

## OPINION

## Massachusetts needs more ex-public defenders as judges

By Sadiq Reza



Four to one. That is the ratio of former prosecutors to public defenders who sit on the seven-person Supreme Judicial Court, our highest state court.

On our 25-member Appeals Court, which sits one level below the SJC and is the final word in the vast majority of criminal cases, the count is worse: 16 to three. But two of those former public defenders also worked as prosecutors before reaching the bench; and two other appellate judges, while never formal prosecutors, worked in the Attorney General's Office (i.e., in other law enforcement roles).

This staggering imbalance of experience and outlook is unacceptable in the branch of government that is least accountable to the people and most responsible for ensuring individual liberty and fair treatment by law enforcement and the Legislature.

The numbers are better at our trial level criminal courts — the Superior Court, District Court and Boston Municipal Court — where the ratio on the bench is closer to 2:1. Even so, former prosecutors fill some half of those seats, while former defenders fill less than a third.

And of Gov. Charlie Baker's 18 judicial nominations since last October, 13 worked as prosecutors while only seven appear to have meaningful experience as public defenders.

Still, four of those seven also worked as prosecutors or as other law enforcement attorneys before turning to criminal defense work. And only one of them worked at our state public defender's office, the Committee for Public Counsel Services.

("Public defenders" in Massachusetts include CPCS attorneys, who handle some 20 percent of indigent defense needs, and private attorneys who are screened by CPCS and handle the rest, often along with other work. All counts here come from best research efforts; and there are no official biographies of our 250-plus trial court judges.)

This is a trend in the wrong direction, especially as the realities and consequences of our nation's socio-economic inequities have been on stark display since the pandemic-and-protest spring of 2020.

At the federal level, President Biden has made it a priority to appoint former public defenders to the bench, given their

*Sadiq Reza is a lecturer at Boston University School of Law, clinical instructor at Harvard Law School's Criminal Justice Institute, professor emeritus at New York Law School, and a former public defender in Washington, D.C.*

well-documented dearth there as opposed to the abundance of former prosecutors, to interpret and apply the nation's Constitution and laws. The confirmation of Judge Ketanji Brown-Jackson to the U.S. Supreme Court in April was a pinnacle of this effort.

Meanwhile, for the Boston-area federal courts, two of President Biden's three nominations thus far have been public defenders, both of those to the 1st U.S. Circuit Court of Appeals; his third nomination, to the U.S. District Court in Boston, is a former prosecutor.

Gov. Baker and his successor must follow the president's lead and correct the wide imbalance between prosecutors and public defenders in the courts of Massachusetts.

Why? During now-Justice Jackson's confirmation hearings, much was said to defend the work public defenders do, in response to suggestions that her time in that role was a blemish on her stellar record. But little was said to explain why

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it is essential — not just acceptable — to have former public defenders as judges, in numbers equivalent to those of former prosecutors.

Put simply: Protecting individuals against government overreach is the daily work and animating ethos of public defenders. This means close scrutiny of law enforcement actions and constant challenges to governmental claims of authority and necessity. Constitutional protections of liberty, due process, equality and fairness are the operating principles of this work. Such work as a lawyer, day in and day out, requires and fosters a healthy skepticism of official assertions of power, a perspective that does not readily defer to the claimed prerogatives of the arms of government, and a heightened awareness of and sensitivity to the difficulties of the least privileged members of society.

Judges who bring that mindset to the bench are lawyers who are especially attuned to recognizing the needs and vulnerabilities of those with lesser means, as well as possible threats to the liberty of us all — unquestionably more so than judges who have spent years as lawyers "on the other side," aligned with law enforcement agents and institutions and vigorously pressing their causes.

Make no mistake about it: Public defenders protect all of us as they represent individual clients, including the guilty ones. Any time charges against a drug dealer are dismissed because of a "bad

search" by police officers — the cliché "legal technicality," more accurately called a violation of the Fourth Amendment — the constitutional protection we all enjoy against unjustified government intrusions into our homes and lives is vindicated and strengthened.

Each time a murder confession is thrown out because officers botched reading the suspect her Miranda rights, the constitutional safeguard we all have against coerced confessions is reaffirmed.

Every time a jury of 12 citizens renders a verdict of acquittal after a trial, we all are further protected from our own wrongful conviction and punishment.

And yes, public defenders protect innocent people while defending guilty ones, including by making sure the innocent are not falsely deemed guilty.

A decade ago here in Boston, it was a public defender who had the audacity to press a novel demand for in-person testimony by police drug lab experts, rather than ac-

cepting the standard written reports of drug analysis that courts had found sufficient to convict criminal defendants of drug crimes for decades.

