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## Viewing Access to Justice for Rural Mainers of Color Through a Prosecutorial Lens

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# VIEWING ACCESS TO JUSTICE FOR RURAL MAINERS OF COLOR THROUGH A PROSECUTION LENS

*Maybell Romero*

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# VIEWING ACCESS TO JUSTICE FOR RURAL MAINERS OF COLOR THROUGH A PROSECUTION LENS

*Maybell Romero* \*

## ABSTRACT

Rural areas throughout the country, including those in Maine, are beginning to navigate the challenges and benefits of burgeoning communities of color. District Attorneys' offices in the state, however, have done little to prepare for this major demographic shift. Maine district attorneys must expand their understanding of their duties to do justice and assure access to justice by better serving rural Mainers of color. While a number of scholars have focused on the legal challenges communities of color face in urban environments as well as those faced by what have been presumed to be White communities in rural areas, this paper is the first to examine the relationship between rural Mainers of color and elected district attorneys.

This paper advocates that prosecutors adopt, as Professor Lisa Pruitt has termed, a "thicker" definition of access to justice, particularly for rural Mainers of color. This paper is unique in that it examines access to justice not just from the perspective of providing access to counsel in either the criminal or civil context, but focuses exclusively on the role of rural Maine prosecutors.

## I. INTRODUCTION

In August of 2016, Governor Paul LePage made a series of statements that, rightfully, scandalized and angered numerous constituencies, but especially people of color. Earlier the same year, LePage blamed Maine's drug problems on "guys" by the name of "D-Money, Smoothie, Shifty" who would, supposedly, travel to Maine "from Connecticut and New York."<sup>1</sup> He stated that, apart from selling heroin, "half the time they impregnate a young, white girl before they leave."

When asked to explain these remarks on August 24, 2016, LePage opted to dig himself into a deeper hole. Explaining that he had taken the time to put together a binder collecting information on all the drug arrests in the state, he added that "90-plus percent of those pictures in my book, and it's a three-ringed binder, are black and Hispanic people" and "[l]et me tell you something: Black people come up the highway and they kill Mainers. You ought to look into that."<sup>2</sup>

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\* Assistant Professor, Northern Illinois University College of Law. J.D., U.C. Berkeley School of Law, 2006; B.A., Cornell University, 2003. Thanks to Lisa Pruitt, Valena Beety, and the editorial board of the *Maine Law Review* for your feedback and support.

1. Randy Billing, *LePage in Spotlight for Saying Drug Dealers Impregnate "White Girls,"* PORTLAND PRESS HERALD (Jan. 7, 2016), <https://www.pressherald.com/2016/01/07/lepage-accused-of-making-racist-comment-at-bridgton-meeting/> [<https://perma.cc/BW9C-GBCK>].

2. Steve Benen, *Maine's LePage Comes Unglued After Racial Controversy*, MSNBC: RACHEL MADDOW SHOW (Aug. 27, 2016, 01:05 AM), <http://www.msnbc.com/rachel-maddow-show/maines-lepage-comes-unglued-after-racial-controversy> [<https://perma.cc/RPK4-S6XB>].

Even though his estimation was grossly inaccurate<sup>3</sup> and strongly inflected with racist sentiment, LePage's remarks did reflect a misunderstanding under which many Americans currently labor—that all of rural and nearly rural<sup>4</sup> America is uniformly White and monolithically conservative.<sup>5</sup> Depictions of rural society and life, not only pop-culturally<sup>6</sup>, but by news media and even some legal scholars often suffer from an urbanormativity that often ignores the unique features and nuances of life in rural communities.<sup>7</sup>

The demographics of rural America are quickly changing, however. People of color now constitute seventeen percent of rural America's population.<sup>8</sup> The rural population of color is well positioned to surpass the rural White population at some point given that one-third of the rural population of color are under age eighteen, while only one-fourth of the rural White population consists of those under eighteen.<sup>9</sup> Maine, in particular, has seen demographic changes over the past four years, with Maine and West Virginia being the only states in the country where deaths outpace births.<sup>10</sup> The state, however, has still enjoyed population growth, reversing a brief decline in 2015.<sup>11</sup> This growth was thanks to “newcomers from other parts of the

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3. Eric Russell & Scott Thistle, *LePage Effectively Endorses Racial Profiling in Maine's Battle Against Drug Addiction*, PORTLAND PRESS HERALD (Aug. 26, 2016), <https://www.pressherald.com/2016/08/26/house-democrats-condemn-lepage-attack-on-westbrook-legislator> [<https://perma.cc/G3CZ-VGMW>] (“According to the FBI's Criminal Justice Information Service, 1,211 people in Maine were arrested on charges of drug sales or manufacturing in 2014. Of them, 170—14.1%—were black, and almost all the rest were white, the service said.”).

4. By using the words “nearly rural” here, this paper recognizes that the term “rural” is difficult, if not impossible, to neatly define. As the U.S. Census Bureau has explained, it “define[d] rural as what is not urban—that is, after defining individual urban areas, rural is what is left.” MICHAEL RATCLIFFE, CHARLYNN BURD, KELLY HOLDER, & ALLISON FIELDS, U.S. CENSUS BUREAU, *DEFINING RURAL AT THE U.S. CENSUS BUREAU: AMERICAN COMMUNITY SURVEY AND GEOGRAPHY BRIEF* (Dec. 2016), [https://www2.census.gov/geo/pdfs/reference/ua/Defining\\_Rural.pdf](https://www2.census.gov/geo/pdfs/reference/ua/Defining_Rural.pdf) [<https://perma.cc/8WAJ-87R4>].

5. See Sarah Jones, *Whitewashing Trump Country*, THE NEW REPUBLIC (Feb. 21, 2018), <https://newrepublic.com/article/147136/whitewashing-trump-country> [<https://perma.cc/M8TF-F3HX>] (discussing the erasure of people of color from rural areas and communities by the media at large). For an example of this type of “whitewashing,” see *American Democracy's Built-in Bias Towards Rural Republicans*, THE ECONOMIST (July 12, 2018), <https://www.economist.com/leaders/2018/07/12/american-democracys-built-in-bias-towards-rural-republicans> [<https://perma.cc/J3HP-YVA9>].

