second avenue for expertise on the client population outside of professionals: the clients, potential clients, or client-eligible individuals who avail themselves or can avail themselves of PILO services.[268]

Research suggests that organizations with participation from clients who have personal closeness to the services an organization provides, are better able to craft more effective policies and services than organizations without those individuals.[269] Authentic participation from clients can promote effective organizational performance.[270] To the extent that the board is responsible for the organization's mission, strategic planning, and the direction of the agency, as far as outreach, or as far as broadening the services that they could be providing, [clients] would be better able to point out opportunities for improvement in that area, or if there are other things or needs that they can identify that possibly the organization can look at . . . since we're not in the situation."[271] PILOs—regardless of their funding structure—generally believe that client expertise on their boards is probably a good idea.[272]

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[262] *Id.*

[263] *See, e.g.*, Siciliano, *supra* note 51, at 1316–18 (finding that 58% of the YMCA board members in the study were from the business sector).

[264] *See generally* Abzug & Galaskiewicz, *supra* note 56.

[265] Harris, *supra* note 130, at 127.

[266] *See* Abzug & Galaskiewicz, *supra* note 56, at 53.

[267] *Id.* at 54.

[268] *See, e.g.*, Interview with PILO122 (Mar. 23, 2020) (on file with author).

[269] *See* LeRoux, *supra* note 5, at 505; William A. Brown, *Inclusive Governance Practices in Nonprofit Organizations and Implications for Practice*, 12 NONPROFIT MGMT. & LEADERSHIP 369, 370 (2002).

[270] LeRoux, *supra* note 5, at 505.

[271] Interview with BD024 (Nov. 5, 2020) (on file with author).

[272] *See, e.g.*, Interview with PILO128 (June 17, 2020) (on file with author).

The CEO of a large LSC funded PILO in the South provided an excellent example of the importance of client expertise for legal and community strategies and organizational decision-making in the excerpt below:

> So, we have a couple of client reps who are community advocates. They're working within the poor communities and are working on issues that impact the poor citizens of those communities. [They] identify issues that [are] going on in [rural counties] and bring that back to us. So, for example, [two client-eligible board members] who have been involved in their communities and helping the poor for years identified certain issues in Black communities where there are no paved roads. Yet as soon as you get to the first White community, the roads are paved. Why is that? And so that issue was raised with us. One of our lawyers . . . has spent several years now in a couple of communities working with people like [client] to first look at the laws and see if those counties or those municipalities are discriminating against African American communities. And whether or not the laws need to be changed.[273]

Client participation on PILO boards can also enhance organizational legitimacy and increase trust in the service providing institution.[274] Trust is particularly relevant as research has shown that people of color—especially Black individuals—do not trust the criminal or civil justice systems and the institutions established to provide legal services.[275]

Yet, as indicated on the graph below, client representative is uncommon on PILO boards.[276] Indeed, outside of LSC board mandates, client representation is relatively rare.[277] While 31% of all board members in LSC-funded PILOs are client-eligible, only 1% of board members in non-LSC-funded PILOs are client-eligible.[278]

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[273] Interview with PILO113 (Feb. 27, 2020) (on file with author).

[274] *Id.*

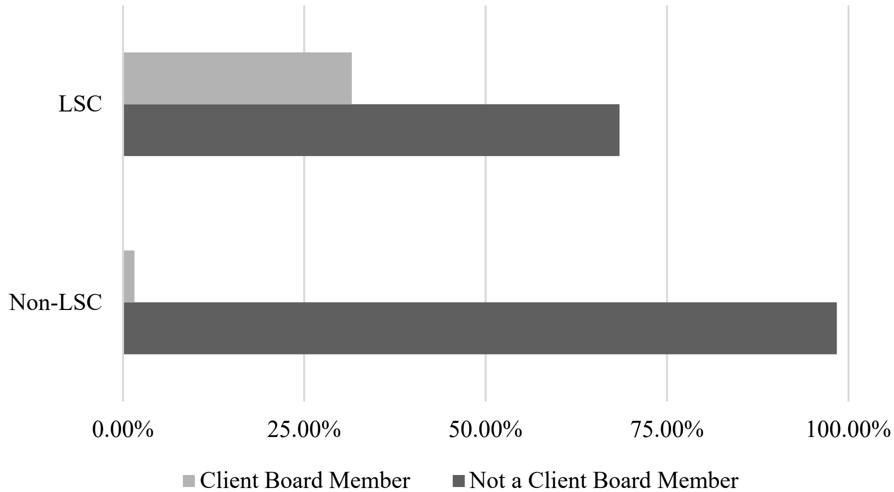
[275] *See generally* Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016).

[276] *See infra* Figure 2. There are PILOs with majority board members with personal connections to their organizations' mission. For example, organizations that engage in LGBTQ+ advocacy often have a large number of board members from LGBTQ+ communities. *See, e.g.*, *Board of Directors*, GLBTQ LEGAL ADVOCS. & DEFS., https://www.glad.org/about/board-of-directors/ [https://perma.cc/XTT4-SM9X]. These arguments are not applicable to those organizations.

[277] *See infra* Figure 2. This finding is congruent with research in other types of nonprofit organizations. *See, e.g.*, LeRoux, *supra* note 5, at 512.

[278] *See infra* Figure 2.

Figure 2: *Client Eligible Board Members by LSC Status*



The primary concern CEOs of both LSC and non-LSC-funded PILOs have is how to integrate client-eligible board members on boards that are heavily focused on the monitoring and financial provision roles. The CEO of a large non-LSC funded PILO explained the difficulty of including clients on a board focused on providing financial capital:

> So, we actually had conversations . . . about client involvement in the board and whether we thought that was a good or bad idea. And we came to the conclusion that . . . given that our board is so much a fundraising board . . . that it was going to feel like tokenism, [because] the thought at the time was having one or two people but it didn't sit right with us and so we didn't go in that direction.[279]

For LSC-funded PILOs, it is not unusual for client-eligible board members to have a second-tier status among board members. Because the focus is often on the board's monitoring role, some CEOs come to the conclusion that client-eligible board members may not be able to fully participate, as explained in the example below:

> I can honestly tell you that in the past three years, it seemed to be two-tiered. So, I mean they all met together, and they all had the same voting rights. But the client board members felt like, well, we're not like them and it was sometimes negative, sometimes positive. We . . . started doing more trainings for client board members so they wouldn't feel unable to understand the financials. So, the CFO does a training for them on this is how you do the financials, and you know what? They are fantastic. They ask more questions

[279] Interview with PILO128 (June 17, 2020) (on file with author).

