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Rural Spaces, Communities of Color, and the Progressive Prosecutor

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RURAL SPACES, COMMUNITIES OF COLOR, AND THE PROGRESSIVE PROSECUTOR

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The concept of the progressive prosecutor has captured the attention of many newspapers, media outlets, district attorney candidates, legal scholars, and the public at large. Many with sincere interests in reforming the criminal legal system have excitedly traced the success of candidates styling themselves as progressive prosecutors.

Although located throughout the country, these progressive prosecutors share a geographic commonality—they generally hail from large cities or urban metroplexes. Examples include Wesley Bell in St. Louis, Rachael Rollins in Boston, Larry Krasner in Philadelphia, and Kim Foxx in Chicago. Meanwhile, in the rural reaches of the country, disproportionate contact between police and minorities has increased. In rural jurisdictions, incarceration rates have increased, and prosecutors have seemingly become less reform minded.

This Article casts suspicion on progressive prosecution. It questions whether such an appellation should exist given the current nature of the prosecutor's job in the United States. It also serves as a warning; although such prosecutors have become more common in large cities, practitioners and scholars should not forget that reforms that occur in large jurisdictions sometimes do not extend to those suffering injustices in small communities.

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INTRODUCTION	804
I. WHAT IS RURAL?	806
A. Defining “Rurality”	806
B. Rural Whitewashing	809
II. THERE ARE NO PROGRESSIVE PROSECUTORS	811
A. Defining “Progressive”	811
B. The Impossibility of the Progressive Prosecutor	813
III. RACIAL INEQUITIES IN PROSECUTORS’ OFFICES AND INCARCERATED POPULATIONS	818
CONCLUSION	821

INTRODUCTION

A burgeoning number of prosecutors and district and state’s attorney candidates have begun to identify as progressive prosecutors. These prosecutors generally favor decriminalizing low-level offenses, using alternatives to incarceration, examining the police more critically, and exercising discretion.¹

Races pitting progressive prosecutors against often-entrenched incumbents have spurred important and necessary discussions about reform in the criminal legal system. These races also make for interesting politics. Often these contests pit a new, progressive prosecutor against an incumbent from the same party. Wesley Bell, the St. Louis County prosecutor, defeated another Democrat, Bob McCulloch, who had won seven elections in a row, usually unopposed.² Tiffany Cabán, a Democrat public defender running for Queens District Attorney, nearly pulled off a similar upset against Melinda Katz, the Democratic Queens Borough President who was expected to enjoy an easy victory at the polls.³

All of these prosecutors, though, operate in large urban areas. This focus on urban progressive prosecutors is part of a large pattern of policymakers

¹ See Emily Bazelon & Miriam Krinsky, Opinion, *There’s a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html> [<https://perma.cc/HZ58-HCZY>].

² See Joel Currier, *Wesley Bell Ousts Longtime St. Louis County Prosecuting Attorney*, ST. LOUIS POST-DISPATCH (Aug. 8, 2018), https://www.stltoday.com/news/local/govt-and-politics/wesley-bell-ousts-longtime-st-louis-county-prosecuting-attorney/article_5b2134b8-f204-5e20-9572-e59cacbb0aed.html [<https://perma.cc/HTN8-9KZL>].

³ See Associated Press, *Tiffany Cabán Concedes Defeat in Contested Queens DA Race*, NBC NEWS (Aug. 6, 2019), <https://www.nbcnews.com/politics/elections/tiffany-cab-n-concedes-defeat-contested-queens-da-race-n1039841> [<https://perma.cc/BDH2-HFCN>].

and scholars ignoring rural jurisdictions and the systemic issues within those areas. The political divide between urban and rural communities has grown sharper during the past twenty years.⁴ Democrats and liberals “have reinforced their party loyalty and progressive leaning over time with a similar development occurring among geographically dispersed Republicans.”⁵ Studies of and reflections on progressive prosecutors, while informative, often completely discount this acute political divide between urban and rural areas and ignore the state of prosecution, progressive or not, in rural jurisdictions.⁶

Ignoring rural jurisdictions erases a number of communities of color throughout the United States. People of color now represent nearly twenty percent of the rural American population, with the percentage only increasing each year.⁷ Rural Hispanics⁸ usually lived in the Southwest but have begun to move into areas such as the Pacific Northwest for work.⁹ The reported Native population has grown thanks to more accurate accounting during the last few Censuses; the 2010 Census reported a thirty-nine percent increase in the Native population from the 2000 Census.¹⁰ This is a marked increase, especially when compared with prior Census data, and is likely due to a greater ability to claim Native ethnicity in combination with others given that it was the first year one could report more than one ethnicity.¹¹ There are still

⁴ See generally James G. Gimpel, Nathan Lovin, Bryant Moy & Andrew Reeves, *The Urban-Rural Gulf in American Political Behavior*, POL. BEHAV. 3–5 (forthcoming 2020), <http://www.andrewreeves.org/papers/urbanrural.pdf> [https://perma.cc/5PT2-TC7V] (examining the forces driving the urban-rural divide in elections).

⁵ *Id.* at 2.

⁶ See, e.g., *The Paradox of “Progressive Prosecution”*, 132 HARV. L. REV. 748 (2018) (focusing on urban prosecutors and the risks of relying on prosecutors to drive criminal justice reform); Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. 411 (2019) (discussing some “progressive” prosecutors in large metro areas); Editorial Board, *A Wiser Generation of Prosecutors*, N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/opinion/a-wiser-generation-of-prosecutors.html?_r=0 [https://perma.cc/F755-SABA] (praising “progressive” prosecutors in Denver, Houston, and Chicago).

⁷ See ECON. RES. SERV., U.S. DEP’T. OF AGRIC., RACIAL AND ETHNIC DIVERSITY IS INCREASING IN RURAL AMERICA, https://www.ers.usda.gov/webdocs/publications/44331/10597_page7.pdf?v=41055 [https://perma.cc/Z7Q8-K2UG].

⁸ This Article adopts the terminology of the different government agencies and services that work on collecting population data.

⁹ See ECON. RES. SERV., *supra* note 7.

