

MOVING PAST “PROGRESSIVE” PROSECUTION IN THE WAKE OF THE TRUMP ADMINISTRATION

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INTRODUCTION

A year out from the end of the Trump presidency, much of the country seems to remain sharply divided between those who felt the end came entirely too slowly and those who still refuse to admit that Trump lost the election. Trump seemed to relish conflict and reliably used it as a political tool, fomenting it further by engaging in “racist rhetoric . . . and socially divisive policies.”¹ Trump’s policies and communications in several areas were inconsistent and even incoherent.²

Trump’s messaging on criminal law and policy often appeared confused and contradictory as well. On June 1, 2020, as an incumbent president campaigning for re-election and speaking on the then-recent murder of George Floyd at the hands of police, Trump stated, “I am your president of Law and Order,” returning to a theme pervasive throughout his administration.³ As Professor Trevor George Gardener recently addressed,

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1. Roy L. Brooks, *Subordination Discourse: A Critique of Trump’s Diversity Model*, 4 U. PA. J.L. & PUB. AFF. 203, 204 (2019) (citations omitted).

2. See Bridie Pearson-Jones, *Donald Trump Has Been on a Very Long, Very Incoherent Twitter Rant*, INDY 100 (May 28, 2017), <https://www.indy100.com/news/donald-trump-crashed-twitter-loving-viral-potus-fake-news-theresa-may-angela-merkel-7760336> [<https://perma.cc/BJ4B-RYPV>]; see also Matt Flegenheimer, *What’s a ‘Covfefe’? Trump Tweet Unites a Bewildered Nation*, N.Y. TIMES (May 31, 2017), <https://www.nytimes.com/2017/05/31/us/politics/covfefe-trump-tweet.html?mtrref=www.google.com> [<https://perma.cc/Z4KS-JWNA>]; Carolina Arlota, *How President Trump’s War on Science Undermines Cost-Benefit Analysis of Climate Policies*, 50 ENV’T. L. REP. 10999, 11015 (2020).

3. CBS News, *Trump: “I am Your President of Law and Order”*, YOUTUBE (June 1, 2020), <https://www.youtube.com/watch?v=1V46JPtj31s> [<https://perma.cc/M4SN-PEEZ>]. Since Trump was permanently banned from Twitter on January 8, 2021, in the wake of the of the mob attack on the Capitol on January 6, 2021, it is now more difficult to find examples of his tweets consisting merely of the words “Law and Order,” though examples can be found secondhand on different news sites and blogs See, e.g.,

this focus on “Law and Order” served two purposes: 1) to focus the public’s attention on a false myth of increasing rates of minority crime, and 2) to shift that same focus away from the White House itself and the criminal conduct of not just Trump himself but also of others working within the administration.⁴ But Trump also engaged in some criminal justice policy making that contradicted this trend. He touted the First Step Act⁵ as an important measure in criminal justice reform,⁶ though scholars like Professor Rachel Barkow are correct in explaining that the First Step Act is “just the outlier on what would otherwise be a truly abysmal record on criminal justice issues.”⁷

Given President Trump’s “Law and Order” messaging and his flagrant and theatrical support of the police, it is not surprising to look back and see that a major rise of the “progressive prosecution” movement aligns very closely in time to the Trump years. Kim Foxx was elected and assumed office as Cook County State’s Attorney in 2016 after promising greater transparency.⁸ Larry Krasner in Philadelphia was elected District Attorney not long after in 2017 on promises of limiting and ending mass incarceration, treating children involved in the juvenile justice system like

Beth Schwartzapfel, *What Trump Really Means When He Tweets “LAW & ORDER!!!”*, MARSHALL PROJECT (Oct. 7, 2020), <https://www.themarshallproject.org/2020/10/07/what-trump-really-means-when-he-tweets-law-order> [<https://perma.cc/T5FN-J2PF>]; Jamie Samhan, *Donald Trump Gets Mocked for ‘Law & Order’ Tweet*, ET CANADA (May 31, 2020), <https://etcanada.com/news/651250/trump-gets-mocked-over-law-order-tweet/> [<https://perma.cc/2G9W-4Z3A>].

