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### The Racial Reckoning of Public Interest Law

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# The Racial Reckoning of Public Interest Law

Atinuke O. Adediran and Shaun Ossei-Owusu\*

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## INTRODUCTION

Public interest law has played a critical role in American social movements and change. Abolitionist societies and lawyers litigated fugitive slave cases that led to the Civil War and the formal end of slavery. Lawyers figured prominently in organized efforts toward political reform thereafter. These include, but are not limited to, the Progressive movement of the late nineteenth and early twentieth centuries, the long Civil Rights Movement, and the War on Poverty. Public interest law has also been integral to contemporary struggles for social change. Challenges to mass incarceration, economic inequality, the eviction crisis, and an increasingly penal immigration system have all featured organized efforts by attorneys. Their advocacy takes shape through legal aid organizations, impact litigation, and pro bono work.

Interestingly, scholars have captured the racial problematics of public interest law history. Some abolitionist lawyers were self-serving advocates who did not see Black people as equals. In their quest for a more egalitarian economic

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social order, progressives were often susceptible to racial favoritism and focused their legal efforts on ethnic Whites to the exclusion of Black, Asian American, and Latinx peoples. The Civil Rights Movement's emphasis on race amplified intersectional oversights that often marginalized women of color. The liberal legalism of the War on Poverty brought tangible social benefits to the marginalized, but also helped generate the problem of mass incarceration.

The racial politics of contemporary public interest law are less clear. Because race is often conflated with class, and concerns about economic inequality often animate public interest organizations, there is a common-sense assumption that these organizations operate under anti-racist principles. According to this logic, since racial minorities are disproportionately poor, and many poverty-inspired public interest organizations represent them, racial justice and anti-racism are institutionalized features of their work. This is not necessarily the case. In fact, the very little scholars have captured on race and contemporary public interest law leaves more to be desired and invites doubt. Overall, the legal profession is racially unrepresentative of American society; this demographic fact applies to public interest law, which is ironically the most diverse segment of a homogenous industry. Public defenders, legal aid attorneys, and pro bono lawyers can harbor hazardous racial biases. Some scholarship and organizations are beginning to acknowledge this point.

This Essay goes a step further. It contends that segments of public interest law often get a pass on questions of race because it is a field of law that is genuinely concerned with marginalized communities. But the historical record, the dearth of empirical data on race, the homogeneity of the legal profession, and the recognition that no one is necessarily immune from racial biases all demand that the public interest bar reckon with its racial character. The racial oversights of public interest law can manifest themselves in hiring, staffing, organizational mission, leadership, and the actual delivery of legal services. We argue that a racial accounting is particularly important for public interest organizations that are not explicitly organized around racial justice.<sup>1</sup> Public interest lawyers are the presumed and actual allies of racial minorities, which could make detection of racial biases more elusive. Although counterintuitive, we maintain that actualizing an anti-racist society will be impossible without looking within the ranks and practices of attorneys who hold themselves out as racial allies.

Part I of this essay provides a brief history of race in public interest law. Part II addresses the contemporary lack of race and ethnicity data in public interest law. Part III introduces two paths towards addressing both the lack of racial and ethnic diversity and lack of data.

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1. For example, much of what we describe is not applicable to organizations such as the NAACP Legal Defense and Educational Fund, Mexican American Legal Defense and Educational Fund, or the Asian American Legal Defense and Education Fund

## I.

## A BRIEF HISTORY OF RACE AND PUBLIC INTEREST LAW

Public interest law as a concept is a recent development, but there are numerous episodes in legal history that gesture to this portion of the legal industry and underline the clarion call for a racial reckoning at the heart of this Essay. Abolitionist lawyering serves as a useful point of departure. Abolitionist societies provided legal aid to fugitive slaves and the abolitionists who abetted the latter.<sup>2</sup> Despite the availability of historiography that demonstrates the racial problematics of abolitionism more generally,<sup>3</sup> scholars are only beginning to peel back the layers of racial politics in abolitionist lawyering specifically.<sup>4</sup> But some of the lessons that can be gleaned from the legal work of abolitionists coincide with some of the warnings offered by contemporary scholars of public interest law: that these relationships are rife with paternalism and unexamined power asymmetries that have racial consequences.<sup>5</sup>

In the post-Civil War context, scholars of civil legal aid and public defense have shown how providers were relatively inattentive to the legal needs of non-Whites despite actively trafficking racial tropes about ethnic White immigrants.<sup>6</sup> The War on Poverty and its aftermath ushered a new realization of the ways race influenced public interest law and the poverty that is often central to this sector of the legal profession. A host of factors influenced this recognition. These include, but are not limited to, the Warren Court's simultaneously occurring, racially-sensitive Due Process Revolution;<sup>7</sup> a new generation of liberal White attorneys who were influenced directly and indirectly by the Civil Rights

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2. See, e.g., ALAN K. CHEN AND SCOTT CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE (2012); STEVEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL (2010); ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975); Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1880 (2019).

