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**Racial Rhetoric or Reality?  
Cautious Optimism on the Link Between  
Corporate #BLM Speech and Behavior**

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RACIAL RHETORIC OR REALITY?  
CAUTIOUS OPTIMISM ON THE LINK  
BETWEEN CORPORATE #BLM SPEECH  
AND BEHAVIOR

Lisa M. Fairfax\*

*The summer of 2022 marks the two-year anniversary of the dramatic rekindling of the #BlackLivesMatter movement because of the murders of George Floyd, Breonna Taylor and other unarmed Black people at the hands of police. The summer of 2020 saw cities in the United States and around the world erupt in protest, with calls to dismantle racist policies and practices both in the criminal system and within the broader society, with a particular emphasis on policies and practices impacting Black people. The summer of 2022 also marks the two-year anniversary of the visible and somewhat surprising avalanche of corporate statements proclaiming solidarity with the Black community, condemning racism and bigotry, and pledging to help eradicate racist policies and practices within their own institutions. Corporations and their brands inundated the public with black squares, #BlackLivesMatter signs, and emphatic insistence that corporate leaders would “not be silent about our fight against racism and discrimination,” and that they would “do more . . . and do it now.”*

*Most commentators viewed these corporate statements with severe skepticism, characterizing them as “cheap talk,” a “marketing ploy,” or “an outright lie.” Relying on original empirical research, this Article refutes that skepticism and demonstrates that, just one year later, many corporations*

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*followed through on their talk with actions aimed at promoting diversity and eroding racist and discriminatory practices. This Article makes three critical assertions with respect to these corporate statements. First, this Article uses original empirical research to reveal that the vast majority of the corporate statements made in the summer of 2020 embodied a commitment to actively work against racism and discrimination and actively promote diversity and inclusion. Second, this Article draws upon original empirical research to refute critics and demonstrate that, on the one-year anniversary of these commitments, many corporations followed through on their speech with concrete actions, at least with respect to their boards. Third, after examining the impact of structural limitations and other roadblocks, this Article sounds a note of caution about whether and to what extent we can expect long-term changes in corporate behavior that meaningfully moves the needle on improving racial diversity and equity in the corporate sphere.*

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## I. INTRODUCTION

In the wake of the murders of George Floyd, Ahmaud Arbery, Breonna Taylor, and other unarmed Black people at the hands of police, the summer of 2020 saw America's cities erupt in protest and calls to dismantle racist policies and practices aimed at Black people. The protest reignited the "Black Lives Matter" movement, a movement protesting police brutality and racially motivated crimes against Black people, which began in 2013 in response to the murder of Trayvon Martin, an unarmed seventeen-year-old Black teenager.<sup>1</sup> Protests around police killings of unarmed Black people included calls to dismantle racist and biased practices in the criminal system and throughout all levels of society.

One of the ways corporations responded to these calls was with a virtual flood of statements professing to support the Black community, expressing a rejection of racism, intolerance, bias, and bigotry, and pledging to help eradicate racist policies and practices both within their own institutions and the broader society.<sup>2</sup> Original research done by this

<sup>1</sup> *See About, BLACK LIVES MATTER*, <https://blacklivesmatter.com/about/> (on file with the Columbia Business Law Review).

<sup>2</sup> *See, e.g., infra* tbl.1 (documenting statements from Fortune 500 companies); David Gelles, *Corporate America Has Failed Black America*, N.Y. TIMES (June 6, 2020),

author reveals that as of August 2020, 86% of Fortune 100 companies and 66% of Fortune 500 companies released such statements.<sup>3</sup> Illustrative of such statements, Harley-Davidson insisted: “Racism, hate or intolerance have no place at Harley-Davidson. We stand in solidarity with our Black colleagues and riders, as we condemn acts of racism and bigotry of any kind . . . . United we will ride.”<sup>4</sup> Some corporations used their respective platforms to denounce silence; Netflix stated: “To be silent is to be complicit.”<sup>5</sup> Finally, corporations released statements committing to actively work against racist policies and practices, with statements ranging from open-ended promises to concrete commitments. For example, Johnson & Johnson issued a statement, declaring “[W]e must do more. And we must do it now.”<sup>6</sup> Johnson & Johnson also released a

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<https://www.nytimes.com/2020/06/06/business/corporate-america-has-failed-black-america.html> [<https://perma.cc/J5CN-GVQ3>] (noting that it “seemed like every major company has publicly condemned racism”); Sahil Patel, *Brands Follow Antiracist Statements with Donations. What’s Next?*, WALL ST. J. (June 6, 2020, 6:00 AM), <https://www.wsj.com/articles/brands-follow-anti-racist-statements-with-donations-whats-next-11591437600> (on file with the Columbia Business Law Review) (noting statements and donations from companies); Arvind Hickman, ‘*Generic Statements Are a Distraction and Talk Is Cheap*’—PR Leaders on Brands Supporting Black Protestors, PRWEEK (June 1, 2020), <https://www.prweek.com/article/1684783/generic-statements-distraction-talk-cheap-%E2%80%93-pr-leaders-brands-supporting-black-protestors> [<https://perma.cc/Y4WU-RTLX>] (noting major corporations posting in solidarity with Black community).

<sup>3</sup> See *infra* tbl.1.

<sup>4</sup> See Harley Davidson (@harleydavidson), TWITTER (June 1, 2020, 5:41 PM), <https://twitter.com/harleydavidson/status/1267571957190602754> (on file with the Columbia Business Law Review) [hereinafter Harley-Davidson Statement].

<sup>5</sup> See Netflix (@netflix), TWITTER (May 30, 2020, 4:30 PM), <https://twitter.com/netflix/status/1266829242353893376?lang=en> (on file with the Columbia Business Law Review) [hereinafter Netflix Statement].

<sup>6</sup> Alex Gorsky, *A Message from the Johnson and Johnson Chairman and CEO Alex Gorsky About Recent Events in the United States*, JOHNSON & JOHNSON (June 2, 2020), <https://www.jnj.com/latest-news/a-message-from-johnson-johnson-ceo-alex-gorsky-about-recent-events-in-the-united-states> [<https://perma.cc/NXH5-AXYV>] [hereinafter Johnson & Johnson Statement].

list of action plans aimed at tackling racism and discrimination within its own company.<sup>7</sup>

Many commentators viewed the deluge of corporate statements with skepticism, if not outright hostility.<sup>8</sup> As one *New York Times* article stated, “[M]any of the same companies expressing solidarity have contributed to systemic inequality, targeted the [B]lack community with unhealthy products and services, and failed to hire, promote, and fairly compensate [B]lack men and women.”<sup>9</sup> Some viewed the statements as “cheap talk”—a way to express a vague commitment without taking concrete action.<sup>10</sup> Others viewed the statements as marketing ploys—a way to attract consumers and other market participants aligned with the Black Lives Matter movement.<sup>11</sup> Still others viewed the statements as

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<sup>7</sup> See *id.*

<sup>8</sup> See, e.g., Dakin Andone, *Roger Goodell Saying Black Lives Matters Is ‘Almost Like a Slap in the Face,’ Michael Bennett Says*, CNN (June 13, 2020, 6:50 PM), <https://www.cnn.com/2020/06/13/us/michael-bennett-roger-goodell-black-lives-matter-trnd/index.html> [<https://perma.cc/GR8N-AKB7>] (quoting NFL player referring to Goodell’s statements as “slap in the face”); Catherine Thorbecke, *Does Black Lives Matter Sell? As Protests Roil the Nation, Corporate America’s Response Met with Skepticism*, ABC NEWS (June 10, 2020, 5:02 AM), <https://abcnews.go.com/US/black-lives-matter-sell-protests-roil-nation-corporate/story?id=71150331> [<https://perma.cc/DJ4V-4BWU>] (quoting various commentators questioning whether companies will do more than only issue statements).

<sup>9</sup> See Gelles, *supra* note 2.

<sup>10</sup> Mellody Hobson, *‘Talk is Cheap’—Ariel Investments’ Mellody Hobson on Corporate America’s Responsibility to Fight Inequality*, CNBC (June 1, 2020, 9:31 AM), <https://www.cnbc.com/video/2020/06/01/mellody-hobson-corporate-americas-responsibility-fight-inequality.html> (on file with the Columbia Business Law Review); see Sarah Todd, *CEOs Are Finally Talking About Racism. Will it Change Anything?*, QUARTZ (June 3, 2020), <https://qz.com/work/1864328/ceo-statements-on-race-matter-more-than-you-think/> [<https://perma.cc/6W3S-LMJ9>] (noting that statements have been met with “understandable skepticism” and that it is “reasonable to be dubious about corporate America’s commitment to standing up against racism and police brutality, particularly when the statements in question offer little to nothing in the way of plans for concrete actions”).

<sup>11</sup> See Gelles, *supra* note 2; Terry Nguyen, *Consumers Don’t Care About Corporate Solidarity. They Want Donations*, VOX (June 3, 2020, 1:00 PM), <https://www.vox.com/the-goods/2020/6/3/21279292/blackouttuesday->

hypocritical.<sup>12</sup> According to this view, corporate America has benefitted from, maintained, and facilitated systemic racism—and thus corporate statements condemning racism ring hollow.<sup>13</sup>

Relying on original empirical research, this Article refutes critics and argues that such research demonstrates that corporations that issued statements in the summer of 2020 have in fact made efforts to follow through on their promise to promote diversity and work to combat racism within the corporate sphere. Importantly, the empirical research pays particular attention to corporate actions related to Black individuals. To be sure, corporate statements included mention of other groups, especially other people of color. However, because corporate statements reflected a response to the Black Lives Matter movement, those statements not only expressed support for Black individuals, but also expressed particular commitments to Blacks. Hence, any effort to refute criticism of those statements must especially focus on corporate actions specifically aimed at Blacks.

This Article advances three critical arguments about the deluge of corporate statements issued in the summer of 2020. First, this Article argues that such statements can be viewed as corporate commitments to *actively* work against discrimination and racism, and thus can be characterized as an example of antiracism. For purposes of this Article, the terms “antiracism” or “antiracist” as applied to speech are used to capture three core concepts. First, such speech denounces racism, bigotry, and discrimination.<sup>14</sup> Second, such speech repudiates silence.<sup>15</sup> The final and quintessential element is that such speech embodies a commitment to

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brands-solidarity-donations [<https://perma.cc/Y9BC-MARA>] (noting concern that statements represented a “PR façade”).

<sup>12</sup> See Todd, *supra* note 10 (noting that NFL’s statement “roundly reeks of hypocrisy”); Hickman, *supra* note 2 (noting that corporations making statements, such as YouTube and L’Oréal, have been criticized for a perceived hypocrisy”); Nguyen, *supra* note 11 (noting perceived hypocrisy).

<sup>13</sup> See Gelles, *supra* note 2.

<sup>14</sup> See *infra* Section II.B.

<sup>15</sup> See *id.*

actively work to dismantle discriminatory policies and practices or otherwise to actively promote diversity and inclusion.<sup>16</sup> This Article's empirical survey of the corporate statements issued in the summer of 2020 reveals that such speech has all three of these hallmarks. In this regard, this Article uses the term "antiracist" to characterize these corporate statements to reflect the fact that the vast majority of corporate statements included promises by corporations to proactively work against racism and improve diversity, particularly within their own corporations.<sup>17</sup>

Second, this Article is an optimistic and contrarian one. In stark contrast to predictions from the many commentators who sharply criticized and dismissed the potential impact of corporate statements,<sup>18</sup> this Article asserts that such blanket denunciation has proven inappropriate. On the one hand, this Article points out that corporate statements condemning racism and affirming the importance of Black lives have important and beneficial normative implications irrespective of their behavioral impact. On the other hand, this Article draws upon an original empirical survey to demonstrate that, on the first anniversary of these corporate statements, many corporations that issued such statements began to follow through on their commitments, at least with respect to increasing the presence of Blacks and other people of color on their boards. This research suggests that corporate statements dramatically influenced corporations' willingness to take actions aimed at increasing diversity and ameliorating the impact of racism. This research thereby discredits the

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<sup>16</sup> See *id.*; Kristen Rogers, *How To be an Anti-Racist: Speak Out in Your Own Circles*, CNN HEALTH (June 4, 2020, 4:50 AM), <https://www.cnn.com/2020/06/04/health/how-to-be-an-anti-racist-wellness/index.html> [<https://perma.cc/G65K-X6QF>]; *Being Antiracist*, SMITHSONIAN, <https://nmaahc.si.edu/learn/talking-about-race/topics/being-antiracist> [<https://perma.cc/DH4Y-LRU7>] (last visited May 19, 2022); Hillary Hoffower, *What It Really Means To be an Anti-Racist, and Why It's Not the Same as Being an Ally*, BUS. INSIDER (June 8, 2020, 11:16 AM), <https://www.businessinsider.com/what-is-anti-racism-how-to-be-anti-racist-2020-6> [<https://perma.cc/739A-F69M>].

<sup>17</sup> See *infra* Section II.B.

<sup>18</sup> See *infra* Section II.C.



notion that these corporate statements should have been blanketly dismissed as merely cheap talk or opportunistic rhetoric. Rather, it posits that critics were too readily dismissive of these statements' importance and potential impact.

Finally, however, this Article sounds a note of caution about the overall and long-term impact of these statements on the corporate effort to promote diversity and eradicate discrimination within the economic sphere. While this Article's survey suggests real promise about corporations' willingness to follow through on their commitments, there are nonetheless challenges ahead that could undermine or impede the progress illuminated by this Article's study. For example, it may be that board diversity is not a good indicator of corporate efforts to promote diversity or otherwise tackle discrimination, particularly with respect to other aspects of the corporate and economic environment. At the very least, board diversity is just one of many actions that corporations need to take,<sup>19</sup> and it is too soon to tell if corporations will focus on efforts that include other critical actions, such as working to create a more diverse and inclusive workforce or otherwise working to ensure that corporate policies do not have a negative impact on Blacks and other vulnerable communities. There also are serious structural and substantive limitations to enhancing board diversity that may undermine continued progress in this area.<sup>20</sup> Additionally, we now appear to be in a different moment. In the summer of 2020, polls revealed historically unprecedented consensus among all races about the level of discrimination faced by Blacks and other people of color as well as the need to take action to ameliorate that discrimination.<sup>21</sup> As a result,

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<sup>19</sup> See *e.g.*, *Gelles*, *supra* note 2. For example, corporations need to focus on pay practices, culture, wealth, and income disparities and other equity concerns in the economic arena.

<sup>20</sup> See *infra* Part IV.

<sup>21</sup> Polls revealed that most Americans believe that racism and discrimination are "big problem[s]" and that the protests are justified. See, *e.g.*, MONMOUTH UNIV. POLL, NATIONAL: PROTESTORS' ANGER JUSTIFIED EVEN IF ACTIONS MAY NOT BE 3 (2020), <https://www.monmouth.edu/polling->

corporations and society in general experienced intense internal and external pressure to make express commitments to tackle racism and follow through on those commitments. Two years later, both are experiencing serious backlash, including backlash with respect to efforts to improve board diversity.<sup>22</sup> This backlash begs a serious question about whether corporations will remain willing to make substantive, meaningful, and long-term change with respect to diversity and inclusion in the economic sphere.

Part II introduces an original empirical survey of the corporate statements made by companies within the Fortune 500.<sup>23</sup> This Article defines “antiracism” and “antiracist speech,” and then relies on that survey to demonstrate the manner in which the corporate speech that is the focus of this Article can appropriately be classified as antiracist. Part II

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[institute/documents/monmouthpoll\\_us\\_060220.pdf](https://www.institute.com/documents/monmouthpoll_us_060220.pdf)  
[<https://perma.cc/RXJ5-R8WX>] (finding that seventy-six percent of Americans “called racism and discrimination ‘a big problem’ in the United States”).

<sup>22</sup> See, e.g., Janice Gassam Asare, *The War on Critical Race Theory Continues as Some Call It Anti-White*, FORBES (May 9, 2021, 7:34 PM), <https://www.forbes.com/sites/janicegassam/2021/05/09/the-war-on-critical-race-theory-continues-as-some-call-it-anti-white/?sh=5a7658af73a7> [https://perma.cc/7JJY-43R7]; Adam Harris, *The GOP’s ‘Critical Race Theory’ Obsession*, ATLANTIC (May 7, 2021), <https://www.theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828/> [https://perma.cc/G4PA-Z4X6] (discussing House bills that would prohibit schools and organizations from engaging in diversity training); David Smith, *There’s a Concerted Backlash*, GUARDIAN (June 12, 2021, 3:30 AM), <https://www.theguardian.com/world/2021/jun/12/ibram-x-kendi-antiracism-backlash-interview> [https://perma.cc/EV8V-MK8S]; Rosalind M. Chow et al., *Fighting Backlash to Racial Equity Efforts*, MIT SLOAN MGMT. REV. (June 8, 2021), <https://sloanreview.mit.edu/article/fighting-backlash-to-racial-equity-efforts/> [https://perma.cc/6W47-A65H]; Laura Meckler & Hannah Natanson, *As Schools Expand Racial Equity Work, Conservatives See a New Threat in Critical Race Theory*, WASH. POST (May 3, 2021, 1:29 PM), <https://www.washingtonpost.com/education/2021/05/03/critical-race-theory-backlash/> [https://perma.cc/Q3RK-5A8U].

<sup>23</sup> Special thanks to Nickolas Kinslow for his diligent efforts in compiling the data presented on the statements made by Fortune 500 corporations.

concludes by identifying the most prominent arguments advanced by those skeptical of the value and impact of such statements. Part III evaluates the impact of these statements both normatively and behaviorally. Part III begins by highlighting the normative value of corporate statements. Part III then introduces a second empirical survey to assesses the extent to which corporations that published such statements have made progress with respect to board diversity in general, and with respect to the number of Black directors on their board in particular. Such survey illustrates the significant impact corporate speech has had on corporate reality, at least in terms of corporate progress on board diversity. Part IV sounds a note of caution by pinpointing some of the hurdles, both short-term and long-term, with ensuring that corporations will remain committed to translating their talk into action. Part V concludes.

## II. THE PROLIFERATION AND MEANING OF CORPORATE BLACK LIVES MATTER SPEECH

### A. A Deluge of Corporate #BlackLivesMatter Statements

This Article relies on an original empirical survey of the statements made by corporations within the 2020 Fortune 500 in response to the police shootings in the summer of 2020.<sup>24</sup> The survey collects data on statements made by and on behalf of such corporations available in the public domain, including on corporate websites, corporate social media accounts, newspaper articles, publicly available reports, emails or memos to particular stakeholders such as customers or employees issued by or on behalf of corporations, and other

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<sup>24</sup> Extraordinary thanks to Nickolas Kinslow for this incredible research effort in producing the information in the appendices. These appendices can be found at Lisa M. Fairfax, *Appendices: Racial Rhetoric or Reality? Cautious Optimism on the Link Between Corporate #BLM Speech and Behavior*, 2022 app. COLUM. BUS. L. REV. apps. 1 <https://doi.org/10.52214/cblr.v2022i1.9968> (on file with the Columbia Business Law Review).

forms of communications that became available to the public during these months. The survey collected data on statements made by or on behalf of corporations during the months of June, July, and August 2020, though the vast majority of such statements were issued in June.<sup>25</sup>

The survey reveals that a sizeable majority of corporations in the Fortune 500 made such statements.

### 1. An Avalanche of Statements and Their Silent Corporate Counterparts

Table 1: Statements Made by Fortune 500 Companies from June-August 2020

<b>Company Rank</b>	<b># of Statements</b>
F1-100	84
F101-200	70
F201-300	70
F301-400	55
F401-500	50
F500 Total	329 (65.8%)

As Table 1 reveals, a considerable majority of Fortune 500 companies issued statements in the wake of the murders of George Floyd, Breonna Taylor, and other Blacks at the hands of police. Eighty-four percent of Fortune 100 companies made statements, as did nearly 75% of the Fortune 300, with the number declining towards the bottom half of the Fortune 500. Only 55% of companies in the Fortune 301-Fortune 400 issued such statements, and 50% of the companies in the Fortune 401-500 issued such statements. Nonetheless, as of August 2020, collectively 329 companies in the Fortune 500 issued such statements, accounting for nearly 66% of the Fortune 500. Companies that issued statements include household

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<sup>25</sup> See Kevin McElwee, *The Fortune 100 and Black Lives Matter*, TOWARDS DATA SCI. (Jan. 29, 2021), <https://towardsdatascience.com/the-fortune-100-and-black-lives-matter-f8ef1084f7b6> [<https://perma.cc/7NRV-39AH>] (noting that most of the racial justice tweets from the Fortune 100 were issued in June).

names and cut across industries: for example, Walmart,<sup>26</sup> Apple,<sup>27</sup> eBay,<sup>28</sup> Estee Lauder,<sup>29</sup> BlackRock,<sup>30</sup> Netflix,<sup>31</sup> Nordstrom,<sup>32</sup> Nike,<sup>33</sup> Gap,<sup>34</sup> Pfizer,<sup>35</sup> and CVS Health.<sup>36</sup> Many non-Fortune 500 companies also issued statements,

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<sup>26</sup> Letter from Doug McMillon, President & CEO, Walmart, to Walmart Assocs. (June 12, 2020), *Advancing Our Work on Racial Equity*, <https://corporate.walmart.com/newsroom/2020/06/12/advancing-our-work-on-racial-equity> [<https://perma.cc/6X5C-2KY8>].

<sup>27</sup> Tim Cook, *Speaking up on Racism*, APPLE, <https://www.apple.com/speaking-up-on-racism/> [<https://perma.cc/5GG2-QN2P>] (last visited June 15, 2022).

<sup>28</sup> James Iannone, LINKEDIN, <https://www.linkedin.com/feed/update/urn:li:activity:6673241294590095360/> [<https://perma.cc/7Z5F-L4SS>] (last visited June 15, 2022).

<sup>29</sup> Letter from William P. Lauder, Executive Chairman, Estee Lauder Cos. & Fabrizio Fred, President & CEO, Estee Lauder Cos., to Estee Lauder Cos. Global Employees (June 10, 2020), <https://www.elcompanies.com/en/news-and-media/newsroom/company-features/2020/elc-commits-to-racial-equity> [<https://perma.cc/AW7M-WUFE>].

<sup>30</sup> Larry Fink & Rob Kapito, *Our Actions To Advance Racial Equity and Inclusion*, BLACKROCK (June 22, 2020), <https://www.blackrock.com/corporate/about-us/social-impact/advancing-racial-equity> [<https://perma.cc/NR2Q-9KCK>].

<sup>31</sup> Netflix Statement, *supra* note 5.

