

AN INCOMPLETE HISTORY OF EXCLUSION: MODERN AND CONTEMPORARY BLACK ART AND THE U.S. ART MUSEUM

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Who are the patrons of art, the museum board members, the collectors? Who is the audience for high culture? Who is allowed to interpret culture? Who is asked to make fundamental policy decisions? Who sets the priorities?

Maurice Berger, *Are Art Museums Racist?*

ABSTRACT

Historically white art museums have adopted policies of diversity and inclusion that are not reflected in their leadership, curatorial ranks, and representation of Black artists in collections and exhibitions. Mission statements welcoming diversity and inclusion are only symbolic because museums have not adopted the structural changes that will lead to diverse and inclusive artistic representation. Even if museums claim they are implementing diverse and inclusive hiring processes and exhibition strategies, the people at the top of the power and wealth hierarchy at museums are board members who are predominantly white men who want to fund museums that reflect their interests, namely, exchanging money and gifts of art for positive public image and influence over the works and messages shown by museums.¹

I. INTRODUCTION

A survey of the catalogs of 18 major U.S. museums shows that on average, 85.4% of artists collected are white.² Narrowing the scope to artists most likely still living (born in 1945 or later) that are North American, the number increases to 91.7%.³ Compared to the 2016 American Community Survey, which found that 78.6% of artists self-identified as white, and to the

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¹ In this Note, “diversity” focuses on mainly racial and ethnic diversity, although other aspects of diversity and accessibility concerns at museums exist that are not examined. In addition, “museum” in this Note refers to a nonprofit institution displaying and collecting art.

² Chad M. Topaz et al., *Diversity of Artists in Major U.S. Museums*, PLOS ONE, Mar. 20, 2019, at 1, 8.

³ *Id.* at 9.

2010 Census, which found that 72.4% of the U.S. population self-identified as white, the living American artists being shown in museums are disproportionately white.⁴ Modern and Contemporary American artists of color are underrepresented in major U.S. museums.⁵

This Note will examine why Black artists are underrepresented in U.S. museums. Part I explores the cultural and economic significance of art museum holdings, the demographics of museum visitors, and the impact that inclusion or exclusion from museum shows has on artists, communities, and the art market. Part II traces the history of significant exhibitions and policies regarding Black artists, museum workers, and the general public for a few case-study U.S. museums, and considers museums' responses to the 2020 Black Lives Matter movement. Part III analyzes why museums are not diversifying despite outward expressions of commitment to diversity. First, steep barriers to entry disproportionately impact museum workers of color. Second, museum curators and directors are mostly white, but regardless of the staff's and leadership's points-of-view, the people holding the most economic and curatorial power are board members. Museums depend increasingly on private donors and wealthy board members for financial support in the face of declining government funding, and thus board members—mostly wealthy white men—wield the power in determining what and who gets shown to serve their own economic and political interests at the cost (or in their eyes, the benefit) of manipulating the cultural narrative. Finally, Part IV addresses an ambitious plan to diversify New York City cultural institutions and museum responses to the 2019 coronavirus ("COVID-19") pandemic, which reflect varying approaches to addressing art museum racism before an uncertain future for museums.

II. THE MUSEUM, THE VISITOR, AND THE IMPACT ON THE ART MARKET

A. WHY DO WE HAVE ART MUSEUMS?

Museums that display art occupy a position of legitimacy and value, both cultural and economic, concerning the contents of their permanent collection and temporary exhibitions, and the messages conveyed by who they choose to display and how. Though attempting to appear as neutral spaces to display history and aesthetic creations, art museums sit at the "intersection of power and the history of cultural forms."⁶ Museums present a cultural identity and narrative of art history depending on whose voices they include and exclude. In 1987, artist and curator Howardena Pindell wrote, "The art world will state that all white exhibitions, year after year . . . are not a reflection of racism.

⁴ *Id.*

⁵ Representation is higher at museums that focus on works by people with shared specific affinities and identities, such as the Studio Museum in Harlem which shows only artists of African descent. The museums under focus in this Note claim to accept and show works across all identities.

⁶ BRIDGET R. COOKS, EXHIBITING BLACKNESS: AFRICAN AMERICANS AND THE AMERICAN ART MUSEUM 7 (2011) (quoting Carol Duncan).

The lie or denial is cloaked in phrases such as ‘artistic choice’ or ‘artistic quality’ when the pattern reveals a different intent.”⁷

Before museums, art galleries in private homes were considered “public spaces,” but the only public that could access the collections were “well-born, educated, men of taste, and, more marginally (if at all), well-born women.”⁸ Beyond signaling wealth and power, art was “a source of valuable moral and spiritual experience.”⁹ In the late 1700s, museums emerged as collections and as architectural works, “neutral sheltering spaces” for art objects.¹⁰ Built to emulate palaces and temples, museums stand as protectors of “secular knowledge” and “preservers of the community’s official cultural memory.”¹¹ Carol Duncan, an art historian, states, “To control a museum means precisely to control the representation of a community and its highest values and truths. It also is the power to define the relative standing of individuals within that community.”¹² Duncan describes museums as ritual spaces that demand contemplation, learning, performance, and transformation.¹³ In their early days, museums were compared to sacred spaces, but even then some critics worried about the act of repositioning art.¹⁴ Poet and writer Johann Wolfgang von Goethe was disturbed that art stolen from other countries was placed into Germany’s museums as “trophies of conquest,” because the creation of those museums inevitably depended on the “destruction of something else”—the cultural histories of those objects and their people.¹⁵

Large art museums emerged in the United States in the 1870s with New York’s Metropolitan Museum of Art (“the Met”), Boston’s Museum of Fine Arts, and Chicago’s Art Institute.¹⁶ The ideal visitor was a “self-improving, autonomous, politically empowered (and therefore male) individual who enters the museum in search of moral and spiritual enlightenment.”¹⁷ That visitor was therefore a man of a certain wealth, education, and race. Museums presented the history of art and allowed visitors to “live the spiritual development of civilization,”¹⁸ which is inextricable from colonialism. The founders of American museums were wealthy financiers and businessmen who had conflicting goals of making art and knowledge accessible while reinforcing class boundaries by “disseminat[ing] a single high culture,” that is, “western European high culture.”¹⁹ Although official records professed no biases to race or class, museums created barriers to the poor by requiring entrance fees, being closed on Sundays, and being located

⁷ Julia Halperin & Charlotte Burns, *African American Artists Are More Visible Than Ever. So Why Are Museums Giving Them Short Shrift?*, ARTNET NEWS (Sept. 20, 2018), <https://news.artnet.com/the-long-road-for-african-american-artists/african-american-research-museums-1350362>.

⁸ CAROL DUNCAN, *CIVILIZING RITUALS: INSIDE PUBLIC ART MUSEUMS* 36 (1995).

⁹ *Id.*

¹⁰ *Id.* at 1.

¹¹ *Id.* at 8.

¹² *Id.*

¹³ *Id.* at 10–13.

¹⁴ *Id.* at 15–16.

¹⁵ *Id.* at 16.

¹⁶ *Id.* at 49.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 54.

in inaccessible neighborhoods.²⁰ Charles Loring of the Boston Museum of Fine Arts wrote about his “dislike of museums that attracted an ‘immigrant population’” and preferred instead museums that had the air of “a very rich and exclusive metropolitan club house.”²¹ Although funded and filled by the rich, museums needed to appear inclusive in order to achieve the “status, authority, and prestige of public spaces.”²²

B. COMMUNITY MEMBERS WHO VISIT MUSEUMS

Museums attract mostly white visitors partly because of their white-centric offerings and partly because potential Black visitors have systematically been excluded from higher education and early exposure to the arts. Art museums have historically catered to “connoisseurs” of art—typically upper-class white people.²³ Studies show that museum audiences today reflect the same demographics.²⁴ A 2010 study of 40,000 museum-going households in the United States shows that most visitors are wealthy, highly-educated, and white.²⁵ Only 16% of art museum visitors self-identified as a member of a minority group, and 9% of art museum visitors self-identified as a member of a minority group who is a “core museum visitor,” meaning they have had repeat museum engagement.²⁶ A National Endowment of the Arts (“NEA”) Survey of Public Participation in the Arts found that in 2008, 5.9% of art museum visitors were Black, accounting for 4% of all visits, meaning that Black museumgoers were less likely to be repeat visitors.²⁷ People of color are 82% more likely than white people to avoid participating in cultural organizations because those organizations “fail to reflect a range of cultural backgrounds”—significantly, the “lack of a variety of backgrounds,” and not just the absence of one’s own background, is the determining factor.²⁸ Given that museums have marginalized Black artists, museum visitors, and art-world professionals, and have used Black art as a primitive Other to contrast and elevate white art and artists, it is unsurprising that Black people feel excluded by and are less likely to visit museums.²⁹

Beyond the lack of representation, art museums also present barriers to entry by catering to people with knowledge of or familiarity with art history, which often comes from higher education and early exposure to arts institutions. Attendance is directly correlated with education and wealth. In 2008, 53.9% of adults who visited art museums had college or graduate degrees, while 17.6% of adults who visited art museums had high school

²⁰ *Id.* at 56.

²¹ *Id.*

²² *Id.* at 57.

²³ MARTIN BRAATHEN, *THE PRICE OF EVERYTHING...: PERSPECTIVES ON THE ART MARKET* 9 (2007); see Gretchen Jennings & Joanne Jones-Rizzi, *Museums, White Privilege, and Diversity: A Systemic Perspective*, *DIMENSIONS* 63, 66 (2016).

²⁴ Jennings & Jones-Rizzi, *supra* note 23, at 66.

²⁵ *Id.*

²⁶ *Id.* (defining minority as nonwhite).

²⁷ NAT’L ENDOWMENT FOR ARTS, *2008 SURVEY OF PUBLIC PARTICIPATION IN THE ARTS* 27 (2009).

²⁸ LIAM SWEENEY & ROGER SCHONFELD, *INTERROGATING INSTITUTIONAL PRACTICES IN EQUITY, DIVERSITY, AND INCLUSION: LESSONS AND RECOMMENDATIONS FROM CASE STUDIES IN EIGHT ART MUSEUMS* 17, 17 n.10 (2018).

²⁹ See COOKS, *supra* note 6, at 1–2.

diplomas or less.³⁰ In terms of income, adults making under \$50,000 per year comprised 28.2% of art museum visitors while adults making over \$50,000 per year comprised 71.8% of art museum visitors.³¹ Thus, those with leisure time who feel most comfortable visiting museums are predominantly wealthy and highly educated.

Early exposure to the arts through primary and secondary education that offers visual arts courses also helps familiarize students with art history and the cultural significance of various types of art. However, public high schools serving lower-income neighborhoods are less likely to offer visual arts education courses. The percentage of students receiving free or reduced-price lunch (“FRL”) is a proxy for the socioeconomic status of their neighborhoods, and the likelihood that a public high school offers at least one visual arts course decreases as the percentage of students eligible for FRL increases.³² A public school with 0% of students eligible for FRL has a 95% chance of offering a visual arts course, while a school with 50% of students eligible for FRL has a 86% chance of offering a visual arts course, while a school with 100% of students eligible for FRL has a 66% chance of offering a visual arts course.³³ Thus, schools in lower-income neighborhoods are less likely to offer courses in visual arts compared to schools in higher-income neighborhoods.