6. These depictions seem to tend toward two caricatures and extremes: 1) the idealization of rural communities as tight-knit, traditional bastions of stereotypical American values, e.g. *The Andy Griffith Show* and *Petticoat Junction* or 2) drug-addled dystopian societies comprised of violent, addicted populaces, e.g. *Justified* and *Ozark*.

7. Urbanormativity views rural areas from a perspective in which rural areas are “dependent upon the cit[ies]” rather than considering such areas and their unique issues and challenges apart from any relationship with urban centers. See Gregory M. Fulkerson & Alexander R. Thomas, *Introduction: The Need to Reimagine Rural*, in REIMAGINING RURAL: URBANORMATIVE PORTRAYALS OF RURAL LIFE 1, 4-5 (Gregory M. Fulkerson & Alexander R. Thomas eds., 2016).

8. Judith A. Winston, *Rural Schools in America: Will No Child Be Left Behind? The Elusive Quest for Equal Educational Opportunities*, 82 NEB. L. REV. 190, 197 (2003).

9. *Id.*

10. Darren Fishell, *Maine's Population Is Up, Thanks to People from Away*, BANGOR DAILY NEWS (June 2, 2017), <http://bangordailynews.com/2016/12/20/the-point/maines-population-is-up-thanks-to-people-from-away/> [<https://perma.cc/3HAU-4M36>] (summarizing U.S. Census Bureau data regarding Maine population trends).

11. *Id.*

country and the world . . . .”<sup>12</sup> These changes have been especially pronounced in Maine’s primary school population; in 2000, “only 18 Maine schools had fewer than 90% white students. In 2014-15, there were fifty such schools—and at five of those schools, white students made up less than half the student body.”<sup>13</sup> Between 2000 and 2010, every county in the state saw a double-digit percent of growth of residents of color.<sup>14</sup>

New Americans, both immigrants and refugees, will be essential in helping to sustain local Maine economies and industries that would have difficulties finding workers otherwise.<sup>15</sup> A recent NPR radio story provides a useful perspective on immigrants boosting Maine’s workforce, highlighting small towns like Milbridge, which has experienced a dramatic increase in its Latino population due to jobs in lobster processing plants, agricultural harvesting, and other jobs that are demanding in terms of manual labor.<sup>16</sup> As Maine’s White population both ages and moves away, it can be expected that Maine will become even more attractive to new Americans seeking cheaper land and safe environments in which to raise their families.

There have been laudable efforts in Maine to attract new residents and to help make transitions after moving to the state a bit easier. The Maine Revenue Service administers the Opportunity Maine Tax Credit, providing reimbursements for student loans under certain circumstances.<sup>17</sup> A number of non-profit organizations operate in the state with goals such as helping recent immigrants establish themselves as farmers,<sup>18</sup> providing interpretation and translation services,<sup>19</sup> and helping new Mainers learn English and gain financial literacy skills.<sup>20</sup> Maine’s criminal justice system, however, remains plagued by inequities that can be observed when looking at rates of police contact by certain populations as well as incarceration rates.

While other scholars, both legal and sociological, as well as governmental agencies, have focused on a number of factors that influence racially-based inequities in the criminal justice system, including access to counsel and policing, there has

12. *Id.*

13. *Id.*

14. See SUSTAINABLE URBAN REGIONS PROJECT ET AL., CHANGING MAINE: MAINE’S CHANGING POPULATION AND HOUSING 1990-2010, at 38-43 (Sept. 2012), [https://umaine.edu/mitchellcenter/wp-content/uploads/sites/293/2013/08/Census\\_Report\\_1012121.pdf](https://umaine.edu/mitchellcenter/wp-content/uploads/sites/293/2013/08/Census_Report_1012121.pdf) [<https://perma.cc/KR4B-PFYE>].

15. This is, in fact, true for the vast majority of the country. The Pew Research Center has projected that the most dramatic growth in the working-age population in the United States over the next decades will be from new immigrants, while there will be a decrease in working-age adults born in the United States. Jeffrey S. Passel & D’Vera Cohn, *Immigration Projected to Drive Growth in U.S. Working-age Population Through at Least 2035*, PEW RESEARCH CTR. (Mar. 8, 2017), <http://www.pewresearch.org/fact-tank/2017/03/08/immigration-projected-to-drive-growth-in-u-s-working-age-population-through-at-least-2035/> [<https://perma.cc/CK8J-PSJZ>].

16. Hansi Lo Wang, *Maine’s Immigrants Boost Workforce of Whitest, Oldest State in the U.S.*, NAT’L PUB. RADIO (Apr. 20, 2017), <https://www.npr.org/2017/04/20/524536237/maines-immigrants-boost-workforce-of-whitest-oldest-state-in-u-s> [<https://perma.cc/6DH2-E6AG>].

17. *Opportunity Maine*, LIVE & WORK IN ME., <https://www.liveandworkinmaine.com/opportunity-maine/> [<https://perma.cc/V83H-6DKJ>].

18. *Farmer Training*, CULTIVATING COMMUNITY, <https://www.cultivatingcommunity.org/programs/farmer-training/> [<https://perma.cc/9FJN-WTNV>].

19. *FAQs: Frequently Asked Questions*, CATH. CHARITIES REFUGEE & IMMIGRATION SERVS., <https://www.ccmaine.org/refugee-immigration-services/faqs#Fact2> [<https://perma.cc/D5P9-KPRP>].

20. *About MEIRS*, ME. IMMIGRATION & REFUGEE SERVS., <https://meirs.org/about-us/> [<https://perma.cc/5JPK-K6CF>].

been comparatively little discussion as to what prosecutors themselves can do to foster better relationships with communities of color, particularly in rural areas. This paper seeks to address the relationship between rural Mainers of color and prosecutors. In Part II, it explores the meaning of “rural” and how the understanding of rurality influences the discussion of rural issues. Part III explores relationships between prosecutors and people of color, looking at prosecutors’ offices not only in Maine but in other predominately rural states and regions as well. Part IV offers some practical solutions to improving those relationships.

