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## The Common Prosecutor

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# The Common Prosecutor

Melanie D. Wilson\*

*This symposium piece stems from the Loyola University of Chicago Law Journal’s Criminal Justice Symposium and my engagement with a panel of experts discussing wrongful convictions, pleas, and sentencing. The essay focuses on the role of prosecutors and contends that the system will improve only when more law school graduates of every race, religion, gender identity, background, ideology, ability, sexual orientation, and other characteristics serve as prosecutors. We have witnessed the rise of the “progressive prosecutor.” Now, we need to add more “common prosecutors.”*

*The homogeneity of prosecutors is well known and well documented. For example, as of October 2020, eighty-five percent of U.S. attorney’s offices were led by white men. Yet, the people investigated and prosecuted for crimes are disproportionately people of color. Members of the LGBTQ community and people living in poverty are also disproportionately targeted by our justice system. Filling the office of the prosecutor with significantly more “common prosecutors”—those characterized by a lack of privilege or special status—will mitigate several flaws in the system. This diversity, for instance, will improve prosecutorial decision-making, increase public confidence in the system, encourage more productive police-citizen interactions, and tend to reduce prosecutor and law enforcement bias. This essay explains why and provides concrete suggestions for how to accomplish such diversity.*

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#### INTRODUCTION

I grew up a common kid.<sup>1</sup> I was the first in my family to go to college, let alone to graduate from law school. After law school, I became what I like to call a common prosecutor.<sup>2</sup> This Essay contends that we need more—many more—“common prosecutors”—those characterized by a lack of privilege or special status—to give the people of the United States representation, to instill more confidence in the justice system, and to reform the system, naturally, from the inside out.

On April 9, 2021, as part of the *Loyola University Chicago Law Journal*’s Symposium, “The Criminal Justice System in Review: Accountability, Reform, and Policy,” I served as one of five members on

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1. Merriam-Webster defines “common people” as those “characterized by a lack of privilege or special status” and says that common may also mean “familiar” and “appearing frequently.” *Common*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/common> [https://perma.cc/LEG6-MNZH] (last visited June 28, 2021).

2. I served as an assistant United States attorney in the Middle District of Georgia from 1999 until 2001 and in the Northern District of Georgia from 2001 until 2005.

a panel of experts to discuss “Wrongful Convictions, Pleas, and Sentencing.” My co-panelists, Jon Gould, Andrew Leipold, Richard Leo, and Colin Miller did not disappoint. Each explained some aspect of his ongoing scholarly work that reveals a piece of our flawed justice system. As part of those distinguished presentations, Professor Gould talked about the consequences of “failed prosecutions” when guilty people “go free.”<sup>3</sup> Professor Leo discussed the history of wrongful convictions, including our country’s refusal to acknowledge them until 1932, and our failure to appreciate their frequency until the 1980s when forensic DNA analysis emerged.<sup>4</sup> Professor Miller argued that prosecutors have an ethical duty to rectify wrongful convictions and that the Fifth Amendment’s Grand Jury Presentment Clause is a tool that prosecutors should use when doing so.<sup>5</sup> Professor Leipold reminded us that as of March 2021, 2,753 people had been exonerated following their criminal convictions, and that twenty-one percent of those who were wrongfully convicted professed guilt as part of a plea.<sup>6</sup> He asserted that while there are structural reasons to believe that guilty pleas are a “bulwark against wrongful convictions,” we know that “guilty pleas and wrongful convictions exist side-by-side.”<sup>7</sup> Relatedly, Professor Leipold discussed the significant number of Americans who report a lack of faith in the justice system.<sup>8</sup>

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3. Jon Gould, Remarks at the Loyola University Chicago Law Journal Virtual Symposium: The Criminal Justice System in Review: Accountability, Reform & Policy (Apr. 9, 2021), <http://blogs.luc.edu/lawjournal/virtual-symposium/> [https://perma.cc/WJ7B-E78G].

4. Richard A. Leo, Remarks at the Loyola University Chicago Law Journal Virtual Symposium: The Criminal Justice System in Review: Accountability, Reform & Policy (Apr. 9, 2021), <http://blogs.luc.edu/lawjournal/virtual-symposium/> [https://perma.cc/WJ7B-E78G].

5. Colin Miller, Remarks at the Loyola University Chicago Law Journal Virtual Symposium: The Criminal Justice System in Review: Accountability, Reform & Policy (Apr. 9, 2021), <http://blogs.luc.edu/lawjournal/virtual-symposium/> [https://perma.cc/WJ7B-E78G]; see also U.S. CONST. amend. V, § 1, cl. 1 (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .”).

6. Andrew D. Leipold, Remarks at the Loyola University Chicago Law Journal Virtual Symposium: The Criminal Justice System in Review: Accountability, Reform & Policy (Apr. 9, 2021), <http://blogs.luc.edu/lawjournal/virtual-symposium/> [https://perma.cc/WJ7B-E78G].

7. *Id.*

8. *Id.* In addition to the statistics Professor Leipold offered, numerous other sources report the erosion of confidence in the American justice system. See, e.g., Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html> [https://perma.cc/22LK-92DL] (“For the first time in its 27 years of measuring attitudes toward the police, Gallup found that a majority of American adults do not trust law enforcement.” (citing Megan Brenan, *Amid Pandemic, Confidence in Key U.S. Institutions Surges*, GALLUP (Aug. 12, 2020), <https://news.gallup.com/poll/317135/amid-pandemic-confidence-key-institutions-surges.aspx> [https://perma.cc/Y8JS-TQNL])); Jeffrey M. Jones, *Black, White Adults’ Confidence Diverges Most on Police*, GALLUP (August 12, 2020), <https://news.gallup.com/poll/317114/black-white->

I focused my part of the Symposium on the role of prosecutors in the system.<sup>9</sup> I emphasized the benefits—to both actual and perceived justice—when we expand the diversity of people who serve as prosecutors.<sup>10</sup> In this Essay, I further develop this idea, arguing that our justice system would greatly benefit if more law school graduates—of every ideology, race, religion, gender identity, background, and other characteristics—served (at least a year or two) as a prosecutor.

Diversifying the office of the prosecutor is a big step toward improving several flaws in our current system. Attracting a wide-ranging group of prosecutors is likely, for example, to improve prosecutorial decision-making, increase public confidence in the system, encourage more productive police-citizen interactions, and reduce prosecutor and law enforcement bias. These ideas are developed more fully in this Essay in three parts. Part I explores the public's thirst for change in the current system, which is evidenced by polling and by various justice reform efforts. Part II examines the homogeneity of prosecutors and discusses the recent uptick in the election of "progressive prosecutors"—those with an agenda to improve the justice system. Part II also argues that, as a critical part of any real progress toward reform and the rebuilding of confidence in the system, we must expand the prosecutor ranks to include not only "progressive prosecutors," but also a diverse group of prosecutors with varied backgrounds and characteristics. I call this group "common prosecutors." Common prosecutors are lawyers who more closely reflect the demographics of our country in terms of race, gender, sexual orientation, religion, experience, ability, socioeconomic background, geographic origin, and other characteristics. Part III concludes the Essay by offering concrete methods to attract more "progressive" and "common" prosecutors at a time when prosecutors and police are under intense scrutiny. Specifically, in Part III, I explain how law schools can hasten the progressive shift in the justice system by encouraging and empowering more common prosecutors, and how we can hold chief prosecutors accountable for prioritizing diversity and all

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adults-confidence-diverges-police.aspx [https://perma.cc/W5CR-63XK] (stating that while "[fifty-six percent of White adults" said they had "'a great deal' or 'quite a lot' of confidence in the police," Gallup found that only "[nineteen percent] of Black adults" had the same level of confidence); see also *Americans' View of Government: Low Trust, but Some Positive Performance Ratings*, PEW RSCH. CTR. (Sept. 14, 2020), <https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/> [https://perma.cc/HM7F-3XG9] ("For years, public trust in the federal government has hovered at near-record lows.").

9. Melanie D. Wilson, Remarks at the Loyola University Chicago Law Journal Virtual Symposium: The Criminal Justice System in Review: Accountability, Reform & Policy (Apr. 9, 2021), <http://blogs.luc.edu/lawjournal/virtual-symposium/> [https://perma.cc/WJ7B-E78G].

10. *Id.*

of its benefits.

### I. THE THIRST FOR CHANGE IN OUR SYSTEM OF JUSTICE

A majority of the public has lost confidence in law enforcement and in the justice system more generally.<sup>11</sup> In an effort to change the system, there is significant momentum for justice reform initiatives.

#### A. Polls Demonstrate Falling Public Confidence in the System

After the nation watched the video of former Minneapolis police officer Derek Chauvin suffocating and killing George Floyd in May 2020, public confidence in the police fell to a record low forty-eight percent, according to a Gallup poll conducted later that summer.<sup>12</sup> The poll revealed that Democrats are particularly skeptical of police<sup>13</sup> and that the gap between the confidence of white and Black Americans in the police “has never been greater.”<sup>14</sup> According to the survey, “56 percent of white adults said they were confident in the police, whereas only 19 percent of Black adults said the same.”<sup>15</sup>

A similar crisis in confidence faces the justice system more generally. Results from the 2020 Gallup poll shows that only twenty-four percent of Americans have a “great deal” or “quite a lot” of confidence in the criminal justice system, forty percent have “some” confidence, and thirty-three percent have “very little” or no confidence in the system.<sup>16</sup> As a result of plummeting faith and growing frustration, in the months after George Floyd’s death, there were calls to “defund the police.”<sup>17</sup> Mr. Floyd’s murder undoubtedly influenced the numbers and intensified

11. See discussion *infra* Sections I.A–B (describing how public confidence in police has fallen).

12. See Ortiz, *supra* note 8 (“The drop in confidence came after George Floyd, a Black man, was killed in Minneapolis police custody at the end of May [2020], inspiring weeks of civil unrest nationwide.”); Jones, *supra* note 8 (“This year’s survey was conducted after George Floyd was killed while in police custody in Minneapolis in late May [2020].”).

13. See Megan Brenan, *Amid Pandemic, Confidence in Key U.S. Institutions Surges*, GALLUP (Aug. 12, 2020), <https://news.gallup.com/poll/317135/amid-pandemic-confidence-key-institutions-surges.aspx> [<https://perma.cc/Y8JS-TQNL>] (“Confidence in the police rose seven points among Republicans to [eighty-two percent] and dropped six points among Democrats to 28%.”). The distrust and partisan divide over policing was even more notable considering the growing public confidence in other American institutions such as the military and healthcare providers. See *id.* (“At the same time that several institutions have engendered greater public confidence, one—the police—stands alone as seeing a significant decline in the past year.”).

14. Ortiz, *supra* note 8 (citing Jones, *supra* note 8).

15. *Id.* (citing Jones, *supra* note 8).

16. Brenan, *supra* note 13.

17. See, e.g., Deena Zaru & Tonya Simpson, ‘Defund the Police’ Movement 6 Months After Killing of George Floyd, ABCNEWS (Nov. 25, 2020, 6:49 AM), <https://abcnews.go.com/US/defund-police-movement-months-killing-george-floyd/story?id=74296015> [<https://perma.cc/G38G-KMZL>] (explaining that in response to George Floyd’s death, there have been more calls to defund police).

hostility toward law enforcement, but the skepticism has been mounting for years and highlights the urgent need for change in the core of the system.

Inequality and overenforcement of criminal laws coupled with unduly harsh punishments for relatively minor criminal violations exacerbate the public's lack of respect for the system. Stories of disparate prosecutions are widespread. Think Kelley Williams-Bolar versus Felicity Huffman. Williams-Bolar, "a single, [B]lack mother living in public housing" in Ohio, was "convicted and imprisoned . . . for falsifying her address to get her kids into better public schools."<sup>18</sup> Williams-Bolar used her father's address to enroll her two daughters in a school in his district, because the girls spent significant time at their grandfather's home anyway.<sup>19</sup> Soon, Williams-Bolar and her father were charged with felonies for "falsification of records and theft of public education."<sup>20</sup> Williams-Bolar was convicted by a jury and sentenced to two concurrent five-year sentences, which were suspended "down to [ten] days" in jail, three years of probation, and eighty hours of community service.<sup>21</sup> By comparison, Felicity Huffman, a white "Desperate Housewives star," was sentenced to two weeks in a "low-security prison for women," as well as "a \$30,000 fine, 250 hours of community service and a year's probation" when she pled guilty "to fraud and conspiracy for paying an admissions consultant \$15,000 to have a proctor correct her daughter's SAT answers."<sup>22</sup> Huffman "was the first parent sentenced in a scandal involving dozens of wealthy parents accused of bribing their children's way into elite universities or cheating on college entrance exams."<sup>23</sup>

With regard to harsh punishments, there are too many examples to

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18. Annie Lowrey, *Her Only Crime Was Helping Her Kids*, THE ATLANTIC (Sept. 13, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/her-only-crime-was-helping-her-kid/597979/> [<https://perma.cc/LC34-BPW7>].

19. *Id.* (explaining that Williams-Bolar split time between her home and her father's home, and she preferred her father's school district as it met all of Ohio's twenty-six educational standards, whereas her district only met four standards).

20. *Id.*

21. *Id.* (describing that it is uncommon for parents to be charged with a felony for engaging in boundary-hopping, where typical punishments include fines or unenrolling children from the school); see also Owen Daugherty, *Story of Mother Sentenced to Jail for Enrolling Child in Different District Resurfaced Amid College Scandal*, THE HILL (Mar. 14, 2019, 12:05 PM), <https://thehill.com/blogs/blog-briefing-room/news/434051-story-of-mother-sentenced-to-jail-for-enrolling-child-in> [<https://perma.cc/N276-8MF6>] (noting Williams-Bolar's sentence). Another homeless single mother living in Connecticut "was convicted on similar charges." Lowrey, *supra* note 18.

22. Associated Press, *Felicity Huffman Released Early from Two-Week Prison Sentence*, PBS NEWSHOUR (Oct. 25, 2019, 4:16 PM), <https://www.pbs.org/newshour/nation/felicity-huffman-released-early-from-two-week-prison-sentence> [<https://perma.cc/92Q6-CJHZ>].

23. *Id.*

recount.<sup>24</sup> But “three-strikes laws” and “habitual-offender” statutes demonstrate the concept well. The case of Alvin Kennard is typical. When Kennard was eighteen years old, “he pleaded guilty to three counts of second-degree burglary in connection with a break-in at an unoccupied service station . . . .”<sup>25</sup> At age twenty-two, after he robbed a bakery of \$50, “he was sentenced to life without the possibility of parole” as part of Alabama’s Habitual Felony Offender Act.<sup>26</sup> The robbery “was committed with a pocket knife and involved no injuries . . . .”<sup>27</sup> And, in California, twenty-seven-year-old Jerry Dewayne Williams was “sentenced under California’s ‘three-strikes’ law to [twenty-five] years to life in prison for stealing a slice of pepperoni pizza” from “a group of children on a pier in Redondo Beach.”<sup>28</sup> His sentence required that he serve “20 years before he [was] eligible for parole.”<sup>29</sup>

Wrongful convictions also establish an urgency for justice reform. According to information released by the Death Penalty Information Center (DPIC) in March 2021, “the vast majority of wrongful convictions in the United States are not caused by mere accidents within the legal process. Instead, much more troubling patterns of police or prosecutorial misconduct, use of knowingly false testimony, and racial bias emerged.”<sup>30</sup> The report found that “69.2% of the exonerations included misconduct by police, prosecutors, or other government officials.”<sup>31</sup> It also documented racial disparities. Notably, “[o]fficial misconduct resulted in the wrongful convictions of 58.2% of white exonerees but 78.8% of Black exonerees and 68.8% of Latinx ones.”<sup>32</sup> And, “63.8% of

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24. See, e.g., I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1568 (2020) (“The thirteen million misdemeanor cases that prosecutors file each year.” (citing ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 2 (2018))).

