

The Pathological Whiteness of Prosecution

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Criminal law scholarship suffers from a Whiteness problem. While scholars appear to be increasingly concerned with the racial disparities within the criminal legal system, the scholarship's focus tends to be on the marginalized communities and the various discriminatory outcomes they experience as a result of the system. Scholars frequently mention racial bias in the criminal legal system and mass incarceration, the lexical descendent of overcriminalization. However, the scholarship often fails to consider the roles Whiteness and White supremacy play as the underlying logics and norms driving much of the bias in the system.

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*This Article examines the ways that Whiteness is the norm within the criminal legal system, including within criminal law commentary. It does so by focusing on the burgeoning area of criminal law discourse that examines the role of the prosecutor. In *The Pathological Politics of Criminal Law*, Professor William Stuntz famously argued that the criminal legal system's perversions are understood through an examination of the prosecutor. This Article aims to complicate the Stuntzian conception of the almighty prosecutor. It first shows that the prosecutor's power is bounded by a presumption of punitiveness, challenging the assumption that it is enough to replace the person in the prosecutor's seat to meaningfully reform the criminal legal system. Second, it demonstrates that the prosecutor's power stems in part from the Whiteness and maleness of the prototypical prosecutor, exposing Stuntz's failure to contend with both the experience of non-White and non-male prosecutors and the Whiteness of most prosecutors.*

This power can be witnessed through the racialized and sexualized experience of progressive prosecution, wherein White male prosecutors are lauded as progressive heroes and Black women prosecutors are critiqued for not being progressive enough. This Article analyzes the sentiments of online conversations about eight progressive prosecutors to assess how the sentiments differ by race and gender. Its findings reveal how the very foundation of the criminal legal system relies upon a White, male paradigm of punitiveness that is resistant to reform, and that this paradigm has infected even "progressive" discourses about the system. Moreover, the system appears to be rotten to the core, or at least punitive to its core, suggesting that efforts to reform it are futile.

This Article invites liberal commentators who hope to address the excess of incarceration to critically examine the ease with which they critique Black women and valorize White men in the system. It invites liberals to untangle the layers of bias that are pervasive in liberal thought.

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INTRODUCTION

“[D]umb n[*****] bitch. . . .”¹

“N[*****] C[***]. . . you’re not going to beat these white boys. . . .”²

“[S]tupid b——. . . damn inbred snowflake. . . Can’t wait till you get stripped of you [sic] license. . . . Then you can go back to being the useless hood rat you are.”³

“You should watch where you bring attention to yourself at. The FBI is now being informed of the actions you’ve been taking behind the scene. You’re about the [sic] windup in jail instead of prosecuting cases.”⁴

“[F]ucking n——s. n——s everywhere. the black woman is sticking up for a convicted COP killer. She should be on trial for her job and fired and thrown to the streets. she should pick cotton for the rest of her life and be whipped.”⁵

"You are out of your mind. When the violence starts and they turn their anger on you, maybe the officers will be a little slow to react. You are a cop hater. Marilyn Mosby is nothing but a (expletive) Black Panther (expletive). She should be hung.”⁶

"Marilyn Mosby was gunned down in cold blood walking into the courthouse. Not one officer came to assist. A police statement simply read, 'Sucks to be her.' Nobody will miss that (expletive).”⁷

These are some of the messages that have been sent to Black women prosecutors who claim to be embracing a less punitive approach to prosecution. I was unable to locate similarly offensive messages that were sent to White male

1. Nicole Lewis & Eli Hager, *Facing Intimidation, Black Women Prosecutors Say: “Enough,”* MARSHALL PROJECT (Jan. 16, 2020), <https://www.themarshallproject.org/2020/01/16/facing-intimidation-black-women-prosecutors-say-enough> [https://perma.cc/V3U3-KDSE].

2. *Id.*

3. Scott Powers, *Twine noose lowlights hate being sent Aramis Ayala’s way*, FLA. POL. (Apr. 21, 2017), <https://floridapolitics.com/archives/236600-twine-noose-lowlights-hate-sent-aramis-ayalas-way/> [https://perma.cc/5ZX9-U3RV].

4. *Id.*

5. *Id.*

6. David Collins, *Baltimore Prosecutor Receives Vicious Threats*, WBALTV (July 1, 2016), <https://www.wbaltv.com/article/baltimore-prosecutor-receives-vicious-threats/7101505#> [https://perma.cc/E4NN-VC85].

7. *Id.*

prosecutors. These messages suggest that not all prosecutors are all-powerful, illustrating a larger problem within criminal legal theorizing and scholarship.

Criminal law scholarship suffers from a Whiteness problem. Criminal law scholars appear to be increasingly concerned with the racial disparities within the criminal legal system.⁸ There are more articles that explicitly discuss racial bias and discrimination than in the past.⁹ Scholars are concerned with the punitiveness of the system, which disproportionately falls on racially marginalized communities.¹⁰ They frequently mention the role of race and bias in the criminal system and in mass incarceration, the lexical descent of overcriminalization.¹¹ Some observers might say that to a certain degree, everyone is now a race scholar. Or, at the very least, many who write about

8. See, e.g., Joshua Kleinfeld, Laura I. Appleman, Richard A. Bierschbach, Kenworthy Bilz, Josh Bowers, John Braithwaite, Robert P. Burns, R. A. Duff, Albert W. Dzur, Thomas F. Geraghty, Adriaan Lanni, Marah Stith McLeod, Janice Nadler, Anthony O'Rourke, Paul H. Robinson, Jonathan Simon, Jocelyn Simonson, Tom R. Tyler & Ekow N. Yankah, *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1698 (2017) ("Equal citizenship should be a foundational principle of criminal justice. The principle of equal citizenship requires, but is not limited to, fairness and functionally equal rights across lines of race and wealth, and applies to the substance of criminal law, enforcement of criminal law, criminal procedure, and sentencing."); Luis Chiesa, *The Model Penal Code, Mass Incarceration, and the Racialization of American Criminal Law*, 25 GEO. MASON L. REV. 605, 609–10 (2018) (noting the need to address the "racialization of American criminal law"); Caryn Devins, Roger Koppl, Stuart Kauffman & Teppo Felin, *Against Design*, 47 ARIZ. ST. L.J. 609, 644 (2015) (acknowledging how "the Commerce Clause . . . that was used to empower African Americans through civil rights statutes was later used to disempower them through the War on Drugs"). *But see* Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 498 (2019) (noting that the academic debate on mens rea reform "frequently avoids issues of social marginalization, race, or structural inequality and instead focuses on questions of moral culpability, 'rule of law', and 'neutral' legal principles"); Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1572 (2017) (reducing race to one of several demographic variables that impact interactions with the criminal legal system) ("Given the enormous influence of one's life experience, be it one's culture, gender, education, socioeconomic status, race, religion, or any number of other influential demographic variables, how could it be that despite these dramatic differences there can exist such human universals?").

9. For instance, a Westlaw search of racial within the same sentence as "criminal law" (a Westlaw Boolean search of ("racial /s "criminal law")) yields 575 hits of all secondary sources, including law review articles and legal treatises, between 01/01/1980 to 01/01/2005, which is a twenty-five-year time period. An identical search yields 911 hits between 01/01/2005 to 01/01/2021, which is a sixteen-year time period and nine years fewer than the previous search. While a cursory exercise, this search suggests an increase in scholarly interest in racial issues and criminal law.

10. It is important to note that some scholars, such as Professor Dorothy E. Roberts, have long critiqued the racialized harms of the criminal legal system. See, e.g., Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1945 (1993) ("Not only is race used to identify criminals, it is embedded in the very foundation of our criminal law."); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1291 (2004) ("Mass incarceration dramatically constrains the participation of African American communities in the mainstream political economy. This civic exclusion stems largely from the 'invisible punishments' that accompany a prison sentence.").

11. *But see* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 262 (2018) (arguing that the distinction between overcriminalization and mass incarceration is substantive) ("[I]t is not uncommon for a single article to contain a great deal of slippage in its treatment of what constitutes overcriminalization or mass incarceration.").

criminal law are willing to at least mention that there is a racial component to its administration.¹² The focus of the scholarship tends to be on the marginalized community and the various discriminatory outcomes they experience as a result of the system.¹³

However, criminal law scholarship is often missing a consideration of the roles of Whiteness and White supremacy as the underlying logics and norms that drive much of the bias in the system.¹⁴ Scholars equate “race consciousness with consciousness of [B]lackness,” but their failure to contend with the role of Whiteness in facilitating mass criminalization and incarceration provides a “building block in the edifice of [W]hite supremacy.”¹⁵ It is as if “White” is not a racial classification. Race has instead become about the marginal status of Black and Brown people rather than the invisible power and punitiveness that Whiteness facilitates.

This Article examines the ways that Whiteness has become the underlying norm within the criminal legal system, including within the discourse about criminal law and mass incarceration. It conducts this examination by focusing on the burgeoning area of criminal law scholarship that examines the role of the prosecutor, particularly the progressive prosecutor.¹⁶ The scholarship on

12. Nevertheless, there are some scholars who remain consistent in their ability to ignore racialized harms. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, 55 WAKE FOREST L. REV. 933, 979 (2020) (limiting the racialized harms of the criminal legal system to speculative claims about crimes against “minority crime victims”) (“But it is virtually certain that the costs of the additional crimes committed as the result of the changes are not distributed evenly throughout Cook County, but rather are heavily concentrated among minority crime victims.”).

13. *See, e.g.*, Lara Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 393, 404 (2018) (recounting how a White prosecutor created barriers to the release of innocent Black defendants).

14. *But see* Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 818–19 (2020) (“[G]iven the inherent [W]hiteness of the law—especially criminal law—many prosecutors, including those few who are people of color, may fall into implicit bias and unconscious racist patterns.”); Kathleen Daly, *Criminal Law and Justice System Practices as Racist, White, and Racialized*, 51 WASH. & LEE L. REV. 431, 451 (1994) (“[W]hiteness and middle class values are structured in criminal law and justice system practices. The precise elements of a ‘[W]hite point of view’ (what is often referred to as institutionalized racism) have not been clarified for criminal law and justice system practices . . .”).

15. Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 956–57 (1993).

16. *See* Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1541 (2020) (“[T]he progressive prosecutor movement does not seek to reform prosecutorial power, at least immediately, so much as to capitalize on it. Reformers argue that electing progressive prosecutors will help to reverse the punitive trends of the past several decades.”); Hao Quang Nguyen, *Progressive Prosecution: It’s Here, but Now What?*, 46 MITCHELL HAMLIN L. REV. 325, 329 (2020) (discussing the ways progressive prosecutors use their “broad discretionary authority as ministers of justice” and arguing that “such methods should be used to renounce the conviction-driven system and promote more equitable and fair justice for all”); Chad Flanders & Stephen Galoob, *Progressive Prosecution in a Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 685, 688 (2020) (discussing progressive prosecution in light of COVID-19 and the post-pandemic world); Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 707–08 (2020) (“Two societal trends are key ingredients in the rise of the progressive prosecutor: (1) a growing recognition of the problem of mass

prosecutors, progressive or otherwise, rarely grapples with the role of Whiteness in shaping what it means to be a prosecutor.¹⁷ Attention to Whiteness reveals that it is a norm that both shapes the experiences of prosecutors and facilitates a punitiveness that maintains White supremacy.

Professor William Stuntz famously argued that the perversions in the criminal system can be understood through an examination of the role of the prosecutor in the criminal legal system.¹⁸ He argued that prosecutors are quasi-legislators who legislate by selecting the charges for defendants and setting the baseline for criminal convictions.¹⁹ According to Stuntz, prosecutors hold much of the power within the criminal legal system and contribute to a pathological politics that rewards participants for meting out more punishment even when

incarceration, and (2) a gradual downward trend in crime.”); Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 738 (2020) (“[T]he contemporary progressive prosecution movement comes on the heels of concerns about mass incarceration, an increasing distrust of professionals and experts of all sorts, and a political focus on inequality in the criminal justice system. The movement is also accompanied by a growing chorus of scholars who believe the solution to criminal justice problems is handing over control to local communities.”). There have been some debates about whether progressive prosecution is a tautology. Compare Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 773 (2020) (seeking to “point out some of the assumptions of the progressive prosecution movement and indicate some of the areas where it is susceptible to a fate resembling past reform efforts”), Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 750 (2018) (disrupting “the celebration of unusually progressive prosecutors to emphasize the risks associated with relying on prosecutors in the movement to reform the U.S. criminal legal system” and arguing that “these reforms are ‘reformist reforms’ that fail to deliver on the transformative demands of a fundamentally rotten system”), and Romero, *supra* note 14, at 815 (“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, let alone one who is truly progressive.”), with Heather L. Pickerell, *Critical Race Theory & Power: The Case for Progressive Prosecution*, 36 HARV. BLACKLETTER L.J. 73, 74 (2020) (“Some argue that a progressive prosecutor could not exist in theory or in practice. This paper concedes that other actors in the criminal system will unavoidably shackle a theoretically perfectly progressive prosecutor. But, inspired by Critical Race Theory literature, this note makes the case for why identifying and supporting progressive prosecutors is imperative to achieve meaningful criminal justice reform.”); John F. Pfaff, *Why the Policy Failures of Mass Incarceration Are Really Political Failures*, 104 MINN. L. REV. 2673, 2690 (2020) (“[T]he progressive prosecutor movement is less about changing hearts and minds, and more about giving voice to more-urban, more-minority voters: those whose hearts and minds are not the same as more punitive, rural White voters, but whose say has been historically curtailed.”).

17. But see Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 24 (2019) (explicitly acknowledging that race and gender may impact a prosecutor’s ability to implement progressive reforms). Further, scholars have contended with the bias facilitated by Whiteness in other contexts within criminal law. See, e.g., Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2546 (2020) (“[A]n assumption that to be free of convictions is to have lived a law-abiding life runs the risk of compounding ‘White credit’ and reinforcing a sense of [W]hite innocence, all while downplaying the extent to which those endowed with [W]hiteness and/or other forms of privilege can avoid findings of guilt.”).

18. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) (“In general, the role [that criminal law] plays is to empower prosecutors, who are the criminal justice system’s real lawmakers.”).

19. See *id.* at 509.

more punishment is undesirable.²⁰ He proclaimed, “American prosecutors, by and large, see themselves as czars.”²¹

Of late, there has been a growing trend of progressive prosecutors who aim to use the power of the prosecutor’s office to advance a new vision of prosecutors.²² Scholars have questioned the intentions of these prosecutors as well as their ability to be progressive while prosecuting.²³

Missing from these conversations is an in-depth analysis of Whiteness and patriarchy as underlying features of the prosecutor’s office.²⁴ Criminal law scholarship rarely considers how being non-White or non-male, or even worse both, fundamentally alters the functions of the prosecutor’s office. This Article brings a subtle shift in perspective by centering the racial privilege of most prosecutors through an analysis of the barriers that non-White prosecutors encounter. It frustrates the Stuntzian conception of the almighty prosecutor by demonstrating that that conception is bounded by the Whiteness of the prototypical prosecutor. This Article argues that the recent rise in “progressive prosecutors” illustrates the limitations of the Stuntzian conception of the all-powerful prosecutor.

First, this Article demonstrates that the power of prosecutors is bounded by a presumption of punitiveness. This Article relies upon data from a social listening algorithm that examined the tone of the conversation about progressive prosecutors online (see Section II.C *infra*). These data include thousands of tweets, blog entries, Facebook posts, and Instagram posts that mention progressive prosecution or the names of eight prominent, self-identified progressive or reform-minded prosecutors who are the subject of this study. In general, progressive prosecutors appear to experience a hostile media

20. See *id.* at 519 (“[P]rosecutors can, even in discretionary sentencing systems, significantly raise the defendant’s maximum sentence, and often raise the minimum sentence as well.”). *But see* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 174 (2019) (critiquing the consensus in criminal justice scholarship that prosecutors have all the power in the system).

21. Stuntz, *supra* note 18, at 581 (“American prosecutors, by and large, see themselves as czars.”). Professor Stuntz’s choice of the word czar—rather than chief, sultan, emperor, or oba—is itself a racialized representation of monarchy that appears neutral rather than racialized when left unexamined.

22. See, e.g., FAIR AND JUST PROSECUTION, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 3 (2018), https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf [<https://perma.cc/FGR9-65TY>] (“In recent years, the role of prosecutors has received increasing attention. Given their powers, prosecutors are well positioned to make changes that can roll back over-incarceration. They can use their discretion to improve the overall fairness and efficacy of the criminal justice system and champion priorities that improve the safety and well-being of our communities.”).

23. See, e.g., FRANKLIN ZIMRING, *THE INSIDIOUS MOMENTUM OF MASS INCARCERATION* 150 (1997) (arguing that changing the “hearts and minds” of individual line prosecutors is “inefficient and unnecessary” to address the incarceration crisis in the United States).

24. *But see* Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 203–04 (2007) (“Unwarranted racial disparities cannot be eliminated without the active participation of prosecutors. Prosecutors, along with other criminal justice officials, must be willing to acknowledge the role they play in contributing to these disparities and agree to institute reform measures.”).

environment based upon concerns that they are not sufficiently punitive or concerned with public safety. In addition, several progressive prosecutors have experienced pushback from other powerful actors in the criminal legal system, including the police, judges, and other prosecutors.

These data contradict the assumption that it is enough to replace the person in the prosecutor's seat to achieve meaningful reform in the criminal legal system. Even prosecutors appear to be bounded by the system's inherent punitiveness. When prosecutors exercise their discretion to adopt a new vision of prosecution, other criminal legal actors can intervene to prevent the implementation of progressive policies. This core contribution to the literature highlights the limitations of reforming the criminal legal system by reforming the prosecutor's office, contesting Stuntz's declaration that prosecutors are powerful czars. Prosecutors appear to be czars, so long as they are punitive.

Furthermore, when progressive prosecutors are non-White and non-male, they appear to experience excessively hostile resistance. The online narratives about these prosecutors, particularly Black women prosecutors, are harsher and more personal than those about their White male counterparts, as this analysis shows. Stuntz's account of the prosecutor does not consider the experience of non-White and non-male prosecutors, nor does it contend with the Whiteness of most prosecutors. This Article argues that the struggles of Black women prosecutors demonstrate the limitations of the conception of the prosecutor as almighty and all-powerful. The findings from the social listening algorithm illustrate the importance of a decarceral agenda that is not overly reliant on changing the occupant of the prosecutor's seat in a given jurisdiction. Judges, police officers, and nearby prosecutors may all conspire to obstruct the policies of progressive prosecutors. More critically, these findings reveal how the very foundation of the criminal legal system relies upon punitiveness and is resistant to reform. The system appears to be rotten, or at least punitive, to the core, suggesting that efforts to reform it are futile.

Second, the most troubling part of the data analysis involves the resistance that progressive prosecutors encounter outside of the criminal legal system from liberal commentators and groups. There appears to be a racialized and sexualized experience of progressive prosecution, wherein White male prosecutors are lauded as progressive heroes while Black women prosecutors are critiqued for not being progressive enough. For example, the positive online commentary about progressive prosecution appears to be primarily centered around Larry Krasner and Chesa Boudin—White men—with some progressives labeling them as the ideal progressive prosecutors. Meanwhile, Black women progressive prosecutors like Kimberly Foxx, Kimberly Gardner, and Marilyn Mosby were elected before Krasner and represent similarly important American cities (Chicago, St. Louis, and Baltimore, respectively), but rarely enjoy the laurels of the White liberal media. The ways in which the experience of prosecution is bounded by the racial and sexual identity of the prosecutor are rarely explored

and examined. This Article argues that the Whiteness of criminal law discourse is made transparent through the experiences of Black women prosecutors.

This Article engages in an intersectional examination of the role of prosecutors and reveals that race and gender constrain prosecutors' ability to be truly progressive.²⁵ Black women prosecutors have encountered unparalleled resistance to their progressive policies, despite the quasi-legislative role Stuntz claimed prosecutors to possess.²⁶ This resistance suggests that the power of the prosecutor is not easily separated from the maleness and Whiteness of those who have typically filled the prosecutorial role.

This feature of the embodiment of prosecution is often ignored, as scholars concerned with the racial effects of prosecution focus on the racial characteristics of the defendants but ignore the racial privilege of the prosecutor. Perhaps prosecutors are so powerful both because they are so punitive and because they are so White.²⁷ A 2019 study found that 95 percent of elected prosecutors are White, and 73 percent are White men.²⁸ When scholars fail to examine the role of Whiteness in facilitating punitiveness, the prosecution becomes a nonracial, all-powerful figure in the criminal legal system—a raceless, genderless “czarism.”²⁹

Furthermore, this Article invites liberal commentators hoping to address the excess of incarceration to critically examine the ease with which they critique Black women and valorize White men. It invites liberals to untangle the layers of bias that pervade liberal thought.

Black women prosecutors who have explicitly adopted a progressive agenda have been harassed by the police, undermined by their staff, and attacked in the media as unconcerned with public safety. Police officers raided the offices of the Circuit Attorney in St. Louis, Kimberly Gardner, in an act of hostility that

25. See Davis, *supra* note 17, at 24:

It is difficult to determine the extent to which race and gender play a role in a District Attorney's ability to implement a progressive agenda. Progressive organizations have praised Krasner for his ability to implement radical reforms in Philadelphia, but it would be unfair and simplistic to conclude that he is more progressive than Foxx, Rollins, or Ayala. Not only do the latter three serve in more conservative jurisdictions where the political climate makes it difficult for them to implement radical reforms, but their status as [B]lack women also forces them to endure gender and racial biases that Krasner does not face.

26. See Stuntz, *supra* note 18, at 582:

[O]ur society's desire to criminally punish the sale and possession of narcotics leads naturally to a kind of czarism among prosecutors, to the practice of substituting their own discretionary enforcement decisions for the decisions legislatures enshrine in criminal codes. Once prosecutors take that view of their job with respect to drug crime, it is hard to prevent them from taking a similar view of their job across the rest of their dockets.

27. See REFLECTIVE DEMOCRACY CAMPAIGN, TIPPING THE SCALES: CHALLENGERS TAKE ON THE OLD BOYS' CLUB OF ELECTED PROSECUTORS 1 (2019), <https://wholeads.us/wp-content/uploads/2019/10/Tipping-the-Scales-Prosecutor-Report-10-22.pdf> [<https://perma.cc/4DKM-J69X>] (noting the power of the prosecutor and the historic and current Whiteness of those who hold the position nationwide and arguing that this race and gender inequality prevents criminal justice reform).

28. *Id.* at 2.

29. See Stuntz, *supra* note 18, at 582.

is unfathomable under Stuntz's account of the prosecutor.³⁰ At the same time, these prosecutors are expected to deliver more for their communities and are scrutinized as not being progressive enough by White liberals, who maintain a very superficial racial analysis.³¹ Critics examine the records of Black women prosecutors the same as any other prosecutor, as if they are not constrained by racial and gender subordination.³²

These commentators rarely consider progressive prosecutors' genuine interest in harm reduction because they view prosecutors as the essential enemies of the decarceration project.³³ This Article urges White liberals to take their critiques inward and to seriously contend with the role of Whiteness in maintaining the carceral nature of prosecution.