## II. THE MEANING OF RURAL: A PLETHORA OF DEFINITIONS

### A. *Pop Cultural and Vernacular Understandings of Rurality*

The urban-rural divide has recently become a very hot topic, especially since the 2016 election of Donald Trump to the presidency and the 2018 midterm elections. An NPR Morning Edition report reduced a rural caller to a stereotype, explaining that the caller, a mechanic from Kansas, had less education than urban Americans and, because of that, “felt misunderstood and left out.”<sup>21</sup> Other pieces that have explored this divide seem to regard “rural folk” as ignorant and incapable of “empathizing with those with different lifestyles” and unable to understand “racially charged tension,” operating under a presumption of an almost exclusively White rural America.<sup>22</sup> Painting with rather broad brushstrokes, such news media and political commentary outlets ignore the fact that “[r]ural communities have a distinctive culture” and that “[t]hey are diverse in their needs and experiences.”<sup>23</sup>

Rurality is also often conflated with Whiteness and conservatism. In a column in *The New Yorker* discussing Harvard College’s admissions policies, Harvard Law School Professor Jeannie Suk Gersen falls into the trap of assuming that rurality and Whiteness are one and the same.<sup>24</sup> As highlighted by UC Davis Law Professor Lisa R. Pruitt, it appears that Professor Gersen regards what she refers to as “Sparse Country,” as well as the rural experience, with more than just “a whiff of disdain,” seemingly coming to the conclusion that any applicants from rural communities have little to contribute to the Harvard community and even less to teach their urban counterparts.<sup>25</sup>

Television and movies have also fallen victim to conflating rurality almost

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21. Frank Morris, *The Role the Urban-Rural Divide Plays in Midwest Results*, NAT’L PUB. RADIO (Nov. 8, 2018), <https://www.npr.org/2018/11/08/665547116/role-rural-urban-divide-plays-in-midwest-results> [<https://perma.cc/NC76-8P3D>].

22. Natalie Schmidt, *Understanding Rural America*, MEDIUM (Nov. 22, 2016), <https://pensivepost.com/understanding-rural-america-d9695a6b3516> [<https://perma.cc/J7RW-BB3Z>].

23. Tiffany D. Baffour, *Addressing Health and Social Disparities Through Community-Based Participatory Research in Rural Communities: Challenges and Opportunities for Social Work*, 3 CONTEMP. RURAL SOC. WORK, 4, 6 (2011).

24. Jeannie Suk Gersen, *At Trial, Harvard’s Asian Problem and a Preference for White Students from “Sparse Country,”* THE NEW YORKER (Oct. 23, 2018), <https://www.newyorker.com/news/our-columnists/at-trial-harvards-asian-problem-and-a-preference-for-white-students-from-sparse-country> [<https://perma.cc/NQR3-PWN7>].

25. Lisa R. Pruitt, *“Sparse Country” at Harvard as Derision of Rurality and Conflation with Whiteness*, LEGAL RURALISM (Oct. 26, 2018), <http://legalruralism.blogspot.com/2018/10/sparse-country-at-harvard-as-derision.html> [<https://perma.cc/7PEK-NS9Q>].

exclusively with Whiteness. These depictions often seem to fall into three distinct camps: (1) wholesome comedy such as *Green Acres*, the *Andy Griffith Show*, and, though they were transplanted to a city, *The Beverly Hillbillies*; (2) rural crime drama, for example, television shows like *Justified* and *Ozark* as well as movies like *Winter's Bone*; and (3) rural horror, exemplified by movies such as *Deliverance* and *Silence of the Lambs*. One may easily dismiss these pop cultural<sup>26</sup> depictions of rurality as being inconsequential. While a great deal of debate continues among cognitive psychologists over whether pop culture influences the viewpoints of those who consume it,<sup>27</sup> it would seem to follow that those who have never had exposure to rurality in the United States would have their opinions on such regions influenced by such depictions.

One may wonder why such depictions of rurality that conflate it with Whiteness matter. Equating rurality with Whiteness effects an erasure on people of color from the rural landscape. Fifteen percent of rural Americans are people of color<sup>28</sup> and pop culture does a poor job of representing it. “[T]he rural imaginary plays . . . a central role in constructing a national imaginary in the United States,” and as such “it is not surprising to see individuals” and, perhaps, popular media and commercial interests such as the tobacco industry “who seek the privileges associated with white, settler patriarchy adorn themselves with elements of rural culture.”<sup>29</sup> Accepting the predominant but incorrect narrative that rural is tantamount to White functions to make acknowledgement of the issues facing rural Americans and rural Mainers of color all the more difficult to recognize and address, despite the fact that it seems safe to assume that rural America, including rural Maine, will continue to become more diverse.

### B. Census and Other Agency Definitions

Apart from contending with the difficulties posed by broad, popular understandings of rurality, researchers engaged in rural issues are faced with the challenge of different formalized definitions of “rural.” While the U.S. Census Bureau defines rural in the negative—essentially labelling areas rural if they are not part of an urbanized area—other federal agencies use very different definitions. For example, rather than the urban-rural classification system used by the Census Bureau

26. For purposes of this essay, Professor Papke’s definition of “pop culture” will be used: pop culture consists of “cultural commodities and experiences produced by the culture industry and marketed to mass audiences. The definition designates something much more specific than just ‘the popular.’” David Ray Papke, *The Impact of Popular Culture on American Perceptions of the Courts*, 82 *IND. L.J.* 1225, 1226 (2007).

27. Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 *J. CRIM. L. & CRIMINOLOGY* 161, 175 (2017). Cultivation theory in particular examines the media’s role in social control: “[t]hat is, it examines how media are used in social systems to build consensus.” *Id.* at 175 n.67 (quoting Cynthia Bond, *We, the Judges: The Legalized Subject and Narratives of Adjudication in Reality Television*, 81 *UMKC L. REV.* 1, 16 (2012) (internal citations and quotation marks omitted)).

28. Alisa Valentin, *Why Rural Communities of Color Are Left Behind: A Call for Intersectional Demographic Broadband Data*, *PUB. KNOWLEDGE* (Oct. 19, 2018), <https://www.publicknowledge.org/news-blog/blogs/why-rural-communities-of-color-are-left-behind-a-call-for-intersectional-de> [<https://perma.cc/VPK2-V3FC>].