25. Meghan Keneally, *Man Who Spent 36 Years in Prison for Stealing \$50 from a Bakery Is Now Set to Be Freed*, ABC NEWS (Aug. 29, 2019, 3:15 PM), <https://abcnews.go.com/US/man-spent-36-years-prison-stealing-50-bakery/story?id=65264675> [https://perma.cc/BRQ3-44FF].

26. *Id.* (explaining that the Act has since been changed so that judges may give possibility of parole to fourth-time offenders).

27. *Id.* Kennard had previously been convicted of three nonviolent property crimes. *Id.*

28. Associated Press, *25 Years for a Slice of Pizza*, N.Y. TIMES, Mar. 5, 1995, at A21. “Mr. William’s lawyer, Arnold Lester, said he would appeal, adding, ‘Mr. Williams will be facing the same sentence as if he’d raped a woman, molested a child or done a carjacking, because the statute does not draw distinctions.’” *Id.*

29. *Id.* Williams was previously convicted for “robbery, attempted robbery, drug possession and unauthorized use of a vehicle.” *Id.*

30. Samantha O’Connell, *New Innocence Report from DPIC Adds 11 New Individuals to Capital Exoneration List*, A.B.A. (Mar. 3, 2021), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/publications/project\\_blog/new-dpic-innocence-report-feb-2021/](https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/new-dpic-innocence-report-feb-2021/) [https://perma.cc/35DW-MNHC] (citing DEATH PENALTY INFO. CTR., DPIC SPECIAL REPORT: THE INNOCENCE EPIDEMIC 4 (2021)).

31. *Id.*

32. *Id.*

wrongfully convicted death-row exonerees are people of color.”<sup>33</sup> This data on misconduct and wrongful convictions helps explain why so many have lost confidence in the system.

### B. Americans Are Pursuing Reform of the System

In recent years, the public has been urging reform of the justice system in an effort to decrease police violence, improve system integrity and reliability, and reduce the length of incarceration for minor offenses and drug crimes. Congress and state legislatures are responding, and there are a number of local initiatives as well. For instance, in March 2021, the House of Representatives passed the George Floyd Justice in Policing Act of 2021.<sup>34</sup> The law was aimed at “mak[ing] the prosecution of police misconduct easier, expand[ing] federal oversight into local police units, limit[ing] bias among officers, and chang[ing] policing tactics.”<sup>35</sup> To carry out its goals, the Act would have eliminated qualified immunity for officers and require extensive data reporting about police misconduct.<sup>36</sup> But the legislation ultimately stalled in the Senate in September 2021, when Republicans and Democrats reached an impasse—each group blaming the other.<sup>37</sup> In 2018, with bipartisan support, Congress adopted the First Step Act to reduce “unnecessarily long federal [prison] sentences and improve conditions in federal prison.”<sup>38</sup> Many are hopeful that Congress will build on these efforts.<sup>39</sup>

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33. *Id.*

34. See George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021) (“To hold law enforcement accountable for misconduct in court, improve transparency through data collection, and reform police training and policies.”).

35. Sean Collins, *The House Has Passed the George Floyd Justice in Policing Act*, VOX (Mar. 3, 2021, 9:34 PM), <https://www.vox.com/2021/3/3/22295856/george-floyd-justice-in-policing-act-2021-passed-house> [<https://perma.cc/Q4CK-BWXZ>]. The bill works to encourage state and local governments to adopt federal reforms through penalties for noncompliance. *Id.*

36. *Id.* (“The bill attempts to make it easier to hold individual law enforcement officers accountable through changes to existing law and practice.”).

37. Felicia Sonmez and Mike DeBonis, WASH. POST (Sept. 22, 2021, 7:35 PM). The House had passed the legislation It passed in the House along party lines—219-213—with no Republicans voting in favor. Collins, *supra*, note 35.

38. Ames Grawert, *What Is the First Step Act—And What’s Happening with It?*, BRENNAN CTR. FOR JUST. (June 23, 2020), <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it> [<https://perma.cc/LM6V-WGT9>]. The law shortens some federal prison sentences and provides more opportunities for offenders to qualify for a “safety valve” that helps some offenders avoid a mandatory minimum sentence. *Id.*; see generally NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW (2019) (providing a detailed analysis of the Act’s provisions).

39. A.B.A. Governmental Affairs Office, *117th Congress Has Opportunities for Bipartisan Criminal Justice Reforms*, A.B.A. J. (Feb. 1, 2021, 12:15 AM) <https://www.abajournal.com/magazine/article/117th-congress-has-opportunities-for-bipartisan-criminal-justice-reforms> [<https://perma.cc/3HU3-R72E>] (expressing optimism for criminal justice reform and noting that several reform bills died in 116th Congress due to unique challenges).

There have been similar laws adopted in several states, and cities are engaging in reform efforts, too.<sup>40</sup> For example, in June 2020, Colorado Governor Jared Polis signed Senate Bill 217, which, among other things, heightened the standard required for police to use deadly force—from a reasonable belief that someone is a threat to the officer, themselves, or the public, to a requirement that police face an “imminent threat.”<sup>41</sup> The new Colorado law also prohibits police from “using deadly physical force to apprehend a person who is suspected only of a minor or nonviolent offense.”<sup>42</sup> Of equal importance, the reform legislation requires police to report a significant amount of data. For instance, they must report “racial data on officers’ encounters with the public” as well as “whenever [an officer] unholsters their weapon or points it a[t] a citizen and whether or not they fired it.”<sup>43</sup>

In Illinois, Governor J.B. Pritzker signed a similar “broad criminal justice reform bill”—House Bill 3653.<sup>44</sup> Among other requirements, House Bill 3653 mandates that officers “use officer-worn body cameras,” produce “monthly reports,” and regularly account for “use of force,” as well as incidents involving “a person experiencing a mental health crisis.”<sup>45</sup> Perhaps most notably, the Illinois law limits the instances during which police are justified in using force against a suspect.<sup>46</sup> Other states, including North Carolina, New Jersey, Oregon, Tennessee, and Virginia, have also begun to reform aspects of their criminal justice systems.<sup>47</sup>

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40. See NICOLE D. PORTER, THE SENT’G PROJECT, TOP TRENDS IN STATE CRIMINAL JUSTICE REFORM, 2020, at 2–4 (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/01/Top-Trends-in-State-Criminal-Justice-Reform-2020.pdf> [<https://perma.cc/8PME-E7Z5>] (detailing reforms many states have made).

41. Jesse Paul & Jennifer Brown, *Colorado Governor Signs Sweeping Police Accountability Bill into Law. Here’s How It Will Change Law Enforcement*, COLO. SUN (June 19, 2020, 9:53 AM), <https://coloradosun.com/2020/06/19/colorado-police-accountability-bill-becomes-law/> [<https://perma.cc/LM6V-WGT9>].

42. *Id.*

43. *Id.*

44. See *Summary of Provisions in Illinois House Bill 3653: Criminal Justice Omnibus Bill*, INST. FOR ILL.’S FISCAL SUSTAINABILITY (Feb. 15, 2021), <https://www.civicfed.org/iifs/blog/summary-provisions-illinois-house-bill-3653-criminal-justice-omnibus-bill> [<https://perma.cc/Y4T9-97T6>] (explaining provisions of broad new Illinois criminal-justice reform bill).

45. *Id.*

46. *Id.*

47. See Kenny Lo et al., *5 Discussions That Shaped the Justice Reform Movement in 2020*, CTR. FOR AM. PROGRESS (Mar. 18, 2021, 11:25 AM), <https://www.americanprogress.org/issues/criminal-justice/news/2021/03/18/497328/5-discussions-shaped-justice-reform-movement-2020/> [<https://perma.cc/YR55-AM3V>] (outlining a number of states and cities that have adopted laws to reform aspects of the justice system, including: New York, Virginia, Albuquerque, Austin, Baltimore, Minneapolis, San Francisco, and Seattle); see also Tosin Fakile, *Governor Lee Signs*

Several governors issued executive orders to ameliorate the impact of the pandemic on those in jails and prisons.<sup>48</sup> Some cities are adopting significant reforms too. For instance, in Washington, DC, officials passed a law allowing petitions for sentence modifications from those who committed crimes before age twenty-five and those who have spent at least fifteen years in prison.<sup>49</sup>

These reforms are a good beginning. But any meaningful and lasting improvement must include change in the office of the prosecutor.

## II. THE NEED FOR COMMON PROSECUTORS

Real and lasting change in the criminal justice system will require reform from the inside—starting in the office of the prosecutor.

### A. *The Homogeneity of Prosecutors*

There are approximately 2,300 “chief [state] prosecutors” in the United States,<sup>50</sup> about 25,000 state assistant prosecutors,<sup>51</sup> and another (approximately) 5,000 federal prosecutors.<sup>52</sup> But of those, how many are women, people of color, first-generation college goers or first-generation law school graduates? How many were raised in lower socioeconomic environments? How many report living with a disability? We don’t know, but what we do know looks bleak. While statistics on police are readily

*Criminal Justice Reform Bills Monday*, WSMV (May 24, 2021), [https://www.wsmv.com/news/gov-lee-signs-criminal-justice-reform-bills-Monday/article\\_2757d642-bc73-11eb-b7b2-c77ee0b4a552.html](https://www.wsmv.com/news/gov-lee-signs-criminal-justice-reform-bills-Monday/article_2757d642-bc73-11eb-b7b2-c77ee0b4a552.html) [<https://perma.cc/GE4S-KVWU>] (discussing Tennessee legislation passed to create community-based alternatives to incarceration for some crimes and capping probation sentences); PORTER, *supra* note 40, at 2–3 (outlining New Jersey law reducing prison population because of COVID-19, Oregon law decriminalizing possession of certain drugs, and North Carolina law shortening prison sentences for certain drug offenses).

48. Maryland Governor Lawrence Hogan, Jr., issued an executive order allowing the early release of most older inmates and those near the end of their incarceration to reduce the threat of spreading COVID-19 among those in custody. *See* Governor Md. Exec. Order No. 20-11-17-03, at 1–5 (Nov. 17, 2020) (“Because of inmates’ close proximity to each other, employees, and contractors in correctional facilities, the spread of COVID-19 there poses a significant threat to their health, welfare, and safety . . . .”); *see also* PORTER, *supra* note 40, at 2 (detailing similar executive order issued by Kentucky Governor Andy Beshear).

49. PORTER, *supra* note 40, at 3.

50. Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [<https://perma.cc/38MG-4J3Y>]; *see also* STEVEN W. PERRY & DUREN BANKS, BUREAU JUST. STAT., NCJ 234211, PROSECUTORS IN STATE COURTS, 2007 - STATISTICAL TABLES 1 (2011), <https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/pse07st.pdf> [<https://perma.cc/28YQ-2HN7>] (indicating that in 2007, there were 2,330 state prosecutors’ offices, headed by a chief prosecutor and handling felony cases in U.S.).

51. PERRY & BANKS, *supra* note 50, at 2.

52. *Federal Prosecutors: Wide Variation Found in Handling of Criminal Referrals for Prosecution*, TRAC REPS. (Jan. 24, 2003), [https://trac.syr.edu/tracreports/pros/ausa\\_pctdecG.html](https://trac.syr.edu/tracreports/pros/ausa_pctdecG.html) [<https://perma.cc/Z8PE-9DWL>].

accessible<sup>53</sup> and some information about the demographics of judges is available,<sup>54</sup> there is little information compiled about prosecutors. We are sure that the top federal prosecutor jobs across the United States have always been dominated by white men, and the lack of racial and gender diversity only worsened during Donald Trump's four-year term as president. As of October 2020, white men led eighty-five percent of U.S. attorneys' offices.<sup>55</sup> Only nine U.S. attorneys were women at that time, and there were only two Black and two Hispanic U.S. attorneys in the nation.<sup>56</sup> Even before Trump's presidency, however, there was a dearth of diversity within the ranks of federal prosecutors. In 2015, only eight percent of assistant United States attorneys were Black, and only five percent were Latino.<sup>57</sup> Similarly, while women have constituted the majority of law students in the United States since 2016,<sup>58</sup> only thirty-eight percent of assistant U.S. attorneys were women in 2015.<sup>59</sup>

We know even less about state prosecutors.<sup>60</sup> The statistics we do have tell a disappointing story. A report released in July of 2015 indicated that ninety-five percent of America's elected prosecutors were white, and

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53. See, e.g., *Police Officer Demographics in the U.S.*, ZIPP.A.COM (Sept. 9, 2021) <https://www.zippia.com/police-officer-jobs/demographics/> [<https://perma.cc/HT4W-8E4L>] (detailing an extensive collection of police officer data).

54. See Democracy and Government Reform Team, *Examining the Demographic Compositions of U.S. Circuit and District Courts*, CTR. FOR AM. PROGRESS (Feb. 13, 2020, 12:01 AM), <http://www.americanprogress.org/issues/courts/reports/2020/02/13/480112/examining-demographic-compositions-u-s-circuit-district-courts/> [<https://perma.cc/QWM8-ZEN9>] (providing demographic data on judges in U.S.).

55. See Jake Bleiberg et al., *Trump's Top Federal Prosecutors Are Overwhelmingly White Men*, AP NEWS (Oct. 6, 2020), <https://apnews.com/article/race-and-ethnicity-donald-trump-shootings-racial-injustice-george-w-bush-f6995edcc2158df1f8b0cb4f9574bdaf> [<https://perma.cc/VCX8-B5JT>] (noting that analysis of government data from nearly thirty years revealed a lack of diversity amongst U.S. attorneys).

56. *Id.*

57. Raman Preet Kaur, *When It Comes to U.S. Attorneys, All Americans Need a Seat at the Table*, CTR. FOR AM. PROGRESS (June 22, 2017, 9:02 AM), <https://www.americanprogress.org/issues/courts/news/2017/06/22/434808/comes-u-s-attorneys-americans-need-seat-table/> [<https://perma.cc/Z3UJ-NX9F>].

58. Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html> [<https://perma.cc/D2JS-K47P>] (explaining increase of women in law schools across the United States).