¹⁰ *Demographics*, NAT’L CONGRESS OF AM. INDIANS, <http://www.ncai.org/about-tribes/demographics> [https://perma.cc/LRJ6-BHN5] (last updated June 1, 2020).

¹¹ See TINA NORRIS, PAULA L. VINES & ELIZABETH M. HOEFFEL, U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 CENSUS BRIEFS (2012),

a substantial number of Black nonmetro residents living throughout the Deep South, whose proportion of the rural population has remained constant for decades.¹² The Hispanic population in this region has increased as well.¹³

This Article argues that the notion of the progressive prosecutor is only that—a notion. This is because the progressive prosecutor is one who still participates in and buys into a criminal legal system that can never be progressive given its own terms and purpose. Further, this notion is completely cut off from the ways that the criminal legal system operates in rural areas and the communities of color that exist there. Part I explains the concept of rurality and discusses the often-ignored diversity that exists in rural areas. Part II interrogates the progressive prosecutor, especially in the rural context. Part III offers a survey of disproportionate incarceration rates in some of the most rural states in the country, as well as some thoughts on how to bridge the gap between urban and rural.

I. WHAT IS RURAL?

Rural communities, rather than being monolithically white and conservative, are, rather, exceptionally diverse in character, culture, and social fabric. They do all share some common characteristics, including that they are so very difficult to categorize. Additionally, the general American public makes a great deal of undeserved judgments about these communities as a whole. Both these points—the difficulty of defining and categorizing “rural” and the fact that “rural” is largely stereotyped in this country—are highlighted in the following two subsections defining rurality and rural “whitewashing.”

A. DEFINING “RURALITY”

One of the greatest difficulties in studying and writing about rural America from any standpoint is deciding on a definition of “rural.” There have been many attempts to advance a workable definition of rurality. These

<https://www.census.gov/history/pdf/c2010br-10.pdf> [<https://perma.cc/B4MM-ZY26>]. Only as of the 2000 Census were people given the option to identify with more than one race. The 2010 Census offered the first opportunity to observe any population changes in those who identify as multiple-race. The population of those identifying as multiple-race increased by 32% during that time, while those reporting only a single race grew by 9.2%. U.S. Census Bureau, *2010 Census Shows Multiple-Race Population Grew Faster Than Single-Race Population* (Sept. 27, 2012), <https://www.census.gov/newsroom/releases/archives/race/cb12-182.html> [<https://perma.cc/H5JR-QQYY>].

¹² ECON. RES. SERV., *supra* note 7.

¹³ *Id.*

efforts may be categorized in two ways: (1) empirical and (2) sociological. Traditionally, census definitions have prevailed in defining “rural” in a quantifiable, empirical fashion; these definitions, though, have consistently defined rural in the negative, viewing rurality simply as the opposite of urban. This view not only makes the studying of rurality complicated, but also confounds courts who have to define “rural” for themselves.¹⁴ However, different agencies and groups have recently tried to set formalized definitions of “rurality” based on a select set of metrics.¹⁵ For example, starting in 2017, the Census Bureau started formulating rural statistical areas, which would purport to establish sets of characteristics to define “rural” rather than relying on the traditional approach of defining it as the opposite of urban areas.¹⁶ As Davies and Clark remarked, “[t]here are a variety of approaches to measuring rurality in the United States, and choices among them depend on their appropriateness both to the questions being asked and the analytic approaches employed.”¹⁷

There are also more sociologically based definitions of rurality that have been deployed in foundational studies of rurality and the law. In her work examining access to justice in rural America, Ann Eisenberg posits four rural Americas: “(1) amenity-rich rural America; (2) chronically poor rural America; (3) declining resource-dependent rural America; and (4) amenity/decline rural America.”¹⁸ The Deason Center for Criminal Justice Reform at the SMU Dedman School of Law has only recently begun to study what they have started to term “STAR” communities—small, tribal, and rural communities—in an attempt to be inclusive and recognize the commonalities inherent in these different communities.¹⁹ There do seem to be some commonalities, however, across these different rural Americas. “People living in small towns tend to know their neighbors and interact with them in

¹⁴ See, e.g., *Town of Rib Mountain v. Marathon County*, 926 N.W.2d 731, 735–39 (Wis. 2019); *Am. Bankers Ass’n v. Nat’l Credit Union Admin.*, 934 F.3d 649, 671–73 (D.C. Cir. 2019); *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 190 P.3d 38, 50–53 (Wash. 2008).

¹⁵ See, e.g., *Rural Statistical Areas*, U.S. CENSUS BUREAU (Apr. 3, 2017), <https://www2.census.gov/about/partners/sdc/resources/ratclapril2017.pdf> [<https://perma.cc/L2BS-RH9S>].

¹⁶ *Id.*

¹⁷ Andrew Davies & Alyssa Clark, *Gideon in the Desert: An Empirical Study of Providing Counsel to Criminal Defendants in Rural Places*, 71 ME. L. REV. 245, 259 (2019).

¹⁸ Ann M. Eisenberg, *Distributive Justice and Rural America*, 61 B.C. L. REV. 189, 203 (2020).

¹⁹ See Deason Center, SMU DEDMAN SCHOOL OF LAW, <https://deasoncenter.smu.edu/star-justice/> [<https://perma.cc/2K3W-QU9V>] (last visited Aug. 8, 2020).

multiple settings.”²⁰ Perhaps because of that, there is generally a high level of community trust and high levels of community participation among rural dwellers, no matter if they live in an amenity-rich rural community or one struggling with economic decline.²¹

Though a number of definitions exist that each attempt to define exactly what “rural” means and each definition seems only slightly different, each actually stands apart from the others in important ways. Suburbs, exurbs, and rural areas are also often lumped together in a category called nonmetro,²² though each of these is vastly different from the other, but also hard to distinguish from the other given a lack of established definitions.²³ For the purposes of this Article, I adopt a more flexible, yet perhaps more workable, definition. Specifically, it derives 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.”²⁴ I do not attempt to lump all of rural culture and life together, given the great diversity within rural settings throughout the United States. Rurality in Utah is very different from rurality in Illinois, which is very different from rurality in Kentucky, and so on.

