

# Elections and Pro-Prosecution Culture

Maybell Romero\*

The 2020 presidential election and campaign leading up to it was unique and historic for a veritable panoply of reasons: the first impeachment of Donald Trump,<sup>1</sup> the cancellation of campaign events and disruption of primary elections due to the COVID-19 pandemic,<sup>2</sup> Donald Trump and many of his family and close associates contracting COVID-19 themselves,<sup>3</sup> the death of Justice Ruth Bader Ginsburg,<sup>4</sup> and the quick confirmation of Justice Amy Coney Barrett,<sup>5</sup> among others. Perhaps one of the most momentous events of the campaign season was then Democratic nominee Joe Biden announcing his choice of vice-presidential nominee, Kamala Harris. As the first woman, Black, and Asian-American vice-presidential nominee and, eventual, Vice President, Harris has already become something larger than her own self—a symbol of hope for the many Americans and others around the world who have been waiting for more diverse people in the highest levels of American government.

I watched the Democratic National Convention (DNC) back in August 2020 in varying states of fascination,<sup>6</sup> boredom,<sup>7</sup> and embarrassment.<sup>8</sup> While there were

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<sup>1</sup> Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html> [https://perma.cc/G2T2-HW89].

<sup>2</sup> Katie Glueck, *Joe Biden Will Host 'Virtual Events' as Coronavirus Fears Heat Up*, N.Y. TIMES (Jun. 18, 2020), <https://www.nytimes.com/2020/03/11/us/politics/biden-coronavirus-campaign-events.html> [https://perma.cc/QUB5-U4DM].

<sup>3</sup> Peter Baker & Maggie Haberman, *Trump Tests Positive for the Coronavirus*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/2020/10/02/us/politics/trump-covid.html> [https://perma.cc/5RSN-4BG4].

<sup>4</sup> Clare Foran, Manu Raju & Ted Barrett, *McConnell Vows Trump's Nominee to Replace Ginsburg Will Get Senate Vote, Setting Up Historic Fight*, CNN (Sept. 19, 2020), <https://www.cnn.com/2020/09/18/politics/congress-fight-rgb-seat/index.html> [https://perma.cc/G8JR-FNB4].

<sup>5</sup> Lisa Mascaro, *Barrett Confirmed as Supreme Court Justice in Partisan Vote*, ASSOCIATED PRESS (Oct. 26, 2020), <https://apnews.com/article/election-2020-donald-trump-virus-outbreak-ruth-bader-ginsburg-amy-coney-barrett-82a02a618343c98b80ca2b6bf9eafe07> [https://perma.cc/JHE9-TNWW].

<sup>6</sup> With now Vice President Harris' acceptance speech. Eric Mack, *User Clip: Kamala Harris DNC Speech*, C-SPAN (Aug. 19, 2020), <https://www.c-span.org/video/?c4900743/user-clip-kamala-harris-dnc-speech> [https://perma.cc/WPB6-7NV7].

<sup>7</sup> With lengthy segments of the event.

<sup>8</sup> Anyone remember this rendition of "What It Is"? *User Clip: Billy Porter & Stephen Stills DNC Performance*, C-SPAN (Aug. 17, 2020), <https://www.cspan.org/video/?c4900187/user->

many reasons why I decided to watch much of the convention, I did so in large part out of curiosity surrounding Harris' acceptance of the vice-presidential nomination. Up to that point, Harris' record as a prosecutor, both on the local level and at the state level, had been justifiably scrutinized,<sup>9</sup> with many, me included, having considered her previous experience as a prosecutor as disqualifying.

She embraced and recast her time as a prosecutor in her acceptance speech, which perhaps should have come as a surprise to no one after she had campaigned as a proud prosecutor back when she was competing against other candidates, including Joe Biden. On the third day of the convention, she related that:

The fight for justice is a shared responsibility. That led me to become a lawyer, a district attorney, attorney general . . . . And at every step of the way, I've been guided by the words I spoke from the first time I stood in a courtroom: Kamala Harris, for the People.<sup>10</sup>

While I never had the same extensive experience practicing as an attorney, let alone a prosecutor, in California, I have had opportunities to stand up in courtrooms in Los Angeles as a "certified" law student with limited supervised practice responsibilities.<sup>11</sup> Because of that experience, I, too, have uttered a similar pronouncement: Maybell Romero, for the People. I had to unlearn this form of address when I went to start my career after law school as a county level prosecutor in northern Utah. When I stood to enter my appearance for the first time as a prosecutor in Utah I began as I had learned back in California—Maybell Romero, for the People.

The judge, the bailiffs, and the other attorneys in the room burst into laughter. "What do you think this is, Ms. Romero? Law & Order?" the judge asked. Well, if I wasn't supposed to refer to myself as representing the people, what was I supposed to do, I asked one of my co-workers who happened to be in the room. "You're 'the State,' Maybell," he explained. I look back on this exchange, a lot, in my day-to-day work. In law school, I took seriously the admonition that if I wanted to reform the

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clip-billy-porter-stephen-stills-dnc-performance [https://perma.cc/GLU2-WS7S].