An adult’s educational level and income are also correlated with their own childhood exposure to the arts, with more frequent visits of museums and galleries as a child associated with higher educational level and higher income later in life. The NEA proposes two explanations: (1) children who are privileged enough to visit an art museum also enjoy socioeconomic advantages, including the ability to afford and attend college; or (2) early participation in the arts encourages children to pursue opportunities like education to “expand their horizons.”³⁴

However, in its report the NEA neglects to connect the second explanation to the first, that wanting and being able to pursue education to widen one’s horizons is dependent on one’s existing financial resources and that early participation in the arts is already selective for higher income groups. Early participation in the arts depends on the accessibility of arts programs in schools, which depends on school resources and the socioeconomic levels of the surrounding community, assessed by using FRL numbers. Early participation and encouraged continuation also depend on the child’s guardians’ views of arts and arts education, and if the guardian or guardians are less educated and less wealthy, then they are less likely to visit museums, and therefore less likely to bring a child to a museum. More educated or higher-income parents and guardians are more likely to have children who take art classes in or out of school and visit an art museum.³⁵

³⁰ NAT’L ENDOWMENT FOR THE ARTS, *supra* note 27, at 27.

³¹ *Id.*

³² KENNETH ELPUS, UNDERSTANDING THE AVAILABILITY OF ARTS EDUCATION IN U.S. HIGH SCHOOLS 25–26 (2017).

³³ *Id.* at 26.

³⁴ NAT’L ENDOWMENT FOR ARTS, A DECADE OF ARTS ENGAGEMENT: FINDINGS FROM THE SURVEY OF PUBLIC PARTICIPATION IN THE ARTS, 2002–2012, at 65 (2015).

³⁵ *Id.* at 66.

White children benefit from generations of access to quality primary schooling and higher education and from the cycle of passing on informal and formal education in “high culture,” or art. The accessibility of well-funded public and private primary education is also limited to mainly middle- and upper-class white people. School segregation and residential segregation are interconnected, so the quality of schools is related to the value of residential properties.³⁶ Persistent residential segregation in the United States is tied to many factors, including neighborhood formation during Reconstruction and the Jim Crow era, white flight upon integration of schools and neighborhoods, and discriminatory practices by banks and government.³⁷ Neighborhoods with high poverty rates spend 15.6% less per student on schools than wealthier neighborhoods because public schools are funded largely by property taxes.³⁸ Schools have even fewer resources in racially segregated neighborhoods because of the additional wealth gap created by race.³⁹ Schools also receive funding from parent and school associations, which rely on the family wealth of students attending the school.⁴⁰ In addition, racially discriminatory redlining by financial institutions in the 1930s has led to the continuing economic divide. Many formerly redlined neighborhoods were mostly minority and low income and remain so today.⁴¹ Homeownership is the main method of accumulating wealth, but redlining and its lasting effects create additional barriers that prevent Black and other minority communities from building wealth.⁴²

Most museum visitors are unsurprisingly white since access to higher education is tied to wealth and wealth is concentrated in white households. After adjusting for inflation, the median white family wealth in 2016 was \$146,984, an increase from \$110,160 in 1983.⁴³ In contrast, the median Black family wealth in 2016 was \$3,557, a decrease from \$7,323 in 1983.⁴⁴ White individuals are also more likely to seek additional education after high school. In 2016, immediate college enrollment of recent high school or equivalent graduates numbered 70.5% for white graduates and 56.5% for Black graduates.⁴⁵ However, high school completion rates are similar, at 94.5% for white students and 92.2% for Black students.⁴⁶ Given that white families are overall wealthier than Black families, many Black students lack the resources that white students have from family wealth to attend college. Because museum attendance is correlated with education and wealth, Black people are less likely to visit art museums than white people in a repeating pattern of exclusion.

³⁶ Anurima Bhargava, *The Interdependence of Housing and School Segregation*, in A SHARED FUTURE 388, 388 (2018).

³⁷ Aaron Williams & Armand Emamdjomeh, *America is More Diverse Than Ever – but Still Segregated*, WASH. POST (May 10, 2018), <https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities>.

³⁸ Bhargava, *supra* note 36, at 392.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Tracy Jan, *Redlining Was Banned 50 Years Ago. It’s Still Hurting Minorities Today.*, WASH. POST (Mar. 28, 2018, 3:00 AM), <http://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today>.

⁴² *Id.*

⁴³ CHUCK COLLINS ET AL., DREAMS DEFERRED 8 (2019) (values adjusted to 2018 dollars).

⁴⁴ *Id.* at 9.

⁴⁵ LORELLE L. ESPINOSA ET AL., RACE AND ETHNICITY IN HIGHER EDUCATION 39 (2019).

⁴⁶ *Id.* at 30.

Additionally, most museums charge admission. Among American museums, 60% charge general admission fees and the remaining 40% are either free or have suggested admission.⁴⁷ The median admissions fee is \$6, although this number includes all types of museums.⁴⁸ Among the twenty-four Manhattan art museums, eighteen charge general admission with an average and median fee of \$12.⁴⁹ Admissions fees are secondary barriers to visiting, not primary, since increased visitor numbers after museums remove fees are due to repeat existing visitors and not new visitors,⁵⁰ meaning that a museum that lowers or removes its admission fee does not substantially draw in new visitors who were previously deterred by the cost. Removing entrance fees can make a museum more financially accessible, but those who take the opportunity are or reflect existing patrons, since the primary factor determining engagement is education.⁵¹

C. THE MUSEUM AS COMMUNITY MEMBER

Museums hope to draw in new visitors who do not regularly frequent museums, and a common initiative is to create “community outreach” programs.⁵² Museums are attempting to become centers for community gathering and are doing so by increasing interactive programming such as free workshops, speaker series, and concerts.⁵³ However, “community” is coded language. When museums ask how they can engage the local community, they are referring to lower-income people of color, since museums are already engaging higher-income white community members. Even if community outreach is effective and free programs draw more Black visitors to art museums, the lack of diverse artists provides little incentive for the new visitors to stay and return for the art. Museums would thus be creating separate services that give the appearance of diversity efforts and increased diverse visitor numbers while changing little about the structure and main focus of museums: the art on view. In addition, Black people working at museums or seeking to work at museums may be backed into community outreach positions instead of curatorial positions since leadership desires ambassadors who can connect to and appear sympathetic to Black communities.⁵⁴ Without changing the core art, staff, and leadership demographics, museums are creating superficial outlets for diversity efforts instead of addressing the structural issues that impede inclusion.

The availability of arts and cultural establishments within a neighborhood can strengthen community identity, improve literacy and schooling, increase civic participation, and increase public safety and

⁴⁷ SMITHSONIAN INST., GOING FREE? COOPER-HEWITT NATIONAL DESIGN MUSEUM AND GENERAL ADMISSION FEES 1 (2007).

⁴⁸ *Id.*

⁴⁹ *Id.* (updated to reflect the Met’s new admissions policy).

⁵⁰ *Id.* at 2.

⁵¹ *Id.* at 3.

⁵² Yuha Jung, *The Art Museum Ecosystem: A New Alternative Model*, 26 MUSEUM MGMT. & CURATORSHIP 321, 322 (2011).

⁵³ *Id.*

⁵⁴ Jennings & Jones-Rizzi, *supra* note 23, at 71.

health.⁵⁵ In low-income neighborhoods in New York City, high levels of cultural activity correlate with lower rates of obesity and crime and higher numbers of students scoring at the top levels for English Language Arts and Math assessments.⁵⁶ On a more individual scale, the opportunity to see artwork by and featuring Black Americans is impactful for young Black children. After President Barack Obama and First Lady Michelle Obama chose Black artists Kehinde Wiley and Amy Sherald to paint their official portraits, a photo of a young Black girl gazing up in awe at Sherald's painting of Michelle Obama went viral on the Internet. Sherald responded that the moment made her think of an elementary school trip to a museum during which she saw a painting of a Black man, which made her realize she could become an artist.⁵⁷ For that young girl, “[w]hat dreams may come?”⁵⁸

D. THE IMPACT OF MUSEUM APPROVAL ON THE VALUE OF ART

The quality and cultural value of art is said to be subjective, but those who determine whether art is “good” are curators, directors, gallery owners, collectors, and critics: a realm dominated by white men.⁵⁹ When asked what makes art “good,” artists and arts professionals often deflect to saying that it depends on the viewer, which is the general public.⁶⁰ However, if the members of the general public who regularly visit museums are white and wealthy, then the cultural value and subsequent economic value of art is dependent on white and wealthy interests and tastes. William Rubin, the former Director of Painting and Sculpture at the Museum of Modern Art (“MoMA”) in New York, stated:

There’s a consensus as to what is art in most periods, but [the consensus is] not made by the man on the street. It is formed by those deeply concerned with the substance of art. This is not elitist, because anyone may participate. Basically, the larger public makes a subjective determination: I know art when I see it.⁶¹

Essentially, he proposes that anyone with an appreciation and interest in art determines what is and is not art, and having that concern raises one above

⁵⁵ NYC DEP’T OF CULTURAL AFFS., *CREATENYC: A CULTURAL PLAN FOR ALL NEW YORKERS* 85 (2017) (citing MARK J. STERN & SUSAN C. SEIFERT, *THE SOCIAL WELLBEING OF NEW YORK CITY’S NEIGHBORHOODS: THE CONTRIBUTION OF CULTURE AND THE ARTS* (2017)). However, it is unclear whether the improvement within a neighborhood is due to the effects of the arts and cultural establishments or due to the gentrification that often follows the presence of arts and cultural establishments. See Decolonize the Art World (@decolonizetheartworld), INSTAGRAM, <https://www.instagram.com/p/CCLw0D-FE0J> (last visited Jan. 16, 2021) (“Many of today’s best known and most celebrated arts districts . . . used to be predominantly working class. But most of the working class people who lived in these neighborhoods have been displaced by gentrification and artwashing . . .”).

⁵⁶ NYC DEP’T OF CULTURAL AFFS., *supra* note 55, at 87.

⁵⁷ Brittany Britto, *Photo of Girl Staring in Awe at Michelle Obama Portrait Goes Viral, Resonates with Baltimore Artist*, *BALT. SUN* (Mar. 5, 2018), <https://www.baltimoresun.com/features/baltimore-insider/bs-fe-little-girl-parker-curry-amy-sherald-michelle-obama-portrait-viral-20180305.htmlstory.html>.

⁵⁸ *Id.*

⁵⁹ Elizabeth Méndez Berry & Chi-hui Yang, *The Dominance of the White Male Critic*, *N.Y. TIMES* (July 5, 2019), <https://www.nytimes.com/2019/07/05/opinion/we-need-more-critics-of-color.html>.

⁶⁰ Amei Wallach, *ART: Is it Art? Is it Good? And Who Says So?*, *N.Y. TIMES* (Oct. 12, 1997), <https://www.nytimes.com/1997/10/12/arts/art-is-it-art-is-it-good-and-who-says-so.html>.

