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Table of Contents

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The Failures of Money Bail and the Need to Abolish It

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The Failures of Money Bail and the Need to Abolish It

On any given day in the United States, more than 450,000 individuals—presumed innocent and not convicted of a crime—are held in local jails awaiting trial. Most are there simply because they cannot afford bail.

Approximately 70% of all people incarcerated in jails in this country have not been convicted of a crime.[1] Pretrial incarceration has driven most of the net growth in jail populations in the United States over the past 20 years[2] and much of that growth is due to the increased use of money bail.[3] As the "front door" to our nation's prison system, our local jails process more than 11 million people annually, and 3 in 5 are people too poor to afford the bail amounts set for them.[4] The social and economic costs of the current bail system are staggering. With an annual price tag of more than $13 billion, taxpayers are shouldering a high price for a failed system.[5]

Our deeply flawed money bail system is steeped in race and class bias.

In the U.S., Black people make up only 12% of the population, yet comprise 33% of the total jail and prison population[6] and more than 43% of the pretrial jail population.[7] Black and Latinx individuals are detained pretrial at much higher rates than White people in part due to bias in charging and in setting bail[8] but also because of the massive racial wealth gap in the U.S.[9] which renders White defendants much more likely to be able to pay bail amounts than their Black and Latinx counterparts.

Prosecutorial and judicial decision-making during bail hearings reflect racial bias, with prosecutors frequently asking for extraordinarily high bail amounts for often low- to medium-level offenses[10] and judges setting high bail amounts based on racial stereotypes and race-based overestimations of risk levels. These decisions are often the result of risk assessment algorithms that are themselves based on biased data.[11]

The money bail system undermines the core constitutional principle of the presumption of innocence, and the right to liberty absent conviction of a crime.

The U.S. Supreme Court has affirmed that "liberty is the norm" and set fundamental guidelines for determining a fair bail.[12] These guidelines are commonly ignored. For those who cannot afford to pay, the money bail system has become a way of routinely subverting both the presumption of innocence and the right to liberty for those who have not been convicted of a crime. The American Bar Association, in its standards on pretrial release, asserts, "The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, burdens defendants with economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support."[13]

Money bail drives mass incarceration, extracts money from the poor, and makes us no safer.[14]

People who are accused of a crime and are awaiting trial may be released on their own recognizance, released on a secured or unsecured bond, released

under a certain condition or combination of conditions (e.g. participation in a substance abuse program, electronic monitoring, in-person check-ins, and phone call check-ins, etc.), or detained. Bail is a financial incentive that is imposed to encourage an accused person to reappear for trial (and related court proceedings). If a defendant can post bail, they are released from jail and are obligated to show up for all required court dates in order to recover their bail payment.

The most common form of money bail is a secured bond or surety bond. A secured bond requires an individual to post the full amount of the bail bond in cash or use real property (real estate equity) ***before*** they can be released from jail. If a person does not have the total amount of money needed to post bail, they can hire the services of a bail bond agent. Usually, the bail bond agent requires the individual (or family) to pay 10% of the bail, which is never returned even if the case is dropped ***or the individual is acquitted***. Individuals who are unable to pay the entire bail amount or cannot afford the services of a bail bond agent must remain in jail until trial. Therefore, money bail is often referred to as a form of wealth-based discrimination because an individual's freedom is determined by their ability to pay.[15]

From 1990-2009, the percentage of people charged with felonies who were required to pay cash bail for their release increased from 37% to 61%.[16] The sharp decrease in the release of people on their own recognizance—and the corresponding

increase in the requirement of cash bail as a condition of release—has increased our total jail population and had a discriminatory impact on low-income and minority defendants. Money bail is listed as a condition of release more often for Black defendants than White defendants, and Black defendants are often given higher bail amounts than White defendants for the same or similar charges.[17]

Black and Latinx people are more impacted by the significant harms that occur as a result of pretrial incarceration.[18] People unable to afford bail have their economic and social well-being upended and destroyed as a result of their pretrial incarceration. In addition to experiencing the horrors of incarceration, they may lose their jobs, their homes, and custody of their children.[19] Unable to easily communicate with their attorney, they are less able to assist in the preparation of their own defense. Research shows that pretrial incarceration is associated with increased conviction rates and longer sentences.[20]

Pretrial detention itself is also a significant factor in plea bargaining, as prosecutors have used it as leverage to exact plea bargains from persons who cannot afford to pay for their release prior to trial. This unfair leverage and limitless power provided to prosecutors exacerbates the race and wealth inequality in the criminal legal system. At the same time, it does not make communities safer. Persons exposed to violence and trauma in jail are less able to successfully reintegrate into society and more likely to take part in crime.[21] Pretrial detainees released following acquittal or dropped charges are denied legal recourse to gain some measure of compensation for what the system took from them. This is an issue that must be revisited, as scholars have suggested, to ensure that prosecutors and the courts exercise more care in how they evaluate cases, and rely on less restrictive alternatives to pretrial detention.[22]

There are effective means of ensuring people appear for trial without money bail.

There is growing evidence of alternatives to money bail that are less onerous and more effective means of ensuring persons charged with crime return to court for their trials. Such alternatives include: reminders of upcoming appearance dates via calls, texts, and emails[23] and independent pretrial service agencies that provide access to substance abuse and mental health services and to supportive services, such as childcare and transportation, that help ensure defendants can make their court dates.[24] Where implemented, these types of programs have proven to be at least as effective as money bail, often more so, and at lower cost to taxpayers, individuals, and the community.

Critical pretrial reform includes the presumption of release for all misdemeanor and all non-violent crimes, and a prompt adversarial hearing and right to expedited appeal for those not immediately released.

The U.S. Supreme Court prohibits state laws and practices that make a person's liberty dependent on their wealth.[25] To protect that principle and the presumption of innocence, comprehensive procedural changes are needed to the pretrial system. These include the presumption of release on recognizance for misdemeanors and all non-violent crimes. For persons not released automatically on their own recognizance, they must be provided a prompt adversarial hearing with a right to counsel, and an expedited right of appeal. The purpose of the hearing would be to assess whether the person presents a substantial and identifiable risk of flight or (where required by law) a specific, credible danger to individuals in the community. If not, the person must be released.[26]

Bail reform has received bipartisan support in Congress and has garnered support from a wide array of stakeholders in the criminal justice system, including: the American Bar Association, the National Association of Pretrial Services Agencies, the Conference of State Court Administrators, the National Association of Counties, the Conference of Chief Justices, the American Jail Association, the International Association of Chiefs of Police, the Association of Prosecuting Attorneys, and the National Association of Criminal Defense Lawyers.[27]

The Legal Defense Fund calls on District Attorneys to immediately stop asking for monetary bail and to support the elimination of its practice entirely. Prosecutors must embrace the presumption of innocence by making release on one's own recognizance the pretrial default for all individuals charged with non-violent offenses and must ensure that persons not immediately released get a prompt right to an adversarial hearing with counsel and an expedited right of appeal. Prosecutors must also support the elimination of risk assessment tools and other algorithmic prediction tools built on racially biased data in pretrial decision-making.

Notes

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The Relationship Between Prosecutors and Police: Promoting Accountability and Building Public Trust

The Relationship Between Prosecutors and Police: Promoting Accountability and Building Public Trust

> **"[N]othing since slavery—not Jim Crow segregation, not forced convict labor, not lynching, not restrictive covenants in housing, not being shut out of New Deal programs like Social Security and the GI Bill, not massive resistance to school desegregation, not the ceaseless efforts to prevent African Americans from voting—nothing has sparked the level of outrage among African Americans as when they have felt under violent attack by the police."**
>
> – Paul Butler, CHOKEHOLD: POLICING BLACK MEN (2017).