For the purposes of this Article, I also adopt a view of rurality focusing on the highest number of rural dwellers per state—specifically, on the ten states with the greatest proportion of rural residents.²⁵ In that sense, I have

²⁰ David V. Evans, Toby Keys & Steven Meltzer, *Rural Health Care: Communities, Systems, and Patient Care*, in *MEDICAL MANAGEMENT OF VULNERABLE AND UNDERSERVED PATIENTS: PRINCIPLES, PRACTICE, AND POPULATIONS* 5 (2d ed. 2016).

²¹ Although there is less in the way of civic involvement among residents of communities facing economic decline, “large majorities of residents across all types of rural communities are highly positive in their attitudes toward neighbors and their local community.” Michele Dillon & Justin Young, *Community Strength and Economic Challenge: Civic Attitudes and Community Involvement in Rural America*, CARSEY INST. 5 (2011).

²² See, e.g., *Defining Rural Population*, HEALTH RES. & SERV. ADMIN., <https://www.hrsa.gov/rural-health/about-us/definition/index.html> [https://perma.cc/5459-3CAC] (last updated July 2020).

²³ Richard Florida, *How Should We Define the Suburbs?*, BLOOMBERG CITYLAB (June 12, 2019), <https://www.bloomberg.com/news/articles/2019-06-12/why-we-need-a-standard-definition-of-the-suburbs> [https://perma.cc/U656-YK53].

²⁴ Lisa R. Pruitt, *Latina/os, Locality, and the Law in the Rural South*, 12 HARV. LATINO L. REV. 135, 136 n.2 (2009). Just as in Professor Pruitt’s article, this Article makes no distinctions between models operating on either rural-urban or metropolitan-nonmetropolitan dichotomies.

²⁵ *2010 Census Urban and Rural Classification and Urban Area Criteria, Percent Urban and Rural in 2010 by State*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2010-urban-rural.html> [https://perma.cc/8QNB-9ZVH] (last updated Dec. 2, 2019).

made a somewhat utilitarian choice to focus on states where I believe the most people, including the most rural people of color, would benefit from some attention brought to their circumstances. While much attention is placed on reform of the criminal legal system, especially in the wake of George Floyd's tragic murder at the hands of police, much of this focus is placed on urban centers.²⁶ This Article also benefits from narrowing its focus to these ten states because data already exists about disproportionate minority involvement with the criminal legal system, and these states are conclusively rural. This focus, however, should not take away from the fact that even the most urbanized states, such as Nevada and California, may not have large rural populations, but still consist of vast stretches of unpopulated, open space. Readers should realize that rural spaces exist in every state, even those states with large cities and those states thought of in the wider imagination as urban. States like these face substantial challenges providing services to their few rural dwellers, and those challenges should be acknowledged.

B. RURAL WHITEWASHING

In 2019, Paul Krugman wrote a New York Times op-ed entitled "Getting Real About Rural America."²⁷ His piece is telling of how many people think about rural places and their rural residents as a "world apart," one not necessarily part of "real America."²⁸ Krugman unfairly characterizes rural America as analogous to the former East Germany, which suffered from a lackluster economy and reemergent anti-Semitism.²⁹ Although rural

²⁶ See, e.g., Jan Ransom & Annie Correal, *How the New York Protest Leaders Are Taking On the Establishment*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/nyregion/nyc-george-floyd-protests.html> [<https://perma.cc/JB3J-ZF22>]; *In Pictures: A Racial Reckoning in America*, CNN, <https://www.cnn.com/2020/05/27/us/gallery/george-floyd-demonstrations/index.html> [<https://perma.cc/5LP6-9MGL>] (last updated July 9, 2020).

Some news agencies, however, have begun to pay attention to the spread of the protests to smaller communities with some surprise, possibly due to the contradiction with the popular imagination of small and rural communities being conservative and unwilling to consider criminal justice reform at all. See, e.g., Clayton Sandell & Jeffrey Cook, *George Floyd's Death Awakens Activism in Rural, White America*, ABC NEWS (June 16, 2020, 9:23 AM), https://abcnews.go.com/US/george-floyds-death-awakens-activism-rural-white-america/story?id=71262386&catalogId=10051&offerId=72902D&source=IONIC&sourceId=x&awc=10844_1594079300_510cd9851e6e8b14734ca75253897da8&utm_source=AWIN&utm_medium=Affiliate [<https://perma.cc/CEJ8-CA4S>].

²⁷ Paul Krugman, Opinion, *Getting Real About Rural America*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/opinion/rural-america-economic-decline.html> [<https://perma.cc/7W2D-K9XF>].

²⁸ *Id.*

²⁹ *Id.*

communities are often, if not usually, highly racially segregated, they are not as monolithically white as news media, television, movies, and even legal scholarship are apt to assume.³⁰ As Professor Valena Beety explains: “Americans are socialized to envision rural peoples as ethnically monolithic: all the same and all White. Yet rural areas can be diverse, and not all are fairly characterized as White dominant.”³¹ As “‘urban’ is not synonymous with ‘black’,” so “‘rural’ is not synonymous with ‘white’”³²

Americans often labor under the assumption that rurality is equivalent to “white,” “conservative,” and “agricultural.” But racial and ethnic diversity is on a dramatic rise throughout rural America. Ninety percent of rural places experienced an increase in diversity between 1990 and 2010.³³ Hispanics have recently become the most populous minority group in rural America, making up 9.3% of rural dwellers as compared to 8.2% for Black Americans.³⁴

Rural Americans also work in a sometime-surprising number of industries apart from agriculture. Manufacturing and mining are also traditional rural industries,³⁵ though they have not been as successful in

³⁰ See Maybell Romero, *Viewing Access to Justice for Rural Mainers of Color Through a Prosecutorial Lens*, 71 ME. L. REV. 227, 231–32 (2019) (citing Jeannie Suk Gersen, *At Trial, Harvard’s Asian Problem and a Preference for White Students from “Sparse Country,”* 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>]; 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-NS9QJ>]).

³¹ Valena E. Beety, *Prosecuting Opioid Use, Punishing Rurality*, 80 OHIO ST. L.J. 741, 745–46 (2019).

³² Eisenberg, *supra* note 18, at 214.