⁶¹ *Id.*

the common “man on the street.” However, being above the “man on the street” contradicts the statement that art is for anyone. Rubin’s classification *is* elitist, since those that can afford the time and education to be “deeply concerned” with art and thus the power to dictate its cultural value are mostly wealthy white people.⁶²

As supposed authorities on the “best” art, museums and the people with power to dictate what does and does not get shown at museums have enormous influence on the market value of art.⁶³ Art history texts are often based on works in or once accessible in museums, a way of preserving an artist’s legacy.⁶⁴ Art dealers and auction houses use the term “museum quality” to denote recognition of a work’s cultural importance and the corresponding increase in demand and market value.⁶⁵ Despite the lack of price information available at art museums and the distinction between museums as nonprofit exhibits and galleries as for-profit showrooms, museums are inextricably tied to the art market and to the evaluation of artworks as economic assets.⁶⁶ For example, the Tate Britain held a David Hockney retrospective that ended on May 29, 2017 which then traveled to the Met, with the exception of one painting that went to auction at Sotheby’s London.⁶⁷ Hockney’s *15 Canvas Study of the Grand Canyon* (1998) sold for over £6 million, well above the estimated £3.8–5 million.⁶⁸ The auctioneer introduced the work as “[f]resh from the walls of the Tate,” selling the work by using its acceptance by a famous museum as a marker of prestige.⁶⁹

Within the art world, the practice of lending a work to a museum for a temporary exhibition and then immediately offering it for sale at auction is frowned upon but not prohibited.⁷⁰ Some museums contract with the lender to refrain from selling a work for “several months” after the end of the exhibition featuring the work, but such conditions are unlikely because museums are wary of turning away potential lenders who are often serious collectors of other works the museum may be interested in borrowing in the future.⁷¹ Thus, art dealers and collectors follow the exhibition history of artists to determine the immediate and long-term value of the artists’ works. Advice for collectors looking to acquire work by “emerging artists,” or artists at the beginning of their careers, includes checking to see if an artist has been included in a “public exhibition curated by a museum,” since inclusion indicates recognition of “quality.”⁷² Inclusion within a museum show could

⁶² Work in art leadership fields, such as curators, directors, gallery owners, and critics, also filter out people who cannot afford the path to climbing up the employment ladder, which often requires high levels of education (at least a master’s degree and sometimes a Ph.D.), unpaid internships, and relying on social networks for employment and referrals. See *infra* Part III.A.

⁶³ Chiara Badinella & Derrick Chong, *Contemporary Afro and Two-Sidedness: Black Diaspora Aesthetic Practices and the Art Market*, 21 *CULTURE & ORG.* 97, 120 (2015).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ BRAATHEN, *supra* note 23, at 13.

⁶⁷ Georgina Adam, *Show and Sell: The Added Value of a Museum Exhibition*, *ART NEWSPAPER* (June 12, 2018), <https://www.theartnewspaper.com/news/shop-and-sell>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Ana Bambić Kostov, *How to Look at Emerging Artists and Recognize a Future Star*, *DISCOVERY ART FAIR* (June 4, 2018), <https://discoveryartfair.com/recognize-emerging-artists>.

launch an artist's career. Conversely, inclusion in poorly-curated exhibitions with little media fanfare is "just as bad" as being excluded from museums entirely for an artist's career.⁷³ Therefore, artists who aim to increase the economic value of their body of work want to be included in museum exhibitions and collections that generate favorable reviews and are seen by the maximum number of people possible.

The path for an emerging artist to become featured in a museum show varies, but there are a few commonalities among top-selling artists. An *Artnet* study found that among the most successful five hundred American artists at auction born in 1966 or later, 35% received a degree in art but no Master of Fine Arts ("MFA") degree, 58% received an MFA, and 7% had no academic studies in art.⁷⁴ In addition, MFAs are powerful in launching careers if they are issued from specific schools. Yale's Graduate School of Art is the most prestigious graduate art program in the United States, and it produced vastly more successful artists in the study than any other MFA program, almost double the second most-attended MFA program within the study.⁷⁵ The distribution of MFA programs in the study follows a "power law" distribution in which "a small number of outcomes have dramatically higher values than the remaining population."⁷⁶ "Power law" distributions often appear in fields that adhere to a "rich-get-richer" pattern, in which more connected and resourced people have access to more opportunities than less connected people.⁷⁷ Such connections often depend on referrals within social and class circles that reinforce racial and economic divides. Because fine art, like many creative fields, is a "rich-get-richer" industry, in addition to a prestigious graduate degree, professional and familial connections create opportunities for emerging artists. If an artist has the right connections, they have access to dealers, collectors, and market recognition, and then eventually to museum prominence once a subjective level of market and cultural impact or potential impact is achieved. Prestigious MFAs signal that an emerging artist is "proximate" to those same social and professional connections, which open the door to similar recognition and success.⁷⁸ Since higher education selects for those with the ability to afford an undergraduate degree and any graduate degrees, many Black artists who may not have the same social connections as white artists are hindered from pursuing a graduate program because of lack of wealth, and thus the two main paths to attaining recognition are inaccessible.

As an example of the ability of a museum show to launch an artist's career, the painter Mark Bradford grew up as the son of a hairstylist in South Los Angeles and received an MFA in 1997.⁷⁹ The first major show featuring his work was a group show at the Studio Museum in Harlem in 2001.⁸⁰ In

⁷³ KELLIE JONES, *It's Not Enough to Say "Black is Beautiful": Abstraction at the Whitney, 1969–1974*, in *EYEMINDED: LIVING AND WRITING CONTEMPORARY ART* 397, 408 (2011).

⁷⁴ Ben Davis, *Is Getting an MFA Worth the Price?*, ARTNET NEWS (Aug. 30, 2016), <https://news.artnet.com/art-world/mfa-degree-successful-artists-620891> (subtracting fifty-two names that focus on street art, American West art, and celebrities that also happen to create art as a hobby).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ ALBERT-LÁSZLÓ BARABÁSI, *LINKED: THE NEW SCIENCE OF NETWORKS* 88 (2002).

⁷⁸ Davis, *supra* note 74.

⁷⁹ Calvin Tomkins, *What Else Can Art Do?: The Many Layers of Mark Bradford's Work*, NEW YORKER (June 15, 2015), <https://www.newyorker.com/magazine/2015/06/22/what-else-can-art-do>.

⁸⁰ *Id.*

2007, the Whitney Museum of American Art (“the Whitney”) featured a small but well-reviewed solo show and then purchased one of his works.⁸¹ The Whitney was his breakthrough: the New Museum in New York then commissioned him to make a work, and the Wexner Center for the Arts assembled the first survey of his work which would travel to the Institute of Contemporary Art in Boston, the Museum of Contemporary Art in Chicago, the Dallas Museum of Art, and the San Francisco Museum of Modern Art (“SFMOMA”).⁸² In 2017, Bradford represented the United States at the Venice Biennale,⁸³ then in the same year he had a show at the Hirshhorn Museum and Sculpture Garden in Washington, D.C.⁸⁴ The first works he sold after the 2001 Studio Museum show went for \$5,000 each.⁸⁵ Following the 2007 Whitney show, one of his works that went to auction was estimated between \$100,000–\$150,000 and ultimately sold for \$173,000.⁸⁶ In 2018, following the Biennale and Hirshhorn shows, one of his paintings was estimated at auction between \$8.3–\$11.1 million and ultimately sold for \$11.9 million, making him one of the most expensive living American artists and the most expensive living artist of color.⁸⁷ In the span of twenty years, Bradford became one of the most in-demand American artists with the help of strategic museum shows.

Black artists who were excluded or misrepresented by major institutions often formed collectives, galleries, and performance spaces for Black art. These art groups—such as AfriCOBRA in Chicago, Studio Z in Los Angeles, and Where We At and A.I.R. Gallery in New York—emerged during and after the Black Arts Movement in the 1960s–70s to create new spaces for and to feature the work of Black artists. The Studio Z collective included, among others, David Hammons, Senga Nengudi, and Maren Hassinger, artists who were excluded from or misrepresented by major museums. Los Angeles-based Black artists saw the “role of the West as a site of possibility, peace, and utopia,” but when they attempted to participate and contribute, they were forced out by segregation, economic inequality, and racially restrictive covenants.⁸⁸ When Hassinger and Betye Saar broke through with simultaneous solo shows in Los Angeles in the 1980s, critics focused on their identities rather than their work, to Hassinger’s disappointment.⁸⁹ Hassinger and Nengudi already faced difficulty in getting their work shown, since their work was not considered Black or feminist enough to fit into contemporary political movements.⁹⁰ Thus, they and other Black artists decided to form

⁸¹ Nate Freeman, *This Work Will Put Mark Bradford Among the Most Expensive Living Artists*, ARTSY (Feb. 22, 2018, 6:53 PM), <https://www.artsy.net/article/artsy-editorial-work-will-mark-bradford-10-expensive-living-artists>.

⁸² *Id.*

⁸³ The Venice Biennale is a prestigious biennial exhibition of art, including fine art, in Venice, Italy that features international art. There are permanent national pavilions at the Biennale and each country can choose the artist that represents them for each Biennale.

⁸⁴ Freeman, *supra* note 81.

⁸⁵ Tomkins, *supra* note 79.

⁸⁶ *Mark Bradford Untitled (Corner of Desire and Piety) III*, PHILLIPS, <https://www.phillips.com/detail/mark-bradford/NY010316/9> (last visited Dec. 20, 2019).

⁸⁷ *Mark Bradford Helter Skelter I*, PHILLIPS, <https://www.phillips.com/detail/mark-bradford/UK010118/14> (last visited Dec. 20, 2019); Freeman, *supra* note 81.

⁸⁸ WE WANTED A REVOLUTION: BLACK RADICAL WOMEN, 1965–85: A SOURCEBOOK 106 (Catherine Morris & Rujeko Hockley eds., 2018).

⁸⁹ *Id.* at 107.

⁹⁰ *Id.*

their own collectives and spaces. Hammons, Nengudi, Hassinger, and Saar are now all collected and exhibited by major museums, decades after they began making and showing work. Hassinger was featured in a 2018 retrospective at the Baltimore Museum of Art (“BMA”). After returning to artmaking after years of teaching, she is finally experiencing mainstream prominence and income coming in from her artwork alone.⁹¹

Museums that focus on showing work by only Black artists, such as the Studio Museum in Harlem, provide another dilemma: “Are African American artists stifled by the segregation of black museums, or do these institutions allow their art to flourish despite the dominant culture’s lack of interest?”⁹² With the exposure gained by shows in Black museums, Black artists like Mark Bradford have greater chances of being shown in mainstream museums. However, mainstream museums then do not need to take the risk of showing new Black artists—they can leave that labor to Black museums, and then capitalize on it once the artists have shown their potential. Maurice Berger asks, “To what extent does the mere existence of African American museums unintentionally absolve majority institutions of their social responsibility to black Americans?”⁹³ Kinshasha Holman Conwill, the executive director of the Studio Museum in Harlem, believes that Black museums are necessary because they give Black artists a platform long denied by mainstream museums.⁹⁴ She states that people who believe Black museums perpetuate the cycle are fantasizing that mainstream museums would be immediately receptive to Black artists, that “there would be this great opening of doors and black artists would start pouring in to the mainstream of American art. Well, that’s not what is happening.”⁹⁵

III. SNAPSHOTS OF MUSEUMS AND THEIR RELATIONSHIP WITH BLACK ARTISTS THROUGH HISTORY

This Part will focus mainly on the BMA in Baltimore, Maryland; the Whitney in New York City, New York; and the Detroit Institute of Arts (“DIA”) in Detroit, Michigan. These three museums were selected for analysis based on status as a nonprofit private museum, location in a major metropolitan area in the United States, establishment before 1940, display of work by American artists, and historical or recent significant acts to address the representation of Black artists.⁹⁶ The three museums have mission statements that reflect commitments to diversity and inclusion, but there is a “very weak association” between a collection’s mission and diversity.⁹⁷ None of the three museums has had a Black director.