3. See, e.g., JEAN R. SODERLUND, QUAKERS AND SLAVERY: A DIVIDED SPIRIT 187 (2014); RICHARD S. NEWMAN, THE TRANSFORMATION OF AMERICAN ABOLITIONISM: FIGHTING SLAVERY IN THE EARLY REPUBLIC (2002); PAUL GOODMAN, OF ONE BLOOD: ABOLITIONISM AND THE ORIGINS OF RACIAL EQUALITY (2000).

4. See Farbman, *supra* note 2; Maeve Glass, *Citizens of the State*, 85 U. CHI. L. REV. 865 (2018); Deborah A. Rosen, *Slavery, Race, and Outlawry: The Concept of the Outlaw in Nineteenth-Century Abolitionist Rhetoric*, 58 AM. J. LEGAL HIST. 126 (2018).

5. See Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649 (2017); Anthony V. Alfieri, *Paternalistic Interventions in Civil Rights and Poverty Law: A Case Study of Environmental Justice*, 112 MICH. L. REV. 1157 (2014); David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454 (1981).

6. See e.g., SARA MAYEUX, FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA (2020); FELICE BATLAN, WOMEN AND JUSTICE FOR THE POOR: A HISTORY OF LEGAL AID, 1863-1945 (2015); JEROLD AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976); Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161 (2019).

7. Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59 (2010).

Movement;<sup>8</sup> the opening up of the legal profession to racial minorities;<sup>9</sup> and a shifting vision of poverty eradication that was more egalitarian than its Progressive Era counterpart.<sup>10</sup> The conservative backlash of the 1970s and 1980s, which was a response to the perceived excesses of the War on Poverty and the Civil Rights Movement,<sup>11</sup> deployed coded rhetoric that drew attention to the racialized nature of poverty.<sup>12</sup>

But in the twenty-first century—a period characterized by a more robust racial vocabulary—many problems still remain. The first is the relatively homogenous nature of the public interest law sector. Although this is a microcosm of a problem in the larger legal community, and despite the fact that the legal profession is arguably more inclusive now than it has been in American history, the demographics of the public interest bar remain persistently unrepresentative of the general population.<sup>13</sup> Diversity certainly does not ensure recognition of the racially specific forms of bias that influence poverty and exist independent of it, but the homogeneity of the public interest bar—whether through service by organizations or pro bono work—can serve as an impediment for deep racial understanding and hinder racial justice.

The second and related problem is a conflation of poverty and race. Since many public interest organizations are animated by concerns about indigence and inability to afford an attorney, there is often an assumption that the labor in this area naturally serves racial justice imperatives. (The same kind of logic can influence public interest advocacy on issues tied to gender, sexual orientation, and disability, to name a few.) But this presumed intersectionality, in the absence of explicit enunciation, is misplaced, as the Essay explains.

Finally, there has been a relative inattention to the ways race influences the delivery of legal services by public interest attorneys. This problem is tied to the aforementioned lack of diversity in the legal profession and racial assumptions that undergird public interest work. But descriptive, empirical, and theoretical

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8. LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS* (2006).

9. Jason P. Nance and Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 *CONN. L. REV.* 271, 286 (2014).

10. See ALICE O'CONNOR, *POVERTY KNOWLEDGE: SOCIAL SCIENCE, SOCIAL POLICY, AND THE POOR IN TWENTIETH-CENTURY U.S. HISTORY*, 124-125 (2002); PETER LEVINE, *THE NEW PROGRESSIVE ERA: TOWARD A FAIR AND DELIBERATIVE DEMOCRACY* 53 (2000).

11. See ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2009); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

12. See e.g., IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2015); ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* (2004); TALÍ MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* (2001).