> than my attorney board members because they'll just look at something and go, I don't know what this means.[280]

The board member of another LSC funded PILO in the South said that:

> [A]s far as participating as board members I don't observe if they are as good as the other members. It would be a little intimidating if you are a client who sits on a board with other professionals, [it's] a little embarrassing. So, I think they attend but they are not conspicuous . . . . [W]e need to do a little bit better about integrating our clients in with the board.[281]

When client-eligible individuals are invited to sit on boards of non-LSC funded PILOs, there is often a tokenism problem with either a single one or usually no more than two clients on the board. Probably because of the tokenism problem, some non-LSC funded PILOs have established separate client advisory councils or committees. Client advisory groups are used across the social service subsectors as a common method of gathering client input.[282] Ordinarily, advisory councils can provide social capital by conducting community outreach events, such as educational forums.[283] They can also provide human capital by "assess[ing] community strengths and needs, determin[ing] funding priorities, review[ing] grant applications, and mak[ing] recommendations that are rarely reversed by boards of directors."[284]

However, in PILOs, separate client advisory councils generally have no influence on monitoring, advice, or resource provision. The CEO of a large non-LSC funded PILO in the Northeast described the interaction between the client advisory council and the board—which has mostly law firm partners—as a "Hollywood party:"

> The downside is . . . most everyone is a law firm partner. While some of them grew up in poverty and some of them have substantial volunteer experience with people living in property, others don't. And so that certainly is very different from a board that has 20, 30, 40%, 50% members of the community. We have interactions between our client advisory council and the board, which go very well, but they're more social in nature—like a Hollywood party type thing, but not governance.[285]

However, not including clients on PILO boards can narrow the board's role and prevent the board from helping the organization to accomplish its tangible and intangible goals. For example, a CEO discussed how the lack of client

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[280] Interview with PILO120 (Mar. 6, 2020) (on file with author).

[281] Interview with BD024 (Nov. 5, 2020) (on file with author).

[282] LeRoux, *supra* note 5, at 506.

[283] Judith R. Saidel, *Expanding the Governance Construct: Functions and Contributions of Nonprofit Advisory Groups*, 27 NONPROFIT & VOLUNTARY SECTOR Q. 421, 426 (1998).

[284] *Id.*

[285] Interview with PILO106 (Feb. 26, 2020) (on file with author).

human capital functionally converts the board's advice and counsel role into a resource provision role, narrowing the board's function:

> We had a board committee that was involved . . . in labor negotiations for our last contract. If our community board members were more vocal probably they would have a larger say in that and that would be helpful. Our attorney board members, that's not where their skill set it. I mean they're practicing lawyers in big firms; they have no connection to the type of work we're doing, or no ability to say better than we do about focusing on X issue instead of Y issue. So, we have a board program committee, but it doesn't really function—it functions more as like how can it help with training our staff, how can we marshal the resources that are available through their firms to think about training, things like that.[286]

Interview data help us identify two areas of exploration related to client expertise as human capital. The first is the very lack of client expertise on boards without LSC board composition requirements. The second is an overemphasis on the monitoring role and by extension, underemphasis of the board's role in providing advice to the organization. It is in providing strategic advice about the client population and connecting organizations to the client community that client-eligible individuals can be particularly helpful on PILO boards. For example, clients can make PILOs aware of legal and social problems in the communities PILOs serve. Clients can also connect PILOs with potential clients and vital information important for providing legal advocacy. This is not to say that client human capital cannot be useful in the monitoring role. It can. However, while the strength of a law firm partner may be to draft by-laws and fundraise, the strength of a client may be to provide information on client community needs and generate deeper networks that can increase a PILO's legitimacy.

3. *Race, Ethnicity, and Gender Diversity*

Another form of human capital is diversity based on identity factors such as race, ethnicity, and gender. Research suggests that diversity based on gender, race, and ethnicity impacts board cognition, dynamics, decision-making, and outcomes in an organization.[287] This is particularly salient because PILO clients are overwhelmingly poor and racial and ethnic minorities.[288] Yet, PILO board members are overwhelmingly White at 73% across the United States.[289] This

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[286] Interview with PILO101 (Feb. 4, 2020) (on file with author).

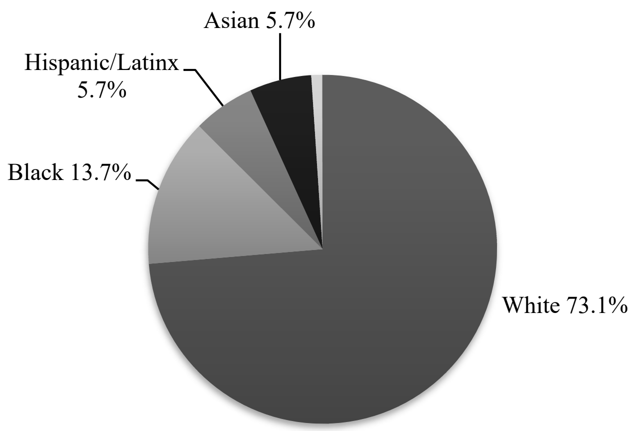
[287] Johnson, Schnatterly & Hill, *supra* note 149, at 239.

[288] *See, e.g.*, Adediran, *Relational Costs*, *supra* note 25, at 360; Adediran, *Allies*, *supra* note 22, at 2164–65.

[289] To be sure, there is variance across states. For instance, while the percentage of White board members in South Carolina is 56%, it is 79% in California, 80% in New York, and 95% in West Virginia.

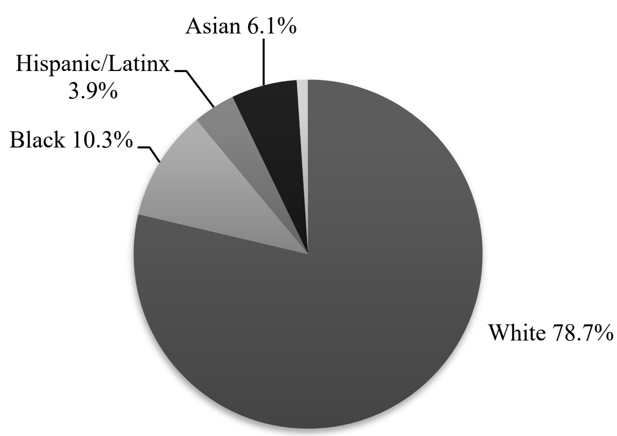
means that most PILO boards have only a handful of racial or ethnic minorities on their boards.