Whiteness as a pervasive norm in the criminal legal system positions non-punitive Black women prosecutors as threats to the system. First, these women counter the assumption that the State must be represented by a White man, as it traditionally has been. Their very existence in the office appears to be disorientating, which might explain why conservative news outlets have targeted them and launched media campaigns that focus on Black women progressive prosecutors. In addition, these women contest the traditional role of the prosecutor as chiefly in support of punishment for daring to consider non-punitive alternatives for those presumed to be criminals, many of whom are Black, Indigenous, Brown, or people of color. Consequently, the way in which these Black women perform their progressive agenda appears different from that of prosecutors who do not have to contend with the uneasiness that comes with being women in positions of power while transforming a punitive system.

Part I of this Article discusses the criminal law scholarship on prosecution and the underlying assumptions that shape the dominant discourse about prosecutors and their power. Part II introduces Critical White Studies as a theoretical framework for understanding the data and explains the methodology

30. See Doyle Murphy, *St. Louis Police Seized the Circuit Attorney's Servers Yesterday — Then Gave Them Back*, RIVERFRONT TIMES (Mar. 13, 2019), <https://www.riverfronttimes.com/newsblog/2019/03/13/st-louis-police-seized-the-circuit-attorneys-servers-yesterday-then-gave-them-back> [<https://perma.cc/7J57-S8DB>].

31. See, e.g., Lara Bazelon, Opinion, *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/P6Q4-KANB>] (omitting any discussion of Harris' race and gender in an analysis of her prosecutorial record, illustrating a colorblind critique which inadvertently entrenches Whiteness as the norm by assuming that all prosecutors are operating from similar positions of power and privilege).

32. See, e.g., *id.*

33. See, e.g., Danielle Silva, *Defining Prison Abolitionism in a Time of Progressive Prosecutors*, DAVIS VANGUARD (Nov. 8, 2019), <https://www.davisvanguard.org/2019/11/defining-prison-abolitionism-in-a-time-of-progressive-prosecutors/> [<https://perma.cc/AK7K-JGU5>] (reporting on the release of a document laying out abolitionist principles and strategies for prosecutor organizing) (“[P]rosecutors should be seen as law enforcement and part of the prosecution, even if they have progressive politics. While they may have [attractive] policies . . . [p]rosecutors are not social workers . . . They cannot and should not provide services to people who are in need.”).

for this study. It demonstrates that the Whiteness of prosecutors enables them to engage in punitiveness. Part III adopts an intersectional analysis to examine the data about the online commentary on progressive prosecution. The data frustrate the Stuntzian conception of the almighty prosecutor and illustrate that progressive prosecutors have encountered substantial resistance to their decarceral agendas. The data illustrate the ways in which Whiteness, which is underexamined in criminal law scholarship, has been a pervasive presence that underlies the discussion about prosecutors.

This Article is not intended to suggest that progressive prosecution is a desirable approach for alleviating mass incarceration or that prosecution is the most effective strategy for addressing community harms. Rather, this Article makes a critical intervention into an active debate that evaluates all prosecutors by the same terms and analyzes the ways in which White liberals have become all too comfortable critiquing Black women without any engagement with Whiteness, intersectionality, or critical race theory. This Article argues that scholars and activists should critically engage with the role Whiteness plays in empowering prosecutors to be punitive and acknowledge the limitations of the Stuntzian conception of the prosecutor as almighty. Such engagement would reveal that the racial embodiment of prosecutors is often as important as their political embodiment as progressive or punitive.

I.

THE ASSUMPTIONS ABOUT PROSECUTION

It is no longer controversial to claim that the criminal system is bloated and dysfunctional.³⁴ While there have always been scholars who critiqued the excesses of the criminal system³⁵ and the ways that prosecutors contributed to the problem, the widespread embrace of this perspective occurred within the past decade. Almost 2.3 million people are incarcerated in the United States, and there is a sense that the system is out of control.³⁶ Consequently, there is a growing

34. See, e.g., Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1388 (2018) (“It’s a familiar story by now. The U.S. criminal justice system is a colossus, its reach unprecedented by both global and historical measures. The United States houses approximately one-fifth of the world’s prisoners. Yet incarceration represents just a fraction of the criminal justice system.”); Marah Stith McLeod, *Communicating Punishment*, 100 B.U. L. REV. 2263, 2265 (2020) (“To some critics, American criminal justice is dysfunctional and inhumane, as illustrated by the mass incarceration of disproportionately poor and minority offenders and the draconian sentences meted out for some offenses.”); Rebecca Sharpless, *“Immigrants Are Not Criminals”*: *Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 740 (2016) (“[P]olicymakers have begun taking a hard look at our bloated criminal justice system, a move facilitated by fiscal concerns, the shortcomings of the war on drugs, and falling crime rates.”).

35. See Roberts, *The Social and Moral Cost*, *supra* note 10, at 1272–73 (describing the buildup of the American system of mass incarceration, its disproportionate impact on young Black men, and the academic literature that has sought to address this phenomenon).

36. WENDY SAWYER & PETER WAGNER, PRISON POL’Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2020 (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/5P8Y-BRRZ>].

body of criminal law scholarship that examines the role of the prosecutor in criminal law administration.³⁷ The prosecutor's office has been emblematic of power, and scholars have examined how prosecutors exercise that power to do good or evil.³⁸

Existing scholarship suggests that one way to control the system is through the prosecutor's office.³⁹ So scholars have examined the discretionary role that prosecutors play in deciding what charges to pursue.⁴⁰ Multiple studies have shown that prosecutors, like many criminal legal system actors, exercise their discretion in a racially biased manner.⁴¹ Criminal law scholars have lamented the opacity of prosecutorial decision making, illustrated by the lack of transparency regarding prosecutorial declinations to pursue a case⁴² and a general lack of data sharing about how prosecutors exercise their discretion.⁴³

37. However, this is not intended to suggest that scholarship on prosecutors is new. Several scholars, including Professors Angela J. Davis, Bruce Green, and Ronald Wright, have been focused on the prosecutorial function for some time now. *See, e.g.*, Davis, *supra* note 17, at 202–03 (arguing that the exercise of prosecutorial discretion is “one of the most significant contributing factors” to racial disparities in the American criminal justice system).

38. *See* Rachel E. Barkow, *Criminal Justice Reform and the Courts*, U. CHI. L. REV. ONLINE (2019), <https://lawreviewblog.uchicago.edu/2019/10/15/criminal-justice-reform-and-the-courts-by-rachel-e-barkow/#:~:text=by%20Rachel%20E.-.Barkow,often%20dictate%20a%20defendant's%20sentence.> [https://perma.cc/9Q6J-SWHE]:

Prosecutors seem to be the primary target for criminal justice reformers today, and with good reason: they are key gatekeepers to whether criminal charges get brought or not, and the particular charges they bring often dictate a defendant's sentence. In a world dominated by plea bargains, prosecutors are essentially the final adjudicators in most criminal cases.

39. *See id.*

40. *See* Stuntz, *supra* note 18, at 582 (describing the policy-making effect of prosecutors' discretionary enforcement decisions).

41. *See, e.g.*, Davis, *supra* note 17, at 210 (“Arbitrary, unsystematic decision-making, exacerbated by unconscious race and class predilections, sometimes results in disparate treatment of similarly situated victims and defendants. That prosecutors do not intend to cause racial disparities does not excuse them from responsibility for the harmful effects of their decisions.”); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 302 (2014) (“Prosecutors have also been known to exercise charging discretion in a manner that creates racial disparities, and have fought for and won the right to avoid scrutiny of charging decisions that create those disparities. They have also fought legislative initiatives that would permit challenges based on race disparities.”).

42. *See, e.g.*, Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 480 (2020) (“Historically, prosecutors rarely accounted for their declination decisions. This was consistent with the overall lack of prosecutorial accountability and transparency, which for many years went largely unchallenged.”).

43. *See, e.g.*, Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 980 (2021) (“The failure to record plea offers and plea agreements is part of a broader problem of lack of transparency in the criminal justice system, particularly with respect to prosecutorial decisionmaking. Prosecutors are not required to provide reasons for their charging or plea-bargaining decisions”); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 594 (2014) (“Data transparency could make the community's views a more regular influence on the budget priorities and office policies of prosecutors. These techniques for publicizing data about prosecutor performance and collecting community feedback might promote a form of prosecutor accountability that goes beyond the blunt force of elections.”).

The criminal law scholarship on prosecutors has focused on the harms of biased prosecution and suggested opportunities for improvement through increased transparency, accountability, or monitoring.⁴⁴ The scholarship tends to focus on the power of the prosecutor's office, providing commentary about how that power is exercised.⁴⁵ It is often premised on the expectation that prosecutors hold a considerable amount of the total power within the criminal legal system.⁴⁶ Because of this power, prosecutors may play an important role in the project of decarceration.⁴⁷ By providing insights into the limitations on this power's exercise, scholarship often seeks to promote a fairer and more just criminal legal system. Additionally, this scholarship frequently seeks to improve prosecution by exposing its weaknesses and suggesting new modes of accountability.⁴⁸ The implicit belief in the scholarship appears to be that targeting prosecutors may lead to meaningful change in a fundamentally broken system.⁴⁹

A. The Traditional Story: The "All-Powerful" Prosecutor

William Stuntz offered a famous critique of prosecution that described prosecution as quasi-legislative.⁵⁰ In *The Pathological Politics of Criminal Law*, Stuntz described a criminal legal system pathologized by the power given to prosecutors.⁵¹ The perverse politics of criminal law encouraged legislators to pass new laws in response to public outrage following extraordinary incidents of violence. Because the criminal code was already so bloated, this tactic allowed legislators to demonstrate their seriousness about addressing the harm without

44. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 180 (2007):

External reform of the prosecution function must include: (1) strengthening ethical rules and bar disciplinary proceedings and otherwise raising the standard of practice among prosecutors; (2) strengthening the electoral and appointment processes for prosecutors by increasing transparency in prosecution offices and educating the public about the prosecution function; and (3) passing legislation, when necessary, to ensure that essential components of reform efforts are realized.

45. See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 127–28 (2008) (describing the preceding half century of scholarship's concern with the degree of discretion prosecutors wield, particularly the issues of selective prosecution, overcriminalization, and changes in sentencing laws).

46. See Stuntz, *supra* note 18, at 509 (explaining how expansive criminal codes that “cover everything and decide nothing” delegate power from lawmakers and judges to prosecutors and police departments).

47. See, e.g., Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1081 (2016) (“These two proposals [expanded use of diversion and clemency programs] could bring about a direct and substantial reduction in the prison population without posing [sic] a threat to public safety.”).

48. See, e.g., Miller & Wright, *supra* note 45, at 195 (examining the potential for prosecutors to “increase transparency through internal data collection”).

49. See Davis, *supra* note 47, at 1081 (“A prosecutor has an ethical duty to seek justice and improve and reform the administration of the criminal justice system.”).

50. See Stuntz, *supra* note 18, at 509.

51. See *id.* (“[Our criminal justice system] seems like, and is, an unhealthy state of affairs.”).

regard for how the laws were implemented.⁵² The public demand for new laws, and the sheer breadth of criminal liability that resulted, led to overcriminalization.⁵³ State and federal legislators provided prosecutors with a menu of options for charging defendants.⁵⁴

Scholars have claimed that the politics of being responsive to public outcry, combined with punitive sentiment, has contributed to a pathological dependence on punishment to address social issues.⁵⁵ Stuntz noted that criminal laws “cover a good deal of marginal middle-class misbehavior,” which he deemed a “very odd state of affairs.”⁵⁶ Stuntz referred to obscure laws that criminalized selling untested sparklers and selling alcohol to a “common drunkard” to illustrate the magnitude of the problem.⁵⁷ On any given day, Americans may unwittingly violate multiple state or federal criminal laws that make ordinary activities criminal.⁵⁸ Prosecutors contribute to the pathology by using the breadth of criminalization to overcharge defendants for conduct that leads to little community harm.⁵⁹

According to Stuntz, the breadth of the criminal code essentially transformed prosecution into legislation, and prosecutors became powerful actors in the criminal legal system.⁶⁰ Prosecutors act as quasi-legislators by deciding whether to pursue charges toward certain defendants and by selecting which charges to bring.⁶¹

Scholars have further developed Stuntz’s framework and argued that prosecutors are able to dictate the law through their charging decisions.⁶² Prosecutors can pick and choose which laws to enforce and how to implement them when they select a defendant’s charge.⁶³ Their use of discretion effectively

52. *See id.*

53. *See id.* (describing this historical escalation as a “one-way ratchet”).

54. *Id.* at 519–20 (explaining that the increasing breadth and depth of criminal law resulted in the transfer of legislative and adjudicatory power to prosecutors).

55. *See generally* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019) (examining how politicians have stoked the fears of the public to justify punitive practices in the criminal legal system).

56. *See* Stuntz, *supra* note 18, at 509.

57. *Id.* at 515–16.

58. *See id.* at 516–18 (citing possession of “burglars’ tools” such as screwdrivers, possession of “drug paraphernalia” such as bowls and spoons, and ordinary lying as the sorts of everyday activities that are criminalized by certain state and federal laws).

59. *See id.* at 509 (observing that expansive contemporary criminal codes “cover a range of ordinary, fairly innocuous behavior”).

60. *See id.* at 509, 581–82.

61. *See id.* at 519–20.

62. *See* Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 754 (2001) (“When a prosecutor and defense attorney agree upon a plea to a hypothetical charge or to a nonestablished punishment, they legislate.”).

63. *See* Stephanos Bibas, *Pleas’ Progress*, 102 MICH. L. REV. 1024, 1039 (2004) (reviewing GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003)) (examining prosecutorial discretion in charging decisions).

determines what conduct gets criminalized and how.⁶⁴ And there is essentially no oversight of these discretionary decisions.⁶⁵

This power is the focus of Stuntz's critique of the role of prosecution in the criminal legal system.⁶⁶ According to Stuntz, these politics give a single system actor the ability to determine which charges to pursue and the aggressiveness with which to pursue these charges.⁶⁷ These choices impact the nature of the negotiation process between prosecutors and defense counsel.⁶⁸ Consistently charging defendants for crimes that are much more serious than the conduct involved, but that fit within the meaning of the described conduct in overbroad criminal statutes, may coerce defendants into pleading guilty to crimes even when they did not commit them.⁶⁹

By setting the terms of negotiation, prosecutors are essentially legislating about whom to charge and how to charge them.⁷⁰ Defense counsel has an ethical obligation to communicate the risks of moving forward with a criminal trial given the heightened charges that defendants initially receive.⁷¹ Prosecutors' positions of power enable them to set the terms of the negotiation process with defense counsel.⁷² Because the vast majority of criminal cases result in guilty pleas, the negotiation process is key to how defendants experience the

64. See Michael J. Slobom, *Introduction*, 123 DICK. L. REV. 587, 587 (2019):

Recent events have produced public outcries against prosecutorial decisions to not charge the wealthy and powerful, to overcharge and aggressively prosecute people of color, and to refuse to charge petty offenses. The major concerns underlying each of these outcries, whether well-founded or not, are that prosecutors have either weaponized their authority to an unlawful extreme or have completely abdicated their duties to seek justice.

65. See H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 65 (2011) ("In implementing the plea-bargaining process, the state, as the prosecutor of crimes, has a powerful incentive to begin the inevitable negotiating process from a position of strength, which often results in overcharging.").

66. See Stuntz, *supra* note 18, at 509.

67. See *id.* at 541.

68. See FISHER, *supra* note 63, at 212–21 (2003) (examining plea bargaining in the United States); Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 54–55 (2014) (noting the inequities that occur in the plea-bargaining process).

69. See Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 155 (1994) ("Prosecutors sometimes 'overcharge,' accusing the defendant of a crime of which he is clearly innocent, in an effort to induce him to plead guilty to the 'proper' crime.").

70. See Stuntz, *supra* note 18, at 509.

71. See Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1472 (2016) (discussing how the widespread practice of prosecutorial overcharging should impact the training of public defense attorneys).

72. See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 869 (1995) ("By charging the defendant with the most serious offenses that the prosecutor believes the defendant's conduct supports, the prosecutor can push up the trial penalty and limit, as a consequence, the defendant's ability to waive his right to trial intelligently and voluntarily.").

administration of the criminal law.⁷³ The negotiation process may impede just outcomes, especially because it heavily favors prosecutors.⁷⁴

Prosecutorial discretion often contributes to racial disparities in criminal adjudication.⁷⁵ Prosecutors' implicit or explicit racial biases may lead them to treat certain defendants as more threatening than others.⁷⁶ In fact, empirical research demonstrates that there are distinct racial disparities in prosecution.⁷⁷ Black defendants are more likely to face prosecution for less serious offenses than White defendants.⁷⁸ White defendants are more likely to be referred to diversion programs and other alternatives to incarceration than Black defendants.⁷⁹

B. Reforming the System by Reforming the Prosecutor

In response to the growing concern about prosecutorial punitiveness, activists have initiated campaigns in hopes that changing the person in the prosecutor's office might change the nature of prosecution.⁸⁰ Liberal organizations have also initiated campaigns to increase prosecutorial accountability no matter who holds the position.⁸¹

Much of this energy and organizing around addressing mass incarceration or overcriminalization through prosecution stems from the "Bye Anita"

73. See Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1132 (2017) ("Since plea bargaining is essentially the way criminal cases are dealt with and there are so few trials, a plea may be treated like an administrative adjudication.").

74. See GARY T. LOWENTHAL, *DOWN AND DIRTY JUSTICE: A CHILLING JOURNEY INTO THE DARK WORLD OF CRIME AND THE CRIMINAL COURTS* 111–12 (5th ed. 2007) (describing the power imbalance between prosecutors and defense attorneys during plea bargaining as the "tilt of the playing field").

75. See Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1215 (2018) ("[W]hite defendants are over twenty-five percent more likely than [B]lack defendants to see their top charge dropped or reduced than black defendants.").

76. See Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 433–34 (2013) ("Prosecutors cannot absolve themselves of responsibility for racial disparities by overlooking structural factors that produce different types of adolescent offending, by pandering to explicit or implicit racist constituent interests, or by refusing to confront the impact of implicit bias on their own interpretation of factors such as the perception of dangerousness and a youth's ties to the community.").

77. *Id.* at 434–35.

78. See Berdejó, *supra* note 75, at 1215.

79. See Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1383 (2018) ("For victimless crimes, one has grounds to worry about the fate of alternative sanctions, like diversion, that tend to disproportionately favor [W]hite defendants."); Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, 3 RACE & JUST. 210, 223 (2013) ("Black defendants have odds of receiving pretrial diversion that are 44% lower than those of White defendants charged with similar offenses.").

80. See Am. C.L. Union, *It's Time to Transform What It Means to Be a Prosecutor*, AM. C.L. UNION: NEWS & COMMENT. (Feb. 18, 2020), <https://www.aclu.org/news/smart-justice/our-vision-to-transform-what-it-means-to-be-a-prosecutor/> [<https://perma.cc/QY8T-JRKH>].

81. See *Join the Movement: Hold Local Prosecutors Accountable!*, COLOROFCHANGE (2021), <https://act.colorofchange.org/signup/join-the-movement-da-accountability> [<https://perma.cc/7TT6-FFD3>].

campaign in Chicago in 2016.⁸² Following the mishandling of the police killing of Laquan McDonald, community groups—including BYP 100—initiated a campaign to oust Anita Alvarez, the Democratic Cook County State’s Attorney. Alvarez failed to bring charges against the Chicago police officers who killed the unarmed teenager.⁸³ The campaign organized to remove Anita Alvarez from office and adopted the hashtag #BYEANITA to motivate support for her removal from office.⁸⁴ While the campaign did not explicitly endorse other candidates for the position, it remained in communication with Kimberly Foxx.⁸⁵

Kimberly Foxx is a Black woman and a former resident of the Cabrini-Green housing projects in Chicago. She rejected the regressive policies of Anita Alvarez’s office.⁸⁶ Her campaign platform articulated a new vision for prosecution in Chicago that prioritized leniency, harm reduction, and alternatives to incarceration.⁸⁷ Foxx went on to win her election in Chicago and was among the first of a growing group of prosecutors who openly identified themselves as embracing a reform-minded approach to prosecution.⁸⁸

Other communities also focused on prosecutorial reform. Around the same time, Ohio activists successfully campaigned to remove Timothy McGinty as the District Attorney for Cuyahoga County after he advocated *against* charges for the police officers who killed twelve-year-old Tamir Rice.⁸⁹ Following this

82. See Stephanie Lulay, *‘Bye Anita’: How Chicago’s Young Black Activists Fought for Alvarez’s Loss*, DNAINFO (Mar. 16, 2016), <https://www.dnainfo.com/chicago/20160316/river-north/bye-anita-activists-celebrate-anita-alvarez-ouster-with-song-hashtag/> [<https://perma.cc/SYL9-J34L>].

83. See #BYEANITA, ASSATA’S DAUGHTERS, <https://www.assatasdaughters.org/byeanita/> [<https://perma.cc/5FLK-367S>] (“Demand: Anita Alvarez must be voted out of office.”).

84. See *id.*

85. See Micah Uetricht & Derrick Clifton, *Kim Foxx Trounces Anita Alvarez, but Activists Say They Want More*, CHI. READER BLOG (Mar. 16, 2016), <https://www.chicagoreader.com/Bleader/archives/2016/03/16/kim-foxx-trounces-anita-alvarez-but-activists-say-they-want-more> [<https://perma.cc/WX8X-SHQ7>] (“Assata’s Daughters [one of the community groups that campaigned for Alvarez’s removal] also released a statement after the votes had been tallied. ‘Chicago Black youth kicked Anita Alvarez out of office . . . We won’t stop until we’re free and Kim Foxx should know that as well.’”).

86. See Paul Caine, *New Cook County State’s Attorney Kim Foxx Talks Reform Plans*, WTTW NEWS: POLITICS (Jan. 11, 2017), <https://news.wttw.com/2017/01/11/new-cook-county-state-s-attorney-kim-foxx-talks-reform-plans> [<https://perma.cc/9RLK-4PXA>]; Matt Daniels, *The Kim Foxx Effect: How Prosecutions Have Changed in Cook County*, MARSHALL PROJECT (Oct. 24, 2019), <https://www.themarshallproject.org/2019/10/24/the-kim-foxx-effect-how-prosecutions-have-changed-in-cook-county> [<https://perma.cc/Y4XR-3HNA>].

87. See Carol Felsenthal, *Kim Foxx Wants to Tell You a Story*, CHI. MAG. (Dec. 10, 2018), <https://www.chicagomag.com/Chicago-Magazine/January-2019/Kim-Foxx-Wants-to-Tell-You-a-Story/> [<https://perma.cc/9LWR-Z297>].

88. See Hosea Sanders, *Kim Foxx Wins Cook County State’s Attorney Race*, ABC7: POLITICS (Nov. 8, 2016), <https://abc7chicago.com/politics/kim-foxx-wins-cook-county-states-attorney-race/1597500/> [<https://perma.cc/H9RD-NVEN>]. Kimberly Foxx has campaigned on the promise that she would “reform[] justice” in Cook County. *Thank You, Cook County*, KIM FOXX: COOK COUNTY STATE’S ATT’Y, <https://www.kimfoxx.com/> [<https://perma.cc/4RN8-ZN52>].

