



BUILDING AN ANTI-RACIST PROSECUTORIAL SYSTEM:
OBSERVATIONS FROM TEACHING
A DOMESTIC VIOLENCE PROSECUTION CLINIC

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INTRODUCTION AND BACKGROUND

Building an anti-racist prosecutorial system at the county or city level is a daunting but imperative task made more exigent by current events. This article, and the symposium of which it is a part, occurs at a very challenging moment—in the midst of a global pandemic and after a turbulent election year culminating in the January 6, 2021 violent storming of the United States Capitol¹ by white supremacists and

1. Dalton Bennett et al., *41 Minutes of Fear: A Video Timeline from Inside the Capitol Siege*, WASH. POST (Jan. 16, 2021), <https://www.washingtonpost.com/investigations/2021/01/16/video-timeline-capitol-siege/>; Lindsay Wise et al., *The Protesters Are in the Building: Inside the Capitol Stormed by a Pro-Trump Mob*, WALL ST. J. (Jan. 6, 2021, 11:53 PM), <https://www.wsj.com/articles/the-protesters-are-in-the-building-inside-the-capitol-stormed-by-a-pro-trump-mob-11609984654>; Luke Broadwater, *Police Told to Hold Back on Riot Response, Report Finds*, N.Y. TIMES (May 18, 2021), <https://www.nytimes.com/2021/04/13/us/politics/capitol-police-riot-report.html> (discussing the underestimation of risk and the lack of preparation for the riots and how officers were instructed by their leaders not to use their most aggressive tactics to hold off the mob). This contrasts starkly with the overly militarized police response to peaceful anti-racism protests during the summer of 2020. Audra D. S. Burch et al., *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (June 4, 2021, 8:50 PM), <https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html>. Of course, not all police agencies responded in the same way. For example, I participated in a peaceful Black Lives Matter protest in Troy, New York on June 7, 2020, where the local officers were handing out pizza. Kate Lisa Johnson, *Troy PD: Protest Was Peaceful*, HUDSONVALLEY360, https://www.hudsonvalley360.com/news/publicservicenews/troy-pd-protest-was-peaceful/article_ce252368-a92c-11ea-aa44-4ffd88909613.html (last visited Aug. 15, 2021). The only arrests were of individuals in fatigue gear with handguns. Lauren Stanforth, *Troy*

misogynists² with the active support of the sitting President.³ The symposium follows up on the racial justice reckoning which bloomed during the late spring and into the summer of 2020 in the aftermath of the torture and murder of George Floyd during a police “encounter.”⁴ Built on decades of work by activists, policymakers, poets, and theorists of color, racial justice issues dominated the attention of the nation, of the white majority, of retraumatized Black Americans,⁵ and of all people of

Police: Group in Fatigues with Guns Apprehended During Rally, TIMES UNION (June 7, 2020, 7:51 PM), <https://www.timesunion.com/news/article/Troy-police-group-in-fatigues-with-guns-15323396.php>. The individuals arrested were suspected of trying to stir up trouble and were later tied to a militia group. Ngoc Huynh, *Troy Police Find Militia Manual After Arrest of 2 Armed Men at Black Lives Matter Rally*, N.Y. UPSTATE (June 16, 2020), <https://www.newyorkupstate.com/capital-region/2020/06/report-troy-police-find-militia-manual-after-arrest-of-armed-men-at-black-lives-matter-rally.html>. One of the men was a soldier from Fort Drum. Mike Goodwin & Kenneth C. Crowe II, *Soldier Arrested After Troy Police Say He Had Firearm Near Civil Rights Rally*, TIMES UNION (June 8, 2020, 6:01 PM), <https://www.timesunion.com/news/article/Soldier-arrested-after-police-say-they-caught-him-15324705.php>.

2. For a helpful working definition of misogyny, which I use in gender scholarship, please see KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* 1 (2017). Manne rejects (as distracting and unhelpful to those who are subject to it) the dominant but “naïve conception of misogyny,” which focuses on individuals who hate “women *qua* women,” or “simply because they are women.” *Id.* at 18-19, 32-33. Instead, she points out “[m]isogyny may pursue its targets not in the spirit of hating women but, rather, of loving justice.” *Id.* at 18-20; see also Mary A. Lynch & Andrea A. Curcio, *Institutional Service, Student Care-Work, and Misogyny: Naming the Problem and Mitigating the Harm*, 65 VILL. L. REV. 1119, 1119 (2020).

3. This truthful statement does *not* mean that every single insurrectionist or rioter was there because of racism or misogyny. It does *not* mean that every participant was white or male. It means that the emotions that carried people to try to overturn the government at a transitional moment were formed out of racist and misogynistic thinking. Sabrina Tavernise & Matthew Rosenberg, *These Are the Rioters Who Stormed the Nation’s Capitol*, N.Y. TIMES (May 12, 2021), <https://www.nytimes.com/2021/01/07/us/rioters-capitol.html>; Rashawn Ray, *What the Capitol Insurgency Reveals About White Supremacy and Law Enforcement*, BROOKINGS INST. (Jan. 12, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/01/12/what-the-capitol-insurgency-reveals-about-white-supremacy-and-law-enforcement/>; Tom Mockaitis, *White Supremacists Still on the March*, HILL (Apr. 11, 2021, 9:30 AM), <https://thehill.com/opinion/civil-rights/547557-white-supremacists-still-on-the-march>; Mona Lena Krook, *Misogyny in the Capitol: Among the Insurrectionists, a Lot of Angry Men Who Don’t Like Women*, CONVERSATION (Jan. 13, 2021, 8:23 AM), <https://theconversation.com/misogyny-in-the-capitol-among-the-insurrectionists-a-lot-of-angry-men-who-dont-like-women-153068>; Sarah Maslin Nir, *The Misogynistic ‘Dating Coach’ Who Was Charged in the Capitol Riot*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/04/nyregion/samuel-fisher-capitol-riot.html>.

4. Audra D. S. Burch et al., *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (June 4, 2021, 8:50 PM), <https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html>.

5. I use the term American to include people who reside here with the intent to stay. Those *without* documentation of citizenship or residency are included in my definition of Americans.

color.⁶ While dealing with masking, lockdown, social isolation, COVID-19 testing and health scares, many of us also focused on reading works by authors of color,⁷ listening more attentively to our countrywomen of color, and deeply examining the racial injustice historically baked into the American criminal justice system.⁸ This racial justice blossoming accelerated pre-existing calls to both *abolish the police*⁹ and *end mass incarceration*¹⁰

6. In this article, for purposes of discussing racial bias and criminal justice, I will sometimes use the term *Black survivors* and sometimes *survivors “of color”* depending on the context, the research to which I refer, and the impact on intersectional identities. I feel it is important to identify for purposes of racial justice not only those who consider themselves non-majoritarian/nonwhite but also those perceived by criminal justice actors or intimate partners as nonwhite. The term “of color” as I use it includes Black, non-Hispanic Black (referred to in the research at times as African-Americans), Native and Indigenous Peoples, Hispanic, Latinx who are of color, Asians (far eastern, southeastern and Pacific Islanders), and Middle Easterners. I will use other more specified terms when that specific context is relevant. Sheeren Marisol Maraji et al., *Is It Time to Say R.I.P. to ‘POC’?*, NPR (Sept. 30, 2020, 12:22 AM), <https://www.npr.org/2020/09/29/918418825/is-it-time-to-say-r-i-p-to-p-o-c> (“Many felt that people using the term POC were (intentionally or not) sidestepping the truth: that certain effects of racism—things like mass incarceration, police violence, inability to access good health care—disproportionately affect Black and Indigenous people. Not *all* ‘people of color.’”). I heed the wisdom of clinical law expert and legal scholar Michelle Jacobs’s writing on the subject of honoring each identity separately and fully. Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 40 (2017) (“For over twenty years now, the data . . . consistently shows that the communities of non-White women do experience violence, both at the hands of the state, as well as at the hands of intimates, but that violence manifests differently in each community.”).

7. Alex Thompson, *White America Is Reckoning with Racism. It Could Reshape 2020.*, POLITICO (June 9, 2020, 7:50 AM), <https://www.politico.com/news/2020/06/09/white-voters-2020-biden-304804>; Nicole Chavez, *2020: The Year America Confronted Racism*, CNN, <https://www.cnn.com/interactive/2020/12/us/america-racism-2020/> (last visited Aug. 6, 2021).

8. KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* xvi-xvii (2021) (“Our nation’s obsession with policing and incarcerating Black America begins with Black children. The history of mass incarceration and police violence against Blacks has been well told in books like *The New Jim Crow* (Michelle Alexander), *Policing the Black Man* (edited by Angela J. Davis), *Chokehold* (Paul Butler) and *Locking up Our Own* (James Forman Jr.)...”); see generally Eugene K. Chow, *A Racial Reckoning*, FORDHAM LAW. (Fall/Winter 2021), <https://digital.law.fordham.edu/issue/fall-winter-2021/a-racial-reckoning/> (recapping the national movement for racial justice in the wake of police killings of black individuals).

9. Ruairi Arrieta-Kenna, *The Deep Roots—and New Offshoots—of ‘Abolish the Police’*, POLITICO (June 12, 2020, 7:30 PM), <https://www.politico.com/news/magazine/2020/06/12/abolish-defund-police-explainer-316185>; *Profiles in Abolition: Highlighting Ongoing Struggle to Abolish the Prison Industrial Complex*, CRITICAL RESISTANCE, <http://criticalresistance.org/abolition/> (last visited Aug. 6, 2021) (organization founded by Angela Y. Davis to abolish the prison-industrial complex).