59. Kaur, *supra* note 57.

60. See Debbie Mukamal & David Alan Sklansky, Opinion, *A Study of California Prosecutors Finds a Lack of Diversity*, L.A. TIMES (July 29, 2015, 4:43 AM), <https://www.latimes.com/opinion/op-ed/la-oe-0729-sklanskymukamal-diversity-prosecutors-california-20150729-story.html> [<https://perma.cc/8CVR-GT36>] ("Race and gender statistics for police officers have been publicly available for decades, but nothing similar has existed for prosecutors."); *id.* (indicating a public-records request revealed eight percent of federal prosecutors were African American, five percent were Latino, and thirty-eight percent were women in 2015).

eighty-three percent were men.<sup>61</sup> And, a study of the State of California from Stanford Law School revealed significant homogeneity of prosecutors in a state that otherwise boasts significant diversity. While Latinos are the largest demographic group in California, in 2015 only nine percent of California prosecutors were Latino.<sup>62</sup> On the other hand, seventy percent of prosecutors in California were white at that time, compared to the population, which was slightly above thirty-eight percent white.<sup>63</sup> The good news rests in gender diversity in the office of the prosecutor—forty-eight percent of prosecutors in California were female in 2015.<sup>64</sup>

The national numbers also reveal important racial and gender gaps. Reflective Democracy reported that, as of 2015, ninety-five percent of elected prosecutors across the United States were white and remained ninety-five percent white in 2019.<sup>65</sup> That same report found that as of 2019, only two percent of state prosecutors were women of color, and only three percent were men of color.<sup>66</sup> Women overall, however, have made some gains, constituting twenty-four percent of state prosecutors as of 2019.<sup>67</sup>

Although prosecutors' offices are filled with white men, the people investigated and prosecuted for crimes are disproportionately people of color.<sup>68</sup> Because of this disparity, prosecution can seem more like persecution of members of an out-group by members of an in-group.<sup>69</sup>

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61. Amita Kelly, *Does It Matter That 95 Percent of Elected Prosecutors Are White?*, NPR (July 8, 2015, 4:59 PM), <https://www.npr.org/sections/itsallpolitics/2015/07/08/420913118/does-it-matter-that-95-of-elected-prosecutors-are-white> [<https://perma.cc/S8AL-EQEN>].

62. Mukamal & Sklansky, *supra* note 60.

63. *Id.*

64. *Id.*

65. REFLECTIVE DEMOCRACY CAMPAIGN, TIPPING THE SCALES: CHALLENGERS TAKE ON THE OLD BOYS' CLUB OF ELECTED PROSECUTORS 1 (2019), <https://wholeads.us/wp-content/uploads/2019/10/Tipping-the-Scales-Prosecutor-Report-10-22.pdf> [<https://perma.cc/Q9ZT-QAPU>].

66. *Id.* at 4–5.

67. *Id.* at 5.

68. See Capers, *supra* note 24, at 1600 (emphasizing that Americans remain residentially segregated, resulting in crime that is intraracial, and that prosecutors and other criminal-justice actors who mediate criminal cases are predominantly white). See generally ELIZABETH HINTON ET AL., VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM (2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/KY7S-VZ8G>] (explaining the continuing overrepresentation and disparate treatment of Black Americans in the criminal justice system).

69. An “in-group” is composed of people “who share [the same] particular qualities . . . .” Susan Krauss Whitbourne, *In-Groups, Out-Groups, and the Psychology of Crowds*, PSYCH. TODAY (Dec. 7, 2010), <https://www.psychologytoday.com/us/blog/fulfillment-any-age/201012/in-groups-out->

“Black men comprise about [thirteen] percent of the male population, but about 35 percent of those incarcerated.”<sup>70</sup> Black women face similarly daunting statistics. “One in 18 black women born in 2001 will be incarcerated sometime in her life, compared to one in 45 Latina women and one in 111 white women.”<sup>71</sup> As with Black men, forty-four percent of incarcerated women are Black, even though Black women comprise only thirteen percent of the female population in the United States.<sup>72</sup> As for other characteristics of prosecutors—such as whether they grew up in big cities or small towns, their socioeconomic background, whether they identify as lesbian, gay, bisexual, or transgender—we do not know. No one tracks this (or similar) information.<sup>73</sup>

While discouraging, none of these statistics (or lack thereof) is surprising. The vast majority of lawyers—not just prosecutors—are white and male. Although a (slight) majority of the U.S. population is female, as of 2019, only thirty-six percent of lawyers are women.<sup>74</sup> Even worse, “85% of lawyers are white, compared to [seventy-seven percent] of the U.S. population,”<sup>75</sup> and “[o]nly 5% of lawyers are African American, 5% are Hispanic, and 3% are Asian.”<sup>76</sup> Similarly, about three percent of

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groups-and-the-psychology-crowds [https://perma.cc/Z9U9-ZA86]. The groups may be “determined by factors intrinsic to who we are (sex, age, race/ethnicity) but in many other cases they are arrived at in a somewhat arbitrary fashion.” *Id.* Krauss recounted a classroom experiment conducted in 1968 by Iowa third-grade teacher, Jane Elliot. *Id.* Elliot divided her students by eye color and quickly saw the in-group of one eye color “sadistically ridicule[] their unfortunate classmates” in the out-group, “calling them ‘stupid’ and shunning them in the playground during recess.” *Id.*; see also Klaus Abbink & Donna Harris, *In-Group Favouritism and Out-Group Discrimination in Naturally Occurring Groups*, 14 PLOS ONE 1, 1 (Sept. 4, 2019), https://doi.org/10.1371/journal.pone.0221616 (noting extensive research establishing that in-group favoritism and out-group discrimination often occurs when people from different groups interact, including young children, who already exhibit greater generosity to in-group members over out-group individuals).

70. HINTON ET AL., *supra* note 68, at 1.

71. *Id.* at 2.

72. *Id.*

73. The American Bar Association compiles some of this information (and more) when it comes to lawyers who work at law firms and those who work in government positions, but not prosecutors. See, e.g., AM. BAR ASS’N, ABA PROFILE OF THE LEGAL PROFESSION 29–44 (2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020.pdf [https://perma.cc/AW4V-WJNM] (compiling demographics on the legal profession).

74. Nicole Black, *ABA 2019 Report: Lawyer Demographics, Earnings, Tech Choices, and More*, MYCASE BLOG, https://www.mycase.com/blog/aba-2019-report-lawyer-demographics-earnings-tech-choices-and-more/ [https://perma.cc/E6HK-HF2S] (last visited Sept. 21, 2021).

75. *Id.*

76. *Id.*; see also AM. BAR ASS’N, ABA NATIONAL LAWYER POPULATION SURVEY 4 (2021), https://www.americanbar.org/content/dam/aba/administrative/market\_research/2021-national-lawyer-population-survey.pdf [https://perma.cc/77C2-DZS7] (reporting that five percent of lawyers are African American, five percent are Hispanic, two percent are Asian, two percent are multiracial, and four-tenths percent are Native American).

lawyers identify as LGBTQ.<sup>77</sup>

The job of prosecutor has historically attracted an even more disproportionate number of white lawyers and male lawyers than the legal profession. That was certainly my experience when I was an assistant U.S. attorney from 1999 to 2005 in the Middle District and, later, the Northern District of Georgia. While the U.S. attorneys for whom I worked valued diversity and remained mindful to ensure a diversified pool of candidates for every prospective lawyer position, they were saddled with a long history of deficits in hiring and retaining women prosecutors and prosecutors of color. Thus, they added to the diversity of the office in meaningful ways but could not eradicate the impact of decades of homogenous hiring.<sup>78</sup> Not every U.S. attorney has a similar commitment to diversity. No matter; as the statistics and unfairness of the system demonstrate, now is the time to double down on hiring a more diverse group of prosecutors. The system cannot improve without such rich and broad diversity among prosecutors.

The perceived unfairness in the system created by racial, gender, and other—documented and undocumented—disparities is made worse by the fact that the vast majority of law enforcement officers, who work closely with prosecutors and investigate crimes, are also from the “in-group” of white males.<sup>79</sup> Until there is no out-group of suspects and criminal defendants—until the demographics within the prosecutor’s office mirror that of the country and the demographics of those accused

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77. *LGBT Representation Among Lawyers in 2019*, NALP (Jan. 2020), <https://www.nalp.org/0120research> [<https://perma.cc/H6VQ-LX4T>].

78. Beverly B. Martin, now judge on the United States Court of Appeals for the Eleventh Circuit, was the U.S. attorney when I was hired in the Middle District of Georgia in 1999. When I moved to the Northern District of Georgia in 2001, Richard H. Deane, Jr., was the U.S. attorney when I first interviewed. He was replaced before I joined the office by William S. Duffey, Jr.

79. See Lauren Leatherby & Richard A. Oppel Jr., *Which Police Departments Are as Diverse as Their Communities?*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/interactive/2020/09/23/us/bureau-justice-statistics-race.html> [<https://perma.cc/L7P3-X88E>] (noting that despite public outcry over lack of diversity, data shows officers are reportedly more white than communities they serve and becoming whiter). Black officers continue to be less represented despite an increase in diversity among police departments. *Id.* In Minneapolis, where former officer Derek Chauvin was convicted of second-degree murder of George Floyd, racial and ethnic minorities comprised approximately twenty-six percent of the population. John Kelly et al., *How Much Do Police Officers Mirror the Communities They Serve? ABC News Looked at The Data*, ABC NEWS (May 20, 2021, 5:05 AM), <https://abcnews.go.com/US/police-officers-mirror-communities-serve-abc-news-looked/story?id=77536865> [<https://perma.cc/P3K2-BRBH>]. Despite this statistic, people of color fill less than twelve percent of police jobs, according to data from fifteen counties in the metropolitan area. *Id.* See also *Police Officer Demographics in the US*, ZIPPPIA, <https://www.zippia.com/police-officer-jobs/demographics/> [<https://perma.cc/8D23-792P>] (last visited Sept. 21, 2021) (analyzing resumes and Census Bureau data and reporting that only 17.7% of police officers are women, and that 62.4% of officers are white with fourteen percent Black).

of crimes—the system will appear unfair and biased. It is well established that “[w]hen people from different groups interact, in-group favouritism and/or out-group discrimination often result. Evidence of this phenomenon is vast and comes from multiple experiments by different researchers around the world, using different types of social identities (minimal and natural) and different populations . . . .”<sup>80</sup>

Because prosecutors represent “the People” in state court and “the United States” in federal court, prosecutors should be comprised of “the people,” in all our diversity.<sup>81</sup>

### B. *The Rise of the “Progressive Prosecutor”*

As part of the recent justice reform movement, voters have elected several “progressive prosecutors”—those with a change agenda that often includes mitigation of (or abolishing) the death penalty, prosecuting more “bad cops,” eliminating racial disparities in the system, and modifying the way we handle bail for indigent defendants charged with minor crimes.<sup>82</sup> In other words, “progressive prosecutors” reflect more modern ideals of justice.

Who are these “progressive prosecutors,” and how are they different from the others?<sup>83</sup>

While there is no single definition of the “progressive prosecutor,” legal scholars, journalists, and practicing lawyers appear to coalesce around several individuals who qualify. They often reference Aramis

80. Abbink & Harris, *supra* note 69, at 1. See also Marilyn B. Brewer, *Intergroup Discrimination: Ingroup Love or Outgroup Hate?*, in *THE CAMBRIDGE HANDBOOK OF PSYCHOLOGY OF PREJUDICE* 90, 90–110 (Chris G. Sibley & Fiona Kate Barlow eds., 2016) (reviewing theory and research on in-group bias and out-group discrimination); see generally Okhee Park Hong, *A Cognitive Approach to the Study of Ingroup Bias: Role of Reasons* (1988) (Ph.D. dissertation, Iowa State University) (Iowa State University Digital Repository) (recapping the research on ingroup bias as of 1988).

81. By arguing for more prosecutors from all walks of life, I do not contend that we should only increase the diversity of prosecutors by adding women and people of color, nor that more liberal (or progressive) prosecutors are preferred. See, e.g., Caleb Parke, *L.A. Prosecutor Slams New Liberal DA’s Push to Reduce Violent Crime Sentences, Says Voters Don’t Support It*, FOX NEWS (Dec. 17, 2020), <https://www.foxnews.com/politics/los-angeles-liberal-da-soros-george-gascon-jon-hatami> [<https://perma.cc/W2TW-HH6K>] (reporting criticism of district attorney’s “extreme liberal policies” to enact criminal justice reform). But at least initially, it will be important to add this diversity because it has historically been lacking and primarily associated with criminal defense work.

82. See Austen, *supra* note 50 (“[V]oters have elected [as of 2018] 30 reform-minded prosecutors, in municipalities as varied as Corpus Christi, Kansas City and San Francisco.”).

83. See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1416–17 (2021) (“What exactly is a ‘progressive prosecutor’? . . . [W]ho is entitled to claim the mantle?”); Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 815 (2020) (arguing that a better name for prosecutors interested in “decriminalization, decarceration, and police accountability is ‘reform-minded’” rather than progressive).

Ayala, the former state's attorney for Orange and Osceola counties in Florida; Kim Foxx, Cook County, Illinois, state's attorney; Philadelphia District Attorney Larry Krasner; and Houston District Attorney Kim Ogg, among others.<sup>84</sup> And the popularity of progressive prosecutors continues to grow. In San Francisco, the new district attorney, Chesa Boudin, "plans to reform the city's criminal justice system."<sup>85</sup> He "ran for district attorney on a platform of reducing mass incarceration."<sup>86</sup> George Gascón, who became district attorney in Los Angeles County in December 2020, faced opposition from the California District Attorney's Association for his "criminal justice reforms."<sup>87</sup> Gascón was elected for his "progressive promises like never seeking the death penalty and not using sentencing enhancements to trump up 'gang' charges against defendants in court."<sup>88</sup> Karen McDonald, the newly-elected county prosecutor in Oakland, Michigan, established the office's first hate-crimes unit in her first 100 days in office and has already "directed assistant prosecutors not to request cash bond or oppose pretrial release in cases involving low-level, non-violent crimes . . ."<sup>89</sup> In 2020, Harold Pryor, Jr., "trounced 20-year prosecutor Gregg Rossman to become Broward [County Florida]'s first African-American state attorney."<sup>90</sup> Pryor "campaigned on promises to eradicate wrongful convictions, support therapeutic courts and decriminalize poverty."<sup>91</sup> This is just a sampling of the prosecutors elected as part of the "progressive prosecutor" movement.

At a minimum, experts appear to agree that progressive prosecutors are

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84. See, e.g., Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 *FORDHAM L. REV. ONLINE* 8, 10–11 (2018) (naming prominent "progressive prosecutors"); see also Frances Robles, *5 Prosecutors with a Fresh Approach*, *N.Y. TIMES* (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/us/change-minded-prosecutors.html> [<https://perma.cc/4929-FWGW>] (highlighting prosecutors Andrew Warren, Scott Colom, Kim Foxx, Aramis Ayala, and Kim Ogg).

85. Vincent O'Bannon, *New San Francisco DA to Reform Criminal Justice System*, *SAN QUENTIN NEWS* (Mar. 12, 2020), <https://sanquentinnews.com/new-san-francisco-da-to-reform-criminal-justice-system/> [<https://perma.cc/YL9V-U3M5>].

86. *Id.*

87. See Jerry Iannelli, *Los Angeles D.A. George Gascón Leaves California's Powerful D.A. Association*, *THE APPEAL* (Feb. 16, 2021), <https://theappeal.org/politicalreport/george-gascon-leaves-californias-district-attorney-association/> [<https://perma.cc/C3RP-WFN8>] (explaining that George Gascón resigned from California District Attorney's Association, which was fighting his criminal justice reforms).

88. *Id.*

89. Hassan Abbas, *Oakland County Prosecutor Karen McDonald Marks 100 Days with Key Reforms*, *ARAB AM. NEWS* (Apr. 16, 2021, 10:30 AM), <https://www.arabamericanews.com/2021/04/16/oakland-county-prosecutor-karen-mcdonald-marks-100-days-with-key-reforms/> [<https://perma.cc/JB5U-87HB>].

90. Noreen Marcus, *Broward's New State Attorney Says He'll Reimagine the Top Prosecutor's Job*, *FLA. BULLDOG* (Jan. 18, 2021), <https://www.floridabulldog.org/2021/01/new-broward-state-attorney-pryor-says-hell-reimagine-job/> [<https://perma.cc/WH92-338T>].