Figure 3: *Percent Board Members by Race*



However, the data is much more nuanced than the statistics would suggest. Lawyers make up the supermajority of PILO boards.[290] Among board members who are lawyers, about 79% are White as illustrated on the chart below.

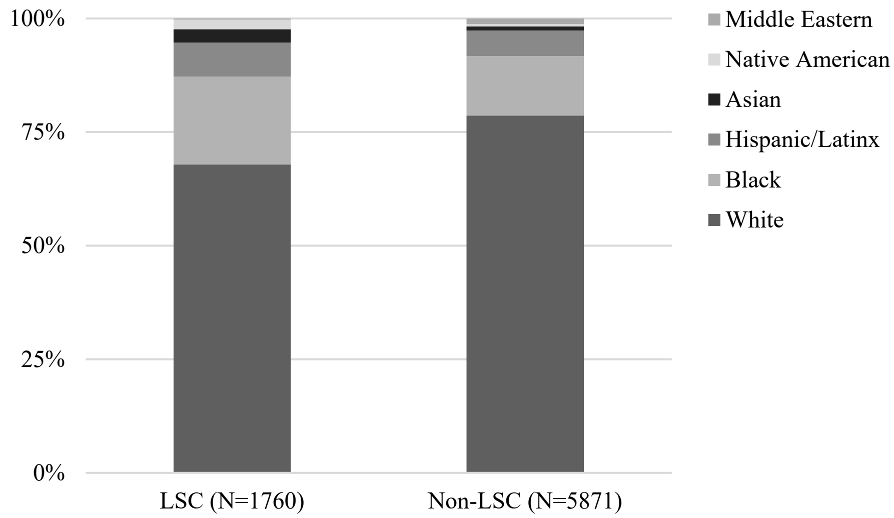
Figure 4: *Lawyer Board Members by Race*



[290] *See, e.g.*, 45 C.F.R. § 1607.3(b) (2020).

Racial diversity is skewed along LSC funding status. LSC-funded PILO boards are generally more racially and ethnically diverse, because LSC requires its grantees to include client-eligible individuals on boards.[291] The graph below indicates that the percentage of racial and ethnic minorities in LSC-funded organizations is 32%. At non-LSC-funded organizations racial and ethnic minorities are only 21% of board members.

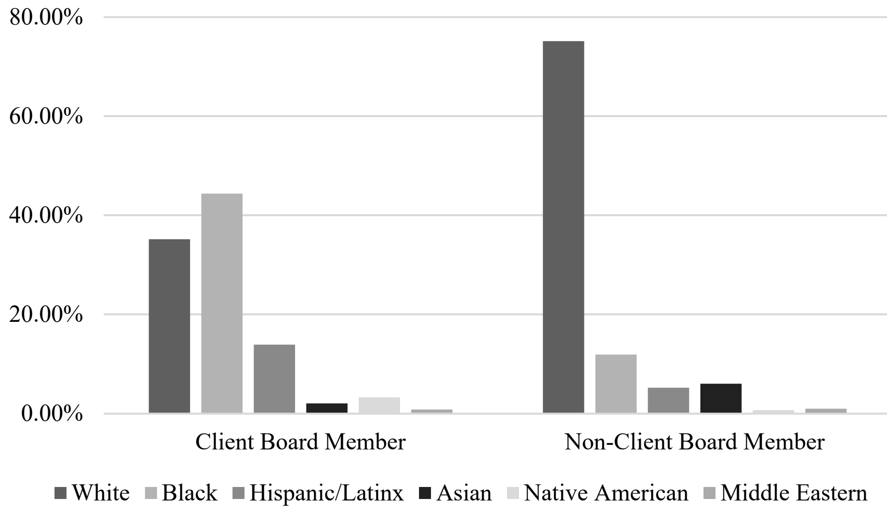
Figure 5: *Race of Board Members by LSC Status*



A large percentage of the racial and ethnic diversity in LSC-funded PILOs comes from client-eligible board members. Client board members on PILO boards are overwhelmingly racial and ethnic minorities.

291 *See id.* § 1607.3(c).

Figure 6: *Percent Client and Non-Client Eligible Board Members by Race*



The graph above is illuminating. It indicates that across the country, while White individuals comprise only 36% of board members who are clients, racial, and ethnic minorities make up 64% of PILO boards.

Interviews illuminate this phenomenon. The CEO of an LSC-funded PILO in the Northeast explained that all the client-eligible board members in that PILO are racial and ethnic minorities, "four African Americans, one Hispanic. And that's a product of this city."[292]

Indeed, LSC-funded PILOs often limit their diversification efforts to client-eligible board members rather than also working to diversify among lawyers and other professionals. For instance, the CEO of a large LSC funded PILO in the Midwest proudly described the racial and ethnic diversity of the board based on the presence of client-eligible members:

> We're trying to work on [diversity] and when you mix in the fact that we have the community board members, we're not doing so bad because most of them are our former clients. I will do a quick run through. So, we have what is it like 17 or 18 community board members [and] I think two of them are White.[293]

The boards of non-LSC funded PILOs are even less diverse than LSC-funded PILOs. For those PILOs with no LSC mandate, there is often little incentive to racially diversify.[294] Instead, board members replicate themselves

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[292] Interview with PILO107 (Feb. 26, 2020) (on file with author).

[293] Interview with PILO101 (Feb. 4, 2020) (on file with author).

[294] In addition to the data in this study indicating that LSC policies have created relatively more diverse boards, extensive research in corporations and law firms has shown that firms generally tend to diversity as a response to incentives from clients or other

through law firm and lawyer networks. The board members of a large PILO in the South provided a representative example of how the law firm and company networks worked:

> So, when I joined the board there was sort of a spot on the board for every large firm in town [and] big banks in town. So, somebody from each of those, and then [large company] has a big legal department. So those three corporations and the big firms and usually a white man that they are on the board, occasionally a white woman, they are on the board together, they made all the decisions.[295]

The board member of a PILO in the South explained how lawyer networks function for board nomination:

> I had a friend who was on the board and she nominated me, and I had one conversation with the people, and they put me on the board. And that's basically what happened. So maybe I just slide onto these boards really easily.[296]

Board recruitment networks are more likely to favor recruiting White board members since a significant percentage of current board members are White.[297] Part V suggests term limits to increase the opportunity for board turnover and provide many more chances than currently available to increase racial and ethnic diversity.

Gender diversity is also important as a form of human capital since PILO clients are overwhelmingly female.[298] PILO boards fare better with gender diversity than racial diversity. The chart below indicates that 49% of PILO boards are male, while 51% are female.