Our courts rebuffed the effort, but the U.S. Supreme Court endorsed it, establishing a nationwide precedent for such evidence. And thus were revealed the misdeeds of drug lab chemist Annie Dookhan, whose years of falsified drug analysis reports enabled the wrongful conviction of countless innocent people among the estimated 40,000 cases her wrongdoing affected.

It bears repeating: Judges who are skilled at challenging law enforcement and identifying potential government overreach, rather than accustomed to prosecuting alleged wrongdoers and defending the power and practices of law enforcement, are judges who can be especially counted on to protect freedom and equal treatment for us all.

Certainly, defenders of the indigent criminally accused are not the only lawyers who bring such a mindset to the judiciary. Legal aid attorneys, such as those who represent tenants in Housing Court or immigrants seeking asylum, and lawyers from public interest organizations like the American Civil Liberties Union and Greater Boston Legal Services, bring a similar perspective. But even fewer judges with this experience — a handful at most — can be found in the Massachusetts judiciary.



DEPOSIT PHOTOS

Worse, whatever diversity of experience and viewpoint those few judges add is vastly outweighed by the length and multiplicity of pro-law enforcement legal roles served by the majority of lawyers who do ascend to the judiciary.

At least nine judges held prosecutor positions at both the federal and state levels. (Among these is the judge who was named Trial Court chief justice this past January.) About a dozen others not only were prosecutors but also spent time in an attorney general's office or other executive law enforcement position before reaching the bench.

Another dozen or so, never formal prosecutors, also served as assistant attorneys general or worked as city attorneys, or were counsel for police or sheriffs' departments — i.e., lawyers who still spent their days advocating for the interests of state powers generally, and law enforcement agents and offices specifically.

Two of Gov. Baker's recent nominations have always and only been prosecutors since graduating from law school, 26 and 28 years ago.

Meanwhile, that so many of our criminal court judges who did public defender work also served as prosecutors before reaching the bench suggests that law enforcement work is close to a sine qua non of a judgeship in Massachusetts, while public interest work is closer to a demerit.

Correcting this imbalance in the Massachusetts judiciary begins with the governor's Judicial Nominating Commission, a group of 21 prominent lawyers who accept and screen applications for judgeships.

We aren't told whom this body recommends to the governor for appointment. Nor, to be sure, do we know that public interest lawyers apply in numbers comparable to those of prosecutor applicants — though if they do not, the sense that success is unlikely might itself deter initiating the rigorous and time-consuming application process.

All we know is whom the governor goes on to nominate: prosecutors over defenders, at a count of 13:7 recently, as noted above. Moreover, four of those recent nominations are elevations — two to the Superior Court from the District Court, and two from the Superior Court to the Appeals Court. Three of those elevated judges are former prosecutors; one was a criminal defense attorney.

The JNC should commit to recommending at least one public defender or comparable public interest lawyer for every judicial vacancy henceforth, along with anyone else it chooses to recommend. (Consider it a judicial version of professional football's Rooney Rule, which expanded this year to require teams to interview at least two minority candidates for every vacancy in a top coaching or management slot.)

Gov. Baker, and most certainly anyone who hopes to succeed him, should pledge to nominate these candidates in numbers equal to those of other nominees, if not in greater numbers, as President Biden has already done for our federal courts to begin to remedy the imbalance there. Then, the Governor's Council — the quasi-legislative body that has the final say on gubernatorial appointments — should confirm these nominees as readily as it does all judicial nominations. (And that we can demand most directly: the council's eight members are elected, one from each of eight geographical districts, every two years.)

None of this is to belittle the essential work prosecutors do. Nor is it to disparage those who choose to serve as attorneys for law enforcement. Remember, too, that our fine prosecutors and AGs also pursue powerful alleged wrongdoers, not just weaker ones.

And admirably, they are increasingly attuned to the realities of the less privileged among us and the devastating harms of mass incarceration, and commensurately inclined to curb prosecutions and limit requests for pre-trial jailing and post-conviction imprisonment.

Nor, of course, is this to impugn the credentials or fairness of our hard-working judges who used to be prosecutors or other government advocates.

It is, rather, to explain the equal importance of having former public defenders, and public interest lawyers generally, on the Massachusetts bench, and to urge their appointment in numbers equivalent to the numbers of prosecutors and other government advocates who are appointed.

As the Brennan Center of Justice said last month in its annual study of state court judges: "A diverse bench is crucial to achieving a fair system of justice and promoting public trust in our courts." That is as true in Massachusetts as it is everywhere else. **MLW**