13. See *infra* Part II.

scholarship is increasingly drawing attention to the ways attorneys—irrespective of their own social identity—can engage in problematic racialized behavior in the delivery of their legal services.<sup>14</sup> These problems serve as entry points for our own discussion on the need for a racial reckoning in public interest law. In this Essay, we focus on the lack of data on the racial and ethnic makeup of the sector that makes addressing homogeneity particularly challenging. We also address the conflation of poverty and race.

## II.

### LACK OF RACIAL AND ETHNIC DIVERSITY DATA

While scholars have captured the historical race problems in public interest law, the contemporary role of race in the sector is less clear. To begin to get to the question of how race animates the public interest law sector, it is important to have a clear picture of the racial and ethnic compositions of the lawyers and leaders who represent indigent clients and engage in legal advocacy. These lawyers and leaders practice and lead in a variety of settings, including in public interest legal organizations (PILOs), public defenders' offices, and law firms.<sup>15</sup> The indigent clients represented by these lawyers and leaders are disproportionately racial and ethnic minorities.<sup>16</sup> This section highlights the lack of data on race and ethnicity, which can illuminate the complex relationship between anti-racism and anti-poverty representation and advocacy.

#### A. Public Defense

There is neither comprehensive nor recent racial demographic data of public defenders in the United States. The National Association of Law Placement (NALP)'s most recent data was from 2003 when 20% of public service employees were racial and ethnic minorities.<sup>17</sup> Notably, the data did not distinguish among public service employees, lumping together local and state prosecutors, public defenders, and lawyers who practice in PILOs.<sup>18</sup> This is juxtaposed against the prison population—the majority of whom receive some

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14. See, e.g., Theodore Eisenberg and Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1542 (2004); Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 LAW & HUM. BEHAV. 413, 416 (2011); see *infra* notes \_.

15. See generally Chen and Cummings, *supra* note 2.

16. See the Legal Services Corporation (LSC), an independent nonprofit corporation that provides grants for civil legal assistance to poor Americans; LEGAL SERVICES CORPORATION, <https://www.lsc.gov/> (59% of LSC grantee clients were racial or ethnic minorities, or non-White); see also Chester Hartman and David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL'Y DEBATE 461, 467 (2003) (a sample of eviction cases revealed that 70% were filed against women of color).

17. NALP, *Minorities at Private and Public Sector Employers*, NALP BULLETIN, April 2003, <https://www.nalp.org/2003aprminorities>.

18. *Id.*

form of government funded indigent defense. Recent data shows that 35% of state prisoners are White, 38% are Black, and 21% are Hispanic.<sup>19</sup> In twelve states, more than half of the prison population is Black.<sup>20</sup>

The lack of current data on indigent defense, along with the homogeneity of the field, are concerning for at least two reasons. First, for an issue as socially devastating as mass incarceration, it is important to have recent and updated data on the racial and ethnic makeup of indigent defense. Second, there has been research and commentary on bias among public defenders and other actors in the criminal justice system;<sup>21</sup> the available data on the composition of indigent defense suggests that the lawyers that represent indigent criminal defendants are not racially and ethnically diverse,<sup>22</sup> and can provide a clue toward a source of some of these biases.

In addition to these mostly White public defenders, it is important to also grapple with the leadership of public defender offices. There is currently no comprehensive data on the race and ethnicity of Chief Public Defenders. This is a dangerous omission in the fight against mass incarceration because Chief Public Defenders hire and manage the public defenders who provide legal services to indigent criminal defendants, supervise legal representation, shape legal strategy, and establish preventive programs or education.<sup>23</sup> Lacking a clear picture of who determines how strategies and processes within each office operates is counter to an anti-racist agenda. While an individual public defender can attempt to address racial justice, it is impossible to address systemic racism and bias in representation without making changes to public defense as an institution with buy-in from its leaders.<sup>24</sup>

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19. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT 4 (2016).

20. *Id.* at 3.

21. See Henning, *supra* note 5; Ossei-Owusu *supra* note 6; Emily Owens, Erin M. Kerrison and Bernardo Santos Da Silveira, *Examining Racial Disparities in Criminal Case Outcomes Among Indigent Defendants in San Francisco*, QUATRONE CENTER AT PENN LAW 2 (2017); Maurice Chammah, *Do Public Defenders Spend Less Time on Black Clients?*, THE MARSHALL PROJECT (May 2, 2016), <https://www.themarshallproject.org/2016/05/02/do-public-defenders-spend-less-time-on-black-clients>.