<sup>9</sup> Lara Bazelon, *Kamala Harris Was Not a 'Progressive Prosecutor'*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/opinion/kamala-harris-criminal-justice.html> [https://perma.cc/59F5-XCXA]; C.J. Ciaramella, *Kamala Harris' New Book Tries to Massage Her Record as a Prosecutor, But the Facts Aren't Pretty*, REASON (Jan. 9, 2019), <https://reason.com/blog/2019/01/09/kamala-harris-new-book-tries-to-massage> [https://perma.cc/NZ47-7C4Q].

<sup>10</sup> Mack, *supra* note 6.

<sup>11</sup> California Rules of Court allow for law students to take on limited practice duties, including in court under some circumstances so long as they (1) have completed a year of law school at an ABA or State Bar of California accredited school or passed the California first year exam known as the "baby bar," (2) are enrolled in law school in good standing, and (3) have taken and passed or are currently taking evidence and civil procedure. California Rules of Court, Rule 9.42 (2021), [https://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9\\_42](https://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_42) [https://perma.cc/5E97-XEHJ].

criminal justice system that I could do so by being a good prosecutor. My own experience trying to be a good prosecutor has convinced me that they really do not exist.

I believe that under most circumstances, being a prosecutor, even with the loftiest ideals, either radicalizes you out of the job or makes you succumb to its demands. “The People” is something very distinct from “The State”; being a prosecutor will separate you from the people and turns you in to a part of the state that often works against them. It is a role that one takes on, and one that, once you step into, can be hard to see outside of. This is especially true when abandoning the goal of criminal legal system reform is met with political reward.

I was not surprised but was still disheartened to see the pro-carceral turn that then presidential nominee Biden and the Democratic Party took during the DNC. Apart from touting now Vice President Harris’ prosecutorial experience, there were segments of the convention appealing to carceral feminists by lauding the Violence Against Women Act (VAWA)<sup>12</sup> and continuing the myth of rape-kit “backlogs.”<sup>13</sup> At one point, Biden explained that Americans should, generally, support cops, and that cops, on the whole, “are good.”<sup>14</sup> While some were alarmed by the pro-carceral and pro-law enforcement rhetoric employed during the convention, many reasoned that Biden was likely setting a more moderate tone for himself going into the presidential race against then-President Trump.

In the wake of the 2020 presidential election, and in recent district attorney and prosecutorial elections as well, candidates have attempted to tout themselves as “progressive,” somehow. What exactly this is supposed to signal is a matter of

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<sup>12</sup> “The term ‘carceral feminism’ was first coined in 2007 by Elizabeth Bernstein as the critique of a feminist approach to contemporary social issues that relies on the carceral state—police, prisons, and prosecutions—as the primary method for realizing feminist goals.” Chi Adanna Mgbako, *The Mainstreaming of Sex Workers’ Rights as Human Rights*, 43 HARV. J. L. & GENDER 91, 109 (2020) (citing Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism,”* 18 DIFFERENCES: A JOURNAL OF FEMINIST CULTURAL STUDIES, 128, 128–51 (2007)). The Violence Against Women Act (VAWA) has served as a “major lever of legitimacy for expanding the carceral state” by delivering “unprecedented federal funding for sexual and domestic violence prosecution.” Naomi Murakawa, *Racial Innocence: Law, Social Science, and the Unknowing Racism in the US Carceral State*, 15 ANN. REV. L. & SOC. 473, 485 (2019) (internal citations omitted). While domestic violence was long ignored by prosecutors and police, the “passage of VAWA is attributable in part to the success of the battered women’s movement in persuading policymakers of the universality—whiteness—of domestic violence.” Leigh Goodmark, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 24 (2011).

<sup>13</sup> Margaret Ybos has done much to dispel the myth that these “backlogs” are a function of a lack of resources, arguing that this “narrative doesn’t only ignore law enforcement’s unwillingness to take responsibility [for being unwilling to investigate rape]—it enables it.” Margaret Ybos, Heather Marlowe, *Five Ways the Media-Driven Rape Kit ‘Backlog’ Narrative Gets It Wrong*, THE APPEAL (Mar. 5, 2018), <https://theappeal.org/five-ways-the-media-driven-rape-kit-backlog-narrative-gets-it-wrong-99a02956df06/> [https://perma.cc/46AA-DDU8].