89. See Vince Grzegorek, *Embattled Prosecutor Tim McGinty Loses Democratic Primary to Mike O’Malley*, CLEV. SCENE (Mar. 16, 2016), <https://www.clevescene.com/scene-and->

activism, Timothy McGinty lost his reelection campaign to be the Democratic nominee for District Attorney.⁹⁰

In addition to these grassroots campaigns, national organizations like the Color of Change, the American Civil Liberties Union, The Justice Collaborative, and others began to devote resources to increasing the number of progressive prosecutors in this country.⁹¹ These campaigns have successfully supported a number of prosecutors who identify as “progressive” or who otherwise express a desire to adopt a “smart” or “reform-minded” approach to prosecution.⁹² New organizations have popped up that focus on supporting these prosecutors.⁹³

This trend toward progressive prosecution is part of a general trend toward reducing the harms of the criminal legal system. Following the economic recession of 2008, a bipartisan consensus developed around the need to reduce the carceral footprint in the United States.⁹⁴ Incarceration is costly in terms of its physical, emotional, and social toll, as well as its financial impact.⁹⁵ Groups such as the Coalition for Public Safety reflect this consensus.⁹⁶ Although being so-called tough on crime once carried the day when talking about the administration of criminal law, being “smart” on crime became the new currency in criminal legal parlance.⁹⁷ Public opinion research shows that most Americans support criminal justice reform.⁹⁸ It has therefore become politically advantageous for politicians to emphasize how they would adopt smart reforms to shrink the size of the system.⁹⁹

A growing number of prosecutors have embraced this smart approach to criminal law administration. The media has labeled them as “progressive

heard/archives/2016/03/16/embattled-prosecutor-tim-mcginty-loses-democratic-primary-to-mike-omalley-in-prosecutors-race [https://perma.cc/87QU-SGG7].

90. *See id.*

91. *See* Daniel Nicheanian, *The Politics of Prosecutors*, APPEAL, <https://theappeal.org/political-report/the-politics-of-prosecutors/> [https://perma.cc/JK8R-ZDBK] (tracking recent developments with reform-minded prosecutors); *see also* Am. C.L. Union, *supra* note 80 (arguing prosecutors have the power to reduce the harms of incarceration); COLOROFCHANGE, *supra* note 81 (noting the need to hold prosecutors accountable for being overly punitive).

92. *See* Am. C.L. Union, *supra* note 80.

93. *See, e.g.*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/> [https://perma.cc/PQC8-EFNM].

Fair and Just Prosecution (FJP) brings together newly elected local prosecutors as part of a network of leaders committed to promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility.

94. *See* *Conservative, Progressive Groups Partner on Criminal Justice Reform*, PHILANTHROPY NEWS (Feb. 21, 2015), <https://philanthropynewsdigest.org/news/conservative-progressive-groups-partner-on-criminal-justice-reform> [https://perma.cc/A8X8-SV8A].

95. *See id.*

96. *See id.*

97. *Id.*

98. *See* Loren Siegel, *A New Sensibility*, OPPORTUNITY AGENDA 1–4 (2016), <https://www.opportunityagenda.org/sites/default/files/2018-04/A-New-Sensibility-Report.pdf> [https://perma.cc/U4YM-LVRT].

99. PHILANTHROPY NEWS, *supra* note 94.

prosecutors” who embrace the values of “smart” justice with a new vision of what it means to be a prosecutor.¹⁰⁰ Progressive prosecutors argue that prosecutors should look to alternatives to incarceration, such as diversionary programs, to address the harms of criminal adjudications.¹⁰¹ Many of these prosecutors have pledged to hold law enforcement officers accountable when they use excessive force or act hostilely in the community.¹⁰² They embrace progressive values, with some rejecting the death penalty and others directly addressing the harms of racial bias in the prosecutorial process.¹⁰³

This turn is unusual because, in the past, many of these people would have instead been public defenders or civil rights attorneys; in fact, many of them were.¹⁰⁴ In this new era of progressive prosecution, some lawyers might opt to become prosecutors because they believe they can wield the power of that office to achieve progressive reform of the criminal legal system.

Kimberly Foxx was just the beginning of the growing progressive prosecution movement. Progressive prosecutors have been winning local district attorney’s races and organizing to change the narrative about prosecution.¹⁰⁵ Kimberly Gardner was elected as Circuit Attorney in St. Louis after the uprising in Ferguson and pledged to hold law enforcement officers accountable when they shot unarmed people.¹⁰⁶ Marilyn Mosby was elected as the prosecutor in Baltimore shortly before the police murder of Freddie Gray, an unarmed Black

100. See, e.g., Allan Smith, *Progressive DAs Are Shaking up the Criminal Justice System. Pro-Police Groups Aren't Happy*, NBC NEWS (Aug. 19, 2019), <https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286> [<https://perma.cc/D5DR-KTEV>].

101. See Rashad Robinson, Opinion, *The People Who Undermine Progressive Prosecutors*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/opinion/george-floyd-prosecutors.html> [<https://perma.cc/H27N-9DVN>].

102. See Marilyn Mosby, Opinion, *Rethink Policing and Restore Baltimore*, BALT. SUN (June 22, 2020), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0622-marilyn-mosby-rethink-policing-20200622-aofzmfyz6baohdl6fcoramdjta-story.html> [<https://perma.cc/P43N-VLFD>] (“It is high time to reimagine policing in this country. For far too long, we’ve relied on police to fill the gap in social services in our city, and have tasked them with enforcing the criminalization of drug use, sex work, homelessness, truancy, and more.”).

103. See Jordan Smith, *The Power to Kill: What Happens When a Reform Prosecutor Stands Up to the Death Penalty*, INTERCEPT (Dec. 3, 2019), <https://theintercept.com/2019/12/03/death-penalty-reform-prosecutors/> [<https://perma.cc/6J77-AWG2>].

104. Tim Arango, ‘Gentle Steering of the Ship’: How Keith Ellison Led the Prosecution of Chauvin, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2021/04/21/us/keith-ellison-chauvin-trial.html> [<https://perma.cc/YXX7-VNKS>] (noting that the chief prosecutor in Derek Chauvin’s case was a former civil rights attorney who skillfully executed the prosecution).

105. See Candace Smith, Jake Lefferman, & Allie Yang, *Progressive Prosecutors Aim to Change the Criminal Justice System from the Inside*, ABC NEWS (Oct. 1, 2020), <https://abcnews.go.com/US/progressive-prosecutors-aim-change-criminal-justice-system-inside/story?id=73371317> [<https://perma.cc/S3K7-EM4W>].

106. See Eli Hager & Justin George, *One Way to Deal with Cops Who Lie? Blacklist Them, Some DAs Say*, MARSHALL PROJECT (Jan. 17, 2019), <https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-blacklist-them-some-das-say> [<https://perma.cc/YRN3-TGRK>].

man who police officers shot in the back.¹⁰⁷ Aramis Ayala was elected as the prosecutor in Orlando, where she pledged not to seek the death penalty because of its racially discriminatory application.¹⁰⁸ Rachel Rollins was elected as District Attorney of Suffolk County in Boston and subsequently encountered misogynist opposition in her new role.¹⁰⁹ Over the next several years, additional prosecutors—including Chesa Boudin, George Gascón, Larry Krasner, and Wesley Bell—successfully campaigned on progressive platforms.¹¹⁰

Some opportunistic candidates appeared to adopt the progressive prosecutor label because of its popularity. However, many self-identified progressive prosecutorial candidates genuinely believed that they could best reduce the harms of the criminal system from within the prosecutor’s office. Many are former defense attorneys or public defenders¹¹¹ or civil rights attorneys.¹¹² Some grew up in marginalized communities¹¹³ and have family members who are or were incarcerated.¹¹⁴ One has been a victim of police harassment or violence.¹¹⁵

107. See Eli Hager, *Cops Win Another Round Pursuing the Prosecutor Who Pursued Them*, MARSHALL PROJECT (Mar. 20, 2017), <https://www.themarshallproject.org/2017/03/20/cops-win-another-round-pursuing-the-prosecutor-who-pursued-them> [https://perma.cc/5YWS-76RT].

108. See Smith, *supra* note 103.

109. See Arianna MacNeill, *Rachel Rollins Accused 4 Other D.A.’s of Misogyny for Inserting Themselves into Suffolk County Business. They Say That Isn’t the Case*, BOSTON (July 9, 2020), <https://www.boston.com/news/local-news/2020/07/09/rachael-rollins-young-adult-murder-sentencing-explainer> [https://perma.cc/QS9X-TCFL].

110. See Marco della Cava, *New, More Progressive Prosecutors Are Angering Police, Who Warn Approach Will Lead to Chaos*, USA TODAY (Feb. 8, 2020), <https://www.usatoday.com/story/news/nation/2020/02/08/criminal-justice-police-progressive-prosecutors-battle-over-reform/4660796002/> [https://perma.cc/VJH3-6LP4].

111. See Monivette Cordeiro, *Orange-Osceola State Attorney Aramis Ayala to Leave Office When Term Ends but Says ‘I’m Not out of the Fight,’* ORLANDO SENTINEL (Oct. 31, 2019), <https://www.orlandosentinel.com/news/crime/os-ne-aramis-ayala-leaves-state-attorney-20191031-uz25n7oiv5bhp7cvcmmojafaa-story.html> [https://perma.cc/34KG-AYVS].

112. See Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power — and Learns the Limits — of His Office*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [https://perma.cc/STE9-K94D].

113. See Laura Washington, Opinion, *What Kimberly Foxx Learned at Cabrini-Green*, CHI. SUN TIMES (June 24, 2016), <https://chicago.suntimes.com/2016/6/24/18472313/laura-washington-what-kimberly-foxx-learned-at-cabrini-green> [https://perma.cc/F7SL-CDQA] (“Foxx spent her childhood on this old site, in the Cabrini-Green housing projects.”).

114. See Nadeen Yanes, *‘I Simply Did Not Know’: Aramis Ayala’s Husband Says He Mistakenly Voted as Felon*, CLICK ORLANDO (Mar. 8, 2019), <https://www.clickorlando.com/news/2019/03/08/i-simply-did-not-know-aramis-ayalas-husband-says-he-mistakenly-voted-as-felon/> [https://perma.cc/32SM-WGXD].

115. See *Despite Outrage with Aramis Ayala Video, Experts Say Traffic Stop was Legit*, TAMPA BAY TIMES (July 12, 2017), <https://www.tampabay.com/news/politics/stateroundup/despite-outrage-with-aramis-ayala-video-experts-say-traffic-stop-was-legit/2330242/> [https://perma.cc/DF7H-TXNX].

C. Evaluating the Progressive Prosecutor

In response to the growing trend toward progressive prosecution, criminal law scholars and observers have questioned the nature of progressive prosecution and the categorization of various prosecutors as progressive.¹¹⁶ The developing scholarship about progressive prosecution is still asking basic questions about the nature of progressive prosecution. Nevertheless, the “progressive prosecutor” label clearly engenders a considerable amount of skepticism. Some scholars have expressed a general skepticism that prosecution can ever be progressive.¹¹⁷ Others have questioned the genuineness of these prosecutors and have interrogated whether they are merely opportunistic political actors.¹¹⁸

According to Google Trends, the term “progressive prosecutor” came into common usage in 2018, although there was some coverage of “reform-minded prosecutor” in connection with Kimberly Foxx’s election in 2016.¹¹⁹

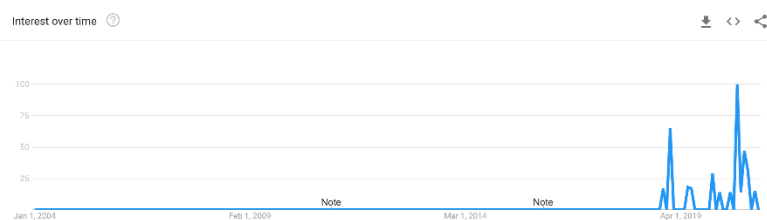


Figure 1. Google Trends Search of “Progressive Prosecutor”

Despite progressive prosecution’s relatively recent nascence, liberals have judged all prosecutors by the metrics of progressive prosecution as if it were an ever-existing term within criminal law parlance. For example, Lara Bazelon famously proclaimed that Kamala Harris was not a progressive prosecutor, eliding the context that the progressive prosecution framework did not even exist when Harris was a prosecutor from 1990 to 2017.¹²⁰

Also noticeably missing from Bazelon’s analysis—and from many liberal critiques of progressive prosecution—is a discussion of Whiteness and anti-Blackness against prosecutors as constraints on how they exercise their

116. See Romero, *supra* note 14, at 815.

117. See *id.*

118. See Jeannie Suk Gersen, *Kamala Harris and the Noble Path of the Prosecutor*, NEW YORKER (Nov. 20, 2020), <https://www.newyorker.com/news/our-columnists/kamala-harris-and-the-noble-path-of-the-prosecutor> [<https://perma.cc/5GSX-VK9A>] (“Some leftist critics doubt prosecutors’ potential to drive meaningful change of such a broken and poisonous system.”).

119. See Christopher Wright Durocher, *Opportunities and Obstacles to Prosecutors Seeking Reform*, AM. CONST. SOC’Y BLOG (Sept. 20, 2017), <https://www.acslaw.org/expertforum/opportunities-and-obstacles-to-prosecutors-seeking-reform/> [<https://perma.cc/ACJ7-VZMZ>].

120. See Bazelon, *supra* note 31; *Kamala Harris: The Vice President*, WHITE HOUSE, <https://www.whitehouse.gov/administration/vice-president-harris/> [<https://perma.cc/2S9Q-2AUS>].

discretion. This Article does not seek to defend the records of these prosecutors, so whether Harris was truly progressive is not at issue. Rather, this Article seeks to name the racial erasure that occurs within the liberal discourse.

Where scholars have focused on racial bias in prosecutorial outcomes, they have primarily addressed the racially disparate outcomes in the prosecution of Black defendants.¹²¹ Professor Angela J. Davis has been a pioneer in examining race and prosecution. Her work looked at the victimization of Black people and others marginalized during prosecution through either the severity of punishment or the failure to remedy prosecutorial misconduct.¹²² This Article considers Whiteness as a lens for understanding prosecution and shifts the focus to the prosecutor as a beneficiary of racial privilege or advantage.

II.

EXAMINING THE WHITENESS OF THE DISCOURSE ON PROSECUTION

Prosecution is a predominantly White and male endeavor.¹²³ A recent study of the demographics of prosecutors in the United States found that White men led 75 percent of prosecutors' offices.¹²⁴ Women of color led a paltry 2 percent of such offices.¹²⁵ That the very bodies responsible for charging people are mostly White bodies has broad implications. Much scholarship focuses on how racial bias may lead to discriminatory outcomes for the defendants; very little scholarship acknowledges how the prosecutors' Whiteness shields the office from scrutiny and facilitates punitiveness.¹²⁶

This Article does not focus on prosecutors' identity *per se*. It instead focuses on how White supremacy enables White bodies to exercise their privilege in a punitive way. What privileges do prosecutors experience because of their Whiteness? Anti-Blackness may contribute to the racial disproportionality of prosecution, but White privilege may shield prosecutors from scrutiny and facilitate punitive prosecutorial practices.

This study embraces the legal methodology of Critical White Studies, which recognizes Whiteness as an object of study and legal analysis. This study leveraged computer coding software provided by Brand Watch (formerly Crimson Hexagon) to analyze 449,000 online mentions about progressive prosecution generally and eight selected progressive prosecutors specifically.

What exactly makes a prosecutor progressive is a legitimate question beyond the purpose or scope of this study. Here, the selected prosecutors all

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

122. See Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 834–36 (2013).

123. See REFLECTIVE DEMOCRACY CAMPAIGN, *supra* note 27, at 2.

124. *Id.*

125. *Id.*

126. *See id.*

embraced a decarceral agenda and adopted policies that decriminalized a broad range of offenses, held police accountable for misconduct, or otherwise reflected a new vision regarding the role of prosecutors. Though none is clearly more progressive than the others, they appear to have had very different experiences in the progressive prosecutor role.

Parts II.A–B discuss Critical White Studies, the framework for designing the algorithm and interpreting the data in a way that accounts for this apparent discrepancy. Part II.C discusses the Brand Watch social listening program that coded and analyzed the data.

A. Critical White Studies

Critical White Studies is a body of scholarship that examines how institutions reproduce White supremacy and provides a framework for understanding the prosecutorial function. Professor Barbara Flagg described Whiteness as reflecting a transparency phenomenon:

White people externalize race. For most [W]hites, most of the time, to think or speak about race is to think or speak about people of color, or perhaps, at times, to reflect on oneself (or other [W]hites) in relation to people of color. But we tend not to think of ourselves or our racial cohort as racially distinctive. Whites' "consciousness" of [W]hiteness is predominantly unconsciousness of [W]hiteness. We perceive and interact with other [W]hites as individuals who have no significant racial characteristics. In the same vein, the [W]hite person is unlikely to see or describe himself in racial terms, perhaps in part because his [W]hite peers do not regard him as racially distinctive. Whiteness is a transparent quality when [W]hites interact with [W]hites in the absence of people of color. Whiteness attains opacity, becomes apparent to the [W]hite mind, only in relation to, and contrast with, the "color" of [non-Whites].¹²⁷

Critical White Studies is concerned with what Professor Camille Gear Rich identified as the "invisibility thesis," which describes "how various laws complicate fair adjudication of racial disputes because they effectively encode or protect a default '[W]hite' normative perspective."¹²⁸ Critical White Studies considers the role of Whiteness in facilitating racial subordination and setting the standards for normality.¹²⁹ As Richard Delgado observed, "[W]hite folks have a race too, although they rarely think about it or see themselves as racialized. By the same token, they sometimes speak in racialized narratives about themselves,

127. See Flagg, *supra* note 15, at 970.

128. See Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1511 (2010) (contributing additional nuance to the discourse by examining how some White people experience marginal Whiteness and receive less privilege).

129. See Flagg, *supra* note 15, at 970.

although the narratives are so familiar that they strike both the speaker and the listener not as narratives at all, but the truth.”¹³⁰

Traditional race scholarship focused on the people at the “bottom of the well”¹³¹—the marginalized people so often excluded from full political participation. Critical White Studies shifts the focus to White people—the politically dominant group in the American racial hierarchy.¹³² This approach acknowledges that the conduct and experiences of White people set the standards, and therefore focuses on Whiteness and the experiences of privilege that it enables.¹³³ It is a change of perspective.¹³⁴

Arguably, much of the literature on race and prosecution has focused on the faces at the bottom of the well, the disadvantaged defendants. This Article uses Critical White Studies to shift the focus to the racially privileged prosecutor.

B. Critical White Studies and Prosecution

Critical White Studies offers a powerful lens for understanding how prosecution has occurred given the historical Whiteness of prosecution in this country.¹³⁵ As described in Part I, a substantial amount of the literature on prosecutors has focused on the power of the prosecutor. However, this scholarship has tended to presume that this power—to quasi-legislate, exercise substantial discretion, and evade accountability or transparency—stems from the office of the prosecutor rather than from the Whiteness of the prosecutors.¹³⁶ This is a mistake.

In describing the prosecutorial endeavor as universally all-powerful, scholars have ignored the role that Whiteness plays in facilitating this power. Whiteness is at the top of the American social hierarchy and allows its

130. See Richard Delgado, *Making Pets: Social Workers, “Problem Groups,” and the Role of the SPCA—Getting A Little More Precise About Racialized Narratives*, 77 TEX. L. REV. 1571, 1579–80 (1999).

131. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

132. See, e.g., CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 289–335 (Richard Delgado & Jean Stefancic eds., 1997).

133. See Richard Delgado, *Rodrigo’s Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247, 1286 (2011); Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, in CRITICAL WHITE STUDIES, *supra* note 132, at 291, 293–94 (describing a knapsack of forty-six privileges that White people can call upon).

134. See Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1185 (2017) (examining the spatial policing of Whiteness):

Emmett Till and Trayvon Martin and the legal cases regarding their deaths [] demonstrate how deeply embedded social and economic structures and practices such as the protection of the material and psychic benefits of [W]hiteness, the protection of “the white space,” and commonsense racism[] animated the two killings and may have influenced their trials, even though the cases occurred more than half a century apart.

135. See *supra* Part I.A–C.

136. See *id.*

beneficiaries to enjoy the privileges of full political participation and recognition.¹³⁷ Prosecutorial power may derive in part from the Whiteness of the prosecutors themselves.¹³⁸ When scholars fail to acknowledge that prosecutors' race may facilitate the punitiveness and administration of prosecution, the experiences of White prosecutors become normalized.¹³⁹ Commentators presume that all prosecutors have similar experiences and therefore evaluate all prosecutors in similar manners.¹⁴⁰ However, White prosecutors may access benefits of Whiteness that are unavailable to other prosecutors.¹⁴¹ Likewise, male prosecutors may enjoy more political cover than female prosecutors.¹⁴² Yet the literature on prosecutors misses this nuance and instead relies upon a Stuntzian conception of the prosecutor that is decidedly White and male.

This portrayal of prosecution is unsurprising because prosecution is a remarkably White endeavor.¹⁴³ Even today, 95 percent of elected prosecutors are White.¹⁴⁴ White privilege may facilitate deference to the office and the prosecutors engaged in the work. It may bestow a presumption of competence, rather than the presumption of incompetence that women and people of color often encounter.¹⁴⁵ It may allow for judicial concern and understanding.¹⁴⁶ This deference may result from the fact that prosecution is official State business—but it is notable that an overwhelming proportion of the representatives of the State are White.¹⁴⁷

The invisibility of the role of Whiteness in facilitating prosecution is precisely why it requires additional analysis. The aspects described as essential features of prosecution may in fact be essential features of White supremacy and power instead.¹⁴⁸ This Whiteness is pathological throughout the criminal legal

137. See McIntosh, *supra* note 133, at 291.

138. REFLECTIVE DEMOCRACY CAMPAIGN, *supra* note 27, at 2.

139. See Bazelon, *supra* note 31; Stuntz, *supra* note 18, at 509.

140. See Stuntz, *supra* note 18, at 509.

141. See McIntosh, *supra* note 133, at 291.

142. See andré douglas pond cummings, Steven A. Ramirez & Cheryl L. Wade, *Toward A Critical Corporate Law Pedagogy and Scholarship*, 92 WASH. U. L. REV. 397, 401 (2014) (noting how a “[W]hite male supremacy” dictates the economy, emphasizing the gendered dimensions of White supremacy).

143. See Stuntz, *supra* note 18, at 509.

144. See REFLECTIVE DEMOCRACY CAMPAIGN, *supra* note 27, at 2.

145. Cf. Angela P. Harris, *Foreword: Presumed Incompetent in the Era of “Diversity,”* in PRESUMED INCOMPETENT II: RACE, CLASS, POWER, AND RESISTANCE OF WOMEN IN ACADEMIA, (2020) (describing the presumption of incompetence that women of color experience in the legal academia); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 272 (2012) (examining “cognitive biases that can affect officer judgments of suspicion”); Robert J. Smith, Justin D. Levinson & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871 (2014) (describing how implicit bias promotes [W]hite favoritism in the criminal legal system).