10. Chow, *supra* note 8; see RACHEL E. BARKOW, *PRISONERS OF POLITICS* 139–207 (2019) (suggesting alternatives to incarceration and pointing to flaws in the legal system that contribute to mass incarceration); see, e.g., EMILY BAZELON, *CHARGED* 272–74

Subsequently, fatal crimes against and harassment of Asian Americans captured national attention and resulted in a long overdue discussion of the contours of Asian American discrimination and othering.¹¹ In addition to absorbing the escalating and devastating consequences of state-sponsored violence on Black, Indigenous and other people of color (BIPOC), our nation has been forced to squarely face the disparities in how we interpret and address criminality and violence, depending on *who* commits the offenses and *by whom* the offenses are experienced. For many women of color, including Asian American women, “misogyny and racism are inseparable.”¹² Prosecutors and police may be even less likely to recognize or add “hate crime” charges in cases of rapes and sexual assaults targeting Asian women.¹³ The March 16, 2021, shootings at three spas in the Atlanta area surfaced the problematic bias, including the fetishization of East and Southeast Asian women¹⁴ and the response by law enforcement trivializing the horror of

(1st ed. 2019) (quoting Eric Gonzales, who suggested jail be a last resort to tackle mass incarceration).

11. Six of the eight people killed in a March 16, 2021 shooting spree of Atlanta-area spas were of Asian descent, seven were women. Giulia McDonnell Nieto del Rio et al., *What We Know About the Victims in the Atlanta Shootings*, N.Y. TIMES (May 11, 2021), <https://www.nytimes.com/2021/03/19/us/atlanta-shooting-victims.html>. As I write this, Asian American parents are struggling with the judgement of whether American public schools are currently a safe place for their children to attend. Moriah Balingit et al., *As Schools Reopen, Asian American Students Are Missing from Classrooms*, WASH. POST (Mar. 4, 2021, 7:00 AM), https://www.washingtonpost.com/education/asian-american-students-home-school-in-person-pandemic/2021/03/02/eb7056bc-7786-11eb-8115-9ad5e9c02117_story.html; see also Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN L. J. 1 (2000) (discussing how stereotypes of Asians and Asian Americans influence the criminal justice system).

12. Alisa Chang, *For Asian American Women, Misogyny and Racism Are Inseparable*, *Sociologist Says*, NPR (Mar. 19, 2021, 7:53 PM), <https://www.npr.org/2021/03/19/979336512/for-asian-american-women-misogyny-and-racism-are-inseparable-sociologist-says>; see also Kimmy Yam, *Racism, Sexism Must Be Considered in Atlanta Case Involving Killing of Six Asian Women, Experts Say*, NBC NEWS (Mar. 17, 2021, 7:02 PM), <https://www.nbcnews.com/news/asian-america/racism-sexism-must-be-considered-atlanta-case-involving-killing-six-n1261347>; Nancy Wang Yuen, *Atlanta Spa Shooting Suspect’s ‘Bad Day’ Defense, and America’s Sexualized Racism Problem*, NBC NEWS (Mar. 18, 2021, 2:40 PM), <https://www.nbcnews.com/think/opinion/atlanta-spa-shooting-suspect-s-bad-day-defense-america-s-ncna1261362> (“Asian women, along with Black and Indigenous women and other women of color, endure racism and sexism in intersectional ways constantly, and they have throughout history.”).

13. Jaemin Kim, *Asian Women: Rape and Hate Crimes*, HUFFPOST (July 29, 2015), https://www.huffpost.com/entry/lets-call-it-what-it-is_b_163698 (written by Jaemin Kim, a film development consultant, writer and lawyer who worked on public policy and advocacy issues at the NYCLU’s Reproductive Rights Project). *Jaemin Kim, Contributor*, HUFFPOST, <https://www.huffpost.com/author/jaemin-kim> (last visited Aug. 6, 2021).

14. Yam, *supra* note 12 (“While police said the suspect denied having racial motivations, experts and activists alike say it’s nearly impossible to divorce race from the

what the offender had done.¹⁵ The County Sheriff noted that the shooter, Robert Long, denied any racial motivations and simply “had a bad day.”¹⁶ Long was reportedly at the “end of his rope” and targeted the spas “to take out [the] temptation” associated with his sex addiction.¹⁷

The modern American criminal justice system grew out of fields seeded and often nurtured with racialized, gendered, ethnically biased, and heteronormative harming. In this article, I defer to the wisdom of survivors of color, as it has been documented by research,¹⁸ to argue that local criminal prosecution will not be built with an authentically anti-racist, more just, or transformative approach¹⁹ until the experiences and voices of women of color and of Lesbian, Gay Bisexual, Transgender, Queer, Questioning and Intersex (LGBTQ+) persons of color who experience intimate²⁰ crimes are prioritized and supported.²¹ These experiences and voices have been historically ignored or marginalized by criminal justice system norms and actors²² as well as by mainstream anti-incarceration activists.²³ Women of color and, in particular, Black

discourse, given the historical fetishization of Asian women.”); Britney Hong, *Fetishization of East and Southeast Asian Women*, N.C. ASIAN AMS. TOGETHER (Mar. 23, 2021), <https://ncaatogether.org/2021/03/23/fetishization-of-east-and-southeast-asian-women>.

15. Yuen, *supra* note 12; Yam, *supra* note 12.

16. Yuen, *supra* note 12.

17. *Id.*

18. See discussion *infra* Part II.C.

19. *Prosecuting in the Police-less City: Police Abolition’s Impact on Local Prosecutors*, 134 HARV. L. REV. 1859, 1869–75 (2021) (arguing for transformative justice); Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement’s Promise*, 64 N.Y.L. SCH. L. REV. 69, 92 (2020) (arguing for restorative justice).

20. I use the term “intimate crimes” to include both intimate partner violence and other sexual assault crimes whether or not the offender/assaulter is an intimate or former intimate. Terminology is challenging because all of these crimes are rooted in issues of power and control and often overlap. Indeed, some violence against women crimes are committed by offenders who treat female acquaintances as *if they are or should be intimate partners*.

21. See generally Lucie Turkel, *Angela Y. Davis Discusses the Importance of Abolition, Intersectionality and Community in USG Justice Now Event*, DAILY CAMPUS (Feb. 2, 2021), <https://dailycampus.com/2021/02/02/angela-davis-discusses-the-importance-of-abolition-intersectionality-and-community-in-usg-justice-now-event/>.

22. CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBT PEOPLE OF COLOR 6–42 (2016), <https://www.arcusfoundation.org/wp-content/uploads/2016/08/lgbt-criminal-justice-poc.pdf> (discussing how the criminal justice sector marginalizes LGBT people of color).

23. Anti-incarceration or prison reform activism often focuses on cisgender men. I was one of the early members of the NYS Coalition for Women Prisoners founded in 1994 (<https://info.nicic.gov/jiwp/node/147>) and saw the bias. The Coalition assisted the Division of Parole to identify and work on issues concerning gender violence. That work was revived more recently under a creative collaboration, *Incarcerated Survivors of Gender Violence Initiative*, which is spearheaded by the Sanctuary for Families and its Executive Director Dorchen Leibholdt. See Pieter Keushkerian, *Sanctuary’s Initiative Works to Reform Parole*

and Transgender women are at disparate risk for state violence in the form of police contact²⁴ and incarceration rates,²⁵ and are also at statistically disparate risk for intimate partner violence and sexual assault.²⁶ They also experience underenforcement²⁷ when they are the victims of intimate crimes.

The disparate safety, harassment, and bodily integrity risks for survivors of color must also take front and center stage when engaged with anti-racism work.²⁸ Black girls and women of color are often “overpoliced and underprotected.”²⁹ Transgender women of color are at most risk for intimate fatal attacks.³⁰ There are rising hate attacks against and hyper-sexualization of Asian American women.³¹ Native and

Hearing Process, SANCTUARY FOR FAMS. (Apr. 20, 2018), <https://sanctuaryforfamilies.org/sanctuaries-initiative-works-to-reform-parole-hearing-process/>.

24. See generally Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39 (2017); #SayHerName, AFR. AM. POL’Y F., <https://www.aapf.org/sayhername> (last visited June 29, 2021); see also SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANS EQUAL., 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF BLACK RESPONDENTS 2 (2017).

25. *Incarcerated Women and Girls*, SENTENCING PROJECT (Nov. 24, 2020), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/>. Between 1980 and 2019, the number of incarcerated women increased from 26,378 to 222,455 with the imprisonment rate for African American women being 83 per 100,000, Latinx women 63 per 100,000, and white women 48 per 100,000. *Id.*

26. See *infra* Part II.B.

27. The Vera Institute of Justice Racial Justice Program found that in one district attorney’s office with which they worked, the odds of charging in cases involving Black victims were 16% lower than in cases involving white victims. Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 821, 843 (2013). See *infra* Part II.B on underenforcement of rape and sexual assault of Black women.

28. CTRS. FOR DISEASE CONTROL & PREVENTION, NISVS: AN OVERVIEW OF 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION (2010) (finding rates of sexual violence higher among those who identify as LGBTQ+ than those who identify as heterosexual); *Sexual Assault and the LGBTQ Community*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-assault-and-the-lgbt-community> (last visited Aug. 10, 2021) (detailing a 2015 U.S. Transgender Survey that found transgender people of color were most likely to have been sexually assaulted in their lifetime).

29. KIMBERLÉ W. CRENSHAW ET AL., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED (2015), https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf.

