

## A Critical Problem Needing a Bolder Solution?: A Response to Atinuke O. Adediran's *Nonprofit Board Composition*

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The governing boards of nonprofit organizations, and particularly of nonprofits that serve low income and other vulnerable populations, fail to adequately include the populations that they serve.<sup>1</sup> At least this is the common understanding among people familiar with these boards.<sup>2</sup> Professor Atinuke Adediran not only confirms the existence of this problem but clarifies it in four important ways.<sup>3</sup> Professor Adediran also proposes concrete steps to address it,<sup>4</sup> although, the clarity she has brought to the problem raises the question of whether she could have been bolder in her proposed solutions.

The clarity comes from new data, careful consideration of previous research, identification of an existing gap in legal scholarship, and the importation from the for-profit context of a helpful theoretical framework. First, Professor Adediran confirms the extent of the population-served board representation problem among a small but critical subset of these nonprofits—public interest legal organizations (PILOs).<sup>5</sup> PILOs are important because they partially fill the enormous gap in civil legal services available to low-income communities.<sup>6</sup> The breadth of the data, encompassing over 500 PILOs from throughout the country, provides a comprehensive snapshot of board compositions by gender, race, and “type” (type is based on professional background, e.g., accountant, educator, lawyer, or whether the board member is client-eligible or a community member).<sup>7</sup> The data confirms the relative paucity of board members who are potential clients or community members and the

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<sup>1</sup> See, e.g., Alyssa Conrardy, *A Common Nonprofit Racial Justice Missing Ingredient: Strong Community Ties*, NONPROFIT Q. (Aug. 31, 2020), <https://nonprofitquarterly.org/a-common-nonprofit-racial-equity-missing-ingredient-strong-community-ties/> [<https://perma.cc/TYE4-9EGQ>].

<sup>2</sup> *Id.*

<sup>3</sup> See generally Atinuke O. Adediran, *Nonprofit Board Composition*, 83 OHIO ST. L.J. 357 (2022); see also *infra* notes 5, 12, 17, 21 and accompanying text.

<sup>4</sup> See *infra* note 27 and accompanying text. For an example of suggestions by others for improving board diversity, see *Diversity on Nonprofit Boards*, NAT'L COUNCIL OF NONPROFITS, <https://www.councilofnonprofits.org/tools-resources/diversity-nonprofit-boards> [<https://perma.cc/TYB6-5YDW>].

<sup>5</sup> Adediran, *supra* note 3, at 384–89.

<sup>6</sup> See LEGAL SERVICES CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017) (finding 86 percent of the civil legal problems faced by low-income individuals “received inadequate or no legal help”).

<sup>7</sup> Adediran, *supra* note 3, at 387–89.

limited representation of racial minorities, particularly among non-Legal Services Corporation (LSC)-funded PILOs that are not subject to a board composition mandate.<sup>8</sup>

The empirical data is not only thorough and compelling, but Professor Adediran also supplements it with qualitative interview data that nicely complements the quantitative information.<sup>9</sup> While not intended to be representative, the dozens of interviews with PILO chief executive officers and board members provide helpful context to the quantitative information.<sup>10</sup> For example, the interviews help illustrate why, absent outside pressure, PILO leaders tend to seek board members whose social capital gives access to financial capital and whose human capital provides legal and financial expertise (as opposed to board members whose social capital or human capital gives better access to information about the population served).<sup>11</sup>

Second, Professor Adediran gathers research that supports the conclusion that a failure to include more—or sometimes any—members of the served population hinders boards from fulfilling their roles.<sup>12</sup> As she details, this literature spans a variety of nonprofit contexts and consistently finds a lack of served population representation on boards, resulting in a negative effect on the interests, skills, and knowledge found in the nonprofit boardroom.<sup>13</sup> This is particularly true given the likely influence of wealthy private donors who provide significant financial support, whether they serve on boards or not. Similarly, in the PILO context, law firms and their lawyers influence boards by providing support in a variety of ways, as detailed in Professor Adediran's previous work.<sup>14</sup>

This research, especially when considered in the aggregate, arguably paints a starker picture than Professor Adediran draws from it. To her credit, Professor Adediran is careful not to read more into each article or study than they support, including her own research. But collectively this research presents a relatively compelling case for how boards of nonprofits that serve low-income and other vulnerable populations unduly weigh financial considerations compared to furtherance of missions.<sup>15</sup> For example, the research highlights how the lack of

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<sup>8</sup> See 42 U.S.C. § 2996f(c) (requiring at least one-third of the governing bodies of recipients of LSC funding to consist of persons who are eligible clients).