4. Trevor George Gardener, *Law and Order as the Foundational Paradox of the Trump Presidency*, 73 STAN. L. REV. 141 (2021). Trump’s brand of “Law and Order” was unique in its extreme regressiveness which encouraged or promised police violence and the increased use of the death penalty, among other things. Mona Lynch, *Regressive Prosecutors: Law and Order Politics and Practices in Trump’s DOJ*, 1 HASTINGS J. CRIME & PUNISH. 195, 203 (2020).

5. The First Step Act has “two main goals: to reduce overly long federal sentences and to improve conditions in federal prison.” Emily M. Smachetti & Alix I. Cohen, *Introduction to the First Step Act*, 69 DOJ J. FED. L. & PRAC. 39, 39 (2021). It reduces mandatory minimum sentences in certain drug convictions, including those of drug dealers, and allows prisoners to request compassionate release directly from courts without the intervention of the Bureau of Prisons. *Id.*

6. Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791, 805 (2019).

7. German Lopez, *Trump’s Criminal Justice Policy, Explained*, VOX (Sept. 11, 2020), <https://www.vox.com/2020-presidential-election/21418911/donald-trump-crime-criminal-justice-policy-record>.

8. Steve Schmadeke, *Kim Foxx Promises ‘New Path’ of Transparency as Cook County State’s Attorney*, CHI. TRIB. (Dec. 1, 2016), <https://www.chicagotribune.com/news/breaking/ct-kim-foxx-states-attorney-met-20161201-story.html>.

children, and exonerating the innocent, among other promises.⁹ Wesley Bell was elected St. Louis County prosecutor in 2018.¹⁰

This Essay looks at the interrelationship between the Trump administration and progressive prosecutors throughout the country, illuminating how self-described progressive prosecutors postured in opposition to Trump. It examines how the progressive prosecutor movement reacted on losing one of its main antagonists. I argue that the term “progressive prosecutor” has, in essence, become vacant, meaningless, and political, and that rather than perpetuating the use of such a label, another should be instituted in its place that emphasizes forward-looking problem solving as advocated in the American Bar Association’s Standards for the Prosecution Function.¹¹

I. TRUMP AND THE DEMONIZATION OF PROGRESSIVE PROSECUTORS

While American political discourse has not always been civil or respectful, Trump was especially content to demonize anything he did not like or which did not align with his own goals. He has used language referring to undocumented Latin American immigrants fit to use only in the context of discussing vermin, stating that they would “pour into and infest our country,” and that deported immigrants were “animals.”¹² In fact, Trump’s first campaign speech traded in this type of demonization, quickly launching into a now infamous assessment of immigration from Mexico: “When Mexico sends its people, they’re not sending their best. They’re not sending you. They’re not sending you. They’re sending people that have lots of problems, and they’re bringing these problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I

9. *Promises Kept*, LARRY KRASNER FOR DISTRICT ATTORNEY, <https://krasnerforda.com/promises-kept> [<https://perma.cc/AG7V-LLFK>].

10. Astead W. Herndon, *Wesley Bell, Ferguson Councilman, Unseats St. Louis County Prosecutor*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/us/politics/wesley-bell-st-louis-election-result.html> [<https://perma.cc/4QU8-T8CQ>].

11. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, AM. BAR ASS’N (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

12. Ed Kilgore, *Trump Uses Language of Exterminators in Attack on ‘Illegal Immigrants’*, N.Y. MAG. (June 19, 2018), <https://nymag.com/intelligencer/2018/06/trump-uses-language-of-exterminators-about-immigrants.html?gtm=bottom>m=bottom>.

assume, are good people.”¹³

But immigrants aren't the only people or group that Trump has demonized during his campaign and administration. Trump has had an antagonistic relationship with the press, dubbing them “the enemy of the American People” in his seeming mission to categorize everything he interacted with as friend or foe and dubbing those foes “public enem[ies.]”¹⁴ Being the expression of some racist, xenophobic, and intolerant deeper-seated id, and combined with his approach to politics, Trump’s fractious worldview should not have come as a surprise. The seeming imprimatur of the government of such tactics and the bullying, demonizing language gives it a validity and weight that it would not have otherwise.¹⁵

To go through an exhaustive list of people in groups Trump has demonized, bullied, or tried to stoke fear against would take many law review articles, which are out there already for the reader to find. Trump, however, has also attempted to demonize ideas and analytical frameworks. In September of 2020, Trump issued an executive order seemingly attempting to root the influence of Critical Race Theory and other “race-based ideologies” out of the federal government.¹⁶ A memo dated September 4, 2020, addressed to “the heads of executive departments and agencies” directed all agencies to

13. Amber Phillips, ‘They’re Rapists.’ *President Trump’s Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/> [https://perma.cc/DZ6F-7F2Y]. In a recent essay, Karla Maradiaga very poignantly referenced the trauma of being a Honduran-American in law school during the Trump administration:

Personally, I was trying to tease holdings out of opinions by judges that upheld bigotry and racism again and again while also being bombarded with images of my community suffering everywhere. I saw images of despondent Central American children on click bait articles every time I logged into Facebook. I heard Trump’s rhetoric demonizing Central American immigrants in class as my Constitutional Law professor apologetically fleshed out the government’s argument for declaring the immigration of Central Americans a national emergency.

Karla Maradiaga, *Un Astro De Nitida Luz*, 29 BERKELEY LA RAZA L.J. 27, 28–29 (2019).

14. RonNell Anderson Jones & Lisa Grow Sun, *Making an Enemy of the Press*, 2017 U. ILL. L. REV. ONLINE (2017).

15. Helen Norton, *Government Speech and the War on Terror*, 86 FORDHAM L. REV. 543 (2017).

16. See Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2022), <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-race-sex-stereotyping/> [https://perma.cc/96UF-ZLWZ].

begin to identify all contracts or other agency spending related to any training on “critical race theory,” “white privilege,” or any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil.¹⁷

Given the language of this memorandum, it is abundantly clear that neither Trump nor anyone else in the White House had any idea what Critical Race Theory actually is or does.

Especially toward the last days of the Trump presidency, both he and his administration officials began demonizing another concept—the progressive prosecutor. This began when Trump established a Commission on Law Enforcement and the Administration of Justice in October of 2019. Among other issues, the Commission was tasked with “study[ing] issues related to law enforcement and the administration of justice” as well as to make recommendations with respect to those issues, including “refusals by State and local prosecutors to enforce laws or prosecute categories of crimes.”¹⁸ The report attempted to explain why progressive prosecutors pose a threat:

A threat to the rule of law, and the ability of law enforcement to uphold it, has recently come from self-identified “progressive” or “social reform” prosecutors who purport to share the distrust and cynicism for law enforcement that some in their communities have. Despite their election to a position to enforce the law, these prosecutors view the very laws they enforce as unjust and illegitimate, and therefore seek to undermine that system by unilaterally deciding not to enforce certain laws. Unlike

17. OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-20-34, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (Sept. 4, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf> [https://perma.cc/65Y7-8VM5].