146. See Richardson, *supra* note 145, at 271–72.

147. See REFLECTIVE DEMOCRACY CAMPAIGN, *supra* note 27, at 2.

148. See Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 886 (1995) (noting how dominant discourse “mask[s] a system of power and that system privileges [W]hiteness”); John A. Powell, *Whites Will Be*

system. Nevertheless, even scholarly discussions of Whiteness have overlooked its role as key to prosecutorial power.¹⁴⁹

While Professor William Stuntz acknowledged that prosecutors were almighty, he claimed that the prosecutorial power derived from the legislature's expansion of the criminal law.¹⁵⁰ He argued:

As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long. The end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys' offices and police departments.¹⁵¹

Stuntz presented his argument as a structural one concerned with the incentives that the system facilitated.¹⁵² However, he ignored the cultural impact of such arrangements (Do all prosecutors access quasi-legislative discretion equally?) and the pervasive Whiteness of prosecutors (Does White privilege shield prosecutors from check by other actors in the criminal legal system, e.g. judges providing broad prosecutorial immunity or state attorneys boards failing to discipline prosecutorial misconduct?). According to Stuntz, the power of the prosecutor was embedded within the office itself, not in the racial privilege of the almost exclusively White individuals who embodied the role.

Curiously, online commentary on progressive prosecution only recently began to mention the race of the prosecutors. There are plenty of debates that discuss—or, more accurately, nod to—the role of race in prosecution, but these tend to focus on the disadvantages and challenges of the defendants. These arguments implicitly amplify the pathologies of Black communities. By contrast, there is shockingly little mention of the fact that nearly all prosecutors in this country are White, or of the racial privilege and racial advantage this confers on prosecutors.¹⁵³ This oversight essentializes prosecutors as White and presumes that all prosecutors have the same levels of positional power and ability to fully wield that power. However, as Part III demonstrates, that is simply not the case.

Whiteness is an important consideration in evaluating prosecution because it provides a protective barrier for the exercise of prosecutorial power by White prosecutors. White prosecutors might receive deference from judges who adjudicate their cases. Even if judges espouse racially progressive values and beliefs, research consistently shows that Americans harbor implicit biases that

Whites: The Failure to Interrogate Racial Privilege, 34 U.S.F. L. REV. 419, 420 (2000) (examining Whiteness as a lens for understanding “sameness and difference, or Whiteness and Otherness”).

149. See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

150. See Stuntz, *supra* note 18, at 509, 582 (noting that there is a “czarism among prosecutors, to the practice of substituting their own discretionary enforcement decisions for the decisions legislatures enshrine in criminal codes” given their discretion in enforcing various crimes).

151. See *id.* at 509.

152. *Id.*

153. See *generally id.* (lacking any reference to the race of the majority of prosecutors).

favor White people over Black people.¹⁵⁴ Americans also exhibit bias against Black people. Americans are more likely to perceive Black people as threatening and menacing and are less likely to believe them.¹⁵⁵ Americans also have preferential biases toward White people.¹⁵⁶ White people are more likely to benefit from positive associations, and Americans are *more* likely to believe and trust White people.¹⁵⁷

These findings illustrate that White people benefit from perceptions of trustworthiness; prosecutors may particularly benefit from this presumption of trustworthiness that White people enjoy. For example, observers may presume that White prosecutors are more concerned with public safety. White prosecutors may also enjoy a more cooperative relationship with other system actors—including the police, who might assume that White prosecutors are on their side. This Article interrogates how Whiteness and racial privilege inform the online conversation around progressive prosecution.

C. Methodology

This Article utilizes computer coding software provided by Brand Watch (formerly Crimson Hexagon) to examine the online conversation about progressive prosecution. The software program analyzes publicly available online textual data based on statistical patterns in the text. The program pulls from “1.2 trillion public, online mentions dating back to 2008, with the addition of half a billion new public posts every day.”¹⁵⁸ The purpose of the program is to “take as data a potentially large set of text documents, of which a small subset is hand coded into an investigator-chosen set of mutually exclusive and exhaustive categories. As output, the methods give approximately unbiased and statistically consistent estimates of the proportion of all documents in each category.”¹⁵⁹ The program examines all publicly available online content, including Twitter posts. The Pew Research Center validated the software and described its data analytics process, including its ability to monitor entire conversations:

CH monitors do not measure each story as a unit, but examine the entire discussion in the aggregate. To do that, the algorithm breaks up all relevant texts into subsections. Rather than the dividing each tweet or sentence, CH treats the “assertion” as the unit of measurement. Thus,

154. See Richardson, *supra* note 145, at 272–73.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Introducing Brandwatch Consumer Research*, BRANDWATCH (Sept. 17, 2019), <https://www.brandwatch.com/blog/introducing-brandwatch-consumer-research/> [<https://perma.cc/M95F-J9PZ>].

159. *Methodology: How Crimson Hexagon Works*, PEW RSCH. CTR. (Apr. 1, 2015), <https://www.journalism.org/2015/04/01/methodology-crimson-hexagon/> [<https://perma.cc/V4GR-THVG>].

posts are divided up by the computer algorithm. If 40% of a story fits into one category, and 60% fits into another, the software will divide the text accordingly. Consequently, the results are not expressed in percent of newshole or percent of posts. Instead, the results are the percent of assertions out of the entire body of posts identified by the original Boolean search terms. We refer to the entire collection of assertions as the “conversation.”¹⁶⁰

For this study, I created an individual query that established the relevant algorithm for the software program to analyze. The relevant time period for the search was from June 30, 2019, to July 27, 2021, unless otherwise stated. In establishing the algorithm, I used Boolean search logic for the program to analyze the relevant posts. To examine the tone of the online conversation on progressive prosecution, the algorithm examined whether the available data reflected a “positive,” “negative,” or “neutral” perspective on the topic or individual listed in the Boolean search. It also analyzed the emotions of the textual data connected to the topic or individual prosecutor to consider whether they reflected emotions such as “joy,” “disgust,” or “sadness.”¹⁶¹

First, I ran the Brand Watch query, utilizing my Boolean search logic, to consider the online conversation on “progressive prosecution.” I searched for “progressive prosecution” by adopting a Boolean search that looked for “progressive prosecution,” or “progressive prosecutors,” or “progressive prosecutor.” Searches that included the terms “reformist prosecutor,” “reform-minded prosecutor” and derivations of those two terms did not yield additional relevant textual data and were thus excluded.

This study first examines the online conversation around progressive prosecution generally. It then takes a sample of eight prosecutors with different demographic profiles to study the difference in experience for different classes of prosecutors. By examining intersectional barriers in prosecution and Whiteness, this study adopts an oversample of four Black women prosecutors to compare with four male prosecutors. Two of the male prosecutors are White and

160. *Id.*

161. *Get a Deeper Understanding of Consumer Sentiment with Emotion Analysis*, BRANDWATCH (Mar. 18, 2019), <https://www.brandwatch.com/blog/get-a-deeper-understanding-of-consumer-sentiment-with-emotion-analysis/> [<https://perma.cc/Q6JT-ESUV>]. Brandwatch uses the list of six **basic emotions** as defined by the famous psychologist Paul Ekman to classify mentions:

- Anger
- Disgust
- Fear
- Joy
- Surprise
- Sadness

Emotion is assigned to mentions automatically by the Brandwatch system, using a custom statistical classifier which was created in-house by our team of data scientists.

You can then filter or chart by any of those emotions to view the emotive mentions in your data set however you like. You can even set up custom alerts to detect sudden increases in a particular emotion surrounding the topic.

two are men of color. This sampling is diverse, and the sample is small enough to allow for an in-depth analysis of their experiences.

The Brand Watch data analysis of the online conversation about progressive prosecution included 41,000 Twitter posts by 24,000 unique authors. The sentiment of the posts were 11 percent positive, 34 percent negative, and 55 percent neutral.

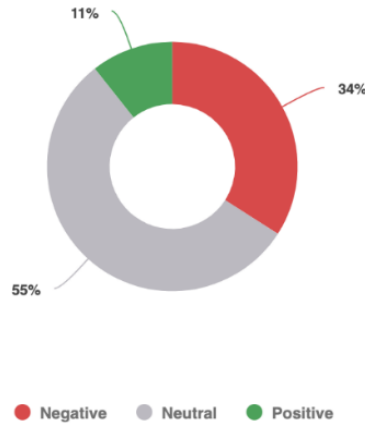


Figure 2. Online Sentiment about Progressive Prosecution

Positive online posts included messages supporting progressive prosecutors, particularly Larry Krasner in Philadelphia and Chesa Boudin in San Francisco. Negative posts included critiques of progressive prosecutors, including posts that critiqued Kamala Harris; posts that shared items from conservative news media outlets accusing progressive prosecutors of disregarding or increasing the rates of violent crime; and posts that responded to the critiques of Kamala Harris and other women of color prosecutors.

The algorithm also examined the emotions expressed in the posts about progressive prosecution. The dominant emotions expressed in these posts were sadness (48 percent), disgust (23 percent), and joy (14 percent). This finding suggests that the online narrative about progressive prosecution is largely negative. Influential news outlets active in the online conversation about progressive prosecution include Breitbart.com and Fox News (local and national). Influential liberal news media outlets included the *New York Times*, yahoo.com, msn.com, and *The Marshall Project*.

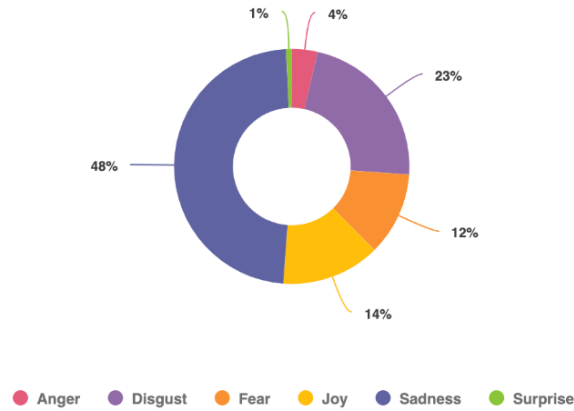


Figure 3. Online Emotions Toward Progressive Prosecution

The most interacted-with tweets on progressive prosecution include a critique of progressive prosecution as a basis for reducing the harms of the criminal legal system (reaching 5 million people online); progressive prosecutor Kimberly Foxx’s message of support for Kamala Harris (reaching 587,000 people online); and a conservative commentator’s critique of the release of Black Lives Matter protestors who had been arrested (reaching 445,000 people online).

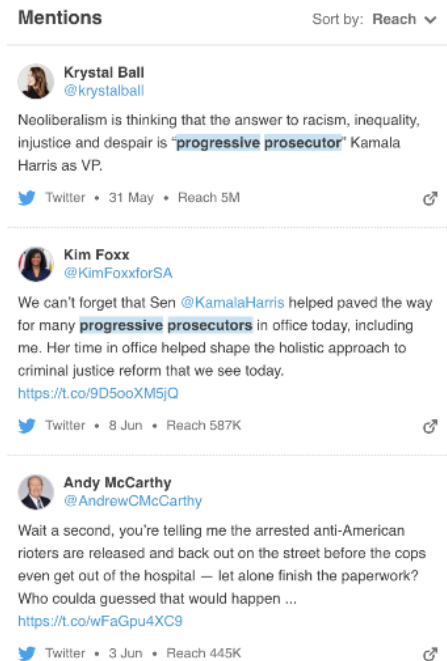


Figure 4. Influential Tweets on Progressive Prosecution

The most influential posts on progressive prosecution with a negative sentiment include a progressive critique of Kamala Harris and the concept of progressive prosecution (the same tweet above which reached 5 million people online); a Black woman commentator's observation of the tension among progressives claiming to support women of color prosecutors when their critiques have successfully undermined them (reaching 295,000 people online); and a progressive's argument that Kamala Harris was not a progressive prosecutor (reaching 295,000 people online). Kamala Harris appears to have been influential in the online commentary about progressive prosecution until November 2020 because of her role as a presidential candidate and then as vice-presidential candidate.

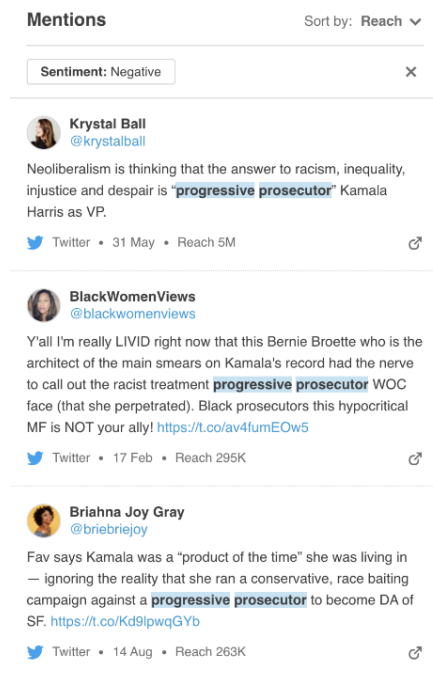


Figure 5. Influential Negative Tweets about Progressive Prosecution

Progressives interested in progressive prosecution as criminal legal system reform and abolitionists interested in making prosecution obsolete should be troubled by this. Conservatives have successfully campaigned against progressive prosecution at the same time. There appears to be a debate within progressive circles about whether individual prosecutors are progressive enough. However, the conservative backlash against progressive prosecutors persists and includes narratives from various conservative media sources, most notably *Fox News*, *One America News*, and *Breitbart News*.

The data prior to the 2020 election show that conversations about Kamala Harris and her record played a significant role in the discourse about progressive

prosecution. The word cloud below illustrates that references to “Harris,” “justice,” “criminal,” “Trump,” and “reform” were a part of the conversation on progressive prosecution between June 30, 2019, and July 27, 2021. The conversations studied also included “San Francisco,” in reference to District Attorney Chesa Boudin in San Francisco.

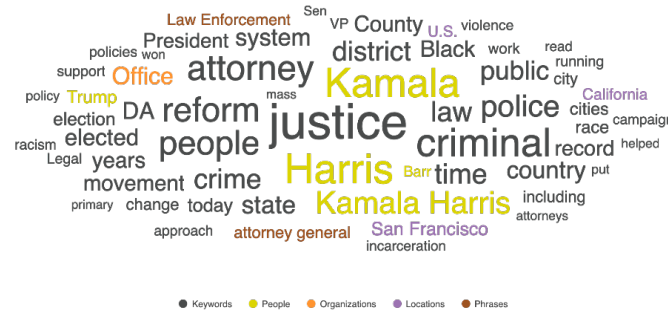


Figure 6. Word Cloud Based on Online Discourse on Progressive Prosecution (July 2019 to July 2021)

An analysis of the online posts about progressive prosecution from January 2021 to July 2021 shows that comments involving Larry Krasner in Philadelphia played a significant role in the online conversation about progressive prosecution. Below is a word cloud generated from online conversation during that time period.



Figure 7. Word Cloud Based on Online Discourse on Progressive Prosecution (January 2021 to July 2021)

In both time periods when online conversations frequently discussed Harris and Krasner, the words “Black,” “violence,” “police,” and “incarceration” appear. Moreover, the January 2021 to July 2021 data reveals the word “backlash” as a significant part of the online conversation.

Criminal law scholarship appears to replicate the online social listening data. The results from a Westlaw search for the individual prosecutors, which gathered all mentions of the prosecutors from the time data became available until July 28, 2021, reflected disparities in mentions within the legal scholarship

discourse. Larry Krasner was the most mentioned progressive prosecutor studied and appeared in 167 different law review articles. Chesa Boudin followed Krasner and appeared in 113 law review articles. This is remarkable because Boudin is a relatively new progressive prosecutor. Kimberly Foxx was next in number of appearances, appearing in eighty-three law review articles. George Gascón followed Kimberly Foxx with appearances in seventy-six law review articles. Marilyn Mosby followed with appearances in sixty-four law review articles, and Wesley Bell appeared in thirty-three law review articles. Aramis Ayala and Kimberly Gardner had the fewest appearances in law review articles with twenty-six and twenty-two, respectively. Although this is an imprecise metric, White male prosecutors appear to play an outsized role in the discourse about progressive prosecutors. It also suggests that there is more enthusiasm about these prosecutors.

D. Bringing Critical Whiteness to the Data

Similar to the algorithm constructed for “progressive prosecution,” I developed an algorithm that examined the social listening data for each individual prosecutor to consider whether White prosecutors benefited from positive narratives. I entered variations of each prosecutor’s name and title to yield results about the online conversation about them. The following Section considers these data. I included this analysis to investigate whether White prosecutors might be presumed willing to protect the interests of dominant groups and to support the general policing and discipline of marginalized communities. Criminal law administration plays an important role in maintaining the dominant racial and social hierarchy by managing and policing communities perceived as threats to the dominant social order.¹⁶² White prosecutors may benefit from a presumption that they protect White interests.¹⁶³ They may share a similar cultural identity and background with the social elites in their community.¹⁶⁴ More importantly, White prosecutors may be protected from accusations of bias toward defendants and against police.¹⁶⁵ These are questions that are underexplored but worthy of additional research.

The focus on Whiteness also reveals constraints on prosecution that are often ignored. The experiences of prosecutors of color expose how the presumptions about prosecutors are just presumptions about White prosecutors.

162. See Susan E. Howell, Huey L. Perry & Matthew Vile, *Black Cities/White Cities: Evaluating the Police*, 26 POL. BEHAV. 45 (2004).

163. See Smith et al., *supra* note 145, at 874–75.

164. See Howell et al., *supra* note 162, at 49 (“Social dominance theory tells us that societies are organized around the notion of dominant and subordinate groups with the dominant groups possessing a disproportionate amount of wealth, power, status, and so forth.”).

165. See Rachel Lippmann, *St. Louis Chief Prosecutor Accuses City, Police Union of Racist Conspiracy in Lawsuit*, NPR (Jan. 14, 2020), <https://www.npr.org/2020/01/14/796199881/st-louis-chief-prosecutor-accuses-city-police-union-of-racist-conspiracy-in-laws> [https://perma.cc/2UM2-TJRM].

Black, Indigenous, and people of color prosecutors have faced accusations of bias toward defendants because defendants tend to also be people of color.¹⁶⁶ These prosecutors might also be assumed to be anti-police because of the hostile relationship between people of color and police in many communities.¹⁶⁷ Examining prosecution through the lens of Whiteness reveals that many of the underlying premises about prosecution are misguided. Prosecution is examined as a singular experience, and prosecutorial power is taken for granted. Criminal law scholarship examines prosecution with little consideration of how the Whiteness of the profession may protect it. But the intersectional barriers that prosecutors of color, particularly Black women prosecutors, encounter when adopting and implementing a decarceral agenda demonstrate that the discourse lacks nuance.¹⁶⁸

E. Limitations

There are several limitations of using social media data to examine progressive prosecution. First, the data might not reflect the entire conversation about a particular topic. Some users utilize private settings which disallow public viewing of their posts. There are conversations occurring in person and on alternative platforms that are not included in the data. Furthermore, my Boolean search results may not include every reference to the topic or individual. For example, posts that misspell people's names, posts that use unusual abbreviations, or posts that refer to a prosecutor by a local nickname are not included in this sample. Moreover, as is often the case with racism and White supremacy, the evidence may be suggestive of racism but open to other interpretations. There may be a temptation to explain away disparities in experience as abnormalities or due to individual circumstances. The data do not allow for definitive causal conclusions.

In total, this Article considers 449,000 online posts that were analyzed through the algorithm. However, algorithms are not foolproof and may lead to biased results. To triangulate the social media analysis, I discuss each prosecutor's political landscape, policies, and experience with legal challenges to describe the political environment outside of the online discourse findings.

The study is limited to the experiences of eight prosecutors who represent several demographic profiles, but they are not the only prosecutors that illustrate

166. See, e.g., Editorial, *When Prosecutors and Cops Are at War, Innocents Pay a Bloody Price*, N.Y. POST (Nov. 16, 2021), <https://nypost.com/2021/11/16/when-prosecutors-and-cops-are-at-war-people-pay-a-bad-price/> [<https://perma.cc/58AM-FGYN>] (displaying images of two Black elected prosecutors and arguing that “in today’s upside-down progressive world, prosecutors too often view cops as culprits and perps as victims”).

167. *Id.* (“Incoming Manhattan DA Alvin Bragg, for one, stresses his distrust of the police. Indeed, he’s had a grudge against them since being stopped by cops as a teen.”) (suggesting a Black newly-elected prosecutor’s experiences with racially biased policing were evidence of his inability to be effective at maintaining public safety).

168. See *infra* Part III.A–D.

the challenges of being a progressive prosecutor. Other notable progressive prosecutors include Rachel Rollins in Suffolk County, Massachusetts—which includes Boston—and Stephanie Morales in Portsmouth County, Virginia. Both of these Black women prosecutors encountered strong resistance. For example, Virginia police officials intended to block Morales from serving as the prosecutor on a case bringing felony charges against local civil rights leaders for the destruction of Confederate monuments.¹⁶⁹ That case involved a blatant attempt to protect White supremacist symbols by interfering with the work of a Black woman progressive prosecutor.

Given the breadth of data analyzed in this study, the sample could only include a small number of prosecutors. The prosecutors who were selected for this study represent three demographic profiles (Black women, men of color, and White men) that are increasingly represented among progressive prosecutors. The selected prosecutors also have substantial local and national profiles, allowing for the analysis of online discourses about them.

Despite these limitations, this study offers helpful insights into how the American public talks about progressive prosecution. My hope is that the findings encourage a more nuanced discourse on progressive prosecution that accounts for White privilege in prosecution. I also hope that liberals are able to contend with their implicit biases that are seeping into progressive discourse.

III.

THE INTERSECTIONAL BARRIERS FOR PROSECUTORS

Marilyn Mosby, the female prosecutor in Baltimore, has received numerous hate messages, including a letter that imagined her death:

Obituary of Marilyn Mosby: [Marilyn Mosby was] gunned down in cold blood walking into the courthouse . . . [and her husband was] found tortured and dismembered. . . [S]everal family members, related to Mr. and Mrs. Mosby, have been reported ‘missing’, the police are not currently investigating and feel that none of the missing are significant.¹⁷⁰

Kimberly Foxx, the Black female prosecutor from Chicago, has received numerous hate messages, and White nationalists protested outside her office in April 2019.¹⁷¹ Black female prosecutor Kimberly Gardener received a message

169. See Ryan J. Reilly, *Cops Who Charged Civil Rights Leaders with Felonies Try to Sideline Progressive Prosecutor*, HUFFPOST (Aug. 18, 2020), https://www.huffpost.com/entry/portsmouth-police-confederate-stephanie-morales_n_5f3bf494c5b6b1015127f1bd [https://perma.cc/Y4MS-NAMX].

