



## Confronting Racial Bias Against Black and African American Victims in the Prosecution of Sexual Violence, Domestic Violence, Stalking, and Human Trafficking

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### Introduction

Crimes involving sexual violence, domestic violence, stalking, and human trafficking create immeasurable physical, emotional, and psychological harm to victims. Despite enhanced public awareness over the last three decades, victims of these frequently co-occurring crimes continue to encounter unique harms and barriers to safety and justice. Far too often, they are blamed for the crimes committed against them, while abusers escape accountability as the criminal justice system underestimates the danger they pose.

To shift this unequal balance and work toward more just and meaningful dispositions, prosecutors have cultivated the technical, legal, and scientific proficiency necessary to properly evaluate evidence and prosecute these cases. Prosecutors understand the need for multidisciplinary collaboration, extra legal support for victims, and other research-informed practices that occur outside of plea, trials, and sentencing. Nevertheless, confronting racial bias when prosecuting sexual violence, domestic violence, stalking, and human trafficking, particularly against Black victims, is still a challenge for some, which results in significant barriers to reporting and inequitable outcomes for victims and their communities.

National statistics, although imperfect,<sup>2</sup> paint a stark picture for women from historically marginalized communities. One in five Black women have been raped and 41 percent have experienced physical violence by an intimate partner.<sup>3</sup> Well over half of American Indian/Alaska Native women have experienced sexual violence or physical violence, and almost half have been stalked in their lifetime.<sup>4</sup> Approximately one in three Latina women have been victimized by intimate partner violence; estimates on the prevalence of intimate and sexual violence in the Asian American community range from 16 to 55 percent.<sup>5</sup>

Survivors from each of these historically marginalized communities face unique historical, racial, cultural, linguistic, and in some cases, jurisdictional barriers to justice for the crimes committed against them. As a result, the obstacles faced by each community merit detailed, nuanced exploration in separate written works. This specific article will offer strategies to confront justice system bias against Black and African American victims. It is based on a web panel, *Confronting Racial Bias & Implementing Strategies to Ensure Justice in the Prosecution of Sexual Violence, Domestic Violence, Stalking, and Human Trafficking*, co-hosted by AEquitas and the National Black Prosecutors Association.<sup>6</sup>

This article aims to provide prosecutors with tools to confront racial bias against Black women victimized by sexual violence, intimate partner violence, stalking, and human trafficking in the criminal justice system by briefly exploring how the history of slavery and racial discrimination in America has produced and reinforced inequalities and challenges that Black women uniquely face as victims; offering examples of how bias affects the criminal justice response; and providing prosecutors with tangible strategies for eradicating biases against Black victims.

- 1. Engage in recruiting practices that promote diversity.** An office that reflects the community it serves will enable prosecutors to make fairer, more informed decisions; present cases more effectively; and enhance rapport with victims, witnesses, and defendants.
- 2. Promote an office culture that values cultural humility.** Prosecutors should recognize how implicit bias may affect their decision-making and the impact of those biases on Black survivors. A cultural humility practice may include informal discussions and formal, office-wide implicit bias training.
- 3. Enhance community outreach efforts.** Earnest, productive dialogue between prosecutors' offices and the public will help prosecutors better understand the lived experiences of community members while enabling communities to learn about specific efforts to correct systemic inequities.
- 4. Re-evaluate processes for assessing the culpability of exploited women and women who experience intimate partner violence.** The disparate arrest of Black women for crimes related to domestic violence and sexual exploitation require prosecutors to re-examine their charging practices.
- 5. Examine data and prosecution practices for racial bias and disparate impact on Black survivors.** Prosecutors can collect, analyze, and review data that will enable them to assess the effectiveness of their response to Black survivors in gender-based violence and human trafficking cases.