Law enforcement in the United States has become militarized, trained, and equipped to fight so-called "wars" on drugs and crime and to treat citizens as if they are the enemy. Founded on institutional racism, law enforcement aggression leads to communities of color being overpoliced—African Americans are more likely to interact with police and more likely to be arrested for actions that would go unpunished elsewhere. The predictable result of unlawful policing practices, including the excessive use of force, is the belief in communities of color that law enforcement is an oppressive force threatening community security, not protecting it. This situation begs the question—who is policing the police? Too often the answer is no one. There are approximately 18,000 law enforcement agencies in the U.S.[1] Evidence shows there is virtually no accountability for police officers involved in excessive use of force.[2] Of the nearly 100 officers arrested for the fatal use of force since 2005, only 35 have been convicted of a crime, often for substantially lower crimes than defendants in comparable murders not involving the police. [3] Only three have been convicted for murder.[4]

Prosecutors' dependence on police creates a conflict of interest that undermines their willingness and ability to prosecute police officers. For too long, prosecutors and courts have been indifferent to police violence. Even in recent cases that starkly illuminate the problem, prosecutors still fail to act.[5] This is almost entirely due to fundamental problems in the police-prosecutor relationship.[6] These seemingly independent actors have a symbiotic connection. In practice, prosecutors depend on police for the success of their cases, from charging to conviction.[7] Police often guide cases with little oversight from prosecutors and are able to influence case outcomes from the moment of arrest.[8] This interdependence means any decision to prosecute police misconduct carries the risk of police withdrawing their cooperation in future cases.[9] The inherent conflict of interest in prosecuting cases of police misconduct and police violence is just one reason why prosecutors must create professional distance between their offices and local police departments.

Politics thwart prosecutor-led attempts to hold police accountable. In most jurisdictions, prosecutors are elected. Being "tough on crime" can make or break a candidacy, so police union endorsement is important. These unions often resist a district attorney's reform attempt,[10]

actively undermine their election and re-election,[11] and strenuously oppose legislation to increase transparency and accountability in misconduct investigations.[12] Within First Amendment limits, police union and police labor organization contributions to district attorney candidates should be tightly controlled.[13] This would shield prosecutors from undue police interference.[14] State ethics rules for prosecutors could bar or restrict these campaign contributions.[15]

Grand Jury manipulation. Very rarely do grand juries indict in police cases of excessive use of force and other alleged misconduct, despite almost uniformly indicting for all other crimes presented to them.[16] While a variety of factors contribute to this,[17] it is mainly due to the considerable power prosecutors use in grand jury proceedings to affirmatively protect the police.[18] Local prosecutors often provide law enforcement suspects greater procedural privilege at the grand jury stage than other suspects, allowing them to have the assistance of counsel, to hear evidence presented to the grand jury, and even to testify before the jurors.[19] Special[20] and independent prosecutors appointed for grand jury proceedings of cases involving law enforcement suspects are less likely to feel pressure to make concessions.[21] The secrecy surrounding grand jury proceedings insulates prosecutors from accountability for their actions related to police officer indictments.[22] Lessening—or even removing—this secrecy would result in transparency in police misconduct cases.[23] Prosecutors can make public the evidence in the case, the rationale for their decisions to charge (or not charge) a police suspect, and the record of grand jury proceedings.[24] Office policy should strictly prohibit special accommodations for police suspects and their counsel, and line prosecutors who employ them should be disciplined.

Maintaining prosecutors and law enforcement collaboration must not override the need to hold police accountable. Prosecutor offices are frequently complicit in police misconduct, which further undermines public confidence in local justice systems. Some offices, for instance, fail to disclose or cover up instances of police dishonesty.[25] Internal measures to track officer misconduct within prosecutor offices "are haphazard at best, and intentionally negligent at worst."[26] Prosecutors must clean up their own houses. Prosecutors can refuse to cover-up police dishonesty and should prosecute excessive force cases.[27]

Prosecutor-based police accountability improves the credibility of the criminal justice system. Misconduct and overreach by police when it comes to shoddy investigations, falsification of evidence,[28] and perjured testimony are well documented.[29] Because prosecutors are dependent on police work for the cases they prosecute, holding police accountable improves the integrity of prosecutorial work product. For example, holding police accountable for lying about evidence will result in fewer future instances of lying—and fewer cases in which false evidence is a barrier to successful and accurate prosecution.[30]

Efforts to restore the public's confidence in law enforcement by prosecuting police misconduct are important and require major reforms. Public confidence in the system is extremely fragile in communities of color.[31] Recent polling on public perceptions of police,[32] prosecutors,[33] and the criminal justice system[34] demonstrates how eroded the "appearance of justice" is for many communities, and reveals drastically different views that fall along racial[35] and socio-economic lines. When asked about their views on police in their communities, 33% of Blacks said police do an "excellent or good job" versus 75% of their White counterparts,[36] and only 31% of Black Americans feel that officers are held accountable when misconduct occurs, versus 70% of Whites.[37] This divide is widening and threatens the credibility and legitimacy of our criminal legal system.

Police accountability for misconduct and excessive use of force can be pursued in several ways,[38] including:

- **Independent Review.** "Independent investigations of all cases where police kill or seriously injure civilians" and similar contexts[39] is recommended. These can take a number of forms, most notably appointing special prosecutors, creating collaborative investigation teams, or creating civilian review boards.

- **Special prosecutors**, from outside the jurisdiction who operate independently of local prosecutors, can provide legitimate prosecution of law enforcement officers and avoid the "appearance of impropriety" that occurs in police misconduct cases where a local prosecutor's "impartiality might reasonably be questioned."[40]

- **Collaborative Investigation Teams.** Employing collaborative investigation teams with representatives from police departments, prosecutor offices, and/or other government and community bodies promotes better misconduct investigations.[41] One model exists in Denver: its officer-involved shooting protocol requires that police department investigators and the district attorney's office collaborate in the shooting investigation before the District Attorney's office determines whether to charge the officer.[42] When no charge is brought, the office must prepare a decision letter, which is available to the public with the investigative file.[43]

- **Civilian Review Boards (CRBs)** "consisting of qualified members with long-term appointments"[44] review the investigation and evidence and advise prosecutors. However, CRBs take significant investment of money and time to create, staff, and train,[45] and have been largely ineffective. Limiting their function to producing lists of potential special prosecutors may be preferable. This would increase community involvement while avoiding some problems that come when CRBs have substantial involvement.[46]

- **Establish Conviction Integrity Units** to identify police officers who should be placed on "do-not-call" lists and disclosed to defense attorneys. Increasingly, advocates are calling for prosecutors to place officers with prior misconduct on restrictive lists,[47] which preclude them from participating in future trials. Chief prosecutors in Philadelphia, Baltimore, Brooklyn, Boston, Houston, and St. Louis have begun building lists that bar officers serving as witnesses for a host of bad acts.[48] The on-going debate about these lists being made publicly available[49] should not preclude prosecutors from sharing individual names with defense attorneys. The work of Conviction Integrity Units could identify officers who should be placed on such lists.

The Legal Defense Fund calls on district attorneys offices to hold police officers accountable for their misconduct, especially that involving excessive and fatal use of force; engage independent review of the most egregious cases of police violence; and actively assist police agencies to identify and correct the failures in policy that allow excessive violence to persist. This will help create community trust and reduce the harm done by police.

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21 *Id.* at 877; Fairfax, *supra* note 16, at 416–17.

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30 *See e.g.*, Harris, *supra* note 9, at 7; *see also id*. at 11.

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39 *Independent Investigations and Prosecutions*, Campaign Zero, https://www.joincampaignzero.org/investigations (last visited Aug. 12, 2020).

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41 *See* State's Att'y, *supra* note 27, at 6.

42 *Id.* at 6–7.

43 *Id*.

44 Robertson, *supra* note 19, at 883

45 *See id.*

46 *Id.* at 885. *See e.g*. Natalie Delgadillo, *Civilian Oversight of Police Appeals to Many. But Is It Always Effective?*, Governing (May 25, 2017), https://www.governing.com/topics/public-justice-safety/gov-civilian-oversight-police-charter-amendment.html; *see also* Priyanka Boghani, *Is Civilian Oversight the Answer to Distrust of Police?,* PBS (July 13, 2016), https://www.pbs.org/wgbh/frontline/article/is-civilian-oversight-the-answer-to-distrust-of-police/.

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NAACP Legal Defense Fund

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Conviction Integrity Units: Why We Need Them and How They Work

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Conviction Integrity Units: Why We Need Them and How They Work

Wrongful convictions are more prevalent than most Americans realize. For far too long, the public has been more concerned about a guilty person going free rather than about an innocent person being locked away for a crime they did not commit.