91. *Id.*

“prominent representatives of a national movement to leverage prosecutorial power to achieve criminal justice reform.”<sup>92</sup> Scholars often laud these prosecutors for their willingness to take seriously the guiding principle for every prosecutor—that she “do justice.”<sup>93</sup> But, as Bruce Green and others have recognized, the directive to “do justice” is not terribly specific.<sup>94</sup> Jeffrey Bellin contends that “[j]ustice serves as a ready placeholder for a multitude of other values (fairness, proportionality, retribution, mercy), providing a rhetorical roadmap to support whatever action a prosecutor selects.”<sup>95</sup> According to Bellin, “Justice as a job description works well for superheroes. When an evil villain attempts to destroy the world, justice provides a ready answer for whether to respond (yes!) and how (whatever it takes!).”<sup>96</sup>

Because the mandate “to do justice” is ambiguous, all prosecutors, even “progressive” ones, will exercise individual judgment and discretion, which necessarily triggers personal biases. Assuming a prosecutor acts in good faith, she will exercise her discretion in ways consistent with her experience, knowledge, ethics, and morality. She will make decisions in a manner she believes will accomplish the most just outcome under the unique circumstances of the case, considering, among

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92. Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1206 (2020) [hereinafter Bellin, *Theories of Prosecution*]. See *id.* at 1205 (citations omitted) (noting the “ascension of unapologetically ‘progressive prosecutors’” in “recent years”); *but see* Romero, *Rural Spaces*, *supra* note 83, at 804, 806 (arguing that all “progressive prosecutors” work in “large, urban areas” and that “the notion of the progressive prosecutor is only that—a notion”). See generally Levin, *supra* note 83 (exploring what is meant by the term “progressive prosecutor”); Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707 (2020) [hereinafter Bellin, *Expanding the Reach*] (discussing progressive-prosecutor movement and impact it may have on the criminal justice system); Nicholas Goldrosen, *The New Preemption of Progressive Prosecutors*, 2021 U. ILL. L. REV. ONLINE 150 (discussing legislation proposed to reduce progressive prosecutors’ discretion).

93. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”). The American Bar Association takes prosecutorial ethics so seriously that it has a separate standard of conduct governing prosecutors. See MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS’N 2021) (establishing the “Special Responsibilities of a Prosecutor”).

94. Reflecting on his experience as a young lawyer in the Southern District of New York, Professor Green said this about the duty:

The source of the duty was never identified . . . . Thus, what might be accepted by many as an article of faith might be viewed skeptically by some. Nor, for that matter, was the duty ever precisely defined. The concept was protean as well as vague. It assumed different meanings in different contexts, meanings that one could only infer.

Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 607–08 (1999).

95. Bellin, *Theories of Prosecution*, *supra* note 92, at 1216.

96. *Id.* at 1220.

other factors: the strength of the evidence, the criminal history and dangerousness of the defendant, the impact on any victims, the leanings of the judge assigned to the case, any statutory minimums or mandates, whether the defendant has accepted responsibility for her crime, and any cooperation the defendant has offered. The prosecutor's background and experience—including her race, socioeconomic and cultural background, whether she grew up in a rural area and whether she was the first in her family to attend college, among other factors—will also influence her decisions.

Although the “progressive prosecutors” have their own biases in their pursuit of justice, they all share a willingness to buck the usual system—the way it has always been—for prosecuting crimes and offenders.<sup>97</sup> They campaigned on new ideas and then actively began implementing nontraditional policies and procedures. In some cases, their policies align better with notions of criminal defense than with traditions of retribution and deterrence that often underlie prosecutorial goals. For instance, Ayala, Florida's first Black state's attorney,<sup>98</sup> declared that she would not seek the death penalty in any murder case, no matter the circumstances.<sup>99</sup> Foxx, “the first African American woman to serve as [Cook County's] top prosecutor,” won election for a second, four-year term in 2020 by sticking to a platform of reform, including increasing the number of people released pretrial on bail and raising the threshold for felony charges.<sup>100</sup> When speaking to a group of law students at the University of Chicago in 2018, Larry Krasner, who is white and male, described himself as “a prosecutor with *com-compassion*. Or a public defender with *pow-er*”.<sup>101</sup> Like many other progressive prosecutors who faced

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97. See Romero, *supra* note 83, at 815 (noting examples of prosecutors trying to dismantle inequities in the criminal legal system).

98. See Allison Ross, *Florida's First Black State Attorney Defends Opposition to Death Penalty*, TAMPA BAY TIMES (Feb. 12, 2020), <https://www.tampabay.com/florida-politics/buzz/2020/02/12/floridas-first-black-state-attorney-defends-opposition-to-death-penalty/> [<https://perma.cc/25AL-TGLK>] (explaining that Aramis Ayala was Florida's first elected Black prosecutor and became a face for capital-punishment alternatives in criminal justice system).

99. Steve Bousquet, *Orlando Prosecutor Defends Stance Against Death Penalty*, MIA. HERALD (June 28, 2017, 9:55 PM), <https://www.miamiherald.com/news/politics-government/state-politics/article158614209.html> [<https://perma.cc/YJP9-JCYF>].

100. Dan Hinkel & Alice Yin, *Democratic Cook County State's Attorney Kim Foxx Fends Off Republican Former Judge Pat O'Brien*, CHI. TRIB. (Nov. 4, 2020, 12:23 AM), <https://www.chicagotribune.com/politics/ct-cook-county-states-attorney-results-kim-foxx-pat-obrien-20201104-4xvvvs2qwrchxhzmzaliangiei-htmistory.html> [<https://perma.cc/Y3EN-J482>].

101. Austen, *supra* note 50. It's unsurprising that Krasner would use the term “public defender” because for twenty-five years before his election as prosecutor, Krasner served as a civil-rights attorney and, before that, a public defender. *Id.*

resistance as they adopted new policies,<sup>102</sup> Krasner reportedly “bumped up against the intransigence of Pennsylvania’s Republican-controlled legislature” and “found himself at odds with police officers, judges and his own line attorneys” in just his first year as district attorney.<sup>103</sup> But in May 2020, Krasner “overwhelmingly won his [Democratic] primary race for re-election to the office of district attorney,”<sup>104</sup> defeating a former long-time homicide prosecutor whom Krasner fired during his first week as district attorney.<sup>105</sup> In his primary victory speech, Krasner reflected:

Four years ago, we promised reform, and a focus on serious crime. People believed what were, at that point, ideas. Promises. And they voted us into office with a mandate. We kept those promises. They saw what we did. And they put us back in office because of what we’ve done.<sup>106</sup>

Krasner had “pledged never to seek the death penalty, stopped requesting cash bail for low-level offenses, expanded diversion programs for some gun offenses, and stopped prosecuting marijuana use and sex work.”<sup>107</sup> Krasner has also made significant strides in holding police accountable for their wrongdoing, including bringing “charges against more than 50 officers accused of misconduct, and institut[ing] a ‘do not call’ list of officers with a history of misconduct and dishonesty . . . .”<sup>108</sup> Even more, Krasner modified an “integrity unit” that “helped to exonerate 20 people since he took office in 2018.”<sup>109</sup> As a result of such policies, and as with many of the other progressive prosecutors, Krasner attracted intense criticism and opposition from some circles. Illustrative of this opposition, a chapter of the Fraternal Order of Police spent \$140,000 opposing Krasner’s re-election.<sup>110</sup>

Why would these “progressive” lawyers—those interested in justice reform, whom many label pro-accused, pro-defendant, or defense-minded—have interest in becoming prosecutors, rather than serving

102. See Andrew Cohen, *Reformist Prosecutors Face Unprecedented Resistance from Within*, BRENNAN CTR. FOR JUST. (June 19, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/reformist-prosecutors-face-unprecedented-resistance-within> [<https://perma.cc/9ZM3-LS53>] (recounting pushback Larry Krasner, Aramis Ayala, Kim Foxx, and others received from judges, a governor, and police unions).

103. Austen, *supra* note 50.

104. Akela Lacy & Alice Speri, *Philadelphia District Attorney Larry Krasner Trounces Police-Backed Primary Challenger*, THE INTERCEPT (May 18, 2021, 11:56 PM), <https://theintercept.com/2021/05/18/larry-krasner-carlos-vega-philadelphia/> [<https://perma.cc/8YZB-SL9E>].

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

defendants (and justice) more directly as defense counsel? The answer is power and the potential to reform the system from the inside. As Jeffrey Bellin said, “Compelling assertions about prosecutorial dominance leap off the pages of the criminal justice literature.”<sup>111</sup> Those aware of the “vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation” include justices of the nation’s highest court.<sup>112</sup>

The “progressive prosecutors” at the core of the reform movement understand that meaningful and lasting change in the system begins in the office of the prosecutor.

### C. *The Need for More “Common Prosecutors”*

Because prosecutors wield significant power and authority in the justice system, prosecutors are central to any permanent change. The system benefits when a broader spectrum of lawyers—much broader—become prosecutors. The problem with the current system is not with the power of the prosecutor nor with progressive, moderate, or even conservative prosecutors, but, rather, with how few new lawyers become prosecutors in the first place.<sup>113</sup> The system will improve only when more recent graduates with enthusiasm for the profession, energy and idealism to pursue justice and equity, and a willingness to make informed changes to traditional practices become prosecutors. We need more prosecutors from rural areas, more who are first-generation lawyers, more Black, brown, Asian, and Native American prosecutors, and others who come from “common” backgrounds.<sup>114</sup> Many of the prominent “progressive prosecutors” are “common prosecutors.” Their “common” characteristics include diversity of race and gender, but also other axes, such as socioeconomic status and culture. For instance, Chesa Boudin, who was

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111. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 172 (2019) (citations omitted). But, while acknowledging that “[c]onclusory statements about unchecked prosecutorial power and discretion are ubiquitous and uncontroversial,” *id.* at 176, Bellin argued that the “cacophonous rhetoric of prosecutorial dominance . . . ignores the agency of” other players in the criminal justice system—such as “[p]olice, legislators, judges, governors, and parole boards.” *Id.* at 212. See generally Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771, 771 (2017) (arguing that implementing “prosecutorial analytics” will help “to improve oversight and to promote systemic interests in justice, fairness, and transparency”).

112. *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting).

113. In *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, Romero said, “One of the areas of aggravatingly slow change in prosecutors’ offices throughout the country is the demography of prosecutors themselves.” Romero, *supra* note 83, at 818. “Three percent of elected prosecutors are men of color, and only two percent are women of color.” *Id.* (citing *Tipping the Scales: Challengers Take on the Old Boys’ Club of Elected Prosecutors*, REFLECTIVE DEMOCRACY CAMPAIGN (Oct. 2019), <https://wholeads.us/tipping-the-scales-read-the-report/> [<https://perma.cc/C9EM-WWZA>]).

114. See *supra* note 1 (defining “common”).

elected district attorney in San Francisco in 2019, was fourteen months old when his parents committed an armored car robbery and were sentenced to prison.<sup>115</sup> The justice system needs and deserves more prosecutors like Boudin. Adding diverse prosecutors will benefit the justice system in countless ways, among them: increasing representation, facilitating better decision-making, and guarding against prosecutor and police bias.

“Progressive” District Attorney Krasner apparently agrees. In a tour of the law school at the University of Chicago during Krasner’s first year as District Attorney, he spoke to a room full of law students, half of whom raised their hands indicating that they “wanted to go into public-interest law or become public defenders.”<sup>116</sup> Speaking directly to them, Krasner “ma[de] the case that the most effective way to transform the criminal justice system—to make it more just—[i]s from a position of authority within that system.”<sup>117</sup> In other words, he was telling the students to become prosecutors, if they were genuinely committed to an equitable system.

Krasner has the right idea. We need more public-interest-minded lawyers and more defense-minded people to become prosecutors. But rather than exclusively seeking more “progressive” prosecutors, as I believe he was suggesting, I am arguing for more prosecutors of every type, what I call “common prosecutors.” By this, I mean that our system of criminal justice will benefit significantly from the inclusion of a much, much wider array of prosecutors, including more women, more people of color, more liberals and progressives, and also more prosecutors from rural areas, more first-generation prosecutors, more from lower socioeconomic backgrounds, more prosecutors whose parents and grandparents are immigrants, more prosecutors from blue-collar backgrounds, and many others. Although attracting such a varied group of lawyers might seem unlikely, it is not as far-fetched as some might suspect. A recent study analyzing 395,254 lawyers using the Database on

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115. Associated Press, *Chesa Boudin, Whose Parents Were Imprisoned, Wins San Francisco D.A.’s Race*, NBC NEWS (Nov. 10, 2019, 8:00 PM), <https://www.nbcnews.com/news/us-news/chesa-boudin-whose-parents-were-imprisoned-wins-san-francisco-d-n1079586> [https://perma.cc/8Y46-WZKQ]. See also *Meet Kim Foxx*, KIM FOXX, <https://www.kimfoxx.com/meet-kim-foxx> [https://perma.cc/V9N4-5JQJ] (last visited Sept. 17, 2021) (quoting Foxx explaining her childhood, “growing up in Chicago’s Cabrini Green housing projects” and being “raised by [her] young mother and grandmother”); *The Revolution in Prosecutors’ Offices*, BRENNAN CTR. FOR JUST. (Apr. 15, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/podcasts/revolution-prosecutors-offices> [https://perma.cc/DLM2-MYLX] (quoting Brooklyn District Attorney Eric Gonzalez, describing his upbringing in Brooklyn “in East New York” in “a community that was a high crime neighborhood” that did not engender “a lot of trust in [the] justice system”).

116. Austen, *supra* note 50.

117. *Id.*

Ideology, Money in Politics, and Elections (DIME),<sup>118</sup> cross-referenced with the Martindale-Hubbell directory of lawyers compiled by LexisNexis, concluded that the ideology of prosecutors is “closer to being bimodal” with thirty-four percent of prosecutors “to the right of center.”<sup>119</sup> This bimodality demonstrates that there is space in the prosecutor ranks for Democrats, Republicans, and Independents.

How do we convince “progressive,” “common,” and other fair-minded people to join these prosecutor groups? And how do we convince the current “in-group” of mostly white, male prosecutors to welcome them when they do join?

Twenty years ago, Professor Abbe Smith wrote an article questioning whether “good people”<sup>120</sup> could and should serve as prosecutors.<sup>121</sup> Smith asserted that “[b]ecause of the context in which they are practicing, even prosecutors who claim to be concerned about racial and social justice are helping to lock up scores of young black men for years.”<sup>122</sup> She essentially questioned “whether well-intentioned prosecutors—prosecutors who are ‘conscientious,’ ‘prudent,’ and socially-conscious—[could] make enough of a difference to overcome this context.”<sup>123</sup> Smith asserted that “most” prosecutors don’t care that much “or even think about” their competing duties as advocates, administrators of justice, and officers of the court whose “duty to seek justice is the chief and abiding ethic . . . .”<sup>124</sup> She later argued, “[a]lthough prosecutors have discretion to go forward with a prosecution and may decline to prosecute for any number of reasons, there is generally not a lot of soul searching about the decision to prosecute.”<sup>125</sup> Almost two decades later—in 2018—Smith reiterated her significant “doubt” about whether “good, well-intentioned people who become prosecutors could bring justice back to the criminal justice system . . . .”<sup>126</sup>

Smith’s theory is interesting and provocative, but I disagree. My own observations and experiences were to the contrary when I was an assistant U.S. attorney. I worked with colleagues who took very seriously their

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118. Adam Bonica et al., *The Political Ideologies of American Lawyers*, 8 J. LEGAL ANALYSIS 277, 279 (2016) (noting that using DIME database allowed access to a “vast number of federal campaign contributions made by individuals”).