## Historical Context: Black Women's Legal and Societal Status as Victims

The history of racial discrimination against Black Americans in the United States created structural barriers and inequalities that Black women continue to face as victims of sexual violence, intimate partner violence, stalking, and human trafficking. The legacy of slavery, in particular, provides important historical context that helps explain the racial bias that continues to permeate the criminal justice system, particularly as it relates to rape law.<sup>7</sup>

In the pre-Civil War era, the rape of enslaved Black women by White men was commonplace—but the legal system refused to recognize it as a criminal offense.<sup>8</sup> The racial stereotypes that justified slavery also justified the law’s refusal to recognize rape against Black Americans as a crime: Black women were portrayed as sexually aggressive and thereby deemed incapable of being raped.<sup>9</sup> This “jezebel” stereotype associated Black women with “increased promiscuity, sexual manipulation, and incitement.”<sup>10</sup> The stereotype perpetuated the false notion that Black women were willing to be sexually dominated and thus responsible for provoking sexual assault.<sup>11</sup>

The law’s refusal to recognize sexual violence against enslaved women as criminal also had an economic motivation: Since children born to enslaved mothers became property of the male slaveowner, sexual assaults against Black women effectively became a means to increase the labor force.<sup>12</sup> The myth of the “jezebel” persisted after the Civil War and the passing of the Fourteenth Amendment. Although rape statutes became “race neutral” on their face, hypersexualized stereotypes of Black women effectively blocked their access to protection from the criminal justice system. These lingering racial biases also facilitated human trafficking in the United States as young Black girls were pushed into the sex trade.<sup>13</sup>

## **The Impact of Victim Race and Racial Bias on Modern Prosecutorial Decisions**

Black women continue to face barriers to justice based on their race, despite an improved criminal justice response to sexual violence and sexual exploitation. Systemic biases have also resulted in many victims of sex trafficking being ignored, misidentified as voluntary sex workers, and arrested for prostitution-related crimes at higher rates than women of other races.<sup>14</sup>

### *Racial Disparities in Reporting*

A history of racial discrimination, along with the reinforcement of racial biases and prejudices by the criminal justice system, has caused many Black women to become unable or unwilling to report the violence against them due to several potential reasons.

1. As members of a group whose incidents of sexual assault were once not recognized as actual crimes, Black women may themselves fail to perceive their incidents as “real rape.”
2. Some Black women are so accustomed to not being taken seriously by law enforcement that they believe their reports will be fruitless.
3. In some cases, there is a deep suspicion of law enforcement: Black women may distrust the police as a result of racial discrimination that they have witnessed and experienced in other contexts within the Black community.<sup>15</sup>
4. Several research studies<sup>16</sup> have documented that the system views Black victims as less credible and more responsible for their crimes than White victims.<sup>17</sup> This disparity in credibility may thus prevent some Black victims from reporting—potentially out of fear of disbelief or even criminalization.

### *Victim Discounting and Perceptions of Credibility*

In some cases, biases against Black women have led to their arrest for crimes resulting from their own victimization. A 2001 study found that, where both parties are subject to dual arrest for a reported domestic violence incident, Black women experience higher arrest rates than White women.<sup>18</sup> Although many jurisdictions in the United States have enacted statutes reflecting a preference for arresting only the “predominant aggressor”—recognizing the problems associated with the arrest of victims of battering who have acted in response to their own victimization—stereotypes

against Black women may still result in their unjust arrest or incarceration. If Black women are perceived as more aggressive than White women, they may be at higher risk of being labeled as the predominant aggressor.

In the context of sex trafficking, Black women are more likely to be seen as culpable and less likely to be seen as victims. Reliable estimates of how many people are trafficked for sexual labor, the demographics of those individuals, and the frequency of their arrests and convictions for prostitution are unknown due to the underground nature of the commercial sex trade and varying definitions of human trafficking. Nevertheless, studies and surveys suggest that Black women and girls are more likely to be surveilled, harassed, and arrested for prostitution-related offenses than their White counterparts.<sup>19</sup> These biases extend to juvenile victims as well: According to the most current available data from the Federal Bureau of Investigation, Black and African American children make up 51 percent of all juvenile prostitution arrests.<sup>20</sup>

### *The Impact of Bias on Decision-Making*

Jurors' decisions are greatly influenced by the victim's actual and assumed behavior and characteristics, particularly in the absence of compelling physical evidence or corroborating witness testimony—a commonplace situation in cases involving sexual violence, child sexual abuse cases, and domestic violence.<sup>21</sup> Research also demonstrates that common rape myths impact jurors' perception of sexual assault victims: The way that a victim dresses or her sexual history may, either consciously or unconsciously, affect a juror's perception of her credibility.<sup>22</sup> With a few exceptions, rape shield laws prohibit jurors from considering evidence of the victim's sexual history.