<sup>9</sup> Adediran, *supra* note 3, at 387.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 392–96.

<sup>12</sup> See sources cited in *id.* at 368–69 nn.51, 56, 58, 377 n.130, 399 n.269.

<sup>13</sup> See, e.g., *id.* at 368–70, 377, 399.

<sup>14</sup> See generally Atinuke O. Adediran, *Solving the Pro Bono Mismatch*, 91 U. COLO. L. REV. 1035 (2020) [hereinafter Adediran, *Solving*]; Atinuke O. Adediran, *The Relational Costs of Free Legal Services*, 55 HARV. C.R.-C.L. L. REV. 357 (2020) [hereinafter Adediran, *Relational Costs*].

<sup>15</sup> See generally Adediran *Solving*, *supra* note 14; Adediran, *Relational Costs*, *supra* note 14.

participation by members of the served population leads to bias in favor of finances to the detriment of mission.<sup>16</sup>

Third, Professor Adediran correctly observes that legal requirements for board members tend to focus on the board's monitoring role and mask this bias.<sup>17</sup> This is because the monitoring role is most strongly related to the classic fiduciary duties of board members to their nonprofits.<sup>18</sup> It is, therefore, common for legal considerations of nonprofit governance to focus on the monitoring role and discuss board composition only as it relates to that specific role.<sup>19</sup> But doing so risks causing a board to give insufficient attention to its other important roles, including setting long-term policies, providing advice and counsel to management, and providing resources, including non-financial ones.<sup>20</sup>

Fourth, Professor Adediran uses the concept of board capital to provide a theoretical framework for explaining why the lack of representation prevents boards from having all the resources they need to best fulfill their duties.<sup>21</sup> She correctly notes that this framework, by encompassing not only human capital but also financial and social capital, helps counter the legal tendency to focus myopically on boards' monitoring roles.<sup>22</sup> For example, and as already noted, the board capital concept exposes how some PILOs tend to narrowly view desirable social and human capital and ignore how that capital could also contribute to better understanding the populations served and their needs.<sup>23</sup>

Having clarified the extent of the problem, Professor Adediran's proposed solutions are a bit of a letdown because she relies on voluntary actions by PILOs and their private supporters.<sup>24</sup> Professor Adediran is also hesitant to explore replicating existing legal mandates, such as those for LSC-funded PILOs or other tax-exempt nonprofits, even though such research would inform and might support imposing similar mandates in this context.<sup>25</sup>

More specifically, Professor Adediran foreswears any reliance on legal mandates out of concerns relating to both the differences between for-profit and

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<sup>16</sup> See, e.g., Julie I. Siciliano, *The Relationship of Board Member Diversity to Organizational Performance*, 15 J. BUS. ETHICS 1313, 1318 (1996) (displaying the largest percentage of board members are company owners, implying access to capital.).

<sup>17</sup> Adediran, *supra* note 3, at 376.

<sup>18</sup> See generally RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS §§ 2.02 (duty of loyalty), 2.03 (duty of care) (AM. LAW INST. 2021).

<sup>19</sup> See, e.g., Peter Molk & D. Daniel Sokol, *The Challenges of Nonprofit Governance*, 62 B.C. L. REV. 1497, 1502–03 (2021) (setting the issue of board diversity to the side to focus on the monitoring role).

<sup>20</sup> See generally MODEL NONPROFIT CORPORATION ACT § 8.01, cmt. (CMT. ON NONPROFIT ORGANIZATIONS, 3d ed. 2008); RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS § 2.05, cmts. a, e (AM. LAW INST. 2021); WILLIAM G. BOWEN, *INSIDE THE BOARDROOM: GOVERNANCE BY DIRECTORS AND TRUSTEES* 18–20 (1994).

<sup>21</sup> Adediran, *supra* note 3, at 378–80.

<sup>22</sup> *Id.* at 378.

<sup>23</sup> *Id.* at 393, 395.

<sup>24</sup> *Id.* at 409–10.