30. The Human Rights Campaign (“HRC”) reported that in 2020 at least forty-four transgender or gender non-conforming people were fatally shot or killed by other violent means, the majority of which were Black and Latinx transgender women. *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2020*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020> (last visited May 12, 2021). It is the highest number of killings since HRC started tracking the data in 2013. *Id.*

31. See Nieto del Rio et al., *supra* note 11. As I write this, Asian American parents are struggling with the judgement of whether American public schools are currently a safe place for their children to attend. Moriah Balingit et al., *As Schools Reopen, Asian American Students Are Missing from Classrooms*, WASH. POST (Mar. 4, 2021, 7:00 AM),

multi-racial women are at the highest risk for contact sexual violence³² during their lifetimes.³³ Female District Attorneys of color face vitriolic attacks and push back for breaking through the glass ceilings of power and holding the “public reins” of criminal prosecution.³⁴

Particular attention must be paid to the perilous situations of victim-survivors³⁵ of intimate crimes.³⁶ When a survivor of color, physically abused or sexually assaulted by an intimate partner, lives in a community which has been long treated abusively and violently by law enforcement, she confronts a seemingly impossible dilemma. To free

https://www.washingtonpost.com/education/asian-american-students-home-school-in-person-pandemic/2021/03/02/eb7056bc-7786-11eb-8115-9ad5e9c02117_story.html; see also Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN L. J. 1 (2000) (detailing how stereotypes of Asians and Asian Americans influence the criminal justice system).

32. “Contact sexual violence is a combined measure that includes rape, being made to penetrate someone else, sexual coercion, and/or unwanted sexual contact.” CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010-2012 STATE REPORT 7 (2017).

33. Shefali Singh, *Closing the Gap of Justice: Providing Protection for Native American Women Through the Special Domestic Violence Criminal Jurisdiction Provision of VAWA*, 28 COLUM. J. GENDER & L. 197, 198 (2014) (“Part I of this Note describes the exigent situation of sexual violence in Indian country against Native Americans (especially by non-Indians) by presenting statistics on the issue.”); CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010-2012 STATE REPORT 20–21 (2017); CTRS. FOR DISEASE CONTROL & PREVENTION, 1546-0738 PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION—NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, UNITED STATES, 2011 5 (2014).

34. See *infra* pp. 1541–43.

35. Individuals who have been subject to intimate partner violence, coercion or terror often reject terms such as victim, battered, or abused as identifiers. Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061 (2006) (discussing the racialization of battered women victimization and agency). There are good reasons for this rejection including the fact that those terms seem to negate female agency and autonomy. For purposes of this article, I will use the term survivor to indicate individuals who are still alive and have current or prior experience with an intimate partner abuser. Note that separating from an abusive partner does not reduce one’s safety risks. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2138–39 (1993) (“The most dangerous time for a battered woman is when she separates from her partner. Many attacks are precipitated in retaliation for her leaving, some as part of an escalation of violence following separation. Separation tends to increase, not decrease the violence, and many of the women who are murdered by their partners are killed after separation.”) (footnotes omitted). Alternatively, “the term victim serves as a poignant reminder of the countless hardships associated with [Intimate Partner Violence].” Elizabeth Walsh, *Her Vote Counts: A Call for the Expansion of Confidential Voter Registration for Victims of Intimate Partner Violence in New York State* 7 (unpublished manuscript) (on file with author).

36. These crimes are often generally referred to as “violence against women.” See Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. (2019).

herself from violent, ongoing abuse, a survivor of color must entrust her life – literally – to the protection of a law enforcement and justice system that has repeatedly failed to earn that trust.³⁷ Survivors of color must also worry that calling the police, or working with the criminal justice system to hold offenders accountable, may trigger overcharging or lengthy incarceration of a partner.³⁸ Black women know fully the complexion of mass incarceration and the historical roots of policing efforts³⁹ to keep white people and white women safe. In addition to risking retaliation by abusers or threats to report undocumented family members,⁴⁰ survivors of color who engage with the criminal justice system also risk being mistakenly arrested by the police as aggressors.⁴¹

37. #SayHerName, AFR. AM. POL'Y F., <https://www.aapf.org/sayhername> (last visited Nov. 4, 2021) (“Launched in December 2014 by the African American Policy Forum (AAPF) and Center for Intersectionality and Social Policy Studies (CISPS), the #SayHerName campaign brings awareness to the often-invisible names and stories of Black women and girls who have been victimized by racist police violence.”); *Prosecuting in the Police-less City: Police Abolition’s Impact on Local Prosecutors*, *supra* note 19, at 1872 (“[A]fter all, prosecutors’ offices tend to have well-earned distrust among members of those communities the offices have long sought to imprison.”); PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 139 (2009) (“A frequent theme in hip-hop is that the law does not correctly select the most deserving candidates for punishment. Specifically, the law does not properly weigh the immorality posed and danger caused by white elites. Rather, it exaggerates the threat posed by the poor and by minorities.”).

38. Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 82–87 (2017).

39. ALL THINGS CONSIDERED, *In the Wake of Chauvin’s Conviction, A Look Back at the Origins of American Policing*, NPR (Apr. 22, 2021, 4:16 PM), <https://www.npr.org/2021/04/22/989938920/in-the-wake-of-chauvins-conviction-a-look-back-at-the-origins-of-american-police> (“In this country, for the years that cover the 1600s to the mid-19th century, the most dominant presence of law enforcement was what we call today slave patrols. That’s what made up policing. . . . And perhaps the most revealing aspect of the way slave patrols functioned is that they were explicit in their design to empower the entire white population with the duty to police movements of Black people. So the tying together early on of the surveillance, the deputization, essentially, of all white men to be police officers or, in this case, slave patrollers and then to dispense corporal punishment on the scene are all baked in [to the development of our criminal justice response] . . .”).

40. Melissa E. Dichter et al., *Engaging with Criminal Prosecution: The Victim’s Perspective*, 21 WOMEN & CRIM. JUST. 21, 24 (2011); *see generally* Susan Grossman & Marta Lundy, *Domestic Violence Across Race and Ethnicity: Implications for Social Work Practice and Policy*, 13 VIOLENCE AGAINST WOMEN 1029 (2007).

41. *Determining the Predominant Aggressor*, ADVOCS. FOR HUM. RTS. (Dec. 26, 2018), https://www.stopvaw.org/determining_the_predominant_aggressor (“The International Association of Chiefs of Police (IACP) defines ‘predominant aggressor’ as ‘the individual who poses the most serious, ongoing threat, which may not necessarily be the initial aggressor in a specific incident.’ . . . Mandatory arrest laws, while originally well [sic] intentioned, resulted in a greater number of arrested women in domestic violence cases.”). Victims may attempt to avert an attack through use of violence in self-defense. *Id.* This can lead to misidentification of the primary aggressor, resulting in harmful legal consequences for the victim such as ineligibility for aid mandated by statute for victims. *Id.*

Survivors of color often want the system to act and hold their abusers accountable *without* the survivors having to further target themselves or aggravate their life situations by testifying or continuing to participate in a prosecution.⁴² They worry about the danger to themselves and their children both from the abusive partner and from participating in the challenging labyrinths of criminal prosecution or enforcing violations of orders of protection.⁴³ These primarily female or female-presenting survivors of color are entitled to access to criminal justice and to societal protection.

In examining the intersection of racism and misogyny⁴⁴ as it plays out in criminal law, this article primarily focuses on the perspectives and desires of criminal victim-survivors regarding prosecution of intimate partners as documented in social science literature. Many female survivors of color want to, and currently need to, access the justice tools provided by criminal law.⁴⁵ It also observes that anti-racism work includes standing against misogynistic or racist attacks on female District Attorneys of color.⁴⁶

For those who want to avoid unnecessary incarceration, reduce racism in the criminal justice system, and secure urgent safety and accountability goals of survivors of color, I offer some observations in my conclusion.⁴⁷

II. LOCAL PROSECUTORS, INTIMATE CRIMES, AND TRADITIONALLY MARGINALIZED SURVIVORS

Prosecutors wishing to unroot racism, mitigate carceral norms, *and* support the safety of women and LGBTQ+ survivors of color must be aware of the limits, dangers, and opportunities inherent in the status quo. That means prosecutors need to focus on both particularized safety goals articulated by individual survivors, *and* how community and state violence magnify and complicate the likelihood and impact of private intimate violence. For survivors in specific communities connected by identity, race, ethnicity, culture or geographical location,⁴⁸ community

42. See discussion *infra* Part II.C.

43. See discussion *infra* Part II.C.

44. See discussion *infra* Part II.B.

45. See discussion *infra* Part II.C. I support building out more civil and community capacity to respond to violence against women beyond criminal justice tools. However, currently that does not exist.

46. See discussion *infra* pp. 1541–43.

47. See discussion *infra* Part III.

48. This article does not explore the role of religious identity which poses its own set of challenges.

and state violence also complicate and impact the possible paths to securing safety.

In this section, the role and power of local prosecutors to prosecute violence against women and intimate crimes is explained using the lens of racial justice. After that, I explore the intersectional experience of women of color with intimate violence, acknowledging in particular misogynoir and the backlash levied against female prosecutors of color. I close this section with an exploration of preferences expressed by actual survivors of color for interaction with criminal prosecution.