<sup>32</sup> Peter E. Nordstrom & Erik B. Nordstrom, *An Open Letter to Our Employees on Black Lives Matter*, NORDSTROM (May 30, 2020), <https://press.nordstrom.com/news-releases/news-release-details/open-letter-our-employees-customers-and-communities> [<https://perma.cc/7GQP-VC86>].

<sup>33</sup> Press Release, Nike, NIKE, Inc. Statement on Commitment to the Black Community (June 5, 2020), <https://news.nike.com/news/nike-commitment-to-black-community> [<https://perma.cc/7WTC-6X9F>].

<sup>34</sup> Gap Inc. Blogs, *United for Justice and Equality*, GAP (June 8, 2020), <https://www.gapinc.com/en-us/articles/2020/06/united-for-justice-and-equality> [<https://perma.cc/SGH4-LTBP>].

<sup>35</sup> Pfizer, Inc. (@pfizer), TWITTER (June 1, 2020, 3:54 PM), <https://twitter.com/pfizer/status/1267545112663461894> (on file with the Columbia Business Law Review).

<sup>36</sup> @CVSHealth, TWITTER (June 12, 2020, 11:41 AM), <https://twitter.com/cvshealth/status/1271467616838787074?lang=en> (on file with the Columbia Business Law Review).

such as H&M,<sup>37</sup> Spotify,<sup>38</sup> Harley-Davidson,<sup>39</sup> Peloton,<sup>40</sup> and Airbnb.<sup>41</sup> As these statements reveal, the summer of 2020 witnessed an outpouring of these corporate statements.

Of course, as of August 2020, roughly 34% of Fortune 500 companies, encompassing several household names, chose not to issue any statements. This includes Exxon Mobil,<sup>42</sup> General Electric, Publix Supermarkets, Costco, Tesla, Whirlpool, Goodyear, Loews, AutoZone, Williams Sonoma, Hertz, Toll Brothers, Smucker, Oshkosh, and Charles Schwab. Many of the companies that chose to remain silent are associated with the oil, gas, and energy sector or the aerospace and defense industry. This includes Phillips 66, Valero Energy, Lockheed Martin, Boeing, Conoco Phillips, Occidental Petroleum, and

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<sup>37</sup> Press Release, H&M, There Is No Room for Silence (June 1, 2020), [https://www2.hm.com/en\\_us/life/culture/inside-h-m/theres-no-room-for-silence.html](https://www2.hm.com/en_us/life/culture/inside-h-m/theres-no-room-for-silence.html) [<https://perma.cc/C7SD-QZT7>].

<sup>38</sup> Press Release, Spotify, Spotify Stands with the Black Community in the Fight Against Racism and Injustice (June 1, 2020), <https://newsroom.spotify.com/2020-06-01/spotify-stands-with-the-black-community-in-the-fight-against-racism-and-injustice/> [<https://perma.cc/WHS8-TTQD>].

<sup>39</sup> Harley-Davidson Statement, *supra* note 4.

<sup>40</sup> Peloton (@onepeloton), INSTAGRAM, [https://www.instagram.com/p/CA3RVZrF7pX/?utm\\_source=ig\\_embed&ig\\_rid=6b831652-7556-4dbc-8197-9f8de3269cb7](https://www.instagram.com/p/CA3RVZrF7pX/?utm_source=ig_embed&ig_rid=6b831652-7556-4dbc-8197-9f8de3269cb7) (on file with the Columbia Business Law Review) (last visited May 19, 2022).

<sup>41</sup> *Antiracism and Allyship Resources for the Airbnb Community*, AIRBNB (June 1, 2020), <https://news.airbnb.com/antiracism-and-allyship-resources-for-the-airbnb-community/> [<https://perma.cc/XJ9E-X6SA>].

<sup>42</sup> One article indicates that Exxon Mobil has issued a Black Lives Matter Statement. See Gavin Bade & Ben Lefebvre, *Calls Rise for Energy Sector To Improve Diversity*, POLITICO (June 14, 2020, 4:30 PM), <https://www.politico.com/news/2020/06/14/energy-sector-diversity-racism-police-318463> [<https://perma.cc/RLC4-GNGL>]. However, this author could not locate the statement. Later articles indicate that Exxon Mobil has remained silent. See, e.g., Ilana Cohen, *Chevron's Black Lives Matter Tweet Prompts a Debate About Big Oil and Environmental Justice*, INSIDE CLIMATE NEWS (June 20, 2020), <https://insideclimatenews.org/news/19062020/chevron-black-lives-matter-tweet> (on file with the Columbia Business Law Review).

General Dynamics.<sup>43</sup> Eleven of the 16 Fortune 100 companies (68.8%) that did not issue a statement hail from the oil, gas, and energy sector or the aerospace and defense industry. This percentage drops when we move further down the Fortune 500. A total of 23 of the 76 Fortune 300 companies that chose not to issue a statement fell within such industries. Some companies within these industries did issue statements, such as Chevron,<sup>44</sup> Marathon Petroleum,<sup>45</sup> Duke Energy,<sup>46</sup> Dominion Energy,<sup>47</sup> and Raytheon.<sup>48</sup> However, commentators have expressed concern about the silence related to these industries.<sup>49</sup> In seeming recognition of the industry-specific silence, some companies in the industry took special effort to distance themselves from their peers. Thus, DTE Energy proclaimed, “We’re an energy company, but we’re also 10k

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<sup>43</sup> See McElwee, *supra* note 25 (noting silence from companies in the aerospace, defense, and gasoline industries).

<sup>44</sup> @Chevron, TWITTER (June 5, 2020, 3:15 PM), [https://twitter.com/Chevron/status/1268984687927705600?ref\\_src=twsrc%5Etfw](https://twitter.com/Chevron/status/1268984687927705600?ref_src=twsrc%5Etfw) (on file with the Columbia Business Law Review).

<sup>45</sup> Marathon Petroleum (@MarathonPetroCo) (June 19, 2020, 9:42 AM), <https://twitter.com/marathonpetroco/status/1273974563882352640?lang=en> (on file with the Columbia Business Law Review) [hereinafter Marathon Petroleum Statement].

<sup>46</sup> Press Release, Duke Energy, Duke Energy Pledges \$1 Million in Grants To Support Social Justice and Racial Equity (June 8, 2020), <https://news.duke-energy.com/releases/duke-energy-pledges-1-million-in-grants-to-support-social-justice-and-racial-equity> [https://perma.cc/5ELU-FRT8].

<sup>47</sup> Press Release, Dominion Energy, Dominion Energy Commits \$35 Million to Initiative Supporting Historically Black Colleges and Universities, Minority Student Scholarships (July 16, 2020), <https://news.dominionenergy.com/Dominion-Energy-Commits-35Million> [https://perma.cc/CP4P-9FF9].

<sup>48</sup> Letter from Gregory J. Hayes, Chairman & CEO, Raytheon Techs., to Emps. (June 10, 2020), <https://www.rtx.com/news/2020/06/10/we-must-stand-together> (on file with the Columbia Business Law Review) [hereinafter Raytheon Techs. Statement].

<sup>49</sup> See Bade & Lefebvre, *supra* note 42 (noting that leaders of the energy industry are predominantly white, nearly three quarters of employees are white, and the industry has long generated complaints that it was hostile to women and people of color).

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people who stand united against discrimination and violence.”<sup>50</sup> Collectively, there is no other industry that had so many companies choosing not to issue statements.

## B. Corporate #BLM Speech Defined

This Article reveals that most of the above-mentioned corporate statements bear all the hallmarks of antiracist speech. This Article defines the terms “antiracism” and “antiracist” to embody three important hallmarks. Those hallmarks are: (1) a rejection of racism and discrimination, (2) a repudiation of silence and inaction, and (3) a commitment to actively challenge racism and promote diversity and inclusion. The terms “antiracism” and “antiracist” are relatively new.<sup>51</sup> However, they are currently being embraced by a growing number of corporations.<sup>52</sup> Importantly, the speech in the summer of 2020 reflected an example of antiracism.

### 1. Rejecting Racism

While it may seem obvious, the first hallmark of antiracism and antiracist speech is the rejection of racism. Some have noted that antiracism is a term that defies easy explanation.<sup>53</sup> Other scholars have noted that antiracist and

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<sup>50</sup> DTE Energy (@DTE\_Energy), TWITTER (June 2, 2020, 2:18 PM), [https://twitter.com/DTE\\_Energy/status/1267883367166509059](https://twitter.com/DTE_Energy/status/1267883367166509059) (on file with the Columbia Business Law Review).

<sup>51</sup> See ALASTAIR BONNETT, ANTI-RACISM 10 (2000) (referring to the term “antiracism” as a twentieth century creation and noting that the term did not appear in regular usage until the 1960s).

<sup>52</sup> See, e.g., Press Release, Dara Khosrowshahi, Uber, Being an Anti-Racist Company (June 17, 2020), <https://www.uber.com/newsroom/being-an-anti-racist-company/> [<https://perma.cc/WMY8-BZYU>]; Micah Maidenburg, *Some Companies Say They Want to Be Antiracist. What Does That Mean?*, WALL ST. J. (July 2, 2020, 10:06 AM), <https://www.wsj.com/articles/some-companies-say-they-want-to-be-antiracist-what-does-that-mean-11593698759> (on file with the Columbia Business Law Review).

<sup>53</sup> See BONNETT, *supra* note 51, at 1 (“Anti-racism appears to have a double life . . . both extraordinarily rare and all-pervasive.”).



antiracism should not be considered the inverse of racist and racism.<sup>54</sup> Nevertheless, at its core, antiracism is linked to racism; antiracism seeks to confront, eradicate, ameliorate, prevent, challenge and, or, dismantle racism and racist behavior, policies and practices.<sup>55</sup> By extension, antiracist speech is speech supporting the elimination of racist policies.<sup>56</sup> Scholars insist that a corporate antiracist statement first and foremost must express ideas related to rejecting racism and bigotry. Professor Deborah Schwartz has indicated that when a corporation engages in antiracist speech, it wants to send a message regarding its concern about racism and its impact on communities of color.<sup>57</sup>

As so defined, antiracism and antiracist speech can be viewed as inherently appropriate and valid. Indeed, even if people disagree about what constitutes antiracist speech and antiracism, there is little disagreement around their inherent validity. Antiracism as its core focuses on the notion that racism is inherently impermissible and reprehensible.<sup>58</sup> As Alastair Bonnett, Professor of Social Geography, notes, racism is “almost universally reviled (at least within public discourse).”<sup>59</sup> Bonnett further explains: “There are . . . few words more likely to evoke any protestations of innocence than the charge of racism. Moreover, in almost every country, those who explicitly assert racism as an ideology form a relatively tiny, and usually, despised band. Most people, it seems, have some sort of stake in anti-racism.”<sup>60</sup> Again, people may disagree regarding the type of speech that may be characterized as antiracist speech. However, most of current

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<sup>54</sup> See *id.* at 2.

<sup>55</sup> Yin Paradies, *Whither Anti-Racism?*, 39 *ETHNIC & RACIAL STUD.* 1, 2 (2016); BONNETT, *supra* note 51, at 3.

<sup>56</sup> See Deborah Schwartz, *A First Amendment Justification for Regulating Racist Speech on Campus*, 40 *CASE W. RES. L. REV.* 733, 776 (1990).

<sup>57</sup> *Id.*

<sup>58</sup> See Victor Suthammanont, *Judicial Notice: How Judicial Bias Impacts the Unequal Application of Equal Protection Principles in Affirmative Action Cases*, 49 *N.Y. L. SCH. REV.* 1173, 1197–99 (2005).

<sup>59</sup> BONNETT, *supra* note 51, at 4.

<sup>60</sup> *Id.* at 4.

society has coalesced around the notion that racism and racists are inherently problematic.<sup>61</sup> In this regard, the terms antiracist and antiracism are “defined in opposition to something considered bad.”<sup>62</sup>

All the corporate statements either professed to support racial justice and equality, declared support for eradicating racism and racist policies, or both—thus embodying antiracist speech. Ninety-four percent of the statements made explicit reference to the Black community and the Black Lives Matter movement. Amazon’s statement proclaimed, “The inequitable and brutal treatment of Black people in our country must stop. Together we stand in solidarity with the Black community—our employees, customers, and partners—in the fight against systemic racism and injustice.”<sup>63</sup> Other statements pledged support for eradicating racism and racist policies. For example, Marathon Petroleum’s statement proclaimed, “MPC stands firmly against racism, intolerance, and hate of any kind.”<sup>64</sup> Southwest expressed a similar sentiment: “We must not tolerate racial injustice.”<sup>65</sup> Raytheon’s statement announced, “We have to respond clearly that racism, discrimination and hatred will not be tolerated.”<sup>66</sup> Kimberly-

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<sup>61</sup> Cf. *George Floyd’s Death: One Year Later*, APNORC (May 21, 2020), <https://apnorc.org/projects/george-floyds-death-one-year-later/> [<https://perma.cc/3LU6-LAQP>] (finding that fifty-nine percent view racism in the United States as at least a “very serious” problem).

<sup>62</sup> BONNETT, *supra* note 51, at 4.

<sup>63</sup> See Amazon (@amazon), TWITTER (May 31, 2020, 1:05 PM), <https://twitter.com/amazon/status/1267140211861073927> (on file with the Columbia Business Law Review).

<sup>64</sup> See Marathon Petroleum Statement, *supra* note 45.

<sup>65</sup> Southwest Airlines (@SouthwestAir), TWITTER (June 3, 2020, 3:00 PM), <https://twitter.com/SouthwestAir/status/1268256144482611209> (on file with the Columbia Business Law Review).

<sup>66</sup> Raytheon Techs. Statement, *supra* note 48. There are many more examples of such statements. Kohl’s not only proclaimed, “[W]e stand together against racism and discrimination,” but also announced “[W]e cannot operate as a civilized society when parts of our population feel marginalized, victimized or targeted just for who they are.” Michelle Gass, *A Message from CEO Michelle Gass to Kohl’s Associates*, KOHL’S (June 1, 2020), <https://corporate.kohls.com/news/archive-/2020/june/a-message-from-ceo-michelle-gass-to-kohl-s-associates> [<https://perma.cc/JVE3-QS6F>].

Clark's statement proclaimed: "There's no place for racism and bias in our lives, our communities or future."<sup>67</sup> PlayStation announced: "We denounce systemic racism and violence against the Black community,"<sup>68</sup> KKR wrote: KKR does not tolerate or condone racism or discrimination against anyone—inside or outside of the workplace."<sup>69</sup> Each corporate statement embodies speech that condemns, challenges, or pledges support for eradicating racism and racist practices.

## 2. Silence as Acquiescence

The second hallmark of antiracism and antiracist speech is a rejection of silence. Because a person's inaction can signal or lead to support of racism and racist policies, inaction is not a hallmark of antiracism. Instead, antiracism and antiracists must implicitly or explicitly reject silence or inaction.<sup>70</sup>

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Kimberly-Clark's statement proclaimed: "There's no place for racism and bias in our lives, our communities or future." Corning expressed "zero tolerance for racism." Dish proclaimed, "We do not tolerate racism." Corning Incorporated (@Corning), TWITTER (June 3, 2020, 8:55 AM), <https://twitter.com/Corning/status/1268164282287632386> (on file with the Columbia Business Law Review). Infinity Ward, which develops Call of Duty, announced: "There is no place for racist content in our games. Infinity Ward (@InfinityWard), TWITTER (June 3, 2020, 5:46 PM), <https://twitter.com/InfinityWard/status/1268297976901849089> (on file with the Columbia Business Law Review); see also Mike Didymus, *Black Lives Matter: Private Equity Giants Respond to George Floyd Murder, Racial Injustice in US*, ALT. ASSETS NETWORK (June 3, 2020), <https://www.altassets.net/market-news/firm-news/black-lives-matter-private-equity-giants-respond-to-george-floyd-murder-racial-injustice-in-us.html> [<https://perma.cc/REN9-U4DX>].

<sup>67</sup> Kimberly-Clark Corp. (@KCCorp), TWITTER (June 9, 2020, 7:00 AM), <https://twitter.com/KCCorp/status/1270309704246403072> (on file with the Columbia Business Law Review).

<sup>68</sup> PlayStation (@PlayStation), TWITTER (June 1, 2020, 10:52 AM), <https://twitter.com/PlayStation/status/1267468949865639936> (on file with the Columbia Business Law Review).

<sup>69</sup> KKR & Co. (@KKR\_Co), TWITTER (June 2, 2020, 3:00 PM), [https://twitter.com/KKR\\_Co/status/1267893942131085314](https://twitter.com/KKR_Co/status/1267893942131085314) (on file with the Columbia Business Law Review).

<sup>70</sup> See Rogers, *supra* note 16; *Being Antiracist*, SMITHSONIAN, *supra* note 16; Hoffower, *supra* note 16.

Antiracist speech therefore is both an embodiment of the rejection of silence and a critical aspect of antiracism.

Each of the corporate statements either implicitly or explicitly condemned inaction and silence. The very fact that corporations *chose to speak* about their condemnation of racism represents a reflection of their refusal to be inactive and thus silent. Against the backdrop of other corporations' willingness to remain silence, this speech is a clear signal of antiracism. In addition, most corporate statements were explicit in their emphasis on the importance of *not* remaining silent or otherwise engaging in inaction. As Sysco's statement noted, "We will not be silent about our fight against racism and discrimination."<sup>71</sup> Century Link expressed a similar sentiment, noting "[N]ow is an important time to raise our voice against the racism and violence faced by Black people."<sup>72</sup> In this same vein, Biogen stated "Now is not the time to be silent."<sup>73</sup> Alliance Data noted "Each of us has a voice, and we have a responsibility to raise our voices."<sup>74</sup> Genworth Financials proclaimed, "[W]e will speak up for you."<sup>75</sup> Similarly, American Airlines insisted that those "who are privileged with leadership" have a responsibility to "use our voices within the business community to encourage and support corporate efforts to eliminate systemic racism in

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<sup>71</sup> Sysco (@Sysco), TWITTER (June 2, 2020, 5:30 PM), <https://twitter.com/Sysco/status/1267931637297434625> (on file with the Columbia Business Law Review).

<sup>72</sup> CenturyLink (@CenturyLink), TWITTER (June 5, 2020, 4:40 PM), <https://twitter.com/CenturyLink/status/1269006108749959169> (on file with the Columbia Business Law Review).

<sup>73</sup> Biogen (@biogen), TWITTER (June 1, 2020, 7:58 PM), <https://twitter.com/biogen/status/1267606498252861440> (on file with the Columbia Business Law Review).

<sup>74</sup> Alliance Data (@AllianceData), TWITTER (June 1, 2020, 4:44 PM), <https://twitter.com/AllianceData/status/1267557546765811712> (on file with the Columbia Business Law Review).

<sup>75</sup> Genworth (@Genworth), TWITTER (June 2, 2020, 3:36 PM), <https://twitter.com/Genworth/status/1267902974745030657> (on file with the Columbia Business Law Review).

America.”<sup>76</sup> Netflix stated, “To be silent is to be complicit”<sup>77</sup> This visible rejection of silence is another indicator that these corporate statements should be viewed as antiracist speech.

The fact that corporate antiracist speech requires a rejection of silence is clearly in tension with the view that corporations should not engage in such speech if their past actions are not consistent with antiracist behavior. As Section III.C reveals, some have criticized as hypocritical corporations that engage in speech that seems inconsistent with their past practices. Moreover, some have indicated that corporations should remain silent and in fact “have no basis” for making antiracist statements if their past values or actions could be viewed as inconsistent with such statements.<sup>78</sup> However, the suggestion that corporations should remain silent runs counter to the demand for a rejection of silence. This demand validates corporate speech at least to the extent it reflects an effort to vocally repudiate racism.

### 3. The Active Commitment

The sine qua non of antiracist and antiracism is an *active commitment* to eradicating racism.<sup>79</sup> As Bonnett notes, “Antiracism implies the ability to identify a phenomenon—racism—and to do something about it.”<sup>80</sup> Another

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<sup>76</sup> *Chartering a Course to Create and Sustain Meaningful Change*, AM. AIRLINES NEWSROOM (June 18, 2020), <http://news.aa.com/news/news-details/2020/Charting-a-Course-to-Create-and-Sustain-Meaningful-Change-ID-BK-06/default.aspx> [<https://perma.cc/YEH9-BRNT>] [hereinafter American Airlines Statement].

<sup>77</sup> Netflix Statement, *supra* note 5. Future plc similarly stated, “To stay silent is to be complicit.” *Future plc on Black Lives Matter*, AV NETWORK (June 26, 2020), <https://www.avnetwork.com/news/future-plc-on-black-lives-matter> [<https://perma.cc/J7F9-WHYB>] [hereinafter Future plc Statement].

<sup>78</sup> Oliver McAteer, *We Have Brands Which Have No Basis Weighing In*: J.M. Smucker CMO, PRWEEK (June 8, 2020), <https://www.prweek.com/article/1685614/we-brands-no-basis-weighing-in-jm-smucker-cmo> [<https://perma.cc/VPM2-X453>].

<sup>79</sup> See Rogers, *supra* note 16; *Being Antiracist*, SMITHSONIAN, *supra* note 16; Hoffower, *supra* note 16.

<sup>80</sup> BONNETT, *supra* note 51, at 3.

commentator similarly heeds that to be antiracist means to actively address the impact of racist policies.<sup>81</sup> Still another maintains that antiracism requires a “conscious effort” to work against racism.<sup>82</sup>

Scholars agree that corporate antiracist speech must include a commitment to support policies and procedures designed to undermine racist practices and behaviors, or otherwise embrace a commitment to dismantle racism. Scholars and commentators further agree that corporate antiracist statements must pledge to challenge, confront, or dismantle racist policies and practices.<sup>83</sup> As one commentator notes, although statements that acknowledge racism in the workplace are important, true antiracist statements express a commitment to examine corporate policies, such as hiring decisions, assessments, and promotions, understand how those policies impact Black workers and members of the Black community, and address how to ameliorate any racist policies.<sup>84</sup>

The overwhelming majority of corporate statements go beyond mere expressions of support. Collectively, such statements express a commitment to challenge their own practices and behaviors, and otherwise pledge to actively work to eliminate racism and racist policies and practices either within their own institutions or within the broader society. More than 40% of Fortune 100 corporations pledged to make a charitable contribution to organizations engaged in the fight for racial justice and equality.<sup>85</sup> Pledges ranged from a \$400

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<sup>81</sup> Rogers, *supra* note 16 (interviewing author and psychologist Beverly Tatum).

<sup>82</sup> Hoffower, *supra* note 16.