22. Extensive research in the criminal justice system has shown that when exposed to racial disparities in criminal punishment, White individuals are much more punitive than racial and ethnic minorities. There is also evidence that Black criminal defendants likely have a preference for Black public defenders because they are more likely to trust them. See Alexis Hoag, *Black on Black Representation*, N.Y.U. L. REV. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3785013](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3785013); Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996, 1007 (2007); Kenneth P. Troccoli, *I Want a Black Lawyer to Represent Me: Addressing a Black Defendant's Concerns with Being Assigned a White Court-Appointed Lawyer*, 20 LAW & INEQ. 1 (2002).

23. Cait Clarke and Christopher Stone, *Bolder Management for Public Defense Leadership in Three Dimensions*, 29 N.Y.U. REV. L. & SOC. CHANGE 113, 113-114 (2004).

24. See generally JONATHAN RAPPING, *GIDEON'S PROMISE: A PUBLIC DEFENDER MOVEMENT TO TRANSFORM CRIMINAL JUSTICE* (2020).

The newfound public recognition of racial discrimination is buoyed by a growing acknowledgement by scholars and lawyers that race can play a role in the provision of legal services to poor people. On the practitioner side, this acknowledgement has come from prosecutors, public defenders, and also PILO attorneys. The bluntest version of this recognition was offered by Rachel Rollins, a Black woman, who is part of the growing crop of “progressive prosecutors” and leads the Suffolk County District Attorney’s Office in Massachusetts (which includes Boston). While discussing the issue of indigent defense on Boston Public Radio, Rollins called attention to the lack of diversity at Committee for Public Counsel Services (CPCS) (the indigent defense provider in Massachusetts). “Ask some of the criminal defendants who are incarcerated—is this a rainbow coalition of people who are representing these individuals?”<sup>25</sup> She added, “I refuse to pretend like this is Thurgood Marshall and Martin Luther King working for CPCS right now and running this operation.”<sup>26</sup> Many bristled at her comments. Still, they represented an important public recognition of the ways indigent legal services organizations are unrepresentative of their client populations. On the defense side, Andrea Lyon, who worked as the Chief of the Homicide Task Force in the Cook County Public Defender’s office, has noted that while working in the office, she presumed that liberals were “good” on issues of race, but encountered incidents that revealed the reality that “stereotypes and prejudice are problems for everyone” including defense attorneys.<sup>27</sup>

### B. Public Interest Legal Organizations

Similar to the lack of data on public defense, there is also limited demographic data on the lawyers who work in PILOs.<sup>28</sup>

The After the JD (AJD) project is an empirical study of the career outcomes of approximately five thousand lawyers. The AJD data is instructive but is based on a representative sample and is based on data from 2012. The study showed that 57% of all PILO lawyers in the study were White.<sup>29</sup>

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25. Andrea Estes, *Rachael Rollins Retreats from Attack on ‘Overwhelmingly Privileged’ Public Defenders After Strong Backlash*, BOS. GLOBE (May 7, 2020), [bostonglobe.com/2020/05/07/metro/rachael-rollins-retreats-attack-overwhelmingly-privileged-public-defenders-after-strong-backlash/](https://www.bostonglobe.com/2020/05/07/metro/rachael-rollins-retreats-attack-overwhelmingly-privileged-public-defenders-after-strong-backlash/) (last visited October 28, 2020).

26. *Id.*

27. Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 755 (2012).

28. These are organizations like the Legal Aid Society or the ACLU. While law school clinics are relevant and some of these conversations are happening in the clinical education literature, our focus here is on PILOs outside of law schools. See generally Jon C. Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 HASTINGS L.J. 445 (2000).

29. Gabriele Plickert, Ronit Dinovitzer, Bryant G. Garth, Robert Nelson, Rebecca Sandefur, Joyce Sterling, and David Wilkins, *After the JD III: Third Results from a National Study of Legal Careers*, AMERICAN BAR FOUNDATION AND NALP (2014).



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

The only recent data from 2020 is from the ABA, which shows that Black, Latinx and Asian lawyers are more likely to work for PILOs than any other sector (13%, 11%, and 13% respectively).<sup>30</sup> However, the data is unclear about what percentage of PILO lawyers are racial or ethnic minorities in recent years.