There is still the threat of implicit and unconscious bias, however, especially given the pervasive and well-documented negative stereotyping of Black women as sexually promiscuous. Several studies that examined charging decisions in sexual assault cases show that prosecutors were more likely to file charges in cases involving White victims than those with non-White or Black victims.<sup>23</sup> Studies have also shown that White mock jurors view Black victims as less truthful and more responsible for their assaults, as compared to White victims.<sup>24</sup> Moreover, this research suggests that mock jurors are more sympathetic to victims and defendants who possess similar characteristics to them, including race—a major issue for Black victims and defendants who often face predominantly White juries.<sup>25</sup>

Understanding the impact of this bias at each level of decision-making allows prosecutors to more vigilantly identify its presence and eradicate it from office- and case-level practices.

## **Strategies for Countering Bias and Enhancing Victim-Centered, Trauma-Informed, Racially Equitable Responses**

The criminal justice system can and must do better. As the gatekeepers to that system, prosecutors are uniquely positioned to ensure that it treats all victims—as well as defendants—fairly and without bias. The criminal justice reform movement has never been more salient. As a nation, we are engaged in a long overdue conversation about the meaning and implementation of fair and equitable justice. It is critical for survivors to be at the center of this commitment.

### *More Diverse Hiring*

To ensure fairness in decision-making, it is vitally important for prosecutors' offices to employ Black, Indigenous, and People of Color (BIPOC).<sup>26</sup> Diversity within a prosecutor's office also helps ensure that the perspectives and lived experiences of all community members are taken into account when setting office priorities; establishing policies for screening, charging, and disposing of cases; and presenting credible cases to juries. By having diversity in the office, victims, witnesses, defendants, and community members may be more willing to engage with system professionals. Sharla Jackson of the Prosecuting Attorney's Council of Georgia explains:

When I see commercials advertising a product to me, but I don't see anyone who looks like me, it sends the clear message that the product is not meant for people who look like me—so I tend to disengage. I am more inclined to pay attention to things that I feel included in.

Despite the benefits that diverse professionals bring to the criminal justice system, Black individuals are poorly represented in the prosecution profession. Some lawyers and law students may be dissuaded from becoming prosecutors because they view them as oppressors, rather than public servants fighting for justice:

[H]istorically, black law students eyeing the job market with the hopes of helping their communities and combating injustice have believed that their best shot at doing so was to become defense attorneys. In that job, a person could use his or her legal expertise to aid the wrongly accused, fight for leniency on behalf of the accused, and generally act as an adversary to those in power. The prosecutor... has been seen as “the means or the vehicle to oppress others—and why be part of the oppression?”

“The key is to emphasize that a prosecutor’s job is to do justice—it’s not just about putting people in prison[.]”<sup>29</sup>

Engaging, carefully planned coursework at the law school level can help reinforce the role of the prosecutor as a justice-seeker, making employment in the prosecutor’s office more attractive to future attorneys. General school outreach at all levels (elementary, middle, and high school; colleges and universities; and law school) and strategic efforts to engage communities<sup>30</sup> can also help bring about a slow but steady improvement in the public perception of prosecutors.

The scarcity of Black prosecutors is attributable in part to the underrepresentation of Black individuals in the legal profession overall—under five percent, according to the most current available data.<sup>31</sup> For some, the cost of law school may be a barrier to entering the legal profession. With law school tuition on the rise annually, it becomes increasingly difficult for prospective students to be able to afford a legal education.<sup>32</sup> Even where students receive financial support from law schools, they may be subject to caps on need-based aid, requiring them to cover the remaining costs of tuition, in addition to health insurance, transportation, books, and living expenses.<sup>33</sup>

Black students who do attend law school may be dissuaded from becoming prosecutors due to the starting salaries offered, which are relatively low compared to the salaries of private practitioners.<sup>34</sup> Since many prosecutors’ offices face limited resources, it will be difficult, if not impossible for offices recruiting prosecutors to compete with private law firms’ hiring packages.<sup>35</sup> Prosecutors’ offices may consider partnering with local law firms willing to sponsor a prosecution fellowship or internship for new attorneys or law students.