29. Garrett W. Nichols, *Rural Drag: Fashioning Rurality and Privilege*, 4 *QED: A JOURNAL IN GLBTQ WORLDMAKING* 41, 46-47 (2017).

and based on population density, the USDA classifies the country's areas as either metropolitan (metro) or nonmetro. Nonmetro areas are then further divided into micropolitan areas, consisting of urban clusters of 10,000-49,999 people, or noncore areas, which amount to all remaining counties.<sup>30</sup>

When applying the Census Bureau definition of "rural," as of the 2010 Census, Maine is the most rural state in the nation, with approximately 61.3% of residents living in rural areas.<sup>31</sup> Unlike most other states with significant rural populations, the number of Mainers living in rural areas as defined by the Census Bureau increased from 59.8% to 61.3% between 2000 and 2010.<sup>32</sup> Maine is also unique in that it has two counties that are considered entirely rural: both Lincoln and Piscataquis Counties are 100% rural with no urbanized areas.<sup>33</sup> These two counties are comprised of 20,980 residents, where 1,304 of them are people of color.<sup>34</sup> As counties like Lincoln, Piscataquis, and others experience the aging of their White populations, it would be reasonable to assume that people of color, including new Americans, will 1) be needed to sustain or grow the population of such counties and 2) be attracted by the potential of inexpensive land and housing.

The Latino population, in particular, will likely be important to population growth in rural counties. When looking at immigration and migration trends throughout the United States, the Latino population in rural areas has grown the fastest of any racial or ethnic group since the 1990s.<sup>35</sup> In 1990, Latinos made up only 3.6% of the country's rural population,<sup>36</sup> though they "accounted for nearly 29 percent of the population gain" in rural regions "between 1990 and 2004."<sup>37</sup> While most immigrants continue to settle in larger metropolitan areas, immigration to rural areas is increasing and immigrants have begun to cast a wider net in their choice of counties and towns of residence.<sup>38</sup>

### C. A More Nebulous Definition of Rural

Both federal agency definitions of "rural" and pop cultural and mass media conceptions of "rural" are rather limiting in their scopes. Definitions such as those

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30. *What is Rural?*, USDA ECON. RESEARCH SERV. (July 12, 2018), <https://www.ers.usda.gov/topics/rural-economy-population/rural-classifications/what-is-rural.aspx> [<https://perma.cc/R7K4-WWKR>].

31. Press Release, U.S. CENSUS BUREAU, Growth in Urban Population Outpaces Rest of Nation, Census Bureau Reports (Mar. 26, 2012), [https://www.census.gov/newsroom/releases/archives/2010\\_census/cb12-50.html](https://www.census.gov/newsroom/releases/archives/2010_census/cb12-50.html) [<https://perma.cc/9493-9THS>]. Maine surpassed Vermont as the most rural state based on populations living in rural areas by just a .02% margin.

32. 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>].

33. *Id.*

34. *Id.*

35. KENNETH JOHNSON, DEMOGRAPHIC TRENDS IN RURAL AND SMALL TOWN AMERICA 1 (Carsey Inst. Reports on Rural Am., 2006).

36. *Id.* at 24.

37. *Id.*

38. *Id.* at 25-26.



used by the Census Bureau, the USDA, or the Office of Management and Budget do not fully consider the human, lived experiences of those in rural areas, while mass media representations of rurality take those experiences and often exploit them, metamorphosing them into grotesque parodies of themselves. For purposes of this essay a more nebulous, incomplete, and thereby paradoxically functional definition will be adopted, specifically from Professor Pruitt's article *Latina/os, Locality, and Law in the Rural South*: "I use the term here to refer to an inchoate concept of rurality, the general idea of sparsely populated areas, including small towns, and associated cultural aspects."<sup>39</sup>

In employing this more imprecise and malleable definition of rural, this paper seeks to avoid the confusion that often occurs when researchers engage in discussions of rurality necessitating constantly shifting definitional goalposts depending on what study is being used in the moment. For purposes of this paper, understanding "rural" and "rurality" as a theoretical and cultural concept rather than merely a precise, completely population driven definition will work just as well when exploring the relationship between prosecutors and rural residents of color and ways that the relationships between them may be improved.

### III. PROSECUTORS AND PEOPLE OF COLOR

When the concept of access to justice is discussed in the vast majority of contexts, it references specifically access to criminal defense counsel, as well as access to representation for a number of non-criminal legal matters.<sup>40</sup> This is very understandable, given that access to counsel, both in criminal and civil matters, is critical to having a fair chance of being heard in legal proceedings, both in and out of court. Access to justice, however, incorporates much more than access to counsel and should be thought of as addressing a number of conditions. For purposes of this paper, a much more expansive conceptualization will be employed:

There is no access to justice where citizens (especially marginalized groups) fear the system, see it as alien and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system.<sup>41</sup>

Prosecutors, under the American Bar Association's Model Rules of Professional

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39. Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135, 136 n.2 (2009). Just as in Professor Pruitt's article, this essay makes no distinctions between models operating on either rural/urban or metropolitan/nonmetropolitan dichotomies.

40. Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 497 (2014) (citing Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913, 914 (2009)); see also JULIET BRODIE ET AL., POVERTY LAW: POLICY AND PRACTICE 587 (2014); WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2012-2013 27 (2012-2013).

41. U.S. INST. OF PEACE, *Necessary Condition: Access to Justice*, <https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice> [<https://perma.cc/77X5-ZUNT>].

Conduct<sup>42</sup> and Criminal Justice Standards for the Prosecution Function,<sup>43</sup> have been given standardized rules of conduct throughout most of the country.<sup>44</sup> The ABA Prosecution Standards charge prosecutors with a duty to “seek justice,” as do the prosecution standards promulgated by the National District Attorneys Association.<sup>45</sup> Seeking justice necessarily includes doing what is possible to increase access to justice at its most basic, especially for vulnerable populations such as immigrants and people of color. “The quality of our justice system is measured by the service it provides to the poorest members of society”<sup>46</sup> as well as its most isolated.

Access to justice extends far beyond access to counsel and can be just as critical a need as securing food or shelter in certain circumstances. In this sense, this paper joins others preceding it in advocating for a “thicker” definition and understanding of access to justice.<sup>47</sup> Along with adopting a thicker access to justice, this paper exhorts prosecutors to conceive of “seeking justice” not simply as winning convictions while abiding by minimal standards of ethical conduct, but rather as a process with which to seek racial justice, economic justice, and even environmental justice for the communities that they purport to serve.