A. Local Prosecutors, Reform, and Anti-Racism

Local prosecutors have a very specific role in the American Criminal Justice system,⁴⁹ although they present with a range of jurisdictional authorities and political bents.⁵⁰ Prosecutorial scope of and responsibility for criminal activity varies depending on the jurisdictional mandate. However, generally it is local prosecutors who deal with – or avoid dealing with⁵¹ – most of the intimate partner and violence against women crimes in the United States.⁵² In fact, part of the genesis of the federal *Violence Against Women Act* was the problem with state judicial systems not taking such crimes seriously and the inability of women to access justice through the state criminal law systems.⁵³

Critiques of prosecutorial power emphasize the lack of transparency into their decision-making processes,⁵⁴ tendency to engage in overcharging⁵⁵, and failure of some offices or individuals to properly

49. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); *Prosecuting in the Police-less City: Police Abolition's Impact on Local Prosecutors*, *supra* note 19, at 1862; Jacob Longman, *Prosecution and the Electorate*, *CIVILIAN* (Sept. 25, 2015), <https://sites.law.lsu.edu/civilian/2015/09/prosecution-and-the-electorate/> (“The United States, in fact, is the only country in the world that [elects prosecutors].”).

50. *See Prosecuting in the Police-less City: Police Abolition's Impact on Local Prosecutors*, *supra* note 19, at 1861–65 (explaining that state laws that define the role of prosecutors differ across the United States which ultimately results in differing prosecutor and police or law enforcement relationships).

51. I. Bennett Capers, *Against Prosecutors*, 105 *CORNELL L. REV.* 1561, 1565–67 (2020).

52. NAT'L DIST. ATT'YS ASS'N, *NATIONAL DOMESTIC VIOLENCE PROSECUTION BEST PRACTICES GUIDE 23* (2017) (“Domestic violence is traditionally and principally a subject to be adjudicated by state and local jurisdictions.”).

53. *Factsheet: The Violence Against Women Act*, WHITE HOUSE, https://obamawhitehouse.archives.gov/sites/default/files/docs/vawa_factsheet.pdf (last visited May 2, 2021) (explaining how VAWA improved the criminal justice response to violence against women and ensured victims and their families had access to aid and other services).

54. Jenny Roberts, *Defense Lawyering in the Progressive Prosecution Era* (forthcoming), <https://www.law.nyu.edu/academics/colloquia/clinical-theory-workshops>.

55. Kyle Graham, *Overcharging*, 11 *OHIO ST. J. CRIM. L.* 701, 702 (2014) (explaining that overcharging can imply three different prosecutorial criticisms: objection to the

disclose discovery and Brady material.⁵⁶ Systemic critiques include the argument that too much power is held by a criminal prosecutor who decides who and what to charge, what evidence should or should not be given over to the defense or revealed to the court, and whether or how to reduce charges, negotiate pleas or recommend lengthy incarceration.⁵⁷ Some activists and scholars go further and argue for the abolition of prosecutors in favor of mercy and community prosecution.⁵⁸

Prosecutors are, on the one hand, blamed for over enforcing, participating in a racially discriminatory criminal justice system, contributing to mass incarceration and fracturing families and communities of color.⁵⁹ On the other hand, given historical and

allegation of a crime without adequate proof; lack of proportionality between consequences and the seriousness of the defendant's allegations; and lack of proof or proportionality when the prosecutor has framed charges with the goal of dismissing or reducing the charges as part of the plea deal).

56. See KRYSTAL RODRIGUEZ, *CTR. FOR CT. INNOVATION, DISCOVERY REFORM IN NEW YORK* (2020); see, e.g., *Weary v. Cain*, 577 U.S. 385 (2016) (holding that a prosecutor's failure to disclose certain material evidence violated a death row inmate's due process rights); see generally *Brady v. Maryland*, 373 U.S. 83 (1963); Shannon N. Cunningham, *Defense Attorneys' Perceptions of Prosecutorial Misconduct* (Aug. 2016) (Ph.D. dissertation, Texas State University) (explaining that the failure to disclose evidence and selective prosecution, amongst other things, are the most common types of prosecutor misconduct).

57. "Prosecutors have the power to flood jails and prisons, ruin lives, and deepen racial disparities with the stroke of a pen. But they also have the discretion to do the opposite. This video explores the power of prosecutors to continue to drive mass incarceration—or end it." *The Power of Prosecutors*, ACLU, <https://www.aclu.org/issues/smart-justice/prosecutorial-reform/power-prosecutors> (last visited May 12, 2021); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523–24 (1981) ("[P]rosecutors have acquired essentially unreviewable discretion. What I mean by discretion is the ability to make decisions about guilt and degree of punishment without the limits of rules or other constraints on freedom of action, including judicial review, generally imposed on other public officials making decisions of comparable import."); DAVIS, *supra* note 49, at 16 ("The lack of enforceable standards and effective accountability to the public has resulted in decision-making that often appears arbitrary, especially during the critical charging and plea bargaining stages of the process.").

58. Capers, *supra* note 51, at 1561–1610. I heard Professor Capers present this paper on April 7, 2020 as part of the Albany Law Schools James T. Gathii's Faculty Workshop Series. As a former federal prosecutor, his experienced disgust with contributing to "mass incarceration" and to "the separation of families" is very relatable. For purposes of my article, it is noteworthy that he does carve out exceptions for child abuse and certain cases of domestic violence while also decrying the failure of prosecutors to pursue sex offense cases. *Id.*; see *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 768–70 (2018); *Prosecuting in the Police-less City: Police Abolition's Impact on Local Prosecutors*, *supra* note 19, at 1860 n.8; Gyasi Lake, *There's No Such Thing as a "Progressive Prosecutor" in a System Designed to Criminalize Blackness*, BLACK YOUTH PROJECT (July 10, 2019), <http://blackyouthproject.com/theres-no-such-thing-as-a-progressive-prosecutor-in-a-system-designed-to-criminalize-blackness> [<https://perma.cc/5XFA-QRC7>].

59. Paul Butler, *Locking Up My Own: Reflections of A Black (Recovering) Prosecutor*, 107 CALIF. L. REV. 1983, 1992 (2019) (reflecting upon the author's own experience and the

patriarchal trivialization of intimate crimes against women⁶⁰ and marginalized peoples,⁶¹ prosecutors are also criticized for failure to pursue sex offenses,⁶² violence against women crimes, or crimes committed by the successful, the powerful, and the rich.

The police were not the only sector of the criminal justice community that historically failed to take violence between intimate partners seriously. Prosecutors did the same, often discouraging victims from pursuing cases (Epstein, 1999). Even when mandatory arrest laws increased the number of incidents brought to their attention, prosecutors rarely pressed charges, and when they did, they rarely followed through and took the case to trial (e.g., Epstein, 1999). District attorneys nationwide explained that “because victims simply do not follow through in domestic violence cases, there is no need to waste precious prosecutorial resources on them” (Cahn, 1992, p. 163).⁶³

work of James Forman Jr.); JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 13 (2017); Gajwani & Lesser, *supra* note 19. Interestingly and perhaps surprisingly, liberals are also held responsible for creating the carceral state. NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014).

60. Lisa Avalos, *Prosecuting Rape Victims While Rapists Run Free: The Consequences of Police Failure to Investigate Sex Crimes in Britain and the United States*, 23 *MICH. J. GENDER & L.* 1, 6–7 (2016) (“The problem of rape complainants being charged with false reporting must be understood within a larger context in which Western countries do a surprisingly poor job of investigating and prosecuting rape. A growing body of evidence demonstrates that police and prosecutors often fail to respond appropriately to complaints of sexual violence. They fail to adequately investigate such complaints, are reluctant to initiate prosecutions, and correspondingly obtain few convictions of rapists. These failings are consistent across many countries lauded for their high levels of development and gender equality including the United Kingdom, the United States, and the Scandinavian countries. As this Article will demonstrate, the practice of charging rape complainants with false reporting is grounded in a failure to investigate rape and is, accordingly, one consequence of this landscape of investigatory failure.”).

61. LAURIE B. GREEN, *Moral Outrage: Postwar Protest Against Police Violence and Sexual Assault*, in *BATTLING THE PLANTATION MENTALITY: MEMPHIS AND THE BLACK FREEDOM STRUGGLE* 81 (North Carolina Scholarship Online 2007) (examining the Black community’s moral outrage against police brutality involving sexual assaults in postwar Memphis and its major ramifications for the politics of racial justice and discussing how police sexual assaults of Black women galvanized African Americans and put race, manhood, womanhood, and sexuality at the center of postwar political tensions in the city).

62. See Avalos, *supra* note 60.

63. Deborah Epstein & Lisa Goodman, *Domestic Violence Victims’ Experiences in the Legal System*, in *STRESS, TRAUMA, AND WELLBEING IN THE LEGAL SYSTEM* 45, 47 (2012).

Intersectional feminists are concerned about the underenforcement of intimate crimes against Black women,⁶⁴ indigenous women,⁶⁵ and other women of color, as well as the psychological impact of sexual assault on “ethnic minority women.”⁶⁶ In addition, the sexualized or eroticized depiction of people of color by criminal justice actors including prosecutors and defense attorneys raises grave concern. On the issue of violence against Black women, it “will continue to affect not only the conviction of African-American men, both guilty and innocent, but also the sexual violation of African-American women and the response to that violation.”⁶⁷ For Asian American women and transgender women, sexual stereotypes also create bias and harm.⁶⁸

Meanwhile, during the past decade, a sea change has occurred in the use of prosecutorial power and the ideas underlying its purpose, making strange bedfellows of fiscal conservatives and reformers.⁶⁹ Energized by a broad coalition of activists, voters elected local district attorneys to address racial disparities, and reduce incarceration rates.⁷⁰ Some refer to

64. Reema Sood, *Biases Behind Sexual Assault: A Thirteenth Amendment Solution to Under-Enforcement of the Rape of Black Women*, 18 U. MD. L. J. RACE RELIGION GENDER & CLASS 405 (2018).