<sup>25</sup> See *id.* at 409.

nonprofit entities that may counsel against expanding for-profit board diversity mandates to nonprofits and the risk of undermining the tasks that current PILO boards tend to do well.<sup>26</sup> Instead, Professor Adediran relies on encouraging PILOs to change their practices in several ways, such as recruiting more non-lawyers and eligible clients and adopting term limits, and imploring private supporters of PILOs to advocate for such changes.<sup>27</sup> These relatively mild, voluntary solutions are vulnerable to several criticisms.

First, these solutions rest on the uncertain assumption that most PILOs and their existing private supporters—principally lawyers and law firms—lack sufficient knowledge regarding either the lack of board diversity or its negative effects on PILO boards. The interviews and research cited by Professor Adediran raise the troubling possibility that PILOs and their supporters have this knowledge.<sup>28</sup> If that is the case, then it is the will to act on this knowledge that is lacking—not the knowledge itself.

Professor Adediran's decision to not recommend legal mandates also rests on the possibility that more research is required to confirm the extent and effect of the problem before pursuing a bolder solution. This is understandable given that legal mandates are blunt instruments and can be politically difficult to impose and sometimes to enforce.<sup>29</sup> For example, Professor Adediran suggests future research could identify factors other than the LSC Act mandate that lead to eligible client board membership.<sup>30</sup> But given that such membership is only one percent in non-LSC funded PILOs, there appears to be no such factors beyond the mandate itself.<sup>31</sup> That said, it likely would be helpful to learn more about the downsides or challenges of greater eligible client board involvement, including in respect to their integration onto boards.<sup>32</sup>

With respect to funders, Professor Adediran relies on the possibility of convincing private foundations to become more significant supporters for PILOs and existing corporate funders to add board diversity conditions to their funding.<sup>33</sup> While these options have some promise, it is unclear how many private foundations would shift their funding priorities to encompass more

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<sup>26</sup> *Id.* at 409–10.

<sup>27</sup> Adediran, *supra* note 3, at 409–10.

<sup>28</sup> *See id.* at 396–403.

<sup>29</sup> *See* Robin S. Golden, *Toward a Model of Community Representation for Legal Assistance Lawyering: Examining the Role of Legal Assistance Agencies in Drug-Related Evictions from Public Housing*, 17 YALE L. & POL'Y REV. 527, 539–40 (1998) (explaining the board composition mandate that was eventually incorporated into the original LSC legislation was the most controversial requirement relating to the federal Office of Economic Opportunity's legal services program); Elizabeth McCulloch, *Let Me Show You How: Pro Se Divorce Courses and Client Power*, 48 FLA. L. REV. 481, 486 (1996) (questioning the compliance with the LSC-funded PILO board composition mandate and its effectiveness in ensuring client voices are heard at the board level).

<sup>30</sup> Adediran, *supra* note 3, at 412.

<sup>31</sup> *Id.* at 400.

<sup>32</sup> *See id.* at 401.

<sup>33</sup> *Id.* at 413–17.

PILOs or how many funders of any type would voluntarily choose to impose such conditions. This solution would therefore likely not reach some PILOs and leave the communities they serve insufficiently represented on their boards.

There are precedents for a bolder solution—and not only in the for-profit business context.<sup>34</sup> First, as Professor Adediran notes and already mentioned here, the LSC Act requires that PILOs receiving LSC funding have at least one-third of their governing bodies consist of eligible clients.<sup>35</sup> The requirement has created a sharp difference in representation on PILO boards depending on whether a PILO accepts LSC funding or not.<sup>36</sup> It is unclear to what extent the increased participation of eligible clients and racial diversity on LSC-funded PILO boards makes a difference, especially given interviews indicating that fully involving them can be difficult.<sup>37</sup> A promising avenue of further research is to see if there are programmatic differences correlated with the board composition differences that do not stem solely from the other LSC Act requirements. And, as Professor Adediran suggests, increasing non-lawyer board members likely requires not following the current LSC Act requirement that boards of LSC-funded PILOs consist of sixty percent lawyers (and relaxing that requirement for LSC-funded PILOs).<sup>38</sup>

Second, there is another available legal vehicle for imposing board composition requirements on all PILOs, not just those that receive LSC funding, as Professor Adediran acknowledges.<sup>39</sup> PILOs generally enjoy tax exemption under Internal Revenue Code section 501(c)(3), subject to providing services to low-income individuals for free or in exchange for fees based on ability to pay,<sup>40</sup> or alternatively, in a manner designed to ensure their cases further the public interest and would not be economically feasible for private firms.<sup>41</sup> The status is effectively an indirect funding source, as it eases obtaining funding from private foundations and other donors, including through tax-deductible

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<sup>34</sup> See generally Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L.J. 1217 (2022); 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/JMQ4-MVFQ].