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stakeholders. *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, 69 (2018) [hereinafter Adediran, *The Journey*] (explaining that corporate clients have historically and currently pressured law firms to diversify).

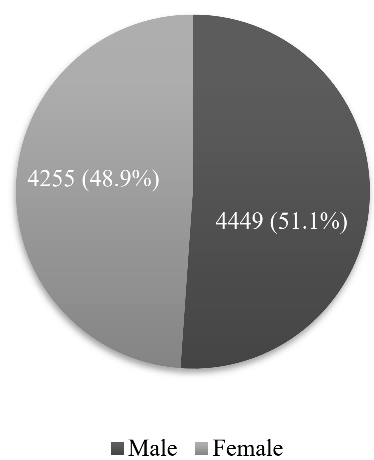
[295] Interview with BD009 (July 8, 2020) (on file with author).

[296] Interview with BD008 (July 8, 2020) (on file with author).

[297] *See supra* Figure 4.

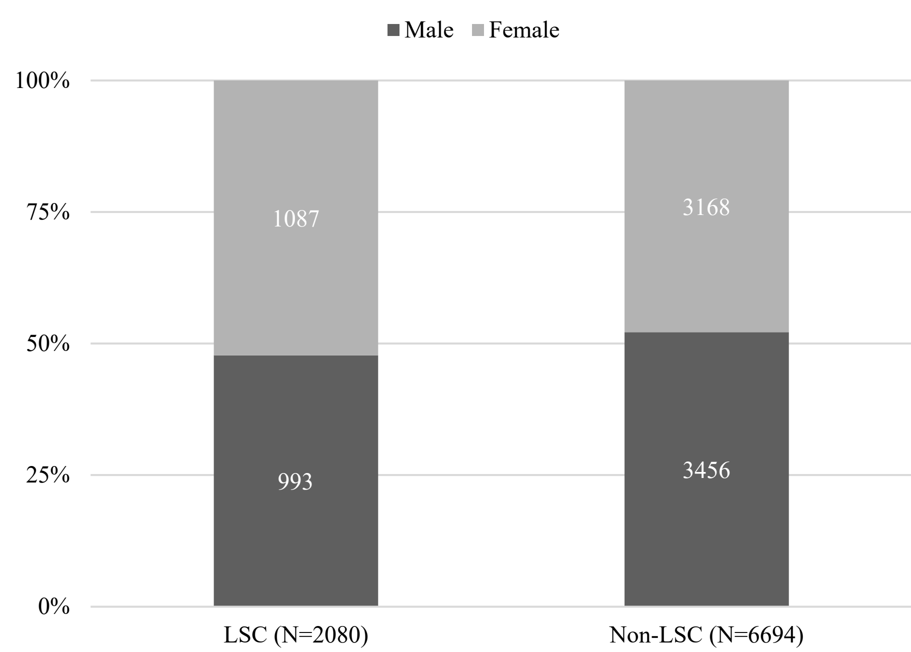
[298] Interview data from all sixty-two CEOs and Boards of Directors confirm this fact.

Figure 7: *Gender Demographics of Board Members*



There is little variation based on LSC status as indicated in the graph below.

Figure 8: *Board Gender by LSC Status*



Men make up 48% of board members in LSC-funded PILOs and 52% in non-LSC-funded PILOs. The slight difference in percentage is probably due to the fact that PILO boards have client-eligible board members who are overwhelmingly female.

In sum, the current landscape of PILO boards is such that there is an intense focus on financial capital, which targets the provision of monetary and in-kind resources and can be easily measured. PILOs' social capital is also geared towards providing financial resources.

Most of the deficit is in board human capital. PILO boards comprise mostly lawyers whose expertise is focused on the monitoring role, emphasizing legal and finance human capital expertise.[299] Human capital expertise on the client population is often lacking. Finally, PILO boards lack racial and ethnic diversity, which is a form of human capital and can impact decision-making and organizational outcomes.

V. FUTURE DIRECTION

This Article does not advocate for legal avenues similar to state level legislation requiring diverse boards in for-profit organizations. It also does not advocate for changes to federal law, including changes to the tax code, or Internal Revenue Code requirements.[300] The Article is sensitive to differences between nonprofit and for-profit boards that can produce different results in the face of government fiat. Nonprofit board directors are often volunteers leading a staff of paid professionals.[301] This creates a complex dynamic.[302]

This Article advocates for changes that PILOs can easily implement and that can be translated to similarly situated nonprofit charities. Right now, PILO boards are excellent monitors and financial resource providers. PILOs also have an almost equal distribution between men and women board members.

However, PILO boards are also engaged in providing intangible resources and advice that can impact PILOs' mission and the kinds of legal services and advocacy PILOs do. Often, few board members have personal connections or lived experiences with the issues PILOs generally address, such as education inequality, voter disenfranchisement, eviction, undocumented immigrant status or other immigration issues, police brutality, disability, domestic violence, racial discrimination, or the consequences of poverty. More robust human and social capital are needed to boost client—rather than lawyer—networks, increase expertise related to the client population, and increase diversity based on race and ethnicity. The current composition of PILO boards prioritizes procuring legitimacy from legal elites. Nonprofit charities that serve low-income disproportionately minority groups also need to show that they represent or

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[299] *See, e.g.*, 45 C.F.R. § 1607.3(b) (2020).

[300] For example, changing tax-exempt laws to require board diversity can be effective, but is likely politically undesirable.

[301] Epstein & McFarlan, *supra* note 33, at 31.

[302] *Id.*

serve the community.[303] There should be better marriage between finances, organizational mission and strategy, and having a diverse range of voices can bridge these components.

PILOs should consider doing the following. First, to address the overemphasis on monitoring and resource provision, PILOs should increase the proportion of individuals with other professional skills in areas that coalesce with legal advocacy and can provide client population expertise. Similarly—although more research is needed on the client board member experience—PILOs that are not funded by the LSC should consider including clients on their boards. For some PILOs, this may mean increasing the size of the board to accommodate human capital. For other PILOs, it may mean changing recruiting strategies. Second, while it is challenging, PILOs should continue to seek other sources of financial capital—such as private foundation funding. Private foundations can also pressure PILOs to diversify their boards. Corporate counsel and law firm board members also have a role to play in being introspective about the lack of diversity on their PILO boards. Lastly, PILO boards that do not already have term limits should consider term limits to allow for faster turnover, which would provide opportunities to increase human capital based on professional expertise, race, or ethnicity.