⁹¹ Cara Ober, *The Relentless Efforts of Maren Hassinger Result in an Overdue Retrospective*, HYPERALLERGIC (Oct. 12, 2018), <https://hyperallergic.com/464931/the-relentless-efforts-of-maren-hassinger-result-in-an-overdue-retrospective>.

⁹² Maurice Berger, *Are Art Museums Racist?*, ART IN AM. (Mar. 31, 2020, 12:59 PM), <https://www.artnews.com/art-in-america/features/maurice-berger-are-art-museums-racist-1202682524> (first published Sept. 1990).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ BMA was established in 1914, the Whitney in 1930, and DIA in 1883.

⁹⁷ Topaz et al., *supra* note 2, at 13.

A. DEMOGRAPHICS OF BALTIMORE, NEW YORK CITY, AND DETROIT
AND THE MUSEUMS' MISSION STATEMENTS

The city of Baltimore is 62.7% Black and has a long history of segregation that still continues today in the location of housing.⁹⁸ The BMA is located within the narrow North-South strip of the city that is predominantly white. When Christopher Bedford was appointed director of the BMA in 2016, the mission changed to state: “The Baltimore Museum of Art connects art to Baltimore and Baltimore to the world, embodying a commitment to artistic excellence and social equity in every decision from art presentation, interpretation, and collecting, to the composition of our Board of Trustees, staff, and volunteers—creating a museum welcoming to all.”⁹⁹ The BMA is an encyclopedic museum, meaning that it shows work from all over the world. Since removing the admission fee in 2016, in one year the BMA found that first-time visitors made up 37% of visitors and the number of visitors of color tripled.¹⁰⁰ In addition, the museum is accessible by a few bus lines and a free shuttle. The free shuttles mostly travel along the North-South strip of the city with limited routes East-West, where the Black population is concentrated.

In New York City, the demographics vary by borough. New York City overall is 24.3% Black, but in Manhattan where the Whitney is located, the number drops to 17.8%.¹⁰¹ The Whitney moved from Greenwich Village, to Midtown Manhattan, to the Upper East Side, and finally to the Meatpacking district in 2015. The Whitney only displays work by American artists and was founded to focus exclusively on American art. The museum's mission originally stated:

It would be presumptuous to point out the road upon which art must travel. We look to the artists to lead the way. . . . As a museum, we conceive it to be our duty to see that he is not hampered in his progress by lack of sympathy and support. . . . [O]ur chief concern is with the individual artist.¹⁰²

The 2015 update to the mission states:

The Whitney Museum of American Art seeks to be the defining museum of twentieth- and twenty-first-century American art. The Museum collects, exhibits, preserves, researches, and interprets art of the United States in the broadest global, historical, and interdisciplinary contexts. As the preeminent advocate for American

⁹⁸ *QuickFacts: Baltimore City, Maryland (County)*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/baltimorecitymarylandcounty/PST045218> (last visited Jan. 16, 2021).

⁹⁹ *QuickFacts: Baltimore City, Maryland (County)*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/baltimorecitymarylandcounty/PST045218> (last visited Jan. 16, 2021).

¹⁰⁰ Nancy Thebaut, *Improving Accessibility to Art Museums*, 35 POL'Y STUD. J. 562, 562 (2007).

¹⁰¹ *QuickFacts: New York City, New York*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/newyorkcitynewyork/PST045219> (last visited Jan. 16, 2021); *QuickFacts: New York County (Manhattan Borough), New York*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/newyorkcountymanhattanboroughnewyork/EDU635219> (last visited Jan. 16, 2021).

¹⁰² WHITNEY MUSEUM OF AM. ART, HANDBOOK OF THE COLLECTION 14 (Dana Miller ed., 2015).

art, we foster the work of living artists at critical moments in their careers. The Whitney educates a diverse public through direct interaction with artists, often before their work has achieved general acceptance.¹⁰³

The Whitney is located by bus and subway stops. Admission is \$25 for adults and free for those eighteen and under.

The City of Detroit is 78.3% Black, a result of white flight that turned the majority white city to majority Black.¹⁰⁴ DIA moved to the downtown area in the early 1900s. It is an encyclopedic museum. Admission is generally \$14 for adults, but in 2012, voters in Wayne, Oakland, and Macomb counties approved a property tax to fund DIA in exchange for free admission, free school field trips with bus transportation, and more community partnerships, among other benefits.¹⁰⁵ However, the tax barely passed in Macomb county. And although the museum promised that after ten years the public millage support would no longer be needed, Detroit's bankruptcy is leading DIA to renew the tax, which casts DIA in an unfavorable light.¹⁰⁶ Its current vision states: "The DIA will be the town square of our community, a gathering place for everybody."¹⁰⁷ Its current mission states: "The DIA creates experiences that help each visitor find personal meaning in art, individually and with each other."¹⁰⁸ Its 2021 goal is to be "relevant to a broad and diverse audience."¹⁰⁹

B. 1900S–60S: THE EARLY EXHIBITIONS

Early major exhibitions in the 1900s of art by Black artists carried the burden of representing Black art and culture to a typical white museumgoer. What appealed to museums and critics during that time were depictions of Black figures within or as the work—thus, work that was visually and immediately about Blackness—and so work that involved other imagery or subjects were deemed not Black enough. In 1932, shortly after the Whitney's establishment, founder Gertrude Vanderbilt Whitney purchased the sculpture of a Masai warrior, *Congolais* (1932), by Nancy Elizabeth Prophet, an African American and Native American artist.¹¹⁰ It was one of the first works by an African American artist that the Whitney acquired, in addition to sculptor Richmond Barthé's work *Blackberry Woman* (1932), which was exhibited in the Whitney's first annual exhibition.¹¹¹ Both works depict Black people.

¹⁰³ *Mission & Values*, WHITNEY MUSEUM AM. ART, <https://whitney.org/about/mission-values> (last visited Jan. 15, 2021).

¹⁰⁴ *QuickFacts: Detroit City, Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/detroitcitymichigan,MI/PST045218> (last visited Jan. 16, 2021).

¹⁰⁵ *Millage Details*, DET. INST. ARTS, <https://www.dia.org/visit/millage-details> (last visited Dec. 19, 2019).

¹⁰⁶ Michael H. Hodges, *DIA Seeks 10-year Millage Renewal Despite 2012 Vow*, DET. NEWS (Nov. 6, 2019, 11:07 AM), <https://www.detroitnews.com/story/entertainment/arts/2019/11/06/dia-seeks-millage-renewal-despite-2012-pledge/4169446002>.

¹⁰⁷ *About the DIA*, DET. INST. ARTS, <https://www.dia.org/about> (last visited Jan. 15, 2021).

¹⁰⁸ *Id.*

¹⁰⁹ *Our Strategic Plan*, DET. INST. ARTS, https://www.dia.org/sites/default/files/strategic_plan_draft_combined.pdf (last visited Jan. 15, 2021).

¹¹⁰ COOKS, *supra* note 6, at 23.

¹¹¹ LISA FARRINGTON, CREATING THEIR OWN IMAGE: THE HISTORY OF AFRICAN AMERICAN WOMEN ARTISTS 114 (2011); COOKS, *supra* note 6, at 23.

Meanwhile, in 1937, BMA's Board of Trustees President Henry Treide surveyed various social, labor, and special interest groups in Baltimore to gather information on what communities wanted from the museum.¹¹² The committee representing the local African American community responded that it wanted to see work by and for African Americans.¹¹³ In response, BMA organized its first exhibition of art by Black artists titled *Contemporary Negro Art* with the assistance of the Harmon Foundation, a privately-funded organization that promoted Black artists.¹¹⁴ It was one of the first exhibitions in the United States at a major museum that featured African American art by African American artists as the centerpiece and not as a foil or support.¹¹⁵ The exhibition, while groundbreaking, remained local in impact at the time: BMA did not tour the show or purchase any of the art from the exhibition.¹¹⁶ Writer and "leader" of the Harlem Renaissance Alain Locke praised the museum for featuring the work of contemporary Black artists but believed that the art needed to succeed in a further purpose of teaching an audience, presumably white, more about Black history and culture.¹¹⁷ He thought that the work was not Black enough; he wanted to see more of the "healthy primitivism."¹¹⁸ Black artists faced challenges from both Black and white critics to take on the labor of educating white audiences and representing history while also not offending or repelling white people, and often those works deemed successful displayed Black people or "primitive" styles without addressing social issues about identity, race, and power. For example, Black artists who worked in Abstract Expressionism are often excluded from discussions of the movement. Curator Beryl White explained, "The idea that black artists can produce work that is not visibly black offers a great point of resistance for white art historians, curators, and critics[.] . . . This art cannot be easily ghettoized; it's harder to control work that doesn't fit white people's perceptions of who black people are."¹¹⁹

C. 1960S: CIVIL RIGHTS MOVEMENT AND ART ACTIVISM

Activism from the civil rights movement carried over into the art world in the 1960s. In 1969, in response to the Met exhibit *Harlem on My Mind* that featured no Black artists, a group of African American artists formed the Black Emergency Cultural Coalition ("BECC").¹²⁰ The BECC turned to the Whitney, a museum proclaiming to be dedicated to American artists, for inclusion. Representatives from the BECC met with then-Whitney director John I. H. Baur and put forward a list of demands, including: (1) a major group show of Black artists organized by a Black curator, (2) increased representation of Black artists in the Whitney Annuals,¹²¹ (3) a commitment

¹¹² COOKS, *supra* note 6, at 34–35.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See id.*

¹¹⁶ *Id.* at 42.

¹¹⁷ *Id.* at 37–38.

¹¹⁸ *Id.* at 38.

¹¹⁹ Berger, *supra* note 92 (citation omitted).

¹²⁰ COOKS, *supra* note 6, at 80–81.