³³ Jennifer Van Hook & Barrett Lee, *Diversity Is on the Rise in Urban and Rural Communities, and It’s Here to Stay*, KINDER INST. FOR URBAN RES. (Feb. 23, 2017), <https://kinder.rice.edu/2017/02/23/diversity-is-on-the-rise-in-urban-and-rural-communities-and-its-here-to-stay> [<https://perma.cc/B2D4-MYAU>].

³⁴ *Race & Ethnicity in Rural America*, HOUSING ASSISTANCE COUNCIL (Apr. 2012), http://www.ruralhome.org/storage/research_notes/rn-race-and-ethnicity-web.pdf [<https://perma.cc/3JC8-CVCN>].

³⁵ Sarah Low, *Manufacturing is Relatively More Important to the Rural Economy than the Urban Economy*, U.S. DEP’T OF AGRIC. ECON. RES. SERV. (Sept. 12, 2017), <https://www.usda.gov/media/blog/2017/09/12/manufacturing-relatively-more-important-rural-economy-urban-economy>; Leslie Whitener & David McGranahan, *Rural America: Opportunities and Challenges*, U.S. DEP’T OF AGRIC. ECON. RES. SERV. (Feb. 3, 2003), <https://www.ers.usda.gov/amber-waves/2003/february/rural-america/>.

recent years due to globalization and the search for alternative fuels.³⁶ Moreover, much of the rural land in the United States is nonarable,³⁷ meaning that it is not suitable for cropland,³⁸ which stands in stark contrast to perceptions of rural places as breadbaskets.³⁹ A variety of service industries employ rural Americans, and the services themselves are diverse, just as in urban cities; they range from healthcare and education to arts and food.⁴⁰ Additionally, many rural Americans are employed to serve tourists and those engaged in outdoor recreation.⁴¹ Because rural dwellers need many of the same goods and services as their urban counterparts, this industry diversity should not be a surprise.

II. THERE ARE NO PROGRESSIVE PROSECUTORS

A. DEFINING “PROGRESSIVE”

The American progressive movement is not new, but it is exceptionally difficult to define.⁴² In a valiant attempt to define the term “progressive,” Jack Russell Weinstein offered the following definition:

[A] progressive is a person who believes that social reform is achievable over time with the proper mixture of individual participation and government support. He or she looks to the future not the past for a better time, and recognizes that there is a universal standard for justice while acknowledging that only by understanding particular contexts and circumstances can the adequacy of the progress be measured. All people are equally entitled to the fruits of progress, the progressive believes, but how these fruits are distributed may depend on the nature of circumstance.

³⁶ Stephanie Ebbs, *Trump Administration's New Proposal Aimed at Helping Coal Industry*, ABC NEWS (Dec. 6, 2018, 12:35 PM), <https://abcnews.go.com/Politics/trump-administrations-proposal-aimed-helping-coal-industry/story?id=59628929> [<https://perma.cc/8STD-SU98>].

³⁷ Daniel Bigelow, *A Primer on Land Use in the United States*, U.S. DEP'T OF AGRIC. ECON. RES. SERV. (Dec. 4, 2017), <https://www.ers.usda.gov/amber-waves/2017/december/a-primer-on-land-use-in-the-united-states/> [<https://perma.cc/3AFC-RZS6>].

³⁸ Douglas Helms, *The Development of the Land Capability Classification*, U.S. DEP'T OF AGRIC. NATURAL RES. CONSERVATION SERV., https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143_021436 [<https://perma.cc/3FWM-EH4L>] (last visited Oct. 24, 2020).

³⁹ Anne B.W. Effland, *When Rural Does Not Equal Agricultural*, 74 AGRIC. HIST. 489, 489–90 (2000).

⁴⁰ Lynda Laughlin, *Beyond the Farm: Rural Industry Workers in America*, U. S. CENSUS BUREAU (Dec. 8, 2016), https://www.census.gov/newsroom/blogs/random-samplings/2016/12/beyond_the_farm_rur.html [<https://perma.cc/J9AV-B89J>].

⁴¹ *Id.*

⁴² Jack Russell Weinstein, *On the Meaning of the Term Progressive: A Philosophical Investigation*, 33 WM. MITCHELL L. REV. 1, 49–50 (2006).

....

[T]he progressive seeks moderation: moderation in change, moderation in assistance, and moderation in autonomy.⁴³

The term's definition has changed somewhat since Professor Weinstein attempted to define it back in 2006 and has developed a pop cultural and political life of its own. The argument about how to define "progressive" took center stage during a Democratic Party primary debate in 2016 between Hillary Clinton and Bernie Sanders.⁴⁴ This argument still reverberated in the leadup to the 2020 presidential election.⁴⁵ Still, it is difficult to establish a precise meaning of the term given the debate that surrounds it and those who try to coopt the word for their own purposes.⁴⁶ Some may regard "progressive" to be synonymous with "liberal," while others believe that any ideology that focuses on working toward progress, no matter how incremental or slow, can also be termed progressive. Because of the term's

⁴³ *Id.* at 50.

⁴⁴ Tara McKelvey, *What Does It Mean to Be a Progressive in the US?*, BBC NEWS (Feb. 5, 2016), <https://www.bbc.com/news/world-us-canada-35467470> [<https://perma.cc/NX2Z-TZNN>]; see also Ron Elving, *Democrats Debate: What Is a Progressive and Who Wants to Be One?*, NPR (Feb. 5, 2016), <https://www.npr.org/2016/02/05/465671983/democrats-debate-what-is-a-progressive-and-who-wants-to-be-one> [<https://perma.cc/NX36-J62W>].

The debate between Clinton and Sanders over the meaning of "progressive" largely started on Twitter, when the Sanders campaign said, in reference to Clinton, "You can be a moderate. You can be a progressive. But you cannot be a moderate and a progressive." After that, a large share of the debate between Clinton and Sanders before the New Hampshire primary in 2016 was devoted to the definition of "progressive." Clinton explained that she believed "[a] progressive is someone who makes progress." Susan Davis, *7 Key Moments from Clinton and Sanders' "Progressive" Debate*, NPR (Feb. 4, 2016), <https://www.npr.org/2016/02/04/465627754/debate-night-clinton-sanders-face-off-in-new-hampshire> [<https://perma.cc/YKLG-SKD9>].