<sup>83</sup> See, e.g., *Being Antiracist*, SMITHSONIAN, *supra* note 16; Hoffower, *supra* note 16 (“Antiracism is a conscious effort to work against multidimensional aspects of racism.”).

<sup>84</sup> Liu, *supra* note 52.

<sup>85</sup> This data was found through this Article’s independent research. This research can be found in Appendix A at Fairfax, *supra* note 24, at app. A at 1–25. See also Livingston, *supra* note 41; Dion Rabouin & Andrew Witherspoon, *Fortune 100 Companies Commit \$1.6 Billion To Fight Inequality*, AXIOS (June 14, 2020), <https://www.axios.com/fortune->

million commitment from PepsiCo<sup>86</sup> and \$100 million commitments from Walmart<sup>87</sup> and Comcast<sup>88</sup> to several \$10 million donations from Amazon<sup>89</sup> and Verizon.<sup>90</sup> Of course, it is clear that antiracist speech must extend beyond commitments to contribute to charities. Indeed, as one commentator noted, simply donating to activist organizations and protesting injustices is not enough; to be antiracist means to actively address the impact of racist policies.<sup>91</sup> Importantly, some of the charitable pledges focused on direct donations to rebuild communities or provide critical supplies and services.<sup>92</sup> In addition, the vast majority of corporate

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100-companies-pledges-racism-inequality-b4b98522-2d2c-4fc7-8308-7faeef0d51c.html [https://perma.cc/ZUV5-4HKB].

<sup>86</sup> *A Message from Our CEO*, PEPSICO,

<https://www.pepsico.com/healthcheck/racial-equality-journey> (on file with Columbia Business Law Review) (last visited May 19, 2022) [hereinafter PepsiCo Statement] (committing \$400 million over five years “to lift up Black communities and increase Black representation at PepsiCo”).

<sup>87</sup> Hayley Peterson, *Walmart CEO in Email Condemns Racial Violence and Pledges \$100 Million To Address Systematic Racism*, BUS. INSIDER (June 5, 2020, 12:47 PM),

<https://www.businessinsider.com/walmart-ceo-email-condemns-racial-violence-pledges-100-million-donation-2020-6> [https://perma.cc/D5CC-QWCZ].

<sup>88</sup> Brian L. Roberts, *Comcast’s Commitment*, COMCAST,

<https://corporate.comcast.com/commitment> (on file with the Columbia Business Law Review) (“[W]e are developing a comprehensive, multiyear plan to allocate \$100 million to fight injustice and inequality against any race, ethnicity, gender identity, sexual orientation or ability.”).

<sup>89</sup> *Amazon Donates \$10 Million to Organizations Supporting Justice and Equity*, AMAZON (June 14, 2020), <https://www.aboutamazon.com/news/policy-news-views/amazon-donates-10-million-to-organizations-supporting-justice-and-equity> [https://perma.cc/LW26-KH6U].

<sup>90</sup> Hans Vestburg, *A Message from Verizon CEO Hans Vestburg*, VERIZON (June 1, 2020), <https://www.verizon.com/about/news/message-verizon-ceo-hans-vestberg> [https://perma.cc/QP86-DNYZ].

<sup>91</sup> Rogers, *supra* note 16.

<sup>92</sup> See Steven Wartenberg, *Huntington Commits \$20B To New Community Plan*, COLUMBUS CEO, (Sept. 1, 2020, 9:55 AM), <https://www.columbusceo.com/story/business/2020/09/01/huntington-commits-20b-to-new-community-plan/43292195/> [https://perma.cc/6PQG-AVB3].

statements include some statement of further commitments.<sup>93</sup> An overwhelming majority of corporations issued statements expressing a commitment to work towards the elimination of racism either within their own institutions, in the broader society, or both. Thus, 95% of Fortune 100 companies, and 93% of Fortune 500 companies who issued statements included such commitments.<sup>94</sup>

The nature and extent of corporate commitments varied. Some corporate commitments took the form of a general promise. HP's indicated the need to "address systemic inequities."<sup>95</sup> United Airlines not only stated, "[W]e stand against racism," but also insisted "[W]e won't just talk."<sup>96</sup> Genuine Parts Company emphasized, "it is our responsibility to be proactive."<sup>97</sup> Similarly, Colgate Palmolive indicated that it is up to "each of us to act to end racism."<sup>98</sup> Biogen expressed its commitment to "doing our part to advance change."<sup>99</sup> While all of these statements reflect a commitment to actively address racism, those commitments are vague at best. However, other companies were much more extensive in their commitments. For example, PepsiCo announced a list of commitments, including a commitment to increase its Black management population, add 100 Black associates to the executive ranks, expand recruiting efforts at historically

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<sup>93</sup> See Fairfax, *supra* note 24, at app. A at 1–25.

<sup>94</sup> See *id.*

<sup>95</sup> See Enrique Lores, *HP's CEO on Diversity, Equality, and Social Justice*, HEWLETT PACKARD (May 29, 2020), <https://garage.hp.com/us/en/news/minneapolis-protest-hp-response-2020.html> [<https://perma.cc/49Z8-D78K>].

<sup>96</sup> United Airlines (@united), TWITTER (June 3, 2020, 2:28 PM), <https://twitter.com/united/status/1268248302832816128> (on file with the Columbia Business Law Review).

<sup>97</sup> Genuine Parts Company (@genuinepartsc), TWITTER (June 2, 2020, 3:50 PM), <https://twitter.com/genuinepartsc/status/1267906507762532354> (on file with the Columbia Business Law Review).

<sup>98</sup> Colgate-Palmolive (@CP\_News), TWITTER (June 19, 2020, 1:28 PM), [https://twitter.com/CP\\_News/status/1274031202245042178](https://twitter.com/CP_News/status/1274031202245042178) (on file with the Columbia Business Law Review).

<sup>99</sup> Biogen (@biogen), TWITTER (June 1, 2020, 7:58 PM), <https://twitter.com/biogen/status/1267606498252861440> (on file with the Columbia Business Law Review).



Black colleges, and implement mandatory unconscious bias training.<sup>100</sup> In addition to committing to “take the energy and awareness” of the protests and “convert it into meaningful and sustainable change,” American Airlines announced a plan that included implicit bias training and intentional recruitment and advancement of Black professionals.<sup>101</sup> Johnson & Johnson’s statement declared, “[W]e must do more. And we must do it now.”<sup>102</sup> Johnson & Johnson also announced ways it would partner with organizations that advance social justice. The company also acknowledged that “change ultimately begins at home” and thus announced several new events associated with actionable plans within its own company.<sup>103</sup> After Future plc insisted, “We’re going to play our part as a plc and do better,” it pinpointed several future pledges.<sup>104</sup> These statements committing to examine internal policies and practices confirm the appropriateness of characterizing the recent wave of corporate statements as antiracist in nature.

Collectively the corporate statements issued in the summer of 2020 reflect powerful sentiments around corporate commitment to tackle racism. Those statements express a rejection of racism and bigotry, as well as a repudiation of silence. Moreover, those statements included a commitment to actively work to achieve greater racial equity and eradicate discrimination and racism.

### C. “Cheap Talk” and Other Arguments for Dismissing Corporate Speech

Corporate America: Talk is cheap. . . . [T]his has been this ongoing struggle where we can’t move the needle. I love the saying: “Math has no opinion.” None. Just count. And when you count and you see . . . at the highest levels of corporate America all the way down

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<sup>100</sup> PepsiCo Statement *supra* note 86.

<sup>101</sup> American Airlines Statement, *supra* note 76.

<sup>102</sup> Johnson & Johnson Statement, *supra* note 6.

<sup>103</sup> *Id.*

<sup>104</sup> Future plc Statement, *supra* note 77.

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the chain, the differences in the numbers, and how people of color, Black and Brown Americans . . . do not show up in the numbers that we exist in this country. That is not acceptable. So, what must we do? Hold ourselves accountable in corporate America. Set targets like we set targets on everything else. Incentivize people. . . . Be very clear and very bold on what the expectations are. . . . Corporate America is run by all stars. They are used to winning. If we do that like we do everything else, we would see this needle move. . . . [S]o much of this civil unrest is tied to economic inequality. That is just a fact. And we need to move the needle on this economic inequality.<sup>105</sup>

Melody Hobson  
President and co-CEO Ariel Investments  
Board of JP Morgan Chase and Starbucks

Despite their expressions of commitment, most commentators immediately discounted corporate statements and characterized them in an extremely unfavorable light. This Section pinpoints some of the primary reasons why commentators have dismissed the significance of these statements.

### 1. Corporate Speech as Cheap Talk

Consistent with Melody Hobson's pronouncement, critics have referred to these corporate statements as "cheap talk."<sup>106</sup> This criticism refers to the fact that such statements appear to represent a relatively quick and easy ploy to convey corporate alignment with the Black Lives Matter movement and the corresponding sentiments reflected in that movement.<sup>107</sup> This criticism also refers to the fact that some statements are vague and do not reflect any specific

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<sup>105</sup> Hobson, *supra* note 10.

<sup>106</sup> See, e.g., Hickman, *supra* note 2; Hobson, *supra* note 10 ("I have to say Corporate America: Talk is cheap.").

<sup>107</sup> See, e.g., Hickman, *supra* note 2; Todd, *supra* note 2; Nguyen, *supra* note 11.

commitments or actionable plans.<sup>108</sup> Thus, several commentators have dubbed these statements “performative activism.”<sup>109</sup> In the view of these critics, these corporate statements cannot be confused for real action.<sup>110</sup> Understanding these statements as cheap talk is to understand that these statements may simply represent a way for corporations to get a simple, but immediate payout from the outward appearance of solidarity with the Black community. Indeed, as Section II.B. revealed, at least a few corporate statements did not even bother to commit to any concrete actions. Other commitments were vague.<sup>111</sup> Then too, even if corporate statements include commitments to taking action, the statements on their own cannot hold corporations accountable for actually following through on such commitments. Finally, we must remember that making a corporate statement can be done relatively quickly. By comparison, weeding out systemic racism is a costly and long-term endeavor.<sup>112</sup> Hence, ensuring that corporations follow through on any commitments within their statements requires a long-term accountability vehicle that cannot be embodied in any statement. From this perspective, these

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<sup>108</sup> See, e.g., Hickman, *supra* note 2 (“Brand-owners need to understand that a tweet can only get them so far. Action must go deeper than optical allyship and performative activism—they have to be driven in organisational change, belief and business practices.”); Todd *supra* note 2 (noting that it is “reasonable to be dubious about corporate America’s commitment to standing up against racism and police brutality, particularly when the statements in question offer little to nothing in the way of plans for concrete actions”).

<sup>109</sup> See, e.g., Nguyen, *supra* note 11; Hickman, *supra* note 2.

<sup>110</sup> See Sally Ho, *Companies Touting Black Lives Matter Accused of Hypocrisy*, ASSOC. PRESS (June 10, 2020), <https://apnews.com/article/media-business-lifestyle-race-and-ethnicity-death-of-george-floyd-ec48d239cd93b8d07a9fc13d62ba7364> (on file with the Columbia Business Law Review) (noting that statements can be distracting and should not be confused for real activism).

<sup>111</sup> *Id.* (discussing vague commitments embedded in some corporate statements).

<sup>112</sup> Institutional change is slow and hard and costly. Hickman, *supra* note 2 (noting that change takes years of understanding and unlearning).

corporate statements represent cheap talk because they may allow corporations to simply “post and look away.”<sup>113</sup>

## 2. Corporate Speech as a Marketing Ploy

Some have criticized the deluge of corporate statements based on the notion that they reflect corporate attempts to appeal to particular markets, and hence to increase their economic bottom line.<sup>114</sup> Professor Dorothy Brown observes that many of these corporate statements were put together by marketing teams.<sup>115</sup> In her view, the fact that such statements were crafted by marketing teams makes them “complete B.S.” and “performative.”<sup>116</sup> Along these same lines, commentators worry that these statements represent an effort to profit from the Black Lives Matter movement, especially considering the current market reality that many consumers prefer to spend money in businesses that appear to be aligned with that movement.<sup>117</sup> As one Black employee put it, “everyone wants to join in and profit from us.”<sup>118</sup> A Black PR professional similarly raised concerns that corporate statements are simply the latest reflection of the fact that corporations have been “happy to take money from Black consumers, and happy to use Black talent to peddle their products.”<sup>119</sup> The concern that these statements may simply represent a marketing ploy may be buttressed by the fact that some have suggested that these statements were put together

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<sup>113</sup> *Id.*

<sup>114</sup> *See* Nguyen, *supra* note 11 (referring to these public statements as a “PR facade”).

<sup>115</sup> Gelles, *supra* note 2.

<sup>116</sup> *Id.*

<sup>117</sup> *See, e.g.,* Ho, *supra* note 110 (noting concern that corporate statements are “empty” words aimed at profiting off of Blacks and the social movement); Nguyen, *supra* note 11 (noting how customers prefer to buy from companies that share their beliefs and values).

<sup>118</sup> Ho, *supra* note 110; *see also* Nguyen, *supra* note 11 (noting that customers are holding corporate brands to higher standards related to their policies impacting race).

<sup>119</sup> Hickman, *supra* note 2.

by marketing teams.<sup>120</sup> Even organizers of the Black Lives Matter movement worry that these corporate statements have become “trendy,” and thus an easy way to gain customers and make money.<sup>121</sup>

### 3. Corporate Speech as Hypocrisy

Many critics strongly contend that these corporate statements are hypocritical because they appear to be inconsistent with many corporations’ past practices involving race.<sup>122</sup> At best, many of these companies had refused to embrace this kind of rhetoric in the past.<sup>123</sup> At worst, companies had engaged in problematic policies and practices with respect to race.<sup>124</sup> Commentators have distinguished between those companies whose statements appear to align with past behaviors and other companies, praising companies in the former category, while condemning those whose behaviors appear to be inconsistent with such statements.<sup>125</sup> Professor Stephanie Creary, Assistant Professor of Management at Wharton, notes that when companies have a “checkered past,” their statements come across as

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<sup>120</sup> See Gelles, *supra* note 2.

<sup>121</sup> Aleem Maqbool, *Black Lives Matter: From Social Media Post to Global Movement*, BBC NEWS (July 10, 2020), <https://www.bbc.com/news/world-us-canada-53273381> [<https://perma.cc/K8TZ-SV6B>] (quoting an organizer in the Black Lives Matter Movement).

<sup>122</sup> See Hickman, *supra* note 2 (noting the many corporations been criticized for their perceived hypocrisy); Ho, *supra* note 110 (quoting Sharon Chuter, a black entrepreneur and participant in a protest, referring to the “glossy” messages spouting support for Black lives as hypocritical and “empty words”). Chuter began the #putuporshutup campaign aimed at pushing corporations to reveal the racial makeup of their workforce and executive ranks. Ho, *supra* note 110.

<sup>123</sup> See Nguyen, *supra* note 11 (noting that many corporations used to “stay silent” out of fear of upsetting or alienating their customer base).

<sup>124</sup> See Todd, *supra* note 2 (noting “many companies claiming to support the protestors have dismal track records when it comes to discrimination with their own ranks”).

<sup>125</sup> See Hickman, *supra* note 2.

“disingenuous.”<sup>126</sup> One commentator argued that such statements could be viewed as hypocritical and “meaningless” because too often there is a clear discrepancy between the corporate statement and corporate policies and practices related to Blacks.<sup>127</sup> Others note that these statements “ring especially hollow” for companies that have a bad track record of either engaging in explicit racist behavior or otherwise treating Black employees unfairly.<sup>128</sup> As a result, too often there are significant disparities between a company’s words and their actions.<sup>129</sup> One individual went so far as to call the statements a “slap in the face” in light of the seeming decades of practices exploitative of Blacks.<sup>130</sup>

Perhaps the biggest area of perceived hypocrisy stems from the gap between corporate statements and corporate policies and practices related to some corporations’ Black employees. As one PR professional emphasized, these statements should be viewed as hypocritical because many of these corporations “have spent years bringing us reports and reviews about their own internal lack of inclusion and diversity.”<sup>131</sup>

The lack of diversity and inclusion within the employment sector is a problem that cuts across all industries. As of August 2020, few companies published data about the racial makeup of their workforce, making it difficult to hold them accountable for their internal operations.<sup>132</sup> According to a nonprofit corporation that tracks social impact, only 40% of

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<sup>126</sup> David Brancaccio et al., *The Right and Wrong Ways for CEO To Address Racism in Policing*, MARKETPLACE MORNING REP. (June 2, 2020), <https://www.marketplace.org/2020/06/02/corporate-response-black-lives-matter-george-floyd-protests-police-misconduct-racism/> [<https://perma.cc/UDL2-BHHL>].

<sup>127</sup> Nguyen, *supra* note 11.

<sup>128</sup> *Id.* (emphasizing discrepancy between corporate statements and treatment of workers and using Amazon as an example).

<sup>129</sup> See Todd, *supra* note 2; Ho, *supra* note 110 (noting disconnect between what company’s project and how they actually operate); Gelles, *supra* note 2 (noting that corporate words “ring hollow, undermined by their own actions”).

<sup>130</sup> Andone, *supra* note 8 (quoting NFL player Michael Bennett).

<sup>131</sup> Hickman, *supra* note 2 (quoting Ronke Lawal).

<sup>132</sup> Gelles, *supra* note 2.

companies are transparent about the racial and gender composition of their employees.<sup>133</sup> However, available data reveals that Black people comprise 12% of the workforce and only 8% of management.<sup>134</sup> Other research confirms that “[a]t many of America’s major employers, Black men and women are absent from meaningful leadership roles.”<sup>135</sup> As the *New York Times* reveals, this trend crosses industry sectors.<sup>136</sup> In finance, for example, as of June 2020, there was not a single Black individual on the senior leadership team of Bank of America, JP Morgan, or Wells Fargo.<sup>137</sup> Likewise, in technology, as of June 2020, there were “zero Black members of the senior leadership teams of Facebook, Google, Microsoft and Amazon.”<sup>138</sup> At the time companies were issuing statements, there were just four Black CEOs of Fortune 500 companies.<sup>139</sup> This deep absence in the leadership ranks of corporate America has meant that little of the wealth created in the stock market and technology sectors have been realized by Black households.<sup>140</sup> Hence, as a whole, there is concern that the overwhelming corporate commitment to racial equality is not reflected in the current makeup of corporate America, seeming to support allegations of hypocrisy.

Furthermore, specific corporations that have made statements are coming under attack as hypocritical as a result of their roles in this phenomenon, with criticism indicating that their statements are not aligned with their past behaviors. The Associated Press (“AP”) reviewed diversity reports of some of the biggest companies pledging support of their Black employees and the Black community and found that their efforts to recruit, maintain, and promote Blacks

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<sup>133</sup> *Id.* (“In business we set targets on everything . . . [yet o]nly in the area of diversity have I seen C.E.O.s chronically say, ‘We’re working on it.’” (quoting Mellody Hobson)).

<sup>134</sup> Ho, *supra* note 110.

<sup>135</sup> Gelles, *supra* note 2.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*; Ho, *supra* note 110.

<sup>140</sup> See Gelles, *supra* note 2.

within their own organizations had “fallen short.”<sup>141</sup> For example, Microsoft has issued statements aligning with the Black Lives Matter movement while only 3% of its U.S. executives, directors, and managers are Black.<sup>142</sup> In addition, the AP found that while 60% of Amazon’s workforce are people of color, only 8% of its managers are Black.<sup>143</sup>

Indeed, Amazon has experienced significant criticism in this area.<sup>144</sup> Few executives have been more vocal in their support of Black Lives Matter than Amazon Chairman and former CEO Jeff Bezos.<sup>145</sup> However, employees have indicated that it is hard to consider his statements more than “lip service” in light of complaints related to discrimination at Amazon.<sup>146</sup> In 2018, news stories emerged alleging that Amazon had a “problem” with employment discrimination.<sup>147</sup> Six former Amazon delivery drivers sued Amazon, alleging that they had been terminated as a result of racial discrimination.<sup>148</sup> More broadly, employees at Amazon have contended that a systemic pattern of racism exists at Amazon.<sup>149</sup> Some evidence of this pattern includes the fact that Amazon’s general counsel was caught making derisive comments about an Amazon employee.<sup>150</sup> In addition,

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<sup>141</sup> Ho, *supra* note 110.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> See Nguyen, *supra* note 11 (noting that many find Amazon’s statement hypocritical).

<sup>145</sup> Karen Weise, *Amazon Workers Urge Bezos To Match Words on Race with Actions*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/technology/amazon-racial-inequality.html> [<https://perma.cc/NTU4-YFX9>] (“And few executives have been as blunt in their public support of the Black Lives Matter movement as Mr. Bezos[.]”).

<sup>146</sup> *Id.*

<sup>147</sup> *Amazon Employment Discrimination: Why Amazon Workers Are Suing the Tech Giant for Discrimination*, RAGER L. FIRM (Dec. 28, 2018), <https://www.ragerlawoffices.com/amazon-employment-discrimination-why-workers-are-suing-tech-giant-for-discrimination/> [<https://perma.cc/9M5W-MY3W>].

<sup>148</sup> *Id.*

<sup>149</sup> Weise, *supra* note 145.

<sup>150</sup> *Id.*



Amazon has a large percentage of Black workers making less than their counterparts.<sup>151</sup> At the time of companies' issuing statements, there were no Black members of Amazon's senior leadership team.<sup>152</sup> These practices appear to support the hypocrisy label levied at Amazon by suggesting that Amazon has not been diligent in advancing equitable employment policies and practices. These prior practices at companies like Amazon have led to people referring to these corporate statements as an "empty gesture," raising concerns that corporate leaders are "not sincere" in their professed commitment "to rooting out racism within its own ranks."<sup>153</sup>

Starbucks also has come under fire for being hypocritical. On June 1, 2020, Starbucks issued the statement: "We will confront racism to create a more inclusive and just world. We stand in solidarity with our Black partners, customers and communities. We will not be bystanders."<sup>154</sup> On June 4, 2020, Starbucks doubled down on its statement. In a tweet entitled "Black lives matter. We are committed to being a part of change," Starbucks proclaimed "We are committed to taking action, learning, and supporting our Black partners, customers and communities."<sup>155</sup> In the statement, Starbucks not only committed to work to "confront bias and racism" and "actively host[] open and necessary conversations" with their employees about racism faced by the Black community, but also pledged \$1 million to support organizations promoting racial equity.<sup>156</sup> On June 10, 2020, just six days later, an internal memo surfaced in which Starbucks refused to allow

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Joel Anderson, *Why the NFL is Suddenly Standing Up for Black Lives*, SLATE (Jun. 7, 2020, 9:34 AM), <https://slate.com/culture/2020/06/nfl-roger-goodell-black-lives-matter-players-video-kaepernick.html> [<https://perma.cc/ASN3-7PJF>].