119. *Id.* at 320.

120. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 374–75 (2001).

121. *Id.*

122. *Id.* at 374.

123. *Id.* at 374–75 (citations omitted).

124. *Id.* at 376–77.

125. *Id.* at 387 (citing STANDARDS OF CRIM. JUST.: THE PROSECUTION FUNCTION § 3-3.9(b)).

126. Abbe Smith, *Good Person, Good Prosecutor in 2018*, 87 FORDHAM L. REV. ONLINE 3, 7 (2018).

ethical responsibilities to only charge crimes for which there was sufficient evidence, to produce all *Brady* evidence sufficiently early, so that an accused could meaningfully evaluate a plea offer, to recommend appropriate sentences, and to hold law enforcement responsible for any constitutional violations and misconduct. But even assuming that I have my own blind spot for prosecutors and that Smith is right—that prosecutors tend “to see things as black and white, right or wrong, guilty or not guilty”<sup>127</sup> and, therefore, care little about their duty of justice—that makes it even more important, indeed, imperative that “good people,” diverse people, “common people,” take on the role of prosecutors across the United States. For as Smith says, and as many others have argued too, the concept of seeking justice “could not be more ambiguous and subject to multiple interpretations.”<sup>128</sup> Smith ended her original essay with a plea “to those who are committed to social and racial justice: Please don’t join a prosecutor’s office.”<sup>129</sup> But surely we don’t want those who are not “good people”—those who, in Smith’s words, don’t engage in much “soul searching about the decision to prosecute”—to take on this powerful role.<sup>130</sup>

Even so, Smith is not alone in discouraging lawyers from becoming prosecutors.<sup>131</sup> In 2000, Kenneth B. Nunn urged “African Americans to refrain from prosecuting crimes and to reject employment opportunities with prosecutors’ offices.”<sup>132</sup> He claimed that “the harm their presence in prosecutors’ offices engenders outweighs any benefit.”<sup>133</sup> Nunn reached this conclusion after narrowing the question to: “[A]t this moment in history, given current political realities, the social milieu in which people of African descent exist in the United States, and the limitations in which Black prosecutors must operate, should African Americans prosecute

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127. Smith, *supra* note 120, at 380.

128. *Id.* at 377 (citing Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 445 (1992)). See Green, *supra* note 94, at 612–18 (discussing multiple interpretations of seeking justice).

129. Smith, *supra* note 120, at 400.

130. *Id.* at 387. Smith’s position on this point is addressed later. She recounted how some of her former students had complained about the “limits on their power, how many people they have to answer to” and how Smith had “seen the role [of prosecutor] consume the person.” *Id.* at 397. For Smith’s most recent scholarship related to prosecutorial ethics, see generally Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411 (2019).

131. In his book, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE*, Paul Butler analyzed Smith’s original article and detailed a similar view. Butler said, “I would not go so far as to call prosecutors ‘bad people.’ I know prosecutors who are fair-minded, concerned about economic and racial justice, and even believe that there are too many people in prison. Unfortunately, their bodies and souls are working at cross-purposes.” PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 103 (2009).

132. Kenneth B. Nunn, *The “Darden Dilemma”: Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1474–75 (2000).

133. *Id.* at 1475.

crimes?”<sup>134</sup> Nunn sketched out his thinking this way:

- (1) [T]he criminal justice system is racist and oppressive to African American people;
- (2) prosecutors are a major source of the racism found in the criminal justice system;
- (3) African American prosecutors cannot eliminate the racism in the criminal justice system by themselves; and
- (4) African Americans should not contribute to the oppression of other African American people.<sup>135</sup>

In further detailing his argument about prosecutors, Nunn emphasized the prosecutor’s “significant discretion,” contending that, “[a]rguably, the overrepresentation of African Americans in the criminal justice system is due largely to the actions of prosecutors” and that “[p]rosecutorial bias is present at virtually every stage of the criminal justice system.”<sup>136</sup> Like Nunn, other notable scholars have focused on prosecutors and their discretion as a source of racism in the criminal justice system. Angela J. Davis, who has written extensively about prosecutorial discretion, has argued for years that “prosecutors play a dominant and commanding role in the criminal justice system through the exercise of broad, unchecked discretion”<sup>137</sup> and that prosecutorial discretion is “a major cause of racial inequality in the criminal justice system.”<sup>138</sup> Paul Butler has described feeling “a little bit used” when he was a prosecutor in the District of Columbia because as a Black man and a prosecutor, his presence “promote[d] the appearance that the system [was] fair.”<sup>139</sup> Butler wrote, “One reason I was hired was so that people with [concerns about the racial composition of the defendants charged] could see my skin. It was supposed to make them feel better.”<sup>140</sup> Taking a different path and focus from Nunn and Butler, Davis has advocated that we use prosecutorial discretion “to construct effective solutions to racial injustice.”<sup>141</sup> I agree with Davis and seek to build on this approach.

While Nunn’s factual observations are spot on, I take issue with his conclusion, at least now—twenty-one years after his essay was published. Nunn was writing at a time when there were few, if any, prosecutors of color, and if progressive prosecutors existed, no one called them that.

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134. *Id.* at 1477.

135. *Id.* at 1478.

136. *Id.* at 1492.

137. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 16–17 (1998).

138. *Id.* at 17.

139. BUTLER, *supra* note 131, at 105.

140. *Id.* at 106. Butler ultimately concluded that lawyers concerned with “mass incarceration and expanding police power” should “not be prosecutors . . .” *Id.*

141. Davis, *supra* note 137, at 17.

They certainly were not an identifiable group. But, the prosecutorial landscape has changed, and at least some prosecutors are using their discretion for reform. As both Nunn's and Davis's essays highlighted, prosecutors exercise extensive discretion and control over so many aspects of a criminal case—from whether to charge a crime and whom and what to charge, to whether to urge release pretrial, offer a favorable plea, accept cooperation, and what sentence to recommend.<sup>142</sup> Given the ability of prosecutors to leverage all of these pressure points in the criminal justice system, we need more, not fewer, prosecutors who understand and appreciate the way bias—express and implicit—impacts these decisions, and we need prosecutors who can counter-balance that system bias.<sup>143</sup> Even Nunn acknowledged at one point that “African American prosecutors could work to change the dynamic in the [prosecutor's] office, so that conscious or unconscious racism would not infect prosecutorial decisions.”<sup>144</sup> So, while Nunn's arguments—opposing African Americans serving as prosecutors—can be alluring, as America begins to confront and attempt to dismantle its systemic racism, there are even better reasons for Black lawyers—and many others from minoritized and underrepresented groups—to become prosecutors and help transform the system.

Until the chief prosecutors and the “line” (or staff) prosecutors who carry out the majority of the day-to-day prosecutorial work—are representative of the rich diversity in our country, the system will neither be fair nor appear just.<sup>145</sup> The “in-group” of mostly white, male prosecutors and law enforcement officers will continue to exercise disproportionate power influenced by their inherent biases in ways that discriminate against “out-groups,” including people of color, poor people, immigrants, LGBTQ individuals, women, people of different religions, and others.

#### 1. Common Prosecutors Are More Likely to Appreciate the Influence of Race, Gender, and Other Irrelevant Characteristics When Exercising Discretion

When prosecutors become a heterogenous group, they will reach

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142. See Nunn, *supra* note 132, at 1492 (discussing prosecutorial discretion). See also Davis, *supra* note 137, at 21–22 (discussing discretionary nature of a prosecutor's charging decisions).

143. See Nunn, *supra* note 132, at 1489–97 (discussing how police and prosecutor bias infiltrates the justice system, resulting in disproportionate numbers of Black Americans being stopped, frisked, arrested, and prosecuted).

144. *Id.* at 1506.

145. See Mukamal & Sklansky, *supra* note 60 (“[T]he vast majority of criminal cases in the United States end in plea bargains, not in trials. So, the discretion exercised in our justice system is mostly not by judges but by prosecutors, and typically not by elected district attorneys but by the legions of far less visible lawyers they employ.”).

better, less biased decisions. In a series of studies in 2000 and 2001, researchers Samuel R. Sommers and Phoebe C. Ellsworth concluded that when race is a blatant issue in a trial, “such as when the crime itself is racially charged or when attorneys inject race-related arguments into the proceedings,”<sup>146</sup> white jurors are more concerned about avoiding prejudice or the appearance of prejudice.<sup>147</sup> But when there is a lack of racially charged trial content, “when [jurors] are presumably less concerned about racism, White jurors are harsher in their judgments of a Black than a White defendant.”<sup>148</sup> Sommers concluded based on his own findings combined with those of other researchers that “activating White jurors’ concerns about prejudice attenuates the influence of a defendant’s race on judgments.”<sup>149</sup> Put more plainly—when white people are reminded about the need to check their biases and treat all people fairly, they are more likely to do so.<sup>150</sup> Relatedly, white people are naturally reminded to check their biases when confronted with people of color and the challenges people of color face in the way of bias and prejudice. Drawing on past research, Sommers found that, when whites “[become] members of a diverse group,” whites are reminded and motivated to avoid prejudice.<sup>151</sup> Similar research “suggests another related prediction, namely that membership in a diverse group affects Whites’ information-processing style.”<sup>152</sup> According to Sommers, “[s]everal studies have found that Whites’ desire to guard against prejudice—or serve as ‘watchdogs’ for bias—lead[ing] them to process information more systematically when it is about a Black target or conveyed by a Black source.”<sup>153</sup>

From this research, one can infer that the presence of more diversity within the prosecutor’s office will have the same effect—it will act as a constant reminder that prosecutors, (and judges, juries, probation officers, and others in the criminal justice system), should avoid prejudice and negative bias. Adding more prosecutors who are Black, brown, women, lawyers from different religions, those from socioeconomically challenged backgrounds, from the LGBTQ community, and other members of “out-groups” is likely to diminish bias and prejudice against

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146. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 599 (2006) (citations omitted).

147. *Id.*

148. *Id.* at 599–600 (citations omitted).

149. *Id.* at 600 (citing several past studies).

150. *See id.* at 599–600 (explaining that reminding white jurors to be cognizant of their racial biases tends to result in treating defendants more fairly).

151. *Id.* at 606.

152. *Id.* at 601.

153. *Id.* (citations omitted).

these groups. Indeed, Sommers's research suggested that the mere presence of nonwhite participants in the justice system will improve the way majority prosecutors process information and evaluate criminal cases. Sommers explained that experiments revealed that racial diversity in juries changed "participants' private trial judgments" even before they actually deliberated with out-group members, meaning "that membership in a racially diverse group affects not only the information White participants convey during the discussion but also how they think about and privately evaluate the case—specifically, rendering them less punitive toward the defendant and more thorough in their information processing . . . ." <sup>154</sup>

This research demonstrates that engaging with diverse people (or even thinking about making decisions in a setting with people of races or other characteristics different from yours) improves your deliberation process and reduces the chance you will act on your prejudices. In the context of prosecutors and the exercise of their extensive discretionary authority, this means prosecutors would be more likely to make decisions in a neutral, egalitarian way, if surrounded by prosecutors with a broad diversity of characteristics and views.

If this analysis is accurate, then majority prosecutors would be less likely to charge Black, brown, and LGBTQ defendants with more serious crimes than they charge against white, heterosexual defendants; less likely to disproportionately charge defendants of color with crimes requiring a mandatory minimum sentence; more likely to agree to bail terms pre-trial for all defendants who commit minor offenses; and less likely to seek sentences harsher for minoritized individuals than they seek for similarly-situated white, straight defendants. Prosecutors might also be more willing to prosecute police officers who inflict unnecessary violence on suspects and pursue more law enforcement officers who engage in other misconduct. Adding diversity to the prosecutor ranks would facilitate greater "motivations to avoid prejudice" and "more systematic and thorough processing of information conveyed by or about [minoritized] individuals."<sup>155</sup> After all, Sommers's research showed that "group racial composition not only affect[s] Whites' information-processing style but also le[ads] to a significant shift in how they interpret[] and weigh[] the evidence."<sup>156</sup> Arguably, the same would hold true for other biases.

Research of jury decision-making also shows that diverse groups make "fewer . . . errors," after "consider[ing] a wider range of information" and

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154. *Id.*

155. *Id.* at 607 (citations omitted).

156. *Id.*

are “more amenable to discussion of [racism]” than all-white groups.<sup>157</sup> Additionally, studies suggest that all-white juries are more likely to reach a unanimous verdict of guilt when a defendant is Black.<sup>158</sup> In other words, groups, including juries, composed of less homogeneous people make “better” decisions because they “are more likely to constantly reexamine facts and remain objective. They may also encourage greater scrutiny of each member’s actions . . . .”<sup>159</sup> Heterogeneous groups “process information more carefully.”<sup>160</sup> And, diverse groups often “dodge the costly pitfalls of conformity, which discourages innovative thinking.”<sup>161</sup> Results from the corporate world reinforce this jury research. Business data demonstrates that companies comprised of “ethnic and racial diversity in management” perform significantly better than other companies.<sup>162</sup> The same is true for companies with female board members. They yield “higher return on equity and higher net income growth” than companies without women on their boards.<sup>163</sup>

Prosecutors make decisions that impact people’s liberty, privacy, sometimes even whether they live or die. Like everyone else, prosecutors remain susceptible to implicit bias, uniform thinking, and myopic judgment, making it critical that they take steps to improve decision-making for key choices, such as whether and whom to charge with crimes. These decisions are at least as important as the judgments businesses make that benefit from diversifying boardrooms. And, while the decisions juries make are also crucial to a justice system that works well and appears fair, juries decide less than ten percent of all criminal cases, making it more vital that the people involved in the other ninety percent are sound decision-makers.<sup>164</sup> The vast majority of criminal cases

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157. *Id.* at 606 (discussing influence of racial diversity in group decision-making). Sommers studied group decision-making by juries, some homogeneous and others heterogeneous. *Id.* at 597.

158. *See id.* at 599 (citation omitted) (investigating the relationship between jury racial composition and deliberations).

159. David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), <https://hbr.org/2016/11/why-diverse-teams-are-smarter> [<https://perma.cc/V25L-QQNX>]. Heterogenous juries can allow jurors “to become more aware of their own potential biases . . . .”*Id.*

160. *Id.*

161. *Id.*

162. *See, e.g., id.* (noting that “public companies in the top quartile for ethnic and racial diversity in management were 35% more likely to have financial returns above their industry mean, and those in the top quartile for gender diversity were 15% more likely to have returns above the industry mean.” (citing Vivian Hunt et al., *Why Diversity Matters*, MCKINSEY & CO. 1–2 (2015), <https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters> [<https://perma.cc/F2VV-XBUQ>])).

163. *Id.*

164. *See* LINDSEY DEVERS, U.S. DEP’T OF JUST., PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011) (“Plea bargaining is a defining, if not the defining, feature of the federal criminal justice system. . . . [S]cholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process.” (citations omitted)).

resolve pre-trial—with decisions to dismiss, an offer of diversion, or through a plea deal negotiated with the prosecutor. It is also the prosecutor who decides whether to initiate a case at all, especially when police have engaged in misconduct. Thus, it is the prosecutors in our system who are in greatest need of sound and objective fact-gathering and decision-making.<sup>165</sup>

Adding significant diversity to the office of the prosecution—the office with the power to initiate and pursue criminal charges—is likely to improve decision-making, reverberating throughout the criminal justice system. We have seen a hint of this change with the rise of the “progressive prosecutors.” Now, we need to build on this trend to include even more “common prosecutors” to add diversity to the justice-reform mix.