¹²¹ The Whitney Annuals began as two survey exhibitions a year in the 1930s and, by the 1960s, became one show per year. There were no juries and no prizes, as were formerly common at art

to hire Black curatorial staff, (4) a commitment to mount a minimum of five solo shows a year for younger artists in the lobby gallery, and (5) purchasing more work by Black artists.¹²² Baur and the Whitney agreed to all five demands.¹²³ However, major tension surrounded the demand for Black curators. The BECC had recognized that Black artists were more frequently shown in museums than they had been in the past, so demands had to progress to representation within professional staff.¹²⁴ Black curators and educators in museums were rare at the time, and the Whitney was initially resistant to the demand, though it eventually accepted.¹²⁵

The BECC action and pressure led to immediate implementation of its demands. Having never previously shown any commitment to featuring work by African American artists since the time of its founding, the Whitney exhibited eleven solo shows and one group show by African American artists in the six-year time span from 1969–75.¹²⁶ This level of commitment was unprecedented but would not have occurred without activist intervention.¹²⁷ Alvin Loving’s solo show in 1969 was the first by an African American artist at the Whitney.¹²⁸ However, conflict arose surrounding the group show *Contemporary Black Artists in America* in 1971. Six months before the opening of the show, the BECC began planning protests, and two months into its opening, seven artists who had withdrawn their work from the exhibition sent a letter to the periodical *Artforum* that critiqued the show’s curation.¹²⁹ The artists¹³⁰ acknowledged that the Whitney was trying to make up for years of exclusion of Black artists, but they called the show an “anti-curated . . . survey” that was the “worst form of tokenism” and merely reactionary to the demands of the BECC.¹³¹ The show was organized quickly, poorly curated because it was curated by a white man without consulting any Black art experts or consultants, held during the off-season when crowd attendance was low, and included few critical essays in the catalogue to accompany the work, leaving critics and audiences with the impression that Black artists were “decorative . . . imitator[s]” not creating Black-enough art because they had no “backgrounds in tribal art.”¹³² Overall, sixteen artists ended up withdrawing their work from the exhibition because of the Whitney’s failure to present a group show that properly represented and respected the artists involved.¹³³

exhibitions. Curators chose the artists to present, but the artists had discretion to choose what of their own work to show, another novel change from the past. The Whitney Annuals are today the Whitney Biennial.

¹²² JONES, *supra* note 73, at 399.

¹²³ Black women felt that the BECC excluded them from making requests for representation by Black women artists and curators. Alma Thomas was the only woman to receive a solo show through the demands.

¹²⁴ JONES, *supra* note 73, at 399.

¹²⁵ *Id.* at 399–400.

¹²⁶ *Id.* at 400.

¹²⁷ *Id.*

¹²⁸ *Id.* at 402.

¹²⁹ *Id.* at 417.

¹³⁰ The seven artists were John Dowell, Melvin Edwards, Sam Gilliam, Richard Hunt, Daniel LaRue Johnson, Joe Overstreet, and William T. Williams. *Id.*

¹³¹ *Id.*

¹³² *Id.* at 416; Grace Glueck, *15 of 75 Black Artists Leave as Whitney Exhibition Opens*, N.Y. TIMES (Apr. 6, 1971), <https://www.nytimes.com/1971/04/06/archives/15-of-75-black-artists-leave-as-whitney-exhibition-opens.html>.

¹³³ JONES, *supra* note 73, at 417.

A year later, in 1972, Alma Thomas was the first African American woman artist to have a solo show at the Whitney.¹³⁴ Despite the significance, there was limited media review of her show.¹³⁵ A review in *Art News*, a scant three sentences long, described Thomas's work as "vibrant primitivist abstractions [which] pulsate with an air of celebration."¹³⁶ The reviewer was incapable of considering her work beyond the association of Black art with "primitive." Overall, although the Whitney was impressive in implementing an immediate action plan to show Black artists, the artists and their work were still marginalized and Othered by the Whitney and by critics. Ten of the solo exhibitions were held in a small lobby gallery and Loving's was held in the second-floor auditorium, all spaces that were intended to show students and emerging artists even though the Black artists relegated there were well-established in their fields.¹³⁷

D. 1990s–2010s: CONTEMPORARY BLACK ART, DIA'S STAFFING ISSUES, AND HIGH MUSEUM'S SUCCESS

In the 1990s, exhibitions about and with contemporary Black artists were still rare. The Whitney's 1994 group show *Black Male: Representations of Masculinity in Contemporary American Art*, curated by Thelma Golden, showed work not by all Black artists but all about the subject matter of Black masculinity in reaction to representations of Black men in the news in the 1980s and 90s.¹³⁸ There was enormous pressure on Golden and the show because the work could risk becoming representative of art about Black men or by Black artists.¹³⁹ Critics complained that the show focused on negative stereotypes of Black men, and although Black people may have understood the social commentary of the work, white people may have missed the meaning and taken the images at face value.¹⁴⁰ Because there were so few shows with Black artists, or about Black art, the existing ones still faced the risk and labor of representing the entire Black identity to white audiences.

In 2000, the General Motors Center for African American Art at DIA was endowed at the start of Graham Beal's directorship, and Beal hired curator Valerie Mercer to head the center in 2001.¹⁴¹ However, despite the endowment and Mercer's hiring, very little was accomplished in the years following due to the persistent marginalization of Black staff and curators, and the museum's desire to withhold radical views about race as to not anger white audiences. No large exhibitions of African American art were held and the only notable event was a solo show by artist Julie Mehretu in 2007.¹⁴² In 2015, new director Salvador Salort-Pons oversaw the prioritization of acquiring and showing Black art, beginning with a three-year initiative that

¹³⁴ *Id.* at 412.

¹³⁵ *Id.* at 413.

¹³⁶ *Id.*

¹³⁷ *Id.* at 403.

¹³⁸ COOKS, *supra* note 6, at 110–24.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Mark Stryker, *DIA Launches Massive Effort to Acquire African-American Art*, DET. FREE PRESS (Nov. 18, 2016, 5:05 PM), <https://www.freep.com/story/entertainment/arts/2016/07/20/dia-african-american-art-david-hammons/87291024>.

¹⁴² *Id.*

included the million-dollar purchase of David Hammons's *Bird* (1990).¹⁴³ An exhibition at the start of his leadership was *30 Americans*, on tour from the Rubell Family Collection of Miami, Florida.¹⁴⁴ The show featured works by important African American artists from the past thirty years, "focus[ing] on issues of racial, sexual, and historical identity in contemporary culture."¹⁴⁵ The show drew 46,560 visitors, 16% higher than the museum's goal, and 41% of the visitors were Black.¹⁴⁶

At the time, the show was a significant but isolated success for DIA in reaching Black museumgoers, many of whom did not regularly visit museums. Around 79.7% of the population of the City of Detroit was Black in 2016, but only 10% of daily DIA visitors were Black.¹⁴⁷ The numbers from *30 Americans* showed that when there were thoughtful and well-curated exhibitions of Black artists, people who feel excluded from museums because their identities and backgrounds are not usually represented or, if at all, misrepresented will attend. It is unsurprising that Black visitor numbers were usually low—in 2018, 94.7% of the artists in DIA's collection available for public search online were white, while only 1.6% were Black.¹⁴⁸

Despite DIA's historically low success in reaching local Black communities, it was selected as a museum for case study by the Andrew W. Mellon Foundation in 2018 because of its high percentage of diverse staff and leadership among comparable museums.¹⁴⁹ The Mellon Foundation's 2015 Art Museum Staff Demographic Survey found that from 181 participating museums, 72% of overall staff identified as white non-Hispanic, while 28% identified as people of color.¹⁵⁰ Among "intellectual leadership"¹⁵¹ jobs—classified as curators, conservators, educators, and senior administrators—84% identified as white non-Hispanic, 6% as Asian, 4% as Black, and 3% as mixed race.¹⁵² In contrast, DIA was relatively more diverse as 53% of overall staff identified as white non-Hispanic, 39% as Black, and 9% as Asian, Hispanic, or mixed race.¹⁵³ Among "intellectual leadership," 71% identified as white non-Hispanic, 15% as Black, and 14% as Asian, Hispanic, or mixed race.¹⁵⁴ The drop in numbers of Black staff in "intellectual leadership" roles both within DIA and overall in the museum field reflects the visible effects of a system that has excluded and continues to exclude Black people from positions of institutional power.

¹⁴³ *Id.*

¹⁴⁴ *30 Americans*, RUBELL MUSEUM, <https://rubellmuseum.org/30a-statement> (last visited Dec. 20, 2019).

¹⁴⁵ *Id.*

¹⁴⁶ Stryker, *supra* note 141.

¹⁴⁷ *ACS Demographic and Housing Estimates*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?g=0400000US26_1600000US2622000&d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2016.DP05 (last visited Mar. 18, 2021); Stryker, *supra* note 141.

¹⁴⁸ Topaz et al., *supra* note 2, at 8.

¹⁴⁹ See generally LIAM SWEENEY & KATHERINE DANIEL, *BECOMING A PUBLIC SQUARE: DETROIT INSTITUTE OF ARTS* (2018), <https://doi.org/10.18665/sr.309184>.

¹⁵⁰ *Id.* at 7.

¹⁵¹ I have put the phrase "intellectual leadership" in quotation marks because classifying those jobs as "intellectual" in comparison to other staff positions emphasizes the class and racial divide and inequity.

¹⁵² SWEENEY & DANIEL, *supra* note 149, at 7.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

At DIA, the gap between staff and leadership is even more pronounced by the layout of the museum's offices, which highlights the inequality. The front-line staff, including security, facilities, and gift store workers are mostly Black and work on the first floor of the museum.¹⁵⁵ The leadership is mostly white, and have their offices on the third floor.¹⁵⁶ Employees described the "great divide" between the floors, in which third-floor workers make decisions from an "ivory tower" without consulting or appreciating first-floor workers.¹⁵⁷ The class, wealth, and racial divide has been integrated as part of the system and takes on a physical upstairs-downstairs dynamic at DIA.

Salort-Pons is aware of the divide and is attempting to break it down with mixed results. He implemented a policy similar to that of the National Football League called the "Rooney-rule" in which teams are required to interview ethnic-minority candidates for leadership positions.¹⁵⁸ In 2016, he hired two assistant curators for the contemporary department when he was only planning to hire one.¹⁵⁹ By hiring Taylor Aldridge and Lucy Mensah, both Black women, DIA increased the national percentage of Black curators in encyclopedic museums by 18%.¹⁶⁰ The two curators collaborated on a successful exhibition, *Making Home* (2018), but tensions during and after the show regarding the extent and creative freedom of their roles eventually led Aldridge and Mensah to resign together after the close of the show.¹⁶¹ Aldridge and Mensah wanted to integrate critical race theory and Black feminist theory into their research and curation. Mercer, the more senior curator, warned that racial issues had to be brought in strategically and gently. She believed that discussion of critical race theory and Black feminist theory in the art or surrounding research would "emphasiz[e] differences" and possibly anger audiences.¹⁶² In Mercer's view, work surrounding racial issues would alienate white audiences, an effect she wanted to avoid. Aldridge and Mensah's position, it appears, was to curate art for Black audiences. Mercer's resistance reflects the view against identity politics, in which some believe that focusing on a specific racial identity and on diversity creates division, rather than commonality between Americans.¹⁶³

DIA gained numeric diversity in the curatorial department and then promptly lost it when it expected to continue operations without any changes to roles, communication, structure, or discussion. DIA's staff and leadership are still more racially diverse than those of most other museums. However, that DIA's diversity is considered above average despite the inequality and segregation leaves questions about the practices and experiences of Black employees at museums that rank at or below the national museum average.

¹⁵⁵ *Id.* at 9.

¹⁵⁶ *Id.* at 9–10.

¹⁵⁷ *Id.* at 10.