There is also no data on the leaders who manage and run these organizations. These leaders—executive directors and boards of directors—perform important roles in establishing policies and strategies that guide the provision of legal services and the legal strategies employed in advocacy. Executive directors hire lawyers that provide legal representation to individual clients and engage in legal advocacy.<sup>31</sup> Executive directors are also involved in recruiting board members, socializing board members about their organizations’ missions, establishing their organizations’ policies in conjunction with the board, and supporting the board’s strategic planning function.<sup>32</sup> This means that executive directors hire the lawyers that provide legal services and advocacy, influence the kinds of legal services and advocacy strategies used, and may have a hand in choosing and socializing the board members that determine the overall vision of these organizations.

Similarly, boards of directors are fiduciaries responsible for the management of the activities and affairs of PILOs.<sup>33</sup> “[T]he board hires, fires,

30. Am. Bar Ass’n, *ABA Profile of the Legal Profession* 44 (2020).

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

32. Kathleen B. Fletcher, *Effective Boards: How Executive Directors Define and Develop Them*, 2 NONPROFIT MGMT. & LEADERSHIP 283, 289-291 (1992).

33. Revised Model Nonprofit Corporation Act § 8.01 (2019).

evaluates, and sets compensation for the executive director.”<sup>34</sup> The board also establishes, “reviews and gives input on the organization’s strategic plan, oversees the organization’s budget and programs,” and determines the vision and mission of the organization.<sup>35</sup> Boards of directors therefore choose who runs the organization and can change or alter the kinds of legal services or causes the organization chooses to engage in. Yet, there is no data on the race and ethnicity of these powerful individuals who show themselves to be allies on racial justice matters.

### C. Pro Bono Lawyers

Pro bono work has become a critical avenue in which legal services and advocacy are provided through the private sector’s largesse.<sup>36</sup> Yet, like public defense and PILOs, there is very limited racial and ethnic demographic data on pro bono lawyers. We know that firms of varying sizes provide the lion’s share of pro bono work annually.<sup>37</sup> And in 2019, only 9% of partners and 24% of associates in law firms across the country were racial and ethnic minorities.<sup>38</sup> This suggests that few pro bono lawyers are racial and ethnic minorities.<sup>39</sup>

It is worth mentioning that a follow-up to the first wave of the AJD survey conducted in 2008 examined the relationship between race and pro bono participation.<sup>40</sup> That survey found that the mean number of pro bono hours was largest among Black respondents.<sup>41</sup> Other research also shows that racial and ethnic minority lawyers have more interest in pro bono work than their White counterparts.<sup>42</sup>

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34. Michael Klausner and Jonathan Small, *Failing to Govern? The Disconnect Between Theory and Reality on Nonprofit Boards, and How to Fix It*, 3 STAN. SOC. INNOVATION REV. 42, 44 (2005).

35. *Id.*

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

37. See *id.*; Scott L. Cummings and Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2359-60 (2010); Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and Market-Reliant Legal Aid*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 95, 96 (Robert Granfield and Lynn Mather eds., 2009); Plickert et al., *supra* note 36, at 38-40.

38. This number includes equity and nonequity partners. Firms range from fewer than one hundred to over seven hundred lawyers. Nat’l Ass’n for Law Placement, Inc. (NALP), *2018 Report on Diversity in U.S. Law Firms* 10 (January 2019), [https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms\\_FINAL.pdf](https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf).

39. See also Caprice R. Jenerson, *INSIGHT: Pro Bono Cross-Cultural Training Needed for Race Equity, Access to Justice*, BLOOMBERG LAW (June 12, 2020), <https://news.bloomberglaw.com/us-law-week/insight-pro-bono-cross-cultural-training-needed-for-race-equity-access-to-justice-58>.

40. Gita Z. Wilder, *Race and Ethnicity in the Legal Profession: Findings from the First Wave of the After the JD Study*, NALP 25 (2008).

41. *Id.*

42. Robert Granfield, *The Meaning of Pro Bono: Institutional Variations in Professional Obligations Among Lawyers*, 41 LAW & SOC’Y REV. 113 (2007).

This may suggest that perhaps pro bono lawyers are racially diverse since a sizable number of Black and other minority lawyers provide pro bono legal services. However, because Black lawyers make up only 6% of lawyers in law firms overall,<sup>43</sup> that assumption would be inaccurate. In addition, over half of the minority respondents in the AJD survey—Black, Latinx, Native American, and Asian lawyers—did no pro bono work at all.<sup>44</sup> We can probably conclude that the majority of pro bono lawyers in law firms are White. However, there is a need for actual rather than speculative data on this point.