<sup>154</sup> Starbucks Coffee (@Starbucks), TWITTER (Jun. 1, 2020, 2:47 PM), <https://twitter.com/Starbucks/status/1267528175870857216> (on file with the Columbia Business Law Review).

<sup>155</sup> Starbucks Coffee (@Starbucks), TWITTER (Jun. 4, 2020, 8:03 AM), <https://twitter.com/Starbucks/status/1268513794172411905> (on file with the Columbia Business Law Review).

<sup>156</sup> *Id.*

its employees to wear #BlackLivesMatter pins and apparel, indicating that wearing such apparel could be “misunderstood and potentially incite violence.”<sup>157</sup> Starbucks’ actions sparked outrage, including calls for a Starbucks boycott.<sup>158</sup> Importantly, many viewed Starbucks’ actions as hypocritical given its earlier statements.<sup>159</sup> In the face of the outrage and hypocrisy labels, Starbucks quickly backtracked, issuing a new statement allowing its employees to wear Black Lives Matter materials, and even agreeing to create “BlackLivesMatter” apparel under the Starbucks logo.<sup>160</sup> For many, Starbucks’ actions represented a prime example of hypocrisy associated with corporate speech.

Corporations also have been labeled hypocritical for practices outside of the employment context. In fact, some view Starbucks’ statement as hypocritical because of its prior treatment of customers. In 2018, Starbucks came under fire when two Black men were arrested for not making a purchase at Starbucks, an incident widely viewed as an example of racial profiling in light of the many non-Black people who sit in Starbucks without ordering anything.<sup>161</sup> In response, Starbucks closed all of its stores to provide anti-bias

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<sup>157</sup> Brianna Sacks & Albert Samaha, *Starbucks Won't Let Employees Wear Gear that Supports Black Lives Matter Because It Is Political or Could Incite Violence*, BUZZFEED (Jun. 10, 2020, 4:54 PM), <https://www.buzzfeednews.com/article/briannasacks/starbucks-is-now-very-pro-black-lives-matter-but-it-wont> [perma.cc/G6AV-B98N].

<sup>158</sup> See, e.g., Noah Manskar, *Starbucks Reverses Ban on Employees Wearing Black Lives Matter Apparel*, N.Y. POST (June 12, 2020, 12:11 PM), <https://nypost.com/2020/06/12/starbucks-reverses-ban-on-staff-wearing-black-lives-matter-gear/> [https://perma.cc/D9RS-3T72]; Peter Adams, *Starbucks' Stumble on Black Lives Matter Shows Rising Stakes for Brands in Addressing Race*, MARKETING DIVE (June 22, 2020), <https://www.marketingdive.com/news/starbucks-stumble-black-lives-matter-rising-stakes-race/580131/> [https://perma.cc/WA57-MNN8].

<sup>159</sup> See, e.g., Manskar, *supra* note 158; Adams, *supra* note 158.

<sup>160</sup> Jordan Valinsky, *Starbucks Reverses Its Stance and Will Now Let Baristas Wear “Black Lives Matter” Apparel*, (June 12, 2020, 12:49 PM), <https://www.cnn.com/2020/06/12/business/starbucks-black-lives-matter/index.html> [https://perma.cc/39KN-WRVY].

<sup>161</sup> Adams, *supra* note 158.

training.<sup>162</sup> This prior conduct related to customers calls into question Starbucks statements regarding support of Black stakeholders. Others point to corporation's past lobbying efforts around race as a sign of their hypocrisy. Several major corporations, including those that have made statements and even pledges to social justice organizations, have spent hundreds of thousands of dollars lobbying members of Congress that have received an "F" rating by the NAACP.<sup>163</sup> An "F" rating reflects the fact that such Congress members have routinely cast negative votes on key civil rights issues.<sup>164</sup>

Importantly, some have suggested that, to the extent these statements are hypocritical, they are actually worse than inaction or silence. As one commentator proclaimed, "silence is deafening, but hypocrisy is intolerable."<sup>165</sup> One corporate executive insisted that corporations should remain silent unless and until their activities could be viewed as in alignment with their racial rhetoric.<sup>166</sup>

#### 4. Corporate Speech as Fraud

There are also those who fear that these corporate statements are inconsistent with corporations' current intentions. From this perspective, the concern is not only that corporations' past behavior belie their current statements, but also that corporations have made such statements with no intention of following through on them. Critics have referred to this possibility as "wokewashing," which refers to the

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<sup>162</sup> *Id.*

<sup>163</sup> Nguyen, *supra* note 11.

<sup>164</sup> *Id.*

<sup>165</sup> Hickman, *supra* note 2.

<sup>166</sup> McAteer, *supra* note 78. While the J.M. Smucker Company's Chief Marketing Officer (CMO) noted that the company "upped its commitment to diversity and inclusion and made a donation," some brands within the company's portfolio chose not to issue a public statement. Commenting on that silence, the company CMO noted "that if this is something the brand has spoken about for a while and its who the brand is, then absolutely. But if it's not, then it's completely inauthentic and you just shouldn't do it." The CMO further noted that brands have "no basis to be weighing in with messaging because it's just not core to who they are and it's not authentic." *Id.*

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corporate practice of “superficially” aligning with progressive causes, while continuing to perpetuate problematic practices.<sup>167</sup>

Some have gone so far as to suggest that corporate statements may be false, misleading, or fraudulent. In fact, in the summer of 2020, shareholders began filing derivative suits based on the notion that corporate commitments to racial diversity were inconsistent with their practices and thus violated state and federal law.<sup>168</sup> At least one of the claims in these suits is that the corporation’s directors “deceived shareholders and the market by repeatedly making false assertions about the Company’s commitment to diversity,” thereby violating their fiduciary duty and federal securities laws.<sup>169</sup>

This Part detailed both the rise of corporate statements rejecting racism, and the skepticism surrounding the impact of those statements. Part III seeks to assess whether such skepticism was warranted.

### III. THE NORMATIVE AND BEHAVIORAL OF CORPORATE SPEECH

A year later, corporate statements rejecting racism are no longer visible on websites, via email, or in the public domain. This Part uses the two-year anniversary of such statements to probe the impact of corporate speech, and assess whether or

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<sup>167</sup> Todd, *supra* note 2.

<sup>168</sup> See Lynn Jokela, *Shareholder Derivative Suit Launched over Diversity Concerns*, CORP. COUNS., (July 14, 2020), <https://www.thecorporatecounsel.net/blog/2020/07/shareholder-derivative-suits-launched-over-diversity-concerns.html> [<https://perma.cc/GN6T-JBYL>] (describing suits against Oracle and Facebook); Kevin Lacroix, *Facebook Board Hit with Derivative Lawsuit on Board Diversity and Other Race Related-Issues*, D&O DIARY (July 16, 2020), <https://www.dandodiary.com/2020/07/articles/shareholders-derivative-litigation/facebook-board-hit-with-derivative-lawsuit-on-board-diversity-and-other-race-related-issues/> [<https://perma.cc/V86T-F63H>] (noting claim that Facebook “deceived shareholders and the market by repeatedly making false assertions about the Company’s commitment to diversity,” thereby violating their duty of candor and also federal proxy laws).

<sup>169</sup> Lacroix, *supra* note 168.

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not the severe skepticism related to that speech was warranted. This Part is divided into two Sections. The first Section offers insights regarding the normative impact of corporate statements. The second Section presents the empirical evidence on the impact of corporate statements on behavior.

### A. The Expressive Value of Corporate Speech

This Section highlights the manner in which corporate speech has intrinsic value as a reflection of corporations' understanding of the normative importance of embracing a belief in Black lives and a corresponding intolerance of racism and discrimination. Critics who have dismissed the importance of corporate speech have overlooked the fact that such statements have intrinsic value because of the ideals they express. These corporate statements are inherently valuable because they signal a corporate willingness to embrace the value of Black lives and specifically reject racism and discrimination. Such an embrace is meaningful for the Black community, the broader corporate community and society more generally. Such an embrace is even more remarkable against the backdrop of companies historical unwilling to give voice to such values.

#### 1. The Value of Corporations Talking the Talk

Corporate statements are inherently valuable even if all they do is signal a corporation's aspirational belief in the appropriateness of rejecting racism and promoting tolerance and equity. Historically, we have recognized that speech is inherently valuable as an expression of critical ideas.<sup>170</sup> Corporations have crafted statements related to their respective missions premised on the basic tenet that words are powerful and valuable.<sup>171</sup> Research around these corporate

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<sup>170</sup> See Michael J. Perry, *Freedom of Expression: An Essay on the Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1146–47 (1983).

<sup>171</sup> See Jim Loehr, *4 Rules To Craft a Mission Statement That Shapes Corporate Culture*, FAST CO. (May 8, 2012),

mission statements reveal that such statements have importance because they serve to signal the types of values corporations believe should be embraced.<sup>172</sup> That research indicates that corporations adopt such statements in order to make a statement about the “right thing to do.”<sup>173</sup> In other words, such statements represent a reflection of aspirational goals.<sup>174</sup> As one scholar points out, corporate statements related to values are inherently normative—a formulation of the behaviors corporation believe they and others ought to engage.<sup>175</sup> Though such statements by themselves do not ensure appropriate action, “each statement places a critical stake in the ground” regarding the kind of behavior corporations aspire towards.<sup>176</sup> The content of the statements therefore reflects a corporation’s attempt to express its core values.<sup>177</sup> Viewed from this perspective, even if they neither reflect nor impact corporate behavior, these corporate statements have a normative value as a reflection of the fact that corporations believe that they ought to project solidarity with the Black community, rejection of racism and bigotry, and a meaningful commitment to create an equitable environment.<sup>178</sup> In this regard, these corporate statements may be valuable in and of themselves, irrespective of why they are adopted or whether they will actually influence behavior,

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<https://www.fastcompany.com/1836576/4-rules-craft-mission-statement-shapes-corporate-culture> [<https://perma.cc/J4J6-QVAC>].

<sup>172</sup> See Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and The Market for Ethical Conduct*, 29 VT. L. REV. 258, 268–269 (2005) (noting that these statements are designed to convey corporate values).

<sup>173</sup> Muel Kaptein & Mark S. Schwartz, *The Effectiveness of Business Codes: A Critical Examination of Existing Studies and the Development of an Integrated Research Model*, 77 J. BUS. ETHICS, 111 (2008).

<sup>174</sup> *Id.*

<sup>175</sup> See Newberg, *supra* note 175.

<sup>176</sup> Loehr, *supra* note 171.

<sup>177</sup> See Daniel Herron & Daniel Haughey, *Do Corporate Mission Statements Really Matter?*, 20 MIDWEST L. J. 94, 98 (2006) (noting that the ultimate achievement of mission statements is to establish goals and set the tone and aspirations of the organization).

<sup>178</sup> See Newberg, *supra* note 175, at 258.

because of what they seek to signal about corporation's aspirational belief in equity.

The fact that corporations have expressed an allegiance to the Black community and a strong repudiation of racism and bigotry is especially important to members of the Black community. Such statements may increase the Black community's sense of inclusion and acceptance.<sup>179</sup> Indeed, notwithstanding the criticism and skepticism, it is relatively clear that "talk" condemning racism and violence against the Black community, and otherwise aligning with the Black community, is important to the Black community, particularly in light of the historical silence on these issues. As Professor Creary noted, "[W]hile, for some, statements or spaces to talk seem like just talk, it means a lot to the individuals who feel like they have been silenced for so long."<sup>180</sup>

Then too, these statements, particularly the sheer volume of such statements, have an impact on other corporations and their sense of the kind of values that corporations *ought* to embrace. The proliferation of such statements helps create an atmosphere that increases the likelihood that other corporations feel more comfortable making such statements.<sup>181</sup> Supporting this impact, research reveals that the volume of statements increased exponentially within a few days, suggesting a snowball effect associated with statements.<sup>182</sup> The large number of corporate statements appeared to increase the consensus around the normative appropriateness of rejecting racism and discrimination.

The very fact that corporations felt compelled to engage in such speech may reflect a critical normative shift in the kinds of values around which corporate America understands it must embrace. Polls taken during the summer of 2020 revealed that a majority of Americans believed racism and

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<sup>179</sup> See Brancaccio, *supra* note 126.

<sup>180</sup> *Id.*

<sup>181</sup> See Sahil Patel, *Brands Follow Antiracist Statements with Donations. What's Next?*, WALL ST. J. (June 6, 2020, 6:00 AM), <https://www.wsj.com/articles/brands-follow-anti-racist-statements-with-donations-whats-next-11591437600> [<https://perma.cc/72GG-CQ9P>].

<sup>182</sup> See McElwee, *supra* note 25.

discrimination is a “big problem” and that the protests are justified.<sup>183</sup> In this regard, corporate statements reflected the corporation’s understanding of America’s shifting sentiments related to race. The fact that so many corporations may have felt compelled to shift their expressive behavior may signal a critical shift in the acceptable norms surrounding race.

The constitutional jurisprudence related to speech recognizes that corporate speech may have an even greater expressive function than individual speech. Supreme Court cases have repeatedly recognized the fact that because the corporation has the special ability to control vast amounts of economic power, corporate speech may have an outsized ability to influence both our economy and our society.<sup>184</sup> As one scholar notes, it has been recognized that corporations have the unique ability to wield power over private individuals and public affairs, and hence their speech also has the special ability to influence.<sup>185</sup> Importantly, it is precisely because corporate speech may be more powerful than individual speech that courts often have expressed a need to regulate it differently than individual speech.<sup>186</sup> In this vein, the long-standing debate around the propriety of corporate speech, and the corresponding need to limit that speech, is a

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<sup>183</sup> MONMOUTH UNIV. POLL, *supra* note 21; see Anderson, *supra* note 153.

<sup>184</sup> See Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 S. CAL. L. REV. 1127, 1287 (1986); see also *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 809 (1978) (White, J., dissenting) (“It has long been recognized . . . the special status of corporations has placed them in a position to control vast amounts of economic power which may . . . dominate not only the economy but also the very heart of our democracy, the electoral process.”); *Citizens United v. Fed Election Comm’n*, 558 U.S. 310, 393–94 (2010) (Stevens J., concurring in part and dissenting in part) (noting the influence of corporations in the electoral process); Ian Spier, *Corporations, the Original Understanding and the Problem of Power*, 10 GEO. J. L. & PUBL. POL’Y 115, 118–19, 147–48 (2012) (noting that corporations present a problem of power).

<sup>185</sup> Spier, *supra* note 184, at 147–48 (noting that corporate power poses unique threats).

<sup>186</sup> Schneider, *supra* note 184, at 1252–61.



recognition of the potential for corporate speech to have an outsized influence on attitudes and behaviors.<sup>187</sup>

This corporate speech is especially significant when viewed against the backdrop of potential silence. In the past, the vast majority of corporations have either remained silent with respect to issues involving race, or otherwise have made statements in support of racist behaviors.<sup>188</sup> In addition, many corporations made the choice not to issue any statements. The corporate choice to make a statement is valuable in the context of this silence as an endeavor to project a more equitable and inclusive image.

Finally, it is notable that the Black Lives Matter movement itself has embraced the view that words have power and are thus intrinsically valuable. This is reflected in prominent slogans from that movement such as “Say Their Names.”<sup>189</sup> The #SayTheirNames campaign encourages publication or use of the individual names of the victims of police killings.<sup>190</sup> This slogan, directing us to give voice to the names of the victims of police killings, is a recognition of the inherent value of speech as a vehicle for raising awareness around important issues. Similarly, the Say Her Name campaign, another campaign stemming from the Black Lives Matter movement, focuses on the importance of speech, with its message to say the names of Black women murdered by

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<sup>187</sup> See Victor Brudney, *Business Corporations and Stockholders’ Rights Under the First Amendment*, 91 YALE L. J. 235, 237 (1981); Larry Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109, 116–18 (1992).

<sup>188</sup> See Nguyen, *supra* note 11.

<sup>189</sup> Caitlin O’Kane, “*Say Their Names*”: *The List of People Injured or Killed in Officer-Involved Incidents Is Still Growing*, CBS NEWS (Jun. 8, 2020, 7:02 AM), <https://www.cbsnews.com/news/say-their-names-list-people-injured-killed-police-officer-involved-incidents/> [<https://perma.cc/9SAB-4RE6>]; Kadir Nelson, *Kadir Nelson’s “Say Their Names”*, NEW YORKER (Jun. 14, 2020), <https://www.newyorker.com/culture/cover-story/cover-story-2020-06-22>. [<https://perma.cc/U5SC-P3R7>].

<sup>190</sup> O’Kane, *supra* note 189.

police.<sup>191</sup> The campaign is an effort to fight for justice for Black women who “are so often forgotten.”<sup>192</sup> While the campaign is part of an overall social justice movement, its explicit emphasis on speech represents a recognition that speech has an intrinsic power to give voice to critical ideas. One of the hallmarks of the Black Lives Matter movement is the call to individuals and organizations to say the phrase “Black Lives Matter.”<sup>193</sup> This is yet another recognition of the value of words and statements.<sup>194</sup> Such statements also align with a core premise of the Black Lives Matter movement that individuals and entities should not be passive or silent in this moment.<sup>195</sup>

## 2. Corporate Speech and Consumer Power

To the extent corporate speech represents a marketing ploy, it also represents a recognition of the power of Black consumers and their allies. Corporations engage in speech as a marketing ploy when they recognize that there is a market that finds such speech valuable, and they are seeking to appeal to that market.<sup>196</sup> The fact that corporations may adopt such speech as a marketing ploy reflects, at least at some level, the corporate embrace of the value of Black consumer and their allies.

There is considerable evidence that Black consumers and consumers of color represent a valuable market. Market research reveals that Black consumers and consumers of color

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<sup>191</sup> Leah Asmelash, *WNBA Dedicates Season to Breonna Taylor and Say Her Name Campaign*, CNN (July 25, 2020, 4:40 PM), <https://www.cnn.com/2020/07/25/us/wnba-season-start-breonna-taylor-cnn/index.html> [https://perma.cc/QRF5-RVKL].

<sup>192</sup> *Id.*

<sup>193</sup> See Anderson, *supra* note 153 (noting Black football players request to the NFL to “condemn racism and the systematic oppression of Black people” and to say “Black Lives Matter”).

<sup>194</sup> See *About*, BLACK LIVES MATTER, *supra* note 1 (“The call for Black lives to matter is a rallying cry for ALL Black lives striving for liberation.”).

<sup>195</sup> See Todd, *supra* note 2.

<sup>196</sup> *Id.* (noting ways in which corporate statements seek to attract consumer markets).

make “considerable contributions to the overall market.”<sup>197</sup> The Black consumer market has seen a dramatic rise, increasing by 114% since 2000.<sup>198</sup> Current research reveals that Black consumers spend some \$1.2 trillion annually.<sup>199</sup> As one market analyst notes, the buying power of Black consumers is “on par with many countries’ gross domestic products.”<sup>200</sup> In some cases, Black consumers and consumers of color represent more than 50% of overall spending in particular product categories.<sup>201</sup> Moreover, Black consumers, at 14% of the overall population, outspend their percentage of the population in at least 16 different market categories.<sup>202</sup> This research underscores the fact that Blacks have an outsized influence over spending in particular markets. In addition, in an effort to capitalize on Black consumer

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<sup>197</sup> *Black Impact: Consumer Categories Where African Americans Move Market*, NIELSON (Feb. 15, 2018), <https://www.nielsen.com/us/en/insights/article/2018/black-impact-consumer-categories-where-african-americans-move-markets/> [<https://perma.cc/9JZQ-FC43>] [hereinafter *Black Impact*, NIELSON].

<sup>198</sup> Univ. of Ga., *Minority Markets Have \$3.9 Trillion Buying Power*, NEWS WISE (Mar. 21, 2019, 8:55 AM), <https://www.newswise.com/articles/minority-markets-have-3-9-trillion-buying-power> [<https://perma.cc/2UQB-N8GD>].

<sup>199</sup> *Black Impact*, NIELSON, *supra* note 197.

<sup>200</sup> *African American Spending Power Demands That Markets Show More Love and Support for Black Culture*, NIELSEN (Sept. 12, 2019), <https://www.nielsen.com/us/en/press-releases/2019/african-american-spending-power-demands-that-marketers-show-more-love-and-support-for-black-culture/> [<https://perma.cc/P529-CWL2>] [hereinafter *African American Spending*, NIELSON].

<sup>201</sup> *Black Impact*, NIELSON, *supra* note 197. For example, in 2017, half of the total amount spent on dry grains and vegetables came from consumers of color, while Black consumers represented more than 15% of spending in this category. *Id.* The total spent in this market is \$941 million in 2017, with Black consumers representing \$147 million. *Id.* Consumers of color also constitute 42.7% of the baby food market, 41.64% of the \$3 billion personal soap and bath needs market, 38.29% of the \$2 billion fresheners and deodorizers market, and 37.5% of the \$6.2 billion shelf-stable juices and drinks market. *Id.*

<sup>202</sup> *Id.* For example, Black consumers account for 22% of the women’s fragrance market, 20% of the men’s toiletries market, 17.5% of the refrigerated juices and drinks market, and 15% of the bottled water market. *Id.*

spending, corporations have created specific products to attract them. Thus, Blacks represent \$54 million of the \$63 million ethnic hair and beauty market, accounting for more than 85% of that market.<sup>203</sup> Ultimately, Black consumers represent millions, if not billions, of revenue dollars for corporations.<sup>204</sup> There is a growing recognition of the impact of population changes on consumer markets, captured by one analyst's view that if a corporation does not have a strategy for marketing to diverse consumers, "it doesn't have a growth strategy."<sup>205</sup>

Research also reveals that Black consumers have considerable influence over the broader consumer market. As one market analyst indicates, "Black consumer choices have a 'cool factor' that has created a halo effect, influencing not just consumers of colors but the mainstream as well."<sup>206</sup> Research reveals that Black consumers' choices are increasingly becoming mainstream choices.<sup>207</sup>

Corporations' growing willingness to make statements rejecting racism thus reflects their growing appreciation for the market and financial power of the Black community and its allies. First, evidence confirms that social responsibility perceptions not only impact a corporation's image, but also influence the propensity of consumers to buy certain products and services or otherwise engage with a corporation.<sup>208</sup> In fact, social responsibility perceptions impact a corporation's financial performance.<sup>209</sup> Second, polls in 2020 revealed that a majority of American believe racism and discrimination is a

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Black Impact*, NIELSON, *supra* note 197.