A. *Increase Non-Lawyer Board Members*

1. *Other Professionals*

PILOs are already thinking about the value of enhancing human capital related to the client population by including non-lawyer professionals on their boards. In fact, the CEO of a large PILO in the Midwest would include lots of perspectives on the board if "money was not a big deal:"

> We definitely would just get a wider variety of professional experiences and perspectives. People who work in social work, who have other points of view: teachers, people with other points of connection with our clients just on the professional side. Medical professionals, I mean we have all sorts of interplay with hospitals and medical clinics and schools, and obviously the government through public services and things like that so we would want the perspective of people who are in those roles. And then we would probably source . . . community members. Just thinking about other people who are networked in other ways. Like whom else can help us spread the word about what it is that we do?[304]

As described above, there are professionals from a range of fields that can enhance the provision of legal services and advocacy that are currently mostly absent from PILO boards. A focus on financial capital and human capital

[303] *See* Abzug & Galaskiewicz, *supra* note 56, at 53.
[304] Interview with PILO101 (Feb. 4, 2020) (on file with author).

expertise related to the monitoring role largely misses the advantages that these professionals can provide.

A large PILO located in the Northeast with a national reach provides a blueprint for other PILOs to establish a more balanced board with a range of human capital perspectives. The Alliance Justice Society (AJC)[305] has been extremely intentional about including human capital focused on the client population in addition to legal and financial expertise on its board. AJC established a board committee that specifically engages evaluating the boards' human capital expertise over time to make sure the organization is still on track. AJC's CEO explained the process below, which can easily be modified and adopted by other PILOs:

> Our organization has been pretty deliberate and thoughtful about the breakdown. How many people from each category do we want in order to make this board perfect? How many general counsel do we want? More people from companies? How many law firm people do we want? How many people from the public interest community? How many people from the judiciary? How many law school deans? So, that combination of . . . being thoughtful about the different segments really helped to give us clear definition. Now, every few years, people look at that composition and make a few tweaks here and there about whether we've got the right combination.[306]

The above blueprint simply suggests that for changes to be made, PILOs must be intentional about determining their board human capital rather than taking the easy approach of filling their boards with mostly law firm and corporate lawyers.

PILOs can start the process by determining how to get expertise from a range of sources that coalesce with the services and advocacy they provide. For example, a PILO that engages in education policy that primarily impacts inner-city school children should consider expertise from professionals in education, juvenile justice, law, mental health, human development, finance, accounting, and media.

Similarly, a generalist PILO that provides legal services and advocacy in a broad range of areas—such as a legal aid organization—should have experts from a range of fields outside of the law. These suggestions likely require relaxing LSC board requirements for the 132 PILOs that must fill their board with 60% lawyers.[307] This restriction can make it challenging for PILOs to incorporate the suggestions in this Article to include a broad range of expertise on their boards. Section 1607 of the Legal Services Corporation chapter in the *Code of Federal Regulations* provides that the requirements are meant to ensure

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[305] To protect the organization's identity, I have used a pseudonym.

[306] Interview with PILO131 (July 8, 2020) (on file with author).

[307] *See* 45 C.F.R. § 1607.3(b) (2020).

that the board "will be well qualified to guide a recipient in its efforts to provide high-quality legal assistance."[308]

This requirement makes the assumption that lawyers are the most qualified professions in PILOs. It also makes an assumption that PILOs do not engage with social problems, which is clearly not the case.

Instead of 60%, the LSC board requirement for lawyers can be reduced to 30% or less. The LSC requirement should also invite well qualified professionals from fields that coalesce with legal services and advocacy, or that would benefit PILO clients.

2. *Clients as Board Members*

For many PILOs, whether and how to include clients on their boards is also an important point of consideration. Having clients on PILO boards can be a source of social capital networks to the client community and information about community needs and services in addition to conducting community assessments.

Both LSC and some non-LSC-funded PILOs are interested in guidance on how and whether to integrate client-eligible individuals onto their boards. An exploration of the role and experience of current client-eligible board members on PILO boards should guide how to integrate clients on PILO boards. Future research should answer questions such as: What factors might determine whether a PILO has client-eligible board members besides LSC requirements? To what extent are client-eligible board members empowered to advocate for poor, mostly minority communities? What are the different avenues in which client-eligible board members join PILO boards? What limitations do client-eligible board members, their boards, and the organizations themselves experience? What are the potential costs of having clients on boards?

Therefore, a better understanding of the experiences of current client-eligible board members, whether they are integrated onto their boards and the obstacles that may prevent their integration and full participation on PILO boards, should ground policy recommendations. Future research can therefore show how client expertise specifically shapes PILO boards. For now, it's important to highlight that most clients who sit on PILO boards are racial and ethnic minorities. It is likely that the intersection of race and poverty creates a power dynamic between client-eligible and lawyer board members who sit on PILO boards.

Future research can also show the costs of increasing human capital that targets client-population expertise on PILO boards. PILOs currently structure their boards to target the monitoring role because of its large number of lawyers who are trained in legal structures, and financial capital because of the dire need for funding. Increasing expertise that would provide advice related to the client population may take away from sources of financial capital, especially from law

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[308] *Id.* § 1607.1.

firms. This may mean that PILOs would have to expand their sources of funding beyond firms and corporations and engage in more grant writing to obtain foundation funding and other grants. Future research should also explore potential costs to clients themselves. The CEO of a large LSC-funded PILO in the Midwest was concerned about the financial impact on clients who serve on boards even though she readily admitted the value of including clients on the board:

> Asking someone who is poor to commit the time that we need to serve on our board to be able to come here—we pay them stipends so that they can get here and back, make sure that they have enough money to take a cab and things like that. But still, it's a lot to ask. And so, if we could have that perspective I think that would be helpful.[309]

The example above suggests that if clients are to be fully integrated, PILOs must reduce any financial burdens that may arise from serving on a board for low-income individuals.

In sum, policy changes related to increasing and integrating clients on PILO boards should be driven by research to indicate the true benefits and costs of having client expertise on PILO boards.

B. *Private Foundations, Term Limits, and Racial and Ethnic Diversity*

PILOs are reliant on large law firms and corporate counsel for financial capital.[310] This reliance is one of the reasons why PILO boards have a large number of law firm and corporate lawyers on their boards. While some PILOs have tapped into foundations as a source of major funding, for some PILOs in the interview study, foundation funding constitutes a minuscule portion of overall contributions from private sources.[311] Increasing foundation funding is not an easy task. It would potentially require hiring a grant writer or development specialist focused on private foundation funding. However, this investment may be worth it in the long run because foundations also have the potential to spur the increase of racial and ethnic diversity on PILO boards.