170. Christina Carrega, *For the Few Black Women Prosecutors, Hate and ‘Misogynoir’ Are Part of Life*, ABC NEWS (Mar. 21, 2020), <https://abcnews.go.com/US/black-women-prosecutors-hate-misogynoir-part-life/story?id=68961291> [https://perma.cc/DAB3-TW9P].

171. *Id.*

stating that she “should be hung up by a tree by the KKK.”¹⁷² Another message stated, “I hope people destroy your neighborhood, threaten your family.”¹⁷³

The rise of progressive prosecutors has introduced a historic number of non-White and non-male prosecutors into the fold. Kimberly Foxx, Kimberly Gardner, Aramis Ayala, and Rachel Rollins are all the first Black women to hold their positions.¹⁷⁴ They have wielded the power of their offices to adopt policies that opt out of charging defendants for less serious offenses, decriminalize marijuana offenses, and hold officers accountable for dishonest law enforcement practices. Nevertheless, as change agents who are also Black and female, they have encountered an inordinate amount of resistance to their reforms. This resistance indicates that the power of the prosecutor’s office is not simply a matter of institutional design and structure.

Compared to carceral prosecutors who embrace a punitive agenda or White or male prosecutors who embrace a “smart” approach to prosecution, Black women prosecutors face unique challenges in implementing their programs.¹⁷⁵ As a general matter, progressive prosecutors have experienced hostility from the police and other actors in the criminal legal system, illustrating the systemic punitiveness of criminal law administration that extends beyond the prosecutor’s office. Contrary to Professor Stuntz’s claim, prosecutors are not almighty czars—especially when they are not punitive. This insight is particularly relevant in devising long-term goals to make the criminal legal system less punitive. It suggests that the power of criminal legal system actors is constrained by the expectation that they act punitively. Consequently, perhaps progressive prosecution should only be an intermediary step as advocates develop a framework for moving outside of the system to address harm.

Interestingly, Black women prosecutors in particular have faced unprecedented challenges to their authority as prosecutors. This study suggests that although they occupy the powerful role of prosecutor, their status as non-punitive Black women prosecutors is inadequate for them to reap all the privileges available to White prosecutors. Black women prosecutors demonstrate that their Blackness may expose them to racialized attacks and disadvantages, and the historical Whiteness and maleness of prosecution has been normalized within common understandings of prosecution. The racialized perception of prosecution relies on the White male prosecutor’s experience of prosecuting,

172. *St. Louis Prosecutor Facing Relentless Resistance as She Works to Reform Justice System*, CBS NEWS: 60 MINUTES (Mar. 11, 2021) <https://www.cbsnews.com/news/kim-gardner-st-louis-prosecutor-60-minutes-2021-03-11/> [<https://perma.cc/ARF7-Q27E>].

173. *Id.*

174. See Aaron Morrison, *Black Women Prosecutors Rally Behind St. Louis Circuit Attorney Over Racist Backlash*, APPEAL (Jan. 17, 2020), <https://theappeal.org/black-women-prosecutors-st-louis/> [<https://perma.cc/9G3R-7XYK>].

175. This study does not include progressive White women prosecutors. However, future work examining the experiences of this group of progressive prosecutors might shed additional light on how gender impacts the exercise of power as a prosecutor.

disregarding that part of the prosecutor's power stems from his Whiteness and punitiveness. The discourse about prosecutors proceeds as if the power of the officer flows solely from the office itself. However, the challenges facing progressive prosecutors indicate that some of the power of punishment is a matter of an institutional design that contemplates a White man exercising power over punishment in a punitive manner.¹⁷⁶ When there is a deviation from this design, there is resistance.

When Black women occupy the office of the prosecutor, there is a pervasive dislocation to the social hierarchy. They are representing the State. They are the People. Their representation of the People and the State is at odds with expectations about who represents power. This may be one reason Black women prosecutors appear to encounter particularly hostile environments when engaging in progressive prosecution. For example, immediately after Aramis Ayala announced her intention to adopt a general policy of not seeking the death penalty, the governor of Florida removed her from several cases, and the Florida Supreme Court upheld her unprecedented removal.¹⁷⁷ In St. Louis, Kimberly Gardner announced her intention to fully investigate officer-involved killings and to treat them like any other criminal investigation.¹⁷⁸ The local law enforcement community responded by raiding her prosecutorial offices.¹⁷⁹ Under a theory of prosecution that contemplates prosecutors as "czars," these situations are unthinkable.¹⁸⁰ These situations illustrate the Whiteness problem that pervades prevalent thinking about prosecutors; that is, there is very little acknowledgment of how the Whiteness of prosecutors empowers them to punish.¹⁸¹ Relatedly, there is very little acknowledgement of how racial subordination and patriarchy constrain the power of non-White and non-male prosecutors.

Intersectionality provides a framework for understanding the hostility that these women encounter in their work as prosecutors. Intersectionality accounts for the distinct forms of subordination that result from the overlapping systems

176. See Smith et al., *supra* note 145, at 874–75.

177. See Aramis Ayala Yanked from Case by Second GOP Governor, *This Time DeSantis*, TAMPA BAY TIMES (Jan. 31, 2020), <https://www.tampabay.com/florida-politics/buzz/2020/01/31/aramis-ayala-yanked-from-case-by-second-gop-governor-this-time-desantis/> [<https://perma.cc/8ZCL-U8YA>].

178. See Nicole Brown Chau, *Good Police Officers "Can't Sit in Complicit Silence" About Racial Injustice, Top Prosecutor in St. Louis Says*, CBS NEWS (June 1, 2020), <https://www.cbsnews.com/news/george-floyd-death-police-kimberly-gardner-st-louis/> [<https://perma.cc/3U98-M6S7>].

179. See Danny Wicentowski, *St. Louis Police Unions on Opposite Sides of Kim Gardner Lawsuit*, RIVERFRONT TIMES (Jan. 17, 2020), <https://www.riverfronttimes.com/newsblog/2020/01/17/st-louis-police-unions-on-opposite-sides-of-kim-gardner-lawsuit> [<https://perma.cc/HF49-WHG9>].

180. See Stuntz, *supra* note 18, at 581.

181. See Ryan J. Reilly, *Electing Prosecutors Are Still Overwhelmingly White and Male*, HUFFPOST (Oct. 24, 2019), https://www.huffpost.com/entry/elected-prosecutors-diversity_n_5db1b486e4b0131fa99ad093 [<https://perma.cc/4VK2-EFP6>].

of marginalization that certain groups experience.¹⁸² Its examination of the ways that these groups experience subordination is not merely additive in its dimensions (i.e., Black women are more oppressed than White women), but rather distinct and unique in its expression.¹⁸³ Intersectionality provides a methodology for interpreting unique expressions of subordination that are frequently erased in mainstream discussions of subordination.¹⁸⁴ The theory developed as Black feminists noted that the mainstream civil rights movement centered Black men and ignored the plight of Black women.¹⁸⁵ Likewise, the mainstream feminist movement centered the experience and concerns of White women.¹⁸⁶ Intersectionality is a framework for understanding how different forms of subordination, such as racism and patriarchy, intersect and lead to distinct forms of subordination.¹⁸⁷ It has been expanded to consider how ableism, heterosexism, transphobia, and other forms of subordination intersect with each other.¹⁸⁸

This Article focuses on the experience of Black women prosecutors as just one example of how intersectional forms of subordination may constrain the ability to resist carcerality.¹⁸⁹ Professor Moya Bailey's framework of misogynoir provides insights as to why Black women prosecutors specifically experience this pushback.¹⁹⁰ Misogynoir refers to the "particular venom directed at Black women through negative representations in the media."¹⁹¹ It is not merely racism that Black women experience. It is "the uniquely co-constitutive racialized and sexist violence that befalls Black women as a result of their simultaneous and interlocking oppression at the intersection of racial and gender

182. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991); Patricia Hill Collins, *Intersectionality's Definitional Dilemma*, 41 ANN. REV. SOCIO. 1, 2 (2012).

183. See Crenshaw, *supra* note 182, at 1241.

184. See *id.*

185. See *id.*

186. But see Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 16 (1991).

187. See Crenshaw, *supra* note 182, at 1244.

188. See Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1401 (2021) (centering "disability theory as a lens for understanding the problems of policing and police violence"); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309–10 (2001) (applying intersectionality theory to queer theory); Richard Delgado, *Rodrigo's Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247, 1257–59 (2011); Yxta Maya Murray, *What FEMA Should Do After Puerto Rico: Toward Critical Administrative Constitutionalism*, 72 ARK. L. REV. 165, 199 (2019) (applying intersectionality theory to examine colonialism and race in the context of Puerto Rico).

189. See *infra* Part III.A–D.

190. See generally MOYA BAILEY, *MISOGYNOIR TRANSFORMED: BLACK WOMEN'S DIGITAL RESISTANCE* (Suzanna Walters ed., 2021) (examining negative representations of Black women in the media landscape).

191. *Id.* at xiii.

marginalization.”¹⁹² This negative representation emboldens actors—both conservative and liberal—to disproportionately critique Black women.

In this study, the data show that conservative news media sources, particularly *Breitbart News* and *Fox News*, have targeted and condemned Black female prosecutors. The critique of Black women prosecutors is not just amplifying and more in quantity; it is also different and distinct in quality by relying upon personal attacks, racial epithets, targeting of family members, and derogatory language.

These women have encountered a racialized and gendered critique since becoming prosecutors. Firstly, the narratives about them as prosecutors are racialized and are suspicious of their commitment to public safety.¹⁹³ Several news articles question whether they are committed to keeping the public safe.¹⁹⁴ Some articles suggest that their policies undermine community safety.¹⁹⁵ Some suggest that they are somehow anti-police.¹⁹⁶ This pushback is rarely acknowledged in the literature about progressive prosecutors and is indicative of a general lack of attention to how Whiteness has protected punitive prosecutors.¹⁹⁷

The following Section analyzes the challenges that several progressive prosecutors have encountered since assuming office and analyzes local and national news coverage of their progressive policies. It begins with the experiences of Black women prosecutors, proceeds to White men prosecutors, and concludes with male prosecutors of color.

A. Challenges in Implementing Progressive Prosecution

This media scan and social media analysis shows how progressive prosecutors have experienced considerable backlash for adopting a nonpunitive agenda. First, all of the progressive prosecutors have encountered hostility to their decarceral agendas from pro-incarceration constituents. They have been accused of being unconcerned with public safety and holding anti-police sentiment. However, Black women prosecutors in particular have suffered harsh personal attacks, incidents of police misconduct, and general questioning of their competence from both the left and right. The social media findings confirm the structural limitations that these prosecutors encounter and suggest a difference in experience between the classes of prosecutors.

The social media analysis examined the levels of “joy,” “sadness,” and “disgust” in the online posts. As previously discussed, in general, 14 percent of the online posts pertaining to “progressive prosecution” expressed the emotion

192. *Id.* at 1.

193. *See infra* Part III.A–D.

194. *See id.*

195. *See id.*

196. *See id.*

197. *See supra* Part I.C (describing literature on progressive prosecutors).

of joy and 23 percent expressed the emotion of disgust.¹⁹⁸ The online posts mentioning male prosecutors in this study included posts that were 17.25 percent reflective of joy, and 20.5 percent reflective of disgust. The online conversation pertaining to White male prosecutors included posts that were 19 percent reflective of joy, and 24.5 percent reflective of disgust. The tone of the online conversation pertaining to men of color prosecutors included posts that were 15.5 percent reflective of joy, and 16.5 percent reflective of disgust.

The tone of the online conversation pertaining to Black women prosecutors included posts that were 8 percent reflective of joy, and 31.5 percent reflective of disgust. Consequently, the conversations about Black women prosecutors included fewer posts that reflected joy; only 8 percent reflected joy, which is substantially lower than the 17.5 percent for White male prosecutors. The posts that reflected joy came from progressive or liberal sources and generally pertained to enthusiasm about the individual prosecutor’s work or policies. There were also more posts that reflected disgust toward Black women prosecutors, with 31.5 percent reflecting disgust. Interestingly, White male prosecutors also had a substantial percentage of mentions that reflected disgust—24.5 percent.

The software program also analyzed whether each post was positive, negative, or neutral in tone. Posts pertaining to progressive prosecution were 11 percent positive and 34 percent negative in tone.

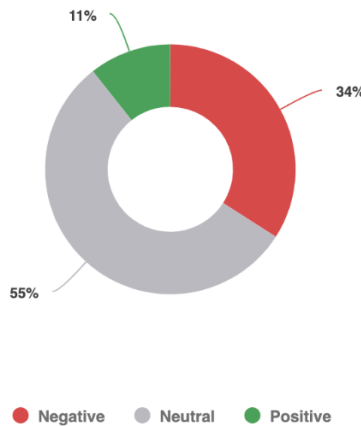


Figure 8. Online Sentiment on Progressive Prosecution

These data suggest that progressive prosecutors experience an uphill battle in promoting their agendas.

The tone of conversation differed based on the demographic profile of the prosecutor being discussed. While these data include a small number of individual prosecutors (n=8), they consider a substantial body of online posts (449,000) and may be helpful in assessing how different classes of prosecutors

198. See *supra* Part II.C.

fare in promoting a progressive agenda of decarceration. The tone of the online conversations pertaining to all male prosecutors in the study included posts that were 8 percent positive and 29.5 percent negative in tone. The tone of the online conversation pertaining to White male prosecutors included posts that were 9 percent positive and 33.5 percent negative in tone. The tone of the online conversation pertaining to men of color prosecutors included posts that were 7 percent positive and 25.5 percent negative in tone. The tone of the online conversation pertaining to Black women prosecutors included posts that were 6 percent positive and 33.6 percent negative in tone. Consequently, the conversations about Black women prosecutors included fewer positive mentions and more negative mentions. These data indicate that all of the progressive prosecutors encounter negative narratives, with Black women and White male prosecutors experiencing substantial negativity. However, the White male prosecutors appear to benefit from more positivity as reflected in the previous analysis concerning online conversations that reflected the emotion of joy.

The online commentaries that were labelled as reflecting joy or as positive generally came from liberal or progressive commentators or media sources, such as the *New York Times*, or prominent public figures like Senator Bernie Sanders. The data suggest that there is more enthusiasm for White male progressive prosecutors, which many observers might find surprising. This suggests that the liberal discourse on progressive prosecutors is biased toward White male prosecutors. White male prosecutors appear to be more likely to be recognized as leaders in the field of progressive prosecution, even when they have similar policies to Black women prosecutors. Meanwhile, Black women prosecutors appear more likely to be critiqued as not being sufficiently progressive or are simply not mentioned at all. Below is the in-depth analysis of each selected prosecutor's experience.

B. Analysis of Black Women Progressive Prosecutors

1. Kimberly Gardner (Circuit Attorney for the City of St. Louis)

Kimberly Gardner became the Circuit Attorney of St. Louis in January 2017 after campaigning on a platform of criminal justice reform. Gardner has expanded diversion programs for less serious offenses, sought to hold police officers accountable for civilian shootings, and refused to prosecute cases presented by the police that had insufficient evidence. Gardner has aimed to reduce the number of incarcerations and prosecutions for less serious offenses, such as possession of marijuana.¹⁹⁹ Rather than incarcerating people who struggle with drug addiction, Gardner has offered them diversion programs that reduce incarceration.²⁰⁰

199. See Morrison, *supra* note 174.

200. See Tanasia Kenney, 'Enough Is Enough': St. Louis' First Black Female Top Prosecutor Files Unprecedented Lawsuit Against Police Union, City over Their 'Racist Conspiracy' to Block Her

a. *General Challenges in Implementing Agenda*

Local police organizations and residents have pushed back against Gardner's reforms. The St. Louis Police Officers Association commented that Gardner "turned murderers and other violent criminals loose to prey on St. Louis's most vulnerable citizens."²⁰¹ One local resident commented that he felt that Gardner is only giving these criminals a "smack on the hand" and that this would consequently hurt the people of the community.²⁰²

Gardner has received backlash after condemning specific instances of police misconduct. In 2019, Cortez Shepard, a twenty-eight-year-old Black man, was contacted by police.²⁰³ The incident occurred while he was driving a vehicle with his girlfriend and his girlfriend's seven-year-old daughter in the car.²⁰⁴ Officers claimed that they observed marijuana on Shepard's lap, and when they asked Shepard to step outside of his vehicle, he refused.²⁰⁵ The situation escalated, and officers tasered and shot Shepard, who officers claimed reached for a gun.²⁰⁶ Someone on Twitter posted a tweet stating "this interaction never should have happened," suggesting that the police should never have made contact with Shepard because of the marijuana on his lap.²⁰⁷ Gardner responded to this Tweet with the statement, "Exactly."²⁰⁸ Gardner's response infuriated many members of the law enforcement community.²⁰⁹ Jeff Roorda, the business manager of the St. Louis Police Officers Association, publicly stated that "[Gardner's] supposed to look at this case objectively . . . and she's tweeting her ignorance to the rest of the world."²¹⁰

Gardner has created a Brady's List for her office, which is a list of law enforcement officers who have, in some fashion, demonstrated unreliable behavior.²¹¹ Although Gardner's office is not the first prosecutor's office to create such a list, it is the first office to refuse all charges and police reports by

Criminal Justice Reform Efforts, ATLANTA BLACK STAR (Jan. 20, 2020), <https://atlantablackstar.com/2020/01/20/enough-is-enough-st-louis-first-black-female-prosecutor-files-unprecedented-lawsuit-against-police-union-city-over-their-racist-conspiracy-to-block-her-criminal-justice-reform-efforts/> [<https://perma.cc/M8UM-WBMF>].

201. See Morrison, *supra* note 174.

202. *Id.*

203. See Danny Wicentowski, 'Exactly': The Controversy Around Kim Gardner's One-Word Tweet, *Explained*, RIVERFRONT TIMES (Sept. 10, 2019), <https://www.riverfronttimes.com/newsblog/2019/09/10/exactly-the-controversy-around-kim-gardners-one-word-tweet-explained> [<https://perma.cc/CHQ6-HA5Y>].

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. See *Those Who Want Reform Will Defend Kimberly Gardner*, ST. LOUIS AM. (Jan. 15, 2020), http://www.stlamerican.com/news/editorials/those-who-want-reform-will-defend-kimberly-gardner/article_8d77b46e-37be-11ea-9cbe-2f62dd1a1117.html [<https://perma.cc/7PX3-UVUN>].

law enforcement officers on the list.²¹² “Last year, Gardner excluded twenty-two St. Louis Division of Police officers from presenting cases to her office, after the Plain View Project accused them of making racist Facebook posts.”²¹³ The combination of Gardner’s refusals to file charges and keep suspects incarcerated has impacted her relationship with the local law enforcement community.²¹⁴ The pushback against Gardner has been extraordinary. As Richard A. Oppel Jr. observed in the *New York Times*, “Ms. Gardner’s professional actions are being scrutinized in a manner that is virtually unheard-of for an elected prosecutor.”²¹⁵ The St. Louis police department has been exceptionally hostile toward Gardner and even raided her offices. She filed a lawsuit claiming that the city and St. Louis Metropolitan Police Department engaged in racist activities toward her, which was later dismissed.²¹⁶

b. Challenges Reflected in Online Commentary

The social media analysis further supports the unusual nature of Kimberly Gardner’s experiences as a prosecutor. There were a substantial 93,000 mentions of Kimberly Gardner online from 43,000 unique authors. The data show that 3 percent of the online commentary on Kimberly Gardner is positive while 30 percent is negative.

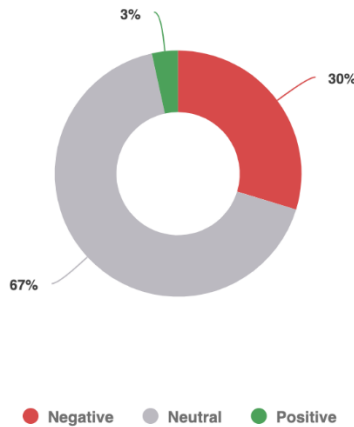


Figure 9. Online Sentiment on Kimberly Gardner

212. *Id.*

213. *See Morrison, supra* note 174.

214. *Id.*

215. *See* Richard A. Oppel Jr., *The St. Louis Prosecutor Went After the Establishment. Now the Tables Are Turned.*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/us/st-louis-prosecutor-kim-gardner.html> [<https://perma.cc/6Z5H-C86M>].

216. *See* Ashli Lincoln, *Families Awaiting Arrests in Murder Cases Express Worry over Relationship Between Kim Gardner’s Office, Police*, KMOV4 (Jan. 16, 2020), https://www.kmov.com/news/families-awaiting-arrests-in-murder-cases-express-worry-over-relationship/article_c4926a6a-38dc-11ea-92a0-b306eab00be7.html [<https://perma.cc/55LR-KEN4>].

The most common hashtags for Gardner refer to the McCloskey case, which involved a White couple who pointed their guns at Black Lives Matters protestors. Gardner pursued criminal charges against the couple.

Top Hashtags ^①

Hashtag	▼ Mentions
#2a	4959
#stl	600
#moleg	491
#stlouis	398
#davididorn	383
#mccloskeys	242
#coninc	236
#riots2020	210
#maga	182
#foxnews	166

Figure 10. Top Hashtags Discussing Kimberly Gardner

Kimberly Gardner appears to have been targeted by conservative news outlets. The top sources of online commentary for Kimberly Gardner were Twitter and *Breitbart News*. *Breitbart News* has been described as “a far-right news and opinion website.”²¹⁷ The third most common source of online commentary for Gardner, *Gateway Pundit*, has been described as an “American far-right fake news website.”²¹⁸ Kimberly Gardner has been a popular target for criticism from conservatives as she has experienced an unusually hostile political environment.

217. *Andrew Breitbart*, WIKIPEDIA (Oct. 1, 2021), https://en.wikipedia.org/wiki/Andrew_Breitbart [https://perma.cc/FNN7-2VWB] (citing, for example, Deen Freelon, Alice Marwick & Daniel Kreiss, *False Equivalencies: Online Activism from Left to Right*, 369 SCIENCE 1197, 1198 (2020)).

218. *The Gateway Pundit*, WIKIPEDIA (Oct. 1, 2021), https://en.wikipedia.org/wiki/The_Gateway_Pundit [https://perma.cc/PV6H-XLAF].











Top Sites ^①			Export [▼]
Site Name	Mentions	Impact	
 twitter.com	77 529	9.4	
 breitbart.com	883	42.9	
 thegatewaypundit.com	745	35.5	
 tumblr.com	456	88.8	
 thehill.com	377	43.9	
 dailywire.com	209	37.7	
 pjmedia.com	168	35.3	
 townhall.com	160	36.8	
 4chan.org	142	53.1	
 freerepublic.com	139	30.3	

Figure 11. Top Websites Generating Online Conversation on Kimberly Gardner

The most common emotion expressed in posts about Gardner was disgust, which was expressed in a substantial 59 percent of mentions. Sadness was the next most common emotion, with 21 percent of mentions. Joy comprised only 9 percent of posts and generally included commentary from liberal or progressive sources. The posts in support of Gardner were typically from influential Black figures, including Roland Martin, Kimberly Foxx, and others who appeared particularly concerned about the challenges that women of color prosecutors seem to encounter.