18. U.S. DEP’T OF JUSTICE, PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, FINAL REPORT 304 (2020), <https://www.justice.gov/file/1347866/download> [https://perma.cc/4C5G-C26F].

standard prosecutorial discretion, in which a prosecutor assesses whether to pursue charges after a case-by-case examination of the individual circumstances, non-enforcement policies remove that discretion entirely by prescribing that certain laws will be categorically unenforced.¹⁹

In addition to the language of the report, Trump administration officials continued attacking progressive prosecutors and the values espoused by the progressive prosecution movement; then Attorney General Bill Barr stated in an August 2019 speech to the Fraternal Order of Police in New Orleans that such prosecutors were “demoralizing to law enforcement and dangerous to public safety” since they “spend their time undercutting the police, letting criminals off the hook, and refusing to enforce the law.”²⁰ Perhaps this should not come as a surprise coming from Bill Barr given that he authored the 1992 working paper “The Case for More Incarceration.”²¹

II. “PROGRESSIVE” PROSECUTORIAL POSTURING IN OPPOSITION TO TRUMP

Trump’s election victory in 2016 was met with disbelief, horror, and outrage by many of those who identified themselves as Democrats or progressives. Many leading political news services predicted a sure win for Trump’s Democratic opponent, Hillary Clinton, and those feeling positive about the potential outcome were, understandably, let down.²² During and following this election, it seemed anyone in opposition and to the left politically of Trump could term themselves as “progressive,” including

19. *Id.* at 6. This assessment ignores the fact that many prosecutorial offices declined to prosecute entire categories of crime even before the larger “progressive prosecution” movement, nor seems to take any issues with offices that decide to always prosecute certain types of crimes as departing from “traditional prosecutorial discretion” either.

20. Michael Balsamo, *Barr Defends Police, Takes Swipe at Progressive Prosecutors*, PBS: NEWS HOUR (Aug. 12, 2019), <https://www.pbs.org/newshour/nation/barr-defends-police-takes-swipe-at-progressive-prosecutors> [<https://perma.cc/SR9D-Y56E>].

21. WILLIAM P. BARR, U.S. DEP’T OF JUST., *THE CASE FOR MORE INCARCERATION* (1992) (available at <https://www.ojp.gov/pdffiles1/Digitization/139583NCJRS.pdf> [<https://perma.cc/57VQ-LL3X>]).

22. This foolhardy self-assurance was mocked in the Saturday Night Live sketch the next week called “Election Night.” Saturday Night Live, *Election Night*, YOUTUBE (Nov. 13, 2022), <https://www.youtube.com/watch?v=SHG0ezLiVGc>.

Clinton herself, whom many considered to be more appropriately characterized as politically moderate.²³ The term “progressive” became a much larger umbrella under which many trying to withstand the Trump storm could take shelter.

Progressive prosecutors, or at least those who would term themselves as such, started making resistance to the Trump administration one of their campaign promises. In that sense, being anti-Trump became shorthand for being progressive, a sort of political signifier. For example, one of Wesley Bell’s campaign websites has a section dedicated to “[F]ighting President Trump’s anti-immigration agenda and increasing trust between immigrants and police.”²⁴ Kim Foxx in Cook County also established herself as anti-Trumpist and therefore progressive by opposing the administration’s anti-immigrant policies and courthouse roundups.²⁵ She later sued the Trump administration over changes to immigration rules in 2019.²⁶ Then-New Orleans City Council member and now Orleans Parish District Attorney²⁷ Jason Williams gave a speech on the steps of New Orleans City Hall in January 2017 stating “I say to Donald Trump, I say to Mr. Bannon, not on my watch, not in my city, not in my country.”²⁸ These actions by district attorneys were laudable, necessary, and enough to get them widely regarded as progressives and firebrands.

23. See Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 811 (2020).

24. *Resist the Trump Administration*, VOTE WESLEY BELL, <https://www.votewesleybell.com/protect-victims-rights-and-ensure-equal-justice> [<https://perma.cc/7BNF-PTD2>].

25. Curtis Black, *Where Does Criminal Justice Reform Stand One Year After Kim Foxx Elected?*, CHI. REP. (Dec. 7, 2017), <https://www.chicagoreporter.com/where-does-criminal-justice-reform-stand-one-year-after-kim-foxx-elected/> [<https://perma.cc/KPW2-ZHE7>].