According to data from the National Registry of Exonerations (NRE), there were 2,673 exonerations in the United States from 1989 to 2020.[1] In total, those exonerees lost more than 23,950 years from their lives. This and other data of exonerations revealed in the last 30 years show that "more innocent people have been convicted than anyone imagined."[2] Exonerees have been convicted for murder, robbery, and drug offenses, and those convictions stemmed from perjury, false accusations, and police and prosecutorial misconduct.[3] The failures of prosecutors (and trial judges) cannot be overstated in what has proven to be one of the most egregious miscarriages of justice in the criminal legal system.

In a 1935 ruling in *Berger v. United States*, the Supreme Court declared that the prosecution's ultimate goal "is not that it shall win a case, but that justice shall be done . . . .[The prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."[4] Yet, many wrongful convictions

Since 1989, more than 2,673 people, mostly Black and brown defendants, have been released from prison due to wrongful convictions and blatant miscarriages of justice. A staggering 23,950 years of their lives were lost.

— National Registry of Exonerations (2020)

can be traced back to prosecutorial misconduct and haste. Too often, prosecutors have focused their attention on win-loss records, sacrificing their roles as ministers of justice or quasi-judicial officials with a duty to promote justice that extends beyond merely securing convictions.[5]

Constitutional, statutory, judicial, and administrative rules and procedures serve as guardrails to protect the rights of the accused and provide a foundation for a fair adversarial process to take place. However, prosecutors, the officers of the court responsible for "doing justice" and working "in the interest of justice," have often subverted this system. Their ethical failures have forced thousands of defendants into jails and prisons on invalid charges based on faulty police investigations, botched prosecutions, and outright misconduct. Conviction Integrity Units (CIUs)[6] have been established by reform-minded prosecutors to examine claims of actual innocence and wrongful conviction, and to determine whether the actions of police and prosecutors meet the highest legal and ethical standards to sustain the conviction. CIUs are one safeguard against the harm of wrongful convictions that all prosecutors must adopt.

Prosecutors have the professional and ethical duty to promote justice in general, which can require "advocat[ing] just as zealously for the freedom of the innocent as . . . conviction of the guilty."[7] Prosecutors are the best-situated actors in the system to identify and correct existing errors and weaknesses in their offices' practices.[8] Due to a lack of statutory guidance and general reticence (and sometimes, outright hostility) to second-guess what they see as hard-won victories, prosecutors have ignored these obligations.[9] There has also been an abdication of oversight from the system as a whole, including the judiciary, to question the finality of many cases that present troubling facts.[10] Consider the case of Curtis Flowers, a Black man who was tried six times and sentenced to death four times for multiple murders that took place in 1996.[11] Flowers' most recent conviction was reversed by the Supreme Court in June 2019 due to the prosecution's "relentless, determined effort to rid the jury of [B]lack persons"[12] in violation of his constitutional rights.[13] Evidence of his innocence has reportedly been uncovered, and the case against him was dismissed with prejudice after the Mississippi Attorney General submitted a motion to dismiss the indictment.[14]

CIUs conduct fact-based reviews of past convictions. Usually housed within District Attorneys' offices (DAO), CIUs examine the legitimacy of past convictions. They investigate claims of "actual innocence."[15] To claim "actual innocence," the defendant asserts that he or she was wrongfully convicted of the crime charged. CIUs are an embodiment of recent principles articulated by the American Bar Association (ABA) to guide prosecutors in evaluating the disposition of certain cases.[16] By reviewing past cases for defects, CIUs can hold prosecutors accountable to the highest "ethical and constitutional obligations"[17] to correct their mistakes and prevent them from happening in the future. By establishing CIUs, elected district attorneys acknowledge their essential role in ensuring that all criminal convictions are justly secured and that cases are routinely examined for legal and procedural errors.

CIUs bypass limitations imposed by the appellate process. A CIU's purpose is fundamentally different from that of appellate units in a DAO. Rather than attempting to preserve convictions, CIUs critically reexamine previously secured convictions and objectively reconsider the possibility of innocence,[18] allowing the wrongfully convicted to get the relief they deserve. Conviction review panels can look at more evidence than what is available during the appellate process, so they are more likely to uncover substantive proof of actual innocence.[19] They are able to do their work despite procedural roadblocks within the criminal appellate process.[20] One example is the filing of a motion for a new trial based on recently discovered evidence, which is subject to time restrictions in most states, typically a few months to three years. Most new evidence to support actual innocence claims can take several years or more to gather. Even when this new evidence is uncovered, convicted individuals face a significant hurdle in convincing the courts that this evidence was not available at their first trial and that having the benefit of this new evidence at a new trial would result in acquittal. Importantly, some CIUs also review cases involving claims of overcharging offenses—that is, cases in which the convicted individual was not entirely innocent but was nevertheless charged with an offense more serious than their actual conduct warranted.[21]

District Attorneys' offices must have a process to correct inevitable errors in the criminal justice system. Even where there is no intentional wrongdoing, prosecutors and other actors within the system are going to make mistakes. Criminal justice is a "high-risk field" with complex processes that are "capable of producing serious accidents."[22] CIUs are error-correcting mechanisms that require prosecutors to reduce the "occurrence and severity" of errors.[23] Extensive self-review can reduce the public condemnation and lack of

trust that occurs when errors are uncovered.[24] Convicting an innocent person and sentencing them to a prolonged prison sentence—even death—is "perhaps the most dramatic example[] of failure in any criminal justice system" and must be corrected.[25] CIUs aim to do just that.

CIUs can reveal systemic weaknesses within prosecutors' offices and help implement procedures to cure them. CIUs have the power to identify systemic weaknesses that either fail to protect against individual errors or actively incentivize them, such as failing to identify and disclose exculpatory evidence or police presenting false testimony at trial.[26] This allows for increased accuracy in future prosecutions as prosecutor offices learn from the mistakes uncovered through these reviews.[27]

Most prosecutors' offices lack effective mechanisms for developing and enforcing prosecutorial best practices—indeed, most lack any formal, written quality assurance programs—so CIU reviews fill a desperate need.[28] Even measures as simple as creating checklists stressing particular pain points—say, the criteria that trigger an obligation to disclose information favorable to the defense, also known as *Brady* material[29]—based on errors identified through case reviews would be a marked improvement over current practices in many prosecutor offices.[30]

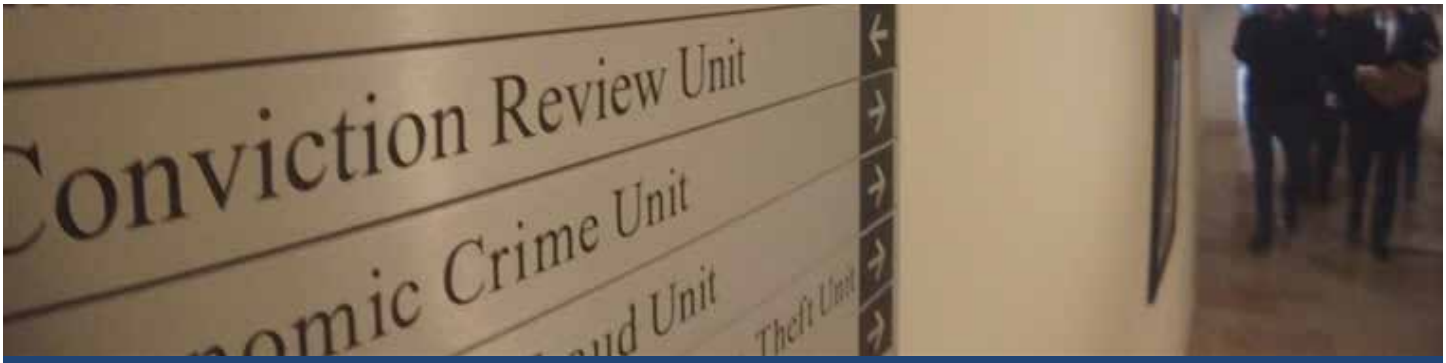
It is important that prosecutors' offices develop office-wide best practices (e.g., what kind of evidence is and is not *Brady* material) and implement those via manuals, guidelines, and training.[31] Guided by the review process, policies created to ensure that everyone from line prosecutors to the District Attorney fully understands that errors were made, and in what ways those actions were legally, factually, or ethically lacking.[32] Even if a particular office had no errors, instituting these review programs shows a commitment to ensuring accurate convictions.[33]