1. *Private Foundation Effect on Racial and Ethnic Diversity*

Research has shown that pressure from external stakeholders can be efficient for diversifying institutions.[312] Short of government fiat, there are important stakeholders that can bring about change in PILOs. In general, private funders—particularly private foundations—have an important role to play in increasing human capital based on race and ethnicity on boards.

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[309] Interview with PILO101 (Feb. 4, 2020) (on file with author).
[310] *See generally* Adediran, *Relational Costs*, *supra* note 25.
[311] *See, e.g.*, Interview with PILO116 (Mar. 5, 2020) (on file with author).
[312] *See* Adediran, *The Journey*, *supra* note 294, at 77.

Private foundations include such well known institutions like the Ford Foundation, Soros Foundation, Kresge Foundation, Open Society Foundation, Hilda Mullen Foundation, Bill & Melinda Gates Foundation, and the Chicago Bar Foundation.

Private foundations have a historical record of influencing PILO board composition. For instance, in the 1970s when the Ford Foundation was concerned about radical lawyering, "nothing . . . seemed to concern [it] more than the question of who would serve on the boards" of the PILOs it funded.[313] Ford recommended "prestigious attorneys" and "men of prestige [and] high caliber" to sit on the boards of the PILOs it funded to prevent radical lawyering.[314]

Today, there is a new but growing phenomenon among foundations to request information on or require a certain level of diversity on boards as a funding prerequisite. Twelve of the sixty-two CEOs and board members in the interview study talked about the ways in which private foundations have begun resting funding on inclusivity. The board member of a small PILO in the Northeast explained that "there are some foundations who say I want to make sure that your board is extra staffed [with] women or whatever it might be. That's certainly something that foundations are often asking."[315]

The board member of a midsized non-LSC funded PILO in the South explained how a well-known foundation's diversity requirements forced the organization to become more racially diverse. Indeed, twelve out of the PILO's twenty-nine board members—41%—are currently racial and ethnic minorities:

> One of the requirements is that boards have a diverse makeup and that they have a plan for maintaining diversity. And it was great for us because it made us sit down and look at it again. And so, we've grown the diversity taskforce, we looked at our board membership and the ways that we needed to improve it and we put in some goals for how we're going to increase diversity balance on the board. We achieved the mountains that we set out for and we're slowly raising that threshold. I think we're still at a point where if we find a qualified minority candidate who's excited about being onboard with us we'll take them midstream because we just don't have enough people in the community to draw from. Or we haven't found enough people in the community to draw from. I'm certain that they're out there we're trying to find more of them.[316]

It is noteworthy that the above PILO is not funded by the LSC and is therefore not required by LSC policy to have community board members on its

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[313] Thomas Miguel Hilbink, Constructing Cause Lawyering: Professionalism, Politics, and Social Change in 1960s America, 376 n.1047 (May 2006) (Ph.D. dissertation, New York University) (ProQuest).

[314] *Id.* at 377 (internal quotation marks omitted).

[315] Interview with BD007 (July 8, 2020) (on file with author).

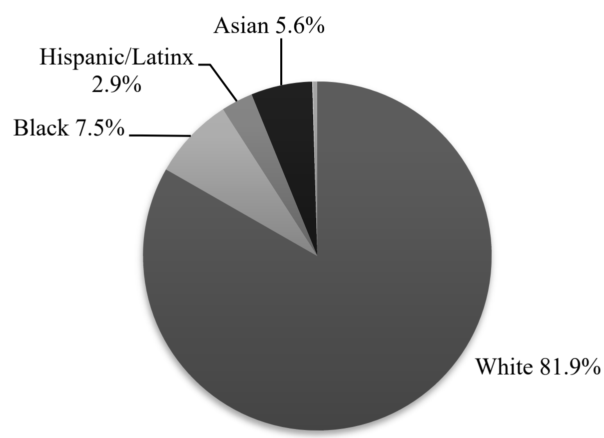
[316] Interview with BD009 (July 8, 2020) (on file with author). Board members and CEOs from other PILOs spoke about similar processes. *See* Interview with BD007 (July 8, 2020) (on file with author); Interview with PILO111 (Feb. 27, 2020) (on file with author).

boards. However, it has three community board members who are also client-eligible.[317] Not surprisingly, all three of them are racial and ethnic minority women.[318] Nevertheless, the private foundation's diversity requirements were effective in increasing the racial and ethnicity human capital to go beyond client and community board members.

If many more foundations established a diversity benchmark or threshold and created measures for addressing reductions below the threshold, PILOs—through their CEOs and board members—would be more likely to work hard to address the issue. Right now, organizations like the above PILO are relatively rare in that, as a non-LSC-funded organization, the diversity work is not being done by client-eligible board members alone and the organization is motivated to maintain that level of diversity.

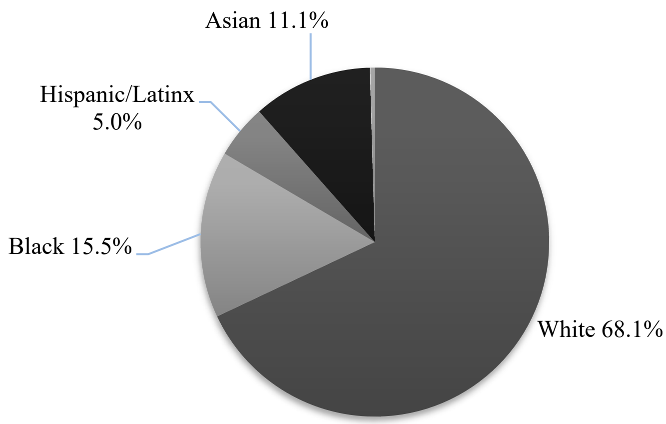
Corporate funders also have the power to increase board human capital related to race and ethnicity. PILO corporate board members are significantly more diverse than PILO law firm members. The twin charts below indicate that while only 18% of PILO board members from Am Law 200 law firms are racial and ethnic minorities, 32% of PILO board members from corporations are racial and ethnic minorities.

Figure 9: *Am Law 200 Board Members by Race*



[317] Interview with BD009 (July 8, 2020) (on file with author).
[318] *Id.*

Figure 10: *Corporate Board Members by Race*



The difference between these numbers is staggering but not surprising. In-house corporate counsel tends to be more racially and ethnically diverse than law firm lawyers.[319] Corporate counsels have been able to pressure law firms to diversity their attorney pool.[320]

Similar to corporate clients putting pressure on law firms to diversity, corporate lawyers who sit on PILO boards can also be drivers of increasing racial and ethnic human capital on PILO boards. They can also motivate law firms to join the call for PILOs to diversity their boards. To take this important step, corporate and law firm lawyers who sit on boards would have to be introspective and consider whether they are complacent. These constituents can do what some private foundations are beginning to do—make funding contingent on board diversity.

