

# Prosecutor Offices Must Reflect the Communities They Serve and the Changing Demographics of America

The American criminal justice system is broken. Designed with two main functions—to protect public safety by controlling crime while at the same time providing due process to protect the rights of individuals—it fails to do either in the Black community. Institutionalized racism infects the entire system, from the lawmakers who over-criminalize and harshly penalize some behaviors to the main system actors who implement the laws — police, prosecutors, and the courts. As the managers and “gatekeepers” of the criminal legal system, prosecutors are responsible for ensuring that a fair, equitable, and just approach is taken in the day-to-day administration of justice. This responsibility requires not only fairness and equity in applying the law, but also an understanding of how institutional racism negatively impacts how justice is administered.

One obvious way to gain this understanding is through shared life experience touched by racism. Yet few prosecutors have a clue about what these experiences look like, and only a tiny fraction have lived them. In a groundbreaking study led by the Reflective Democracy Campaign,<sup>1</sup> researchers found that 95% of prosecutors in the more than 2,372 local districts in the United States are White, with White men accounting for 73% and white women 22%.<sup>2</sup> Minority attorneys make up a meager 5% of all prosecutors, with men of color at

3% and women of color at 2%. The vast majority of prosecutors do not have life experiences of the negative impact racism has had on their Black constituents. It is no wonder that, while Blacks make up roughly 13% of the U.S. population, they account for approximately 40% of the jail and prison populations,<sup>3</sup> and some communities have seen more than one half of their Black men in jails and prisons or under correctional supervision. This obvious problem of the gross racial disparity in the composition of the nation’s prosecutors calls for an untried solution: hire and empower more prosecutors who are diverse and reflective of the communities they serve.

**The lack of public confidence in the criminal justice system is justified when you consider the stark racial and ethnic differences between those executing the laws and those being prosecuted.** In too many circumstances, a Black suspect is arrested by White police officers, before appearing in front of a White judge and hearing from a White prosecutor about what charges are being brought and whether bail should be imposed. A White prosecutor will present evidence at trial or negotiate a plea bargain. This endlessly repeated scenario inevitably leads to an “us versus them” mentality in the Black community<sup>4</sup> and undermines the legitimacy of the system.

Similarly, the slaying of unarmed Black men at the hands of the police for no reason or for minor offenses contrasted with the delicate, measured responses to more violent White offenders<sup>5</sup> only serve to highlight the unfairness of the system. Police brutality of Black people, often perpetrated by White officers,<sup>6</sup> has often gone unchecked by prosecutors. Despite the documented risks that Black people face of police violence, White prosecutors have largely ignored pleas from community members and advocacy groups to hold police accountable for their actions. It is impossible to ignore the lack of Black prosecutors as one reason why.

**To ensure fairness, equity and the just application of laws, district attorneys’ offices must possess an understanding of and affinity for the communities they serve and the changing demographics of our country.** Most elected prosecutors do not reflect the changing demographics of the constituencies they serve, and, more importantly, neither do the staff they lead. This is more important than ever in predominantly BIPOC (Black, indigenous or people of color) communities. The life experience that any professional brings to the execution of their duties affects the quality of their decisions. In the case of prosecutors, understanding the law and ethics is essential. But understanding the communities in which they apply those laws is just

as important. Arguably, the easiest way to gain that understanding is to make sure the demographics of any given office reflect the community it serves. Having a range of life experiences among staff increases the likelihood of any constituency having a representative voice within the office – including someone who is attuned to nuances that might go unnoticed by their colleagues, nuances that can make all the difference to the appearance that justice has been served in any given circumstance.

**District attorneys should ensure that their offices reflect the demographic makeup of the communities they serve and should encourage shared lived experiences is part of the job.** Chief prosecutors have an obligation to hire, train, promote, and retain a diverse workforce, promoting diversity, equity, and inclusion in that process.<sup>7</sup> So far, however, the criminal justice system has failed to adequately represent the broad racial, ethnic, gender, and sexual orientation makeup of America.<sup>8</sup> The appearance of justice is important in carrying out functions of the criminal justice system, and the legitimacy of the system benefits from having a diverse workforce that brings the perspectives and shared lived experiences of the community into the office.