¹⁵⁸ *Id.* at 11.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 11–12.

¹⁶¹ *Id.* at 12–14.

¹⁶² *Id.* at 14.

¹⁶³ See generally Mark Lilla, *The End of Identity Liberalism*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html>.

The High Museum of Art in Atlanta, Georgia is a rare case of an art museum that managed to triple its “nonwhite” audience from 15% to 45% in two years, almost reflecting the 51% “nonwhite” population of the Atlanta metro area.¹⁶⁴ According to Rand Suffolk, the new director who oversaw the changes, there were a few factors that led to the improvement: one third of the in-house exhibitions in 2017 featured artists of color, marketing focused less on a few large exhibitions and more on smaller exhibitions and programming, he reduced admission fees, he diversified docents, and he attempted to diversify staff.¹⁶⁵ Suffolk admits that the staff could still be more diverse, since the staff was 69.6% white in 2015 and decreased only to 65.5% white in 2017.¹⁶⁶ Given that these changes correlated with a major increase in attendance of people of color without significant diversification of staff and board members, the latter of which was not addressed by Suffolk, museums that do diversify staff and board in addition to implementing programming changes would likely see similar if not greater increases in such attendance.

E. 2020: MUSEUMS’ RESPONSES TO THE BLACK LIVES MATTER MOVEMENT

In the summer of 2020, the murder of George Floyd by police sparked protests throughout the United States calling for the end of police brutality and white supremacy. People looked to companies and institutions, including museums, for their response and commitment to end racist practices within their respective organizations. Many museums posted on Instagram an image of a work by a Black artist or a black square with the #BlackLivesMatter hashtag.¹⁶⁷ However, their supposed activism is performative given their roles in enforcing racial and class divides. Museums are built with colonialism. Museums using a slogan rather than admitting to “their own roles in the ‘race problem’ ignites a desire for a more holistic investigation of museums . . . as entities with both the buying power and the political ties to make a lasting impact.”¹⁶⁸

Anonymous and named employees of museums came forward to expose the racism they experienced while working in various institutions. The Instagram account @ChangeTheMuseum features anonymous text submissions, some explicitly naming museums and senior staff. For example, one poster describes the culture of the “Whitney family” in which employees who do not commit all of their energy and time to the museum are “treated as difficult.”¹⁶⁹ Another former employee at the Whitney describes how front-of-house staff, mostly young and people of color, are

¹⁶⁴ Julia Halperin, *How the High Museum in Atlanta Tripled Its Nonwhite Audience in Two Years*, ARTNET NEWS (Dec. 22, 2017), <https://news.artnet.com/art-world/high-museum-atlanta-tripled-nonwhite-audience-two-years-1187954>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See The Metropolitan Museum of Art (@metmuseum), INSTAGRAM, <https://www.instagram.com/p/CA6Zl6clcdq> (last visited Jan. 16, 2021); Whitney Museum of American Art (@whitneymuseum), INSTAGRAM, <https://www.instagram.com/p/CA5mLM8D9LD> (last visited Jan. 16, 2021).

¹⁶⁸ Kimberly Drew, *What Should a Museum Look Like in 2020?*, VANITY FAIR (Aug. 24, 2020), <https://www.vanityfair.com/culture/2020/08/what-should-a-museum-look-like-in-2020>.

¹⁶⁹ Change the Museum (@changethemuseum), INSTAGRAM, <https://www.instagram.com/p/CCqXv0G11Ku> (last visited Jan. 16, 2021).

expected to recognize office staff, mostly white and wealthy, at the entrance even though office staff rarely interact with or show their identification to front-of-house staff.¹⁷⁰ Current and former employees, and the general public, were also quick to question the tepid responses of museums to the Black Lives Matter movement. A sudden influx of artwork by Black artists on museum social media feeds and newly announced exhibitions focusing on Black art does not indicate an anti-racist institution or absolve a museum of their wrongdoing. Curator Kimberly Drew asked, “[D]o you have staff that are a representation of [Black artists’ work] and can speak authentically to the cultural nuances of said work? Are that same staff equitably paid? Are they listened to and cared for? Do roles for them exist outside of educational and community engagement departments?”¹⁷¹ Museums react quickly to social happenings—museum acquisitions of work by African American artists rose 63% in 2015 after the 2014 Black Lives Matter protests¹⁷²—but they respond in a mostly capitalistic sense in buying and showing, not in the long-lasting form of restructuring power hierarchies.

The Whitney attempted to document and exhibit the work of artists in response to the Black Lives Matter movement but was met with criticism due its exploitative practices. See in *Black*, a collective of Black photographers, organized a fundraiser selling one hundred dollar prints by participating Black photographers to benefit organizations addressing civil rights, education and the arts, intersectionality, community building, and criminal justice reform.¹⁷³ The Whitney purchased some prints and notified the artists via email that it had “acquired” the work and would show them in an exhibition called “Collective Actions: Artist Interventions in a Time of Change.”¹⁷⁴ The artists and the collective were outraged. The works were priced so people who normally would not be able to afford prints could purchase them; the Whitney could afford to purchase their works full price.¹⁷⁵ When confronted, the museum offered the artists lifetime free museum entry. In response to the criticism, the Whitney cancelled the exhibit, angering some artists further because they believed the Whitney should have showed the works after paying for the full value.¹⁷⁶ The Whitney “[p]illaging Black [a]rt [i]s [n]othing [n]ew,” says journalist Alex Zaragoza.¹⁷⁷ “That the Whitney would scoop up prints at an accessible price . . . and use it to capitalize off this moment of social reckoning to gain clout points . . . shows how exploitative and capitalistic an institution it is.”¹⁷⁸

¹⁷⁰ Change the Museum (@changethemuseum), INSTAGRAM, <https://www.instagram.com/p/CEZVBylX9S> (last visited Jan. 16, 2021).

¹⁷¹ Drew, *supra* note 168.

¹⁷² Halperin & Burns, *supra* note 7.

¹⁷³ See in *Black* (@seeinblackproject), INSTAGRAM, <https://www.instagram.com/p/CBiomdeFkST> (last visited Jan. 16, 2021).

¹⁷⁴ Julia Jacobs & Zachary Small, *Whitney Cancels Show That Included Works Bought at Fund-Raisers*, N.Y. TIMES (Aug. 25, 2020), <https://www.nytimes.com/2020/08/25/arts/design/whitney-museum-exhibition-canceled.html>.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Alex Zaragoza, *The Whitney Museum Pillaging Black Art is Nothing New*, VICE (Aug. 28, 2020, 12:43 PM) <https://www.vice.com/en/article/n7wm9b/the-whitney-museum-pillaging-black-art-from-see-in-black-is-nothing-new>.

¹⁷⁸ *Id.*

Some people called for museums to address their history of looting from other cultures. A museum that has a large collection of African art objects, such as the Brooklyn Museum, may seem inclusive on the surface, but those objects were acquired through looting and imperialism.¹⁷⁹ Anti-Blackness in museums will not be erased until museums repatriate stolen artwork.¹⁸⁰ In June, the Denver Art museum was allegedly spray-painted with the phrase “America looted to fill this up,” and a white senior staff member who was asked about addressing colonialism referred to a repatriated work as “lost” to Cambodia.¹⁸¹ With museums filled with past and current plunder, their vague promises to do better are empty without addressing their history and committing to restructuring their leadership and board.

IV. MUSEUMS ARE NOT DIVERSIFYING

A. STEEP BARRIERS TO ENTRY FOR BLACK MUSEUM WORKERS

Curators and other leadership at museums are overwhelmingly white in part because people of color seeking a career in museums face steep barriers to entry. Some groups that are historically discriminated against—including women, and people with disabilities—are overrepresented in New York City cultural institutions.¹⁸² However, people of color are significantly underrepresented, particularly in leadership and board positions,¹⁸³ indicating a specifically higher barrier of entry for race. Power structures at museums are old and hierarchical, benefiting whiteness and wealth, and the leaders are reluctant to relinquish and redistribute their control.¹⁸⁴

Multiple factors contribute to the high barriers to entry. First, art has not been positioned as a viable career to Black students. Art history is Eurocentric, and museums are less accessible to Black children.¹⁸⁵ Curator Lowery Sims says, “African Americans were socialized into certain careers after Reconstruction; visual art was not one of them. The economic realities made a career in art even less desirable.”¹⁸⁶ Second, entry-level jobs require advanced degrees and start at minimum wage, and internships are often unpaid. A 2017 study found that the average entry-level salary of a curatorial assistant, a stepping-stone to becoming a curator, is \$42,458, which is considered “low income” in Los Angeles and “very low income” in San Francisco.¹⁸⁷ Fellowships are low-paying and a “way for museums to boost their diversity numbers” by hiring students of color without having to

¹⁷⁹ Angie Jaime, *The ‘Art World’ Can’t Exist in a Decolonized Future*, TEEN VOGUE (June 30, 2020), <https://www.teenvogue.com/story/decolonize-art-photography>.

¹⁸⁰ *Id.*

¹⁸¹ Change the Museum (@changethemuseum), INSTAGRAM, <https://www.instagram.com/p/CEKFQGF8T2> (last visited Jan. 16, 2021).

¹⁸² Julia Jacobs, *New York Knows Its Arts Organizations Have a Diversity Problem. Now What?*, N.Y. TIMES (July 29, 2019), <https://www.nytimes.com/2019/07/29/arts/design/diversity-new-york-culture.html>.

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ Berger, *supra* note 92; *see also supra* Part I.B.

¹⁸⁶ Berger, *supra* note 92.

¹⁸⁷ Carolina A. Miranda, *Column: Are Art Museums Still Racist? The COVID Reset*, L.A. TIMES (Oct. 22, 2020, 4:48 AM), <https://www.latimes.com/entertainment-arts/story/2020-10-22/art-museums-racism-covid-reset>.

promise a permanent position.¹⁸⁸ Third, as addressed in Part I.C., people of color are often backed into education and community outreach positions. Finally, smaller institutions that focus on race-specific artists are more willing to hire untrained employees of color and put in the time, effort, and money to train them. After gaining experience and some renown, those curators are poached by large museums. In the few years leading up to 2017, the Studio Museum in Harlem lost four curators to various large museums throughout the country.¹⁸⁹ Large museums are content to fill their curatorial ranks with established curators of color from other institutions rather than find, train, and pay their own; aspiring curators of color have better chances looking for employment elsewhere.

B. BACKGROUND ON MUSEUM STRUCTURE AND FUNDING

Nonprofit museums are classified as 501(c)(3) institutions, also known as charitable organizations, which can receive tax-deductible donations from individuals and corporations.¹⁹⁰ “Most private museums in the United States have corporate status” and are not, as mistakenly believed to be, charitable trusts.¹⁹¹ This confusion arises from the common labeling of members of the board of directors of museums as trustees. Charitable trusts are managed by a trustee or trustees, and private institutions are controlled by boards.¹⁹² Members of a museum’s board of directors are actually directors, and the museum director, as the general manager, is technically the president.¹⁹³ The renaming of directors as “trustees” and of the president as a “director” lends a museum the favorable but false façade of being a public trust, in which the public is the beneficiary.