<sup>207</sup> *See id.*

<sup>208</sup> Tillman Wagner, Richard J. Lutz & Barton A. Weitz, *Corporate Hypocrisy: Overcoming the Threat of Inconsistent Social Responsibility Perceptions*, J. MKTG., Nov. 2009, at 77, 77 (2009) (citing Xueming Luo & C.B. Bhattacharya, *Corporate Social Responsibility, Customer Satisfaction, and Market Value*, J. MKTG., Oct. 2006, at 1, 1–18).

<sup>209</sup> *Id.* (citing Luo & Bhattacharya, *supra* note 208).

“big problem” and that the protest are justified.<sup>210</sup> Perhaps more importantly, diverse consumer groups appear to be treating commitment to Black Lives Matter as essential.<sup>211</sup> As a result, not only do these commitments impact how such groups will spend their money, but also corporations adoption of these commitments reflect their recognition that such commitments are critical to maintaining and perhaps expanding their market share related to these groups. Third, more than any other consumer, Black consumers’ brand loyalty is contingent upon a brand’s perception as socially conscious and responsible.<sup>212</sup> Research reveals that Black consumers are 20% more likely to say that they will pay extra for a product that is consistent with their values.<sup>213</sup> Black consumers pay heed to what corporations say to them, and they are both savvy and conscious.<sup>214</sup> “Through social media, Black consumers have brokered a seat at the table and are demanding that brands and marketers speak to them in ways that resonate culturally and experientially—if these brands want their business.”<sup>215</sup> These corporate statements therefore reflect corporate recognition of the strength of the Black consumer.

Perhaps more importantly, the corporate willingness to embrace statements rejecting racism also reflects a willingness to ignore particular markets antithetical to diversity and inclusion. From this perspective, the fact that corporations have embraced these statements as a marketing ploy is actually more significant than critics realize. On the one hand, it is hard to doubt the probability that many corporations view these statements as an opportunity to

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<sup>210</sup> See, e.g., MONMOUTH UNIV. POLL, *supra* note 21; Anderson, *supra* note 153.

<sup>211</sup> See, e.g., *supra* notes 154–164 and accompanying text (discussing consumer reaction to Starbucks’ refusal to allow workers to wear clothing supporting Black Lives Matter).

<sup>212</sup> See *Black Impact*, NIELSON, *supra* note 197; *African American Spending*, NIELSON, *supra* note 200.

<sup>213</sup> *African American Spending*, NIELSON, *supra* note 200.

<sup>214</sup> See *id.*

<sup>215</sup> See *Black Impact*, NIELSON, *supra* note 197.

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attract or affirm customers and other stakeholders. On the other hand, this probability should be viewed as welcome news. As one commentator noted, historically many corporations remained silent in the face of calls for stances on racial intolerance, often stemming from fear of alienating or upsetting their customer base.<sup>216</sup> The fact that corporations now believe that it is more important to attract the market of consumers who embrace equity and inclusion could be viewed as a notable new development. These statements reflect a departure from past corporate practices regarding race and racism, and thus demonstrate a corporate desire to appeal to a broader consumer base.

This argument is not tantamount to a conclusion that these corporate statements *actually* reflect corporate commitment to the ideals contained within the statements. It is entirely possible that corporations may not translate their speech into meaningful policies. This argument about market value does not dispute such a possibility. Instead, this Article maintains that even if corporations do not believe the values they have exposed in their corporate statements, there is value in a corporation's willingness to embrace such statements.

## B. The Surprising Link Between Speech and Behavior

While corporate speech rejecting racism may have some normative value, critics roundly condemn its ability to impact behavior. This Section relies on original empirical research to argue that such blanket condemnation is unwarranted. This research examines whether and to what extent corporations made changes to their corporate boards within the year following the issuance of corporate statements, as well as whether and to what extent corporations that did not issue such statements made any board changes. In particular, this research focuses on changes to board composition, with a special emphasis on the race and gender of newly appointed directors. This Article uses the terms "race," "racial," or "person/director of color" to include people who self-identify as

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<sup>216</sup> Nguyen, *supra* note 11.

African-American, Black, Latino, Hispanic, Asian, Pacific Islander, Native American, Native Hawaiian, Alaska Native, or any combination that includes the foregoing.<sup>217</sup> This Article uses the term “diverse” to include people who self-identify as a member of a racial group or people who identify as female. Although this Article recognizes that they reflect an important aspect of diversity, this Article does not focus on individuals who identify as LGBTQ because of the limited disclosure for directors who identify as members of that community.

### 1. Methodology

This Article’s survey related to changes in board composition covered a 1, 2020 (immediately following the period when corporations first issued statements) through July 31, 2021 (approximately one year after the period during which corporations issued statements).<sup>218</sup> Information on board changes to composition was gathered from proxy statements, Form 8-Ks, press releases, and other publicly available information. Information was gathered with respect to companies listed on the 2020 Fortune 500 list.<sup>219</sup> The Fortune 500 list changes every year and several companies

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<sup>217</sup> The definition of “racial diversity” mirrors that adopted by California in its 2020 law that took effect in 2021 mandating board diversity with respect to race and ethnicity. CAL. CORP. CODE § 301.4 (West 2022), *invalidated by* Crest v. Padilla, 20-STV-37513, 2022 WL 1073294 (Cal. Super. Ct. April 1, 2022). The California law required public companies headquartered in California to include a minimum number of directors from an “underrepresented community.” Of note, the law defines individuals from an underrepresented community to include both members from the racial/ethnic groups identified in the text along with people who self-identify as gay, lesbian, bisexual or transgender. *See id.* This definition mirrors that of diversity adopted by Nasdaq. RULEBOOK § 5605(f) (The Nasdaq Stock Mkt. 2021) (“‘Diverse’ means an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority, or LGBTQ+.”).

<sup>218</sup> Fairfax, *supra* note 24, at app. B at 26–53.

<sup>219</sup> *Fortune 500*, FORTUNE, <https://fortune.com/fortune500/2020/search> [<https://perma.cc/VKF6-JF2U>] (last visited May 19, 2022) (listing Fortune 500 companies from 2000).

appearing in the 2020 Fortune 500 list did not appear in the 2021 Fortune 500 list, making comparisons difficult. Thus, for purposes of consistency, the survey examines the same Fortune 500 companies reviewed in 2020 (i.e., the companies that appeared on the 2020 Fortune 500 list.) Of note, as a result of mergers, acquisitions, bankruptcies, and other corporate events, some of the corporations that appeared on the 2020 Fortune 500 list no longer existed, or no longer existed in the same corporate form, as of June 2021. For example, Anixter International became a wholly owned subsidiary of Wesco,<sup>220</sup> TD Ameritrade became a subsidiary of Charles Schwab Corp.,<sup>221</sup> and AK Steel was acquired by Cleveland-Cliffs.<sup>222</sup> Thus, the survey only captures board changes for 496 corporations.<sup>223</sup>

While diligent efforts were made to identify the race and gender of newly appointed directors, limited and imprecise disclosure on this issue made this task especially challenging. This empirical survey reveals that the vast majority of Fortune 500 companies made some disclosure about the gender or racial composition of their board. Unfortunately, the manner and extent of that disclosure varied considerably. First, corporations used different terms to describe the racial makeup of their board. The range of terms included “race,”

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<sup>220</sup> Press Release, WESCO Int'l, Inc., WESCO International Announces Completion of Merger with Anixter International (Jun. 22, 2020), <https://investors.wesco.com/news-and-events/news-releases/news-details/2020/WESCO-International-Announces-Completion-of-Merger-with-Anixter-International/default.aspx?hsCtaTracking=8eccb2bd-cfd6-4c2a-8e46-b11b57d90705%7C1c1acc7c-41aa-45bd-811b-8b9095430a9c> [<https://perma.cc/N9RS-ACH7>].

<sup>221</sup> Bruce Kelly, *Schwab on Track To begin TD Account Transitions*, INVESTMENTNEWS (Oct. 21, 2021), <https://www.investmentnews.com/schwab-on-track-to-begin-td-account-transitions-in-2022-213048> (on file with the Columbia Business Law Review).

<sup>222</sup> Press Release, Cleveland-Cliffs Inc., Cleveland-Cliffs Inc. Completes Acquisition of ArcelorMittal USA (Dec. 9, 2020, 8:11 AM), <https://www.clevelandcliffs.com/news/news-releases/detail/8/cleveland-cliffs-inc-completes-acquisition-of> [<https://perma.cc/KFJ4-HV2B>].

<sup>223</sup> Reliable public information about the board of Farmers Insurance Exchange could not be found.



“ethnicity,” “people of color,” “BIPOC,” and “underrepresented minorities.” Second, several corporations did not separate out race or persons of color when disclosing the diversity of their board. Thus, some corporations defined diverse to include race, gender, and individuals who self-identified as LGBTQ. Other corporations defined diversity to include both gender and race. Third, even when corporations made specific disclosures that related solely to the racial makeup of their board, many companies did not disclose the specific racial groups with which directors identified (e.g., such companies did not identify whether directors identified as African American, Asian, Latino, or Native American). Fourth, and perhaps most problematic, many companies did not identify *which* director(s) identifies as diverse or as belonging to a particular racial group. To remedy these limitations, the race and gender of individual directors was confirmed through a combination of pictures, press releases, newspaper stories, and other publicly available information. Fortunately, it was often the case that when a corporation appointed a diverse director, news outlets highlighted that appointment, increasing the ability to confirm the racial identity of the new appointments. While diligent efforts were made, some diverse directors were no doubt missed. This may be especially true for directors appointed to smaller companies or for director appointments that attracted less media attention. Importantly, this Article’s survey confirms the need for more consistent and precise board diversity disclosure.

As mentioned at the outset, this Article’s empirical survey pays particular attention to Black directors precisely because corporate statements embraced a specific commitment to members of the Black community. Those statements also incorporated other racial groups, especially other people of color. Moreover, the focus on diversity and equity often includes incorporation of women, and thus this Article also focuses on women. However, because corporate statements reflected a response to the Black Lives Matter movement, those statements not only expressed particular support for Black individuals, but also expressed particular commitments to Blacks. Hence, testing the impact of those statements on

corporate behavior requires assessing the extent to which corporate behavior advanced the interests of Blacks.

## 2. The Findings

A sizeable number of corporations that issued a corporate statement appointed new board members. Sixty-three percent of companies in the Fortune 100 that published a corporate statement appointed one or more new directors after the statement. Sixty-seven percent of Fortune 500 companies that published a corporate statement made changes to their respective boards. By contrast, only 31.3% of Fortune 100 and 53.2% of Fortune 500 companies that did not publish a statement made changes to their respective boards.

The vast majority of companies that issued corporate statements appointed at least one Black or diverse director. Nearly half of Fortune 100 companies that appointed a new director used that opportunity to appoint at least one Black director, while an additional 15% of companies appointed at least one director of color, meaning that 63% of companies used their new directorship to appoint at least one person of color to their board. For Fortune 100 companies that did not appoint at least one Black person or a person of color, 18.3% of them appointed at least one white woman. Only 12.1% of Fortune 500 companies that issued a corporate statement and also appointed a new director used the opportunity to only appoint a white man. Put differently, nearly 88% of companies that issued a corporate statement appointed a diverse director—a Black director, director of color, or white woman—within the year following the statement.

Table 2. Number and Percentage of New Directors Appointed by Companies with Statements: Fortune 100

<b>(83 New Directors)</b>	<b>Black</b>	<b>Other Persons of Color</b>	<b>White Women</b>	<b>White Men</b>
Total Number	34	12	19	18
Percentage	41.0%	14.5%	22.9%	21.7%

As Table 2 reveals, the majority of the Fortune 100 directorships of companies that issued statements went to diverse persons, including, 41% of new seats going to Black men or women. Fifty-five percent of new seats went to Black people or people of color, while 78% of seats reflected either gender or racial diversity.

Table 3. Number and Percentage of New Directors Appointed by Companies with Statements: Fortune 500

<b>(348 New Directors)</b>	<b>Black</b>	<b>Other Persons of Color</b>	<b>White Women</b>	<b>White Men</b>
Total Number	145	51	65	87
Percentage	41.7%	14.7%	18.7	25.0%

Table 3 reveals that board appointments in the Fortune 500 followed a similar pattern as those in the Fortune 100. A majority of new seats, 41.7%, went to Black men or women. Because other people of color accounted for an additional 14.7% of new seats, Blacks and other people of color totaled 56.3% of the new board seats. White women secured 18.3% of new board seats, leading to 75% of new board seats reflecting either gender or racial diversity.

By sharp contrast, as Table 4 notes, of the sixteen Fortune 100 companies that did not make a statement, only one company appointed a Black person or person of color. All but one of the new directors were white, and a majority were white men.

Table 4. Number and Percentage of New Directors Appointed by Companies Without Statements: Fortune 100

<b>(8 New Directors)</b>	<b>Black</b>	<b>Other Persons of Color</b>	<b>White Women</b>	<b>White Men</b>
Total Number	1	0	2	5
Percentage	12.5%	0%	25.0%	62.5%

The data reveal more diversity for new appointments in the Fortune 500. As Table 5 reveals, Fortune 500 companies appointed Black directors and directors of color despite not having made a corporate statement, though to a lesser degree than those that did make statements. In contrast to companies that made corporate statements, the largest number of new board seats from corporations that did not make such statements went to white men, followed by white women.

Table 5. Number and Percentage of New Directors Appointed by Companies Without Statements: Fortune 500

<b>(142 New Directors)</b>	<b>Black</b>	<b>Other Persons of Color</b>	<b>White Women</b>	<b>White Men</b>
Total Number	33	17	40	52
Percentage	23.2%	12.0%	28.2%	36.7%

### 3. Unpacking the Findings

As a threshold point, it should be noted that this survey does not include statistical regressions or control variables. Therefore, a causal inference cannot be concluded between whether a company made a statement and whether that company appointed a diverse director(s). A correlation, of course, can be drawn, and indicates that future research should be done to determine whether the association exists after controlling for other variables, including, but not limited to, the size of a company's board and the number and percent of diverse board members prior to June 2020. Further, a correlation between these variables is relevant to the thesis of this Article—corporate statements are not “cheap talk.” Even if a company does not add a diverse director(s) *because* it made a previous statement, the mere fact that a company adds a diverse director(s) *after* it made a previous statement is strong evidence the corporate statement is not “cheap talk.” In such

situations, the company is doing more than issuing a statement by taking concrete action.

With that being noted, the data strongly refutes the dismissal of corporate statements as “cheap talk” without any behavioral impact. Indeed, the data suggest that corporate statements correlated with the appointment of Black individuals or other diverse directors. First, the data suggest that Fortune 100 companies that made statements were almost 50% more likely to make board changes than those that did not make statements, while Fortune 500 companies were 15% more likely to make changes. The corporate willingness to make changes to the board is critical to changing board composition and hence increasing board diversity. In this respect, the data suggest that corporate statements motivated directors to make changes that would pave the way for enhancing diversity.

Second, companies that made statements were much more likely to appoint Blacks and other directors of color following those statements as compared with the number of appointments of directors of color made by similarly situated companies a year ago. In 2021, newly appointed Black directors only accounted for 11% of the total number of new appointments for S&P 500 companies.<sup>224</sup> This compares to new Black directors accounting for close to 42% of Fortune 500 companies that made statements. In 2019, 23% of new directors in the S&P 500 were people of color.<sup>225</sup> In 2020, only 18% of new Fortune 500 directors were people of color and 20.1% of new Fortune 100 directors were people of color.<sup>226</sup> By

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<sup>224</sup> See Jenna McGregor, *A Third of Newly Added Corporate Directors Were Black Last Year, Up from 11%*, FORBES (Oct. 19, 2021, 10:17 AM), <https://www.forbes.com/sites/jenamcgregor/2021/10/19/a-third-of-newly-added-corporate-directors-were-black-last-year-up-from-11/?sh=25ce55f75be3> [<https://perma.cc/PQE6-GKD8>].

<sup>225</sup> SPENCER STUART, 2019 U.S. SPENCER STUART BOARD INDEX 11 (2019), [https://www.spencerstuart.com/-/media/2019/ssbi-2019/us\\_board\\_index\\_2019.pdf](https://www.spencerstuart.com/-/media/2019/ssbi-2019/us_board_index_2019.pdf) [<https://perma.cc/8EFX-M8MJ>] [hereinafter STUART, 2019 REPORT].

<sup>226</sup> DELOITTE, MISSING PIECES REPORT: THE BOARD DIVERSITY CENSUS ON WOMEN AND MINORITY ON FORTUNE 500 BOARDS 7, 19 (6th ed. 2021), <https://www2.deloitte.com/us/en/pages/center-for-board->

comparison, people of color accounted for roughly 56% of new directors appointed by Fortune 500 companies that made statements. Viewed collectively, within one short year, the number of newly appointed directors of color grew from less than a quarter of new directors to more than half.

Data also reveal increased appointments of diverse directors as compared to such appointments a year ago. The survey reveals that three-quarters of all new directors appointed by Fortune 500 companies that made statements were diverse (i.e., people of color or women). By comparison, in 2020, diverse directors comprised 60% of new appointments and 31% of new appointments a decade ago among S&P 500 companies.<sup>227</sup> In the Fortune 500, 46.2% of new directors were diverse while approximately 48% of new Fortune 100 directors were diverse.<sup>228</sup> Hence, this survey reveals a sizable increase in board diversity. This data underscores the connection between companies that made statements and an increase in such companies' appointments of Black individuals in particular, along with other directors of color.

Third, companies that made statements were much more likely to appoint diverse directors than companies that did not make statements. Fortune 100 companies that made statements were four times more likely to appoint a Black director while Fortune 500 companies were two times more likely to appoint a Black director as compared to their counterparts that did not make statements. Companies that made statements also were significantly more likely to appoint diverse directors, with directors of color accounting for a majority of newly appointed directors and diverse directors accounting for more than three-quarters of newly appointed directors. The data strongly suggest that corporations that made statements used the director appointment process to follow through on the commitments embedded in those statements. As a result, the data undermine the contention that corporate talk did not have an

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effectiveness/articles/missing-pieces-board-diversity-census-fortune-500-sixth-edition.html [https://perma.cc/6SYS-677R].

<sup>227</sup> See McGregor, *supra* note 224.

<sup>228</sup> See DELOITTE, *supra* note 226, at 38–39.

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impact on behavior, and thus undermine the contention that such talk could be dismissed as inconsequential or otherwise ineffective in influencing behavior.

This data also reveals the importance of corporate “talk.” Companies that engaged in “talk” were much more likely to take action. By comparison, companies that did not engage in talk were less likely to take any action, and the action that they did take was much less likely to be aimed at promoting racial or gender diversity. While Black individuals accounted for the largest group of new appointments for companies that made statements, white men accounted for the largest group of new appointments for companies that did not make statements. The fact that Fortune 100 companies that did not make statements only appointed one new Black director while Black directors comprised 41% of the overall new appointments for Fortune 100 companies that made statements dramatically highlights the divergence in appointment patterns. The appointment patterns for people of color and other diverse directors also underscores the dramatic differences between corporations that made statements and those that did not. Indeed, while the majority of new appointments for companies that made statements were people of color, the majority of new appointments for companies that did not make statements were white. The stark contrast in the diversity of directors appointed by corporations that made statements and the diversity in the new appointments of those that did not make such statements indicates that the statements strongly influenced corporate behavior. The contrast suggests the value of the statements themselves in motivating consequential behavior, and by extension undermines the blanket condemnation of those statements.

It is entirely possible that these statements may have been a necessary, though not sufficient, first step in increasing the likelihood of corporate action. Research related to corporate value and mission statements supports the notion that corporate statements may be a vital first step towards influencing corporate behavior. To be sure, such research also suggests that corporate statements embracing particular

values may not be sufficient on their own to influence most behaviors.<sup>229</sup> Corporations need to create processes and systems to support the values they express.<sup>230</sup> In other words, research reveals that values embraced in corporate statements need to be incorporated into broader more comprehensive corporate programs and policies in order to meaningfully impact behavior.<sup>231</sup> However, while corporate statements associated with values may not be insufficient on their own to ensure appropriate actions, they are often a vital first step in the process.<sup>232</sup> After his comprehensive review of empirical research related to corporate value statements and codes of conduct, Professor Mark Schwartz concluded that while such statements are “by no means the only necessary step,” they can be “an important first step” towards encouraging behavior.<sup>233</sup> Some researchers and social scientists have gone so far as to say that the mere existence of a value statement may be more important than the content of the statement itself.<sup>234</sup> This is because while such statements are not guaranteed to influence behavior, researchers insist that “it is hard to imagine” how particular values could be an “integral part of a company’s business practices” without the corporation at least adopting a statement embracing those values.<sup>235</sup> This research supports the contention that corporate statements may have been a vital first step for influencing corporate behavior. This research, along with the empirical data presented in this Article, strongly indicates

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<sup>229</sup> Betty Stevens, *Corporate Ethical Codes: Effective Instruments for Influencing Behavior*, 78 J. BUS. ETHICS, 601, 603 (2007) (noting that the mere existence of a corporate code or value statement may be insufficient on its own for influencing behavior).

<sup>230</sup> *Id.* at 603.

<sup>231</sup> See Kaptein & Schwartz, *supra* note 173, at 122.

<sup>232</sup> See Loehr, *supra* note 171.

<sup>233</sup> Mark Schwartz, *The Nature of the Relationship between Corporate Codes of Ethics and Behavior*, 32 J. BUS. ETHICS, 247, 260 (2001).

<sup>234</sup> See Janet S. Adams, Armen Taschian & Ted H. Shore, *Codes of Ethics as Signals for Ethical Behavior*, 29 J. BUS. ETHICS, 199, 208 (2001).

<sup>235</sup> Mark S. Schwartz, *Effective Corporate Codes of Ethics: Perceptions of Code Users*, 55 J. BUS. ETHICS 323, 324 (2004).



that critics are wrong to dismiss the ability of corporate statements to precipitate needed change

As noted, the data address correlation rather than causation. Thus, the data cannot pinpoint a corporation's rationale for appointing a new director, and thus does not conclusively reveal that corporations' commitments or lack thereof dictated their board changes. Proxy statement disclosures reveal companies involved in bankruptcies, proxy fights, settlement agreements, and other corporate events that impacted their boards' composition. These events undermine the notion that corporate statements influenced corporate decisions regarding board composition. Indeed, many board changes were made within a few weeks or a few months following the issuance of a corporate statement. The time involved with nominating, recruiting, and appointing a new director may undermine further the extent to which one can conclude that a corporation's statement or lack thereof had any impact on board appointments within that timeframe.