<sup>35</sup> 42 U.S.C. § 2996f(c).

<sup>36</sup> Adediran, *supra* note 3, at 400–01.

<sup>37</sup> *Id.* at 401–02 (summarizing interviews that indicate the difficulties of integrating client-eligible board members); *id.* at 455–57 (identifying racial composition differences between LSC-funded and non-LSC-funded PILOs).

<sup>38</sup> 42 U.S.C. § 2996f(c).

<sup>39</sup> See Adediran, *supra* note 3, at 409 n.300.

<sup>40</sup> See Rev. Rul. 69-161, 1969-1 C.B. 149, *amplified by* Rev. Rul. 78-428, 1978-2 C.B. 177.

<sup>41</sup> Rev. Rul. 75-74, 1975-1 C.B. 152; Rev. Rul. 75-76, 1975-1 C.B. 154, *amplified by* Rev. Proc. 92-59, 1992-2 C.B. 411.

charitable contributions from individuals and corporations.<sup>42</sup> Both Congress and the Treasury Department have in other contexts required or suggested certain board compositions as a condition of qualifying for exemption under section 501(c)(3).<sup>43</sup> For example, Congress has set specific board composition requirements for section 501(c)(3) credit counseling organizations.<sup>44</sup> And the Treasury Department considers a board consisting primarily of community leaders, as opposed to doctors or administrators, a significant factor when considering whether a nonprofit hospital is described in section 501(c)(3).<sup>45</sup> It, therefore, is plausible for federal tax law to be the mechanism for imposing a mandatory board composition requirement on all PILOs by making it a condition for a PILO to be described in section 501(c)(3).

None of these criticisms should detract from the important contributions that Professor Adediran has made through her article. She has taken what is an often recognized, but less often carefully analyzed, problem and given it quantitative, qualitative, and theoretical clarity.<sup>46</sup> She has also carefully considered and described both how to initially address this problem and what further research is advisable to address it more comprehensively in the future.<sup>47</sup> And it may read too much into the existing research, including Professor Adediran's, to conclude that the lack of board diversity is such a serious problem, and the possible negative effects of board composition mandates are so minor, that a bolder solution is needed than what Professor Adediran proposes.

Professor Adediran has significantly advanced the debate over nonprofit board composition.<sup>48</sup> Her effort to do so is especially critical at this time of heightened concerns about racial discrimination and economic inequality.<sup>49</sup> It is a hope that her work will further encourage nonprofits, funders, and policymakers to take renewed interest in this issue.

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<sup>42</sup> See I.R.C. §§ 170(a)(1), (c)(2) (charitable contribution deduction); *IRC Section 4945(h) – Expenditure Responsibility*, IRS, <https://www.irs.gov/charities-nonprofits/irc-section-4945h-expenditure-responsibility> [<https://perma.cc/7CW8-KPJ3>] (explaining the additional administrative burdens when private foundations make grants to organizations that are not exempt under I.R.C. § 501(c)(3)).

<sup>43</sup> See e.g., *infra* notes 44–45.

<sup>44</sup> I.R.C. § 501(q)(1)(D) (also applicable to credit counseling organizations that are tax-exempt under I.R.C. § 501(c)(4)).

<sup>45</sup> Rev. Rul. 83-157, 1983-2 C.B. 94; Rev. Rul. 69-545, 1969-2 C.B. 117; see also *St. David's Health Care Sys. v. United States*, 349 F.3d 232, 236 (5th Cir. 2003) (concluding not all the factors listed in Rev. Rul. 69-545, including the community board factor, must be present for a hospital to be described in section 501(c)(3)); Gary J. Young, *Federal Tax-Exemption Requirements for Joint Ventures Between Nonprofit Hospital Providers and For-Profit Entities: Form Over Substance?*, 13 ANNALS HEALTH L. 327, 358, 358 nn.198–99 (2004) (arguing the IRS has effectively taken the same position as the *St. David's Health Care System* court).

<sup>46</sup> See generally Adediran, *supra* note 3.

<sup>47</sup> *Id.* at 409–10, 412–13.

<sup>48</sup> *Id.* at 359–62 (highlighting the scholarship gap filled by Professor Adediran's article).

<sup>49</sup> See Conrardy, *supra* note 1.