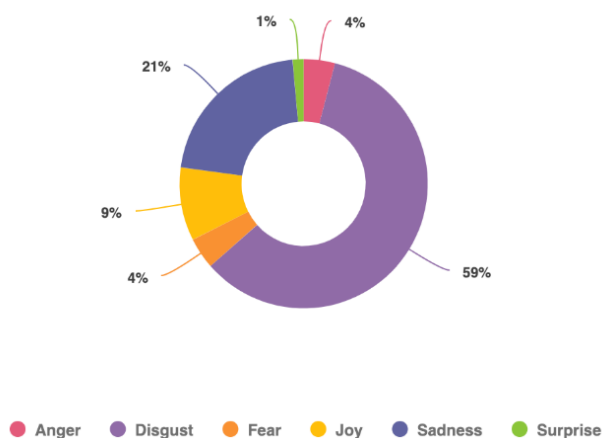


Figure 12. Emotions Expressed in Online Discourses on Kimberly Gardner

2. *Aramis Ayala (State Attorney for the Ninth Judicial Circuit Court of Florida)*

Aramis Ayala was the State Attorney for the Ninth Judicial Circuit Court of Florida and among the first of a growing number of prosecutors who openly

identified as progressive.²¹⁹ Aramis Ayala is an experienced litigator and a cancer survivor, and her spouse has a criminal record.²²⁰ In 2017, soon after her election, Ayala announced that her office would no longer seek the death penalty during her tenure.²²¹ Ayala commented that the death penalty was “not in the best interest of this community or in the best interests of justice.”²²² The Florida governor at the time, Rick Scott, was the first person to act against Ayala.²²³ Scott removed twenty-nine capital cases from Ayala’s caseload and reassigned them to Lake County State Attorney Brad King, who is “an avid death-penalty supporter.”²²⁴ Scott commented that Ayala “has made it clear that she will not fight for justice.”²²⁵

a. General Challenges in Implementing Agenda

At the time of Ayala’s announcement regarding the death penalty, her office was prosecuting Markeith Loyd for the murder of his pregnant ex-girlfriend and an Orlando police officer.²²⁶ Although the death penalty was an available sentence at the time, Ayala pursued a sentence of life in prison instead.²²⁷ Then-Attorney General Pam Bondi criticized Democratic gubernatorial candidate Andrew Gillum for his support of Ayala after her actions in the case.²²⁸ Bondi stated, “It is unfathomable to me that Andrew Gillum would participate in honoring State Attorney Aramis Ayala, who refused to even consider the death penalty for the man who brutally murdered a true hero—Lieutenant Debra Clayton.”²²⁹

In 2017, Ayala challenged the reassignment of cases, and the Florida Supreme Court upheld the reassignments.²³⁰ The court held that “Ayala’s blanket refusal to seek the death penalty in any eligible case, including a case that

219. Smith, *supra* note 103.

220. Josie Duffy Rice, *The Harmful Logic Behind New Attacks on the Husband of This Candidate for Orlando Prosecutor*, DAILY KOS (Aug. 26, 2016), <https://www.dailykos.com/stories/2016/8/26/1564166/-The-harmful-logic-behind-the-attacks-on-the-husband-of-this-candidate-for-Orlando-prosecutor> [https://perma.cc/X2VD-N6MA].

221. See Matt Lupoli, *Aramis Ayala at Odds with Public Officials for Second Time During Term*, WESH 2 (Jan. 22, 2020), <https://www.wesh.com/article/aramis-ayala-at-odds-with-public-officials-for-second-time-during-term/30633222#> [https://perma.cc/3ZKS-Q6QC]; Smith, *supra* note 103.

222. *Citing Conflict with Florida Death-Penalty Ruling, Aramis Ayala Will Not Seek Re-Election as State Attorney*, DEATH PENALTY INFO. CTR. (May 31, 2019), <https://deathpenaltyinfo.org/news/citing-conflict-with-florida-death-penalty-ruling-aramis-ayala-will-not-seek-re-election-as-state-attorney> [https://perma.cc/3VLX-ZMND].

223. *See id.*

224. *Id.*

225. Smith, *supra* note 103.

226. *Id.*

227. *Id.*

228. See Jacob Ogles, *Pam Bondi Slams Andrew Gillum for Celebrating Aramis Ayala*, FLA. POL. (Sept. 30, 2018), <https://floridapolitics.com/archives/276168-pam-bondi-slams-andrew-gillum-for-celebrating-aramis-ayala> [https://perma.cc/25YX-WQF9].

229. *Id.*

230. DEATH PENALTY INFO. CTR., *supra* note 222.

‘absolutely deserve[s] [the] death penalty’ does not reflect an exercise of prosecutorial discretion; it embodies, at best, a misunderstanding of Florida law.”²³¹

Current Governor Ron DeSantis supported and extended the previous reassignments when he took office in 2019.²³² Ayala eventually resigned from her position after a critic argued that she should be lynched.²³³

b. Challenges Reflected in Online Commentary

The social media analysis further supports that Aramis Ayala has experienced considerable challenges as a prosecutor. There were only 5,803 mentions of Ayala online from 3,462 unique authors. The data show that 3 percent of the online commentary on Aramis Ayala was positive while 27 percent was negative.

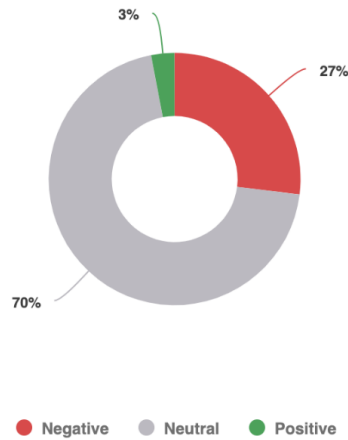


Figure 13. Sentiment Expressed in Online Discourses on Aramis Ayala

Ayala appears not to have benefited from substantial liberal or progressive praise online, even though she was elected in 2016. The top sources of online commentary for Aramis Ayala were Twitter and Tumblr.

231. *Ayala v. Scott*, 224 So. 3d 755, 759 (Fla. 2017) (third alteration added).

232. *See* Lupoli, *supra* note 221.

233. Cordeiro, *supra* note 111.











Site Name	▼ Mentions	Impact
 twitter.com	3842	12
 tumblr.com	63	88.8
 orlandosentinel.com	47	34.6
 clickorlando.com	39	28.2
 wftv.com	33	30.4
 skyscrapercity.com	32	37.5
 yahoo.com	27	95.8
 tigerdroppings.com	26	34
 fox35orlando.com	23	25
 thehill.com	23	43.9

Figure 14. Top News Sources Generating Online Discourses on Aramis Ayala

The most common emotion expressed in posts about Ayala was sadness, which was expressed in a substantial 51 percent of mentions. Disgust was the next most expressed emotion at 34 percent of mentions. Joy comprised only 7 percent of posts and generally reflected commentary from liberal or progressive sources. As with Gardner, the posts in support of Ayala were typically from influential Black figures who appeared particularly concerned about the challenges that women of color prosecutors seem to encounter.

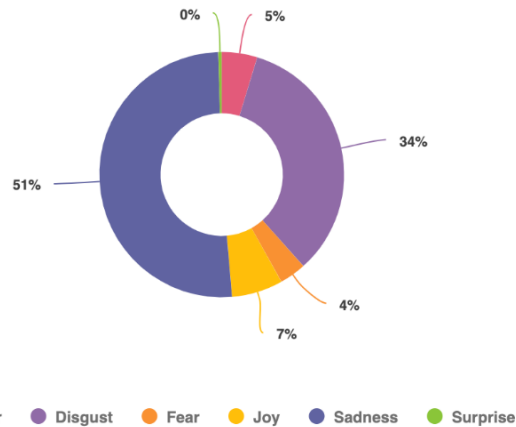


Figure 15. Emotions Expressed in Online Discourses on Aramis Ayala

As with Gardner, the social listening data suggest that Ayala faced a hostile political and social environment.

3. Kimberly Foxx (Cook County State's Attorney)

Kimberly Foxx is the Cook County State's Attorney. Foxx grew up in the Cabrini-Green housing project in Chicago and was sexually assaulted at the age

of five.²³⁴ There have been many varied critiques of Kimberly Foxx, including from former Chicago mayor Rahm Emmanuel and Chicago law enforcement officials. Common critical narratives focus on a perceived lack of justice for victims of crime and the perception that she is undermining law enforcement officers through her police accountability measures.

a. General Challenges in Implementing Agenda

Kimberly Foxx has adopted several policies to reform the Chicago criminal legal system. In December 2016, she increased the minimum loss threshold for felony retail theft prosecutions from \$300 to \$1,000.²³⁵ Due to this change, “[n]early 4,500 fewer felony retail theft charges were filed in Foxx’s first two years in office, compared to the previous two years.”²³⁶ Additionally:

Foxx’s office is exercising discretion in the way it handles drug cases too, which skip the felony review process and go directly to courts. We estimate that Cook County prosecutors have dismissed an additional 2,300 drug cases that, under Alvarez, would have otherwise gone to trial—or ended in a plea. The defendants in some of these cases instead have been diverted to treatment and counseling that led to their charges being dropped.²³⁷

Because of these new policies, police have brought fewer arrests to prosecutors in her office.²³⁸

Westchester Police Chief Steve Stelter commented on Foxx’s change of policies during a press conference, describing “hoops [the police] have to go through to try to get a felony charge, and most of the time it’s not approved.”²³⁹ Stelter said that Foxx’s policies allow criminals “to go back on the street and commit their crimes again.”²⁴⁰ Martin Preib, the Second Vice President of the Chicago Fraternal Order of Police, stated, “The general sentiment is that [criminals] will not be punished for crimes. There’s an overall increase in emboldening criminals across the board.”²⁴¹

In March 2019, Cook County prosecutors dropped all charges filed against actor Jussie Smollett for allegedly staging a hate crime attack.²⁴² Foxx felt the

234. Felsenthal, *supra* note 87.

235. Curtis Black, *Report: Kim Foxx Reforms Show Reducing Incarceration Does Not Compromise Public Safety*, CHI. REP. (July 31, 2019), <https://www.chicagoreporter.com/report-kim-foxx-reforms-show-reducing-incarceration-does-not-compromise-public-safety/> [<https://perma.cc/UCQ4-6SS9>].

236. *Id.*

237. Daniels, *supra* note 86.

238. *See id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. Julie Bosman & Sopan Deb, *Jussie Smollett’s Charges Are Dropped, Angering Mayor and Police*, N.Y. TIMES (Mar. 26, 2019), <https://www.nytimes.com/2019/03/26/arts/television/jussie-smollett-charges-dropped.html?module=inline> [<https://perma.cc/8MR9-DSXM>].

charges against Smollett were extreme; therefore, Smollett did not have to admit guilt with the exchange of community services and forfeiting his \$10,000 bail.²⁴³ In media coverage of the case, “headlines . . . painted her as a Democratic political operative who orchestrated one of the biggest miscarriages of justice since O.J. Simpson was acquitted of murder.”²⁴⁴ After Foxx dismissed the charges against Smollett, a Cook County Judge assigned a special prosecutor to look at the case.²⁴⁵ The former Chicago Mayor Rahm Emmanuel commented that the dismissal of Smollett’s charges is “without a doubt a *white-wash* of justice and sends a clear message that if you’re in a position of influence and power, you’ll get treated one way, other people will be treated another way. There is no accountability in the system. It is wrong. Full stop.”²⁴⁶ Emmanuel’s choice to use the term “white-wash” to describe a Black woman prosecutor exercising her discretion to exact leniency toward a Black defendant is unsettling.

Some commentators have accused Foxx of undermining law enforcement, particularly when dealing with officer misconduct.²⁴⁷ For example, Foxx exonerated dozens of people who were placed under arrest by Ronald Watts, a police officer who ultimately went to prison for police corruption.²⁴⁸ In response, the Chicago police requested a special prosecutor to handle all cases involving police misconduct.²⁴⁹

In April 2019, the Chicago police union and an association of suburban police chiefs issued a vote of “no confidence” in Foxx.²⁵⁰ They also demanded that Foxx resign.²⁵¹ Graham said that there are “countless examples of how Ms. Foxx’s lack of prosecution has cost [sic] [their] members and police officers throughout this country an enormous amount of problems.”²⁵² Chief Steven Stelter, who represented the West Suburban Chiefs of Police Association, said Foxx “enable[s] the offenders [and] the bad guys are not being held accountable.”²⁵³ Stelter believed her policies and decisions not only harmed the

243. Dahleen Glanton, Opinion, *Column: State’s Attorney Kim Foxx Will Force Cook County Voters to Decide What’s More Important, Jussie Smollett or Criminal Justice Reform*, CHI. TRIB. (Nov. 20, 2019), <https://www.chicagotribune.com/columns/dahleen-glanton/ct-dahleen-glanton-kim-foxx-relection-20191120-adnclr4rvzfh5gf2qpfldikbpe-story.html> [<https://perma.cc/VL47-UYB2>].

244. *Id.*

245. *See* Daniels, *supra* note 86.

246. CNN, *Chicago Police Slam Decision in Jussie Smollett Case*, YOUTUBE (Mar. 26, 2019), <https://www.youtube.com/watch?v=7E45gPnqnCA> [<https://perma.cc/LZ4F-BGUX>] (emphasis added).

247. *See* Daniels, *supra* note 86.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. Fox 10 Phoenix, *No Confidence: Chicago Police Union Says Kim Foxx Needs to Go After Jussie Smollett Case*, YOUTUBE (Apr. 4, 2019), <https://www.youtube.com/watch?v=ZkoObqAisAI> [<https://perma.cc/83GA-2ECZ>].

253. *Id.*

citizens of Cook County, “but it’s an officer safety issue with the police officers here in Cook County” as well.²⁵⁴

Graham cited a time Foxx’s office released and reduced charges for a suspect who later murdered an off-duty police officer.²⁵⁵ Graham said this suspect “should have been in jail at the time [the officer] was murdered. But because the charges were reduced, he was out on the street, to murder an off-duty Chicago Police Officer.”²⁵⁶ Graham claimed this murder was a “real hate crime,” in comparison to the Smollett’s alleged staging of a hate crime.²⁵⁷ Graham urged, “[w]e need to have a prosecutor who is going to charge people when they commit a crime.”²⁵⁸ He reasoned that “if there are no charges, and nobody goes to jail, then obviously the law doesn’t mean anything to anyone.”²⁵⁹

b. Challenges Reflected in Online Commentary

The social media analysis suggests that Foxx faced considerable pushback even though she appears to be quite influential. There were a substantial 90,000 mentions of Kimberly Foxx online from 38,000 unique authors. The data show that 8 percent of the online commentary about Kimberly Gardner is positive—the highest among the four Black women in this study—while 40 percent of the online commentary is negative.

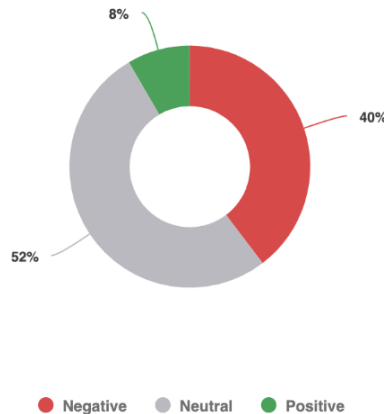


Figure 16. Sentiment Expressed in Online Discourses on Kimberly Gardner

The most shared hashtags for Foxx refer to the Jussie Smollett case, in which Chicago prosecutors eventually entered into an agreement with the

254. *Id.*

255. *Id.*

256. *Id.*

257. *See id.*

258. *Id.*

259. *Id.*

aggrieved actor. Foxx's office was widely critiqued for showing leniency in that case.

Top Hashtags 🔍


Hashtag	Mentions
#jussiesmolletthoax	1166
#jussiesmollett	1066
#chicago	825
#kimfoxx	603
#twill	600
#americafirst	475
#dobbs	470
#cancelconway	351
#julcysmollier	351
#defundcpd	274

Figure 17. Top Hashtags in Online Discourses on Kimberly Foxx

The most influential online posts regarding Kimberly Foxx critiqued her for her handling of the Smollett case.


Mentions Sort by: Reach ▼

Sentiment: Negative ✕

 **Diamond and Silk®**
@DiamondandSilk


I wish people would stop blaming Trump for their own behavior. Jussie Smollett got himself into this mess by lying, and **Kim Foxx** went along with his BS by dropping the charges; it backfired in both their faces. This ain't about Trump, it's about both of them!

Twitter • 13 Feb • Reach 4M 🔗

 **Ryan Fournier**
@RyanAFournier

Kim Foxx, the same state attorney who dropped charges against Jussie Smollett, Has also just dropped charges against hundreds of protesters. While police put their lives on the line, this woman spits in their faces. Disgusting.

Twitter • 2 Jul • Reach 3M 🔗

 **Laura Ingraham**
@IngrahamAngle

What a complete and utter JOKE. #JussieSmolletthoax

Twitter • 10 Feb • Reach 2M 🔗

Figure 18. Influential Tweets Discussing Kimberly Foxx

The top sources of online commentary for Kimberly Foxx were Twitter and *Breitbart News*. Again, conservative news outlets appear to play a substantial role in shaping the narrative about progressive prosecution and critiquing these prosecutors as unconcerned with public safety.

Top Sites ⓘ Export ▼











Site Name	Mentions	Impact
 twitter.com	73577	12.2
 breitbart.com	1062	42.9
 chicagotribune.com	745	42.3
 tumblr.com	426	88.8
 thehill.com	379	43.9
 thegatewaypundit.com	294	35.5
 tmz.com	237	43.3
 pjmedia.com	214	35.3
 freerepublic.com	205	30.3
 city-data.com	202	37.1

Figure 19. Top News Sources Generating Online Discourses on Kimberly Foxx

The most common emotion expressed in posts about Foxx was disgust, with a substantial 51 percent of mentions. Sadness was the next most common emotion at 30 percent of mentions. Joy comprised 11 percent of posts, which is the highest proportion of posts among the Black women prosecutors in the sample.

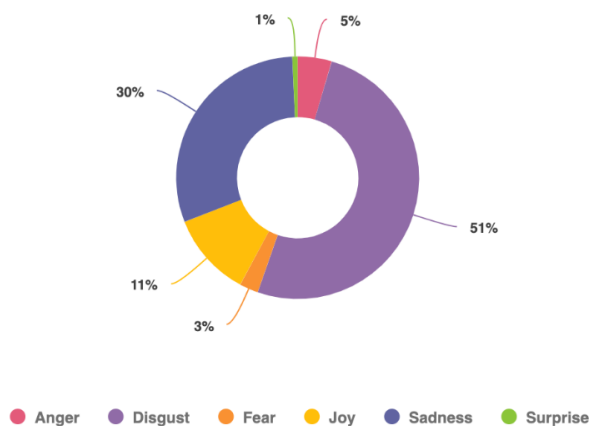


Figure 20. Emotions Expressed in Online Discourses on Kimberly Foxx

Kimberly Foxx appears to benefit from more positive online commentary than the other Black women prosecutors in this study. However, despite her role

as a progressive prosecutor from a big city, she has not benefited from as much enthusiasm as the White male prosecutors in the sample.

4. *Marilyn Mosby (State's Attorney for Baltimore)*

Marilyn Mosby is the second-term State's Attorney for Baltimore. She has received considerable criticism in the media for her progressive reforms. The media has accused her of being sympathetic to "criminals" instead of being committed to justice. The prevalent critical narratives about Mosby include accusations that her policies undermine public safety and that she does not pursue justice.

a. *General Challenges in Implementing Agenda*

The President of Fraternal Order of Police Lodge 3, the police union in Baltimore, Sergeant Mike Mancuso, called Baltimore "a broken city that is being led by people who have absolutely no real[-]time crime plan or, it seems, even know how to formulate one."²⁶⁰ He claimed that "[c]rime in Baltimore is out of control, and until new leadership is elected and appointed, [this] lack of respect for the law and those who enforce it will continue and deepen."²⁶¹ Mancuso made these statements after a Baltimore Police Officer had been attacked by bystanders while he attempted to make an arrest.²⁶²

Commentators have critiqued Baltimore city leaders for failing to adequately address crime in the city. Maryland Governor Larry Hogan expressed his concern that Baltimore's city leaders lacked an adequate plan for addressing crime.²⁶³ He elaborated, "[t]here's no crime plan, there's no continuity and it's just simply unacceptable that people are being shot and killed in the streets every single day, and people are fed up with it."²⁶⁴ One commentator similarly claimed that since Mosby has taken office, "the rate of homicides, shootings and other violent crime has climbed precipitously and shown no signs of retreating."²⁶⁵ These critiques highlight the pressure to address crime in the city.

In light of these concerns, Mosby has encountered resistance while adopting more progressive criminal legal policies. For instance, Mosby promised

260. Dom Calicchio, *Baltimore State's Attorney Blasts Police Union's 'Political Rhetoric' After Video Shows Mob Attacking Officer*, FOX NEWS (Jan. 19, 2020), <https://www.foxnews.com/us/baltimore-states-attorney-blasts-police-unions-political-rhetoric-after-video-shows-mob-attacking-officer> [<https://perma.cc/8PMW-YL4Q>].

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. Jason Johnson, Opinion, *Failed Freddie Gray Prosecutor Marilyn Mosby Adds Insults to Her Injuries*, WASH. TIMES (Dec. 18, 2019), <https://www.washingtontimes.com/news/2019/dec/18/failed-freddie-gray-prosecutor-marilyn-mosby-adds/> [<https://perma.cc/DP2P-26X4>].

that she would no longer prosecute marijuana possession.²⁶⁶ Mosby was “seeking to vacate nearly 5,000 prior marijuana convictions, which date back to 2011. She argued that this was important, especially because those convictions primarily had a negative impact on communities of color.”²⁶⁷ Mosby added that taking the focus off of marijuana crimes would allow prosecutors to focus on more serious offenses.²⁶⁸ However, commentators have critiqued her policy, claiming that Mosby has yet to present evidence that her office has convicted people for more serious offenses.²⁶⁹ One commentator claimed that this means Baltimore “is no safer, even with additional prosecutors focused on felonies rather than marijuana possession.”²⁷⁰ Gary Tuggle, Baltimore’s interim police commissioner, indicated that he would “not tell officers to stop making marijuana arrests.”²⁷¹ In response, “Mosby said he is within his rights to continue marijuana possession arrests, just like she said she is within her rights not to prosecute those arrests.”²⁷²

Governor Hogan also complained that Mosby’s office “acts too quickly to drop criminal cases,” rather than to prosecute them.²⁷³ Hogan has proposed a budget of \$2.6 million to the “state’s attorney general to prosecute more crimes in Baltimore” because it has seen a large increase in the number of homicides.²⁷⁴ “The police union criticized Mosby’s recent appearance in St. Louis, referring to her as an ‘activist prosecutor’ and ‘social justice prosecutor’ but denying Mosby’s race and gender has anything to do with their distaste for her.”²⁷⁵

b. Challenges Reflected in Online Commentary

The social media analysis suggests that Marilyn Mosby faces hostility online, especially from local news sources and conservative news sources. There were 24,000 mentions of Marilyn Mosby online from 13,000 unique authors. The data show that 4 percent of the online commentary on Marilyn Mosby is positive while 34 percent is negative.

