

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

The American criminal justice system is broken. Charged with promoting public safety while protecting the rights of the accused, in the Black community, our criminal legal system fails to do either. Institutionalized racism infects the entire system, from the lawmakers who over-criminalize and harshly penalize behaviors best addressed by social services to the police and prosecutors who enforce our criminal laws. As the administrators 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 the administration of justice.

Prosecutor offices can gain this understanding through shared life experience touched by racism. Yet few prosecutors have knowledge of these experiences, fewer have lived them. In a groundbreaking study led by the Reflective Democracy Campaign,<sup>1</sup> researchers found that 95% of elected prosecutors in more than 2,400 local districts 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 personal life experiences of the negative impact racism has had on their Black constituents. Black people

make up roughly 13% of the U.S. population, but they account for approximately 40% of the jail and prison populations,<sup>3</sup> and some communities have seen over half their Black men in jails and prisons or under correctional supervision at some point in their lives. Along with the myriad factors that define our ineffective criminal legal system, the obvious national problem of racial disparities in prosecutor demographics calls for a modern solution: diversify and empower the prosecutorial ranks to reflect the communities they serve and the changing demographics of America.

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

Similarly, the police slaying of unarmed Black men and women for no reason or for minor offenses contrasted with the measured police response to violent White offenders<sup>5</sup> highlights the unfairness of the system. Police brutality against Black people, often perpetrated by White officers,<sup>6</sup> has gone

largely unchecked by prosecutors. Despite the documented police violence that Black people face, White prosecutors have largely ignored pleas from community members and advocacy groups to hold police accountable. The lack of Black prosecutors is one explanation for this refusal to act.

**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 their staff. This is more important than ever in predominantly BIPOC (Black, Indigenous or People of Color) communities which have faced longstanding structural racism. The life experience that any professional brings to performance of their duties affects the quality of their decisions. For prosecutors, understanding the law and their ethical obligations is essential. But understanding the communities where they apply those laws is just as important. Arguably, the easiest way to gain understanding is to ensure the demographics of an office reflects the community it serves. Staff with a range of life experiences increases any constituent's likelihood of 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 in how justice is served.

**Chief prosecutors can and must establish formal plans to diversify their offices, emphasizing the need for racial, ethnic, gender, and other types of diversity.** District attorney offices should ensure that all voices, experiences, and perspectives within the community are represented.<sup>7</sup> This allows prosecutors to better understand every defendant's circumstances and include cultural sensitivity in their decision-making.<sup>8</sup> Failure to diversify district attorney offices ignores the roots and harm of underrepresentation.<sup>9</sup>

Diversity brings a wealth of perspectives essential to prosecutors doing their jobs fairly and equitably.<sup>10</sup> It promotes differing perspectives that identify issues otherwise missed and result in more robust debate and careful review of evidence.<sup>11</sup> Prosecutor diversity is key to remedy the injustice and discrimination that permeate the criminal justice system.<sup>12</sup>

Diversity is not an end in itself. Black, Latinx, Asian American, Native American, LGBTQ, and female prosecutors must not only be brought into the ranks of prosecutors, they must be empowered to share their life experiences and distinct perspectives. They must not be accused of divided loyalties<sup>13</sup> or having conflicts of interest merely because they question established practices or point out inequities in the system.<sup>14</sup> Importantly, we must support their ascent into positions of leadership, because they can have the most impact there. This impact should extend to the authority to dismiss cases where there is a lack of sufficient evidence to support a charge, where they are convinced that a defendant was not involved in criminal wrongdoing, or where they conclude that justice is better served by an alternative approach.



**The Legal Defense Fund calls on 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 orientations and gender identity to bring a broad 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* (2019), <https://wholeads.us/wp-content/uploads/2019/10/Tipping-the-Scales-Prosecutor-Report-10-22.pdf>.
- 2 *Id.* 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 A.B.A., *ABA Profile of the Legal Profession* 8 (2019), <https://www.americanbar.org/content/dam/aba/images/news/2019/08/ProfileOfProfession-total-hi.pdf>.
- 3 Press Release, Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Pol'y Init. (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.
- 4 See Katherine J. Bies et al., *Diversity in Prosecutors' Offices: Views from the Front Line*, Stan. L., Stan. Crim. Just. Ctr. (2016).
- 5 *Violent White Folks Who Were Arrested With Loving Care By Police*, NewsOne (Sept. 10, 2020), <https://newsone.com/playlist/White-arrested-with-by-police/item/2>.
- 6 *88 Black Men And Boys Killed By Police*, NewsOne (Sept. 3, 2020), <https://newsone.com/playlist/black-men-boy-who-were-killed-by-police/>.
- 7 Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 Geo. J. of Legal Ethics 1079 (Denv. L. Legal Res. Paper Series, Working Paper No. 11-17, 2011).
- 8 *Id.* at 1101-02; see also Bies, *supra* note 4, at 12-15.
- 9 *Id.*; see also Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 Conn. L. Rev. 271 (2014).
- 10 Bies, *supra* note 4, at 12-14; see also Lenese C. Herbert, *Et in Arcadia Ego: A Perspective on Black Prosecutors' Loyalty Within the American Criminal Justice System*, 49 How. L.J. 495, 512 (2006).
- 11 See Katherine J. Bies et al., *Stuck in the '70s: The Demographics of California Prosecutors*, Stan. L., Stan. Crim. Just. Ctr. 15 (2016).
- 12 See Bies, *supra* note 4, at 17.
- 13 See Margaret M. Russell, *Representing Race: Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 Mich. L. Rev. 766, 780-81 (1997);
- 14 See *id.* at 767-68, 770-72; see also Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 Fordham L. Rev. 1473, 1474 (2000).