This paper does not attempt to address all possible aspects of access to justice from the prosecutorial lens; that would make for a paper both unruly and disorganized. At this juncture, this paper turns to the question of what Maine prosecutors can do within the scope of their own roles to help ensure access to justice for rural Mainers of color.

### A. *Inequitable Trends in the Prosecution of Crimes*

#### 1. *Adults in the Criminal Justice System*

Approximately ninety-seven percent of criminal cases are resolved by way of a

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42. AM. BAR ASS’N, *Jurisdictional Rules Comparison Charts*, (Oct. 30, 2018), [https://www.americanbar.org/groups/professional\\_responsibility/policy/rule\\_charts/](https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/) [<https://perma.cc/HSE3-XJSZ>].

43. The Prosecution Standards explain that:

These Standards are intended to provide guidance for the professional conduct and performance of prosecutors. They are written and intended to be entirely consistent with the ABA’s Model Rules of Professional Conduct, and are not intended to modify a prosecutor’s obligations under applicable rules, statutes, or the constitution. They are aspirational or describe “best practices,” and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural right for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge.

CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.1(b) (AM. BAR ASS’N 2015).

44. See AM. BAR ASS’N., *supra* note 42.

45. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.2(b) (AM. BAR ASS’N 2015); NAT’L PROSECUTION STANDARDS Standard 1-1.1 (NAT’L DIST. ATT’YS ASS’N 2009).

46. Larry R. Spain, *The Opportunities and Challenges of Providing Equal Access to Justice in Rural Communities*, 28 WM. MITCHELL L. REV. 367, 367 (2001) (citing Lewis J. Liman, *The Quality of Justice*, 17 YALE L. & POL’Y REV. 287, 287 (1998)).

47. See, e.g., Pruitt & Showman, *supra* note 40, at 497-98.

plea bargain rather than a trial by either the jury or the bench.<sup>48</sup> Plea bargaining has generally been accepted as a necessary evil, supposedly benefitting prosecutors by eliminating the need to put on a trial, defendants by granting some form of certainty in the resolution of their cases, and courts by guaranteeing judicial efficiency. Prosecutors in plea bargaining, as with most aspects of the criminal adjudicative process, wield the greatest amount of power, deciding who gets to benefit from a plea deal or immunity agreement and who does not. However, for such an important part of the adjudicative process, there are very little data regarding how prosecutors, especially at the local level, decide with whom to enter into a plea bargain.

Currently there are approximately 5,000 Maine residents in carceral institutions: 2,400 in state prisons, 1,800 in local jails, 630 in federal prisons, 80 in some sort of youth facility, and 50 who have been involuntarily committed.<sup>49</sup> Pretrial detention, in particular, has been a strong driver of the growth of jail populations throughout the state since 1978. Interestingly, the number of convicted people incarcerated in Maine's jails has decreased dramatically only to be displaced by those who have not yet been convicted at all and either cannot afford bail or have been placed on no bail status.<sup>50</sup> Maine incarcerates 363 out of every 100,000 people in the state.<sup>51</sup> While this is a lower rate than the national average of 698 people, Maine's incarceration rate far outpaces those of countries like the United Kingdom, Portugal, and Canada.<sup>52</sup>

These rates of incarceration grow more worrisome when considering the race and ethnicity of incarcerated people. As of 2010, Black, Indigenous, and Latino people are incarcerated 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>53</sup> Blacks, Indigenous peoples, and Latinos are also overrepresented in Maine prisons and jails while Whites are underrepresented.<sup>54</sup> Blacks are particularly overrepresented as they only comprise one percent of the state's population while making up seven percent of the incarcerated.<sup>55</sup> Indigenous peoples and Latinos also each comprise only one percent of the state's population but each account for two percent of the carceral population.<sup>56</sup> Whites, on the other hand, only make up eighty-eight percent of the

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48. Leon Neyfakh, *No Deal*, SLATE (Apr. 7, 2015), <https://slate.com/news-and-politics/2015/04/plea-bargains-should-prosecutors-be-forced-to-have-their-plea-bargains-approved-by-juries.html>.

49. *How Many Maine Residents Are Locked Up and Where?*, PRISON POL'Y INITIATIVE (Dec. 2018), [https://www.prisonpolicy.org/graphs/correctional\\_control2018/ME\\_incarceration\\_2018.html](https://www.prisonpolicy.org/graphs/correctional_control2018/ME_incarceration_2018.html) [<https://perma.cc/XXP8-LEED>].

50. Joshua Aiken, *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, PRISON POL'Y INITIATIVE (May 31, 2017), <https://www.prisonpolicy.org/reports/jailsovertime.html> [<https://perma.cc/DMN9-D89J>].

51. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (June 2018), <https://prisonpolicy.org/global/2018.html> [<https://perma.cc/AN36-KXCX>].

52. *Id.*

53. *Racial and Ethnic Disparities in Prisons and Jails in Maine*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/ME.html> [<https://perma.cc/9WU4-MUV7>].

54. *Id.*

55. *Id.*

56. *Id.*

incarcerated population.<sup>57</sup> Similar overrepresentation occurs among Maine probationers (Maine has no parole system), with slightly over eight percent considered “non-white.”<sup>58</sup>

## 2. *Youth in the Juvenile Delinquency System*

Disproportionate contact between the criminal justice system and people of color appears to start early in Maine, influencing the juvenile justice system. The large majority of Maine’s youth are White, but just as can be seen with the adult population, the number of minority youth has been increasing at a fast pace.<sup>59</sup> The largest disproportionalities can be observed for Black youth, with some counties having more drastic disproportionalities than others.<sup>60</sup> In an unfortunate turn of events, youth of color in Androscoggin and Cumberland counties are sent to secure confinement at twice the rate of their White counterparts, which is a new trend in the state as most observable inequities in previous years occurred with arrest and referral to the juvenile courts.<sup>61</sup> In Androscoggin County, Black youth are arrested more than three times as often as White youth and diverted from the juvenile delinquency system less than half the time when compared to White youth.<sup>62</sup> Disproportionalities such as these, however, affect all youth of color throughout the state.<sup>63</sup>