## 2. Increasing the Number of “Common Prosecutors” Will Improve Confidence in the System

Eighty-seven percent of Black adults say “the U.S. criminal justice system is more unjust [for] Black people . . . .”<sup>166</sup> The facts support that belief. Although white people constitute about sixty percent of the U.S. population,<sup>167</sup> they are the victims of only forty-one percent of fatal police shootings.<sup>168</sup> In contrast, Black people are killed twenty-two percent of the time during police shootings, although they constitute only 13.4% of the U.S. population.<sup>169</sup> Similarly, only five percent of Black people are illicit drug users, but they “represent 29% of those arrested and 33% of those incarcerated for drug offenses.”<sup>170</sup> Black Americans are also disproportionately the victims of wrongful convictions.<sup>171</sup> This result is unsurprising because African Americans “are incarcerated at more than

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165. This is not to diminish the importance of quality judges and capable defense lawyers. But as many have noted, in our system prosecutors are the most powerful of the three. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (“Only someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation.”).

166. *Criminal Justice Fact Sheet*, NAACP, <https://naacp.org/resources/criminal-justice-fact-sheet> [<https://perma.cc/G7JE-3F5B>] (last visited June 28, 2021).

167. Dudley L. Poston, Jr., *3 Ways That the U.S. Population Will Change Over the Next Decade*, PBS NEWSHOUR (Jan. 2, 2020, 12:22 PM), <https://www.pbs.org/newshour/nation/3-ways-that-the-u-s-population-will-change-over-the-next-decade> [<https://perma.cc/BV8P-HT97>].

168. *Criminal Justice Fact Sheet*, *supra* note 166.

169. *Id.*

170. *Id.*

171. *Id.* (noting that as of October 2016, 1900 people had been exonerated in the U.S., forty-seven percent of them Black).

5 times the rate of whites.”<sup>172</sup> Although “Black people make up just over 13 percent of the United States population, according to census data, [they] made up 34 percent of the correctional population in 2014.”<sup>173</sup>

In contrast to the overcriminalization of Black Americans, women are prosecuted at rates far below their proportion of the population, revealing a gender bias in the system.<sup>174</sup> Women comprise about fifty-one percent of the U.S. population,<sup>175</sup> but they are the subject of only twenty-seven percent of arrests.<sup>176</sup> Nevertheless, the gender “benefit” does not extend to Black women. Women of color experience significant discrimination based on race. “Black women [are] about 17 percent more likely to be in a police-initiated traffic stop than white women, and 34 percent more likely to be stopped than Latina women.”<sup>177</sup> In fact, “Black women [are] *at least as likely* as white men to be arrested during a [police] stop.”<sup>178</sup> And, Black women “experience[] use of force [by police] during a stop about the same rate as white men . . . .”<sup>179</sup>

The statistics revealing the arrest and incarceration rates for Black women suggest that racism in the criminal justice system runs deep. Statistics regarding the disparate application of the justice system to people of color in rural America adds to that evidence. Maybell Romero

172. *Id.* Black people are also five times more likely to be arrested than white people. See Anagha Srikanth, *Black People 5 Times More Likely to be Arrested Than Whites, According to New Analysis*, THE HILL (June 11, 2020), <https://thehill.com/changing-america/respect/equality/502277-black-people-5-times-more-likely-to-be-arrested-than-whites> [<https://perma.cc/GAV3-QW4P>] (noting that according to an ABC analysis of 800 jurisdictions across the U.S., over a three-year timeframe ending in 2018, Black people were five times more likely to be arrested than whites; in 250 other jurisdictions, the number jumped to ten times more likely).

173. Srikanth, *supra* note 172.

174. Women do commit fewer criminal offenses, accounting for some of this disparity. See, e.g., Rene Chun, *Female Fugitives: Why Is “Pink-Collar Crime” on the Rise?*, THE GUARDIAN (Jan. 6, 2020, 1:00 PM), <https://www.theguardian.com/us-news/2020/jan/06/female-fugitives-women-crime-rates-rise> [<https://perma.cc/5NX6-JBFT>] (noting that “[m]en commit more crimes than women do,” and that men “comprise 93% of the prison population” and commit ninety percent of murders).

175. *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/SEX255219#SEX255219> [<https://perma.cc/Y3HR-XMU9>] (last visited Sept. 27, 2021).

176. *Policing Women: Race and Gender Disparities in Police Stops, Searches, and Use of Force*, PRISON POL’Y INITIATIVE (May 14, 2019), <https://www.prisonpolicy.org/blog/2019/05/14/policingwomen/> [<https://perma.cc/NW4B-UZQQ>]. Notably, though, the arrests of women are on the rise, as the arrests of men are falling sharply. *Id.* (indicating that women comprised twenty-one percent of arrests in 1997 and only sixteen percent in 1980, while the number of men arrested has declined by thirty percent in the past two decades).

177. *Id.*

178. *Id.* (“Black women were arrested in 4.4[%] of police-initiated stops, which was roughly three times as often as white women (1.5[%]) . . . .”).

179. *Id.*

discussed this disparity in her essay on access to justice in rural Maine.<sup>180</sup> There, she highlighted that “[a]s of 2010, Black, Indigenous, and Latino people are incarcerated [in Maine] at rates much higher than their White counterparts: 1,553 per 100,000 Blacks are incarcerated, with 747 out of every 100,000 Indigenous peoples, 407 out of every 100,000 Latinos, and only 259 for every 100,000 Whites.”<sup>181</sup> These figures are especially troubling because, as Romero noted, “Blacks are particularly overrepresented as they only comprise one percent of the state’s population while making up seven percent of the incarcerated.”<sup>182</sup>

The LGBTQ community also suffers disproportionately at every pressure point in the criminal justice system. “Researchers estimate that 20% of youth in the juvenile justice system are lesbian, gay, bisexual, questioning, gender nonconforming, or transgender” compared with the 9.5% of LGBTQ youth in the general population.<sup>183</sup> Gay, lesbian, and bisexual people are 2.25 times more likely than heterosexual individuals to be arrested, with “lesbian and bisexual women . . . [four] times as likely to be arrested than straight women . . . .”<sup>184</sup> The disparity continues throughout incarceration. “LGB people are incarcerated at a rate over three times that of the total adult population: 1,882 per 100,000 lesbian, gay, and bisexual people are incarcerated, compared with 612 per 100,000 U.S. residents aged [eighteen] and older.”<sup>185</sup> Strikingly, 33.3% of women in prison identify as lesbian or bisexual, compared to the general population in which only 3.4% of women identify as gay, lesbian, or bisexual.<sup>186</sup> Relatedly, lesbian and bisexual women are sentenced more harshly than straight women.<sup>187</sup> Though we have even less data for

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180. Maybell Romero, *Viewing Access to Justice for Rural Mainers of Color Through a Prosecution Lens*, 71 ME. L. REV. 227, 233 (2019) (noting that “the number of Mainers living in rural areas as defined by the Census Bureau” was 61.3% in 2010 (citing Matt Wickenheiser, *Census: Maine Most Rural State in 2010 as Urban Centers Grow Nationwide*, BANGOR DAILY NEWS (Mar. 26, 2012), <https://bangordailynews.com/2012/03/26/business/census-maine-most-rural-state-in-2010-as-urban-centers-grow-nationwide/> [<https://perma.cc/D2C9-HX8U>])).

181. Romero, *supra* note 180, at 236 (citing *Racial and Ethnic Disparities in Prisons and Jails in Maine*, PRISON POL’Y INITIATIVE (2016), [https://www.prisonpolicy.org/graphs/disparities2010/ME\\_racial\\_disparities\\_2010.html](https://www.prisonpolicy.org/graphs/disparities2010/ME_racial_disparities_2010.html) [<https://perma.cc/G9UD-TKPT>])).

182. *Id.*; see also Romero, *Rural Spaces*, *supra* note 83, at 820 (citing data from states with large rural populations—including Maine, Vermont, West Virginia, Mississippi, Montana, Arkansas, South Dakota, North Dakota, Kentucky and Alabama—demonstrating “shockingly disproportionate minority contact with the criminal legal system” and “disproportionate rates of minorities being imprisoned”).

183. Alexi Jones, *Visualizing the Unequal Treatment of LGBTQ People in the Criminal Justice System*, PRISON POL’Y INITIATIVE (Mar. 2, 2021), <https://www.prisonpolicy.org/blog/2021/03/02/lgbtq/> [<https://perma.cc/D9C4-3K26>].

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

transgender people, they seem to suffer significant discrimination too. The limited research suggests that sixteen percent of transgender and gender non-conforming people spend time in jail or prison compared to five percent of the general population.<sup>188</sup>

The disparate impact of the system on the poor, and even the “near-poor and the average wageearner [sic],” is also well documented and troubling.<sup>189</sup>

Especially in a criminal justice system in which prosecutors wield extensive power, control, and influence—not only in the prosecution of cases, but also in the hiring, supervision, and promotion of other prosecutors—the system will not seem (or be) fair until there is more diversity among those who wield that power. We know that everyone experiences implicit bias and that the current system is treating similarly-situated defendants differently, depending on their race, gender, sexual orientation, poverty status, and other characteristics irrelevant to criminal responsibility. Studies also show that adding diversity to decision-making bodies improves outcomes. And, of course, representation matters, too. Thus, if we hope to remedy some of the disparities and inequities in the system, we need more diversity among prosecutors. This means many, many more prosecutors who reflect America—Black and white, rural and urban, gay and straight, and many others. In short, we need more “common prosecutors.”

When we add these common prosecutors to the current group of majority white, male prosecutors, we improve procedural justice by adding new cultural perspectives currently absent from the decision-making process, and we lend credibility to the process by ensuring

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188. See German Lopez, *5 Ways LGBTQ People Fall into the Criminal Justice System—and Suffer the Worst Once In*, VOX (Feb. 23, 2016, 8:10 AM), <https://www.vox.com/2016/2/23/11095980/lgbtq-gay-transgender-prison> [https://perma.cc/YUJ9-225M] (identifying ways the criminal legal system disproportionately affects LGBTQ people).

189. *Equal Justice for the Poor, Too; Far Too Often, Money—or the Lack of it—Can Be the Deciding Factor in the Courtroom*, Says Justice Goldberg, *Who Calls for a Program to Insure Justice for All Americans*, N.Y. TIMES, Mar. 15, 1964 (§ SM), at 24. See also Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. FOR AM. PROGRESS (Dec. 8, 2016, 9:03 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal/> [https://perma.cc/98WZ-RT7F] (“Other estimates for the percentage of criminal cases involving indigent defendants nationwide put that figure as high as 90 percent.” (citing SPANGENBERG ET AL., U.S. DEP’T OF JUST., BUREAU OF JUST. ASSISTANCE, NCJ 181160, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 3 n.1 (2000))); Tara O’Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION F. (June 30, 2020), <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/> [https://perma.cc/5ZZ7-RFHS] (noting that of the 2.2 million people incarcerated in U.S., about one-fourth are held pre-trial because they cannot afford bail); Kiren Jahangeer, *Fees and Fines: The Criminalization of Poverty*, PUB. LAW., Winter 2019, at 14, 14 (recounting numerous examples of people committing minor offenses only to be incarcerated repeatedly for inability to pay court fees and costs).

representation from a wider array of Americans.

### 3. Common Prosecutors Are Likely to Influence Law Enforcement Officers to Reduce Their Misconduct

#### a. Common Prosecutors May Reduce Police Bias

Much has been made of the codependence of law enforcement officers and prosecutors. Many contend that one of the main reasons police continue to use excessive force during investigations and arrests is that police are not held accountable by prosecutors they have close relationships with.<sup>190</sup> The argument asserts that prosecutors feel an unspoken pressure not to prosecute the law enforcement officers on whom they rely for cases and convictions. Not only are prosecutors dependent on law enforcement officers for cases, but because they are on the same prosecution team, officers are also part of the prosecution “in-group” for whom prosecutors feel a subconscious favoritism.<sup>191</sup> However, diversifying the office of the prosecution can shift this dynamic in a meaningful way.

Even conceding that prosecutors can have large blind spots for their law enforcement “colleagues,” when more “common people” are engaged as prosecutors, the connection and relationships between the two that have offered police undue protection in the past may evolve to reduce bias and to encourage prosecutors to pursue “bad cops.” Once traditional prosecutors develop that same type of connection, admiration, dependence, and relationship with their fellow “progressive” and “common” prosecutors—who are women, people of color, first-

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190. See, e.g., Maybell Romero, *Prosecutors and Police: An Unholy Union*, 54 U. RICH. L. REV. 1097, 1098 (2020) (criticizing the prosecutor-police relationship, including “cooperation between prosecutors and police” that sometimes extends to working together to “influence policy and flummox criminal justice reform”); Capers, *supra* note 24, at 1590 (noting the “symbiotic relationship” between prosecutor and police); ALLYSON COLLINS, HUM. RTS. WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 86 (1998) (proposing the “traditionally close relationship” between prosecutors and police as a reason prosecutors may decline to pursue charges against police for misbehavior); *Coolidge v. New Hampshire*, 403 U.S. 443, 449–53 (1971) (holding that chief investigator and prosecutor cannot constitutionally issue search warrant for case he or she oversees); cf. *Shadwick v. City of Tampa*, 407 U.S. 345, 350–51 (1972) (holding that municipal court clerks tasked with reviewing search warrants in Tampa, Florida, were sufficiently “disengage[d] from activities of law enforcement” to qualify as “neutral and detached”).

191. See generally Whitbourne, *supra* note 69. Never has this in-group versus out-group divide been greater. As Romero’s article highlighted, in St. Louis, assistant prosecutors and their investigators voted to become members of the police union—the St. Louis Police Officer’s Association—a move seen as opposing progressive prosecutor Wesley Bell’s reform policies just after he won election as St. Louis County Prosecutor. Romero, *supra* note 190, at 1099. “Bell took drastically different positions than his predecessor while campaigning for office . . . and ‘pledge[d] to hold police officers accountable for wrongful acts.’” *Id.* (citations omitted).

generation college and first-generation law school graduates, individuals from small towns, meager means, and other “out-group” individuals—prosecutors may be more willing to hold police accountable for misconduct. As more Black and brown people become prosecutors, their colleagues will have more incentive to pursue justice in cases involving unjust, if not tragic, outcomes during which people of color are shot, injured, or even killed, as a result of excessive police violence. “[M]uch present discrimination is a result of favoritism toward an in-group rather than hostility toward an out-group . . . .”<sup>192</sup> And, “exposing people to counter-stereotypes can decrease implicit bias.”<sup>193</sup> In contrast, “segregated work places, schools, and neighborhoods deeply affect the incidence of implicit bias and in-group preference.”<sup>194</sup>

Once lawyers with diverse backgrounds, experiences, cultures, and races become commonplace in prosecutors’ offices across the country, the “in-group” of prosecutors will be redefined, reimagined, and expanded. The new in-group will naturally and consistently constitute a diversified group of prosecutors with mixed experiences and characteristics, making it uncomfortable—consciously or unconsciously—for other, colleague prosecutors to refuse to charge a law enforcement officer who engages in misconduct. At some point, the “bad cop” moves to the out-group.