In addition to the individual lawyers who represent clients or engage in litigation for a cause, it is important to also have data on law firm pro bono leaders. Pro bono partners and counsel in law firms lead their firms' pro bono efforts.<sup>45</sup> Pro bono partners and counsel manage global pro bono programs and can influence the kinds of legal matters and law reform efforts that firms choose to adopt and financially support. They are also involved in approving pro bono matters and supervise and guide associates and partners in representing pro bono clients. In addition, pro bono partners and counsel influence policies that impact racial and ethnic minorities in the United States.<sup>46</sup> Notably, the Association of Pro Bono Counsel (APBCO)—the organization that comprises of law firm pro bono partners and counsel—recently launched the Anti-Racism Alliance.<sup>47</sup> The goal of the Alliance is to combat systemic racism. As of July 2020, the Alliance had grown to 240 law firms with representatives in every US state.<sup>48</sup> While it is not clear how APBCO seeks to combat systemic racism, data on the race and ethnicity of pro bono partners and counsel is key to understanding what anti-racist legal and social advocacy led by law firm leaders might look like.

Overall, it is important to stress the importance of having more robust and recent data to addressing racial bias in public interest law and the legal profession broadly. Without a clear sense of what is lacking and how to combat the problems that lack of diversity might generate—including racism in client experience and outcomes, and neglect of social and legal problems that disproportionately impact communities of color—the path to antiracism is bleak.

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43. The 6% includes partners and associates. NALP, *2018 Report on Diversity in U.S. Law Firms* 9 (Jan. 2019), [https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms\\_FINAL.pdf](https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf).

44. Wilder, *supra* note 47, at 25.

45. Atinuke Adediran, *supra* note 43, at 363-64.

46. See, e.g., Ass'n of Pro Bono Counsel, Letter to the Senate on Behalf of Immigrants (June 4, 2013), <https://apbco.org/wp-content/uploads/2018/11/Letter-to-Senators-re-S744.pdf>.

47. Carolina Bolado, *240 Law Firms Hold Summit to Address Systemic Racism*, LAW 360 (July 29, 2020), <https://www.law360.com/articles/1294480/240-law-firms-hold-summit-to-address-systemic-racism>.

48. *Id.*

### III. THE PATH FORWARD

#### A. Diversify

Much of the research documenting the lack of racial and ethnic diversity in the legal profession focuses on the private sector and the judiciary.<sup>49</sup> Despite the serious need for data, available data points to the importance of increasing racial and ethnic diversity in the public interest sector. While we cannot fully address this task in this Essay, we note two important points.

First, the task of diversifying the public interest law sector must begin with increasing diversity in the legal profession as a whole since the public interest sector encompasses all segments of the profession—government, private practice, and PILOs.

Second, while law schools have become more diverse, with 31% of students in the fall 2019 class identifying as racial and ethnic minorities,<sup>50</sup> research suggests that “minority law students are more likely to begin law school with an initial commitment to public interest careers, but experience elevated levels of ‘identity dissonance’ and alienation” in law school that may cause them to choose other segments of the profession.<sup>51</sup> As such, the goal of diversifying the public interest sector implicates how law schools socialize law students to pursue legal careers.

Therefore, diversifying the public interest law sector involves engaging in an intentional project to increase the number of racial and ethnic minorities from law school all the way to practice.

#### B. Naming Anti-Racism

A major area of improvement for the public interest law sector is to disentangle anti-racism from anti-poverty scholarship and practice. Addressing poverty without calling out or addressing racism or racial inequity in scholarship and practice is antithetical to anti-racism work. On the civil side, racial and ethnic minorities comprise only 39.8% of the U.S. population but make up 58.8% of the individuals who meet the federal poverty threshold and qualify to be clients

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49. See, e.g., Kevin Woodson, *Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms*, 83 *FORDHAM L. REV.* 2557 (2015); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 *WASH. & LEE L. REV.* 405 (2000).

50. See ABA Statistics, [https://www.americanbar.org/groups/legal\\_education/resources/statistics/](https://www.americanbar.org/groups/legal_education/resources/statistics/). Of the 31% racial and ethnic minorities, the breakdown is as follows: Latinx: 40%, Blacks: 24%, Asians: 20%, Mixed race: 12%.