266. Lulu Garcia-Navarro, *Baltimore State’s Attorney Will No Longer Prosecute Marijuana Possession Cases*, NPR (Feb. 3, 2019), <https://www.npr.org/2019/02/03/690975390/baltimore-states-attorney-will-no-longer-prosecute-marijuana-possession-cases> [<https://perma.cc/AU75-Y46D>].

267. *Id.*

268. Joy Lepola, *Effectiveness of Marilyn Mosby’s Pot Policy*, FOX 45 NEWS (Jan. 30, 2020), <https://foxbaltimore.com/features/operation-crime-justice/effectiveness-of-mosbys-pot-policy> [<https://perma.cc/2QWG-KTSW>].

269. *See id.*

270. *Id.*

271. Garcia-Navarro, *supra* note 266.

272. *Id.*

273. Anne Branigin, *Marilyn Mosby Shares Anonymous Racist Call, Calls Out Misogynoir During Solidarity Trip to St. Louis*, ROOT (Jan. 17, 2020), <https://www.theroot.com/marilyn-mosby-shares-anonymous-racist-call-calls-out-m-1841064413> [<https://perma.cc/HYY9-3Q6W>].

274. *See id.*

275. *Id.*

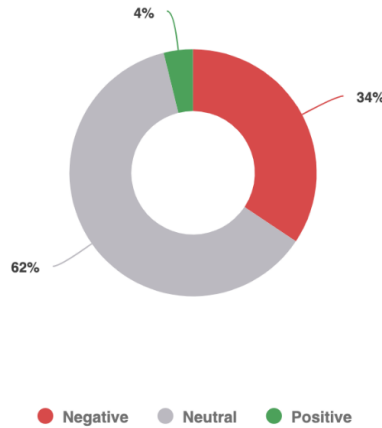


Figure 21. Sentiment Expressed in Online Discourses on Marilyn Mosby

The most shared hashtags for Mosby refer to the Keith Davis, Jr. case, which involves a Black man who has been charged multiple times for murder and who has consistently maintained his innocence.

Top Hashtags ⁽¹⁾

Hashtag	Mentions
#freekethdavisjr	279
#baltimore	218
#kethdavisjr	170
#defundbpd	134
#ados	78
#backtheblue	50
#bluelivesmatter	50
#lawenforcement	50
#policetribune	50
#progressiveprosecutors	49

Figure 22. Top Hashtags Discussing Marilyn Mosby

The online commentary data suggest that Mosby is facing pressure from progressive activists calling to defund the police and release the wrongfully accused. At the same time, there appears to be significant conservative pushback reflected in the hashtags #backtheblue and #bluelivesmatter, which refer to pro-police slogans responding to the Black Lives Matter movement.²⁷⁶ The top sources of online commentary for Marilyn Mosby were Twitter and *Fox News*.

276. See generally India Thusi, *Blue Lives & the Permanence of Racism*, 105 CORNELL L. REV. Online 14 (2020) (discussing Blue Lives Matter as “evidence of the permanence of racism as a juridical and discursive matter in this country”).

The local news outlet—the *Baltimore Sun*—and *Breitbart News* were also influential sources.

Top Sites ⓘ Export ▾

Site Name	Mentions	Impact
twitter.com	18831	11.8
foxbaltimore.com	242	26.3
tumblr.com	174	88.8
baltimoresun.com	131	35
breitbart.com	125	42.9
thehill.com	97	43.9
cbslocal.com	75	42.3
baltimorebrew.com	73	18.3
yahoo.com	73	95.8
thegatewaypundit.com	58	35.5

Figure 23. Emotions Expressed in Online Discourses on Kimberly Foxx

The most common emotion expressed in posts about Mosby was sadness, with a substantial 53 percent of mentions. Disgust was the next most mentioned emotion at 33 percent. Joy comprised only 6 percent of posts and generally reflected commentary from liberal or progressive sources.

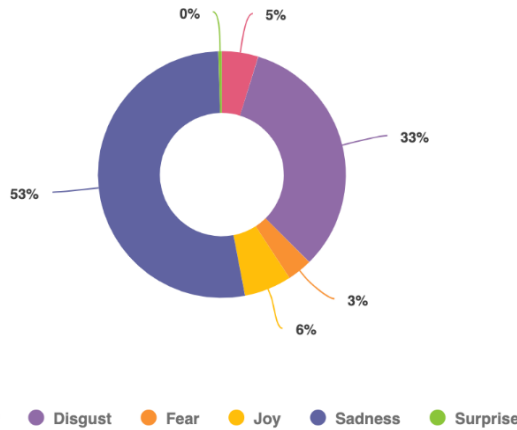


Figure 24. Emotions Expressed in Online Discourses on Marilyn Mosby

Despite being elected in 2015, Mosby has not benefited from the same level of enthusiasm in liberal discourses as the White male prosecutors described below.

C. Analysis of White Men Progressive Prosecutors

Like the Black women prosecutors included in this study, the White male prosecutors in the sample face considerable resistance from conservative

sources. Although they still encounter a number of challenges, their experiences are less aggressive and personal than those of the Black women prosecutors. They have benefited from substantial joy from liberal sources despite being more recent additions to the progressive prosecutorial slate. They have even been highlighted as the prototype or the first, when they are not. Chesa Boudin and Larry Krasner benefit from elite legal credentials; Boudin graduated from Yale Law School and Krasner from Stanford Law School. They may be the beneficiaries of liberal elitism. They also have backgrounds that might make them more attractive to liberals. Notably, the Black women prosecutors also have unique backgrounds and personal connections to their communities, which progressives presumably should value. But the White men appear to benefit from a presumption of trustworthiness and competence that the Black women in the sample do not enjoy.

1. *Chesa Boudin (San Francisco District Attorney)*

Chesa Boudin is a former public defender and District Attorney of San Francisco. He campaigned on a criminal justice reform platform. This Section shows that critics have accused Boudin of being overly sympathetic to people who commit crimes and claimed that he has undermined law enforcement and the criminal justice process. However, progressives have generally been supportive of his efforts.

a. *General Challenges in Implementing Agenda*

Boudin fired seven “veteran attorneys” within his first two days as District Attorney.²⁷⁷ Many view this decision as a “transparent effort to cripple the department’s prosecutorial ability.”²⁷⁸ Former San Francisco Assistant District Attorney Tony Brass was “surprised to hear that experienced attorneys were fired even as Boudin promised to focus on violent crime.”²⁷⁹ Brass claimed that the fired attorneys were “being told that . . . their services have no use in the office anymore.”²⁸⁰ According to a conservative commentator, Boudin planned to “end the prosecution of what he deem[ed] ‘quality of life crimes,’ including public camping, offering or soliciting sex, public urination, and blocking the sidewalk.”²⁸¹ The commentator argued that “[i]nstead of handcuffing criminals, Boudin is handcuffing the prosecutorial process and Lady Justice herself.”²⁸²

277. Kimberly Guilfoyle, Opinion, *San Francisco’s Dangerous New DA*, S.F. CHRON. (Jan. 18, 2020), <https://www.sfchronicle.com/opinion/article/San-Francisco-s-dangerous-new-DA-14986239.php> [https://perma.cc/CBB9-739M].

278. *See id.*

279. Betty Yu, *New San Francisco District Attorney Fires Multiple Prosecutors*, KPIX 5 (Jan. 10, 2020), <https://sanfrancisco.cbslocal.com/2020/01/10/new-san-francisco-district-attorney-fires-prosecutors/> [https://perma.cc/2RJS-LBP8].

280. *Id.*

281. Guilfoyle, *supra* note 277.

282. *Id.*

Members of the law enforcement community expressed concern that Boudin is “giving the ‘green light’ to criminals to attack police.”²⁸³ The city’s police union subsequently requested that the federal government prosecute a case involving a man who was shot by police after allegedly attacking officers with a bottle, rather than Boudin’s office.²⁸⁴ The President of the San Francisco Police Officers Association, Tony Montoya, claimed that Boudin’s decision to drop the charges was “‘a morale buster’ and said the new district attorney is ‘treating the police like criminals rather than the person who caused the shooting to happen.’”²⁸⁵ Montoya also stated, “Mr. Boudin has made it clear to criminals everywhere that you can violently attack a police officer and he’ll look the other way.”²⁸⁶ Additionally, a new website has now been created in order to report when crimes are not being prosecuted.²⁸⁷ The website is called BoudinBlunders.com.²⁸⁸ Montoya described the website as tracking when “the new district attorney is ‘protecting criminals and suspects over crime victims.’”²⁸⁹ Attorney Nicole Pifari commented, “Despite the vast spectrum of political beliefs represented in San Francisco, we should hopefully be able to agree that no one is safe in a city where uniformed police officers are attacked and beaten without consequence.”²⁹⁰ Boudin has also experienced pushback because he vowed that he would not seek cash bail against people accused of crime and initiated a diversion program for parents accused of crimes.²⁹¹

While Boudin has encountered challenges in effectuating his agenda, he has still managed to acquire a substantial following as a national figure. Boudin has a popular podcast, *Chasing Justice*,²⁹² and is recognized as a leading reformer in national media.

b. Challenges Reflected in Online Commentary

The social media analysis suggests that Chesa Boudin has been a favorite within progressive commentary. There were a substantial 53,000 mentions of Chesa Boudin online from 23,000 unique authors. The data show that 10 percent of the online commentary on Chesa Boudin was positive while 36 percent was negative.

283. Evan Sernoffsky, *SF Cops, DA Clash Over Withdrawal of Charges Against Man in Attack on LEOs*, POLICE 1 (Jan. 28, 2020), <https://www.police1.com/officer-shootings/articles/sf-cops-da-clash-over-withdrawal-of-charges-against-man-in-attack-on-leos-s8I0nbyAVnIMRDck/> [<https://perma.cc/54XL-8G86>].

284. *Id.*

285. *Id.*

286. *Id.*

287. *See id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. CHASING JUST. (Nov. 27, 2021), <https://www.chasingjusticepodcast.com/> [<https://perma.cc/59TX-TTEZ>].

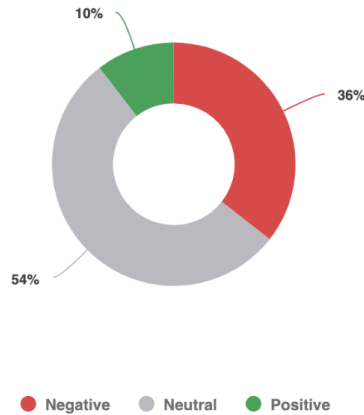


Figure 25. Sentiment Expressed in Online Discourses on Chesa Boudin

The most common emotion expressed in posts about Boudin was sadness, at 35 percent of mentions. Disgust was the next most common emotion with 30 percent of mentions. Joy comprised 20 percent of mentions and generally reflected commentary from liberal or progressive sources, which praised Boudin for his reform-minded prosecution agenda.

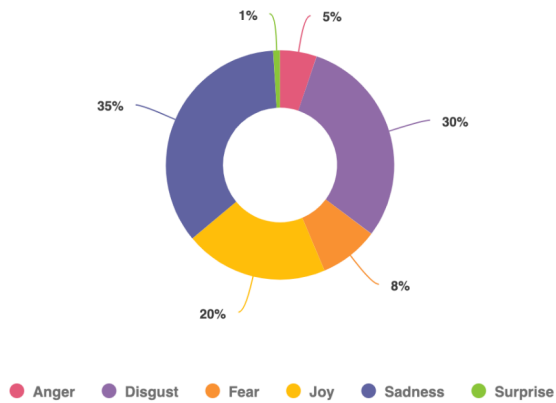


Figure 26. Emotions Expressed in Online Discourses on Chesa Boudin

This was the highest percentage of mentions reflecting joy of all the prosecutors included in this study. There appears to be considerable progressive enthusiasm about Boudin.

2. *Larry Krasner (District Attorney of Philadelphia)*

Larry Krasner is the District Attorney of Philadelphia. There has been substantial local and national media attention on Krasner because of his reform-

based agenda. The common media narratives that criticize Krasner's efforts focus on the claims that he is undermining public safety and preventing access to justice.

a. General Challenges in Implementing Agenda

Krasner has adopted the Accelerated Rehabilitative Disposition (ARD) diversion program.²⁹³ This program is designated for “defendants [who] are first time offenders charged with relatively minor offenses requiring a more lengthy period of supervision than the AMP (Accelerated Misdemeanor Program) program provides.”²⁹⁴ Krasner has also sent gun cases to this diversion program.²⁹⁵ “In 2018, Krasner’s first year as district attorney, [seventy-eight] cases were sent to the ARD program, compared to [twelve] the previous year.”²⁹⁶ One commentator illustrated the public safety pushback to progressive criminal justice reforms: “Gun-related violent crime is up in Philadelphia. That was entirely predictable when we elected a district attorney whose primary goal is releasing criminals rather than prosecuting them.”²⁹⁷

One prominent story involved Maalik Jackson-Wallace.²⁹⁸ Jackson-Wallace was arrested on a gun possession charge and given the opportunity to participate in the ARD diversion program.²⁹⁹ Jackson-Wallace was arrested a second time, again for gun possession, and released on unsecured bail.³⁰⁰ Finally, Jackson-Wallace was arrested a third time, except this time for murder.³⁰¹ Jackson-Wallace had murdered a 26-year-old man by shooting him.³⁰² This incident highlights the challenges in pushing for systemic reform when individual stories may undermine the systemic story about reform. Progressive prosecutors like Krasner have encountered difficulties in implementing their policies as opponents focus on stories like the Jackson-Wallace one.

Local lawmakers have responded by creating pathways around Krasner's policies.³⁰³

293. James D. Schultz, Opinion, *The Disastrous Consequences of DA Larry Krasner's "Reforms,"* PHILA. MAG. (June 27, 2019), <https://www.phillymag.com/news/2019/06/27/larry-krasner-reforms-philadelphia/> [<https://perma.cc/A5KV-FDGA>].

294. *Diversion Unit*, PHILA. OFF. DIST. ATT'Y (Feb. 25, 2020), <https://www.phila.gov/districtattorney/diversion/Pages/default.aspx> [<https://perma.cc/H9X2-TEN3>].

295. See Schultz, *supra* note 293.

296. *Id.*

297. See *id.*

298. See *id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. See Akela Lacy & Ryan Grim, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority*, INTERCEPT (July 8, 2019), <https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general/> [<https://perma.cc/4884-QVXL>].

Lawmakers in Pennsylvania have quietly muscled power away from reformist District Attorney Larry Krasner, passing new legislation giving authority to the state's attorney general to prosecute certain firearms violations in Philadelphia—and nowhere else in the state. The provision will expire in two years, or just after Krasner's first term ends.³⁰⁴

This new provision allows police officers to go directly to the attorney general and eliminate Krasner from the process.³⁰⁵ “The bill was passed by the Republican legislature and signed by the Democratic governor before the end of the legislative session late last month, with no public awareness.”³⁰⁶ In response to Krasner's policies, some “victims and their relatives have complained about [Krasner's] office resolving cases without notifying them, sometimes in a violation of state law. The head of the police union has said Krasner is seeking to ‘destroy criminal justice.’”³⁰⁷

David Heckler, a Republican and former Bucks County judge, district attorney, and state legislator, said some of the proposed changes seemed “inappropriate” and could harm the city's safety.³⁰⁸

“If I were an assistant DA in Philadelphia, I'd tender my resignation,” Heckler said. . . . “If you take an oath as an ADA, whatever the words, it has to be essentially to endeavor as best you can to protect the people of your jurisdiction and to uphold the law. And I think those directives are inconsistent with that duty.”³⁰⁹

Critics have used Krasner's past to claim that he is biased against the police and that he will undermine the pursuit of justice. Prior to becoming the elected district attorney, Krasner specialized in “criminal defense and civil rights cases—he sued the police department some [seventy-five] times.”³¹⁰ Krasner has called law enforcement “systemically racist.”³¹¹ And he has attempted to make progressive changes, such as reducing incarceration.³¹² To implement this goal, Krasner “order[ed] his assistant district attorneys to request cash bail less often and include a cost analysis of incarceration when making sentencing recommendations.”³¹³ Krasner also chose to reduce charges before cases touch

304. *Id.*

305. *See id.*

306. *Id.*

307. Chris Palmer, *Larry Krasner's First Year as Philly DA: Staff Turnover, Fewer Cases, Plenty of Controversy*, PHILA. INQUIRER (Jan. 6, 2019), <https://www.inquirer.com/news/larry-krasner-philadelphia-district-attorney-staff-reform-cases-first-year-20190106.html> [<https://perma.cc/S84D-K3QR>].

308. *Id.*

309. *Id.*

310. Schultz, *supra* note 293.

311. *Id.*

312. *See id.*

313. *Id.*

the negotiating table.³¹⁴ He describes this approach as charging only what the evidence can support.³¹⁵

Former Pennsylvania Governor Ed Rendell, who was Philadelphia's district attorney from 1978 to 1986, noted that many cases depend on nuanced factual determinations that may best be reserved for a judge or jury to decide.³¹⁶ “‘The downside is that someone escapes the appropriate punishment,’ Rendell said. ‘You’ve taken the charge off the table, so neither the jury nor the judge has the right to impose it.’”³¹⁷

Krasner has experienced judicial barriers to implementing his policies. In addition to reducing incarceration in general, Krasner attempted to vacate a death sentence for Robert Wharton, who committed a double murder of a Philadelphia couple.³¹⁸ After murdering the couple, Wharton turned the heater off in their house with the purpose of causing their six-month-old daughter to freeze to death.³¹⁹ Krasner vacated Wharton's death sentence because he thought it was unconstitutional.³²⁰ The U.S. District Judge presiding over the case, Mitchell S. Goldberg, said the murders were “particularly horrific” and did not see a legitimate reason to vacate the death sentence.³²¹ Krasner also attempted to vacate the death sentence of Lavar Brown, but “Pennsylvania Supreme Court [Justice Christine Donohue] also said his office's bid to throw out a convicted killer's death sentence had ‘no support in the law.’”³²² Justice Donohue's majority opinion stated the “DA's Office couldn't change [the death penalty] result ‘based upon the differing views of the current office holder.’”³²³ This case illustrates the difficulties that Krasner has experienced in implementing his policies.

Many judges, prosecutors, police chiefs, police unions, and legislators have loudly opposed—or have actively resisted—this shift to restoration and redemption. Then-U.S. Attorney General William Barr claimed that progressive prosecutors were “‘undercutting the police, letting criminals off the hook, and refusing to enforce the law.’” In a December rally, President Trump singled out Krasner, calling him ‘the worst district attorney,’ one who ‘lets killers out almost

314. See Samantha Melamed & Chris Palmer, *When is Killing ‘Murder’? Philly DA Larry Krasner Rethinks Homicide Prosecutions*, PHILA. INQUIRER (Nov. 14, 2018), <https://www.inquirer.com/philly/news/larry-krasner-murder-cases-philadelphia-district-attorney-20181114.html> [<https://perma.cc/A5XQ-T75X>].

315. *Id.*

316. *Id.*

317. *Id.*

318. Schultz, *supra* note 293.

319. *Id.*

320. *Id.*

321. *Id.*

322. Palmer, *supra* note 307.

323. *Id.*

immediately.”³²⁴ One commentator stated, “Krasner talks a lot about ‘social justice’ and ‘inequality.’ But you won’t hear him mention victims very often. And why? Because Krasner views crime victims as an obstacle to his agenda.”³²⁵

Despite the significant pushback that Krasner has experienced, progressives have consistently lauded him as a progressive prosecutor. His progressive bona fides have not been questioned. Although he became a prosecutor after Kimberly Foxx and Aramis Ayala, he has been held up as the gold standard for progressive prosecution. As Professor Abbe Smith proclaimed, “And now comes Larry Krasner, a true reformer, perhaps the first-ever ‘decarceration’ prosecutor. He has done some amazing things since being elected Philadelphia D[.]A[.]... He’s become the embodiment of the ‘Progressive Prosecutor’... I admit that I feel kind of excited about Krasner.”³²⁶

b. Challenges Reflected in Online Commentary

There were a substantial 71,000 mentions of Larry Krasner online from 33,000 unique authors. The data show that 8 percent of the online commentary on Larry Krasner was positive while 31 percent was negative.

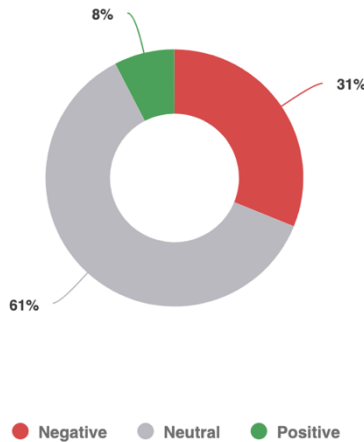


Figure 27. Sentiment Expressed in Online Discourses on Larry Krasner

The negative commentary primarily came from conservative sources and accused Krasner of supporting “criminals” or being unconcerned with violent crime. There was very little negative commentary from liberal sources. Below

324. Jody D. Armour, *How Being “Tough on Crime” Became a Political Liability*, CONVERSATION (Dec. 20, 2019), <https://theconversation.com/how-being-tough-on-crime-became-a-political-liability-128515> [<https://perma.cc/4F8R-REBQ>].

325. Schultz, *supra* note 293.

326. Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411, 415–16 (2019).

are a few Twitter posts that reflect the nature of the negative commentary directed at Krasner.

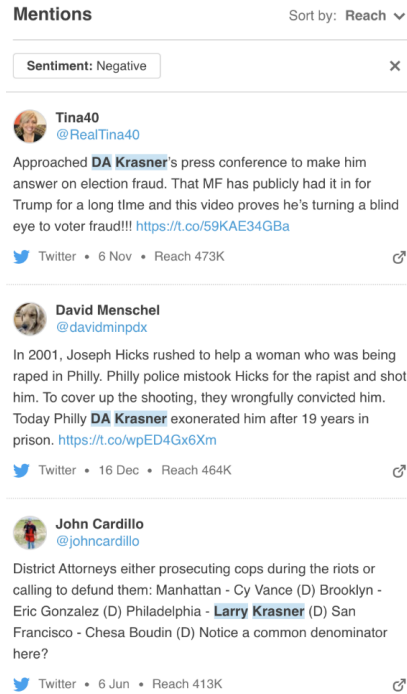


Figure 28. Influential Tweets about Larry Krasner

Some of the most shared hashtags for Krasner invoke the campaign #FreeMumia, which refers to a campaign to release a political prisoner from prison.³²⁷ This suggests that progressives have been demanding that Krasner engage in additional progressive actions, including the release of this political prisoner.

327. BRING MUMIA HOME (Nov. 27, 2021), <https://bringmumiahome.com/> [<https://perma.cc/6UJ6-C5QB>].

Top Hashtags [?]