<sup>14</sup> Reid J. Epstein & John Eligon, *Biden’s ‘Most Cops Are Good’ Comment Rankles Some Progressives*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/us/elections/biden-most-cops-are-good-comment-rankles-some-progressives.html> [https://perma.cc/BA9X-K75R].

debate. As Professor Benjamin Levin has noted in his recent essay *Imagining the Progressive Prosecutor*, the term “progressive prosecutor” can mean many different things to different people.<sup>15</sup> He offers four different typologies of “progressive prosecutor”: 1) progressives who prosecute, 2) the “proceduralist prosecutor,” 3) the “prosecutorial progressive,” and 4) the “anti-carceral prosecutor.”<sup>16</sup>

I agree with Professor Levin, that, of all these visions of prosecution, the “anti-carceral prosecutor” also holds the greatest promise and appeal for me.<sup>17</sup> For all of the defenses of “anti-carceral” prosecutors as being ideal and progressive, I remain unconvinced that prosecution can ever be redeemed. Even the most well-meaning prosecutors operate in a system that is carceral in its fundamental nature, and those who bravely try to fight against it will run into the many other institutional bars that prevent a prosecutor from ever being truly progressive rather than (merely) reformist/reforming: police, judges, and even other prosecutors.

A number of prosecutors who have been labeled or have labeled themselves as “progressive” have encountered substantial roadblocks to their reformist efforts from reactionary line prosecutors. I addressed this in my previous work, *Prosecutors and Police: An Unholy Union*,<sup>18</sup> which opened discussing the open insubordination by line prosecutors against reformist St. Louis County Prosecutor Wesley Bell, which included joining their local police union rather than cooperate in making much needed changes to the function of their office. That work warned that, among other things, the increasingly close relationships between police and prosecutors would unduly influence prosecutors and create a toxic culture that would find itself in opposition to reforms in the criminal legal system.

We have seen exactly that with the election of district attorneys that have been lauded as “progressive”: Just because you change the face of an organization does not mean that the body of an organization changes as well, at least not immediately. With the civil service protections, professional associations, and even unions to which many line prosecutors belong, my fear is that change will come as a glacial pace with much wailing and gnashing of teeth.

Watching Los Angeles District Attorney George Gascón’s treatment by line prosecutors has left me increasingly cynical about the prospect of district attorneys leading changes in criminal legal system, and that is no fault of Gascón’s. Gascón campaigned on what many considered a very “progressive” program, including promising to halt use of sentencing enhancements, as well as the death penalty. He won with a significant margin of seven percent, and his win sparked a great deal of optimism for the future of real criminal justice in Los Angeles. Professor Jody Armour remarked in an interview with Los Angeles public radio station KCRW that

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<sup>15</sup> Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1417 (2021).

<sup>16</sup> *Id.* at 1418.

<sup>17</sup> *See id.* at 1450.

<sup>18</sup> *See generally* Maybell Romero, *Prosecutors and Police: An Unholy Union*, 54 U. RICH. L. REV. 1097 (2020).

Gascón's win was a "triumph of the possibility of protests in the street translating to real action at the ballot box."<sup>19</sup>

I was not surprised when assistant prosecutors began to mutiny against their new boss. Rather than being concerned with their duties as prosecutors as subscribed in the ABA Model Rules to "seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession"<sup>20</sup> as any other lawyer should, Los Angeles County line prosecutors through the Association of Deputy District Attorneys of Los Angeles County (ADDA) sued the newly elected prosecutor, advancing a specious argument that the District Attorney cannot exercise such discretion, while never lodging any complaints about plea bargaining or discretionary charging decisions in the past.<sup>21</sup>

Prosecutors, famously, are powerful and traditionally exercise great discretion in their duties. They are also charged with the unique duty to "seek justice within the bounds of the law, not merely to convict." I look forward to following up this (very) short Essay with a full-length article examining why prosecutorial culture has strayed so far from this ideal and why our faith cannot be placed solely in electing "progressive" prosecutors who do not have the power to clean reactionary rubbish out of their offices.

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<sup>19</sup> Danielle Chiriguayo & Amy Ta, *How George Gascón Might Change the LA District Attorney's Office—The Largest in the US*, KCRW: PRESS PLAY WITH MADELEINE BRAND (Nov. 6, 2020), <https://www.kcrw.com/news/shows/press-play-with-madeleine-brand/la-district-attorney-national-results-election-2020/jackie-lacey-concede-george-gascon-progressive-prosecutors> [<https://perma.cc/N4YP-XQEB>].

<sup>20</sup> MODEL RULES OF PROF'L CONDUCT, PREAMBLE (2020).

<sup>21</sup> In an interview for the podcast "Chasing Justice," Boston District Attorney Rachel Rollins pointed out that "None of you [who criticize 'progressive' prosecutors] cared about prosecutorial discretion as this train was flying 100 miles an hour toward mass incarceration." Chasing Justice, *Season 1 Finale: Overcoming Obstacles to Our Movement With DA Rachael Rollins*, at 52:09 (Aug. 11, 2020), <https://podcasts.apple.com/us/podcast/chasingjustice/id1517729177?i=100048777353> [<https://perma.cc/A5ED-ZMXM>].