65. Cecilia Nowell, *Violence Against Indigenous Women Is ‘a Crisis.’ Deb Haaland’s New Missing & Murdered Unit Could Help, Advocates Say*, LILY (Apr. 20, 2021), <https://www.thelily.com/violence-against-indigenous-women-is-a-crisis-deb-haaland-s-new-missing-murdered-unit-could-help-advocates-say/>.

66. Thema Bryant-Davis et al., *From The Margins To The Center: Ethnic Minority Women and the Mental Health Effects of Sexual Assault*, 10 TRAUMA, VIOLENCE & ABUSE 330 (2009) (“The psychological impact of sexual assault on ethnic minority women includes higher rates of PTSD, depression, substance abuse, suicidality, lowered self-esteem, and somatic symptoms Ethnic minority women are confronted with numerous barriers to obtaining protection and assistance. These barriers include but are not limited to discriminatory policies, financial constraints, social stigma around mental health issues, language issues, and mistrust of agencies based on personal and historical experiences of violations.”); Darci E. Burrell, *Myth, Stereotype, and the Rape of Black Women*, 4 UCLA WOMEN’S L.J. 87 (1993) (“The belief that African-American women are less virtuous and therefore deserve sexual abuse persists, continuing to excuse the sexual violation of these women.”).

67. Burrell, *supra* note 66; *see also* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717 (2006) (“Underenforcement can also be a form of deprivation, tracking familiar categories of race, gender, class, and political powerlessness.”) (footnote omitted).

68. *See* discussion *infra* Part II.B.

69. Liane Jackson, *Change Agents: Catching the New Wave of Reform Prosecutors Upends the Status Quo*, ABA J. (June 1, 2019), <https://www.abajournal.com/magazine/article/change-agents-reform-prosecutors> (“The conservative Koch brothers and liberal George Soros may make strange bedfellows, but the billionaires share a common philanthropic goal: dialing back America’s carceral state and instituting real criminal justice reform.”); *see also* Roberts, *supra* note 54; Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415 (2021).

70. *See* Levin, *supra* note 69.

this as a “generational change,”⁷¹ others as “smart justice,”⁷² while reform-minded prosecutors themselves use the identifier “*Fair and Just Prosecution*.”⁷³

Thus, in many places a new image of a prosecutor and of a prosecutorial system is emerging, while reforming “progressive” prosecutors⁷⁴ have been elected in what appears to be a continuing trend.⁷⁵ Professor Paul Butler, a former federal prosecutor who has spent

71. Jackson, *supra* note 69; see also David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. 25, 26–28 (2017).

72. *Smart Justice*, ACLU, <https://www.aclu.org/issues/smart-justice> (last visited Aug. 16, 2021) (“The ACLU Campaign for Smart Justice is an unprecedented, multiyear effort to reduce the U.S. jail and prison population by 50% and to combat racial disparities in the criminal justice system.”); see also *Prosecutorial Reform*, ACLU, <https://www.aclu.org/issues/smart-justice/prosecutorial-reform> (last visited May 12, 2021) (“Prosecutors are the most influential actors in the criminal justice system. They have almost unlimited power to push for more punishment, often in ways that are largely hidden from public view. This focus on obtaining convictions and securing severe prison sentences, instead of addressing the root causes of crime, is a major driver of mass incarceration that compounds racial disparities throughout the justice system.”).

73. *Fair and Just Prosecution*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org> (last visited May 12, 2021) (“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.”).

74. Not all “Progressive Prosecutors” are anti-carceral. Levin, *supra* note 69, at 1418 (describing four “ideal” types of progressive prosecutors). And even those who come with intent of reform face inevitable obstacles to achieving their goals. Gajwani & Lesser, *supra* note 19

, at 92 (“[T]hree fundamental challenges stand in the way of this kind of prosecutorial reform. First, no matter how progressive, prosecutors become more punitive over time. Second, prosecution offices will never be able to forbear prosecuting violent crime—the crux of addressing mass incarceration—without replacing prosecution with a credible and meaningful alternative. And finally, the adversarial system of justice, built to ensure fairness in fact-finding through trial, is too narrow a tool to provide fairness and accountability in the vast majority of cases where guilt is not contested.”); see also Noel Vossen, *The Fallacy of the Progressive Prosecutor*, BARS (Oct. 18, 2020), (providing examples of “progressive prosecutors” who have contributed to incarceration); Malik Neal, *What the Pandemic Revealed About ‘Progressive’ Prosecutors*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/04/opinion/prosecutors-bail-reform.html> (providing an example of how District Attorney Larry Krasner’s approach to bail reform ultimately contributed to incarceration); David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 670 (2017); Jackson, *supra* note 69. The November 2020 elections also resulted in reformer district attorneys.

75. “Election night saw huge wins for pro-reform, pro-decarceration prosecutors in cities such as Los Angeles, Chicago, and Orlando. Just as notable, if not more so, were the contests in less visible places such as Oakland County, Michigan, where Jessica McDonald sailed to victory in Michigan’s second most populous county.” Taylor Pendergrass, *Criminal Justice Reform Takes Another Big, Messy Step Forward in 2020 Elections*, ACLU (Nov. 6, 2020), <https://www.aclu.org/news/smart-justice/criminal-justice-reform-takes-another-big-messy-step-forward-in-2020-elections/>. Running on a reform platform Jason Williams became the newly elected District attorney of New Orleans Parish.

over a decade theorizing, writing, and speaking publicly about the intersection of race and criminal justice, notes in his recent Harvard Law Review article that although localities can dismantle or defund their police, “[c]hief among the actors who are likely to survive police abolition are local prosecutors.”⁷⁶

Local prosecutors *could be* useful partners for those who desire to reform or improve the criminal justice system.⁷⁷ Potential advantages include: 1) having a much smaller geographic area than most state and federal officials which enables them to “maintain closer ties to the communities they serve” than state or federal actors; 2) having a broader community focus than special issues interest groups; 3) having a broader justice mandate than the police; and 4) being more “democratically accountable”⁷⁸ than local police or specialized nonprofits.⁷⁹ Acknowledging this potential, Professor Angela J. Davis opines,

Whether or not prosecutors intentionally or unconsciously discriminate against defendants of color in the charging and plea-bargaining processes, their decisions—even the race-neutral ones—may cause or exacerbate racial disparities. Their tremendous power and discretion is often exercised in ways that produce unintended and undesirable consequences. However,

See also Nicholas Chrastil, *During First Month in Office, DA Jason Williams Dismissed over 400 Cases Previously Accepted by Cannizzaro*, LENS (Mar. 19, 2021), <https://thelensnola.org/2021/03/19/during-first-month-in-office-da-jason-williams-dismissed-over-400-cases-previously-accepted-by-cannizzaro/>.

76. *Prosecuting in the Police-less City: Police Abolition’s Impact on Local Prosecutors*, *supra* note 19, at 1860 (“Whether known as district attorneys, county attorneys, states’ attorneys, or some other title, local prosecutors’ offices are the legal counterparts to local police . . .”).

77. See, e.g., *id.* at 1874 (“By taking full advantage of existing laws, a local prosecutor can become more than a rote enforcer of traditional criminal law. Instead, they can reimagine themselves as a government agency whose mission is to address the structural ills that plague their communities.”). Professor Butler urges Prosecutor’s offices to take advantage of the role of “*affirmative litigator*” for increased enforcement of environmental harms, residential and employment discrimination, or predatory practices albeit noting inherent dangers with this approach. *Id.* at 1875–79.

78. *Id.* at 1874 (“Public interest legal organizations and community nonprofits are traditionally responsible for filling the service gaps that state and federal government can leave, but local prosecutors’ offices have the advantage of having a broader focus and being democratically accountable.”). Neither Professor Butler nor I are suggesting that the system is currently just in a meaningful way only that creating more just and less racially discriminatory systems is potentially achievable and worth considering.

79. Professor Butler also makes an important point about the uncoupling of prosecutors from their traditional relationship with police with whom they can become coopted or at the very least too cozy for true objectivity and accountability. *Id.* at 1867.

that same power and discretion can be used to remedy the problem.⁸⁰

Selecting local prosecutors by popular vote is a uniquely American tradition, for better or worse.⁸¹ On the one hand, electing prosecutors can “turn[] prosecutors into politicians,” demand that “prosecutors appear tough and unforgiving,” and cause prosecutors to rely on police union and law enforcement endorsements.⁸² On the other hand, elections allow for accountability and sweeping reforms *if* voters demand it.⁸³

The recent string of elections in which prosecutors have won office by promising more thoughtful and less punitive criminal justice policies, or more meaningful oversight of the police, underscore the contingency of the politics of crime, and provide grounds for optimism that political oversight of prosecutors can operate in positive and productive ways.⁸⁴

In addition, unlike law enforcement officers whose traditional mandate is to “Protect and . . . Serve[,]”⁸⁵ prosecutors are ethically obligated instead to *do justice*⁸⁶ which should include dismantling or

80. Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 821, 836 (2013). Note that the Vera Institute of Justice work on Prosecutors and Racial Justice continues. On July 15, 2020, they hosted *We’ve Got the Power: A Virtual Event on the Power of District Attorneys in Criminal Justice*. See *Event: We’ve Got the Power: A Virtual Event on the Power of District Attorneys in Criminal Justice*, VERA INST. OF JUST., <https://www.vera.org/research/weve-got-the-power>.

