

## Criminal Defense Experience is Critical on the Court of Appeals

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By Alice L. Fontier and Alan S. Lewis. Published in the [New York Law Journal](#).

Prosecutors and defense attorneys work the same cases, pace the same courthouses, and pour thousands of hours into studying the same laws. But as both will eagerly tell you, being a prosecutor and being a defender are wildly different experiences, ones that lead to radically different perspectives on the bias of our legal system and how a courtroom ought to be run most fairly. It should be obvious, then, that judges should come from both sides of the courtroom. In order to move closer to our ideal of egalitarian courtrooms in which evidence is presented and weighed fairly and meaningful justice is done, we cannot marginalize the experience of defenders. However, that is exactly what is happening with judicial appointments, which draw overwhelmingly from prosecutors while those who protect people from the worst practices of the criminal legal system are left in the cold.

The New York State Association of Criminal Defense Lawyers (NYSACDL) urges the Commission on Judicial Nomination and the governor to include, among those nominated and appointed to the Court of Appeals, candidates with significant criminal defense experience. New York now has a Court of Appeals-the highest court in the State-that accepts very few leave applications from criminal defendants and sides with prosecutors at unprecedented frequency.

Nationally, we are increasingly recognizing the unfairness to the accused in America's criminal legal system. From policing to prosecution to sentencing, we are seeing numbers and movements bear out precisely the stark racial disparity that defense attorneys have been pointing out for decades. Yet, New York, with its judicial bench overwhelmingly composed of former prosecutors, has been resistant to change. This reluctance to address the ongoing bias in our legal system, and the Governor's preference for elevating prosecutors to the judiciary are intertwined.

The inclination to fill judicial vacancies with former prosecutors is not a new phenomenon. In a 1986 letter to the New York Times, William Kunstler observed that the practice of selecting judicial candidates principally from prosecutor offices-and rarely, if ever, appointing those who had been defense lawyers-had a pernicious effect on the bench. He wrote: "To expect that those deeply involved in the business of prosecuting criminal defendants can suddenly become impartial arbiters defies all logic and human experience." We agree.

Gov. Andrew Cuomo will appoint three members of the seven-member Court of Appeals in just the next seven months; twelve finalists have already been sent to him for consideration. Of these candidates, seven are former or current prosecutors. Not a single finalist has ever devoted her practice primarily to the representation of criminal defendants, and only a few have ever represented a criminal defendant. This year's appointees will join four sitting judges, two of whom are former prosecutors and none of whom has any criminal defense experience whatsoever. The newly formed court will affect the lives of New Yorkers for decades to come, with issues ranging from police surveillance to COVID safety to election law. It is crucial that the bench be diverse; diversity of experience that will be lacking unless persons with criminal defense experience are represented.

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The experience of representing individual clients facing prosecution is highly valuable to the court. Being a criminal defense lawyer-advocating for the individual rights of the accused in a system designed to convict and incarcerate; standing shoulder to shoulder with the accused, their family and their loved ones against the enormous power of the state; holding the state to account for overreach, abuse, and other violations; and wrestling directly with the systemic inequities- gives defense lawyer candidates a unique perspective borne out of these experiences. This unique perspective will improve the high court's decision-making on a range of cases, including criminal, immigration, and civil rights cases.

The last year has been marked by the largest social movement in our history, catalyzed by the murder of George Floyd, and countless other acts of violence abuse, and death that people of color face at the hands of police across this country. Clarity has finally begun to emerge: our fellow citizens will no longer tolerate the daily manifestations of the history of systemic racism in our legal system. The call for change to our system of law enforcement as enacted by the police, enforced by the prosecutors, and upheld by the courts is clear. Changing the historic imbalance inherent in a bench composed disproportionately of former prosecutors is an important first step.

President Joseph Biden heeded the call for change. Of his recent eleven judicial nominations to the federal bench, six have past experience as criminal defense lawyers, including five who were public defenders. Governor Cuomo should heed the same call. Without his doing so, the likelihood shrinks that New York will reckon with its history.

NYSACDL calls on qualified candidates with criminal defense experience to submit applications for the next open seat on the Court of Appeals. We also demand that the Judicial Screening Committee weigh criminal defense experience heavily when selecting its next round of final candidates.

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**Alan S. Lewis** *is a partner at Carter Ledyard & Milburn.*

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## related professionals

**Alan S. Lewis** / Partner

D 212-238-8647

[lewis@clm.com](mailto:lewis@clm.com)