**Chief prosecutors can and must establish formal plans to diversify their offices, emphasizing the need for racial, ethnic, gender, and other forms of diversity.** District attorneys' offices should strive to look more like the community through "formal diversity,"<sup>9</sup> ideally reflecting the demographic breakdown of the community to help ensure that every constituency in a community is represented.<sup>10</sup> This would allow prosecutors to

better understand the circumstances of every defendant and include an element of cultural sensitivity in their decision-making.<sup>11</sup> Fundamentally, demographic diversity represents a recognition of past structural harms that have kept Black communities from achieving the same political, economic, and social successes of their White counterparts. A failure to diversify district attorneys' offices is to ignore the harms of underrepresentation and its roots.<sup>12</sup> Our modern criminal justice system demands that equity be brought to bear on one of the institutions that have supported oppression and driven the mass incarceration epidemic.

Racial, ethnic, and gender diversity are important to a prosecutor's office because it brings with it a wealth of perspectives that is essential to doing the job fairly and equitably.<sup>13</sup> Diversity must be a priority for all prosecutors' offices. Diversity must be more than "aspirational, voluntary, abstract, and tentative."<sup>14</sup> It must become a key part of the path forward to remedy the injustice and discrimination that permeate the criminal justice system.

Diversity is not an end in itself. Black, Latinx, Asian, Native American, LGBTQ, and female prosecutors must not only be brought into the ranks of prosecutors, they must also be empowered to share their life experiences. They must not be accused of divided loyalties or having "conflicts of interest" merely because they question established practices or point out inequities in the system. Most importantly, their ascent into positions of leadership must be supported, because it is there that they can have the most impact. This impact should extend to the authority to dismiss cases where they see a

sufficient lack of evidence to support a charge, or where they are convinced that a defendant was not involved in criminal wrongdoing.



**The Legal Defense Fund is calling on all District Attorneys to prioritize the recruitment, hiring, training, promotion, empowerment, and retention of Black people and other people of color, women, and people of diverse sexual orientation to help bring a diverse range of perspectives and lived experiences to their offices.**

## Notes

1. Reflective Democracy Campaign, Tipping the Scales: Challengers Take On the Old Boys' Club of Elected Prosecutors, <https://wholeads.us/wp-content/uploads/2019/10/Tipping-the-Scales-Prosecutor-Report-10-22.pdf> (last visited August 7, 2020).
2. For additional context, according to the American Bar Association, 85% of lawyers are White, compared to the 77% of the population they account for. Minority attorneys, specifically Black and Hispanics, make up a collective 10%, while accounting for 13% and 18.3% respectively, of the U.S. population; see AMERICAN BAR ASSOCIATION, ABA Profile of the Legal Profession 2019, <https://www.americanbar.org/content/dam/aba/images/news/2019/08/ProfileOfProfession-total-hi.pdf> (last visited April 29, 2020); Quick Facts, U.S. BUREAU OF THE CENSUS, <https://www.census.gov/quickfacts/fact/table/US/PST045218> (last visited April 29, 2020)
3. Wendy Sawyer and Peter Wagner, Mass Incarceration: The Whole Pie 2020, Prison Policy Initiative, <https://www.prisonpolicy.org/reports/pie2020.html> (last visited May 1, 2020).
4. See Katherine J. Bies et al. Diversity in Prosecutors' Offices: Views from the Front Line, A Report of the Stanford Criminal Justice Center (2016).
5. Violent White Folks Who Were Arrested With Loving Care By Police, NEWSONE, (May 8, 2020), <https://newsone.com/playlist/white-arrested-with-by-police/item/2>.
6. 76 Black Men And Boys Killed By Police, NEWSONE, <https://newsone.com/playlist/black-men-boy-who-were-killed-by-police/> (last visited on April 16, 2020).
7. David Douglas, The Ethics Argument For Promoting Equality In The Profession, ABA JOURNAL, November 1, 2019, <https://www.abajournal.com/magazine/article/the-ethics-argument-for-promoting-equality-in-the-profession>.
8. Eli Wald, A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why (Denver Law Legal Research Paper Series Working Paper No. 11-17); see also Jason P. Nance and Paul E. Madsen, An Empirical Analysis of Diversity in the Legal Profession, 47 CONN. L. REV. 271 (2014).
9. See Bies, supra note 4.
10. *Id.* at 1093.
11. *Id.*
12. Wald, supra note 8, at 1141.
13. Herbert, supra note 4, at 512.*Id.*
14. Wald, supra note 8, at 1111.