CIUs should be empowered to seek or support a variety of remedies. Once miscarriages of justice, particularly wrongful convictions, are revealed, CIUs should recommend dismissing/expunging cases, support petitions for the restoration of petitioners' rights, advocate for early release, move to reduce a sentence, or support clemency.[34] CIUs could also support compensation for the wrongfully convicted.[35] Having exposed systemic weaknesses, CIUs must take a proactive approach to prevent future errors by pushing for internal reforms of prosecutorial practices. Recommended practices might include conducting "root cause analyses" on each case where the CIU recommends altering a conviction in order to find common trends and errors; recommending improvements internally to stakeholders; publicizing accepted modifications throughout relevant jurisdictions; and creating a process of implementing and evaluating those modifications.[36]

District Attorneys' offices nationwide must make implementing CIUs a top priority. Despite the significant and proven gains CIUs offer, they remain rare: only about 3% of prosecutor offices currently use CIUs, but they are growing in number. As of 2020, 62 local prosecutors' offices (and three state attorneys general) have active CIU's. A public defender's office in New Jersey has also established one.[37] While an antagonistic relationship between rank and file prosecutors and CIUs might seem inevitable, prosecutors in offices with CIUs "uniformly believe that investigating cases where errors may have occurred is not only desirable, but essential."[38]

Successful implementation of a CIU requires adequate staffing, funding, and a clear mandate. Insufficient staffing, lack of funding, inflexible operating environments, and a lack of clear direction from office leadership[39] can render a CIU unable to fulfill its mandate.[40] To emphasize leadership's support of their mission, CIUs should report directly to DAs or head prosecutors—but a DA should never have ultimate discretion over the CIU's operation[41] since that could potentially threaten its independence and commitment to meaningful reviews. DAs should also anticipate and counter any tendency of line prosecutors to see CIU reviews as a rebuke,[42] and require full cooperation within the office. Commentators have expressed skepticism about prosecutors' ability to self-review, especially when compared to post-conviction advocates like innocence organizations.[43] These organizations, however, often do not have access or the resources to fully examine prosecutors' entire records of case management. Instead, allowing defendants and their counsel to participate in the CIU re-investigation process could provide some balance against prosecutorial bias. Unfortunately, most CIUs exclude petitioners from their review panels, while others require participating petitioners to waive their attorney-client[44] or self-incrimination privileges,[45] which are two major deterrents to petitioner participation. CIUs should employ confidentiality agreements with petitioners and their counsel to facilitate information sharing and prohibit disclosure of shared information.[46] To actualize the prevention of future wrongful convictions by avoiding repeat mistakes, CIUs must dedicate resources to analyzing the systemic causes of wrongful convictions. These and other challenging issues must be considered and resolved by elected district attorneys if a CIU is to be effective.

CIUs must ensure transparency and create confidence in the review process. CIUs should publicize their decisions. Giving stakeholders and the public a look behind the curtain—as well as demonstrating the impact of the review procedures on actual cases—enhances public favor and trust in these systems.[47] Finally, CIUs should issue annual reports on their activities, including ultimate outcomes for reviewed cases.[48]



The Legal Defense Fund calls on District Attorneys to establish, fully-fund, and sufficiently empower Conviction Integrity Units in their offices and require line prosecutors' complete cooperation with these units as a matter of policy.

LDF encourages District Attorney offices, large and small, to utilize existing models and best practices for the establishment of CIUs, like Fair and Just Prosecution's "*Conviction Integrity and Review: Key Principles and Best Practices for Ensuring Justice and Accountability*," and The Innocence Project's "*Conviction Integrity Unit Best Practices*."

Notes

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2 Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 Ohio St. J. Crim. L. 705, 709 (2017).

3 Richard A. Oppel, Jr. & Farah Stockman, *Prosecutors Usually Send People to Prison. These are Getting Them Out.*, N.Y. Times (Nov. 28, 2019), https://www.nytimes.com/2019/11/28/us/conviction-integrity-unit-innocence.html; *see* NRE, Exonerations in 2018 (2019).

4 295 U.S. 78, 88 (1935).

5 Bennett L. Gershman, *The Prosecutor's Contribution to Wrongful Convictions,* in *Examining Wrongful Convictions: Stepping Back, Moving Forward* 109 (Allison D. Redlich et al., ed. 2014).

6 Conviction Integrity Units are defined by different names, including Conviction Review Units, Case Review Units, Post-Conviction Review Section, Conviction Review Committee. The NAACP Legal Defense Fund (LDF) prefers the name Case Review (and Integrity) Unit, which emphasizes an office's role in continual case review not only to ensure the integrity of case processing and convictions, but also to ensure that offices employ industry best practices and training for line prosecutors to ensure conformity with office standards, directives, and protocols.

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8 *Id.* at 1095–96.

9 Laurie L. Levinson, *Searching for Injustice: The Challenge of Post-Conviction Discovery, Investigation, and Litigation,* 87 S. Cal. L. Rev. 545 (2014); Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence* 2014 Utah L. Rev. 613, 624 ("While prosecutors generally aspire to seek justice, their default response to postconviction innocence claims is often characterized by reflexive skepticism and strenuous resistance, a reflex generated by the importance of conviction statistics for raises, recognition, and district attorney politics; social pressure from police officers and other prosecutors; the fact that most such claims are baseless; and the importance of giving finality to victims and the public.") (footnote omitted).

10 *See generally* Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody, ProPublica (Apr. 3, 2013),* https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody (discussing the routine lack of action by trial courts to refer prosecutors to state disciplinary review boards for misconduct); *see also* Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform,* 105 J. Crim. L. & Criminology 881 (2015); Bruce A. Green & Samuel Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis,* 14 Ohio St. J. Crim. L. 143, 144–45 (2016); Samuel J. Levine, *The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial Discretion*, 12 Duke J. Const. L. & Pub. Pol'y 2 (2017).

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12 *Flowers v. Mississippi, 588 U. S.* ____, 139 S. Ct. 2228 (2019).

13 *See Fourteenth Amendment, Equal Protection Clause, Batson Challenges, Flowers v. Mississippi,* 133 Harv. L. Rev. 352, 355–56 (2019).

14 Parker Yesko, *It's Over, Charges against Curtis Flowers are dropped,* APM Reports (Sep. 4, 2020), https://www.apmreports.org/episode/2020/09/04/charges-against-curtis-flowers-are-dropped.

15 John Hollway, *Conviction Review Units: A National Perspective* 9 (Univ. of Pa. Law. Sch, Faculty Scholarship Research Paper No. 16142016), http://scholarship.law.upenn.edu/faculty_scholarship/1614.

16 Model Rules of Prof'l Conduct R. 3.8 (2017).

17 *See* Scheck, *supra* note 2, at 746; Letter from Aramis Ayala et al. (Criminal Justice Leaders), to Kansas City Board of Commissioners, (Aug. 8, 2018) [hereinafter Criminal Justice Leaders Letter], https://fairandjustprosecution.org/wp-content/uploads/2018/08/KCK-CIU-SIGN-ON-LETTER-FINAL.pdf.

18 *Id.* at 25.

19 *Id.* at 41.

20 *See generally* Levinson, *supra* note 9, at 545.

21 Hollway, *supra* note 15, at 42.

22 Webster, *supra* note 1, at 250.

23 Hollway, *supra* note 15, at 13.

24 Kroepsch, *supra* note 7, at 1096, 1099.

25 *See id.* at 1097 (footnote omitted).

26 *See e.g.* Justin Fenton, *Baltimore's State's Attorney says she has a list of 300 officers with credibility issues. Public defenders are demanding to see it,* Balt. Sun (Feb. 11, 2020), https://www.baltimoresun.com/news/crime/bs-md-ci-cr-do-not-call-list-compel-20200211-xsjzrh2we5df7etqreyxgu2e4y-story.html; Elizabeth Weill-Greenberg, *When Cops Lie, Should Prosecutors Rely Upon Their Testimony At Trial,* Appeal (July 29, 2019), https://theappeal.org/advocates-demand-da-do-not-call-lists-dishonest-biased-police/; *see also* Julie Shaw & Chris Palmer, *Here are the 29 Philly cops on the DA's 'Do Not Call' list*, Phila. Inquirer (Mar. 6, 2018), https://www.inquirer.com/philly/news/crime/29-philly-officers-do-not-call-list-krasner-20180306.html.