Juvenile courts were initially instituted during the late 1800s and early 1900s throughout the country with the purpose of offering greater opportunities for rehabilitation of delinquent youth.<sup>64</sup> Oftentimes, juvenile court judges viewed themselves as inhabiting the role of surrogate parents or grandparents for children

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57. *Id.*

58. MARK RUBIN, ME. DEP’T OF CORR., 2013 MAINE ADULT RECIDIVISM REPORT 4 (2013). It is unclear from the Maine Adult Recidivism Report itself where demographic data provided on probationers was collected. It is, however, interesting that rather than acknowledging the distinct racial and ethnic communities that make up “people of color,” the report defines people of color by what they are not, terming them “non-white.” *Id.* This designation suggests such a high level of White/euro-normativity that it skews the manner in which information is presented in such reports. In contrast, the report Disproportionate Contact: Youth of Color in Maine’s Juvenile Justice System, released in 2015, has committed to using the terms “people of color” and “youth of color,” explaining:

While OJJDP employs the word “minority” in its term “disproportionate minority contact,” we use the term “youth of color” throughout this report. The reasoning is three-fold: First, the word “minority” is already inaccurate in majority-minority jurisdictions. According to Census projections, the term will soon be inaccurate nationally, as the birth rate for persons of color will soon exceed the white birth rate. Second, the word “minority” has a negative (subordinate) connotation. Third, “people of color” is the term chosen by non-white populations for its ability to build solidarity and draw attention to the racialization of color.

ROBYN DUMONT ET AL., DISPROPORTIONATE CONTACT: YOUTH OF COLOR IN MAINE’S JUVENILE JUSTICE SYSTEM 5-7 (2015).

59. DUMONT ET AL., *supra* note 58, at 7.

60. *Id.* at 41-49.

61. *Id.* at 41, 44.

62. *Id.* at 41.

63. *Id.* at 2.

64. SAMUEL DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM (2013).

who often had no other supportive contacts.<sup>65</sup> The juvenile court environment, however, began to change dramatically in the 1960s and 1970s with the incorporation of criminal procedural rights applying to children charged with delinquency<sup>66</sup> and with the more punitive treatment of youth by state legislatures.<sup>67</sup> Rather than having the original intended effect of offering chances for rehabilitation to youth, however, increased contact with the juvenile justice system began to lead to a host of negative outcomes for such children once they became adults.<sup>68</sup>

There are numerous reasons why the disproportionalities in question arise in the juvenile delinquency context and replicate themselves, one of them being the conduct of prosecutors themselves. In the most recent version of the juvenile delinquency system report *Disproportionate Contact: Youth of Color in Maine's Juvenile Justice System*,<sup>69</sup> the relationship between youth of color and juvenile prosecutors was explored in some depth, especially in focusing on youths' perceptions of prosecutorial attitudes and behavior:

Several focus group participants were unhappy with the district attorneys' . . . attitudes towards them. One participant shared, "The first time I ever went to court I remember the district attorney saying, 'He is a menace to society.'"

Some youth perceived that the DA predetermined what happened in court or that the judge sided with the DA. One youth added, "Every time I went to the court the district attorney just wanted to commit me every single time, and finally she just got her way."

Several mentioned that they felt there was a lot of bargaining between the DA and the defense attorneys and that the bargaining did not always produce the hoped for result. Several youth expressed that they believe that white youth receive better plea deals and fewer commitments than youth of color, which is substantiated by quantitative data.<sup>70</sup>

If racial inequities occur not only in the adult system but also in the juvenile system, what can Maine prosecutors do to improve and greater equalize outcomes for people of color throughout the entire state? An important place to start addressing

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65. *Id.*

66. *In re Gault*, 387 U.S. 1, 30-31 (1967); Bernard P. Perlmutter, "Unchain the Children": *Gault*, *Therapeutic Jurisprudence, and Shackling*, 9 BARRY L. REV. 1, 42-54 (2007).

67. See, e.g., JEROME G. MILLER, SEARCH & DESTROY: THE PLIGHT OF AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 19 (1993).

68. See Elizabeth S. Barnert et al., *How Does Incarcerating Young People Affect Their Adult Health Outcomes*, 139 PEDIATRICS 1, 4 (2017); Thalia González, *Youth Incarceration, Health, and Length of Stay*, 45 FORDHAM URB. L.J. 45, 65-66 (2017) (citing BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 8 (2006) ("[f]ar from receiving effective treatment, young people with behavioral health problems simply get worse in detention, not better.")). See generally PEW CHARITABLE TRUSTS, RE-EXAMINING JUVENILE INCARCERATION: HIGH COST, POOR OUTCOMES SPARK SHIFT TO ALTERNATIVES (2015); JUSTICE POLICY INS., STICKER SHOCK: CALCULATING THE FULL PRICE TAG FOR YOUTH INCARCERATION (2014), [http://justicepolicy.org/uploads/justicepolicy/documents/sticker\\_shock\\_final\\_v2.pdf](http://justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf) [<https://perma.cc/G4J3-DVST>].

69. DUMONT ET AL., *supra* note 58.

70. *Id.* at 20-21.

this question would be examining the composition of prosecutors' offices and questioning the biases that arise within them.

### B. *Inequities in the Composition of Prosecutors' Offices*

A recent study by the Women Donors Network found that ninety-five percent of elected prosecutors in the United States are White.<sup>71</sup> Seventy-nine percent of prosecutors are White men and sixteen percent of prosecutors are White women.<sup>72</sup> Only four percent of elected prosecutors are men of color, while only one percent are women of color.<sup>73</sup> Prosecutorial power and discretion is wide-ranging, encompassing decisions of what and whether to charge, whom to charge, whether to engage in plea bargaining, and even whether to consent to a bench trial if a trial is necessary at all.<sup>74</sup> The creation of new crimes that go far beyond those that existed at common law has also served to vastly expand prosecutorial power. This problem of overcriminalization is most vividly conceptualized when realizing that there are now more than four thousand federal offenses that carry some sort of criminal punishment and a similar propagation of state level criminal offenses.<sup>75</sup> Crimes, both state and federal, seem to multiply every year like Tribbles.<sup>76</sup>

Given the broad discretion that prosecutors enjoy, as well as overcriminalization becoming (or entrenching itself as) a nationwide problem, voters should be troubled that their elected prosecutors are nearly uniformly White and very often also men.<sup>77</sup> This paper does not purport to argue that White prosecutors, or specifically White male prosecutors, are all flagrantly racist or let such racism infect the way they conduct themselves professionally. Implicit bias and unconscious racism,<sup>78</sup>

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71. See WOMEN DONORS NETWORK, JUSTICE FOR ALL? (2015), <https://wholeads.us/justice/wp-content/themes/phase2/pdf/key-findings.pdf> [<https://perma.cc/ZGU7-CDK7>].