81. See Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 U. CHI. CRIME & JUST. 1, 2 (2012).

82. Sklansky, *supra* note 74, at 647 (2017).

83. *Id.* at 674 (“[I]t is worth keeping in mind the ways in which political oversight can be far less constructive—in particular, the risk of politicizing the treatment of particular defendants. Avoiding that prospect is one more reason to try to develop tools that will help voters to assess prosecutors based on how they run their offices day in and day out.”).

84. *Id.*

85. *The Origin of the LAPD Motto*, L.A. POLICE DEPT., reprinted from BEAT MAG. (1963), https://www.lapdonline.org/history_of_the_lapd/content_basic_view/1128 (last visited Aug. 16, 2021) (detailing the history of the LAPD motto “To Protect and to Serve”). Unfortunately, the cultural imaging of police have created law enforcement “warriors” as opposed to community guardians and anti-violence peacekeepers as a common example of policing. See Steve Inskeep et al., *What Will it Take to Protect Black Americans from Police Violence?*, NPR (June 1, 2020, 5:03 AM), <https://www.npr.org/2020/06/01/866540199/what-will-it-take-to-protect-black-americans-from-police-violence> (“Warriors is what you have now—us against them. Police feel like they’re almost enemies to the people who they’re supposed to be protecting and serving.”).

86. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS’N 2009); N.Y. RULES OF PRO. CONDUCT r. 3.8 cmt. (N.Y. BAR ASS’N 2018) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate”); *The Right Thing: Ethical Guidelines for Prosecutors*, DIST. ATT’YS ASS’N STATE N.Y., daasny.com/wp-

reforming processes which create racial harm when possible and sensitively addressing the complicated realities involved in intimate crimes.

Intentional justice-seeking is not enough, however. Even those prosecutors who start out with the intent to adopt a progressive approach, often become more punitive over time.⁸⁷ Psychological factors⁸⁸ and structural issues⁸⁹ work against sustained progressive polices, even when offices are committed to hiring diverse and empathetic individuals from communities of color who desire to provide fewer carceral outcomes.

B. Intimate Crimes and Women of Color

Many women scholars of color have expanded our understanding of the intersectional⁹⁰ experience of women of color. They have also documented the historical absence of intersectional thinking when

content/uploads/2015/07/2015-Ethics-Handbook.pdf (last visited June 24, 2021) (“We prosecutors have the best job in the criminal justice system because we have more freedom than any other actor to do ‘the right thing.’”); *see also Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor*, 111th Cong. 539 (2009) (statement of Hon. Sonia Sotomayor) (“And Perry said to the prosecutor, ‘It must cause you some pain having expended all that effort in your case to have the charges dismissed.’ And the prosecutor looked up and, ‘No, my job as a prosecutor is to do justice, and justice is served when a guilty man is convicted and when an innocent man is not.’ And I thought to myself, that’s quite amazing to be able to serve that role, to be given a job, as I was by Mr. Morgenthau, a job I’m eternally grateful to him for, in which I could do what justice required in an individual case.”).

87. *See generally* Gajwani & Lesser, *supra* note 19.

88. For example, one of these factors is saliency which is the phenomenon of having “recent or vivid events,” such as offenders to whom one granted leniency visibly or dramatically reoffend become more influential in one’s thinking than, for example, the many offenders who are lost to memory because they never reappear again in one’s daily work. *See id.* at 79.

89. *See id.* at 82 (“[T]he structure of the criminal justice system is ill-suited for providing accountability . . . and inhibits progressive reform.”). The arm’s-length adversarial distance of trial rules do not help create the psychological climate for agreements which really make the victim whole or motivate accountability on the part of the defendant. *See id.* As these authors (and the United States Supreme Court in *Padilla v. Kentucky*) have pointed out, our modern criminal justice system is a system of pleas not of trials. *See id.* at 83 (explaining that less than 3% of state and federal criminal cases go to trial); *see also Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (“Pleas account for nearly 95% of all criminal convictions.”).

90. Critical race theorist Professor Kimberlé Crenshaw introduced the term “intersectionality,” a term she coined to describe the double bind of simultaneous racial and gender prejudice. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139–67 (1989). Professor Crenshaw founded the African American Policy Forum and continues to speak, write, and study intersectional issues. She creatively created communities to explore, examine, and respond to injustice and, thus, has been inspirational to so many in trying to achieve both racial and gender equity.

addressing violence—both state-sponsored and intimate partner—against women of color.⁹¹ The primacy of educated and middle to upper class white women in the narratives which argued for the federal Violence Against Women Act and in the creation of policies responding to violence against women is part of the story.⁹² The primary focus of the prison abolition movement on African American and Black males is another.⁹³ The historically biased focus on straight, cisgender individuals and “acceptable relationships”—i.e., state sanctioned marriage—is a third.⁹⁴ There are multiple complexities for all women of color as they navigate agency and safety in their daily lives.

The risks faced by women of color for experiencing intimate harm should not be minimized, or conveniently overlooked, in order to advance other important social justice and anti-racism priorities. Femicide⁹⁵

91. It is important to acknowledge on whose laboring shoulders our theorizing rests. In terms of Black feminist pioneers, I think of Maria Stewart who is known as the first Black feminist and whose “*brilliant audacity*” shocked the patriarchy in 1832 by speaking in public for the abolition of slavery. Pauli Murray is an influential civil rights and feminist pioneering lawyer who experienced rejection because of her sex, her “mixed-race” identity, and because she believed from birth that she was male. ROSALIND ROSENBERG, JANE CROW: THE LIFE OF PAULI MURRAY (2017). Pioneering author, scholar, and organizer Professor Barbara Smith who wrote *Towards a Black Feminist Criticism*, calling for Black feminism and the larger women’s rights movement to be affirming of all sexual identities and conscious of socio-economic oppressions. See generally Barbara Smith, *Toward a Black Feminist Criticism*, in THE RADICAL TEACHER (1978); see also BELL HOOKS, AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM 105 (1981) (“There has always been greater emphasis on the violent acts of Black men in American society, as it diverts attention away from white male violence.”); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007); see generally the prolific work of Professor Angela Y. Davis. Her groundbreaking speech at the “Inaugural Color of Violence Against Women of Color Conference” motivated anti-violence advocates to think more intentionally about the consequential combination of state, systemic and intimate violence together. Angela Y. Davis, *The Color of Violence Against Women*, Keynote Address Before the Participants at the Color of Violence Conference (Oct. 10, 2000), in COLORLINES (Oct. 10, 2000, 12:00 PM), <http://www.hartford-hwp.com/archives/45a/582.html>. Professor Beth E. Richie is another leading scholar who writes so movingly. See generally BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION (2012).

92. See generally AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION (2020); RICHIE, *supra* note 91, at 2.

93. See RICHIE, *supra* note 91, at 3 (describing how most institutional and political responses to this buildup look at how these developments disadvantage men, particularly Black men).

94. See generally Jenna M. Calton et al., *Barriers to Help Seeking for Lesbian, Gay, Bisexual, Transgender, and Queer Survivors of Intimate Partner Violence*, 17 TRAUMA, VIOLENCE & ABUSE 585 (2016).

95. Femicide refers to the killing of women and is intentionally used rather than the more commonly categorized “homicide.” Just like symptoms of a heart attack differ in men and women, so too risks of femicide are different for women. See generally Leah Rodriguez, *Femicide: Everything You Need to Know*, GLOB. CITIZEN (Nov. 3, 2020), <https://www.globalcitizen.org/en/content/what-is-femicide-everything-you-need-to-know/?template=next>.

statistics have informed us that the most dangerous place for women to be is often in their relationships and in their homes. For years we knew that *half of female murders occur at the hands of male intimate partners*.⁹⁶ Most recently, a September 2020 Violence Policy Report entitled *When Men Murder Women* analyzed 2018 FBI homicide data.⁹⁷ For homicides in which the victim to offender relationship could be identified, 92 percent of female victims (1,606 out of 1,748) were murdered by a male they knew.⁹⁸ For victims who knew their offenders, 63 percent (1,014) of female homicide victims were wives or intimate acquaintances of their killers.⁹⁹ The most recent data from the Centers for Disease Control, which confirmed the seriousness of stalking as a public health problem, revealed that one in six women has been stalked during their lifetime.¹⁰⁰

Non-Hispanic Black and American Indian/Alaska Native women experienced the highest rates of homicide (4.4 and 4.3 per 100,000 population, respectively).¹⁰¹ The Center for Disease Control has recommended targeted IPV prevention programs for populations at disproportionate risk and enhanced access to intervention services for persons experiencing IPV in order to reduce femicides.¹⁰² According to the 2012 National Intimate Partner and Sexual Violence Survey which analyzes data across ethnic and racial identities, “half (49.5%) of multi-racial women, 45.6% of American Indian/Alaska Native women, 38.9% of non-Hispanic White women, 35.5% of non-Hispanic Black women, 26.9% of Hispanic women, and 22.9% of Asian/Pacific Islander women experienced some form of contact SV during their lifetime.”¹⁰³

96. Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014*, CDC (July 21, 2017), <https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm#suggestedcitation>.

97. VIOLENCE POL'Y CTR., *WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2018 HOMICIDE DATA 3* (2020).

98. *Id.*

99. *Id.*

100. *Violence Prevention: Stalking*, CDC, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/stalking/fastfact.html> (last visited Aug. 16, 2021).

101. Petrosky et al., *supra* note 96, at 742.

102. *WHEN MEN MURDER WOMEN*, *supra* note 97, at 6.