51. John Bliss, *From Idealists to Hired Guns? An Empirical Analysis of “Public Interest Drift” in Law School*, 51 *U.C. DAVIS L. REV.* 1973, 1986 (2018). This is in addition to the high debt burden from law school education and low wages that many public interest jobs provide.

of legal services organizations.<sup>52</sup> Not surprisingly, many PILOs—representing individuals who are engaging in impact litigation—are focused on issues that impact communities of color. On the criminal side, Black and Latinx people make up the majority of indigent criminal defendants. Therefore, engaging in public interest legal practice without a serious acknowledgement of the role of race is disastrous to moving the needle on anti-racism work.

Public interest organizations that hold themselves out as having racial justice commitments must disabuse themselves of the idea that racial justice is an inherent feature of their lawyering. This is not a simple task. Many of these organizations work with and represent some of society’s most marginalized members—many of whom are historically subjugated racial groups. Considering the long-standing relationship between race and class, such assumptions are particularly likely in anti-poverty work, but certainly not exclusive to it.<sup>53</sup> Nevertheless, the recognition of anti-racism as a distinct organizational goal is an essential and critical step for such institutions that should inform other anti-racist strategies. Failing to recognize the distinct contours of anti-racism makes it easy for organizations to assume that good intentions, coupled with other social justice imperatives (e.g. anti-poverty, gender equality), are sufficient to address the scourge of racial subordination.

Professors L. Song Richardson and Phillip Atiba Goff hone in deeper on the issue of race and legal services and advocacy and suggest that “confidence in one’s own egalitarianism can be an obstacle to identifying [implicit bias], meaning that individuals who became [public interest lawyers] in order to fight racial injustice may be just as susceptible to the effects of [implicit bias] as those with less noble motives.”<sup>54</sup> Importantly, the summer 2020 protests have highlighted the need for PILOs to recognize the independent and intersectional importance of racial discrimination. Some White public interest lawyers and leaders come from poor backgrounds or have deep knowledge about poverty in American society. This knowledge and experience, while important, does not necessarily mean that they understand the unique experiences of poor minorities. The need to understand the experience of poor minorities is important because

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52. Am. Bar Ass’n, *Legal Services Corporation 2019 Income Guidelines*, [https://www.americanbar.org/groups/legal\\_services/flh-home/flh-faq/](https://www.americanbar.org/groups/legal_services/flh-home/flh-faq/); UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219>; *Poverty Rate In The United States In 2019, By Ethnic Group*, STATISTICA, <https://www.statista.com/statistics/200476/us-poverty-rate-by-ethnic-group/>.

53. See, e.g., KELSIE KRETSCHMER, FIGHTING FOR NOW: DIVERSITY AND DISCORD IN THE NATIONAL ORGANIZATION FOR WOMEN, 90-92 (2019) (describing how race was an important feature of the National Organization for Women’s platform in the 1970s and noting how minority women’s leadership, membership, and issues were nevertheless a low priority).

54. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2634 (2013).

the nature of poverty that White Americans tend to experience can differ from the poverty experienced by racial and ethnic minorities. Factors such as spatial segregation across racial groups can complicate how poverty is experienced by different racial and ethnic groups.<sup>55</sup>

In light of this, we offer two approaches to disentangling race from poverty, or anti-racism work from anti-poverty work. The first approach is to acknowledge race in organizational mission. The second is to engage in training that goes beyond the commonplace implicit bias training that is often offered by firms and other organizations.

First, PILOs' missions are generally focused on either providing low-income individuals with legal representation, or for PILOs focused on advocacy, advancing a cause for vulnerable communities. We propose that PILOs that are not established to combat racial inequality but specifically address race in their work should consider emphasizing race in their missions. Many PILOs would fall into this category since the work of many of these organizations specifically target communities of color. Indeed, some of these organizations have been addressing issues that stem from systemic racism for decades, and some explicitly work to combat systemic racism. Directly and specifically naming race in organizational mission will influence resource allocation and channel the organizations' innovation towards making improvements that specifically address anti-racism.<sup>56</sup> While etching race into an organization's mission may not be the right approach for all PILOs—particularly those that do not service minority clients or are not focused on issues tied to race—it can be an important step for others.