Despite financial barriers, prosecutors’ offices can still work to increase the diversity of their staff through targeted recruitment strategies. They can reach diverse candidates through professional associations,<sup>36</sup> law school affinity groups,<sup>37</sup> and law schools housed at Historically Black Colleges and Universities. Hiring a chief diversity officer, whose job it is to cultivate an accepting office and seek out competitive and diverse candidates, can also be beneficial for recruitment.<sup>38</sup>

The prosecution profession’s diversity problem does not end at recruitment. There are few BIPOC lawyers—and even fewer BIPOC lawyers who are women—at the leadership level. According to recent data, 95 percent of elected prosecutors are white, 75 percent are white men,<sup>39</sup> and only two percent are women of color.<sup>40</sup> Diversity experts cite the lack of networking and mentorship opportunities for women and people of color as a large reason for their underrepresentation in leadership positions.<sup>41</sup> Mentorship programs that pair professionals at the top of their agencies or companies with younger professionals from diverse racial, ethnic, and gender groups have been shown

to advance the careers of women and minorities.<sup>42</sup> Offices can partner more experienced prosecutors with those who are newer or less experienced to encourage regular consultation and mentoring.<sup>43</sup>

### *Cultural Humility, Intra-Office Dialogue, and Diversity Training*

The National Institute of Health defines cultural humility as “a lifelong process of self-reflection and self-critique whereby the individual not only learns about another’s culture, but starts with an examination of her/his own beliefs and cultural identities.”<sup>44</sup> Engaging in cultural humility is a crucial practice for prosecutors, who have more power over life and liberty than any other professional in the United States.<sup>45</sup> Prosecutors can practice cultural humility at the office by engaging colleagues in conversations about how race or culture may impact the dynamics of a crime, a victim or witness’ ability to participate in the criminal justice process, and the prosecutor’s perception of a case.

Offices can also develop informal, voluntary employee groups to promote more structured discussion. These groups can provide space for employees to discuss specific personal and professional challenges while furthering professional relationships and intercultural learning.<sup>46</sup> By promoting an office culture where employees can have uncomfortable but necessary conversations, leaders can promote the cohesive and inclusive environment necessary for correcting biases in the justice system.

To offset the impact of unconscious racial stereotypes and victim discounting against Black survivors, prosecutors’ offices may consider mandating implicit bias and cultural sensitivity training for all staff. Although research on implicit bias training is relatively new and still advancing, several studies have demonstrated the effectiveness of training in reducing implicit bias and racial preferences.<sup>47</sup> Efforts that rely on “one and done” training sessions, however, will not be impactful. Implicit bias training should be part of a larger, comprehensive effort to correct inequities in the criminal justice system. In 2019, Harvard Business Review identified key components of an effective implicit bias program:

**Diversify your training approach.** [Invest] in a multipronged diversity and inclusion program that encourages underrepresented talent to join, stay, succeed, and lead within your organization. This includes a broad range of approaches, from targeting training to different audiences, to re-engineering hiring practices, to normalizing flex time, to using technology and behavioral science to reduce bias in performance evaluations.

**Get data.** Regularly collecting and reviewing data will let you know how your programs and policies are performing, so you can make adjustments. While many organizations track diversity metrics around recruitment, selection, and retention, considerably fewer regularly collect data on the attitudes and behaviors of current employees who are the target of most diversity trainings. Doing so will yield insights into the impact of any particular interventions (for example, seeing improvement among those whose attitudes were least inclusive to start).

**Experiment.** Treating diversity training as an experiment (where you test treatments against a control) can help organizations gain insight into what’s effective and what’s not without reducing the benefits from the training programs themselves. [For example,] this approach has enabled [the authors] to see the spillover effects of the gender-focused training on attitudes and behaviors toward racial minorities. The incremental costs of creating subtly but potentially meaningfully different versions of the same training are relatively small, whereas the benefits could be considerable.<sup>48</sup>

Implicit bias training should be a “launching pad for cultural humility ... not a destination.”<sup>49</sup> In other words, the training should stem from the office’s genuine search to improve its practice; it cannot be a “box-checking” exercise. An earnest desire to practice cultural humility at the highest levels of leadership will increase the motivation of office staff<sup>50</sup>—and will thus likely increase the effectiveness of implicit bias training.

## *Community Outreach, Services, and Partnerships*

The dedication of prosecutors can make it difficult for them to see their failures regarding racial bias. When prosecutors hear community members say that they feel ignored or abandoned by the justice system, their defenses may, understandably, kick in. They may insist that these perceptions are not accurate—not in *their* jurisdictions. Or they can hear community feedback, review the research, and acknowledge the fact that their approach may not be adequately protecting victims and communities.