103. SHARON G. SMITH ET AL., NAT'L CTR. FOR INJ. PREVENTION & CONTROL, *THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2010-2012 STATE REPORT 3* (2017), <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf>; *see generally* U.S. DEP'T JUST., NATIONAL CRIME VICTIMIZATION SURVEY, CONCATENATED FILE, 1992-2015, (2015); MATTHEW J. BREIDING ET AL., PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION—NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, UNITED STATES, 2011 CDC: MORBIDITY AND MORTALITY WKLY. REPORT 1 (2014), www.cdc.gov/mmwr/pdf/ss/ss6308.pdf; MIKEL L. WALTERS ET AL., *THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION 1* (Nat'l Ctr. for Inj. Prevention Control, 2013), <https://www.cdc.gov/violenceprevention/pdf/>

The most fatal violence and the highest level of intimate violence in the United States is experienced by transgender or gender nonconforming people of color. In recent years, the majority of transgender fatalities were of “Black and Latinx” transgender women.¹⁰⁴ Sadly, the particular othering of this group means there is a dearth of longitudinal government and community research to guide us.¹⁰⁵ The heteronormative lens through which government traditionally operated is demonstrated by the fact that the first study of sexual orientation and IPV by the Center for Disease Control and Prevention occurred in 2010.¹⁰⁶ That study found that bisexual women were disproportionately impacted by IPV and “experienced a significantly higher lifetime prevalence of rape, physical violence, and/or stalking by an intimate partner, and rape and SV (other than rape) by any perpetrator, when compared to both lesbian and heterosexual women.”¹⁰⁷

nisvs_sofindings.pdf; see Margo L. Nightingale, *Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases*, 23 OTTAWA L. REV. 71 (1991) (discussing the multiplied oppressed experience of Native women).

104. The Human Rights Campaign (“HRC”) reported that in 2020 at least forty-four transgender or gender non-conforming people were fatally shot or killed by other violent means, the majority of which were Black and Latinx transgender women—it is the highest number of killings since HRC started tracking the data in 2013. *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2020*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020> (last visited June 28, 2021). As of this year, there already have been twenty-nine transgender or gender nonconforming deaths by violent means. *Fatal Violence Against Transgender and Gender Non-Conforming Community in 2021*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021> (last visited July 1, 2021) (“Sadly, 2021 has already seen at least 44 transgender or gender non-conforming people fatally shot or killed by other violent means. We say at least because too often these stories go unreported — or misreported. In previous years, the majority of these people were Black and Latinx transgender women.”). Note that HRC has “adopted the term ‘Latinx’ rather than Hispanic or Latino to represent the identities of non-binary, gender non-conforming and gender-expansive people. ‘Latinx’ also centers the lives of indigenous, Brazilian and other non-Spanish speaking people” in their celebrations and work. Milagros Chirinos, *Latinx Heritage Month: More Than One Word, More Than One Heritage*, HUM. RTS. CAMPAIGN (Sept. 13, 2019), <https://www.hrc.org/news/latinx-heritage-month-more-than-one-word-more-than-one-heritage>.

105. This absence of longitudinal attention and study and means that the practical wisdom of the specialized activists and community coalitions who are most knowledgeable about these dangers should be accorded great deference.

106. See NISVS: AN OVERVIEW OF 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION, NAT’L CTR. FOR INJ. PREVENTION AND CONTROL 1 (2010) (The Centers for Disease Control and Prevention’s *National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation* was the first of its kind to present comparisons of victimization by sexual orientation for women and men).

107. *Id.* (finding rates of sexual violence higher among those who identify as LGBTQ+ than those who identify as heterosexual). The Sexual Orientation Report indicates that individuals who self-identify as lesbian, gay, and bisexual have an equal or higher

The National Center for Transgender Equality reported in 2015 that transgender people of color were most likely to have been sexually assaulted in their lifetime.¹⁰⁸ The numbers are startlingly high. Fifty-three (53%) of Black transgender and non-binary individuals have experienced sexual violence¹⁰⁹ and forty-four (44%) of respondents experienced physical violence by an intimate partner.¹¹⁰ Particularized oppressions occur and were identified in separate reports for Black, Latino/a American, Indian and Alaskan Native, and Asian, Native Hawaiian, and Pacific Islander experiences.¹¹¹

These numbers cannot be equitably addressed simply by accessing existing criminal justice or other support services.¹¹² Sixty-seven percent (67%) of Black respondents and fifty-eight (58%) of Asian and Native Hawaii and Pacific Islander respondents said they would feel somewhat or very uncomfortable asking the police for help.¹¹³ Even when survivors do have contact with law enforcement, respondents experience “high levels of mistreatment and harassment by police” including physical attacks and sexual assault.¹¹⁴ A 2016 study of lesbian, gay, bisexual, transgender and queer survivors of intimate partner violence revealed broad dissatisfaction with formal support services including DV agencies, shelters, crisis lines, police, attorneys, and clergy.¹¹⁵ Obstacles inhibiting service ranged from lack of understanding on how aspects of IPV that are unique to same-sex relationships affect LGBTQ+ survivors’ mental and

prevalence of experiencing IPV, SV, and stalking as compared to self-identified heterosexuals. Bisexual women are disproportionately impacted. *Id.*

108. SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANS EQUAL., 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF BLACK RESPONDENTS 2 (2017), (“Among the most important findings was that many respondents were impacted by the compounding effects of multiple forms of discrimination, and transgender people of color who completed the survey experienced deeper and broader forms of discrimination than white USTS respondents and people in the U.S. population overall.”). The 2015 U.S. Transgender Survey (USTS) is the largest survey examining the experiences of transgender people in the United States, with 27,715 respondents nationwide. *See id.*; *see also Sexual Assault and the LGBTQ Community*, *supra* note 28.

109. *See* JAMES ET AL., *supra* note 108, at 15. The survey also revealed that transgender women and nonbinary people with male on their birth certificate were more likely to have been sexually assaulted (16%) during the preceding year. *Id.* at 15.

110. *See id.* at 16.

111. SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 52 (2016).

112. *See* JAMES ET AL., *supra* note 108; *see also* LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 16 (2018).

113. JAMES ET AL., *supra* note 111, at 189.

114. *See* JAMES ET AL., *supra* note 108, at 14.

115. *See* Calton et al., *supra* note 94, at 585–600 (citation omitted).

physical health¹¹⁶ to failure to clearly cover LGBTQ+ survivors.¹¹⁷ LGBTQ survivors experience bias from police and are contacting the police less frequently even though rates of violence have increased.¹¹⁸ LGBTQ survivors also fear systemic inequities in going to trial, such as bias from the jury.¹¹⁹ These fears are heightened for trans or other misunderstood queer-identifying individuals.¹²⁰

Many feminist scholars—and Black Feminist scholars in particular—also reject the idea that criminal justice responses will improve victim safety especially for women of color. In 2000, at the pathbreaking Color of Violence Conference¹²¹ Professor Angela Y. Davis stated, “[t]he major strategy relied on by the women’s anti-violence movement of criminalizing violence against women will not put an end to violence against women – just as imprisonment has not put an end to ‘crime’ in general.”¹²² In her scholarship, Professor Beth E. Richie carefully dissects the matrix of forces that are set upon women “who are the most stigmatized, the least protected, and therefore in greater danger.”¹²³ More recently, Professor Leigh Goodmark has called for *Decriminalizing Domestic Violence*¹²⁴ while Law Professor Aya Gruber argues that the “feminist war on crime” contributed so greatly to racialized mass incarceration that feminists need to “choose” and oppose carceral policies.¹²⁵

Meanwhile, other voices are calling out for the protection of Black girls and women *both* from private harassment, sexual assault and intimate partner violence *and* from state violence.¹²⁶ A recent report of the African American Policy Forum studied the quandary in which young Black girls find themselves. They feel and are both under-protected from harassment and violence and overpoliced.¹²⁷ This experience alienates

116. *Id.* at 585, 587.

117. *Id.* at 585, 591 (citation omitted).

118. *Id.* at 592.

119. *See id.*

120. *Id.* at 591–92 (citation omitted).

121. *See* RICHIE, *supra* note 91, at 155.

122. GOODMARK, *supra* note 112, at 18.

123. RICHIE, *supra* note 91, at 18.

124. *See generally* GOODMARK, *supra* note 112, at 18–19 (critiquing the criminalization of domestic violence).

125. *See* GRUBER, *supra* note 92, at 192, 204.

126. Angela Y. Davis is an example of such a voice. *See* Davis, Keynote Address, *supra* note 91; *see also* RICHIE, *supra* note 91, at 47; Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 WM. & MARY J. RACE, GENDER, & SOC. JUST. 39 (2017).

127. *See* Crenshaw et al., *supra* note 29. A very visible example of the phenomenon occurred in Rochester, New York. *See, e.g.*, Jemima McEvoy, *Footage of Rochester Police Restraint, Pepper-Spraying 9-Year-Old Girl Sparks Outrage*, FORBES (Feb. 1, 2021, 9:34 AM), <https://www.forbes.com/sites/jemimamcevoy/2021/02/01/footage-of-rochester-police->

girls and young women from education and from a broader network of community support. It impairs a real chance for a better future and an adolescent's very sense of themselves as growing agentic adults.¹²⁸ Moreover, a Georgetown study found that young girls of color and particularly Black girls are presumed to be less childlike and not as deserving of protection as their white peers.¹²⁹

Social media is replete with the hashtag *#ProtectBlackWomen*, as well, as with examples of the ugly backlash that occurs when women of color¹³⁰ name the violence perpetrated against them, particularly when it involves a powerful celebrity offender.¹³¹ When a six-part documentary-series, "Surviving R. Kelly," showcased the "decades of emotional, physical, and sexual abuse he allegedly perpetrated against Black girls and women," his "accusers"¹³² were blamed for being "fast."¹³³ The New York Times reported that one of the jurors who acquitted Kelly in a 2008 child pornography trial found the Black female young victims incredible based on their presentation and appearance. "I just didn't believe them, the women The way they dress, the way they act—I didn't like

restraining-pepper-spraying-9-year-old-girl-sparks-outrage/?sh=642b07ae2cfd ("At one point, police are heard telling the girl, 'You're acting like a child,' and she responds, 'I am a child.'").