A second approach to disentangling anti-racism from anti-poverty work is through training that goes beyond implicit bias, to specifically address the role of race and poverty in public interest law. Research has shown that corporate implicit bias training has weak effects on combating bias against minorities.<sup>57</sup> Accordingly training must focus on how race and poverty interact in the delivery of legal services. The National Legal Aid & Defender Association (NLADA) has provided a guideline called a “racial justice plan” that encourages member organizations to “speak with clarity about poverty and racial equity,” improve internal governance to reflect racial equity, and “support a purpose-driven practice that employs strategic advocacy to advance racial justice in our

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55. See Mario Luis Small, David J. Harding and Michèle Lamont, *Reconsidering Culture and Poverty*, 629 ANNALS AM. ACAD. OF POL. & SOC. SCI. 6, 22 (2010); Emily Badger, *Black Poverty Differs from White Poverty*, WASH. POST (Aug. 12, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/08/12/black-poverty-differs-from-white-poverty/>.

56. See Robert E. McDonald, *An Investigation of Innovation in Nonprofit Organizations: The Role of Organizational Mission*, 36 NONPROFIT & VOLUNTARY SECTOR Q. 256, 261 (2007).

57. Alexandra Kalev, Erin Kelly and Frank Dobbin, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 610 (2006).

communities.”<sup>58</sup> NLADA has also begun to aggregate tools for advancing racial justice in the legal aid community and designed a Fight Against Implicit Bias and Racial Inequality (FAIR) Pledge that calls on advocates to confront implicit bias and actively promote racial justice.<sup>59</sup>

Training must be geared towards appropriate institutional audiences. After all, a racial justice plan that would work for pro bono lawyers and partners may not work for PILOs or public defender offices. Public defenders who represent Black and Brown communities should be trained to understand how systemic racism shapes not just the number of incarcerated people, but also the manner in which race shapes the delivery of legal services to Black and Brown communities. Such training programs are already underway. For example, the Equal Justice Society has established a training program geared towards public defenders.<sup>60</sup> PILOs should begin to incorporate specific training geared towards understanding how race interacts with poverty. PILO executive directors, boards of directors, other managers and individual lawyers should be exposed to hands-on and practical training geared towards their client population.<sup>61</sup> Finally, law firms engaged in pro bono work should be trained on how race interacts with their pro bono representation. Pro bono partners and counsel who manage pro bono programs and lawyers particularly should work toward having a more sophisticated understanding of the role of race in legal representation. They should also be aware of how the lack of racial and ethnic diversity among pro bono lawyers intersects with law firm representation. Law firms can and should seek expertise on how to establish tailored training programs for this purpose.

In sum, the public interest sector—defense lawyers and leaders, lawyers and leaders in PILOs, and law firm pro bono lawyers and pro bono partners and counsel—should become open to deeper understanding at the intersection of race and poverty. These lawyers and leaders are not immune from bias that can impact the hiring, retention, and promotion of racial and ethnic minorities in the public interest law sector, and the provision of and delivery of legal services and advocacy. Public interest organizations that address systemic racism in their work should endeavor to focus their missions in whole or part on their anti-racist

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58. Nat'l Legal Aid & Defender Ass'n, *NLADA Statement on the Killing of George Floyd and Standing Up with Communities to Defeat Racist Violence*, NLADA (June 1, 2020), [www.nlada.org/node/32531](http://www.nlada.org/node/32531).

59. *Id.*

60. For example, the Equal Justice Society has established a practical bias training for public defenders, which helps them “to develop a trial advocacy plan that reduces procedural bias and preserves issues of bias for appeal.” *Implicit Bias Training for Public Defenders*, EQUAL JUSTICE SOCIETY <https://equaljusticesociety.org/publicdefenderstraining/> (last visited Dec. 6, 2020).

61. For an example, see Janerick Holmes, Kimberly Merchant and Ellen Hemley, *The Racial Justice Institute: Bringing a Race Equity Lens to Legal Services Advocacy*, 32 MGMT. INNOVATION EXCELLENCE FOR LEGAL AID J. SPECIAL ISSUE: ADVANCING EQUITY 46 (Spring 2018).

work. Public interest lawyers and leaders should also undergo training and reflection at the intersection of race and poverty. Implicit bias training that is particularly geared towards race equity goals and tailored to lawyers in particular institutional settings can be a useful approach.

#### CONCLUSION

Public interest law is ripe for a racial reckoning. The history of this field, along with the empirical scholarship and practice realities, all call for more meaningful engagements with racial justice. This sector of the bar—because of the nature of its work—is well-positioned to address and ameliorate racial inequality. Accordingly, it is up to PILOs of all types to decide whether they will fully embrace the need to incorporate racial justice in their work where necessary or proceed with some version of half-hearted attempts and neglect.