The extensive research demonstrating the positive impact that diversity has on decision-making also suggests that “common prosecutors” would reduce bias. As Sommers and Ellsworth’s research in the jury setting shows, diversity within the decision-making group increases the sensitivity to race of the individuals in that group and the manner in which they make decisions.<sup>195</sup> As explained in Section II.C.1, even before jury deliberations began, white study participants who anticipated deliberating in a diverse pool of jurors about the guilt or innocence of a Black defendant were less likely (about thirty-four percent versus fifty percent) to say that they thought the defendant was guilty.<sup>196</sup> This finding “suggest[s] that white jurors’ knowledge that they would debate the case

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192. PERCEPTION INST., TRANSFORMING PERCEPTION: BLACK MEN AND BOYS: EXECUTIVE SUMMARY 8 (2013), <http://perception.org/wp-content/uploads/2014/11/Transforming-Perception.pdf> [<https://perma.cc/ML6L-T9Q4>] (citation omitted).

193. *Id.* at 11. *See also* Section II.C.1 *supra* (discussing research on impact of racial diversity in reducing racial bias in jury decisions).

194. PERCEPTION INST., *supra* note 192, at 12.

195. *See* Press Release, Am. Psych. Ass’n, Racially Diverse Mock Juries Have Wider Ranging and More Accurate Deliberation Discussions, Says Study (2006), <https://www.apa.org/news/press/releases/2006/04/diverse-jury> [<https://perma.cc/K6ME-8BKF>] [hereinafter Racially Diverse Mock Juries] (discussing Sommers’s study).

196. *See* discussion *supra* Section II.C.1 (discussing research results on jury deliberations); Sommers, *supra* note 146, at 603.

in a diverse group affected their opinions even before deliberation began.”<sup>197</sup> The study also indicated that diversity on the jury “remind[ed] them to keep their judgments free from prejudice.”<sup>198</sup> I would expect the same reminders for law enforcement when they know that they will be reporting their investigative work and describing their conduct to a diverse set of prosecutors. They will be more mindful of their own biases and more concerned about appearing racist, sexist, homophobic, xenophobic, classist, or otherwise unfair. Prosecutors are also likely to feel the influence of common prosecutors helping to check their pro-police biases.

b. Common Prosecutors May Prosecute More “Bad Cops”

One of the marks of “progressive prosecutors” is their willingness to hold police accountable for misconduct. For example, progressive prosecutor Marilyn J. Mosby, the state’s attorney in Baltimore, charged six police officers involved in the arrest of suspect Freddie Gray, who was abused at the scene of the arrest and rendered unconscious during a subsequent van ride to the police station.<sup>199</sup> In San Francisco, District Attorney Chesa Boudin investigated police after a homeless man attacked them with a vodka bottle, and police responded by shooting the man three times, resulting in the amputation of his leg.<sup>200</sup> In Suffolk County, District Attorney Rachael Rollins, “the first woman of color to serve as district attorney in Massachusetts,” declared: “District attorneys have been complicit and co-conspirators in this lack of oversight [of police]. And we deserve to be called out about it.”<sup>201</sup> As noted earlier, Philadelphia District Attorney Krasner “brought charges against more than 50 officers

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197. Racially Diverse Mock Juries, *supra* note 195. See also Sommers, *supra* note 146, at 607 (“[T]he mere expectation of deliberating with a racially heterogeneous group is sufficient to influence judgments.”).

198. Racially Diverse Mock Juries, *supra* note 195. See also Sommers, *supra* note 146, at 607 (“These pre-deliberation findings . . . are consistent with the hypothesis that membership in a racially diverse group can activate Whites’ concerns about avoiding prejudice.”).

199. See generally Comment, *The Paradox of “Progressive Prosecution”*, 132 HARV. L. REV. 748 (2018) (explaining details of Mr. Gray’s arrest, trauma he suffered following arrest, and his eventual death, as well as Prosecutor Mosby’s attempt to hold officers involved accountable).

200. Marco della Cava, *New, More Progressive Prosecutors Are Angering Police, Who Warn Approach Will Lead to Chaos*, USA TODAY (Feb. 10, 2020, 11:50 AM), <https://www.usatoday.com/story/news/nation/2020/02/08/criminal-justice-police-progressive-prosecutors-battle-over-reform/4660796002/> [<https://perma.cc/3HKX-UE3A>] (explaining that police officers demanded swift prosecution against a homeless man, Jamaica Hampton, but San Francisco’s reform-minded district attorney held off, saying he would not immediately press charges against Hampton as officers were also under investigation).

201. Alanna Durkin Richer & Michael Tarm, *Prosecutors Charge Police, Push Reforms Amid Floyd Protests*, U.S. NEWS & WORLD REP. (June 18, 2020), <https://www.usnews.com/news/politics/articles/2020-06-18/prosecutors-charge-police-push-reforms-amid-floyd-protests> [<https://perma.cc/VRC7-GY5R>].

accused of misconduct, and instituted a ‘do not call’ list of officers with a history of misconduct and dishonesty . . . .”<sup>202</sup> And Minnesota Attorney General Keith Ellison, who is Muslim and “the first Black person elected to statewide office,”<sup>203</sup> decided within days of becoming the state’s chief prosecutor to charge Derek Chauvin for killing George Floyd and later obtained a conviction on three counts, including murder.<sup>204</sup>

Notwithstanding these examples, relatively few prosecutors are “progressive,”<sup>205</sup> and other prosecutors from out-groups—women, LGBTQ people, religious minorities, etc.—are scarce, too. Therefore, these efforts to prosecute police are seen as outliers from the norm, and these attempts are often met with substantial resistance.<sup>206</sup> Even when pursued, the efforts commonly fail altogether. In Mosby’s prosecution of the police in Mr. Gray’s arrest, for example, three of the six officers were acquitted, and Mosby dropped the charges against the other three.<sup>207</sup> One of the most notoriously unsuccessful cases is the attempted prosecution of Ferguson, Missouri, police officer Darren Wilson, whom the grand jury refused to indict after Wilson shot and killed Michael Brown, an

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202. Lacy & Speri, *supra* note 104.

203. Tim Arango, “Gentle Steering of the Ship”: How Keith Ellison Led the Prosecution of Chauvin, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2021/04/21/us/keith-ellison-chauvin-trial.html> [<https://perma.cc/P88X-VGBJ>]. Ellison became the first Muslim elected to Congress in 2006 and served for twelve years before returning to Minnesota to successfully run for attorney general in 2018. *Id.*

204. Deanna Paul et al., *The Derek Chauvin Prosecutors and Their Big Gamble*, WALL ST. J. (Apr. 22, 2021, 10:12 AM), <https://www.wsj.com/articles/derek-chauvin-trial-prosecution-team-11619062349> [<https://perma.cc/6MZD-JJK9>] (explaining that charging Derek Chauvin with second-degree murder in George Floyd’s death was Ellison’s first major decision as attorney general); Joe Barrett & Jacob Gershman, *Derek Chauvin Guilty of Murder in Death of George Floyd*, WALL ST. J. (Apr. 20, 2021, 11:14 PM), <https://www.wsj.com/articles/derek-chauvin-convicted-of-murder-in-killing-of-george-floyd-11618952910> [<https://perma.cc/TK6Q-AWNW>] (reporting Derek Chauvin was found guilty of all counts: second-degree murder, third-degree murder, and manslaughter).

205. See Romero, *supra* note 83, at 804–05 (noting examples of prosecutors trying to dismantle inequities in criminal legal system). As Romero noted, all progressive prosecutors so far are in large, urban areas. *Id.* at 804. But much police abuse occurs in rural areas as well. See *id.* at 805–06, 811–18 (describing problems with failing to account for rural population within rise of urban “progressive prosecutors,” leading to further inequities in rural-urban divide).

206. See, e.g., Max Hauptman, *Entire Portland Police Crowd-Control Unit Quits over Fellow Officer’s Assault Charge*, WASH. POST (June 18, 2021, 9:45 PM), <https://www.washingtonpost.com/nation/2021/06/18/portland-protest-team-resign/> [<https://perma.cc/7JSS-2U6W>] (“All of the approximately 50 members of a Portland, [Oregon], police crowd-control unit resigned from their assignment . . . one day after a grand jury charged Officer Corey Budworth with one count of assault in the fourth degree . . . for his actions during an Aug[ust] 18[th] protest in downtown Portland.”).

207. See Comment, *supra* note 199, at 749 (stating that State’s Attorney Mosby announced she was compelled to drop charges against remaining officers despite apparent injustice).

unarmed Black teenager.<sup>208</sup> More recently in September 2020, a grand jury refused to indict Louisville, Kentucky, police after they shot and killed Breonna Taylor while executing a warrant in her home after midnight.<sup>209</sup>

Although there does not appear to be a statistical analysis of how many of these new “progressive” prosecutors are willing to file charges against police, the anecdotal evidence is building that all prosecutors are beginning to take police brutality more seriously and that the progressives are leading the way. Nevertheless, prosecutions of police are still exceedingly rare.<sup>210</sup> As a result, if more prosecutors were not only “progressive,” but also people of color, young people, first-generation lawyers, lawyers from rural backgrounds and from low-income families, among others, then we would likely see even more prosecutors willing to prosecute police when appropriate. After all, it is people with these backgrounds who are disproportionately targeted by police. At a minimum, we are likely to see these diverse prosecutors take a closer look at police misconduct involving minoritized people.

In sum, intuition suggests and research shows that all prosecutors would make more informed decisions resting more soundly on a strong factual base if they worked in offices with a mix of people from various

208. See Anya van Wagtenonk, *Grand Jury Won't Indict Officer in Michael Brown Death*, PBS NEWSHOUR (Nov. 24, 2014, 10:06 PM), <https://www.pbs.org/newshour/nation/grand-jury-decides-not-to-indict-darren-wilson-in-shooting-death-of-michael-brown> [<https://perma.cc/UGX5-A5CD>] (noting that Prosecuting Attorney Robert McCulloch announced that a grand jury would not indict Missouri police officer in killing of Michael Brown); Alana Wise, *Latest Probe Ends in No Charges for Former Ferguson Officer Who Killed Michael Brown*, NPR (July 30, 2020, 8:35 PM), <https://www.npr.org/2020/07/30/897475866/latest-probe-ends-in-no-charges-for-former-ferguson-officer-who-killed-michael-b> [<https://perma.cc/F9NZ-75HG>] (explaining that a different prosecutor reinvestigated case in 2020 and concluded that the state could not prove charges against Darren Wilson beyond a reasonable doubt under Missouri law).

209. See Amelia Thomson-DeVeaux et al., *Why It's So Rare for Police Officers to Face Legal Consequences*, FIVETHIRTYEIGHT (Sept. 23, 2020, 4:53 PM), <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/> [<https://perma.cc/U8CQ-CW58>] (explaining that while a grand jury refused to charge any Louisville police officers with killing Breonna Taylor, one former officer was indicted for recklessly endangering Taylor's neighbors); see also Richard A. Opper Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/BS4N-EQMZ>] (noting details of police raid and that one officer was eventually indicted for “wanton endangerment of neighbors,” but not for killing Taylor).

210. See Thomson-DeVeaux et al., *supra* note 209 (noting that no national system for reporting police misconduct exists, so researchers, journalists, and activists must collect their own data—which can be exceedingly difficult (citing *Police Integrity Research for the Public Good*, HENRY A. WALLACE POLICE CRIME DATABASE, <https://policecrime.bgsu.edu/> [<https://perma.cc/6USN-FVST>] (last visited June 29, 2021))). The Henry A. Wallace Police Crime Database, maintained by Professor Philip M. Stinson of Bowling Green State University, reported that—as of Mar. 22, 2020—only 110 law enforcement officers had been charged with murder or manslaughter in an on-duty shooting, and only forty-two officers had been convicted. *Id.*

backgrounds, cultures, and experiences, and that such diversity in the prosecution's office would result in better decisions about whom to prosecute and how to handle cases.

### III. SOLUTIONS: ATTRACTING AND RETAINING COMMON PROSECUTORS

Assuming you are convinced, as I am, that increasing diversity in the office of prosecutors across the country is desirable and that we do want more "good people" and "common people" to become prosecutors, how do we accomplish that goal? Given the dearth of diversity in these offices currently, how can we meaningfully shift that reality? No doubt, we will need a multi-pronged, assertive approach that includes changing the narrative about prosecutors; improving how well we prepare law students to become prosecutors; using incentives to attract more lawyers and law students from all backgrounds, races, cultures, genders, sexual identities, religions, and abilities; and holding prosecutors' offices accountable for proactive hiring efforts.

#### A. *Changing the Narratives About Prosecutors*

As a first, essential step, we must change the narratives about prosecutors. As long as the dominant narrative remains that good people should not become prosecutors and that people of color and other minoritized people become part of the problem if they serve, we will not change the system any time soon or in much-needed ways. On the other hand, we know from the improvements that progressive prosecutors have accomplished that the prosecutor wields significant influence in how the system works and which goals are prioritized. Therefore, we need both organizations with diverse membership and individuals with influence to help change the public's perception of prosecutors. We need organizations, such as the National Black Prosecutors Association<sup>211</sup> and the LGBTQ Bar, to support and encourage lawyers from underrepresented backgrounds to become part of the reform movement.<sup>212</sup> We need more prosecutors like Baltimore State's Attorney

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211. The National Black Prosecutors Association (NSPA) is "dedicated to the advancement of Blacks as prosecutors. Founded in 1983, the Association's membership is comprised of both chief and line prosecutors nationwide." See *The National Black Prosecutor's Association*, NBPA, <https://www.blackprosecutors.org/> [<https://perma.cc/Q4WN-PSD5>] (last visited June 29, 2021). Among other activities, the organization conducts a yearly job fair "to promote diversity in prosecutors' offices by providing a forum in which law students, recent law graduates, and experienced attorneys can meet and interview with prospective prosecutorial employers at the local, state, and federal levels." *38th Annual Virtual Job Fair*, NBPA, <https://www.blackprosecutors.org/annual-conference#job-fair> [<https://perma.cc/A4UT-Z2R4>] (last visited Oct. 18, 2021).

212. See also Melba V. Pearson, *Data as a Tool for Racial Justice*, CRIM. JUST., Spring 2021,

Marilyn Mosby who, in January 2020, traveled to Saint Louis to stand in solidarity with other “[B]lack, female prosecutors to speak out against a political and law enforcement establishment that she says has attacked her” and others like her.<sup>213</sup> We need more prosecutors, such as Larry Krasner, who can credibly encourage those with a penchant for criminal defense to consider prosecution instead. We need more prosecutors from underrepresented backgrounds to encourage law students and recent graduates to become prosecutors. Adding this diversity will help transform the current, broken system.

We also need law professors (all of whom enjoy extensive access to, and influence over, law students) to help change the narrative. This means both those who have been criminal defense counsel and those who are former prosecutors. Professors should talk in the classroom, in their office hours, and at other opportunities about the importance to the system that fair-minded, ethical, “good people” become prosecutors. In my experience, law schools are full of professors (tenured, tenure-track, and adjunct) who are former criminal defense lawyers, but former prosecutors are much rarer in the professoriate. As a result, there are few role models and fewer advocates for students to choose prosecution when they express interest in practicing criminal law. Many students have recounted how their professors discouraged them from prosecution and encouraged them to become public defenders. Hopefully, the new progressive-prosecutor movement will influence more law faculty with both types of experience to encourage law students to explore a career in either defense or prosecution.