As private institutions, museums generate funding from three major sources: (1) unearned revenue from fundraising from individuals, foundations, and corporations; (2) earned income through sales from admission, museum store, and restaurants; and (3) government grants and contracts.¹⁹⁴ Government funding for cultural institutions has been diminishing, especially given the policies of the Trump administration, so museums have had to rely on and aggressively pursue fundraising. Government funds shrank from supplying 38% of museums’ annual operating budgets in 1989 to 24% in 2008, while private funding increased to compensate for the loss.¹⁹⁵ In 2012, museums received 38% of their operating revenue from private donors, 24% from government agencies, and the rest from earned income and investment income.¹⁹⁶

¹⁸⁸ Change the Museum (@changethemuseum), INSTAGRAM, <https://www.instagram.com/p/CFm7QMMFVRI> (last visited Jan. 16, 2021).

¹⁸⁹ Robin Pogrebin, *It’s a Diverse City, but Most Big Museum Boards Are Strikingly White*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/arts/design/new-york-museums-diversity-staff-boards.html>.

¹⁹⁰ Yuha Jung, *Diversity Matters: Theoretical Understanding of and Suggestions for the Current Fundraising Practices of Nonprofit Art Museums*, 45 J. ARTS MGMT. L. & SOC’Y 255, 257 (2015).

¹⁹¹ MARILYN E. PHELAN, MUSEUM LAW: A GUIDE FOR OFFICERS, DIRECTORS, AND COUNSEL 9 (4th ed. 2014).

¹⁹² *Id.* at 14–16.

¹⁹³ *Id.* at 16.

¹⁹⁴ Jung, *supra* note 190, at 255.

¹⁹⁵ *Id.* at 257–58.

¹⁹⁶ *Id.*

The NEA, the federal agency that funds the arts, has faced funding cuts and was at risk of elimination. In 1996, Congress cut the agency's funding from \$180 million to \$99.5 million in response to conservative lobbyist groups such as the American Family Association taking offense to works by controversial artists who received NEA grants.¹⁹⁷ Republican legislators under House Speaker Newt Gingrich even called for the elimination of the NEA, but it instead remained with half the funding and staff.¹⁹⁸ The funding has remained at the same level since, but every year that President Donald Trump was in office, he called for the elimination of the NEA. His 2017, 2018, 2019, and 2020 Proposed Budgets suggest that the activities funded by the NEA are not "core Federal responsibilities" and request sufficient funding to shut down the NEA.¹⁹⁹ Each year Congress retained funding, but arts groups, artists, and museums remain concerned. After the first proposal, organizations began lobbying Congress, circulating petitions, and issuing statements denouncing the plans.²⁰⁰ Part of Trump's reason to defund the NEA in 2019 was that over seventy nonprofit groups receiving grants had asset bases larger than \$1 billion, but he misunderstands the availability of those assets to support programming.²⁰¹ The majority of those assets are property, including artwork and buildings, that cannot be sold as they are central to the services offered by arts organizations and museums.

C. MUSEUM BOARDS REFLECT EXCLUSIONARY, WEALTHY, AND WHITE INTERESTS

With the increasing reliance on private fundraising, attracting donors is directly tied to the composition of the board and the work shown at the museum. With prices of modern and contemporary art skyrocketing, museums want to cultivate relationships with wealthy collectors to ensure future gifts of work that museums can no longer afford to purchase outright.²⁰² To attract wealthy collectors, museums expand and renovate their spaces. To pay for improvements, museums fill their boards with wealthy patrons, often collectors, and they court the boards of major corporations. Museums aiming to expand their collections and physical space choose potential board members based on their wealth rather than their knowledge of art, as museum directors once did.²⁰³ Museums have historically taken all philanthropic contributions, no matter the source—all money was good money for supporting museum operations.

Individuals, corporations, and foundations donate to museums for multiple reasons but, regardless of motive, gifts are strategic. First, gifts are "predicated on expected reciprocal gift[s]," giving the donor power and

¹⁹⁷ NATIONAL ENDOWMENT FOR THE ARTS: A HISTORY, 1965–2008, at 91 (Mark Bauerlein & Ellen Grantham eds., 2009).

¹⁹⁸ *Id.* at 116, 118.

¹⁹⁹ OFF. OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, A BUDGET FOR A BETTER AMERICA 98 (2019).

²⁰⁰ Sopan Deb, *Trump Proposes Eliminating the Arts and Humanities Endowments*, N.Y. TIMES (Mar. 15, 2017), <https://www.nytimes.com/2017/03/15/arts/nea-neh-endowments-trump.html>.

²⁰¹ OFF. OF MGMT. & BUDGET, *supra* note 199, at 98.

²⁰² Holland Cotter, *Money, Ethics, Art: Can Museums Police Themselves?*, N.Y. TIMES (May 9, 2019), <https://www.nytimes.com/2019/05/09/arts/design/museums-ethics.html>.

²⁰³ Bob Colacello, *Might at the Museum*, VANITY FAIR (Jan. 21, 2015), <https://www.vanityfair.com/culture/2015/02/met-moma-museum-war>.

influence over the recipient.²⁰⁴ Second, a donation to the arts can give the donor a positive public image and improve business. David Rockefeller, former Vice Chairman of MoMA, Co-Founder of the Business Committee for the Arts, and Chairman and CEO of Chase Manhattan Bank Corporation, gave a speech to the National Industrial Conference Board in 1966 stating:

From an economic standpoint, such involvement in the arts can mean direct and tangible benefits. It can provide a company with extensive publicity and advertising, a brighter public reputation, and an improved corporate image. It can build better customer relations, a readier acceptance of company products, and a superior appraisal of their quality. Promotion of the arts can improve the morale of employees and help attract qualified personnel.²⁰⁵

Thus, sponsoring the arts improves a corporation's image for customers and employees, and corporations hope that a philanthropic side mission will spur business and make employees work harder.

To join a museum board, potential members may be asked to make a large financial contribution. So called "initiation fees" are in place at more prominent museums, such as the Met or MoMA, where museum officials keep details of the fees secret.²⁰⁶ The amount requested correlates to a potential board member's wealth, with wealthier candidates contributing \$10 million or more.²⁰⁷ In addition, board members make annual donations and contributions to acquisition funds, museum galas, and capital-building campaigns.²⁰⁸ Increased contributions can lead to higher public prestige and more control. For example, editor-in-chief of American *Vogue* Anna Wintour raised over \$125 million for the Met in her time as an honorary board member, and she was thus promoted to a voting board member and received the honor of having the Met Costume Institute renamed the Anna Wintour Costume Center.²⁰⁹ The percentage of board members of nonprofit organizations who make financial contributions has increased from under 50% in 1999 to 80% in 2014, and as of 2012, 75% of surveyed organizations required contributions from board members.²¹⁰

In today's climate of renewed activism, groups and artists are starting to trace the sources of private museum donations and board members' wealth and call out individuals and corporations whose wealth is often "tainted" by unethical and exploitative practices.²¹¹ In New York City in March 2019, artists, activists, and some Whitney staff formed Decolonize This Place, a collective that demanded that the Whitney remove board member Warren B. Kandors, the owner of Safariland, LLC, which produces police and military supplies including tear gas that was supposedly used at the U.S.-Mexico

²⁰⁴ BRAATHEN, *supra* note 23, at 39.

²⁰⁵ Hans Haacke, *On Social Grease*, 42 ART J. 137, 141 (1982) (quoting David Rockefeller's speech "Culture and the Corporation's Support of the Arts").

²⁰⁶ Colacello, *supra* note 203.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ ANDREA FRASER, 2016 IN MUSEUMS, MONEY, AND POLITICS 27 (2018).

²¹¹ Cotter, *supra* note 202.

border.²¹² Kanders stated that he was not personally responsible for what people did with his company's products.²¹³ The Whitney's director Adam Weinberg sent a letter to staff emphasizing the staff's distance from board power and the board's alleged lack of curatorial influence: "As members of the Whitney community, we each have our critical and complementary roles: trustees do not hire staff, select exhibitions, organize programs or make acquisitions, and staff does not appoint or remove board members."²¹⁴ However, because board members hold the wealth, they have indirect (if not direct) influence over what and who the museum collects, shows, and hires. Kanders eventually resigned with public statements of disapproval over the decision coming from himself and Weinberg.

Although Kanders was the public face of "tainted" wealth, many other members of boards have similar connections to weapons manufacturing, private prisons, opioids, and other industries that exploit people, especially people of color, for wealth. Those board members have donated money and art in exchange for a benevolent public image and a legacy at prominent cultural and historical institutions. In another example, Met board member David H. Koch, a billionaire whose money from energy and chemicals supported far-right Libertarianism and eventually the emergence of the Tea Party movement, gave \$65 million to the Met for the construction of a plaza and fountains in front of the museum's famous façade.²¹⁵ In return, the plaza was renamed the David H. Koch Plaza. Koch donated over \$1 billion over his lifetime, including to the Met, Lincoln Center for the Performing Arts, American Museum of Natural History, and other cultural and medical institutions.²¹⁶ However, though his name remains on many structures and wings as a symbol of his philanthropy, those gestures also obscure and fail to address his legacy in supporting conservative causes and causing environmental destruction on a grand scale.²¹⁷

Kanders and Koch, like most museum board members, are white. Although museums have been showing art by Black artists for decades, almost all board members in New York up until the 1980s were white.²¹⁸ The diversity of artistic history predated the diversity of philanthropic and governing histories.²¹⁹ In New York City, the boards of museums are still 89.3% white.²²⁰ The wealth gap has increased, and because wealth is so racialized due to the lasting effects of slavery and systemic segregation and exclusion, white Americans hold seven times the wealth of Black

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Colacello, *supra* note 203; Robert D. McFadden, *David Koch, Billionaire Who Fueled Right-Wing Movement, Dies at 79*, N.Y. TIMES (Aug. 23, 2019), <https://www.nytimes.com/2019/08/23/us/david-koch-dead.html>.

²¹⁶ McFadden, *supra* note 215.

²¹⁷ *Id.*

²¹⁸ Jacob Bernstein, *The Disrupters: Making New York's Cultural Boards More Diverse*, N.Y. TIMES (July 30, 2016), <https://www.nytimes.com/2016/07/31/style/diversity-cultural-boards-trustees-new-york.html>.

²¹⁹ *Id.*

²²⁰ BOARDSOURCE, MUSEUM BOARD LEADERSHIP 2017: A NATIONAL REPORT 8 (2017).

Americans.²²¹ Black Americans hold less than 3% of the national wealth.²²² In 2018, the top 10% of the wealth distribution held 70% of the total household wealth, up from 60% in 1989.²²³ The top 1% held almost 32%, up from 23%.²²⁴ Estimates from the 2010 Survey of Consumer Finances shows that the top 1% in terms of net worth was 92.5% white non-Hispanic and 0.5% Black, with an average age of 60.2 years.²²⁵ Most board members are over sixty years of age, and recruiting young members, considered under-sixty in the museum world, is newsworthy.²²⁶ Because wealth is being hoarded by a smaller percentage of people who are overwhelmingly white, museums are in a vulnerable position in having to appeal to the white ultra-wealthy collectors, patrons, and board members or lose their largest source of funding.²²⁷ To do so, museums would adjust their programming, exhibits, and collection to reflect the interests of the wealthy white donors.