72. *Id.*

73. *Id.*

74. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1524-25 (1981); see also John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991).

75. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 713 (citing Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Save the State from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 170-73 (2003)).

76. See *Star Trek: The Original Series: The Trouble with Tribbles* (NBC television broadcast Dec. 29, 1967). Tribbles are a fictional, rapidly-reproducing invasive species in the Star Trek canon.

77. See WOMEN DONORS NETWORK, *supra* note 71.

78. Professor Charles H. Lawrence, III developed a useful definition of unconscious racism in the late 1980s, explaining that "Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites." Charles H. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 & n.21 (1987) (citing DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW (2d ed. 1980); LERONE BENNETT JR., BEFORE THE MAYFLOWER (5th ed. 1982); JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM (5th ed. 1980); VINCENT HARDING, THERE IS A RIVER (1981); A. LEON HIGGINBOTHAM JR., IN THE MATTER OF COLOR (1978); JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY (1970); MANNING MARABLE, BLACK AMERICAN POLITICS: FROM THE WASHINGTON MARCHES TO JESSE JACKSON (1985); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135-43 (1982)).

however, can be just as harmful to communities of color as racism that is consciously nurtured.

The bases for prosecutorial decision making are seldom, if ever, easily available to the public.<sup>79</sup> While some district attorneys of late have made very public commitments to transparency, they often fail to deliver.<sup>80</sup> Even with the practical shield of nearly unfettered discretion, most prosecutors would likely deny that they do their jobs in a discriminatory fashion and would prefer not to be thought of as racists.<sup>81</sup> Under most circumstances, not being a flagrant racist is a sound choice from a public choice theory perspective in that avoiding the appearance of racism is (usually) to one's career advantage, though most people are also motivated by the desire to be respected and do a good job.<sup>82</sup> The desire to feel like one is doing a good job, however, may also give prosecutors even greater cause to ignore the possibility that they may harbor implicit biases that affect their job performance. If confronted with the prospect of harboring any such bias, most prosecutors would take offense and could easily offer race-neutral explanations for their exercises of discretion and decision-making.<sup>83</sup>

A number of studies suggest that implicit bias operates at a multitude of prosecutorial decision-making points. A 2017 study showed that White defendants in Wisconsin often benefitted from better plea deals than Black defendants; White defendants would have their most serious charge dropped as the result of a plea bargain twenty-five percent more often than Black defendants.<sup>84</sup> Another found that Black defendants in Manhattan were nineteen percent more likely than White defendants to be offered deals that included some amount of jail time.<sup>85</sup> In an additional study conducted by the Newport News Daily Press using Hampton Roads circuit court data, Whites were found to receive no jail time in forty-eight percent of

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It is interesting to note that, while many appear to think of unconscious bias as a relatively newly described and debated phenomenon, scholars such as Professor Lawrence have been addressing it for the past thirty years.

79. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 58 (1998).

80. See, e.g., Dana DiFilippo, *Black Lives Matter, Family Press Philly DA To Release Inmate They Say Is Innocent*, *WHYY.ORG* (Jan. 9, 2018), <https://whyy.org/articles/black-lives-matter-family-press-philly-da-release-inmate-say-innocent/> [<https://perma.cc/Z5DP-CNF2>] (profiling a case in which Philadelphia District Attorney Larry Krasner has refused to meet with protesters, who were met with barricade and police rather than the transparency promised during the last election cycle).

81. Davis, *supra* note 79, at 34.

82. Edward L. Rubin, *Rational Choice and Rat Choice: Some Thoughts on the Relationship Among Rationality, Markets, and Human Beings*, 80 *CHI.-KENT L. REV.* 1091, 1109-10 (2005) (citing JAMES DAVID BARBER, *THE LAWMAKERS: RECRUITMENT AND ADAPTATION TO LEGISLATIVE LIFE* (1965); RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* (1973); STEVEN S. SMITH & CHRISTOPHER J. DEERING, *COMMITTEES IN CONGRESS* (1984); WILLIAM K. MUIR, JR., *LEGISLATURE: CALIFORNIA'S SCHOOL FOR POLITICS* (1982); JOHN W. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* (1973); ARTHUR MAASS, *CONGRESS AND THE COMMON GOOD* (1983)).

83. Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 *CORNELL L. REV.* 383, 433 (2013).

84. Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 *B.C. L. REV.* 1187, 1191 (2018).

85. BESIKI KUTATELADZE ET AL., *VERA INST. JUSTICE, RACE AND PROSECUTION IN MANHATTAN* 6-7 (July 2014), <https://www.vera.org/publications/race-and-prosecution-in-manhattan> [<https://perma.cc/82EV-DPGX>] (follow "Research Summary" hyperlink).

plea deals versus twenty-two percent for Black defendants charged with comparable drug distribution crimes.<sup>86</sup> Federal prosecutors have also been found to be nearly twice as likely to bring charges carrying mandatory minimum sentences against Black male defendants as they would be with White male defendants engaging in similar criminal conduct.<sup>87</sup> While it is impossible, of course, to be privy to an individual prosecutor's thought processes such that researchers could know with certainty why that (likely White and male) prosecutor behaves as he does, the studies offered here serve as examples of compelling circumstantial evidence of the influence of implicit bias in prosecutorial decision-making.

Maine is one of several states in which all of the elected prosecutors throughout the state are White, with the large majority of them also being male. While it will be impossible to know at the time of publication of this paper what the racial, ethnic, and gender composition of each district attorney's office will be, it would be a safe bet that the vast majority of assistant/deputy district attorneys are White men. If this has yet to present a representational disconnect with Mainers of color, one should expect that, if the composition of district attorney's offices remains consistent, that it will not be long before such offices cease to represent the populations they purport to serve.