26. Juan Perez Jr., *Cook County State’s Attorney Kim Foxx and Activists Sue Trump Administration Over Proposed Immigration Rules That Could Hurt Local Health System*, CHI. TRIB. (Sept. 24, 2019), <https://www.chicagotribune.com/politics/ct-cook-county-immigration-activist-lawsuit-20190925-4jvd6tykqjgtbkkdakmpf4cfoq-story.html>.

27. Nick Chrastil, *Jason Williams Sworn in as Orleans Parish DA, Promising ‘Justice that Endures’*, LENS NOLA (Jan. 11, 2021), <https://thelensnola.org/2021/01/11/jason-williams-sworn-in-as-orleans-parish-da-promising-justice-that-endures/> [<https://perma.cc/WQU7-Z87T>].

28. *‘Not in My City, Not in My Country’: Jason Williams Gives Fiery Speech at #MuslimBan Protest*, WGNO (Jan. 30, 2017), <https://wgno.com/news/politics/not-in-my-city-not-in-my-country-jason-williams-gives-fiery-speech-at-muslimban-protest/> [<https://perma.cc/YP29-8BTU>].

A. “Progressive” Prosecution After Trump

It is generally easier to be against policy than to make policy, which is true for several reasons. A path dependence model would explain this difficulty by arguing that institutional structures and cultures are very “sticky.”²⁹ There are people within such institutions who would rather not have any change happen, further complicating matters.³⁰ While it may be difficult to pin down in all instances why those who make up an institution would be incentivized to continue with the status quo versus making policy changes, one explanation seems obvious—the ease and familiarity of keeping things the same as they ever were.

I would argue this happened to a large extent with then-Vice Presidential candidate Kamala Harris’s labelling of herself as a “progressive” prosecutor when she was in California, and with Merrick Garland’s appointment as Attorney General. Harris attempted to brand herself as a “progressive” prosecutor in her autobiography, *The Truths We Hold: An American Journey*, explaining that, as a prosecutor, her aim was “to speak up for those whose voices aren’t being heard, to see and address the causes of crime, not just their consequences, and to shine a light on the inequality and unfairness that lead to injustice.”³¹ I, however, agree with assessments like those of my colleague Professor Lara Bazelon: while Harris may have been ahead of her time on some policies in matters, she is not close to a progressive prosecutor. Her actions of fighting to uphold wrongful convictions, laughing at the concept of legalized marijuana, and threatening parents whose children miss school with truancy prosecutions in and of themselves disqualifies her from being anything near progressive.³² Despite her public posturing, her office did not put progressive changes into practice.

There’s been a great amount of debate on the left regarding whether President Biden can call himself progressive as well. During the 2020

29. Bryan D. Jones, Tracy Sulkin & Heather R. Larsen, *Policy Punctuations in American Political Institutions*, 97 AM. POLI. SCI. R. 151, 152 (2003).

30. See generally Ian Greener, *Understanding NHS Reform: The Policy-Transfer, Social Learning, and Path-Dependency Perspectives*, 15 GOVERNANCE 161 (2002).

31. KAMALA HARRIS, *THE TRUTHS WE HOLD: AN AMERICAN JOURNEY* 49–50 (2019).

32. 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/5FZE-5DHE].

presidential campaign and election, he was often deemed to be as such just by standing in contrast to President Trump. Many had hoped Biden would be a forceful progressive presence upon election to the presidency and had hoped to have someone that they would deem progressive heading the Department of Justice. Instead, they got Merrick Garland. Instead of a civil rights attorney or perhaps a public defender to lead the Department of Justice,³³ Biden chose a D.C. Circuit Court judge who practiced at Arnold and Porter and then switched to being a federal prosecutor.³⁴