27 *See* Scheck, *supra* note 2, at 718; *see* Hollway, *supra* note 15, at 75–76; *Conviction Integrity and Review: Key Principles and Best Practices for Ensuring Justice and Accountability*, Fair & Just Prosecution 2 (Aug. 2019) [hereinafter Fair & Just Prosecution], https://fairandjustprosecution.org/wp-content/uploads/2019/08/Conviction-Integrity-Statement-of-Principles.pdf; *Conviction Integrity Unit Best Practices*, Innocence Project 4 (Oct. 15, 2015) [hereinafter Innocence Project], http://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf.

28 Barry C. Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 Cardozo L. Rev. 2215, 2225–26 (2010) [hereinafter Scheck, *Professional and Conviction Integrity Programs*]; *see also id*. at 2216 ("Professional and Conviction Integrity Programs are models for internal regulation of prosecutorial offices. They draw upon quality assurance ideas that have been successfully employed by the medical profession to reduce error, which were, in turn, borrowed from business and industry.").

29 *Brady v. Maryland*, 373 U.S. 83 (1963).

30 Scheck, *Professional and Conviction Integrity Programs, supra* note 27, at 2239–40 (At least for courts, the legal focus on procedural over factual errors and the "harmless error doctrine" also limit their ability to enforce prosecutorial best practices); *See* Webster, *supra* note 1, at 255–56.

31 *Id.* at 2244; *see* Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 8 Vand. L. Rev. 171, 238 (2005).

32 *See* Scheck, *Professional and Conviction Integrity Programs supra* note 27, at 2247–48.

33 *See id.* at 2218.

34 Fair & Just Prosecution, *supra* note 27, at 2–3.

35 *Cf.* NRE, *supra* note 3("Fewer than half of exonerees received any compensation.").

36 Innocence Project, *supra* note 27 ("District attorney's office should have a unit tasked to do 'root cause analysis' (RCA) of errors, including errors identified by a CIU."); *see also* Fair & Just Prosecution, *supra* note 27, at 2–3 ("Errors identified by the CIU should be used to inform proactive accountability measures and trainings within offices . . . ." (emphases omitted).

37 *See* NRE, *Conviction Integrity Units* (2020), http://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx (last visited Sept. 12, 2020).

38 Hollway, *supra* note 15, at 13.

39 *Id.* at 32–33.

40 *Id.* at 10. ("Very few CRUs have written protocols, policies, or procedures, and what protocols do exist have rarely been made public.").

41 *See id.* at 24.

42 *See id*. at 19; Oppel, *supra* note 3.

43 Criminal Justice Leaders Letter, *supra* note 16.

44 Hollway, *supra* note 15, at 50.

45 *Id.* at 51.

46 *See* Innocence Project, *supra* note 27; *see, e.g.,* Scheck, *supra* note 2, at 730.

47 *See* Hollway, *supra* note 15, at 59–60.

48 *See id.* at 65.

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Eliminating Racial Disparities in Prosecution

Eliminating Racial Disparities in Prosecutorial Discretion

In the United States, "prosecutors must exercise judgment about which of the many cases that are technically covered by the criminal law are really worthy of criminal punishment."[1] They have broad discretion and authority to decide everything from what and who to investigate, what charges to bring, whether to offer a plea bargain, and what sentence to recommend.[2] The most urgent concern for prosecutors in making discretionary decisions should not be whether a case can be won or whether an accused person has committed a crime, but whether prosecuting the offense serves the public interest.[3]

Racial bias pervades prosecutorial discretionary decision-making. The law requires prosecutors to exercise their broad powers in good faith and in a non-discriminatory manner. Unfortunately, when it comes to Black and Latinx defendants, prosecutors routinely exercise their discretion in a racially discriminatory manner. Recent studies demonstrate that prosecutors are more likely to engage in charge bargaining[4] with White defendants than with Black or Latinx defendants with similar legal charges.[5] White defendants are "twenty-five percent more likely than Black defendants to have their most serious initial charge dropped or reduced to a less severe charge."[6] As a result, White defendants who face initial felony charges "are approximately fifteen percent more likely than Black defendants to end up being convicted of a misdemeanor instead."[7] "[W]hite defendants initially charged with misdemeanors are approximately seventy-five percent more likely than Black defendants to be convicted for crimes carrying no possible incarceration, or not to be convicted at all."[8] Because more than ninety-five percent of criminal convictions in the United States come from closed-door plea-bargaining rather than a jury trial,[9] prosecutors' charging power enhances their control of plea-bargaining outcomes.[10] Sixty percent of all convicted defendants plead guilty to non-violent offenses related to immigration, drugs, or property – crimes overrepresented by low socioeconomic and minority groups.[11] Among people convicted of drug or property crimes, prosecutors are more likely to apply mandatory terms and sentencing enhancements to Black and Latinx men.[12]

Measures to Reduce Racial Disparities Resulting from Discrimination in Prosecutorial Discretion

I. UNIFORM DECISION-MAKING

Inconsistency among office-wide and individual prosecutorial decision-making contributes to disparities in the treatment of individuals in the criminal legal system.[13] One study found that "prosecutors displayed widely divergent views about the goals of the criminal justice system, charging philosophies, and plea bargaining strategies."[14] These differences account for some of the variation in screening, charging, and plea offer decisions.[15] District attorneys can establish and maintain consistency in decision-making by developing manuals with specific rules for screening cases, charging cases, dismissing cases, and plea offers for uniform outcomes across cases and prosecutors.[16] Robust training programs for

new prosecutors and periodic refresher courses for veterans should cover these rules and practices. Most importantly, supervising prosecutors should review the decisions of all prosecutors to ensure consistency within the office. Studies have found that when the most experienced prosecutor in a unit screens all its cases, there is a noticeable increase in consistency in screening decisions.[17]

II. CHARGING

MANDATE RACIAL IMPACT STUDIES

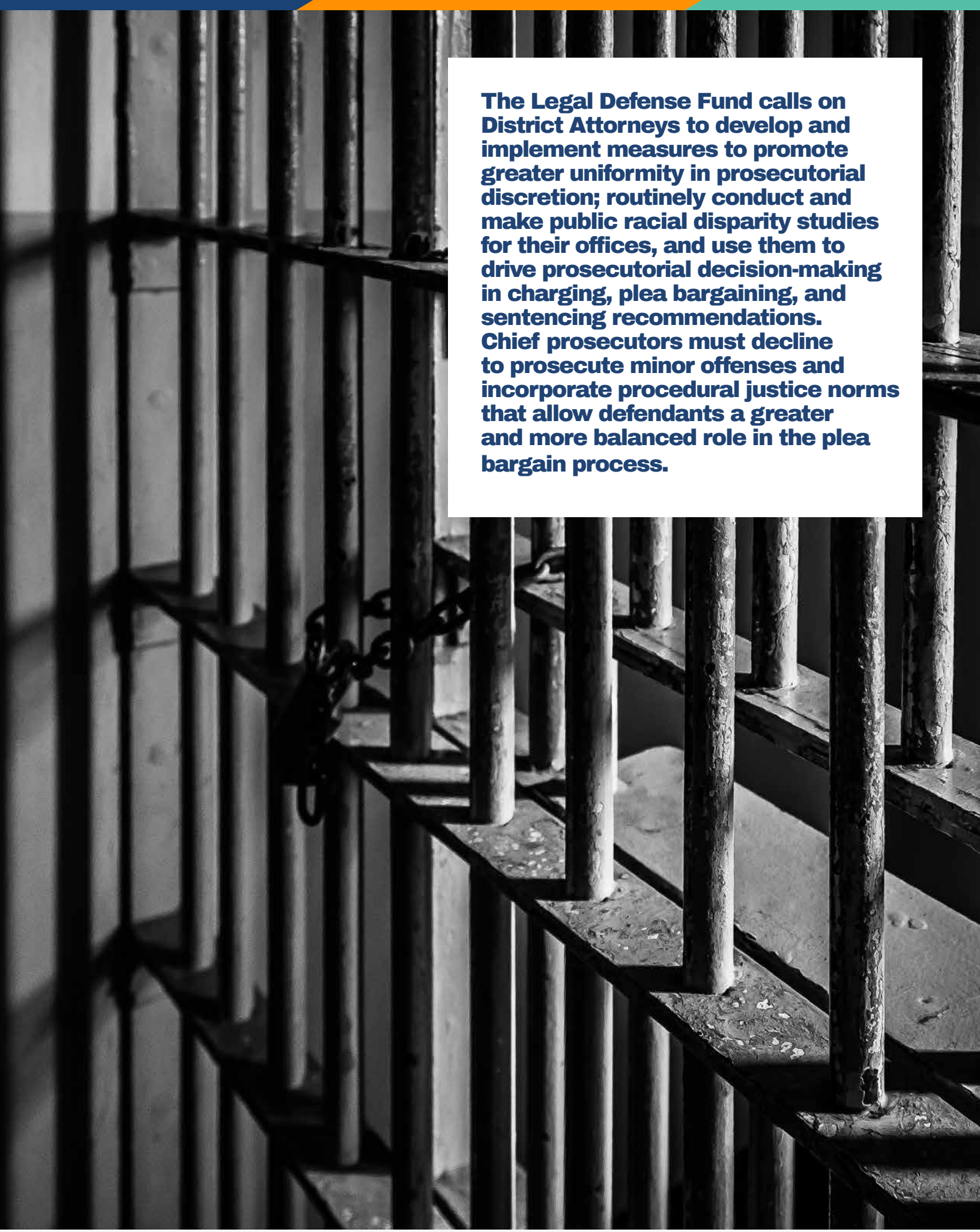
Racial impact studies are "the collection and publication of data on the race of the defendant and the victim in each case for each category of offense, and the prosecutorial action taken at each step of the criminal process."[18] This data is analyzed to determine if race had a statistically significant correlation with prosecutorial decisions.[19] Such studies can reveal disparate treatment of African American defendants or victims or the discriminatory impact of race-neutral discretionary decisions and policies. They help prosecutors make informed decisions about policies formulated to guide discretion in specific cases. Racial impact studies also inform criminal defendants, crime victims, and the public about the exercise of prosecutorial discretion, which could force prosecutors to be accountable for their decisions.[20]