Relatedly, the deans of students at law schools and their career development teams should be trained and knowledgeable about the value of prosecutors and related job opportunities, so that they do not simply steer students with a public-interest bent or an interest in access-to-justice issues to the criminal-defense side. Many law students are given limited information about (and encouragement to pursue) becoming a prosecutor.<sup>214</sup> Without complete information, students and law graduates cannot make quality decisions, and the bulk will continue to choose

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at 4, 5 (arguing for prosecuting offices to engage with National Black Law Students Association and National Black Prosecutors Association to increase racial diversity among prosecutors).

213. Tim Prudente, *Baltimore State’s Attorney Mosby Stands with Progressive Prosecutors, Also Airs Dispute with Gov. Hogan at St. Louis Rally*, BALT. SUN (Jan. 15, 2020, 6:32 PM), <https://www.baltimoresun.com/politics/bs-md-ci--20200115-r6j3hfsllbh3vcdpxjoaq36ggu-story.html> [https://perma.cc/NVK6-FJ8H].

214. I teach investigative and adjudicative criminal procedure. By the time students reach my course in either their fourth semester (2L year) or sixth semester (3L year), many have already concluded that working on the defense side is the only role that will help reform the system. I do my best to present another view and convince them otherwise. But often the die is cast.

criminal defense when interested in “changing the system.”

*B. Preparing and Encouraging Every Student to Become a Competent Prosecutor*

At least some law schools already do a good job training and encouraging their students to become prosecutors. But until all law schools prepare every student with the necessary skills to serve as a capable and ethical prosecutor, law schools as a group will contribute to the injustice in the system.

1. Preparation to Become a Prosecutor

After the murder of George Floyd, law schools across the country vowed to adopt anti-racist agendas. Law schools serious about that commitment must prepare all of their students to become ethical and able prosecutors. According to a study by the National Registry of Exonerations, “54% of false convictions that later resulted in exonerations” resulted from police and prosecutor misconduct “that distorted evidence or undercut innocence . . . .”<sup>215</sup> The study only evaluated cases in which someone was convicted and later “declared factually innocent by a government official or agency, based at least in part on evidence of innocence.”<sup>216</sup> In other words, this was a tiny sliver of criminal cases, but strikingly (and sadly), in thirty percent of the cases, prosecutors committed misconduct,<sup>217</sup> including lying during the trial and concealing exculpatory evidence.<sup>218</sup> “The most common type of misconduct was concealing exculpatory evidence, which occurred in 44% of exonerations.”<sup>219</sup> And, as discussed in Section II.A, wrongful convictions—due to police and prosecutor misconduct—disproportionately impact people of color.

It is uncertain what role a lack of education or understanding played in the prosecutors’ misconduct, but because prosecutors have responsibilities and obligations unlike other lawyers, it is critical that law schools properly prepare them for these unique responsibilities, or missteps are sure to occur. As Bruce Green has explained, “Prosecutors’

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215. Debra Cassens Weiss, *Police and Prosecutor Misconduct Contributed to Over Half of False-Conviction Cases, New Study Finds*, A.B.A. J. (Sept. 16, 2020, 1:32 PM), <https://www.abajournal.com/news/article/police-and-prosecutor-misconduct-contributed-to-over-half-of-false-conviction-cases-study-finds> [https://perma.cc/CT2M-PFLU].

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* “Prosecutors and police officers committed misconduct at about the same rate in state court cases that resulted in exonerations. But prosecutors in federal exonerations committed misconduct more than twice as often as police and committed misconduct seven times as often as police in exonerations for white-collar crimes.” *Id.*

work is different from that of other lawyers.”<sup>220</sup> Green explained that the legal profession—a traditionally self-regulating profession—may address the uniqueness of the prosecutorial role in either of two ways: “First, prosecutors might be exempted from disciplinary restrictions that apply to lawyers generally . . . . [Or], [s]econd, prosecutors might be subjected to additional restrictions . . . .”<sup>221</sup> Because the vast majority of law graduates pursue private practice and take non-prosecution positions,<sup>222</sup> many law schools do not require students to take criminal law and procedure courses beyond the three-credit-hour, first-year basic, substantive criminal law course. But that course covers neither a prosecutor’s ethical obligations nor her obligations to produce exculpatory evidence to the defense. If a student only took this one criminal law course before becoming a prosecutor, she would be ill-equipped for the many weighty decisions every prosecutor makes daily in her work. And, traditionally, professional responsibility courses are heavily weighted to readings and discussions applicable to civil matters and representation of non-government clients. They tend to spend little time covering the ethical and professional duties of the prosecutor.<sup>223</sup> So, a law graduate who did not take elective courses in criminal procedure and criminal law would need significant post-graduation training and experience to become a capable prosecutor. A law student could not possibly graduate from an ABA-accredited law school without a significant understanding of civil cases—having taken numerous courses describing, explaining, and modeling civil disputes and matters, but she might graduate with little to no comprehension of how to prosecute a criminal matter.

In addition, the Supreme Court decisions governing a prosecutor’s *Brady* obligations, which require the government to produce exculpatory

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220. Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1573.

221. *Id.* at 1573–74 (citations omitted).

222. *See, e.g.*, NAT’L ASS’N FOR L. PLACEMENT, JOBS & JDS: EMPLOYMENT FOR THE CLASS OF 2019: SELECTED FINDINGS 4 (2020) (reporting that 55.2% of the law graduates who found employment by March 2020 took positions in private practice, that 11.3% took jobs in business, 11.5% became judicial clerks, and only 19.4% took public interest positions or positions in other government offices).

223. Some professional responsibility professors do spend time on the important ethical duties required of prosecutors. *See, e.g.*, Sung Hui Kim, Professional Responsibility 312 Syllabus, Fall 2020, UCLA School of Law, at 8 (July 19, 2020), <https://contemporaryprofessionalresponsibility.files.wordpress.com/2020/07/2020-fall-kim-pr-syllabus-7-19-2020.docx> [<https://perma.cc/AVY8-PH7Y>] (devoting two classes to “Prosecutorial Ethics” in syllabus for Fall 2020 semester). On the other hand, it is more common for law professors to skip prosecutorial ethics in traditional professional responsibility courses. *See, e.g.*, Robin Morris Collin, Professional Responsibility Syllabus, Fall 2018, Willamette Univ. Coll. of L., <https://web1.willamette.edu/law/pdf/morriscollin-pr-syllabus-fa18.pdf> [<https://perma.cc/828U-ZVWV>] (devoting no class time to prosecutorial ethics during Fall 2018 semester).

evidence to the defense, leave significant room for interpretation regarding what information must be disclosed. As a result, prosecutors not well educated on both *Brady* (and its progeny) and their ethical duties may struggle to “[do] justice” as required.<sup>224</sup> Although in *Brady v. Maryland*,<sup>225</sup> the Supreme Court clearly declared that “suppression by the prosecution of evidence favorable to an accused” violates the Due Process Clause “where the evidence is material” to either the guilt or punishment of the accused,<sup>226</sup> subsequent Supreme Court cases muddled the issue of materiality, making it less obvious what evidence the prosecutor is obligated to provide to the defense. In *United States v. Bagley*,<sup>227</sup> the Court explained that *Brady* requires only the disclosure of evidence “that is both favorable to the accused and ‘material either to guilt or to punishment.’”<sup>228</sup> In other words, prosecutors must determine whether or not evidence is material to the accused’s defense when conducting their analysis of whether failing to disclose will violate their legal (and ethical) duty. But, of course, prosecutors are rarely privy to the defense’s strategy. Therefore, the materiality of a given piece of evidence may not be obvious. If inadequately prepared and educated on this important—but ambiguous—issue, prosecutors are more likely to breach their duty and withhold evidence that, in hindsight, was material. On the other hand, if every law student is well educated and trained on how to properly assess these issues and the ramifications of failing to disclose relevant and material *Brady* evidence, we are likely to experience better, more just outcomes and, thus, less prosecutorial misconduct.

The same concept applies to lawyers who become prosecutors without taking courses in constitutional criminal procedure. Without a full understanding of the Fourth, Fifth, Sixth, and Fourteenth Amendments, it would be challenging for prosecutors to hold law enforcement accountable for breaches of suspects’ rights. Prosecutors, too, would be more likely to violate the accused’s constitutional rights during trial and

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224. See MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2021) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, STANDARD 3-1.2(b) (AM. BAR ASS’N 4th ed. 2017) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”).

225. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that due process requires prosecution turn over evidence favorable to defense upon request if it relates to defendant’s guilt or innocence or to sentencing).

226. *Id.*

227. *United States v. Bagley*, 473 U.S. 667, 678 (1985) (holding that consistent with U.S. Supreme Court’s “overriding concern with the justice of the finding of guilt,” in a case involving *Brady* materials, reversible error occurs only if evidence is material when its suppression undermines confidence in trial outcome (quoting *United States v. Agurs*, 427 U.S. 97, 112 (1976))).

228. *Id.* at 674 (quoting *Brady*, 373 U.S. at 87).

plea bargaining.

Furthermore, few law school courses adequately discuss the immense discretion prosecutors exercise and how they should calibrate that power. When, for example, is it appropriate and warranted for a prosecutor to decline to prosecute? When should a prosecutor allow for non-prosecution alternatives, such as diversion or mediation? How should prosecutors respond when a majority of the public they serve oppose the prosecution of minor crimes, such as marijuana possession for personal use, or the prosecution of what is effectively punishing poverty or other “status” crimes?

## 2. Encouragement to Become a Prosecutor

In addition to adequate education, we need more and better incentives to encourage law graduates—of all backgrounds and characteristics—to become prosecutors. To this end, among their other fundraising priorities, law schools should prioritize scholarships and debt-forgiveness programs for graduates who finish law school and serve for a designated period—perhaps two to six years. They could implement a sliding scale, reducing debt by a certain sum once a graduate reaches the two-year service mark, and provide additional relief for every twelve to eighteen months a graduate serves beyond two years, capping it at a fixed point. The scale might adjust for service in areas that are underserved, for example, rural areas.

These programs could be modeled on similar programs that encourage health professional students to seek positions in rural and other underserved areas or modeled on successful law school loan repayment programs, such as the one at Yale Law School.<sup>229</sup> These debt-relief programs will be especially important for “common prosecutors,” because statistically they are the most likely to carry significant student-loan debt.<sup>230</sup> Adopting these programs are also likely to benefit law schools by attracting more students. The programs might be particularly attractive to first-generation lawyers and people from low-income and rural areas, many of whom may have an affinity for public interest and

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229. See *About the Career Options Assistance Program*, YALE L. SCH., <https://law.yale.edu/admissions/cost-financial-aid/post-graduate-loan-repayment/about-coap> [<https://perma.cc/4TVS-VWJB>] (last visited Oct. 12, 2021) (describing Career Options Assistance Program and its goal to help alleviate law graduates’ debt burdens for pursuing public-sector careers).

230. See Adam Looney, *The Student Debt Burden and Its Impact on Racial Justice, Borrowers, and the Economy*, BROOKINGS INST. (Apr. 13, 2021), <https://www.brookings.edu/testimonies/the-student-debt-burden-and-its-impact-on-racial-justice-borrowers-and-the-economy/> [<https://perma.cc/6234-CVLX>] (“Federal student loans impose a crushing burden on many borrowers . . . . The borrowers who struggle are disproportionately from lower-income families, first-generation students, and students of color.”).

service.

After George Floyd's death at the hands of police, law schools across the country declared their intent to act proactively to defeat racism. If schools are serious about taking steps to reduce the racism in the criminal justice system, and if we want true reform, we need to help build a pipeline of well-prepared prosecutors who will commit to justice as well as to anti-racism.

### *C. Holding Chief Prosecutors Accountable for the Lack of Diversity*

Prosecutors' offices must take concrete steps to increase diversity from within. They should be held to account by maintaining and publishing statistics on their composition and hiring, should actively seek to diversify their hiring pools, and should collaborate with law schools to provide incentives to encourage more interest in prosecution.

Prosecutors should be required to publish information about the composition of their prosecutors similar to the statistics the American Bar Association's Section of Legal Education requires law schools to publicize.<sup>231</sup> For example, as part of each law school's enrollment data disclosures, they report how many of their law students identify as Asian, Hispanic, Black, two or more races, etc. The ninety-three United States attorneys (in the federal system) and every district attorney (in the state systems) should be required to post prominently on their web pages the race, gender, sexual orientation, and other similar attributes of the attorneys in their offices. And these statistics should be divided into "line prosecutors" and the leadership in the office.

Prosecutors, like other businesses and organizations, should also take active steps to ensure that hiring pools are diverse. Only then can they make a genuine effort to hire the best and brightest and ensure that the office of the prosecution begins to reflect the broad diversity within the country. To attract this type of diversity in hiring pools, prosecutors' offices should join with law schools in collaborating to inform students and graduates of opportunities to become prosecutors and in creating incentives to encourage more people to apply. These incentive programs may involve debt forgiveness or hiring bonuses for new hires. The prosecutors' offices should also work collaboratively with organizations such as the National Black Prosecutors Association, the Lavender Law Conference and Career Fair, and similar organizations to increase their chances of hiring more prosecutors who are currently underrepresented in the system. As of 2015, "95 percent of [America's] elected prosecutors

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231. See ABA STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS., STANDARD 509(b) (2020-21) (requiring "public[] disclos[ure] on its website" of various information, including "admissions data" and "enrollment data").

are white, and 83 percent are men. Only 1 percent are women of color . . . .”<sup>232</sup> In addition, we do not collect statistics on the sexual orientation, socio-economic backgrounds, abilities, and other characteristics of prosecutors. In a country where a significant percentage of people want reform in the justice system, diversifying the ranks of prosecutors is an important beginning.<sup>233</sup> Holding prosecutors accountable will aid in hastening that diversity.

#### CONCLUSION

More than half of Americans have lost confidence in our criminal justice system. People of color, in particular, feel like the system is unfair. The system continues to charge, wrongfully convict, and incarcerate the poor, people of color, LGBTQ individuals, and other minoritized people in disproportionate numbers. Police apply force to them unevenly, too. Prosecutors, who wield significant discretion and power in the system, play a critical role in ensuring that the system works properly and that similarly-situated defendants are treated similarly. With the rise of “progressive prosecutors,” we now have proof that a change in the composition of prosecutors leads to meaningful improvements in how the criminal justice system operates. Diversifying the office of the prosecutor will further improve prosecutorial decision making by reducing prosecutor and law enforcement bias, encouraging more productive police-citizen interactions, and increasing public confidence in the system. Progressive prosecutors are a good start. Now we need to prepare, attract, and retain prosecutors with varied backgrounds and characteristics—“common prosecutors.”

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232. Kelly, *supra* note 61 (citing REFLECTIVE DEMOCRACY CAMPAIGN, JUSTICE FOR ALL 1 (2015), [https://wholeads.us/wp-content/uploads/2019/03/Justice-For-All-Report\\_31319.pdf](https://wholeads.us/wp-content/uploads/2019/03/Justice-For-All-Report_31319.pdf) [<https://perma.cc/DG8M-BKKN>]). The study’s leader, Brenda Choresi Carter, told NPR, “The group of people who are really the managers of the criminal justice system in America are concentrated among one demographic group: white men.” *Id.*

233. Prosecutors’ offices are far from the only offices that need to diversify. “More than half of people think their company should be doing more to increase diversity among its workforce.” *See What Job Seekers Really Think About Your Diversity and Inclusion Stats*, GLASSDOOR (July 12, 2021), <https://www.glassdoor.com/employers/blog/diversity/> [<https://perma.cc/T4KH-GP6V>].