We also should be mindful of the shifting regulatory environment. On September 30 2020, California passed a law mandating diversity of underrepresented communities on corporate boards of companies with headquarters in California.<sup>236</sup> The requirement was set to take effect in January 2023,<sup>237</sup> but the legislation since been struck down by the California Superior Court.<sup>238</sup> In December 2020, Nasdaq proposed a "comply or explain" disclosure rule requiring that Nasdaq listed companies either have at least one female and at least one member of an underrepresented community on their boards or explain why they do not.<sup>239</sup> The

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<sup>236</sup> 2020 Cal. Stat. 3701 (codified at CAL. CORP. CODE § 301.4 (West 2022)).

<sup>237</sup> Cal. Corp. Code § 301.4 (West 2022).

<sup>238</sup> *Crest v. Padilla*, 20-STV-37513, 2022 WL 1073294, at \*19 (Cal. Super. Ct. April 1, 2022) (holding that the California diversity board requirement violates the Equal Protection Clause of the California Constitution).

<sup>239</sup> The Nasdaq Stock Mkt. LLC, A Proposal To Advance Board Diversity and Enhance Transparency of Diversity Statistics Through New Proposed Listing Requirements (Form 19b-4) (Dec. 1, 2020).

Securities and Exchange Commission (SEC) approved the Nasdaq diversity rule in August 2021, and it is set to take effect in as early as August 2022.<sup>240</sup> On the one hand, these changes likely influenced corporate conduct, increasing the possibility that corporations would seek out diverse board candidates. On the other hand, such an influence does not negate the influence of corporate statements. Indeed, both the California law and the Nasdaq rule have been challenged,<sup>241</sup> and hence some corporations have not been willing to simply diversify their board as a result of these regulatory changes. Then too, the rules do not apply to all corporations, and thus many corporations altered their board composition despite the lack of requirement to do so. In addition, these laws were not in effect at the time that many corporations were making changes to their board, further evidence that corporations acted despite the lack of any specific requirements. Moreover, it is entirely possible that corporate speech around rejecting racism influenced regulatory action. Prior to 2020, California had adopted a board diversity rule that only focused on gender,<sup>242</sup> and thus failed to include race and ethnicity. Prior to 2020, the momentum around board diversity initiatives at the federal level had been relatively tepid. While the racial reckoning of 2020 clearly altered the regulatory environment, it also seems likely the avalanche of corporate statements

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<sup>240</sup> Order Approving NASDAQ Proposed Rule Changes Relating to Board Diversity, Exchange Act Release No. 92,590, 86 Fed. Reg. 44,424 (notice Aug. 12, 2021). The rule has been codified at RULEBOOK § 5605(F) (The Nasdaq Stock Mkt. 2021).

<sup>241</sup> Complaint, Alliance Fair Bd. Recruitment vs. Sec. Exch. Comm'n, No. 21-60626 (5th Cir. Filed Aug. 10, 2021).

<sup>242</sup> 2018 Cal. Stat. 6263 (codified at CAL. CORP. CODE § 301.3 (West 2022)). This legislation was also recently struck down by the Los Angeles Superior Court. *Crest v. Padilla*, No. 19STCV27561 (Cal. Sup. Ct. May 13, 2022) (holding that the California gender board requirement violates the Equal Protection Clause of the California Constitution). California's Secretary of State has said that California will appeal the decision. Alisha Haridasani Gupta, *Another California Board Diversity Law Was Struck Down, but It Already Had a Big Impact*, N.Y. TIMES (May 19, 2022), <https://www.nytimes.com/2022/05/19/business/california-board-diversity-women.html> [<https://perma.cc/7UUA-E5XK>].

influenced that environment and regulatory acceptance of the need for increased diversity policies and practices.

In addition, there are many factors that strongly suggest that corporate statements impacted the appointment of new directors, including those appointed relatively soon after such statements. First is the strong correlation between the companies that made the statements and the appointment of such directors, particularly when viewed against the backdrop of the diversity numbers for those companies that did not make statements.<sup>243</sup> Second, the unprecedented number of newly appointed directors, along with the unprecedented number of newly appointed Black directors, strongly suggests that corporate statements, with their emphasis on ameliorating discrimination in the Black community, influenced those appointments.<sup>244</sup> Importantly, the number of new independent directors was the highest it has been since 2004.<sup>245</sup> The *Wall Street Journal* reported that the number of new Black directors tripled in the year following the issuance of corporate statements.<sup>246</sup> The number of new Latino directors doubled during that same time period.<sup>247</sup> Other studies confirm the sharp rise in the number of first time Black directors, as well as the number of new Black directors more generally.<sup>248</sup> Notably, available research reveals that as of the spring of 2020, the number of Black directors appointed

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<sup>243</sup> See *supra* Section III.B.2.

<sup>244</sup> See Matthew Scott, *Russell 3000 Companies Appoint 130 Black Board Members in 5 months*, CHIEF EXEC., (Nov. 6, 2020), <https://chiefexecutive.net/russell-3000-companies-appoint-130-black-board-members-in-5-months/> [<https://perma.cc/HSB3-8VZ3>] (showing that by November 2020, there were 130 new Black directors at Russell 3000 firms, representing a 239% increase in those directors).

<sup>245</sup> Theo Francis & Jennifer, *Big Companies Boost Share of Black and Latino Directors*, WALL ST. J. (June 16, 2021, 2:06 AM), <https://www.wsj.com/articles/this-years-influx-of-directors-starts-shift-in-boardroom-diversity-11623835801> (on file with the Columbia Business Law Review).

<sup>246</sup> *Id.* (showing that the percentage of new directors that were Black in the S&P 500 increased from 11% to one-third in one year).

<sup>247</sup> *Id.*

<sup>248</sup> See, e.g., Scott, *supra* note 244.

to boards had either stalled or declined.<sup>249</sup> By comparison, by November 2020, there were 130 new Black directors at Russell 3000 firms, representing a 240% increase in those directors.<sup>250</sup> The research in this Article indicates that this stunning surge was driven in large part by corporations that made statements in the summer of 2020. Other commentators concur that until the racial reckoning of 2020, studies suggested that racial diversity had taken “something of a backseat” to gender equality in the boardroom.<sup>251</sup> The data therefore strongly indicate that corporate statements not only motivated corporations to make board changes, but also motivated them to make changes aimed at promoting diversity and equity, particularly with respect to Blacks and other people of color.

Third, the fact that so many appointments occurred off-cycle, and thus outside of the traditional nomination and recruitment process, suggests that corporations accelerated their board appointment process or otherwise took special steps to comply with their commitments. In a normal cycle, corporations appoint new board members at their annual meeting, and most annual meetings occur in the spring—with the height of the annual meeting season occurring from April to June.<sup>252</sup> However, in the months after these corporate

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<sup>249</sup> See, e.g., STUART, 2019 REPORT, *supra* note 225, at 1; *Diversity Push Barely Budes Corporate Boards to 12.5%, Survey Finds*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/09/15/business/economy/corporate-boards-black-hispanic-directors.html> [<https://perma.cc/H5U3-JVP3>]; Sheryl Estrada, *More Women Selected as Fortune 500 Board Directors, But Racial Diversity Lags*, HR DIVE (Sept. 23, 2020), <https://www.hrdiver.com/news/women-fortune-500-board-directors-racial-diversity/585738/> [<https://perma.cc/U6DQ-MUL6>]; DELOITTE, *supra* note 226.

<sup>250</sup> Scott, *supra* note 244.

<sup>251</sup> Alexandra Olson & Stan Choe, *Study: Racial Diversity Stagnated on Corporate Boards*, ASSOC. NEWS (June 8, 2021), <https://apnews.com/article/race-and-ethnicity-business-c85831a5cec6268e0726c3ce28c39436> [<https://perma.cc/6P8J-Y2DJ>].

<sup>252</sup> Annual shareholders meetings generally include the election of board members. See *Welcome to Proxy Season: A Primer on Proxy Statements and Shareholder Meetings*, FINRA, (Mar. 25, 2016.)

statements were issued, a significant number of new board appointments were made prior to the annual meeting.<sup>253</sup> Corporate governance experts have emphasized the fact that the recent increase in board diversity did not stem from ordinary board turnover, but rather from the fact that many boards added new seats prior to their annual meeting to increase diversity.<sup>254</sup> These actions represents yet another indicator of the extent to which corporate statements influenced board behavior.

Fourth, commentators have touted these new appointments of diverse directors as a reflection of corporate focus on diversity and antiracism, and as a reflection of corporate response to the racial reckoning of the summer of 2020.<sup>255</sup> As one commentator noted, board changes “flowed from public attention on racial disparities in the wake of the police killing of George Floyd and the Black Lives Matter protests.”<sup>256</sup> Other experts agree, noting that there was “no doubt” that the “spotlight on racial inequities for Black executives in corporate America last year spurred momentum to diversity corporate boardrooms.”<sup>257</sup> Finally, corporations

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<https://www.finra.org/investors/insights/welcome-proxy-season-primer-proxy-statements-and-shareholder-meetings> (on file with the Columbia Business Law Review). At public companies, annual meetings occur by proxy and the period in which public corporations hold their annual meeting is referred to as the proxy season, the height of which is between the months of March/April and June of each year. *See generally* Sarah Haan, *Civil Rights and Shareholder Activism: SEC v. Medical Committee for Human Rights*, 76 WASH. & LEE L. REV. 1167, 1187 (2019); *What Is Proxy Season?*, TOPPIN MERRILL, <https://www.toppinmerrill.com/glossary/proxy-season/> [https://perma.cc/2Q6F-KVNP] (last visited June 14, 2022).

<sup>253</sup> *See* Francis & Maloney, *supra* note 245.

<sup>254</sup> *See Id.*

<sup>255</sup> *See* BD. PROSPECTS, IMPACT OF GEORGE FLOYD’S MURDER AND BLACK LIVES MATTER MOVEMENT ON BOARD DIVERSITY (2020), <https://bp-amz-storage.s3.amazonaws.com/public-documents/admin/russell-3000---board-diversity-2020-update.pdf> [https://perma.cc/5R69-YP5Z].

<sup>256</sup> Francis & Maloney, *supra* note 245 (quoting Julie Hembrook Daum, head of Spencer Stuart’s North American board practice).

<sup>257</sup> DELOITTE, *supra* note 226, at 17 (quoting Michael C. Hyter, President & CEO, The Exec. Leadership Council).

themselves have specifically emphasized these new appointments of diverse directors as a reflection of their commitment to racial justice and their compliance with diversity pledges made in the summer of 2020.<sup>258</sup>

Taken together, the data refute the view that corporate statements should be dismissed as “cheap” and inconsequential. Instead, the data reveal that these statements had a significant impact on influencing corporate behavior in a manner aimed at promoting diversity and responding to calls for a more inclusive corporate environment.

The fact that corporations that did not make corporate statements also appointed a large number of Black and diverse directors could be viewed by some as undermining the importance of such statements, and suggesting that they are not important for influencing behavior. Indeed, even among companies that did not issue corporate statements, approximately two-thirds of the newly appointed directors in the Fortune 500 were diverse and nearly 23% of them were Black.<sup>259</sup>

Indeed, as Section II.C revealed, many suggested that corporate statements may be viewed as hypocritical unless and until corporations have engaged in behavior consistent with the speech. In this regard, corporate executives have suggested that some corporations did not engage in corporate

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<sup>258</sup> See Liz Warren, *Levi's Appoints Ulta's Elliott Rodgers to Its Board of Directors To Further DTC Efforts*, SOURCING J., (Dec. 11, 2020, 12:52 PM), <https://sourcingjournal.com/denim/denim-brands/levi-strauss-elliott-rodgers-board-directors-dtc-diversity-250058/> [<https://perma.cc/XNK7-73HM>] (noting that the appointment comes following Levi's pledge to appoint a Black leader to its board and create a more diverse and inclusive workplace); see also Post Holdings, Inc., *Defensive Proxy Statement*, at 11 (Schedule 14A) (Dec. 7, 2020), <https://postholdings.gcs-web.com/static-files/fb57ac7b-2f77-466c-ba33-752bb3d0763d> [<https://perma.cc/XW3M-NKKU>] (noting that the consideration of racial diversity impacted its recent addition of a Black woman to its board, who was appointed in July 2020).

<sup>259</sup> See *supra* tbl. 5.

speech based on concerns about hypocrisy.<sup>260</sup> This not only suggests that corporate silence should not be criticized as a reflection of lack of corporate commitment to rejecting racism, but also that such silence should not be condoned as undermining the potential for appropriate behavior.

However, the divergence between diverse appointments for corporations that made statements and those that did not indicates the influential nature of the statements. Indeed, it is clear that corporations that made statements were more likely to appoint Black and diverse directors—57% of companies that made statements versus 34% of those that did not.<sup>261</sup> These demographic differences in appointments reveal that the failure to make a statement did align with less board diversity. This reduced diversity underscores the importance of the corporate statements.

It is likely that corporate statements impacted the behavior of corporations that did not make such statements. On the one hand, the deluge of corporate statements caused commentators to highlight companies that refused to make statements.<sup>262</sup> Critics used a corporation's silence to question that corporation's commitment to racial justice and equity.<sup>263</sup> Some companies that were called out actually made statements following the criticism.<sup>264</sup> For example, in June 2020, an article surfaced highlighting companies that did not

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<sup>260</sup> See McAteer, *supra* note 78. Others have speculated that that company legal departments may advise companies not to issue statements. See Veronica Root Martinez, *The Diversity Risk Paradox*, 75 VAND. L. REV. 115, 126 (2022).

<sup>261</sup> See *supra* tbls. 3, 5.

<sup>262</sup> See, e.g., Jeff Green & Gerald Porter Jr., *From Goldman to Apple, Companies Gauge New Calculus on Race*, BLOOMBERG (June 4, 2020, 5:00 AM), <https://www.bloomberg.com/news/articles/2020-06-04/from-goldman-to-apple-companies-gauge-new-calculus-on-race> (on file with the Columbia Business Law Review) (noting that Nvidia was one of few companies that had not made a statement in support of black lives).

<sup>263</sup> See Jeff Green & Gerald Porter Jr., *Silent No More on Race, America's CEOs Fumble for Right Words on Race*, BLOOMBERG (June 4, 2020, 9:12 PM), <https://www.bloomberg.com/news/articles/2020-06-04/from-goldman-to-apple-companies-gauge-new-calculus-on-race> (on file with the Columbia Business Law Review).

<sup>264</sup> See, e.g., *id.*

engage in corporate speech, including Nvidia.<sup>265</sup> Thereafter, Nvidia not only issued a statement,<sup>266</sup> but within a year, Nvidia had appointed the first Black person and the first person of color to its board.<sup>267</sup> It is entirely possible that other companies may have foregone statements, but chose to engage in actions in response to the criticism. In this regard, the attention these silent companies received as a result of the overwhelming number of corporate statements may have generated pressure to appoint diverse directors as signal of their commitment to racial justice, even—or perhaps especially—among those companies that had refused to make a statement.

On the other hand, the deluge of corporate statements may have created an environment in which actions aimed at promoting diversity and equity were viewed as more acceptable.<sup>268</sup> Indeed, research around norm development

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<sup>265</sup> *Id.*

<sup>266</sup> NVIDIA, FY20-21 SNAPSHOT: ENVIRONMENTAL, SOCIAL, GOVERNANCE (2020), [http://q4live.s22.clientfiles.s3-website-us-east-1.amazonaws.com/364334381/files/doc\\_downloads/governance\\_documents/2020/06/FY2020-NVIDIA-Governance-ESG-Snapshot.pdf](http://q4live.s22.clientfiles.s3-website-us-east-1.amazonaws.com/364334381/files/doc_downloads/governance_documents/2020/06/FY2020-NVIDIA-Governance-ESG-Snapshot.pdf) [<https://perma.cc/TX4T-QUFH>] (“NVIDIA stands with the Black community. We are committed to creating employment opportunities, and deepening our connection with Historically Black Colleges and Universities, as well as organizations that support Black professionals.”).

<sup>267</sup> Nvidia appointed John Dabiri, a Nigerian American, to its board in July 2020. Press Release, NVIDIA, NVIDIA Names John Dabiri to Board of Directors (July 13, 2020), <https://nvidianews.nvidia.com/news/nvidia-names-john-dabiri-to-board-of-directors> [<https://perma.cc/MV6H-GFAD>]; *About Us: John Dabiri*, NVIDIA, <https://www.nvidia.com/en-us/about-nvidia/board-of-directors/john-dabiri/> [<https://perma.cc/XDF3-EJ4P>] (last visited May 19, 2022). Prior to that time, Nvidia has been identified as a company without a Black person on its board. See Kerri Anne Renzulli, *The 20 Largest Public U.S. Companies Without a Black Person on Their Board*, NEWSWEEK (June 17, 2020, 5:00 AM), <https://www.newsweek.com/20-largest-public-us-companies-without-black-person-their-board-1511319> [<https://perma.cc/PN3Y-JLEM>] (noting that Nvidia is among the companies that “heads the list” of the 20 largest public companies that did not have a single Black person on its board).

<sup>268</sup> See Sahil Patel, *Brands Follow Antiracist Statements with Donations. What’s Next?*, WALL ST. J. (June 6, 2020, 6:00 AM), <https://www.wsj.com/articles/brands-follow-anti-racist-statements-with->



supports the notion that the overwhelming number of corporate statements may have contributed to an environment in which an increasing number of corporations have come to view actions rejecting racism as more normatively appropriate. Available research points to several factors that facilitate norm development that are relevant to this Article's inquiry.<sup>269</sup> First, norms can develop through explicit statements.<sup>270</sup> Second, norms can be imposed by a norm-giving authority, such as a powerful entity or powerful leaders within the entity.<sup>271</sup> Third, statements and actions issued on the heels of a critical event may increase the likelihood of norm development.<sup>272</sup> This research suggests that norms can develop through statements made by powerful organizations or their leaders. This research therefore suggests that the issuance of corporate statements may have increased the likelihood that even corporations that did not make such statements would alter their behavior by increasing the likelihood that their behavior would be viewed as normatively appropriate. Thus, the overwhelming amount of corporate speech may have had important spillover effects, and thus may have impacted even those corporations that did not speak. In this regard, there is strong reason to believe that corporate statements played an important role in the actions

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donations-whats-next-11591437600 (on file with the Columbia Business Law Review).

<sup>269</sup> See Sergey Gavrilets & Peter J. Richerson, *Collective Action and the Evolution of Social Norm Internalization*, 114 PNAS 6068, 6068 (2017) (arguing that norm development can occur in a variety of different ways); Richard H. McAdams, *The Origin, Development and Regulation of Norms*, 96 MICH. L. REV. 338, 352–354 (noting that origins of norms remain a puzzle); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1262 (1999) (discussing social norms in the context of corporate law); Daniel C. Feldman, *The Development and Enforcement of Group Norms*, 9 ACADEMY MGMT. REV. 47, 52 (1984) (discussing the development of norms).

<sup>270</sup> Feldman, *supra* note 269, at 50.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*; see also Eisenberg, *supra* note 269, at 1264 (discussing critical mass and tipping); Cristina Bicchieri & Alexander Funcke, *Norm Change: Trendsetters and Social Structure*, 85 SOC. RES.: AN INT'L Q. 1, 3 (2018). (discussing trendsetting).

of even those corporations that did not engage in making such statements.

Some have expressed a more cynical and problematic rationale for corporations that remained silent but nevertheless appointed Black or diverse directors. Some have pointed to this behavior as a way of corporations threading the needle, and thus seeking to appease stakeholders interested in issues of equity and racism while not alienating those who are clearly not interested in such issues.<sup>273</sup> One commentator refers to this tap dance as an “odd economic calculus,” pursuant to which corporations are afraid to make a vocal commitment for fear of ostracizing certain stakeholders, but want to signal their concern for racial issues at some level.<sup>274</sup> Under this rationale, corporations chose *not* to make statements because they were not comfortable taking a public or visible stance with respect to racial justice and equity, but nonetheless engaged in behavior aimed at promoting diversity based on their desire to appease some portion of their constituents. The fact that such corporations made a change with respect to enhancing diversity can be viewed positively. However, the reluctance to make a public statement may have several negative repercussions. First, it may increase the likelihood that any changes made by such companies may be limited to board diversity rather than focused on equity and inclusion more broadly. Second, there is reason to be concerned that corporations that made appointments without being willing to make any public statement may be more responsive to push back from those not interested in eradicating discrimination. By contrast, companies that both made a statement and followed it with action may be more deeply committed or at the very least more responsive to pressure from those aligned with diversity efforts. Third, the failure to make a statement may undermine the important normative benefits associated with speech including the feelings of inclusion by Blacks and people of color, along with the signaling effect associated with valuing racial equity and

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<sup>273</sup> See McElwee, *supra* note 25.

<sup>274</sup> *Id.*

inclusion. Taken together, the fact that some corporations may have appointed Black and other diverse directors without making any statements may generate concerns about the robustness of commitments from those companies. Such concerns validate the importance of the statements.

Viewed holistically, the empirical evidence on corporate behavior refutes the notion that corporate statements should be characterized as mere window-dressing and thus inconsequential. Instead, that evidence suggests that such statements had a significant influence on corporate behavior, not only impacting the corporations that made statements, but also potentially impacting those that did not. In this regard, the blanket denunciation of such statements was not warranted.

#### IV. THE CAUTION

Of course, while this Article makes the case for optimism around the impact of corporate speech and behavior, it also acknowledges important areas of concern. This Section discusses these areas, which are critical because they address the potential for long-term or sustained changes in the corporate environment.