⁴⁵ Sanders has continued to reference this conflict with Clinton recently. When explaining his seemingly greater willingness to endorse Former Vice President Joe Biden than Clinton in 2016, he said "I think the difference now is that, between you and me, I have a better relationship with Joe Biden than I had with Hillary Clinton, and that Biden has been much more receptive to sitting down and talking with me and other progressives than we have seen in the past . . ." Tucker Higgins, *Joe Biden Is 'More Receptive' to Progressives Than Past Democrats, Bernie Sanders Says*, CNBC (June 9, 2020, 12:04 PM), <https://www.cnbc.com/2020/06/09/sanders-biden-more-receptive-to-progressives-than-past-democrats.html> [<https://perma.cc/E89T-GLUD>].

⁴⁶ Politicians and corporations are among those jumping on the "progressive" bandwagon of late. Nearly all of the Democratic presidential candidates have referred to themselves as "progressive" at one juncture or another. Businesses as large as IBM have plied in the language of progressivism on their corporate social responsibility websites. See *Five Questions with Stanley S. Litow*, IBM, <https://newsroom.ibm.com/index.php?s=20288&item=30475> [<https://perma.cc/BTR4-2DT9>]. In part because of this, "progressive" has lost much of its significance and meaning.

malleability and the opportunistic ways in which it has been used, especially recently, it has become largely devoid of meaning, particularly in the context of the phrase “progressive prosecutor.” Sometimes it simply refers to prosecutorial standards as low as abiding by the most basic constitutional strictures upon the role.

B. THE IMPOSSIBILITY OF THE PROGRESSIVE PROSECUTOR

The public confidence crisis of the early 2010s in the criminal legal system⁴⁷ has given way to a new, optimistic conceit: the progressive prosecutor. Prosecutors began to take on a more powerful role in the modern American criminal legal system during the early 1900s in part because of the rise of organized crime.⁴⁸ Since then, because both case law and statutes imbue them with the ability to exercise broad discretion with little to no meaningful oversight, prosecutors have exerted a high level of dominance in the criminal adjudicative process.

The ABA Prosecution Standards charge prosecutors with a duty to “seek justice,” as do the prosecution standards promulgated by the National District Attorneys Association.⁴⁹ Pinning down a universally accepted meaning of “doing justice,” however, proves beyond challenging. The United States Supreme Court has done shockingly little to clarify what specifically is encompassed within this duty and what prosecutors can or cannot do to comport with this duty.⁵⁰ Some have viewed the duty to do justice as a “semijudicial” responsibility.⁵¹ Bennett Gershman has argued that this duty is really an “ethical duty to truth,” and that this duty derives from several sources: (1) “the prosecutor’s role as a minister of justice[.]” (2) constitutional obligations placed upon the prosecutor through the *Brady* line

⁴⁷ Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 176–77 (2017).

⁴⁸ *Id.* at 175.

⁴⁹ NAT’L PROSECUTION STANDARDS r. 1-1.1 (NAT’L DIST. ATT’YS ASS’N 2009); CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION r. 3-1.2(b) (AM. BAR ASS’N 2017).

⁵⁰ Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN ST. L. REV. 1133, 1136–37 (2005). Professor Hoeffel notes that the only guidance from the Court comes from *Berger*’s discussion of the prosecutor’s role. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.”).

⁵¹ Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1123 (1998) (citing J. Allison DeFoor II, *Prosecutorial Misconduct in Closing Argument*, 7 NOVA L.J. 443, 448 (1983)).

of cases, (3) limitations upon the evidence that prosecutors may rely upon before charging a suspect with a crime, and (4) the power imbalance between the state and defendant inherent in the American criminal legal system.⁵²

Defining what exactly a progressive prosecutor is hinges on the way “seeking justice” is defined. Although I agree with many of the definitions and conceptions of the meaning of the prosecutor’s duty to do justice advocated by colleagues and predecessors who examined the prosecutorial role, I do not believe they go far enough. Perhaps surprisingly, my understanding of an expansive, truly progressive role for the prosecutor originates in a rather conventional source addressing prosecutorial ethics and duties—the ABA’s Criminal Justice Standards for the Prosecution Function. Not enough emphasis has been placed on the prosecutor’s role outside the active prosecution of defendants, when a prosecutor can, and is encouraged by the ABA Standards, to do so much more.⁵³ Standard 3-1.2(f) exhorts that the “prosecutor is not merely a case-processor but *also a problem-solver responsible for considering broad goals of the criminal justice system.*”⁵⁴ It also prescribes that a “prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, the prosecutor should stimulate and support efforts for remedial action.”⁵⁵ This gives a prosecutor wide latitude to engage in work apart from prosecuting crimes, such as working toward economic and environmental justice and providing useful community service.

Doing justice goes far beyond merely complying with constitutional mandates, not prosecuting the innocent, or not being duplicitous. As I have advocated in previous work:

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

⁵² Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 313–15 (2001) (citing *Berger*, 295 U.S. at 88; YALE KASIMAR, WAYNE R. LAFAYE, JEROLD H. ISRAEL & NANCY KING, MODERN CRIMINAL PROCEDURE 1205 (9th ed. 1999); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 809 (6th ed. 2000); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 4:1 (2d ed. 1999)).

⁵³ In fact, the Prosecution Standards as promulgated envision a prosecutor who takes an active role in using their influence to correct problems in the criminal legal system: “The prosecutor’s office should be available to assist community efforts addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.” CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION std. 3-1.2(e) (AM. BAR ASS’N 2017).

⁵⁴ *Id.* at 3-1.2(f) (emphasis added).