Outreach efforts that embrace an ongoing dialogue between system professionals and the public provide prosecutors' offices with an opportunity to both educate community members and learn from them. An earnest, humble dialogue is necessary to earn the trust of historically marginalized communities and ensure that that prosecution of gender-based violence and human trafficking is culturally responsive.

Through community outreach, prosecutors can combat myths about violence against women and victim responses to trauma. Messages that emphasize the importance of consent and bodily autonomy can directly counter stereotypes about Black women that have led to victim blaming and discounting in the criminal justice system.<sup>51</sup> Prosecutors' offices can acknowledge their previous failures, be transparent about their current practices and prosecution outcomes,<sup>52</sup> and highlight specific efforts and initiatives that aim to serve Black victims of sexual violence, intimate partner violence, stalking, and trafficking.

Prosecutors can promote a dialogue about the experiences, priorities, and concerns of community members, including Black women, through their existing community engagement efforts. Listening sessions hosted in community centers, churches, and community forums or town halls can provide prosecutors with insight into community members' concerns while conveying the office's ongoing commitment to correct past injustices. In addition to in-person communication, offices can also elicit public feedback through written surveys. Offices that administer victim experience surveys can adapt these existing tools and dissemination plans in order to survey the wider community.<sup>53</sup>

Offices may also consider strengthening and expanding their existing partnerships to better serve victims' needs beyond the criminal process. Research has shown that a system working collaboratively to provide a coordinated response encourages more victims to access services and participate in the criminal justice process.<sup>54</sup> Collaboration enables prosecutors and allied professionals to share resources, educate one another, evaluate and refine their practices on a continual basis, adapt their approaches in response to emerging issues, and ensure the sustainability of their practices. The development of coordinated community responses, more formal enhanced collaborative task forces, and multi-agency, co-located service centers are common strategies for holistically addressing survivors of sexual violence, intimate partner violence, stalking, and more recently, human trafficking.<sup>55</sup>

Offices should employ advocates with expertise working with members of the Black community. System-based advocates can help to build trust between prosecutors and victims while enabling prosecutors to better understand the experiences of Black survivors. Their services should be provided to victims regardless of their participation in the prosecution of the abuser.<sup>56</sup> Advocates employed by prosecutors' offices can be a tremendous source of expertise on the dynamics of sexual violence, intimate partner violence, stalking, and human trafficking; victim responses to trauma; and the unique challenges faced by Black survivors.

Aside from coordinating the provision of services for victims—including housing, counseling, and vocational training—advocates can be an asset to the investigation and prosecution of the crimes committed against survivors. By maintaining contact with victims throughout a criminal case and supporting their needs, advocates help establish

rapport and build trust between victims and the prosecutor's office and enhance victims' ability and willingness to participate in the criminal justice process.

By collaborating with advocates, prosecutors can develop a better understanding of victims' histories and vulnerabilities, which may have affected their experience of the crime and their ability to report it.<sup>57</sup> These details will be helpful to the case going forward by assisting prosecutors with strategizing the victim's direct testimony at trial and conveying the victim's full experience to the jury.<sup>58</sup>

In order to address the full spectrum of a survivor's needs, prosecutors' offices should ensure they are also collaborating with community-based advocacy organizations and service providers, which have specialized expertise in providing services to Black women and other members of traditionally marginalized communities.

Although social services for victims may be limited during the COVID-19 pandemic, it is crucial for prosecutors' offices to communicate to victims the services that are available and to collaborate with system and community professionals to offer them in the safest possible way to reduce the spread of COVID-19, which has disproportionately affected communities of color.<sup>59</sup>

### *Assessing the Culpability of Women of Color*

Racial stereotypes and unconscious bias can lead system professionals to criminalize Black women at disproportionate rates.<sup>60</sup> In the context of intimate partner violence, this can lead to the arrest of Black victims exercising their right to self-defense or otherwise acting in response to a violent relationship; in human trafficking, the arrest of an exploited woman or girl who is coerced or controlled by a trafficker.<sup>61</sup> Indiscriminate arrest and charging of victims erodes trust in the criminal justice system and deters reporting of future violence. If victims are convicted, they will be permanently labeled as offenders, which may block their access to advocacy services or employment. This can exacerbate victim-defendants' financial and emotional dependency on their violent partners and perpetuate the cycle of abuse. The disparate arrest of Black women for intimate partner violence and offenses that co-occur with sexual exploitation indicates a need to reevaluate prosecutors' processes for assessing culpability in these cases.