##### A. Board Matters

At the outset, it must be acknowledged that there are those who would disagree, and quite strongly, with the notion that board diversity is a reflection of corporate commitment to eradicating racism and promoting equity and inclusion. Some have suggested that board diversity should be viewed as a form of tokenism or even appeasement that has no impact on a corporation's efforts to respond to racism and bias.<sup>275</sup> Such

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<sup>275</sup> See Bello Lawal & Mohammed Nuhu, *Board Diversity or Tokenism: A Case for Social Inclusion and an Efficiency Model*, APPLIED FIN. & ACCT., Feb. 2021, at 22, 25–26; Katherine L. Milkman, et al., *On the Board, "Tokenism" Is the New Tokenism*, WASH. POST (Nov. 3, 2018), <https://www.washingtonpost.com/business/2018/11/03/tokenism-is-new-tokenism/>, [<https://perma.cc/5KRF-K9HY>]; cf. Edward Chang, et al., *Diversity Thresholds: How Social Norms, Visibility, and Scrutiny Relate to*

critics suggest that board diversity efforts are not responsive to the broader effort to address racial disparities and injustices in the economic sphere.<sup>276</sup> Indeed, the Black Lives Matter economic agenda focuses broadly on the restructuring of the economy and economic justice.<sup>277</sup> Appointing Black and diverse directors is not necessarily aligned with such an agenda. Even if board diversity is responsive to the broader economic justice agenda, it may represent a relatively small component of that effort and thus may be viewed as insignificant when compared with the need to respond to racial concerns in the economic realm, such as income and wealth disparities, the racial wage gap, and discrimination in the work force.<sup>278</sup>

The fact that boards play a limited role in corporate affairs further undermines the extent to which diversifying boards can be viewed as a meaningful indicator of corporate commitments. While boards do exercise oversight over important matters within the corporation, given the size and breadth of corporate activities, there are many matters that simply cannot and do not come to the attention of the board.<sup>279</sup> Moreover, boards do not have responsibility for the day-to-day activities of the corporation, which is arguably where most issues associated with bias and discrimination occur.<sup>280</sup> From this perspective, some may contend that board diversity is an

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*Group Composition*, 62 ACAD. MGMT. J. 144, 165 (2019) (finding that scrutinized groups tend to cluster diversity around the social norm for diversity set by peers).

<sup>276</sup> See Gelles, *supra* note 2.

<sup>277</sup> See Janell Ross, *What a Black Lives Matter Economic Agenda Looks Like*, WASH. POST (Aug. 29, 2019), <https://www.washingtonpost.com/news/the-fix/wp/2016/08/29/what-a-black-lives-matter-economic-agenda-looks-like/> [<https://perma.cc/875S-4D6C>].

<sup>278</sup> See *id.* (identifying actions that should be taken to respond to economic-racial concerns).

<sup>279</sup> See Jill Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265, 269–275 (1997).

<sup>280</sup> See Stephen Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 27 n.114 (2002).

inappropriate or insufficient indicator of a corporation's commitment to racial equity.

In addition, diversifying the board is no guarantee that the corporation will be responsive to issues of equity or that the corporation will engage with such issues appropriately. Even in the boardroom, increasing racial and gender diversity on its own is not enough to ensure an equitable and inclusive environment.<sup>281</sup> Importantly, available research reveals that without critical mass, diverse directors may not feel comfortable voicing different experiences and perspectives, particularly around sensitive or controversial racial issues.<sup>282</sup> Beyond the boardroom, a diverse board is no guarantee of equitable and inclusive corporate practices. Corporations must proactively adopt policies and practices that promote diversity and counteract bias and discrimination throughout the corporate sphere.<sup>283</sup> This includes altering their own culture, while also attending to the impact of corporate actions on non-employee stakeholders and the society.<sup>284</sup> Moreover, corporations must be vigilant in monitoring and ensuring compliance with these policies and practices.<sup>285</sup> Anecdotal evidence suggests that corporations that have diversified their board continue to engage in problematic practices—some companies that have increased diversity on their boards, have not supported other policies deemed equitable and

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<sup>281</sup> See Martinez, *supra* note 260, at 127–29 (arguing that the ends of diversity, equity, and inclusion programs are not merely to increase demographic diversity but “to create an equitable and inclusive culture”).

<sup>282</sup> See, e.g., Diana C. Nicholls Mutter, Note, *Crashing the Boards: A Comparative Analysis of the Boxing Out of Women on Boards in the United States and Canada*, 12 J. BUS. ENTREPRENEURSHIP & L. 285, 295–96 (2019) (collecting studies); Alison M. Konrad, Vicki Kramer & Sumru Erkut, *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance*, 37 ORG. DYNAMICS 145, 145–56 (2018) (discussing interviews with women in corporate America); Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 837 n.201 (collecting studies).

<sup>283</sup> See Martinez, *supra* note 260.

<sup>284</sup> See *id.*

<sup>285</sup> See *id.* at 124.

inclusive.<sup>286</sup> Importantly, while increasing board diversity is relatively straightforward, altering culture and implementing racial equity practices may take considerably more time and are significantly more challenging to implement. This suggests that board diversity on its own is not a sufficient indicator of a corporation's commitment to addressing issues of bias and discrimination in the workforce and economic sphere.

However, this Article insists that board diversity represents a critical aspect of a corporation's commitment to eradicating racism for several reasons. First, increasing the number of Black directors and other diverse directors on the board was a key aspect of the "ask" of those who criticized corporate statements as cheap talk.<sup>287</sup> In this respect, by being responsive to this ask and diversifying their board, corporations can be viewed as appropriately following through on their rhetoric.

Second, because boards represent a crucial aspect of the corporation and its power structure, adding Blacks and other diverse directors to that structure enables them to have a seat at the table to help ensure that corporate power is exercised responsibly.<sup>288</sup> Under corporate law, all corporations and their activity must be managed by or under the direction of

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<sup>286</sup> See Levi Sumagaysay, *Companies Declared 'Black Lives Matter' Last Year, and Now They're Being Asked To Prove It*, MKT. WATCH (Mar. 6, 2021, 4:34 PM), <https://www.marketwatch.com/story/companies-declared-black-lives-matter-last-year-and-now-theyre-being-asked-to-prove-it-11614972986> [<https://perma.cc/2LE9-JHN9>] (explaining companies' resistance of pay disclosures related to gender and race, racial equity audits, and other shareholder proposals focused on equity).

<sup>287</sup> See Hobson *supra* note 10; see also *The Board Challenge Launches Pledge for Companies To Add a Black Director to Their Boards*, BLACK ENTER. (Sept. 9, 2020), <https://www.blackenterprise.com/the-board-challenge-launches-pledge-for-companies-to-add-a-black-director-to-their-boards/> (on file with the Columbia Business Law Review); *About Us*, BD. CHALLENGE, <https://theboardchallenge.org/about-us/> [<https://perma.cc/3ZP2-9WJR>] (last visited May 19, 2022) ("The Board Challenge is a movement to improve the representation of Black directors in corporate U.S. boardrooms by challenging companies to take the Pledge to appoint a Black director within the next year.").

<sup>288</sup> See Fairfax, *supra* note 282, at 825, 830–31, 837.

the board of directors.<sup>289</sup> This oversight function means that boards play a vital role in the corporate ecosystem; having Black directors as a part of that ecosystem serves to give Blacks a voice in that system.

Third, increasing diversity on the board increases the likelihood that corporations will appropriately attend to issues of race and equity.<sup>290</sup> Boards play a pivotal role in the corporate sphere and setting tone and agenda for the corporation. Boards can shape policy, practice, and priorities through asking strategic questions or highlighting particular areas of concern.<sup>291</sup> Thus directors, particularly Black directors who often have important perspective on these issues, can help set an expectation around diversity, equity, and inclusion within the corporation and beyond.<sup>292</sup> Boards

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<sup>289</sup> DEL. CODE ANN., tit 8, § 141 (2021); *see also* MODEL BUS. CORP. ACT § 8.01 (1969) (AM. BAR. ASS'N., amended 2016).

<sup>290</sup> *See* Lisa M. Fairfax, *Empowering Diversity Ambitions: Brummer and Strine and Diversity Makes the Legal and Business Case for Doing More, Doing Good, and Doing Well*, 75 VAND. L. REV. EN BANC 131, 135 (2022) (arguing that diversity “translate into equitable employment policies and practices”); Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 20 (2022) (noting research that boards with less diversity are less likely to support causes relevant to diverse communities). *see also* Mike Fucci & Terri Cooper, *The Inclusion Imperative for Boards*, DELOITTE INSIGHTS, 5- (Apr. 2, 2019), <https://www2.deloitte.com/us/en/insights/topics/value-of-diversity-and-inclusion/redefining-board-responsibilities-to-support-organizational-inclusion.html>. [<https://perma.cc/98EZ-AS5T>] (noting the important role boards can play to promote inclusion).

<sup>291</sup> *See* Matt Krentz, Ulrike Schwaz-Runer & Frances Brooks Taplett, *Diverse Boards Haven't Led to Diverse Leadership Teams (Yet)*, BO. CONSULTING GRP. (Apr. 22, 2020), <https://www.bcg.com/en-us/publications/2020/diverse-leadership-teams> [<https://perma.cc/2J8V-QNK7>].

<sup>292</sup> *See* Fairfax, *supra* note 290, at 134–35; Brummer & Strine, *supra* note 290, at 21–22. One survey found that 75% of surveyed members of public companies consider corporate culture among the responsibilities of the full board. DELOITTE, 2018 BOARD PRACTICES REPORT 15 (2018), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/2018-board-practices-report.pdf> [<https://perma.cc/AQ66-HUS5>].

also play an accountability role in helping to maintain corporate focus and compliance with its commitments.<sup>293</sup>

To this end, research around the correlation between board diversity and issues of race and equity support the presumption that enhancing such diversity positively impacts those issues.<sup>294</sup> Such research indicates that having racial and gender diversity on the board increases the likelihood that corporations will promote racially equitable workplace policies and practices.<sup>295</sup> Such diversity also has the potential to reduce the amount or severity of race-based employment discrimination.<sup>296</sup> Research also suggests that the presence of Blacks and other diverse directors increases the likelihood that corporations better market their goods and services to Blacks and people of color, or otherwise will be better equipped to identify and develop new products and services that address the needs of Blacks and members of diverse communities.<sup>297</sup> Notably, board diversity is not a panacea, and it is important not to overstate the extent to which Black directors or diverse directors on their own can or should bear the responsibility for eradicating or ameliorating racism and discrimination in the economic arena.<sup>298</sup> However, those same studies make clear that companies with the most diverse leadership, including diversity at the board level, are much more likely to drive and reflect significant inclusion.<sup>299</sup> Further, diverse leadership is critical to increasing the

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<sup>293</sup> See Brummer & Strine, *supra* note 290, at 21–23; Fairfax, *supra* note 290, at 134–35.

<sup>294</sup> See Kathleen Buse et al., *The Influence of Board Diversity*, 133 J. BUS. ETHICS 187–88 (2016) (arguing that the gender and racial diversity of non-profit boards directly influence board governance practices, such as adoption of diversity policies and behaviors facilitating inclusion).

<sup>295</sup> See Fairfax, *supra* note 290, at 135; Brummer & Strine, *supra* note 290, at 21–23.

<sup>296</sup> See Fairfax, *supra* note 282, at 825.

<sup>297</sup> See *id.* at 820.

<sup>298</sup> See Lisa M. Fairfax, *Racial Reckoning with Economic Inequities*, 106 CORNELL L. REV. ONLINE 68, 75–78 (2022); Fairfax, *supra* note 282, at 826–28.

<sup>299</sup> See *id.* at 41; see also Brummer & Strine, *supra* note 290, at 21–23; Fairfax, *supra* note 290.



likelihood that programs aimed at promoting equity and inclusion will be systemic.<sup>300</sup> This research confirms that board diversity can help better ensure that corporations are equipped to tackle issues of racial equity within the corporate sphere.

In addition, research suggests that other methods of improving diversity and eradicating racial bias in the workforce have proven ineffective. After analyzing three decades worth of data from more than 800 U.S. firms and interviewing hundreds of corporate managers and executives, Frank Dobbin and Alexandra Kalev found that most diversity programming does not increase diversity or improve racial equity within the corporation.<sup>301</sup> Critically, Dobbin and Kalev found that companies double down on tactics that do not work such as diversity training, hiring test, performance ratings and grievance systems all of which have the potential to “activate bias rather than stamp it out.”<sup>302</sup> The three most popular interventions make firms less diverse not only because managers and individuals resist strong arming, but also because hiring tests are used selectively or often in a discriminatory fashion or ignore or cherry-pick the results while training often takes on a negative connotation so that they amplify rather than quash bias.<sup>303</sup> Raters “lowball” women and minorities in performance reviews in a manner. Instead, Dobbin and Kalev insisted that companies should focus on increasing contact between diverse individuals and others on the job.<sup>304</sup> They found that two of the most effective interventions for increasing diversity and equality in the corporate sector are increasing engagement between people of color and white people, and increasing diversity in the

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<sup>300</sup> See MCKINESY & CO., *supra* note 298, at 41; Brummer & Strine, *supra* note 290, at 21–23; Fairfax, *supra* note 290.

<sup>301</sup> Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV., July–Aug. 2016, at 52, 53, <https://hbr.org/2016/07/why-diversity-programs-fail> [<https://perma.cc/KTA6-8V4N>].

<sup>302</sup> *Id.*

<sup>303</sup> *See id.*

<sup>304</sup> *Id.* at 57.

management team.<sup>305</sup> Increasing diversity in the management team helps engage managers in problem solving, exposes them to perspectives from different groups, and encourages social accountability for change.<sup>306</sup> Companies that have gotten consistently positive results related to diversity and inclusion have made diverse leadership teams a priority.<sup>307</sup> When Blacks and whites work together as equals there is a lower racial animus and greater willingness to engage Working side by side breaks down stereotypes and thus dampens racial bias, leading to higher shares of diverse individuals in management roles.<sup>308</sup> “When managers actively help boost diversity in their companies . . . they begin to think of themselves as diversity champions.”<sup>309</sup> Accountability is crucial. The idea that managers will have to explain their decision leads them to reduce their biases. Accountability and disclosure reduce discrepancies in performance and pay.<sup>310</sup>

Fourth, increasing board diversity is an important response to the bias and discrimination that hinders the ability of Blacks and other diverse directors to progress up the corporate ladder.<sup>311</sup> Studies consistently demonstrate that levels of racial bias and discrimination in the corporate workforce have remained virtually unchanged for decades despite over fifty years of antidiscrimination legislation.<sup>312</sup>

<sup>305</sup> *Id.* at 54.

<sup>306</sup> *Id.*

<sup>307</sup> Dobbin & Kalev, *supra* note 301.

<sup>308</sup> *Id.* at 59.

<sup>309</sup> *Id.* at 57.

<sup>310</sup> *Id.* at 59.

<sup>311</sup> See Fairfax, *supra* note 298, at 90.

<sup>312</sup> See, e.g., Laura Morgan Roberts & Anthony J. Mayo, *Towards A Racially Just Workplace*, HARV. BUS. REV. (Nov. 14, 2019), <https://hbr.org/cover-story/2019/11/toward-a-racially-just-workplace> [<https://perma.cc/N6U5-S2C8>]; Everett J. Mitchell II & Donald Sjoerdsma, *Black Job Seekers Still Face Racial Bias in Hiring Process*, LIVECAREER (Sept. 2, 2020), <https://www.livecareer.com/resources/careers/planning/black-job-seekers-face-racial-bias-in-hiring-process> [<https://perma.cc/N6U5-S2C8>]; Lincoln Quillian et al., *Hiring Discrimination Against Black Americans Hasn't Declined in 25 Years*, HARV. BUS. REV. (Oct. 11, 2017), <https://hbr.org/2017/10/hiring-discrimination-against-black-americans->

This discrimination impacts all phases of employment, from hiring and development, to retention and promotion.<sup>313</sup> The discrimination and bias against Blacks and other workers of color impedes their ability to progress within the corporation and plays a pivotal role in the fact that relatively few Black people and people of color are promoted or hired into the highest and most influential positions within the corporation.<sup>314</sup> This includes board seats.<sup>315</sup> Commentators have noted that persistent racial bias and discrimination in corporate hiring and promotion practices is the primary reason for the “painfully slow” advancement of Black professionals once they enter the workforce and the “especially bleak” underrepresentation of Black professionals in the “highest echelon of corporate America.”<sup>316</sup> Board diversity represents one response aimed at counteracting this bias and discrimination, and is thus an important aspect of the broader effort to respond to issues of bias and discrimination in the workforce sphere.

Ultimately, the board diversity effort is positive, but one that must be viewed with caution—while board diversity is an important and integral part of the corporate response to bias and discrimination, it is only one aspect of that response. Moreover, other aspects of the response may be more challenging and require more long-term commitment. It is thus too soon to tell if corporations will use their board diversity efforts as a springboard for grappling with other racial equity issues or if they will view board diversity as an end, and thus sufficient measure of their commitment to promoting diversity and inclusion.

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hasnt-declined-in-25-years [<https://perma.cc/3VQ6-LSYJ>]; Eva Zschirnt & Didier Ruedin, *Ethnic Discrimination in Hiring Decisions: A Meta-Analysis of Correspondence Tests 1990-2015*, 42 J. ETHNIC & MIGRATION STUD. 1115, 1116 (2016).

<sup>313</sup> See Roberts & Mayo, *supra* note 312.

<sup>314</sup> See J. Yo-Jud Cheng, Boris Groysberg & Paul M. Healy, *Why Do Boards Have So Few Black Directors?*, HARV. BUS. REV. (Aug. 13, 2020), <https://hbr.org/2020/08/why-do-boards-have-so-few-black-directors> [<https://perma.cc/U6CN-B53R>].

<sup>315</sup> See Cheng, Groysberg & Healy, *supra* note 314.

<sup>316</sup> See *id.*

## B. Structural Limitations

Given the limitations on board size and turnover, the fact that so many corporations made changes to their board within such a short timeframe is a positive signal. Boards are a relatively small group, with the average board including between 9 and 12 people.<sup>317</sup> Moreover, 94% of boards do not have term limits.<sup>318</sup> Although 70% of boards have mandatory retirement policies, many boards set retirement age at 75 or older,<sup>319</sup> and over the past few years boards have steadily increased their mandatory retirement age, extending the time for which directors must step down.<sup>320</sup> Only a small percentage of sitting directors on boards with mandatory retirement policies are within three years of mandatory retirement.<sup>321</sup> These numbers underscore the fact that there tends to be relatively little board turnover, and suggest that the sluggish pace of turnover is likely to continue.<sup>322</sup> Commentators have pointed to this lack of turnover as a critical barrier to the effort to diversify boards.<sup>323</sup> Spencer

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<sup>317</sup> STUART, 2019 REPORT, *supra* note 225, at 14; SPENCER STUART, 2020 BOARD INDEX 10 (2020), [https://www.spencerstuart.com/-/media/2020/december/ssbi2020/2020\\_us\\_spencer\\_stuart\\_board\\_index.pdf](https://www.spencerstuart.com/-/media/2020/december/ssbi2020/2020_us_spencer_stuart_board_index.pdf) [<https://perma.cc/5AVK-NNTL>] [hereinafter STUART, 2020 REPORT].

<sup>318</sup> STUART, 2020 REPORT, *supra* note 317, at 2, 13 (noting that only 6% of boards have term limits); *see also* STUART, 2019 REPORT, *supra* note 225, at 17–18 (noting that only 5% of boards have explicit term limits).

<sup>319</sup> STUART, 2020 REPORT, *supra* note 317, at 14; STUART, 2019 REPORT, *supra* note 225, at 19.

<sup>320</sup> STUART, 2020 REPORT, *supra* note 317, at 14 (noting that today, 48% of boards have a mandatory retirement age of 75 or older, as compared to only 19% of boards that had such a retirement age a decade ago).

<sup>321</sup> *Id.* at 2, 14 (noting that only 16% of independent directors are within three years of mandatory retirement and that most directors have at least a decade of board service remaining before such retirement).

<sup>322</sup> *See id.* at 14 (noting the connection between retirement policies and turnover).

<sup>323</sup> *See* Andrew Ross Sorkin, *A Hidden Hurdle in Efforts To Diversify Boardrooms*, N.Y. TIMES (Feb. 16, 2021), <https://www.nytimes.com/2021/02/16/business/dealbook/boardroom-diversity.html>, [<https://perma.cc/8BN2-BJPN>] (linking slow efforts to diversify boards to low turnover).

Stuart's report on public company board practices notes that the push for greater board diversity has created a conundrum for corporations because so few seats open in a given year.<sup>324</sup> This conundrum makes the fact that corporations managed to appoint so many diverse directors in such a relatively short time even more incredible, while strongly suggesting that corporations' statements served as a significant motivator of corporate behavior. To be sure, the fact that corporations successfully and expeditiously managed to overcome turnover concerns may call into question the legitimacy of the turnover problem. Nevertheless, the fact that corporations found solutions to that problem is a strong reflection of their commitment to follow through on their statements.

However, structural limitations could still serve as an impediment for future progress. Many companies that issued statements did not make any changes to their board, which may be an indication that such companies felt constrained by structural limitations or otherwise were relying on those limitations as an excuse for failing to improve diversity on their boards. Indeed, while boards can and do increase their size in order to make room for diversity, experts agree that this tactic is "not a sustainable option" given the average board size.<sup>325</sup> Additionally, at an overall turnover rate of 0.84 new directors per board, seeking to add directors through turnovers alone will ensure a sluggish pace for board diversity.<sup>326</sup> Thus, this structural limitation will continue to serve as a barrier to board diversity efforts, and thus will continue to be a cause for concern for those seeking to meaningfully diversify boards.

### C. The Pipeline Problem Revisited

Corporations have blamed their lack of board diversity on the lack of sufficiently qualified Blacks and diverse candidates

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<sup>324</sup> STUART, 2020 REPORT, *supra* note 317, at 2.

<sup>325</sup> *Id.* at 13 (noting that only 6% of boards have term limits).

<sup>326</sup> *See id.* at 2.

for board positions.<sup>327</sup> Even corporations with strong commitments to diversity have relied on the so-called pipeline problem to explain their failure to make progress in this area. One infamous example was Wells Fargo, the largest U.S. bank employer.<sup>328</sup> In a company-wide memo, Wells Fargo CEO Charles Scharf blamed the bank's failure to achieve its diversity goals on "the unfortunate reality" "that there is a very limited pool of Black talent."<sup>329</sup> Wells Fargo is often praised for its diversity,<sup>330</sup> and the memo was issued to announce Wells Fargo's new diversity initiatives.<sup>331</sup> Scharf's comments reveal that even strong advocates of diversity blame the pipeline problem for stalled diversity efforts.

Many have criticized the pipeline problem as illegitimate for at least two reasons. First, despite the fact that there are very few legal requirements for being a board candidate, corporations often rely on criteria that automatically narrows the number of qualified Blacks and other diverse candidates.<sup>332</sup> The most noticeable example is the overreliance on candidates who are CEOs or otherwise have a C-suite title.<sup>333</sup> One study shows that 29% of new independent directors for S&P 500 companies are active or retired

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<sup>327</sup> See, e.g., Imani Moise, Jessica DiNapoli & Ross Kerber, *Exclusive: Wells Fargo CEO Ruffles Feathers with Comments About Diverse Talent*, REUTERS (Sept. 22, 2020, 12:46 PM), <https://www.reuters.com/article/us-global-race-wells-fargo-exclusive/exclusive-wells-fargo-ceo-ruffles-feathers-with-comments-about-diverse-talent-idUSKCN26D2IU> [<https://perma.cc/M57U-JGNL>].