Increasing the racial and ethnic diversity of PILO boards—especially outside of the client population—may have some costs. One potential cost is that current CEOs and board members may have some difficulty recruiting racial and ethnic minorities to occupy board seats because they lack personal or

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[319] *See generally* MINORITY CORP. COUNS. ASS'N, COMPREHENSIVE EXAMINATION OF DIVERSITY DEMOGRAPHICS, INITIATIVES, AND POLICIES IN CORPORATE LEGAL DEPARTMENTS: SUSTAINING PATHWAYS TO DIVERSITY (2011), https://mcca.com/wp-content/uploads/2017/04/Book11-Teal.pdf [https://perma.cc/VJW9-G3UZ]. In a survey that includes 765 corporate legal departments that employ over 8000 corporate lawyers, 20% report that their top legal officer position was held by a racial or ethnic minority. *Id.* at 4. Departments of two to five employees had the highest percentage of race/ethnic minority employees at 23%, compared to the overall 16%. *Id.* at 9.

[320] *See, e.g.*, Meredith Hobbs, *Will Coke's New Guidelines Move the Needle for Law Firms?*, LAW.COM (Feb. 1, 2021), https://www.law.com/dailyreportonline/2021/02/01/will-cokes-new-guidelines-move-the-needle-for-law-firms/ [https://perma.cc/U8TK-ZXAX].

professional connections with racial or ethnic minorities.[321] Another potential cost that PILO executive directors mentioned during interviews was the loss of financial capital from law firm partners who are often White. These concerns are related to assumptions that many PILO CEOs and board members have, as the CEO of a medium-sized PILO in the Northeast explained:

> It's the easiest way to think, 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. And of course, that assumes . . . there are insufficient number of partners of color at law firms. But there are some and there are people. 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. And . . . board membership was sort of a reward for a firm providing financial support.[322]

As explained by the CEO above, PILOs would need to shift their assumption that funding comes from board financial capital and board financial capital consists mainly of White lawyers from law firms. Without that shift in thinking, PILOs would assume that increasing the diversity of their boards (outside of the client population) creates a direct loss to funding sources. The important point from the interview above is that there are racial and ethnic minorities who can be sources of both financial capital and human capital. These individuals can also come from outside the legal profession.

2. *Diversification by Term Limits*

Darren Rosenblum and Yaron Nili have argued that term limits can be an effective way to increase gender diversity on for-profit boards.[323] Similarly, in nonprofits, term limits are the default method for rotating board members.[324] They are also "widely recognized as a best practice strategy," helping to revitalize the board with "new ideas and perspectives."[325] "Term limits ensure that a board's composition reflects its current leadership needs."[326] The statement from the board member of a PILO in the Northeast explaining how he joined his current board in 1995 when the organization likely had different needs, reflects the importance of having term limits:

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321 *See* Adediran, *Allies*, *supra* note 22, 2211–12.

322 Interview with PILO132 (July 16, 2020) (on file with author).

323 *See generally* Darren Rosenblum & Yaron Nili, *Board Diversity by Term Limits?*, 71 ALA. L. REV. 211 (2019).

324 William A. Brown, *Board Development Practices and Competent Board Members: Implications for Performance*, 17 NONPROFIT MGMT. & LEADERSHIP 301, 305 (2007).

325 *Id.*

326 BOARDSOURCE, LEADING WITH INTENT: NATIONAL INDEX OF NONPROFIT PRACTICES 18 (2017), https://leadingwithintent.org/wp-content/uploads/2017/11/LWI-2017.pdf?hsCtaTracking=8736f801-1e14-427b-adf0-38485b149ac0%7C82ace287-b110-4d8f-9651-2b2c06a43c05 [https://perma.cc/ZG5F-86MH].

> A friend of mine just went out and tried to find everybody he could, no matter how irrelevant to the substance of welfare law, to see if they could help at least fund the organization and keep it going. And I was really impressed. And I said, "Sure." And that is when I got involved. So, it was 1995–1996 and I helped keep it going and I learned about what they were doing and that is how I got started. So, it was not an intellectual thing on my part—I am so sorry.[327]

There are different forms of term limits. Some term limits are based around a given period, say six years, after which a board member's tenure expires.[328] Other forms have limits on how many consecutive terms an individual board member can serve.[329] Outside of legal nonprofits, term limits have become the norm in nonprofit organizations, with 72% of nonprofit boards having limits on how many consecutive terms a board member can serve.[330] While the current research did not survey all PILOs about their term limits, interview data suggests that term limits exist in some PILOs. Some PILOs have two consecutive board terms or six years in total. Others have nine year terms, or up to twelve years. However, term limits may not be as widespread among PILOs as they are among other nonprofit charities.

Resistance to term limits comes from both CEOs and long-term board members. The CEO of a PILO in the South explained her lack of interest in term limits:

> I do not like term limits because we have fully amazing board members, and we don't want to lose them. And to the extent we've had not so great board members [there] were natural times for them to be out. People do stay on the board a long time. And there is some attrition just with people, you know, retiring or whatever.[331]

A CEO whose PILO recently adopted term limits described the resistance from board members and why it was necessary to impose term limits:

> There was a big fight. The limit now is a four-year term, and you can do two of them. And then there's a one year set off. It's not a lifetime ban. If you're the best board member in the history of board members, you only have to set off a year and you could still be involved with us. You're just not on the board for that one year. This one woman joined in 1984. But you know what has happened, like with any organization that has longtime board members, they lose steam at some point. They have other interests. Their life moves on. And there are other people who could bring in different perspectives, new energy, new thoughts, new relationships.[332]

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327 Interview with BD010 (July 13, 2020) (on file with author).
328 *See* Rosenblum & Nili, *supra* note 323, at 219.
329 BOARDSOURCE, *supra* note 326, at 18.
330 *Id.*
331 Interview with PILO112 (Feb. 27, 2020) (on file with author).
332 Interview with PILO115 (Mar. 5, 2020) (on file with author).

Term limits can be an effective way to increase the racial and ethnic diversity on PILO boards. CEOs and board members would need to be intentional about how they replace their board's human capital at the end of each board member's term.