⁵⁵ *Id.*

of color. “The quality of our justice system is measured by the service it provides to the poorest members of society”⁵⁶ as well as its most isolated.⁵⁷

I was a prosecutor for about five years. I genuinely thought I could be one of these progressive prosecutors. After working in exurban and rural counties where line prosecutors were flagrantly micromanaged, though, it became clear to me that it is impossible to be a good prosecutor in a bad system,⁵⁸ let alone one who is truly progressive. Perhaps a better label for a prosecutor who makes a greater investment in decriminalization, decarceration, and police accountability is “reform-minded.” Prosecutors who serve in the current American criminal legal system, however, cannot claim to be progressive or even transgressive without, at the very least, actively working to completely dismantle the systems and hierarchies in which they exist.⁵⁹

I do not think all prosecutors are motivated by bad intentions, nefariously attempting to further the well-documented inequities of the current criminal legal system. Certain large-city prosecutors, such as Larry Krasner in Philadelphia and Kim Foxx in Chicago, have instituted positive

⁵⁶ 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)).

⁵⁷ Maybell Romero, *Viewing Access to Justice for Rural Mainers of Color Through a Prosecutorial Lens*, 71 ME. L. REV. 227, 235 (2019).

⁵⁸ See Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 396 (2001).

⁵⁹ I would be generally willing to consider a prosecutor who shows up for work, wastes government time and resources, and flummoxes prosecutions to be a progressive prosecutor. Professor Stephen Galoob dubbed this idea during this symposium, the “Office Space Theory of Prosecution.” In the film *Office Space* (1999), the main character, Peter Gibbons, works as a programmer in a job he finds entirely uninspiring and frustrating. Peter explains that when he goes into work every day, “I just stare at my desk, but it looks like I’m working. I do that for probably another hour after lunch, too. I’d say in a given week I probably only do about fifteen minutes of real, actual work . . . it’s not that I’m lazy, it’s that I just don’t care.” OFFICE SPACE (Judgmental Films 1999).

Although I think Professor Galoob’s choice of pop culture reference is apt, I also believe a more ideal figure to lionize and emulate in this model would be *Parks and Recreation*’s Ron Swanson, who chooses to do nothing in an effort to inhibit his office’s functionality: “Normally, if given a choice between doing something and nothing, I’d choose to do nothing. But I will do something if it helps someone else do nothing. I’d work all night, if it meant nothing got done.” *Parks and Recreation: Article Two* (NBC television broadcast Apr. 18, 2013).

changes in their jurisdictions. Still, their reform efforts face vast amounts of resistance.⁶⁰

There are likely a number of rural-American prosecutors who face similar resistance. These prosecutors, although fair-minded, have had to weather and give in to pressures “from police unions, individual police officers, other conventional prosecutors, and some judges”⁶¹ and, because of this, may be seen as “progressive-minded” rather than truly progressive; at the very least, a truly progressive prosecutor should actively work to ensure the obsolescence of their own position and office. I view Krasner and Foxx with some degree of cautious optimism and skepticism because, as Abbe Smith has recently highlighted, there are several district attorneys throughout the country who have masqueraded as reformers and been anything but, with Cyrus Vance, Leon Cannizzaro, and Jackie Lacey as prominent examples.⁶²

Many aspects of the American legal system, even outside the criminal legal sphere, were formed around deeply embedded systems of class and racial subordination. The Constitution itself was originally drafted to favor, serve, and protect the interests of landowning white men.⁶³ The criminal law may aptly be characterized as both white and racist.⁶⁴ Likewise, the American

⁶⁰ See Andrew Cohen, *Reformist Prosecutors Face Unprecedented Resistance from Within*, BRENNAN CTR. FOR JUST. (June 19, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/reformist-prosecutors-face-unprecedented-resistance-within> [<https://perma.cc/L3BZ-QJ7S>].

⁶¹ Smith, *supra* note 6, at 420.

⁶² *Id.* at 416.

⁶³ See Abel A. Bartley, *The Fourteenth Amendment: The Great Equalizer of the American People*, 36 AKRON L. REV. 473, 479–80 (2003) (“Traditionally, the rights and privileges of American citizenship had been reserved exclusively for White men. Women, Africans, and Native Americans were never considered for full citizenship in the original republic. During the Constitutional Convention, the founding fathers made no provisions for African American citizenship. Each state set its own rules to govern citizenship. However, their definition of citizenship was limited and reserved to a few select White men. State citizenship did not confer all citizenship rights. Despite their polemics on egalitarianism, the founding fathers’ definition of equality never extended far enough to include African Americans or women. The fifty-five White men who met in Philadelphia, in May 1787, to write the Constitution, never considered African American citizenship. The only times African Americans were mentioned were in reference to their propertied status.”).

⁶⁴ I agree with the pronouncement that we could all “take a step back and note that when we say criminal law and justice system practices are white, we are noting that law (and its agents) have a ‘point of view.’” In her paper, Kathleen Daly sagaciously demonstrates that “(1) white justice cannot ‘hear’ or empathize with the stories of crime involving minority group members, (2) white justice over-criminalizes minority group members in policing and justice system responses, and (3) white justice expects lawbreakers to become conventional and ‘straight’ with ease and does not recognize the barriers to achieving this status that minority group members face.” Kathleen Daly, *Criminal Law and Justice System Practices as Racist, White, and Racialized*, 51 WASH. & LEE L. REV. 431, 452–53 (1994).

legal system as a whole “does not simply reflect ideas about race. The law constructs race”⁶⁵ While defense counsel are charged with the duty to use the few tools they are reserved under the law to zealously represent their clients, prosecutors, unless they are appearing in court to dismiss any and all charges, are enforcing the rules of a legal system which is inherently racist and sexist. Even the most reform-minded prosecutors cannot be called progressive given these ground rules.

Changes to prosecutorial approaches have been incremental and slow in urban centers and will likely come even slower in the rural reaches of the country, though recent Black Lives Matter protests advocating against systemic racism might instigate quick changes that (I hope) may prove me wrong.⁶⁶ Given the paucity of attorneys in rural areas,⁶⁷ the players in the criminal adjudicative process, including the prosecutor—be they elected, appointed, or procured by way of a bidding process—often stay the same for lengthy stretches of time.⁶⁸ Further, other scholars have noted that closer interpersonal relationships with police officers and other political actors in small jurisdictions may hamper policy change in rural prosecutors’ offices.⁶⁹ Perhaps it is for these reasons that rural prosecutors disproportionately send an increasingly large number of people to prisons and jails,⁷⁰ the opposite of what any progressive prosecutor would promise to do.