<sup>328</sup> See *Leading Banks in the United States as of December 31, 2021, by Number of Employees*, STATISTA (May 2022), <https://www.statista.com/statistics/250220/ranking-of-united-states-banks-by-number-of-employees-in-2021/> [<https://perma.cc/4JFV-5C82>].

<sup>329</sup> Jemima McEvoy, *Wells Fargo CEO Apologizes for Saying There's A 'Limited Pool of Black Talent'*, FORBES (Sept. 23, 2020, 11:11 AM), <https://www.forbes.com/sites/jemimamcevoy/2020/09/23/wells-fargo-ceo-apologizes-for-saying-theres-a-limited-pool-of-black-talent/#5f1f8aa64622> [<https://perma.cc/D4BP-XBP8>].

<sup>330</sup> McEvoy, *supra* note 329.

<sup>331</sup> McEvoy, *supra* note 329.

<sup>332</sup> Fairfax, *supra* note 311.

<sup>333</sup> See STUART, 2020 REPORT, *supra* note 317, at 10.

CEOs.<sup>334</sup> Unfortunately, the number of women and people of color in those roles is relatively small. For example, Black people account for 13.4% of the U.S. population,<sup>335</sup> and 12% of the U.S. workforce.<sup>336</sup> However, Blacks only account for 8.6% of managers and 5.9% of chief executives.<sup>337</sup> Consequently, there are only three Black CEOs of *Fortune* 500 companies—meaning 99.4% of *Fortune* 500 CEOs are white.<sup>338</sup> In this regard, overreliance on such roles automatically shrinks the pool of qualified diverse candidates. Importantly, studies do not indicate that people who serve in the C-suite or as CEOs are more qualified to serve on the board.<sup>339</sup> Thus, empirical evidence does not suggest that overreliance on people who

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<sup>334</sup> *Id.*

<sup>335</sup> Geri Stengel, *Black Lives Matter Protests Moves Corporate D&I Initiatives Center Stage*, FORBES (June 17, 2020, 7:00 AM), <https://www.forbes.com/sites/geristengel/2020/06/17/black-lives-matter-protests-moves-corporate-di-initiatives-into-the-spotlight/#df5fdc17a0d0> (on file with Columbia Business Law Review).

<sup>336</sup> Emily Rolan & Mitra Toosi, *Blacks in the Labor Force*, U.S. BUREAU LAB. STAT. (2018), <https://www.bls.gov/careeroutlook/2018/article/blacks-in-the-labor-force.htm> [<https://perma.cc/JU8U-VJND>].

<sup>337</sup> *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU LAB. STAT. (Jan. 20, 2022), <https://www.bls.gov/cps/cpsaat11.htm> [<https://perma.cc/JS4Y-MD6P>].

<sup>338</sup> See Dominic-Madori Davis, *One of the Only 4 Black Fortune 500 CEOs Just Stepped Down—Here Are the 3 That Remain*, BUS. INSIDER (July 21, 2020, 9:34 AM), <https://www.businessinsider.com/there-are-four-black-fortune-500-ceos-here-they-are-2020-2> [<https://perma.cc/C6NV-6L42>].

<sup>339</sup> See, e.g., HEIDRICK & STRUGGLES & ROCK CTR. FOR CORP. GOVERNANCE, STAN. UNIV., 2011 CORPORATE BOARD OF DIRECTORS REPORT (reporting that 79% of surveyed directors said that active CEOs are no better than non-CEO board members); Rudiger Fahlenbrach, Angie Low & Rene M. Stulz, *Why Do Firms Appoint CEOs as Outside Directors?*, 97 J. FIN. ECON. 12 (2008) (evaluating data from 1988 to 2005 on more than 10,000 firms and concluding that CEO directors “do not have a significant impact on the appointing firm’s operating performance, its decision-making, the compensation of its CEO, or on advising or the monitoring of management by the board.”); MYLES MACE, *DIRECTORS: MYTH AND REALITY* 90, 92 (1971) (finding no between CEO status and performance).

serve in such roles is appropriate.<sup>340</sup> Focusing on such roles undermines a corporation's ability to diversify its board, and because such a focus is not necessarily warranted, such a focus may be viewed as an illegitimate barrier to board diversity. The second reason to question the legitimacy of the pipeline problem stems from concerns that corporations may be overlooking qualified diverse candidates who already serve in high-level roles.<sup>341</sup> Indeed, many boards and nominating committees continue to rely on relatively insular and homogenous nomination and recruitment practices, such as informal and relatively non-diverse networks and social or professional circles.<sup>342</sup> This is true even for those corporations that profess a desire to diversify their board.<sup>343</sup> These practices support the contention that boards may not be casting a sufficiently broad net, and thus may be missing many talented Black and diverse candidates in their search process.<sup>344</sup> From this perspective, the pipeline problem may have been overstated. Nonetheless, it is clear that corporations relied on the pipeline problem to justify stalled efforts with respect to board diversity.

On the one hand, the significant increase in Blacks and other directors of colors is especially remarkable in light of the pipeline problem. This Article highlights the fact that corporations managed to find hundreds of qualified Black and

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<sup>340</sup> HEIDRICK & STRUGGLES & ROCK CTR. FOR CORP. GOVERNANCE, *supra* note 339; Fahlenbrach, Low & Stulz, *supra* note 339; MACE, *supra* note 339.

<sup>341</sup> See Moise, DiNapoli & Kerber, *supra* note 327.

<sup>342</sup> See Cydney Posner, *Addressing the Challenge of Board Racial Diversity*, COOLEY PUBCO (Aug. 25, 2020), <https://cooleypubco.com/2020/08/25/board-racial-diversity/> [<https://perma.cc/BCG7-Y9Y4>]; Cheng, Groysberg & Healy, *supra* note 314; DELOITTE, *supra* note 314, at 8

<sup>343</sup> See DELOITTE, *supra* note 292, at 8 (only eight percent of boards rely on diverse networks when seeking to diversify their board).

<sup>344</sup> See Mitchell & Sejoerdsma, *supra* note 312; Posner, *supra* note 342; Cheng, Groysberg & Healy, *supra* note 314; KORN FERRY, THE BLACK P&L LEADER: INSIGHTS AND LESSONS FROM SENIOR BLACK P&L LEADERS IN CORPORATE AMERICA 28, [https://www.kornferry.com/content/dam/kornferry/docs/pdfs/korn-ferry\\_theblack-pl-leader.pdf](https://www.kornferry.com/content/dam/kornferry/docs/pdfs/korn-ferry_theblack-pl-leader.pdf) [<https://perma.cc/ZJ4W-MV6H>].



other diverse board candidates. Many of them held C-suite titles, validating the notion that corporations had overlooked candidates in those roles.<sup>345</sup> Many others held leadership titles and roles outside of the C-suite, validating the notion that qualified board candidates could be found beyond the criteria on which boards had historically focused.<sup>346</sup> It is important to note corporations issued statements and disclosures indicating their belief that these newly appointed directors were fully qualified to serve on their boards.<sup>347</sup> Thus, corporations managed to recruit and nominate qualified diverse candidates within a relatively short timeframe, suggesting that their statements motivated them to take proactive steps to recruit and find available talent from a diverse group of people. Given the historically slow pace of change combined with the oft-cited concern about the pipeline problem, the dramatic increase in Black and other diverse directors is remarkable and a strong indication of corporations' commitment to transforming their statements into concrete action.

However, concern about the pipeline problem may remain, making it unclear how such concern will impact ongoing efforts. Indeed, a sizable number of corporations making statements did not choose to appoint any new directors. Others appointed white women and men as opposed to Blacks or other people of color. Obviously, we cannot know whether the so-called pipeline problem represented the actual reason for corporations' failure to appoint diverse directors. Indeed,

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<sup>345</sup> See STUART, 2020 REPORT, *supra* note 317, at 7–9 (demonstrating that most new directors are active or retired CEOs).

<sup>346</sup> See *id.* (showing range of backgrounds including financial executives, functional/line leaders and division and subsidiary presidents)

<sup>347</sup> See *e.g.*, Kraft Heinz Co., Defensive Proxy Statement, at 14 (Schedule 14A) (Mar. 26, 2021), <https://ir.kraftheinzcompany.com/static-files/1fc0e4fb-7299-4bb7-a7c7-0cacf5b931b6> [<https://perma.cc/3HSJ-CJ8R>] (noting that Black director nominee, Lori Dickerson Fouche, brings extensive experience and expertise); Colgate-Palmolive Co., Defensive Proxy Statement, at 17 (Schedule 14A) (Mar. 24, 2021) <https://investor.colgatepalmolive.com/static-files/06d247e7-f2cc-4753-91e1-8d40f42ca2f> [<https://perma.cc/F642-854K>] (noting the skills and qualifications of new Black director nominee Kimberly Nelson).

corporations have many priorities when seeking directors,<sup>348</sup> and appointing directors who are not people of color does not necessarily mean that corporations do not have a commitment to creating a racially diverse board. But one can only imagine that, consistent with history, some corporations will continue to rely on the pipeline problem to explain away their decision to maintain a board that is not reflective of their commitments.

Another concerning manifestation of the pipeline problem and its impact on board diversity is the fact that corporations tend to draw from the same group of Black and diverse board candidates. Research confirms that people of color hold more board seats than their white counterparts, and that this problem is especially acute for seats held by Black directors.<sup>349</sup> This Article's survey confirms this research: Even some newly appointed Black directors held multiple board seats.<sup>350</sup> This undermines the extent to which the increase in board seats also increases the total number of Black people holding those seats. The tendency to tap the same women and people of color for board seats also highlights the pipeline

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<sup>348</sup> STUART, 2020 REPORT, *supra* note 317, at 6–7 (noting the backgrounds and experiences of directors).

<sup>349</sup> See DELOITTE, *supra* note 226, at 3, 23 (noting that the fact that people of color tend to hold more seats than their white counterparts shows that there is a difference between board diversity and the diversity of the population of board members and that this difference reveals the need to take a broader look at potential board candidates when selecting board members).

<sup>350</sup> For example, Nadja West was newly appointed to the Johnson & Johnson board, and also sits on two other public company boards. See *Johnson & Johnson Names Dr. Nadja West, Retired United States Army Lieutenant General and Former United States Army Surgeon General to its Board of Directors*, JOHNSON & JOHNSON, <https://www.jnj.com/johnson-johnson-names-dr-nadja-west-retired-united-states-army-lieutenant-general-and-former-united-states-army-surgeon-general-to-its-board-of-directors> [https://perma.cc/PL8A-LMTE] (last visited June 16, 2022). Similarly, Derica Rice was newly appointed to the Target and the Carlyle Group boards and also sits on the Bristol Myers Squibb and Walt Disney boards. See *Derica W. Rice*, CARLYLE, <https://www.carlyle.com/about-carlyle/team/derica-w-rice> [https://perma.cc/JNR5-Y2R7] (last visited June 16, 2022).

problem, emphasizing the need to take a broader look at potential board candidates and their skillsets when selecting board members.<sup>351</sup> This tendency also poses a problem both for individual directors and corporations. For individual directors, too many board seats may result in them being less effective as a board member because they may not have sufficient time or capacity to devote to their board duties.<sup>352</sup> For corporations, having a director with too many board seats is viewed as a problematic corporate governance practice, and could lead to negative ratings and less effective governance overall.<sup>353</sup> Either of these is problematic from a diversity standpoint because it means that diverse directors may be overburdened, which could undermine the extent to which they can be effective as directors, or otherwise engage in the necessary work to advance a racial equity agenda.

Another issue that has emerged with respect to the pipeline problem are company policies that limit or prohibit individuals from serving on boards. Seventy-seven percent of corporations limit their own directors from serving on other

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<sup>351</sup> *Id.*

<sup>352</sup> See Yaron Nili, *Horizontal Directors*, 114 NORTHWESTERN U. L. REV. 1179, 1194–97 (2020); Jeremy C. Kress, *Board to Death: How Busy Directors Could Cause the Next Financial Crisis*, 59 B.C. L. REV. 877 (2018). Jeremy McClane & Yaron Nili, *Social Corporate Governance*, 89 GEO. WASH. L. REV. 932, 966–56 (2021).

<sup>353</sup> See Kosmas Papadopolous, *Director Overboarding*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 5, 2019), <https://corpgov.law.harvard.edu/2019/08/05/director-overboarding-global-trends-definitions-and-impact/> [<https://perma.cc/T8EY-EENF>]. Large asset managers and investors, including Vanguard and BlackRock, have named overboarding as a key concern because it impacts directors' ability to fulfill their responsibilities by limiting their ability to spend adequate time on their board responsibilities. *Id.*; Sarah Krouse & Joann Lublin, *Big Investors Want Directors To Stop Sitting on So Many Boards*, WALL ST. J. (Sept. 26, 2017, 10:19 AM), <https://www.wsj.com/articles/big-investors-want-directors-to-stop-sitting-on-so-many-boards-1506418201> (on file with the Columbia Business Law Review); see also *Director Overboarding*, INSTITUTIONAL S'HOLDER SERVS., <https://www.issgovernance.com/file/policy/us-overboarding.pdf> [<https://perma.cc/A2VF-UVDB>] (discussing issues with overboarding).

public company boards.<sup>354</sup> Some companies impose limits on every director, while others impose limits on particular directors, with the most common limit being imposed on audit committee members.<sup>355</sup> Additionally, many companies have policies that restrict the number of public company boards on which employees may serve or otherwise only allow certain employees to serve on for-profit boards.<sup>356</sup> For example, some companies only allow direct reports to the CEO to serve on public company boards.<sup>357</sup> Companies with restrictive board policies for their employees contend that such policies are aimed at protecting companies and ensuring that their employees' focus remains on the company at which they are primarily employed, and thus that their attention is not diverted away from their core responsibilities.<sup>358</sup> An additional concern with enabling employees to serve on public company boards is the potential conflict of interest or reputational harm that may be associated with serving on the board of another public company.<sup>359</sup> Importantly, policies that prevent employees other than those in the senior ranks to serve on boards have a disproportionate impact on diverse directors because so few women and people of color are at the senior ranks in company. The research reveals that people of color who are chosen to serve as directors tend to be younger, actively employed, and holding positions that are not at the most senior level.<sup>360</sup> As one commentator notes, if companies have policies prohibiting certain kinds of less senior

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<sup>354</sup> SPENCER STUART, 2021 BOARD INDEX 10 (2020), <https://www.spencerstuart.com/research-and-insight/us-board-index> [<https://perma.cc/J96T-2VA5>] [hereinafter STUART, 2021 REPORT].

<sup>355</sup> *Id.*; see Papadopoulos, *supra* note 353.

<sup>356</sup> Sorkin, *supra* note 323.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> STUART, 2020 REPORT, *supra* note 317, at 8. Almost half of new directors are actively employed, and 69% of first-time directors are actively employed, and newly appointed women and people of color are most likely to be first time directors. *Id.* at 7. 17% of new directors are 50% or younger, and half of this group are women. *Id.* at 8.

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employees from serving on boards, “this creates a kind of systemic impediment to diversifying boardrooms.”<sup>361</sup>

#### D. Backlash

The fact that many companies followed through on their actions despite pushback can also be viewed as a positive sign. To be sure, as this Article reveals, many corporations responded to the racial reckoning in the summer of 2020 with expressions of support. However, this Article also reveals that many others did not. Moreover, companies experienced backlash for their support as well as their efforts to take actions that advanced their statements.<sup>362</sup> The fact that corporations made efforts to follow through on their commitments notwithstanding this backlash is notable.

Unfortunately, it is not clear how corporations will react now that backlash has intensified. In July 2020, polling demonstrated that most Americans of all races and age groups expressed concern about racial inequality, agreed that Blacks faced discrimination, and supported nationwide public protest including the BlackLivesMatter movement.<sup>363</sup> We are in a much different and more hostile climate than the one in the summer of 2020. It is undeniable that backlash has intensified.<sup>364</sup> States have mobilized against efforts to

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<sup>361</sup> Sorkin, *supra* note 323.

<sup>362</sup> See, e.g., Green & Porter Jr., *supra* note 263; *Goodyear Faces Scrutiny After Leaked “Diversity” Policy Backs BLM but Not Police*, TRANSP. NATION NETWORK (Aug. 19, 2020, 10:07 PM), <https://www.transportationnation.com/goodyear-faces-scrutiny-after-leaked-diversity-policy-backs-blm-but-not-police/> [<https://perma.cc/T2GX-BYET>]; Mary Vanac, *Goodyear Clarifies that Employees Can Show Support for Police*, CLEV. BUS. J. (Aug. 20, 2020), <https://www.bizjournals.com/cleveland/news/2020/08/20/goodyear-employees-can-support-police.html> [<https://perma.cc/YXA8-3LEM>].

<sup>363</sup> Sabrina Siddiqui, *Poll Shows Most Voters Agree Black, Hispanic Americans Face Discrimination*, WALL ST. J. (July 21, 2020, 12:01 AM), <https://www.wsj.com/articles/majority-of-voters-say-u-s-society-is-racist-as-support-grows-for-black-lives-matter-11595304062> (on file with the Columbia Business Law Review).

<sup>364</sup> See *supra* note 22 and accompanying text.

promote diversity and inclusion.<sup>365</sup> Members of the corporate community also have expressed resistance to corporate and regulatory efforts related to board diversity and racial equity.<sup>366</sup> It is not clear whether this more hostile climate will cause corporations to be hesitant to continue their important and necessary work in this area.

While the increase in board appointments for Blacks and other directors of colors is notable and suggests that corporate statements spurred corporations to make a more concerted effort to live up to their commitments, there remain many obstacles that may prevent corporations from continuing those efforts. To begin, there are structural and substantive impediments to improving diversity on boards. Significantly, board diversity research makes clear that even with increased efforts to diversify boards, there remains a “long road” to achieving equity on boards.<sup>367</sup> Then too, it is not clear whether and to what extent the effort to diversify boards will translate into broader more meaningful steps to address racism and bias within the corporation and beyond. This is particularly concerning given the greater difficulty, and thus greater needed for sustainable engagement, associated with addressing those issues. Thus, this Article offers a note of optimism about the influence of corporate statements on corporations’ short-term behavior but insists that it may be too soon to tell if that influence will carry-over to more long-term changes.

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<sup>365</sup> See, e.g., Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 21, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> [https://perma.cc/9QX8-GECQ] (noting state legislation on “critical race theory” and diversity training).

<sup>366</sup> See, e.g., Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California’s SB 826*, at 2 (Stanford Law Sch. & The Rock Ctr. for Corp. Governance, Working Paper No. 232, 2018); Jesse M. Fried, *Will Nasdaq’s Diversity Rule Harm Investors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 31, 2021), <https://corpgov.law.harvard.edu/2021/04/08/will-nasdaqs-diversity-rules-harm-investors/> [https://perma.cc/WWE6-GFV9].

<sup>367</sup> See DELOITTE, *supra* note 226, at 6.

## V. CONCLUSION

On May 25, 2020, George Floyd, a forty-six-year-old Black man, was murdered when a white police officer knelt on Floyd's neck for eight minutes and forty-six seconds as Floyd, whose hands were handcuffed, and whose "offense" was passing a counterfeit bill, called for his mother and repeated the words "I can't breathe." Three other officers participated in the murder. Two police officers helped restrain Floyd while the third actively prevented bystanders from intervening, as their fellow officer ended Floyd's life.

Protests erupted over Floyd's murder, which was caught on tape. Tragically, Floyd's murder was yet another in a long line of Black people killed at the hands of police—and on camera for the world to witness. Protesters called for Black lives to matter, demanded that we say the names of the victims of police killings, and pressed individuals and corporations to align themselves with the fight to end racial injustice. Protesters also called for an end to the silent acceptance of racist policies and practices in criminal law and the broader society.

In response, corporations have spoken. "We must not tolerate racial injustice." "We have to respond clearly that racism, discrimination and hatred will not be tolerated." "We stand together against racism and discrimination." "We cannot operate as a civilized society when parts of our population feel marginalized, victimized or targeted just for who they are." "There's no place for racism and bias in our lives, our communities or future." "There must be a zero tolerance for racism." "We do not tolerate racism." "We reject racism, intolerance, and bigotry."

In so doing, hundreds of corporations chose to reject silence. Eighty-six of the Fortune 100. Seventy-one of the Fortune 101-200. Seventy-one of the Fortune 201-300. Fifty-seven of the Fortune 301-400. Fifty of the Fortune 401-500. And countless other corporations and entities both large and small.

Hundreds more corporations remained silent. Exxon Mobil. Lockheed Martin. AutoZone. Valero Energy. Occidental Petroleum. Williams Sonoma. Costco. Oshkosh.

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Hertz. Dillard's. Publix Supermarkets. General Electric. Whirlpool. Tesla. Charles Schwab.

While critics have characterized corporate statements as meaningless rhetoric or hypocritical, this Article offers a different perspective. From a normative perspective, this Article first contends that it matters that corporations feel compelled to issue statements rejecting violence against Black people along with racist policies and practices. It matters because speech can serve as a powerful vehicle for expressing and confirming our aspirational ideas. It also matters because speech can serve as a source of affirmation for members of the Black community while enhancing the potential that sentiments rejecting racism are viewed as normatively preferable throughout the corporate eco-system. In this regard, we should be more concerned with Williams Sonoma, Auto Zone, Oshkosh and the hundreds of other Fortune 500 corporations that have chosen silence, and hence could not even be bothered with at least projecting the appearance of rejecting racism.

Relying on an original empirical study, this Article also demonstrates that these corporate statements matter because they actually positively influenced corporate behavior. Empirical research demonstrates that the issuance of corporate statements was linked to an increased likelihood that corporations would appoint Black directors and other directors of color at a rate far greater than previous years and at a rate far greater than corporations that did not issue corporate statements.

This Article is optimistic, but only cautiously so. This Article does not seek to suggest that board diversity alone will address the many racial inequities that plague the economic sphere. This Article acknowledges the many hurdles that may impede efforts to diversify corporate boards. Perhaps more importantly, board diversity is just one of many steps that need to be taken to generate a more racially equitable corporate environment. This Article also does not seek to discount the efforts that must go into generating such an environment, and hence does not seek to equate board diversity efforts with corporations' willingness or capacity to



respond to systems of bias and discrimination within their corporation or beyond.

However, this Article refutes the critics by revealing that corporate statements clearly served as an important catalyst for change associated with racial equity within corporate America. Those statements prompted corporations to begin the process of reducing racism and discrimination in the economic sphere and the broader society. Given the intractability of that racism and discrimination, this Article vehemently argues that it is important not to dismiss any tool that can be useful in this endeavor.