DECLINE TO PROSECUTE MINOR OFFENSES

Chief prosecutors must decline to prosecute minor offenses where arrest patterns show a disparate impact on racial minorities.[21] This reduces the harmful effect that zero tolerance policing practices have on historically disadvantaged communities.[22] Studies show that racial disparities in plea-bargaining outcomes are greater in cases involving misdemeanors and low-level felonies than in cases involving more severe offenses.[23] And a zero-tolerance policing approach to minor offenses has increased the number of individuals subjected to criminal courts to over thirteen million per year, with police focused disproportionately on poor communities of color.[24] In addition to reducing racial disparities in the criminal justice system, declining to prosecute minor offenses could ultimately affect policing strategies, reallocate resources to the most serious crimes (including helping victims of those crimes), and lead to equal enforcement of the laws on the streets.[25]

III. PLEA BARGAINING

"[P]rosecutors acknowledge that the likelihood of innocent individuals pleading guilty is substantial."[26] Scholars suggest that prosecutors need to incorporate procedural justice in the practice of plea-bargaining, since bargaining power lies disproportionately in the hands of the government. Prosecutors must give defendants the "opportunit[y] to tell their sides of the story before making or responding to an offer; explain their bargaining positions by reference to objective, uniformly applied criteria; demonstrate consideration of arguments made by defendants; and avoid the use of charging threats and other high-pressure tactics to induce guilty pleas."[27] These practices and procedures do not occur uniformly or on a systematic basis.[28] Research indicates that "implementing procedural justice norms not only may increase defendant satisfaction with plea-bargained outcomes (even if the outcomes themselves remain substantively unchanged), but also may contribute to the perceived legitimacy of the criminal justice system and ultimately enhance defendants' levels of voluntary compliance with legal rules and authorities."[29] Prosecutors must consider specific changes in office policies and practice that would conform plea bargaining with this procedural justice model.[30]



The Legal Defense Fund calls on District Attorneys to develop and implement measures to promote greater uniformity in prosecutorial discretion; routinely conduct and make public racial disparity studies for their offices, and use them to drive prosecutorial decision-making in charging, plea bargaining, and sentencing recommendations. Chief prosecutors must decline to prosecute minor offenses and incorporate procedural justice norms that allow defendants a greater and more balanced role in the plea bargain process.

Notes

1 Leslie C. Griffin, *The Prudent Prosecutor*, 14 Geo. J. Legal Ethics 259, 263 (2001) (citing Gerard E. Lynch, *Our Administrative System of Criminal Justice,* 66 Fordham L. Rev. 2117, 2136–37 (1998) (emphasis omitted).

2 *Id.*; *see also* Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U.J. Legis. & Pub. Pol'y 821, 823 (2013).

3 K. Babe Howell, *Prosecutorial Discretion: The Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 Geo. J. Legal Ethics 285, 313 (2014).

4 *See* Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains,* 55 Stan. L. Rev. 1409 (2003); *see e.g.,* Lindsey Devers, *Plea and Charge Bargaining*, Bureau of Justice Assistance, U.S. Dep't of Just. (Jan. 24, 2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf; *see also* Ronald Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors,* 91 Marq. L. Rev. 9 (2007).

5 Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, 3 Race & Just. 210, 212 (2013).

6 Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. Rev. 1188, 1191 (2018).

7 *Id.* (footnote omitted.)

8 *Id.*

9 *See generally* Nat'l Assoc. of Crim. Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (July 10, 2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf; *see also* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. Empirical Legal Stud. 459 (2004).

10 Davis, *supra* note 2, at 832-33.

11 Brady Heiner, *The Procedural Entrapment Of Mass Incarceration: Prosecution, Race, and The Unfinished Project of American Abolition*, 42 Phil. & Soc. Criticism 594, 616 (2015).

12 Schlesinger, *supra* note 5, at 212.

13 Howell, *supra* note 3.

14 Bruce Frederick & Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making – Technical Report* (Doc. No. 240334, Grant No: 2009-IJ-CX-0040) Nat'l Inst. Of Justice, U.S. Dep't of Just. 280 (Dec. 2012).

15 *See id.*

16 *See id.* at 283.

17 *See id.* at 282–83.

18 Davis, *supra* note 2, at 836.

19 *See id.*

20 *See id.*

21 *See* Howell, *supra* note 3, at 287, 326–34.

22 *See id.* at 287.

23 Berdejo, *supra* note 6, at 1213-20

24 Howell, *supra* note 3, at 290 (footnote omitted).

25 *Id*. at 327.

26 *Id.* at 291 (footnote omitted).

27 Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 Ga. L. Rev. 407, 411 (2008).

28 *Id.*

29 *Id.* at 412

30 *Id.* at 413.

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Beyond Conviction Rates: Reevaluating Measures of Success for Prosecutors

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Prosecutorial Success Based on Conviction Rates Distorts the Criminal Justice System

Most prosecution offices and individual prosecutors measure their success and effectiveness with a heavy focus on the number of convictions they obtain. This often stems from political pressure to be seen as tough-on-crime. The focus on conviction rates creates tremendous pressure on prosecutors to adopt a win-at-all costs attitude. The institutional culture created by focusing on convictions ignores the question of whether a criminal conviction really is just in a given case and, worse, provides incentives for prosecutorial misconduct to occur in the pursuit of the "win."

"The American prosecutor today has the power to shift the decision-making framework of the criminal system from retributive to restorative without a single legislative act."

Rather than fixating on win-loss tallies, prosecutorial success should focus on maintaining an adversarial system that acts consistent with the law, is fair and transparent, equitably resourced, evidence-based, and minimizes the negative impact that prosecutors' actions have on individuals and communities, particularly communities of color. Major transformation is necessary to succeed, and prosecutors must be willing to pursue these measures despite protests from internal or external sources. "The American prosecutor today has the power to shift the decision-making framework of the criminal system from retributive to restorative without a single legislative act."[1]

Conviction rates are not indicators of prosecutorial success—unless overflowing prisons and the social devastation that mass incarceration brings is the intended outcome. Very little data is available indicating what strategies are most effective to measure prosecutorial performance.[2] It seems obvious that prosecutors should be focused on justice and safety. If we are to move to a restorative model of criminal justice (which emphasizes repairing the harm caused by criminal behavior) and determine the most effective strategies available to prosecutors to accomplish this goal, prosecutors must consider the effects of their work on the entire criminal justice system and the communities they serve rather than individual cases.[3] For example, diversion or substance abuse programs might have a greater impact on the recidivism rate than prosecuting youth offenders or those dependent on drugs or alcohol and might

be cost-effective. Prosecutors must partner with judges, police, and defense attorneys to create evidence-based policies to move to a restorative framework.