“Progressive” prosecution has become a trend, one where claiming to be a progressive prosecutor has distinct political advantages even if no radical change is pursued at all. Darcy Covert argued in her essay for *The Atlantic*, “The False Hope of the Progressive Prosecutor Movement,” that many goals that have been labeled as “progressive” are not as revolutionary as their label might promise.³⁵ This includes not prosecuting minor offenses, using more problem-solving courts, and collecting more data on prosecutorial decision making and processes.³⁶

The focus on elected district attorneys as progressive prosecutors also misses a key dimension in trying to change the culture of different prosecution offices: the line prosecutor. Speaking with one of my criminal procedure students in the fall of 2021, I was struck by an observation he made: “Don’t look at an elected DA to determine if an office is progressive, look at the line prosecutors.”³⁷ Frustratingly, some have begun to, at least anecdotally, recognize a trend that I myself saw when I was a prosecutor: “new prosecutors,” even when aware of many of the inequities of the criminal legal system and even when encouraged to use their discretion modestly and wisely, become “increasingly punitive, and no amount of training [] counter[s] this trend.”³⁸ This sort of trend can arguably be seen

33. Carrie Johnson, *Who Might Joe Biden Select To Lead the Justice Department?*, NPR (Nov. 19, 2020), <https://www.npr.org/2020/11/19/936264465/who-might-joe-biden-select-to-lead-the-justice-department> [<https://perma.cc/GCA3-C9QC>].

34. *Attorney General: Merrick B. Garland*, U.S. DEP’T OF JUST. (July 27, 2021), <https://www.justice.gov/ag/bio/attorney-general-merrick-b-garland> [<https://perma.cc/FUW5-Y9H4>].

35. Darcy Covert, *The False Hope of the Progressive-Prosecutor Movement*, ATLANTIC (June 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141/> [<https://perma.cc/AD9W-6HTH>].

36. *Id.*

37. Conversation with Tulane Law School student Jack Samuels, Tulane Law School, November 2021.

38. Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement’s Promise*, 64 N.Y.L. SCH. L. REV. 70, 70–71 (2020).

in offices where “progressive” prosecutors have recently been elected but have not been living up to their promises. Alvin Bragg, the new Manhattan District Attorney, has been characterized as “not a progressive prosecutor” as he has only offered “slightly more humane practices within a criminal legal system where cruelty is the norm” by Manhattan public defenders.³⁹ In New Orleans, Jason Williams began charging some juveniles as adults, though he unequivocally stated that he would not do so while campaigning for Orleans District Attorney.⁴⁰ The word “progressive” has started to lose not just its luster, but also any meaning. It is time to move on.

B. Abandoning “Progressive”

In a piece I wrote for the Journal of Criminal Law and Criminology, I articulated my ideal vision of a progressive prosecutor—one who actively works toward the obsolescence of their office or the flummoxing of its purpose. I posited this hypothetical prosecutor in a somewhat jocular way, dubbing them the “Ron Swanson” prosecutor.⁴¹ While that reference was meant to help the reader and symposium audience understand the extent to which I believe change in the way a prosecutor approaches their role would have to be so drastic for that prosecutor to even be considered “progressive,” I do have some practical suggestions for moving past “progressive” prosecution. I believe that the usage of the term “progressive” in the context of prosecution has rendered the term meaningless. Perhaps that is a good thing. Throwing off the yoke and costuming of a label can make voters, scholars, and prosecutors themselves focus on the policies of their specific offices in greater detail.

While I would be thrilled to see the dismantling of the carceral state across the board, I realize the perfect prosecutor should not be the enemy of the good, and people who want to become prosecutors to make positive

39. Rigodis Appling & Claire Stottlemeyer, *Alvin Bragg Is Not a Radical; He’s a Responsive Politician*, N.Y. DAILY NEWS: OPINION (Jan. 28, 2022), <https://www.nydailynews.com/opinion/nyoped-alvin-bragg-is-not-a-radical-20220128-xwguhcqxqfga5fltt5bk4glidq-story.html>.