The possible drawbacks of term limits are the same potential costs that may arise if non-lawyer professionals and clients become more prominent of PILO boards. The main concern is that imposing term limits may reduce board financial capital. However, increasing racial and ethnic diversity—particularly outside of the client population—may not lead to the loss of financial capital. Racial and ethnic minorities can also be sources of financial capital if board members would expand their networks to reach them.

C. *Implications for For-Profit Boards*

The concept of board capital can be applied to corporate boards with some modifications. Boards of directors of corporations are generally not expected to raise funds for their firms as nonprofit directors do.[333] As such, when board capital is used in the for-profit sector, it often comprises of social capital and human capital.[334]

Social capital serves a similar purpose in the for-profit sector as it does in nonprofit organizations. Corporations need resources—information, contacts, advice—which they can obtain through networks with other corporations and individuals through board members.[335] Social capital may add value to a corporation by increasing its ability to coordinate activities with other corporations and individuals, improving its access to vital information and resources, or enhancing its status in the business community.[336] Social capital can also be converted to human capital by using board networks to reach sources of human capital. Social capital in this way is particularly salient for recruiting new board members from diverse backgrounds, which is an area of recent attention in the corporate governance literature.[337]

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333 *Compare* Diane Lerner, *Board of Directors Compensation: Past, Present and Future*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 14, 2017), https://corpgov.law.harvard.edu/2017/03/14/board-of-directors-compensation-past-present-and-future/ [https://perma.cc/H359-FNDH], *with* Avrum Lapin, *Skin in the Game: The Importance of Board Giving*, GIVING USA (June 4, 2018), https://givingusa.org/skin-in-the-game-the-importance-of-board-giving/ [https://perma.cc/8SG9-RB6].

334 *See supra* Parts II.C, III.

335 Dallas, *supra* note 9, at 805; Kobi Kastiel & Yaron Nili, "*Captured Boards": The Rise of "Super Directors" and the Case for a Board Suite*, 2017 WIS. L. REV. 19, 23 (emphasizing the role of board directors in bridging information asymmetries through social networks, which goes beyond the monitoring role); Jeremy McClane & Yaron Nili, *Social Corporate Governance*, 89 GEO. WASH. L. REV. 932, 941–42 (2021); Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 153 (2019).

336 Dallas, *supra* note 9, at 805.

337 *See, e.g.*, Nili, *supra* note 335, at 147–48. *See generally* Rosenblum & Nili, *supra* note 323; Stephanie J. Creary, Mary-Hunter ("Mae") McDonnell, Sakshi Ghai & Jared

In addition, a growing area of corporate law emphasizes the importance of protecting the interests of a broad range of stakeholders—including employees, suppliers, and communities—rather than simply maximizing shareholder value.[338] Board social capital can be deployed to meet this particular need with board members who have networks with a range of stakeholders.

Similarly, human capital can be applied to for-profit boards. In the current literature, board expertise in things like finance, accounting, or the industry, and board diversity related to gender, and race and ethnicity are often separate discussions.[339] Board human capital captures a range of important skills, expertise, backgrounds, and identity factors that corporate boards as a group ought to have. Combining identity diversity with expertise and skills may strengthen arguments about the importance of increasing diversity and inclusion on for-profit boards without needing to show that diversity improves the bottom line.

VI. CONCLUSION

Nonprofit charities that serve low income and other vulnerable populations are some of the most important American institutions and have become critical during the COVID-19 pandemic. Many of these institutions were established with the ideals of inclusiveness or to empower the communities they serve through their leadership. The composition of their boards of directors is an important point for this inclusion work. However, the boards are often not composed to include directors with personal and professional knowledge about populations served. Yet, the law of fiduciary duties, corporate governance scholarship, and best practices do not provide sufficient guidance on how to compose nonprofit boards to empower vulnerable communities.

This Article's central thesis is that the boards of directors of these institutions should have the skills, professional and personal backgrounds to perform their roles as board members to monitor management, provide

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Scruggs, *When and Why Diversity Improves Your Board's Performance,* HARV. BUS. REV. (Mar. 27, 2019), https://hbr.org/2019/03/when-and-why-diversity-improves-your-boards-performance [https://perma.cc/4PLJ-2YQJ]; Jena McGregor, *Corporate Boards Are Still Mostly White, Mostly Male—And Getting Even Older*, WASH. POST (Apr. 24, 2018), https://www.washingtonpost.com/news/on-leadership/wp/2018/04/24/corporate-boards-are-still-mostly-white-mostly-male-and-getting-even-older/ [https://perma.cc/XG4C-VLYF].

[338] *See, e.g.*, Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 VA. L. REV. 937, 939 (2020); Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1404 (2020); P.M. Vasudev, *The Stakeholder Principle, Corporate Governance, and Theory: Evidence from the Field and the Path Onward*, 41 HOFSTRA L. REV. 399, 399 (2012); Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 247 (2017); David Benoit, *Move Over, Shareholders: Top CEOs Say Companies Have Obligations to Society*, WALL ST. J. (Aug. 19, 2019), https://www.wsj.com/articles/business-roundtable-steps-back-from-milton-friedman-theory-11566205200 (on file with the *Ohio State Law Journal*).

[339] *See generally supra* Part III.

resources, and offer strategic and informed advice related to the client population. To support this normative claim the Article introduces the concept of board capital to legal scholarship to show the importance of having board members with skills, knowledge, expertise, networks, experience and identity factors, such as race, ethnicity and gender diversity that are critical to fulfilling boards' monitoring, advice, and resource provision roles. Board capital consists of three forms of capital: (1) financial capital (funds), (2) social capital (networks to external constituents), and (3) human capital (education; knowledge; skills; expertise in law, finance, the specific industry; and identity factors, such as gender, race and ethnicity).

In addition, the Article uses empirical data from the boards of directors of public interest legal organizations (PILOs) to show the relationship between board composition and board capital. Findings show that PILO boards comprise majority lawyers who are mostly from law firms and corporations and are more likely to hew to their expertise in the law to monitor managers, and their abilities to provide financial capital to their organizations. PILO board members often have limited connection to the legal and social problems PILOs seek to address, such as economic inequality, racial inequality, eviction, immigration, and the consequences of poverty for low income individuals and groups and can typically provide only limited strategic advice related to the core purpose of most PILOs. The Article makes recommendations to increase human capital to target board members who are equipped to provide strategic advice and urges PILOs to be more intentional about having more balanced boards with financial, social and human capital. The Article also highlights the role of private foundations, corporations, and term limits in increasing racial and ethnic diversity in the composition of PILO boards. These findings have implications for other nonprofit charities.