Given the inherent power imbalances, racial biases, and other inequities intentionally established as part of the criminal legal system, I believe it to be impossible to be a progressive prosecutor. There is a danger in getting distracted by such terminology, used as a sort of security blanket to assure those of us that hoped for change in prosecutors’ offices that change is, in

⁶⁵ Devon W. Carbado, *Afterword: Critical What What?*, 43 CONN. L. REV. 1593, 1610 (2011).

⁶⁶ See April Simpson, *Why Rural America Is Joining the Movement for Black Lives*, PEW STATELINE (June 12, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/06/12/why-rural-america-is-joining-the-movement-for-black-lives> [<https://perma.cc/S6Y5-V6F2>].

⁶⁷ See Lisa R. Pruitt, J. Cliff McKinney, II & Bart Calhoun, *Justice in the Hinterlands: Arkansas as a Case Study of the Rural Lawyer Shortage and Evidence-Based Solutions to Alleviate It*, 37 U. ARK. LITTLE ROCK L. REV. 573, 579 (2015).

⁶⁸ Valena E. Beety, *Prosecuting Opioid Use, Punishing Rurality*, 80 OHIO ST. L.J. 741, 752 (2019).

⁶⁹ See Madison McWithey, Note, *Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography, Part Two: External Constraints*, 61 B.C. L. REV. I.-49, I.-55 (2020).

⁷⁰ Michelle Mark, *There’s a Huge Divide Between What Parts of the Country Send People to Prison*, BUS. INSIDER (Sept. 6, 2016, 5:13pm), <https://www.businessinsider.com/rural-prosecutors-incarcerate-more-people-than-urban-ones-2016-9> [<https://perma.cc/TWE4-32A3>].

fact, happening. This obscures the fact—made painfully clear by the events of the past summer—that such changes are happening entirely too slowly and are leaving vulnerable people, such as people of color, behind in rural communities.

III. RACIAL INEQUITIES IN PROSECUTORS' OFFICES AND INCARCERATED POPULATIONS

One of the areas of aggravatingly slow change in prosecutors' offices throughout the country is the demography of prosecutors themselves. Three percent of elected prosecutors are men of color, and only two percent are women of color.⁷¹ Given all the other methods of procuring prosecutorial services in rural jurisdictions,⁷² it can be incredibly difficult to get an accurate gauge of both the sex and racial backgrounds of unelected prosecutors. As one of the (likely) rare women of color prosecutors, I acutely felt my distinctness while I served as a prosecutor; I looked more like and could relate more readily to the lived experience of a large number of the defendants I prosecuted than I could to those of my colleagues in the County Attorney's Office.

Even outside the specific context of being a prosecutor, when I started practicing in Northern Utah in 2006, I became the first woman of color lawyer for at least three counties (several more if counties across the border in Idaho and Wyoming are included). When prosecuting adults and juveniles in cases with a wide range of severity, from traffic violations to murder, I was often confronted with and felt alienated by the fact that, “[a]s critical race theorists have pointed out, everyone has a race, but the hidden norm in law is white.”⁷³ I now acutely understand, in a way that I did not when I started as a prosecutor, that given the inherent whiteness of the law—

⁷¹ *Tipping the Scales: Challengers Take on the Old Boys' Club of Elected Prosecutors*, REFLECTIVE DEMOCRACY CAMPAIGN (Oct. 2019), <https://wholeads.us/tipping-the-scales-read-the-report/> [<https://perma.cc/C9EM-WWZA>].

⁷² Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 181–87 (2017).

⁷³ Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL OF RTS. J. 153, 160 (1996) (quoting Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1361 (1991)).

especially criminal law—many prosecutors, including those few who are people of color, may fall into implicit bias⁷⁴ and unconscious racist patterns.⁷⁵

Implicit bias infects all of the criminal law, guiding decision making priorities of police, judges, jurors, and prosecutors alike.⁷⁶ Prosecutors, as is well known, exercise outsized influence over the criminal legal system given their broad ability to exercise discretion.⁷⁷ The potential for abuse of this discretion is significant given that “there is nothing in the law, in judicial decisions, or elsewhere to define whether an exercise of discretion,” even if motivated by implicit bias, “is wise or unwise, and judges only rarely praise or criticize prosecutors’ decision-making when prosecutors have unreviewable discretion.”⁷⁸ Implicit racial bias can make itself felt at many stages of a prosecutor’s handling of a case, from charging decisions and pretrial decisions on bail and plea bargaining to selecting juries and recommending sentences.⁷⁹

In beginning the study of bias and racism’s effects on rural criminal legal systems and prosecutors, it is helpful to note the existence of glaring

⁷⁴ “Implicit biases are unconscious, non-deliberate attitudes and stereotypes that affect individuals’ decisions for better or worse.” Bruce A. Green, *Legal Discourse and Racial Justice: The Urge to Cry “Bias!”*, 28 GEO. J. LEGAL ETHICS 177, 180 (2015) (citing Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006)).

⁷⁵ Professor Charles R. 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 R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (citing D. BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980); L. BENNETT, BEFORE THE MAYFLOWER (5th ed. 1982); J. FRANKLIN, FROM SLAVERY TO FREEDOM (5th ed. 1980); V. HARDING, THERE IS A RIVER (1981); A. HIGGINBOTHAM, IN THE MATTER OF COLOR (1978); J. KOVEL, WHITE RACISM: A PSYCHOHISTORY (1970); M. MARABLE, BLACK AMERICAN POLITICS: FROM THE WASHINGTON MARCHES—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)).

Although 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.

⁷⁶ Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 796 (2012).

⁷⁷ Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009).

⁷⁸ Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 608 (2019) (citing *State v. Steckel*, 708 A.2d 994, 1000 n. 7 (Del. Super. Ct. 1996)).