Prosecutor focus on high conviction-rates creates incentives for misconduct. Prosecutors exercise enormous discretion at nearly every phase of the criminal legal process and their decisions are not subject to any systematic review. The use of unregulated discretion to deliver high conviction rates creates incentives for misconduct, often in the form of blatant constitutional violations of a defendant's rights. These include withholding evidence favorable to the defense, denying a defendant's right to counsel, striking jurors based on race, knowingly offering perjured testimony at trial, and using illegally obtained evidence to obtain convictions, which fails to protect individuals from unconstitutional police actions. Flagrant abuses of power during plea-bargaining and grand jury proceedings also violate the spirit of the Constitution's protections. Far from inconsequential, misconduct often results in wrongful convictions, victims forced to endure retrials, and devastated families—especially in Black and Latinx communities—while the guilty go unpunished. Winning convictions may be an indication of a line prosecutor's prowess as a litigator, but high conviction rates say little about justice and public safety.

Disciplinary authorities must take prosecutorial misconduct more seriously[4] and pursue prosecutors aggressively for misconduct.[5] Courts should also impose disciplinary measures.[6] But the most effective way to combat misconduct associated with the dogged pursuit of wins is to no longer equate success with high conviction rates. When a prosecutor is incentivized to pursue the most just outcome, there is decreased emphasis on convictions and less incentive for misconduct.

Redefining success to focus on goals of restorative justice and public safety provide more appropriate incentives for prosecutors than conviction rates. In general, when compared to convictions, alternative measures of accountability accompanied by programmatic options increase public safety and fairness in the criminal justice process. Alternative approaches to incarceration allow many defendants to access a range of community resources that decrease the probability of re-offending, to address other problematic behaviors (e.g., substance use), while increasing fairness and equity in the system.

Deferred prosecution programs have "tangible benefits for defendants, prosecutors, and the community."[7] This strategy is implemented as early as possible in a case and has the potential to reduce criminal justice system involvement and incarceration rates while maximizing public safety.[8] Deferred prosecution allows individuals to stay in the community while completing several activities, such as restitution, community service, and addiction counseling. Unlike probation, deferred prosecution offers individuals the chance to avoid charges or conviction. Upon successful completion charges can be withheld, or dismissed if a plea has already been entered.

Diversion programs can be initiated during the law enforcement, pretrial, or trial phase of a case. During the law enforcement phase, low-level drug offenders, for example, might be referred to treatment in lieu of entering the criminal system. Diversion programs can reduce dockets, lower costs, focus prosecutor attention on cases that demand more time and resources, and produce better outcomes for individuals and communities. Designed to reduce recidivism, these programs provide additional oversight to cases involving a range of special populations.[9] Failure results in the resumption of traditional criminal proceedings.[10]

Despite its promise, redefining prosecutorial success has several challenges. The win-at-all-costs mindset is the product of many factors, not least of which is the political demand for prosecutors to be tough-on-crime, arising out of fear, racism, and a legitimate desire to increase public safety. However, prosecutors can drive positive changes in public views and among their ranks. They must demand that justice and public safety be served by developing and deploying the most effective and individualized case resolution. Working with stakeholders to get buy-in, prosecutors must educate the public on the positive impact on public safety these alternatives offer and develop a slate of approaches tailored to the specific needs of their community.

Once prosecutorial success measures are determined, chief prosecutors must implement guidelines and require training for all staff. This training should include the implications of "mass incarceration, racial disparities in the criminal justice system, the criminalization of poverty, [implicit bias,] and related topics."[11] Prosecutors unreceptive to change must be replaced.[12] The objective is to focus on strategies that deliver true justice, fairness, and public safety.

The Legal Defense Fund calls on District Attorneys to re-evaluate their vision of prosecutorial success, seek measures of success that embrace restorative justice and employ criteria beyond conviction rates that can create safer communities without the harmful collateral consequences that have resulted from measures of success that prioritize conviction and incarceration.

Notes

1 Olwyn Conway, *How Can I Reconcile With You When Your Foot is On My Neck?: The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 Mich. St. L. Rev. 1349, 1392 (2018) (discussing the immediate change that prosecutors are able to make in the criminal justice system given their enormous discretion and authority).

2 *See generally* Robin Olsen et al., *Collecting and Using Data for Prosecutorial Decisionmaking: Findings from 2018 National Survey of State Prosecutors' Offices,* Urban Inst. (2018), https://www.urban.org/sites/default/files/publication/99044/collecting_and_using_data_for_prosecutorial_decisionmaking_0.pdf.

3 *Id.* at 13.

4 Samuel J. Levine & Bruce A. Green, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis,* 14 Ohio State J. Crim. Law 143, 161 (2016).

5 *Id.* at 145.

6 *See id.; see also id.* at 181–82 ("[T]he extensive historical and contemporary record of judicial review of prosecutors' charging decisions may indeed suggest a justification for state courts, if they so choose, to regulate prosecutorial discretion more meaningfully."); Carrie Pettus-Davis et al., *Deferred Prosecution Programs: An Implementation Guide, Institute for Justice Research and Development* (Dec. 2019), https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication_pdfs/deferred_prosecution_programs_implementation_guide.pdf.

7 Pettus-Davis et al., *supra* note 6, at 8 (citing: Love, M. C., *Alternatives to conviction: Deferred adjudication as a way of avoiding collateral consequences.* 22 Fed. Sentencing Rep. *6–16. (2015)).*

8 *Id.* at 5.

9 George C. Orwat et al., *An evaluation of the Cook County State's Attorney's Office Deferred Prosecution Program,* Ill. Crim. Just. Info. Auth. (2015), http://www.lcjia.state.il.us/assets/pdf/ResearchReports/Cook_County_Deferred_Prosecution_evaluation_0715.pdf

10 Pettus-Davis et al., *supra* note 6, at 8.

11 *See also* Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movemen*t, 3 UCLA Crim. Just. L. Rev. 1, 25 (2019).

12 *Id.* at 26.

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Prosecutorial Constitutionalism and Accountability: A National Commitment for the Local Prosecutor

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Prosecutorial Constitutionalism & Accountability: A National Commitment for the Local Prosecutor

The U.S. Constitution contains protections and rights designed to limit government overreach into a citizen's life and liberty. Many of these rights regulate the conduct of law enforcement and require individuals to be treated fairly and equally during criminal investigations and prosecutions. Prosecutors, who take an oath to uphold and defend the Constitution, are required to neutrally and fairly ensure it is applied.[1] In our system, prosecutors exercise near-absolute authority in decision-making at every stage and are rarely accountable to any judicial body for their actions.[2] This means their power to levy charges, their absolute control over the grand jury, and their unilateral control over the plea-bargaining process are not subject to systematic review.[3] This results in Black defendants routinely being denied their constitutional rights at many phases of the adjudicative process. Because the prosecution's own actions often lead to blatant violations of constitutional rights, the most obvious remedy is easy—prosecutors simply must not commit, support, or benefit from violations of constitutional rights and must affirmatively ensure that individual constitutional rights are protected.

Prosecutors must commit to protecting every person from illegal search and seizure by police.

The Fourth Amendment prohibits illegal search and seizure by the government. Evidence seized by police in violation of the Fourth Amendment is generally barred from use in a defendant's prosecution, even if it is truthful.[4] This exclusion removes any incentive for police to conduct illegal searches and seizures. Courts generally underenforce a defendant's search-and-seizure protections.[5] It must fall to prosecutors to ensure the process is constitutional, fair, and equitable. Prosecutors can self-police by declining to use unconstitutionally acquired evidence, and the Constitution arguably requires them to do so.[6] Prosecutor offices can and should create administrative exclusion rules, a policy that bans the use of any evidence obtained in violation of the Fourth Amendment, even where evidence is technically admissible.[7] This disincentivizes police misconduct by ensuring that line prosecutors aggressively screen and evaluate all evidence for constitutional compliance.[8]

Prosecutors must uphold a defendant's rights to counsel and to a speedy trial.