40. Matt Sledge, *Why Jason Williams’ Move to Charge Juveniles as Adults in Killing is Angering Some Groups*, NEW ORLEANS ADVOCATE (May 30, 2021), https://www.nola.com/news/courts/article_2d3a0a80-c006-11eb-931b-4b8558969269.html [<https://perma.cc/J39D-Q47T>].

41. Ron Swanson, a government employee in the TV series *Parks and Rec*, famously did everything in his power as the head of a local parks agency to get nothing done. *Parks and Recreation* (NBC television broadcast).

changes to the system should be encouraged to do so: as long as a criminal legal system with prosecutors exists, we should encourage those who want to do the best job possible to do the job. As a participant in the symposium stated in response to my presentation, “we don’t want to encourage only assholes to become prosecutors.”⁴² And I agree. Again, as long as there continues to be a criminal legal system, we should try to make it less ugly and violent than it currently is while still endeavoring to eliminate it. In that sense, I want to make it clear that while I do not think that labelling prosecutors as “progressive” is helpful and may actually be harmful in reaching those goals, I do not disagree with the incremental changes many of them have instituted in their jurisdictions.

In determining whether the term “progressive” has any real value any longer in connection to prosecution, I also cannot help but think of how the term is currently received or how it would be received in the places where prisons are located and where sentences of incarceration are now handed down the most—suburban and rural jurisdictions.⁴³ While many who style themselves as progressive on social media insist that because these localities voted more heavily for Trump than urban centers, they should be abandoned to some sort of nebulous bad fate,⁴⁴ taking such a neglectful approach loses sight of the substantial minority populations who live in the rural reaches of the United States, which is now at more than twenty percent of the rural population.⁴⁵

Perhaps rather than relying on a difficult to define characteristic like being “progressive” to categorize prosecutors, eschewing any such labels would make those running for elected prosecutor positions and those who already serve in those spots think about what policies work best for their own goals outside a flat description. The ABA has promulgated its own standards to govern the behavior of prosecutors with protections for

42. Kevin McMunigal, Professor of Law (Nov. 5, 2021) (comments to my presentation during Symposium event).

43. See JESSICA SIMES, PUNISHING PLACES (2020).

44. See, e.g., Jamie P. (@shereaps), TWITTER (Nov. 2, 2020, 8:57 AM), <https://twitter.com/shereaps/status/1324002824221609984> (“In [sic] so tired of hearing ‘we need to listen to rural America’. Nah, fuck rural America. What we need to do is stop making their votes count more than urban votes. The electoral college is a tool in keeping America stupid.”).

45. *Racial and Ethnic Minorities Made up 22 percent of the Rural Population in 2017 Compared to 42 percent in Urban Areas*, USDA ECONOMIC RESEARCH SERVICE, <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=93058> [<https://perma.cc/RML6-Y29K>].

criminal defendants that are broader than those in the Constitution.⁴⁶ Rather than using meaningless terms like “progressive,” prosecutors could familiarize themselves with these standards first and ask themselves how well they comport themselves under the proscriptions within. While I have started to explore these interventions in this brief Essay, these interventions deserve lengthier discussion and treatment, which I look forward to offering in forthcoming articles.

CONCLUSION

The term “progressive prosecutor” has become flabby and shapeless with overuse, like an old sweater or a rubber band. This has become even more evident since Donald Trump’s (fortunate) defeat at the polls. While Trump proved to be a destructive force in office, he served as a common enemy against which many forces could unify. Without this threat, it becomes clear that the promise of the “progressive” prosecutor is merely illusory. It is time to move past this useless categorization and not a moment too soon.

46. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, AM. BAR ASS’N (4th ed. 2017), <https://www.americanbar.org/groups/criminaljustice/standards/ProsecutionFunctionFourthEdition/>.