Prosecutors are not required to present charges in all cases where there is sufficient evidence to support a conviction.<sup>62</sup> In determining whether and how to charge a case, a prosecutor may consider, among other factors, the extent of the harm caused by the offense, the disproportion of the authorized sentence to the particular offense or the offender, and possible improper motives of a complainant.<sup>63</sup> By examining the context of the victim-defendant's relationship with the complainant-abuser, the prosecutor can uncover the intent of the violence: whether it was an act of power and control—the primary motive of domestic abusers—an act of self-defense, or reactionary or retaliatory violence.

This requires a thorough investigation into the history and dynamics of the relationship. A victim-defendant may have felt threatened even if there were no explicit physical or verbal threats. The abuser's seemingly innocuous words, tone of voice, facial expressions, or actions in the moments leading up to the violence may amount to an implicit threat against the victim if those same words, expressions, or actions have been the precursor to physical violence in the past.

Arrest and charging decisions, as well as plea deals, should be designed to hold parties properly accountable, prevent or reduce future violence, deter abusers' manipulation of the criminal justice system, and minimize negative consequences to victim-defendants. Prosecutors may want to consider diversion,<sup>64</sup> which enables victim-defendants to avoid the collateral consequences of conviction while gaining access to services that can help them escape the cycle of abuse, including trauma counseling, job counseling, childcare assistance, and housing.



A contextual analysis is also required when arresting or charging women and girls who may be victims of sexual exploitation or trafficking.<sup>65</sup> These women may come into contact with the criminal justice system as arrestees or defendants charged with prostitution-related or drug offenses, trespass, theft, or a variety of other crimes that may co-occur with sexual exploitation. When the system fails to identify these women as survivors, they may be unjustly charged and convicted of crimes that limit their access to meaningful life opportunities. For instance, a felony record or a requirement to register as a sex offender could limit survivors' access to housing, education, or employment and effectively block exit ramps from exploitation.

A critical first step to remedy this harm is to identify victims as such whenever and wherever they interact with the criminal justice system. Prosecutors can then apply a nuanced, contextual approach to assess the culpability of victim-defendants. They may consider the role the victim played in the crime, whether the victim's participation was connected to her exploitation, and whether she received benefits from participating. The prosecutor may also consider whether any legal defenses apply, such as safe harbor laws, affirmative or statutory defenses, or the common law defense of duress.

Depending on a victim's level of culpability, the prosecutor may decline to prosecute, offer a cooperation agreement, or reduce charges or recommended sentences. In all cases, prosecutors can work collaboratively with law enforcement, probation/parole, and system- and community-based advocates to provide victims with the services and support they need. Where survivors are wrongly convicted, prosecutors can work with civil attorneys to seal their criminal records or expunge or vacate their convictions.<sup>66</sup>

Prosecutors' offices may consider hiring or consulting with women with lived experiences—particularly BIPOC women and women from marginalized communities. These survivors can educate criminal justice professionals on the complicated dynamics of trafficking and exploitation and offenders' methods of coercion and control. They may also serve as peer support specialists for victims, witnesses, and victim-defendants who come into contact with the system. By working directly with survivors who have exited “the Life,” victims may feel less isolated and more empowered to find a pathway out of exploitation.

### *Examine Data and Prosecution Practices for Racial Bias and Disparate Impact*

Most victims of sexual violence do not receive justice through the criminal justice process. Research suggests that most incidents of sexual violence go unreported, and most cases that do get reported are declined without thorough investigation or prosecution.<sup>67</sup> Some victims do not report the assaults against them out of fear of mistreatment by prosecutors or police, fear of not being believed, or a general lack of confidence in the criminal justice system.<sup>68</sup> Other victims choose not to report or participate in the criminal justice process because they do not believe that the assault constituted a “real” rape or because an officer or prosecutor discouraged the victim from going forward with the case.<sup>69</sup> Police may close cases without referring them to prosecutors, or prosecutors may decline charges based on a determination that the victim is not credible.<sup>70</sup>

Prosecutors may also decline charges based on the belief that a crime is not likely to result in a guilty verdict at trial. In evaluating the “convictability” of a case, prosecutors may make assumptions about how the jury *will* interpret and respond to a case, rather than how they should respond, given all admissible evidence. Research documenting the role a victim's race plays in decision-making requires offices to analyze the outcomes of sexual assault, intimate partner violence, stalking, and human trafficking cases to determine if there are similar trends in based on a victim's race and then review the cases to identify unconscious bias.