#### IV. PATHS TOWARD INTERVENTION AND IMPROVEMENT

In 2018, Cumberland County had a hotly contested race for District Attorney between independent Jonathan Sahrbeck and democrat Jon Gale. This race, however, unexpectedly turned uncontested with Gale's withdrawal from the race after allegations of sexual misconduct from the early 2000s came to light.<sup>88</sup> The Cumberland County race joined the eighty-five percent of district attorney and prosecutor races throughout the country that were uncontested.<sup>89</sup>

The Maine ACLU sent out surveys to all district attorney candidates in each of the state's eight prosecutorial districts. This survey sought views from candidates on issues as wide ranging as prosecutorial discretion, drug policy, racial disparities, and mental health.<sup>90</sup> The large majority of candidates, apart from Mr. Sahrbeck and then-candidate but now District Attorney for District 6 Natasha Irving, did not bother to answer the ACLU's questions.<sup>91</sup>

The survey asked a few questions regarding racial disparities in the criminal justice system. When asked whether he would commit "to tracking and working to eliminate racial disparities in decisions made by the district attorney's office, such

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86. Dave Ress, *Blacks More Likely To Get Prison Time in Plea Deals, Hampton Roads Court Data Show*, DAILY PRESS (Mar. 17, 2016), <https://www.dailypress.com/news/dp-nws-sunshine-disparities-20160317-story.html> [<https://perma.cc/3NHE-GHQZ>].

87. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 7 (2013).

88. Megan Gray, *Party Leader Defends Asking Democrat To Drop Out of Race for District Attorney*, PORTLAND PRESS HERALD (Nov. 1, 2018), <https://www.pressherald.com/2018/11/01/democratic-leader-defends-decision-to-ask-da-nominee-to-drop-out/> [<https://perma.cc/5ZXG-6B5F>].

89. See REFLECTIVE DEMOCRACY CAMPAIGN, *Justice for All?*, <https://wholeads.us/justice/> [ ].

90. See DA FOR ME, <https://daforme.com> [<https://perma.cc/35GL-UYZ8>].

91. *Id.*



as disparities in charging decisions, bail recommendations, and plea bargains,” Mr. Sahrbeck answered in tautological fashion, stating that

[a]t the Cumberland County District Attorney’s Office, we do not base prosecution on race in any way shape or form. Tracking such information would be unnecessary. If there is evidence that there are prosecutors in Cumberland County are acting [sic] in a fashion that bases prosecutorial decisions on race, then this issue may need to be revisited.<sup>92</sup>

Absent explicit racism such as an assistant district attorney openly admitting to being motivated by personally held discriminatory beliefs, employing Mr. Sahrbeck’s approach would make it nearly impossible to collect the necessary data to show that racial considerations were infecting a prosecutor’s decision-making and use of discretion. The ACLU also asked candidates whether they were willing to commit to requiring racial equity and bias training for assistant district attorneys: Mr. Sahrbeck once again offered an obstructionist response, effectively adopting a position of willful ignorance that, at best, misunderstands the nature of implicit bias and underscores the need for such training among prosecutors’ offices.<sup>93</sup>

In advocating for a “thicker” understanding of access to justice that includes greater equity and inclusion for rural Mainers of color, the remainder of this paper explains why prosecutors should care about issues such as implicit bias and racial inequities, even when doing so seemingly creates further challenges for their respective offices. This paper also suggests potential interventions that the state should consider to better insure that prosecutors serve the interests of all residents within their jurisdictions. Given that prosecutors enjoy more power and discretion than any other actor in the criminal justice system, including police and judges, “[p]rosecutors should bear the brunt of the remedial responsibility to eliminate racism in the criminal process, even though inappropriate or illegal considerations of race may occur at the arrest state, often before prosecutorial participation in the process.”<sup>94</sup>

#### A. *Why Prosecutors Should Care About Discrimination and Rural Mainers of Color*

If prosecutors as a whole were better able to monitor their own conduct and make conscientious efforts to understand how phenomena such as implicit bias may affect how they approach their jobs, suggestions such as “doctrinal change[,] . . . disciplinary sanctions,” or, as this paper advocates, mandatory data collection and standardized interoffice training on racism, bias, and cultural competence would not

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92. *Id.*

93. *See id.* (Mr. Sahrbeck’s response consisted of the following: “In 2016, [now State Representative] Rachel Talbot-Ross of the Maine NAACP came to the Maine prosecutors Conference [sic] and taught a program about inherent bias. Though I found her talk interesting, I have never witnessed any prosecutor in the Cumberland County District Attorney’s Office act in any fashion with an inherent bias towards any person based on their race, religion, gender, or sexual orientation. Due to that, I do not think it is necessary to this [sic] type of training. If there was evidence of an issue that came up, then this issue may need to be revisited.”).

94. Davis, *supra* note 79, at 31.

be needed.<sup>95</sup>

Speaking from a purely public choice theory perspective, there are a number of reasons why prosecutors should care about the particular struggles of rural Mainers of color, as well as Mainers of color through the entire state. Bipartisan criminal justice reform has found greater support throughout the country and from both major political parties. Even organizations perceived as being far right, such as Koch Industries, have come to very strongly support criminal justice reform and be leaders in its implementation.<sup>96</sup> Prosecutors should generally be interested in criminal justice reform, including promoting racial equities, if only for the long-term political advantageousness of doing so.

A number of other incentives, as well as utilitarian concerns, should convince Maine prosecutors as a whole to care about racial equity and justice. While procedural fairness is a goal that prosecutors should strive for given their roles as ministers of justice, studies have shown that “people are more likely to comply with legal authority they perceive to be legitimate . . . .”<sup>97</sup> If prosecutors hope to foster a culture of law-abidingness, projecting greater authority by caring about all segments of their respective jurisdictions’ populaces should be something they prioritize.<sup>98</sup>

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95. Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1473 (2012).

96. See *Criminal Justice Reform*, CHARLES KOCH INST., <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/> [<https://perma.cc/W7KT-NVKU>].

97. Burke, *supra* note 95, at 1475 (citing TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990)); see Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 400 (2000); Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 716-17 (2000).

98. Compliance with laws is more consistent when authority is perceived by the public to be legitimate rather than derived by fear. Burke, *supra* note 95, at 1475 (citing TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 204 (2002)).