⁷⁹ Smith & Levinson, *supra* note 74, at 805–22.

disparities among the nation's most rural states. As of the 2010 Census, the most rural states by percentage of rural residents are: Maine, 61%; Vermont, 61%; West Virginia, 51%; Mississippi, 51%; Montana, 44%; Arkansas, 44%; South Dakota, 43%; Kentucky, 42%; Alabama, 41%; and North Dakota, 40%. Each of these states exhibits shockingly disproportionate minority contact with the criminal legal system as evidenced by disproportionate rates of minorities being imprisoned as compared to their share of the total population.⁸⁰ Although prosecutors' racial biases may not be the sole cause

⁸⁰ As of 2018, Vermont had 1,800 state inmates. Although Blacks made up only 2% of the population, Latinos 1%, and Native Americans a statistically insignificant percentage, they made up 9%, 5%, and 2% of the incarcerated population. *Vermont Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/VT.html> [https://perma.cc/MMJ6-S7N6].

West Virginia currently imprisons 7,100 people in state prisons, 3,300 people in local jails, 1,800 people in federal prisons, and involuntarily commits 130 people. Its incarcerated population has boomed in recent years, with the number of people incarcerated pretrial overtaking those convicted around the year 2010. Although Whites make up the overwhelming majority of West Virginians at 93%, they only make up 65% of the incarcerated population. In contrast, Blacks, Latinos, and Native Americans only make up 3%, 1%, and a statistically insignificant minority of the population, but they represent 28%, 6%, and 1% of those imprisoned. *West Virginia Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/WV.html> [https://perma.cc/B7AS-KXB4].

Mississippi imprisons 19,000 people in state prisons, 7,500 in local jails, 2,100 in federal prisons, and involuntarily commits thirty people. Mississippi is remarkable due to its incredibly high incarceration rate of 1,039 per 100,000 population, well above the national average of 698 per 100,000 population. Unsurprisingly, racial and ethnic disparities are evident in Mississippi's imprisoned population: although Whites comprise 58% of the population, they make up only 30% of imprisoned people, whereas Blacks, who comprise 37% of the population, make up 57% of the incarcerated. Inequities can also be seen with the Latino population, which only comprises 3% of the total population but 12% of the incarcerated. *Mississippi Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/MS.html> [https://perma.cc/RG2P-ZYML].

Montana incarcerates 3,700 people in state prisons, 1,800 in local jails, 1,400 in federal prisons, 300 in tribal carceral institutions, and sixty people are involuntarily committed. Montana also exceeds the national average of number of people incarcerated per 100,000 at 726 people. Whites are underrepresented in prisons, making up 88% of the general population but only 69% of the incarcerated. Montana is unique in the extreme overrepresentation of Native Americans in jail or prison: although they make up 6% of the population, they account for 22% of the incarcerated. Latinos and Blacks are also overrepresented but at somewhat negligible rates compared to Natives. *Montana Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/MT.html> [https://perma.cc/4KRY-SPZ2].

Arkansas incarcerates 18,000 people in state prisons, 5,300 in local jails, 2,300 in federal prisons, and involuntarily commits 190 people. White people, again, are underrepresented, making up 75% of the general population but only 50% of the incarcerated population. Black people only make up 15% of Arkansas' population but comprise 42% of those imprisoned. Oddly, the same disparities are missing with other ethnic groups: although Latinos make up 6% of the population, they are 7% of the incarcerated, and Natives make up 1% of Arkansans

of disproportionate contact with the criminal legal system, such biases go hand in hand with other dynamics—for example, laws initially drafted to have disproportionate effects on people of color, poverty, and lower socioeconomic status.⁸¹

CONCLUSION

This paper is a warning. Although large city “progressive prosecutors” are lauded for meeting the basic standards of their jobs, minority communities of color in rural settings are ignored during their contacts with

and 1% of those incarcerated. *Arkansas Profile*, PRISON POL’Y INITIATIVE <https://www.prisonpolicy.org/profiles/AR.html> [<https://perma.cc/3252-WDWE>].

South Dakota incarcerates 4,000 people in state prison, 1,700 in local jails, 1,200 in federal prisons, ten involuntarily committed, and 170 in Indian Country jails. Whites make up 85% of the population but only 55% of the incarcerated. In contrast, Natives only make up 9% of the population but 29% of the incarcerated. Blacks, at 3% of the population, make up 8% of the incarcerated, and Latinos, who only make up 1% of all South Dakotans, comprise 6% of the incarcerated population. South Dakota has a remarkably high incarceration rate, close to that of Arkansas, at 855 people per 100,000. *South Dakota Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/SD.html> [<https://perma.cc/4FQJ-8UFA>].

Kentucky incarcerates 24,000 people in state prisons, 13,000 in local jails, 3,500 in federal prison, and fifty people are involuntarily committed. Kentucky’s incarceration rate, like those of several other significantly rural states, is quite high, at 869 people per 100,000 population. Kentucky far outstrips the national average, and its rate of incarceration is orders of magnitude greater than that of other founding NATO countries. Although Whites make up 86% of Kentucky’s population, they are only 64% of the incarcerated, whereas Blacks, at 8% of the total population, comprise 29% of the incarcerated. *Kentucky Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/KY.html> [<https://perma.cc/N6E4-GRX2>].

Alabama imprisons 28,000 people in state prisons, 13,000 in local jails, 4,300 in federal prisons, and holds 170 people in involuntary commitment. Alabama also has a remarkably high incarceration rate at 946 per 100,000 population. Whites make up 67% of the general population but only 42% of the incarcerated, whereas Blacks make up 26% of the population and 54% of the incarcerated. Surprisingly, other minorities such as Latinos and Native Americans are not overrepresented in Alabama prisons and jails. *Alabama Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/AL.html> [<https://perma.cc/W72L-J42S>].

North Dakota incarcerates 1,700 people in state prisons, in addition to holding 1,400 people in local jails, 1,000 in federal prisons, 200 in Indian Country jails, and fifty involuntarily committed. Whites are, once more, drastically underrepresented, making up 89% of North Dakotans but only 59% of the incarcerated, whereas Natives comprise only 5% of the population but 29% of the incarcerated. Latinos are 2% of North Dakotans but 6% of the incarcerated, and Blacks are only 1% of the general population but 5% of the incarcerated. *North Dakota Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/ND.html> [<https://perma.cc/94FD-J439>].

⁸¹ Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/4WK3-5ABB>].

the criminal legal system. We should not forget that although prosecutors may be improving in large cities, such change comes slowly in rural areas, usually to the great detriment of rural Americans of color.