A thorough examination of law enforcement prosecution data, as well as office- and case-level investigative and prosecution practices, will enable criminal justice professionals to evaluate their current response to all sexual violence, intimate partner violence, stalking, and human trafficking cases—including ones involving Black survivors. One helpful strategy is to track and disaggregate case data by the victim's race. This may help officers better understand the reporting rates of BIPOC victims as well as the attrition rate and outcomes of cases involving Black victims.<sup>71</sup>

A quantitative analysis of case data may also take place as part of a larger, systematic review of prosecution practices.<sup>72</sup> By examining the prosecution response through a lens of racial equity, prosecutors' offices can identify victim groups for which current practices are working well and those for which they are not, suggesting office or case-level practices that might need revision or potential biases that may need examination.

## Conclusion

Black women and girls are at greater risk for sexual violence, intimate partner violence, stalking, and human trafficking than able-bodied, cis-gendered White women. They also face greater barriers to justice. In order to fulfill their duties to serve all victims, prosecutors must be willing to understand how their own practices may perpetuate systemic inequities that have allowed offenders to commit violence against Black women with impunity. By confronting and overcoming their own biases through deliberate action, prosecutors can encourage Black women and victims from other marginalized groups to develop greater trust in the legal system and come forward with their assaults.

Calls for racial justice have taken on a scale that has not been seen in over half a century. The U.S. criminal justice system may be on the precipice of momentous reform—reform that has historically focused on ensuring fairer and more equitable responses for defendants. Prosecutors have the unique opportunity to ensure the Black victims and survivors are not left behind in the movement.

## ENDNOTES

1 The authors are Holly Fuhrman, Senior Associate Attorney Advisor, AEQuitas; Jennifer Gentile Long, Chief Executive Officer, AEQuitas; and Mary MacLeod, Associate Attorney Advisor, AEQuitas; with significant contributions from Wendy Gu, Juris Doctorate candidate at Georgetown University Law Center (GULC) and Priscilla Hamilton, a 2020 graduate of GULC. This article was developed as a collaboration between AEQuitas and the National Black Prosecutors Association (NBPA) and was adapted from *Confronting Racial Bias & Implementing Strategies to Ensure Justice in the Prosecution of Sexual Violence, Domestic Violence, Stalking, and Human Trafficking*, a web-based panel hosted by AEQuitas and the NBPA in August 2020. The authors would like to thank the panelists for their scholarship and expertise: Tene McCoy Cummings, Supervisor of the Sexual Assault Domestic Violence Division at the Cook County State's Attorney Office; Sharla Jackson, Domestic and Sexual Violence Resource Prosecutor; Prosecuting Attorneys' Council of Georgia; Carmen Lineberger, Managing Assistant United States Attorney for the Southern District of Florida; Nancy O'Malley, Alameda County, CA District Attorney; Dalia Racine, former Attorney Advisor, AEQuitas; and April Ross, Executive Director of the Georgia Commission on Family Violence. Finally, the authors thank Allie McWilliams, Senior Diversity & Inclusion Coordinator at Vinson & Elkins, for lending her expertise on diversity and inclusion efforts in the workplace. This article is reprinted with permission from the California District Attorney's Association (CDA) and was originally developed for a forthcoming issue of CDA's quarterly publication, *Prosecutor's Brief*.

2 National statistics on the prevalence of sexual violence, domestic violence, stalking, and human trafficking are estimates and subject to bias and flaws in methodology. Nevertheless, several national organizations provide reliable fact sheets documenting the impact of these crimes on survivors from historically marginalized communities. See, e.g., Ujima at <https://ujimacommunity.org>; National Congress of American Indians at <https://www.ncai.org>; and Casa de Esperanza at <https://casadeesperanza.org>.

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66 See MODEL RULES OF PRO. CONDUCT R. 3.8(h) (AM. BAR. ASS'N 1983) (“When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.”).

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