Wealthy white donor interests are often politically conservative. Even as museums espouse open-minded missions of diversity and acceptance and put on radical exhibitions, museum board members donated \$89.2 million to Republican and conservative causes in the 2016 U.S. election cycle, 42% of all contribution records among board members, while \$121.3 million was donated to Democratic and liberal candidates.²²⁸ Even though more money was donated to Democratic and liberal causes, artist and professor Andrea Fraser still reacted to the numbers with “horror,” since the policies of right-wing politicians supported by conservative donors directly threaten the missions of art museums.²²⁹ The voting patterns of conservative board members contradict the messages of inclusion and activism that museums express through their missions and exhibitions. A year after the 2016 presidential election, the Whitney exhibited *An Incomplete History of Protest* (2017), which explored the role of artists in political and social activism by challenging the establishment and fighting for equality.²³⁰ The year of the election, Whitney’s board members donated \$5.7 million to the Democratic party and liberal causes, but over double—\$12 million—was donated to Republicans and conservatives.²³¹

Cultural institutions controlled by small, wealthy, and racially non-diverse boards present several issues in addition to the political contributions of board members. First, board members can make donations of artwork with stipulations on how and how long they must be presented. For example, SFMOMA signed a 100-year agreement with previous board members

²²¹ Trymaine Lee, *A Vast Wealth Gap. Driven by Segregation, Redlining, Evictions and Exclusion, Separates Black and White America*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html>.

²²² *Id.*

²²³ Michael Batty et al., *Introducing the Distributional Financial Accounts of the United States* 26 (Bd. of Governors of the Fed. Rsrv., Working Paper No. 2019-017, 2019), <https://www.federalreserve.gov/econres/feds/files/2019017pap.pdf>.

²²⁴ *Id.*

²²⁵ Lisa A. Keister, *The One Percent*, 40 ANN. REV. SOCIO. 347, 357 (2014).

²²⁶ Colacello, *supra* note 203.

²²⁷ Jung, *supra* note 190, at 258.

²²⁸ FRASER, *supra* note 210, at 14.

²²⁹ *Id.*

²³⁰ *An Incomplete History of Protest*, WHITNEY MUSEUM AM. ART, <https://whitney.org/Exhibitions/AnIncompleteHistoryOfProtest> (last visited Mar. 23, 2020).

²³¹ FRASER, *supra* note 210, at 928.

Donald and Doris Fisher stating that the Fishers' collection must comprise 75% of the museum's main galleries.²³² There was no public discussion prior to accepting the deal, and the arrangement severely limits the narrative of art and history presented by the museum for many generations.²³³ Second, nonprofits and cultural institutions are an "independent sector" for the celebration of creativity, diversity, and representation.²³⁴ However, governing boards lack diversity, sometimes support policies that attack various freedoms, and exclude all but the super-wealthy from governance roles.²³⁵ A high degree of overlap between for-profit success, often from exploitative industries, and nonprofit governance indicates that American cultural heritage is controlled by a tightly-guarded plutocracy.²³⁶ Third, many board members that champion specific artists or works have an ulterior motive in increasing the value of the work within their own collections. When museums show works by artists they collect or from their collection, board members profit from the increased market value.²³⁷ The art market value system is built on exclusion and ownership, and board members seeking to increase the value of marginalized artists is "not radical"—it is just a form of capitalism.²³⁸ Controlling the value of a moment in history is a form of power.²³⁹ Finally, although rising art prices may be good for artists, it does not address structural racism. "Black collectors are now being shut out of collecting black artists," says art dealer Karen Jenkins-Johnson.²⁴⁰ White gallerists prioritize existing collectors over new collectors, and existing collectors are more likely to be white because of wealth.²⁴¹ Thus, newly appreciated Black art is less accessible to Black collectors who do not have the generational wealth of white collectors.

In sum, wealthy white board members buy their way into the top ranks of museums, and museums eagerly seek out and cater to the desires of board members. Board members have the leverage to suggest works and artists they like and want to see within museums, especially since museum recognition increases value, and in doing so board members have "a say in setting the intellectual course of the nation, if not the world, through a leading museum."²⁴² Despite public statements of diversity and inclusion, if any, and the popular conception of art as a radical and socially activist field, art museums are controlled by the same political, economic, social, and racial elite that perpetuate and enforce the racial exclusion within museums and outside of them.

²³² *Id.* at 29.

²³³ *Id.*

²³⁴ *Id.* at 30.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *See supra* Part I.D.

²³⁸ Margaret Carrigan, *How the Art Industry is Grappling with Its Systemic Race Inequality*, ART NEWSPAPER (July 10, 2020, 7:23 AM) <https://www.theartnewspaper.com/news/art-industry-systemic-racial-inequality>.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² FRASER, *supra* note 210, at 27.

V. THE UNCERTAIN FUTURE OF MUSEUM DIVERSIFICATION

A. THE CREATENYC PLAN TO DIVERSIFY NEW YORK CITY'S CULTURAL INSTITUTIONS

In 2017, Mayor Bill de Blasio of New York City established the CreateNYC plan demanding that cultural institutions submit a diversity plan with goals for diversity, equity, and inclusion, and follow that plan or lose city funding.²⁴³ The action plan proposed in 2019 has short- and long-term goals with the results yet to be determined, but it offers an option for other cities to consider if diversity and inclusion are a local priority.

However, many art world workers are skeptical of the plan's goals and feasibility. First, the plan has no numerical goals for progress and therefore no measurement for success. The plan uses "vague corporate terms like 'strategic pillar' and 'recruiting pipeline.'"²⁴⁴ Because the plan is vague, museums are responding with equal vagueness; for example, the Met pledged to increase its board's "overall diversity" without specifying what kind of diversity and by how much.²⁴⁵ Michael M. Kaiser, the chairman of the DeVos Institute of Arts Management at the University of Maryland, says, "I call those wishes, not plans Those kinds of goals are so general that they don't lead to too much change."²⁴⁶ The plan may lead to some visible change, but the generality of the goals may be precisely what museums want. They can form the requirements into the path that is least obstructive to receiving funding while continuing largely as they are. The 2018 study that the plan relied on for demographics did not break down the percentages by institution, so it did not expose the biggest offenders. Marta Moreno Vega, the president of the Caribbean Cultural Center African Diaspora Institute, suspects that the "flims[iness]" of the study was "intentionally done not to create change."²⁴⁷ Second, the city legally cannot require institutions receiving city funding to set hiring quotas, so it can only suggest ways to build diverse applicant pools.²⁴⁸ Third, institutions responded with commitments to diversify, but they used the term "diversity" in a general sense without specifying race, which is the major issue.²⁴⁹ Finally, critics say that the threat to remove city funding was just that—a threat with no enforcement.²⁵⁰ Without an enforcement mechanism, institutions have little incentive to commit to change.

The most effective change at the Met came about not through its years-long diversity plan in response to CreateNYC but after anonymous employees wrote an open letter in June 2020 criticizing the Met's handling

²⁴³ See generally NYC DEP'T OF CULTURAL AFFS., CREATENYC: 2019 ACTION PLAN (2019).

²⁴⁴ Jacobs, *supra* note 182.

²⁴⁵ Sarah Bahr, *Is New York's Arts Diversity Plan Working? It's Hard to Tell*, N.Y. TIMES (Aug. 28, 2020), <https://www.nytimes.com/2020/08/26/arts/design/diversity-new-york-culture-plans.html>.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*; see Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978) (finding that a public university's use of racial quotas in admissions was unconstitutional).

²⁴⁹ Bahr, *supra* note 246.

²⁵⁰ *Id.*

of racial, gender, and sexual bias reports.²⁵¹ In July, the Met responded with thirteen commitments, including hiring a diversity officer within four months (which they did in November 2020), paying its interns by 2022, and setting aside over \$10 million to diversify its collections and exhibitions.²⁵² None of those goals was in the plan given to the city.

B. THE EFFECTS OF COVID-19 ON MUSEUM EMPLOYMENT

The COVID-19 pandemic devastated employment in the United States, and museums were not exempt. As museums across the country closed, they laid off or furloughed many of their employees. However, workers were not equally affected. Front-of-house and lower-ranking staff were first to go, and their numbers contain the majority of people of color working at museums.²⁵³ In April 2020, the Whitney laid off seventy-six employees in one night, primarily “visitor services staff and temporary employees.”²⁵⁴ Education departments, often staffed by people of color, are also at risk—MoMA terminated all of its educators’ contracts in April 2020 and said that “it will be months, if not years, before we anticipate returning to . . . require educator services.”²⁵⁵ Arlene Dávila, a professor of Anthropology and American Studies, asks, “In the arts sector, was diversity then one of the first casualties of COVID-19?”²⁵⁶ Because the pandemic shut down museums before the Black Lives Matter movement pushed them to address their racism, museums cut their most diverse positions with little fear of reprisal. Interestingly, museums did not remove jobs that were no longer necessary; on the contrary, educators and community outreach chairs are especially crucial during the pandemic. With collections, exhibitions, and programming moving online, educators and community outreach chairs are necessary to bridge the physical gap between museums and their constituents.²⁵⁷ Dávila states, “[T]he colonial roots of museums are more visible than ever, proving their critics’ worst fears that museums’ primary function has always been about hoarding objects to create value, with little interest in larger society.”²⁵⁸ Downsizing post-COVID-19 will hurt Black artists and art workers the most. Their positions in museums are considered the most expendable to large institutions, smaller museums that are more welcoming to artists of color are more heavily impacted by the loss of revenue from extended closure, and newly-formed art workers’ unions have suffered after the waves of layoffs.²⁵⁹ It is unknown how museums’ diversity and equity pledges after the Black Lives Matter movement will reverse, if at all, the losses sustained in the pandemic.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*; Miranda, *supra* note 197.

²⁵⁴ Valentina Di Liscia, *MoMA Terminates All Museum Educator Contracts*, HYPERALLERGIC (Apr. 3, 2020), <https://hyperallergic.com/551571/moma-educator-contracts>.

²⁵⁵ *Id.*

²⁵⁶ Arlene Dávila, *In Memoriam of the Art World’s Romance with Diversity*, HYPERALLERGIC (Apr. 17, 2020), <https://hyperallergic.com/556290/in-memoriam-of-the-art-worlds-romance-with-diversity>.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

VI. CONCLUSION

To increase numbers of Black artists, housing and education costs are a barrier to be addressed. To increase numbers of Black curators and directors, entry-level jobs in the arts need to be reasonably paid instead of unpaid. And to increase museum engagement by Black Americans and encourage Black youth to consider a career in the arts, museums need to understand, offer, and support depictions of history and culture that include Black narratives by Black creators. Racial exclusion in museum exhibitions, collections, and leadership is a result of cyclical and systemic segregation tied to historic attitudes about Western culture and Black primitivism and enforced through racial policies in housing, employment, and education dating back generations.

Museum demographics will not change until their boards, the governing members, do. When individuals with the greatest economic power outside of the arts sit in the positions of highest power within the arts, their economic power transfers to cultural power—the influence to dictate the narrative of what is culturally and financially valuable and what and whose identities and histories are represented.