Hashtag	Mentions
#freemumia	356
#philadelphia	337
#philly	305
#covid19	219
#phillydaonpbs	194
#freethemall	170
#freeallpoliticalprisoners	148
#pennsylvania	139
#blacklivesmatter	138
#rt	133

Figure 29. Top Hashtags Discussing Larry Krasner

The online commentary suggests that Krasner is facing pressure from progressive activists who have been referencing Black Lives Matter and calling for the release of political prisoners. The top sources of online commentary for Larry Krasner were Twitter, Tumblr, and 4channel.org (an online anonymous forum). The local news forum *Inquirer* and *Breitbart News* were also influential sources.

Top Sites [?] Export ^v











Site Name	Mentions	Impact
 twitter.com	58331	11.7
 tumblr.com	397	88.8
 4channel.org	333	0
 inquirer.com	300	0
 breitbart.com	222	42.9
 flickr.com	130	45
 phillyvoice.com	126	30.3
 thehill.com	111	43.9
 freerepublic.com	106	30.3
 yahoo.com	98	95.8

Figure 30. Top News Sources Generating Online Discourses on Larry Krasner

The most common emotion expressed in posts about Krasner was sadness, with a substantial 54 percent of mentions expressing sadness. Disgust was the next most common emotion with 19 percent of mentions. Joy closely followed with 18 percent of mentions and generally reflected commentary from liberal or progressive sources.

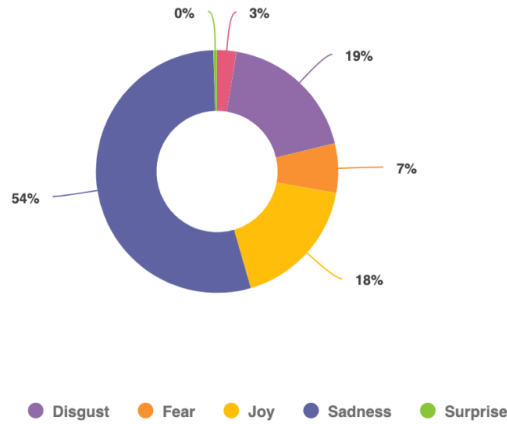


Figure 31. Emotions Expressed in Online Discourses on Larry Krasner

Both Boudin and Krasner appear to benefit from significant support from liberal and progressive sources. They also appear to experience less critique from liberal sources than the Black women prosecutors. For example, Bernie Sanders incorrectly claimed that Larry Krasner sparked a wave of progressive criminal justice reform although Kimberly Foxx, Aramis Ayala, Kimberly Gardner, and Marilyn Mosby were all elected before Krasner. This sentiment reflects a general predisposition toward the White male prosecutors within liberal discourses.



Figure 32. Tweet by Senator Bernie Sanders in Support of Larry Krasner

D. Men of Color Prosecutors

1. Wesley Bell (St. Louis County Prosecuting Attorney)

St. Louis County Prosecuting Attorney Wesley Bell appears to have received much less criticism of his progressive reforms in the recent media. Bell has implemented diversion programs for people accused of committing less serious offenses. He has also prioritized rehabilitation programs rather than

incarceration.³²⁸ Bell has instructed law enforcement to issue summons, rather than warrants, on Class D and Class E felonies.³²⁹ These felonies include second degree rape, child molestation, and burglary.³³⁰ Law enforcement has expressed confusion as to how to handle these types of cases and has requested clarity.³³¹ Nevertheless, officials have indicated that they are “open” to Bell’s ideas.³³²

The social media analysis reflects a less hostile environment than what the Black women prosecutors in the study face, although Bell appears to experience the same sort of resistance that all of the progressive prosecutors in this study experienced. There were 11,000 mentions of Wesley Bell online from 6,410 unique authors. The data show that 9 percent of the online commentary on Wesley Bell was positive while 16 percent was negative.

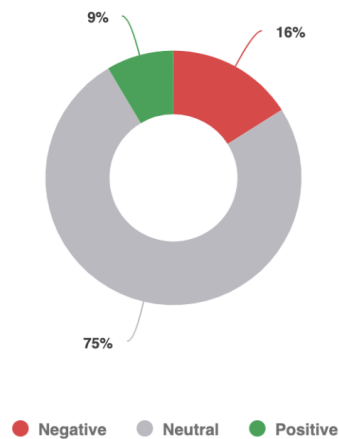


Figure 33. Sentiment Expressed in Online Discourses on Wesley Bell

The most shared hashtags for Bell refer to a parade he hosted for a six-year-old with cancer³³³ and his reinvestigation of the Michael Brown case.³³⁴

328. See Mike Colombo, *Post-Scripts: St. Louis County Prosecutor Wesley Bell's New Initiatives*, FOX 2 (Jan. 13, 2019), <https://fox2now.com/news/post-scripts/post-scripts-st-louis-county-prosecutor-wesley-bells-new-initiatives/> [<https://perma.cc/N4ED-ML7P>].

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. Press Release, Saint Louis County Prosecuting Attorney, Ferguson Police Chief Organizes Birthday Parade for Cancer Survivor Turning 6 (Mar. 4, 2021), <https://www.stlouiscountyprosecutingattorney.com/pressreleases/2021/3/4/ferguson-police-chief-organizes-birthday-parade-for-cancer-survivor-turning-6> [<https://perma.cc/7TXC-J6JC>].

334. Joel Currier, *St. Louis County Prosecutor Reopened Michael Brown Shooting Case but Won't Charge Darren Wilson*, ST. LOUIS POST-DISPATCH (July 31, 2020), https://www.stltoday.com/news/local/crime-and-courts/st-louis-county-prosecutor-reopened-michael-brown-shooting-case-but-wont-charge-darren-wilson/article_8e537a12-4dd0-51d8-a325-11ba7ddd20e.html [<https://perma.cc/DZ94-SB8U>].

Top Hashtags ⓘ

Hashtag	▼ Mentions
#cancer	166
#michaelbrown	113
#mikebrown	102
#ferguson	82
#breakingnews	67
#cheddarpoetry	55
#reform19	29
#stl	28
#breaking	27
#tylergebhard	24

Figure 34. Top Hashtags in Online Discourses on Wesley Bell

The top sources of online commentary for Wesley Bell were Twitter, Tumblr, and local outlets (955thelou, ksdk, and *St. Louis Today*).

Top Sites ⓘ Export ▼











Site Name	▼ Mentions	Impact
 twitter.com	7116	8.8
 tumblr.com	156	88.8
 955thelou.com	59	1.5
 ksdk.com	52	29.3
 stltoday.com	45	35.2
 fox2now.com	41	31
 yahoo.com	36	95.8
 stlamerican.com	31	20.4
 kmov.com	28	29.4
 thegatewaypundit.com	28	35.5

Figure 35. Top News Sources Generating Online Discourses on Wesley Bell

The most common emotion expressed in posts about Bell was sadness, with a substantial 63 percent of mentions expressing sadness. Joy was the next most common emotion with 18 percent of mentions. Bell was the only prosecutor with joy as the second most common emotion expressed in his mentions. Disgust was reflected in only 11 percent of mentions. Disgust was the first or second most common emotion for all of the Black women prosecutors.

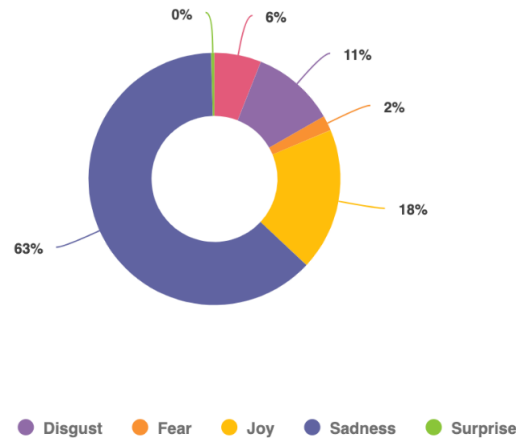


Figure 36. Emotions Expressed in Online Discourses on Wesley Bell

2. *George Gascón (Los Angeles County District Attorney)*

George Gascón was elected as Los Angeles District Attorney in November 2020. He has implemented an array of progressive policies aimed at reducing incarceration in Los Angeles. And like all of the prosecutors discussed in this study, he has experienced substantial pushback from conservative sources that question his commitment to public safety. There were a substantial 61,000 mentions of George Gascón online from 27,000 unique authors. The data show that only 5 percent of the online commentary on George Gascón was positive while 35 percent of the online commentary was negative. Gascón had the most negative sentiment amongst the male prosecutors.

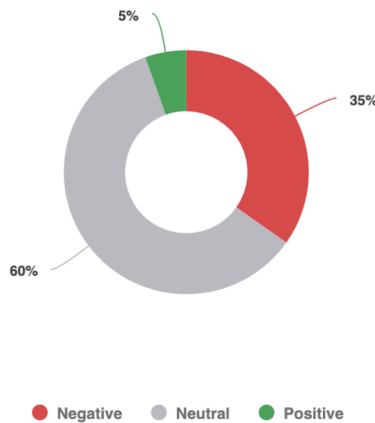


Figure 37. Sentiment Expressed in Online Discourses on George Gascón

The most shared hashtags for George Gascón refer to Los Angeles and efforts to recall Gascón from office. References to #blacklivesmatter are also among the top hashtags in the online commentary about George Gascón.

Top Hashtags ⁽¹⁾

Hashtag	Mentions
#losangeles	516
#recallgascon	489
#recallgeorgegascon	480
#foxnews	373
#georgegascon's	348
#standwithgeorge	293
#breaking	278
#ladaoffice	230
#lacounty	217
#blacklivematter	204

Figure 38. Top Hashtags in Online Discourses on George Gascón

The online commentary suggests that George Gascón is facing pressure from progressive activists calling to defund the police and release the wrongfully accused. The top sources of online commentary for George Gascón were Twitter, Tumblr, and *Breitbart News*.

Top Sites ⁽¹⁾ Export ^v











Site Name	Mentions	Impact
 twitter.com	53,355	10.8
 tumblr.com	530	0
 breitbart.com	223	42.9
 signalscv.com	96	25.8
 latimes.com	89	43.8
 thehill.com	89	43.9
 yahoo.com	87	95.8
 californianewstimes.com	83	0
 mynews1a.com	77	21.3
 thegatewaypundit.com	73	35.5

Figure 39. Top News Sources Generating Online Discourses on George Gascón

The most common emotion expressed in posts about George Gascón was sadness, with a substantial 56 percent of mentions expressing sadness. Disgust was the next most common emotion with 22 percent of mentions. Joy comprised 13 percent of mentions, which was a lower percentage than what the other male progressive prosecutors had but still higher than what any of the Black female prosecutors had.

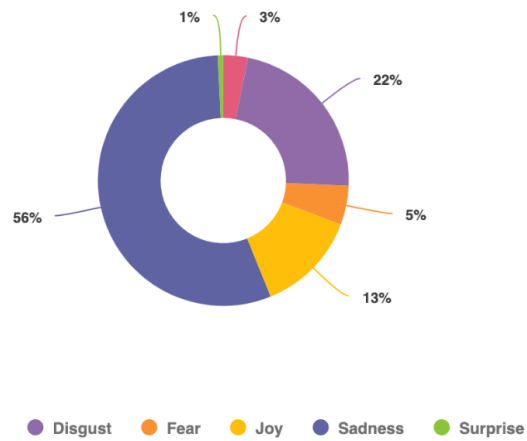


Figure 40. Emotions Expressed in Online Discourses on George Gascón

The positive commentary on Gascón included endorsements from celebrity supporters, such as the rapper Common.

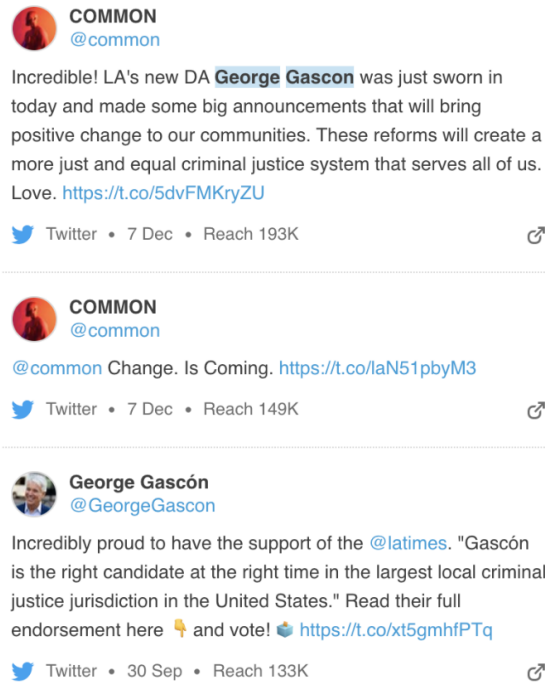


Figure 41. Tweet by the Rapper Common in Support of George Gascón

IV.
MOVING FORWARD

Progressive prosecutors encounter substantial hostility, which suggests that it is not enough to simply change who is prosecuting to promote a decarceral agenda. The below chart illustrates that all of the progressive prosecutors in this study encountered a hostile online environment with much of the commentary being negative in nature. There was also a substantial amount of sadness and disgust expressed toward the prosecutors.

Prosecutor	Positive %	Negative %	Joy %	Disgust %	Sadness %	Anger %
<i>Female</i>	4.5	32.75	8.25	44.25	38.75	4.75
Kimberly Gardner	3	30	9	59	21	4
Aramis Ayala	3	27	7	34	51	5
Kimberly Foxx	8	40	11	51	30	5
Marilyn Mosby	4	34	6	33	53	5
<i>Male</i>	8	29.5	17.25	20.5	52	4.25
Larry Krasner	8	31	18	19	54	3
Chesa Boudin	10	36	20	30	35	5
Wesley Bell	9	16	18	11	63	6
George Gascón	5	35	13	22	56	3

Figure 42. Summary Table

Conservatives have launched consistent attacks against these prosecutors, with news outlets like *Breitbart News* playing an outsized role in shaping the discourse about these prosecutors. As shown in Part III, this has impacted prosecutors' ability to implement their agendas. Although Professor Stuntz identified that the power of prosecutors to punish was because of the broad criminal code, there was a gap in his argument, which did not recognize that the power to punish does not directly translate into the power not to punish. In other words, prosecutors appear to have vast discretion to punish, but when they choose to punish less, they experience significant resistance from other institutional and external actors. As measured by the online narratives about them, progressive prosecutors face hostile political and social climates and must continuously justify their actions.

Moreover, existing scholarship misses the mark when it fails to examine race or Whiteness. As compared to their counterparts, Black women prosecutors face constant critique from liberals who themselves fail to meaningfully examine how gender and race constrain these prosecutors' work.³³⁵ Instead, Black women

335. See *supra* Part III.B.

prosecutors are evaluated the same as any White, male prosecutor, with little consideration of how the Whiteness and maleness of those prosecutors empower them to do their work, or at the very least provide a protective shield against open critique.³³⁶ The work of Black women prosecutors is not immune from legitimate challenges. However, these women do appear to encounter tremendous pressures from both the right and the left.³³⁷ The strongest emotion toward them appears to be disgust, which may be connected to how they dislocate power by representing “the People” as Black women.

The recommendations of this Article are twofold. First, advocates should consider progressive prosecution as merely a stop along the path of decarceration if they want to shrink the size of the criminal legal system. Progressive prosecutors face considerable challenges in implementing their reform agendas. The criminal legal system is designed to be punitive, and even actors with considerable power within the system face challenges when they deviate from punitiveness. The pushback highlights the limitations of reform efforts and suggests that more radical measures are necessary to address the injustice that the criminal legal system perpetuates. This study reveals the limitations of the Stuntzian account of prosecutors by highlighting how the prosecutor’s power is constrained by an expectation of punitiveness. The successful recall of Chesa Boudin clearly illustrates this point. Criminal law reformers should consider advancing an affirmative vision and narrative that explains how decarceration is aligned with promoting true community safety. Critiquing the progressive chops of prosecutors concerned with decarceration while they are experiencing sustained conservative media campaigns against progressive prosecution may ultimately undermine the long-term aims of decarceration.

This study also reveals that, by failing to explicitly contend with racial privilege and disadvantage, Stuntz’s account of prosecution was bounded by an expectation of Whiteness and the maintenance of White supremacy. This characteristic of Stuntz’s account of prosecution is likely not unique to his scholarship, which many scholars regard as being part of the Criminal Law scholarly canon. There are likely many accounts about Criminal Law, Criminal Procedure, and Criminal Legal Theory that contend to be accounts of these bodies of law, but which are in fact accounts of “Whiteness and” whichever topic they are discussing.

Second, advocates, especially those who identify as liberal or progressive, should examine why they are so comfortable critiquing the Black women prosecutors and praising the White men prosecutors. Racism cannot remain an external concept that liberals, especially White liberals, fail to acknowledge within themselves. Racism is clearly reflected in the data, which suggest that liberals reproduce White supremacy and patriarchy even when they do not

336. *Id.*

337. *Id.*

openly espouse them as values. One does not have to support the KKK to be racist. The first step in such open recognition of internal racism—or implicit bias, a term that many may find more comforting—is taking the important step of looking at their commentaries, op-eds, and law review articles and asking themselves, “Why do I feel more comforted when White men are in this role? What internal narratives about competence and trustworthiness inform my critiques?” This form of open and radical self-awareness might encourage commentators to filter themselves. Perhaps liberals might take a step back and not run to critique the Black woman who fills a particular role in the criminal legal system, even though our White supremacist society makes critiquing Black women more natural. While White supremacy and patriarchy are pervasive structural barriers in this country, openly acknowledging them as such and supporting people who encounter them should be a priority.

CONCLUSION

The politics of prosecution is pathological in its Whiteness. The focus in criminal law discourse tends to be on the race of the defendants and those victimized by mass incarceration rather than the race of the system actors. Yet the most harmful criminal legal system actors are overwhelmingly White, and it is worth considering what role their Whiteness plays in facilitating criminal punitiveness. Whiteness is pervasive in the criminal legal system and may be facilitating punitiveness by allowing White actors to benefit from favorable implicit biases that carry a presumption of competence.³³⁸ It may provide a shield from meaningful accountability and may help explain the lack of accountability against some system actors.³³⁹ Focusing on Whiteness also shifts the lens away from the pathologies of the marginalized classes to those of the privileged.

The inability of racialized and sexualized bodies to automatically tap into the full power of the prosecutor indicates that a prosecutor’s political embodiment is confined by intersectional forms of subordination connected to patriarchy and racism. Only certain bodies fully benefit from the power of the prosecutor’s office. Others are constrained by systemic marginalization. Critical White Studies provides a lens for understanding the challenges that Black women prosecutors have experienced. Ignoring the Whiteness of prosecution makes their experiences surprising.³⁴⁰ However, examining how Whiteness has empowered prosecution suggests that the power of prosecution is also about the exercise of White privilege.³⁴¹ Prosecutors have been able to effectively elude meaningful oversight and accountability because they also have historically benefited from their Whiteness and punitiveness.³⁴²

338. *See supra* Part II.A–B.

339. *See id.*

340. *Id.*

341. *See id.*

342. *See id.*

Accordingly, scholars should consider both the Blackness of the defendants as well as the Whiteness of the prosecutors when evaluating the politics of prosecution. This approach would be fruitful when examining various aspects of the criminal legal system beyond prosecution. This approach does not suggest that there is an essentialized notion of how the prosecutor or defendant will behave based on race.³⁴³ Rather, it encapsulates the boundaries of beingness based on essential features without dictating the full terms of beingness. In other words, there may be punitive Black women prosecutors who experience none of the challenges of the featured prosecutors.³⁴⁴

White progressive prosecutors also experience pushback, suggesting that the response reflects the institutional punitiveness of prosecution no matter who embodies the office. Chesa Boudin enjoyed support from many progressives, but a developing narrative about an increase of crime, conservative news coverage of progressive prosecution as contributing to crime, and business stakeholders who generally benefit from aggressive law enforcement practices all contributed to his successful recall from office.³⁴⁵

However, the severity and personal nature of the response against Black women prosecutors in particular suggest that both patriarchy and racism are constraints on the power of prosecutors. This Article does not aim to support the legitimacy of prosecution as a mode for community protection.³⁴⁶ As Professor Bennett Capers convincingly argued, policymakers should shift power away from prosecutors.³⁴⁷ Rather, this Article aims to expose how Whiteness and White supremacy are pervasive, but underdiscussed, features of the criminal legal system. As Baltimore State's Attorney Marilyn Mosby noted, "The disrespect would look different if I looked different. It's extremely personal. The first thing they come at when you're a [B]lack woman is your competency."³⁴⁸

343. But see Devon W. Carbado & Cheryl I. Harris, Essay, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2204 (2019) ("[J]udging a particular analysis to be essentialist does not settle normative questions; rather, the important consideration is whether the deployment of essentialism is justified empirically and normatively in a particular context.").

344. See Sam Levin, *How Black Lives Matter Reshaped the Race for Los Angeles' Top Prosecutor*, GUARDIAN (Oct. 15, 2020), <https://www.theguardian.com/us-news/2020/oct/15/los-angeles-district-attorney-black-lives-matter> [<https://perma.cc/J4KD-JGNZ>].

345. See Jon Skolnik, "Trumpian" effort to recall San Francisco's progressive district attorney bankrolled by GOP money, SALON (June 7, 2022), <https://www.salon.com/2022/06/07/trumpian-effort-to-recall-san-franciscos-progressive-district-attorney-bankrolled-by-money/> [<https://perma.cc/SJ7U-QSA9>].

346. For more on modes of community protection without public prosecutors, see generally I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1609 (2020), for a discussing arguing that policymakers should "consider shifting power from prosecutors to the people they purport to represent." See also Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1165 (2018) ("[A] theoretical intervention that foregrounds (in)equality holds potential—not simply to shore up the conceptual foundations of 'progressive prosecution,' but to transform the very meaning of criminal justice.").

347. Capers, *supra* note 346, at 1609.

348. Lewis & Hager, *supra* note 8.

This observation is reflected in the commentary by both progressives and conservatives. The comfort in critiquing Black women prosecutors while ignoring the privileges of Whiteness reflects a pervasive erasure of racial privilege that is all too common even within liberal and progressive circles.

Moreover, the prosecutors in this Article illustrate that the identity of the person embodying the role of prosecutor is significant, but not in the ways that scholars and activists typically presume. There is no singular almighty prosecutor. Many assume that getting a genuinely progressive body in the prosecutor position is enough to make prosecution more progressive. The question then becomes about assessing the progressive chops of the prosecutor and examining whether they are progressive enough to fulfill their campaign promises.³⁴⁹ However, this Article illustrates how the progressiveness of prosecution is constrained by an expectation of punitiveness. When non-White, non-carceral prosecutors embody the prosecutor's office, they do not automatically embody an all-powerful position, even though prosecutors are afforded substantial discretion within the criminal legal system. Rather, their exercises of discretion are resisted.³⁵⁰ This resistance illustrates how not all prosecutors are almighty czars, nor are they almighty chiefs or obas.

349. See, e.g., Bazelon, *supra* note 31.

350. See *supra* Part III.A.