Under the Sixth Amendment, criminal defendants have the right to counsel at every critical stage of their case.[9] Yet, prosecutors in some jurisdictions routinely confer with judges about important decisions like bail without notifying the defense.[10] Denying defendants the opportunity to present their interests at critical junctures violates their right to counsel and right to due process under the 14th Amendment.[11] All prosecutor offices must

ensure that the right to counsel is protected at every stage of the criminal process and notify the defense of all decision-making opportunities with time to adequately prepare and participate.

The Sixth Amendment also promises defendants a speedy trial. Prosecutors violate this right when they unnecessarily delay prosecutions. This puts a person's life on hold indefinitely and the passage of time can significantly impact the quality of his or her defense.[12] Courts do not rigorously enforce this right because "[i]t is . . . impossible to determine with precision when the right has been denied."[13] Since this creates a greater likelihood of abuse, prosecutor office policy should set clear time limits for every adjudication, with shorter time frames for persons held in custody. Once a trial date is determined, chief prosecutors must limit their staff's ability to use repeated delays to extract plea bargains.

Excluding a prospective juror based on race violates constitutional rights of the defendant and the juror.

Courts have interpreted the Sixth and Fourteenth Amendments to give defendants the right to a jury trial from which people of a particular race have not been intentionally excluded.[14] The Supreme Court has found jurors to also have a constitutional right not to be excluded from jury service on the basis of race.[15] Many prosecutors, however, have engaged in racially discriminatory jury selection because proving discrimination often requires "reading the mind of the prosecutor. If [a] prosecutor can offer a reason for each [peremptory] challenge that sounds race-neutral . . . there is nothing a trial judge or appellate judges can do but nod their heads."[16] Accordingly, office policy must have zero tolerance for line prosecutors excluding jurors due to their race and must gather and analyze selection statistics to uncover and address racial disparities in peremptory challenges, regardless of intent.

Prosecutors must disclose any evidence favorable to the defense.

Starting with *Brady v. Maryland*, which was decided in 1963, the Supreme Court has repeatedly found that the Fourteenth Amendment's Due Process Clause requires that prosecutors disclose to the defense any information favorable to the accused.[17] Further, the disclosure obligation comes with a resulting burden,[18] ensuring that when prosecutors rely on others for expertise they must review their files and evidence and cannot claim ignorance of any exculpatory evidence therein.[19]

Prosecutors routinely fail to turn over exculpatory evidence to the defense,[20] or wait to do so until the defense is unable to use the information effectively (e.g., on the eve of trial).[21] Some prosecutors refuse to disclose exculpatory information they deem inadmissible, immaterial, or not credible, even though none of these is relevant under *Brady*.[22] To ensure compliance with *Brady*, district attorneys must adopt policies to automatically disclose potentially useful information to the defense. Such policies should explicitly reject questions of admissibility, materiality, or credibility as justifications for nondisclosure.[23] Even better, prosecutor offices could institute open-file policies, sharing all information (save for that which might, say, threaten an informant's life) with the defense.[24]

Experts reasonably suggest that prosecutors extend *Brady*-like protection to plea-bargains and give defendants all exculpatory evidence prior to starting negotiations.[25] The spirit of *Brady* could also extend to the grand jury, with prosecutors showing grand jurors all exculpatory and other evidence favorable to the accused before jurors decide whether to indict.[26]

Due process protects against prosecutors using false evidence, like perjured testimony, against defendants.[27] Yet, prosecutors routinely overlook perjury by their own witnesses, often threatening prosecution only for perjured testimony for defense favorable witnesses, including when witnesses wish to recant prior false claims.[28] Prosecutors must have zero-tolerance for false testimony.[29]

The Legal Defense Fund demands that prosecutors embrace their obligations as government officials beholden to the Constitution. Prosecutors must be especially skeptical of evidence favorable to convictions. Where evidence is lacking, prosecutions must not be pursued. District Attorneys must create office-wide policies to: prohibit staff from violating constitutional principles; reprimand those who commit violations; and implement mechanisms to discover such misconduct.[30] Prosecutors must set the highest standards and procedures, despite judicial reluctance to hold prosecutors accountable.

Notes

1 Eric S. Fish, *Prosecutorial Constitutionalism,* 90 S. Cal. L. Rev. 237, 260 (2017).

2 *Id.* at 260; *See* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 Wash. U. L.Q. 713, 715 (1999).

3 Fish, *supra* note 1, at 260–63.

4 *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 649, 655 (1961).

5 *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

6 *See* Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. Davis L. Rev. 1591, 1625-28 (2014).

7 *Id.* at 1595; *cf.* Fish, *supra* note 1, at 251.

8 Gold, *supra* note 7, at 1597.

9 *See, e.g.*, *United States v. Wade*, 388 U.S. 218, 224–25 (1967).

10 Jordan Smith, *New Orleans Prosecutors Routinely Violate Defendants' Rights to Counsel to Keep Them in Jail*, Intercept (May 15, 2019), https://theintercept.com/2019/05/15/new-orleans-prosecutors-sixth-amendment-right-to-counsel-bail/.

11 *Id*.

12 *See* Henning, *supra* note 2, at 772.

13 *Barker v. Wingo*, 407 U.S. 514, 521 (1972).

14 *Batson v. Kentucky*, 476 U.S. 79–80 (1986); *See also*, *Flowers v. Mississippi*, 588 U.S. ___ , 139 S. Ct. 2228, (2019).

15 *Batson v. Kentucky*, at 79–80; *See* Jay Willis, *The Supreme Court Just Struck Down The Last State Law Allowing Split Jury Verdicts,* Appeal (Apr. 20, 2020), https://theappeal.org/supreme-court-ramos-v-louisiana-overturning-precedent/.

16 Steve Weinburg, *Anatomy of Misconduct*, Ctr. for Pub. Integrity (June 26, 2003, last updated May 19, 2014) https://publicintegrity.org/politics/state-politics/harmful-error/anatomy-of-misconduct/.

17 *See* 373 U.S. 83, 84–87 (1963).

18 *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

19 Jessica Brand, *The Epidemic of Brady Violations: Explained*, Appeal (Apr. 25, 2018), https://theappeal.org/the-epidemic-of-brady-violations-explained-94a38ad3c800/.

20 *See, e.g., id.*

21 Weinburg, *supra* note 18.

22 *See* Lisa M. Kurcias, *Prosecutor's Duty to Disclose Exculpatory Evidence,* 69 Fordham L. Rev. 1205, 1216 (2000); Marc Allen, *Non-Brady Legal and Ethical Obligations on Prosecutors to Disclose Exculpatory Evidence,* Nat'l Registry of Exonerations (Jul. 2018), https://www.law.umich.edu/special/exoneration/Documents/NRE_Exculpatory_Evidence_Obligations_for_Prosecutors.pdf.

23 *See, e.g.,* Fish, *supra* note 1, at 273; Weinberg, *supra* note 18.

24 *See* Fish, *supra* note 1, at 283.

25 Fish, *supra* note 1, at 250–51.

26 *Id.* at 294–95. This is already the practice for federal prosecutors. *See* United States Attorney Manual § 9-11.233 (2020).

27 *See Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935).

28 *See* Monroe H. Freedman, *The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors' Offices*, 52 Washburn L.J. 1, 17 (2012).

29 *See generally* Steven Zeidman, *From Dropsy to Testilying: Prosecutorial Apathy, Ennui, or Complicity?,* 16 Ohio St. J. Crim. L., 423, 431–32 (2019); *see also* Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 Va. J. Soc. Pol'y & L. 305, 313.

30 *Cf.* H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, 32 Colo. Law. 11, 21 (2003). Prosecutors in U.S. Attorney's Offices, for example, are required to report to the Office of Professional Responsibility evidence and non-frivolous allegations of at least some forms of misconduct. *See* Justice Manual § 1-4.300 (2018).

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Diversity in Prosectors' Offices

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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,[1] 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%.[2] 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,[3] 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.[4]

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[5] highlights the unfairness of the system. Police brutality against Black people, often perpetrated by White officers,[6] 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.[7] This allows prosecutors to better understand every defendant's circumstances and include cultural sensitivity in their decision-making.[8] Failure to diversify district attorney offices ignores the roots and harm of underrepresentation.[9]

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

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[13] or having conflicts of interest merely because they question established practices or point out inequities in the system.[14] 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).

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