128. See generally Crenshaw et al., *supra* note 29.

129. GREEN, *supra* note 61.

130. NCTE Celebrates CeCe McDonald's Early Release, NAT'L CTR. FOR TRANSGENDER EQUAL. (Jan. 13, 2014), <https://transequality.org/tags/cece-mcdonald>; Marc Lamont Hill, *Why Aren't We Fighting for CeCe McDonald?*, EBONY (June 11, 2012), <https://www.ebony.com/news/why-arent-we-fighting-for-cece-mcdonald/> ("According to studies, 38% of Black trans people indicate that they have been harassed by the police. Even worse, 20% state that they have been physically or sexual assaulted by police. Given this pattern of criminalization and abuse over protection, it is no surprise that most victims of transgender violence (52%) do not report the crimes to law enforcement. It is also unsurprising that CeCe McDonald's claims of self-defense were ignored and ultimately criminalized by police. . . . This also means that mainstream Black advocacy organizations like the NAACP and Urban League must take up McDonald's cause with the same intensity as the Trayvon Martin case.").

131. See Maya Finoh & Jasmine Sankofah, *The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence*, ACLU (Jan. 28, 2019, 12:30 PM), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/legal-system-has-failed-black-girls-women-and-non>.

132. Interestingly, victims in sexual assault cases are called "accusers." This is not as common when the media and others discuss non-intimate crimes. See generally Michele Sharpe, *Who's a Victim? Who's an 'Accuser'? The Loaded Language of Sexual Assault*, WASH. POST (Sept. 27, 2018), <https://www.washingtonpost.com/outlook/2018/09/27/whos-victim-whos-an-accuser-loaded-language-sexual-assault/>.

133. Finoh & Sankofah, *supra* note 131; see Jacey Fortin, 'Surviving R. Kelly' Documentary on Lifetime Details Sex Abuse Accusations, N.Y. TIMES (Jan. 4, 2019), <https://www.nytimes.com/2019/01/04/arts/music/surviving-r-kelly.html>.

them.”¹³⁴ The writer Mikki Kendall said in the documentary, “[n]o one cared because we were black girls[.]”¹³⁵

Singer, songwriter and rapper Megan Thee Stallion, who was mocked publicly after being shot,¹³⁶ explained in an Op Ed in the New York Times that she speaks out for Black women because she is “not afraid of criticism” and “Protect Black women” should not be controversial.¹³⁷

After a lot of self-reflection on that incident, I’ve realized that violence against women . . . happens because too many men treat all women as objects, which helps them to justify inflicting abuse against us when we choose to exercise our own free will.

. . . [t]he issue is even more intense for Black women, who struggle against stereotypes and are seen as angry or threatening when we try to stand up for ourselves and our sisters. There’s not much room for passionate advocacy if you are a Black woman.¹³⁸

A further word must be said about social media and modern technology. The most manipulative abusers and predators were early adopters of every advance in digital surveillance and social media.¹³⁹ They used technology to frighten, coerce, intimidate, control and cause chaos for intimates, ex-intimates or those who they determined were

134. Fortin, *supra* note 133.

135. *Id.* (emphasis added) (internal quotation marks omitted); On September 27, 2021, R. Kelly was convicted by an Eastern District of New York jury of federal racketeering and sex trafficking charges. In her powerful New York Times Editorial, Professor Kim Crenshaw asserts “Until we confront the full weight of Black women’s intersectional vulnerability, these crimes of commission and omission will remain indefensibly common.” Kimberlé Crenshaw, *How R. Kelly Got Away With It*, N.Y. TIMES (Oct. 1, 2021), <https://www.nytimes.com/2021/10/01/opinion/r-kelly-conviction.html>.

136. See Bethonie Butler, *Megan Thee Stallion Was Mocked After Being Shot. As She Reclaims the Narrative, Black Women Recognize Her Pain.*, WASH. POST (July 31, 2020, 1:17 PM), <https://www.washingtonpost.com/arts-entertainment/2020/07/31/megan-thee-stallion/>.

137. Megan Thee Stallion, *Megan Thee Stallion: Why I Speak Up for Black Women*, N.Y. TIMES (Oct. 13, 2020), <https://www.nytimes.com/2020/10/13/opinion/megan-thee-stallion-black-women.html>.

138. *Id.*

139. See *Technology-Facilitated Abuse*, VAWNET, <https://vawnet.org/sc/technology-assisted-abuse> (last visited May 12, 2021); Katherine Kam, *The New Domestic Violence: Technology Abuse*, WEBMD (Nov. 30, 2020), <https://www.webmd.com/mental-health/news/20201130/the-new-domestic-violence-technolog-abuse>; see also Diana Freed et al., “A Stalker’s Paradise”: *How Intimate Partner Abusers Exploit Technology*, 2018 PROC. CHI CONF. ON HUM. FACTORS IN COMPUTING SYS. (2018) (presenting qualitative research of how domestic abusers exploit technologies to intimidate, threaten, monitor, impersonate, harass, or otherwise harm their victims); Diana Freed et al., *Digital Technologies and Intimate Partner Violence: A Qualitative Analysis with Multiple Stakeholders*, 1 PROC. ASS’N COMPUTING MACH. HUM-COMPUT. INTERACTION 1 (2017).

objects of their intimate digital assault.¹⁴⁰ Misogynists and racists did the same.¹⁴¹

The digital space has become a risky and harassing place for women and a doubly discriminatory place for Black women.¹⁴² According to a Pew Foundation study, “33% of women under 35 say they have been sexually harassed online”¹⁴³ Professor Moya Bailey first coined the term *misogynoir*, to capture the ways anti-Black and misogynistic representation shape broader ideas about Black women—particularly in visual culture and digital spaces.¹⁴⁴ To her surprise, the term went viral.¹⁴⁵ Similar to the *#MeToo* movement, Black women of color said “YES! I know that, I feel that, I experienced that.”

A final group of women experiencing the double backlash of gender and race—on and off social media—are female District Attorneys of color.

140. See Kam, *supra* note 139.

141. See *Technology-Facilitated Abuse*, *supra* note 139.

142. Beyond politics, more also cite their gender or their racial and ethnic background as reasons why they believe they were harassed online. See Emily A. Vogels, *The State of Online Harassment*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/>. Women, on the other hand, are more likely than men to report having been sexually harassed online (16% vs. 5%) or stalked (13% vs. 9%). *Id.* Young women are particularly likely to have experienced sexual harassment online. *Id.* In the last five years, Our Justice Center and I have received requests from women whose identity, images and/or personal information has been the subject of pornographic, harassing cyber-revenge by individuals who knew the women but with whom the women did not have any meaningful connection. Monica Anderson & Emily A. Vogels, *Young Women Often Face Sexual Harassment Online – Including on Dating Sites and Apps*, PEW RSCH. CTR. (Mar. 6, 2020), <https://www.pewresearch.org/fact-tank/2020/03/06/young-women-often-face-sexual-harassment-online-including-on-dating-sites-and-apps/>. Of course, the issue of “revenge porn” and other intimate cyber attacks has become the subject of new legislation including in my home state of New York, N.Y. PENAL LAW § 245.15 (McKinney 2021), and increased in alarming rates during the pandemic. See Attorney General James Urges Caution to New Yorkers Against Rising Threat of ‘Revenge Porn’ in Time of Coronavirus, N.Y. ST. ATT’Y GEN. (Nov. 18, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-urges-caution-new-yorkers-against-rising-threat-revenge>.

143. Vogels, *The State of Online Harassment*, *supra* note 142, at 8.

144. Moya Baily with Chanda Prescod-Weinstein: *Misogynoir Transformed*, MLK VISITING PROFESSORS & SCHOLARS PROGRAM (June 7, 2021, 7:00 PM), <https://mlkscholars.mit.edu/updates/2021/moya-bailey-chanda-prescod-weinstein-misogynoir-transformed> (last visited June 14, 2021); Moya Bailey, *Misogynoir Transformed: Black Women’s Digital Resistance*, BROWN: CTR. FOR STUDY OF RACE & ETHNICITY AM., <https://www.brown.edu/academics/race-ethnicity/events/moya-bailey-misogynoir-transformed-black-women’s-digital-resistance> (last visited June 14, 2021); see MOYA BAILY, MISOGYNOIR TRANSFORMED: BLACK WOMEN’S DIGITAL RESISTANCE 23 (2021) (“Black women and Black nonbinary, agender, and gender-variant folks are actively reimagining the world through digital content creation that challenges the misogynoir that negatively impacts their health, and minimizing the harm they experience in the process.”).

145. See Moya Baily with Chanda Prescod-Weinstein: *Misogynoir Transformed*, *supra* note 144.

Although only one percent (1%) of local district attorneys throughout the nation are females of color, the multiplicity of attacks upon them appear to be another kind of *misogynoir*.¹⁴⁶ The ABA Law Journal reports that when Kim Foxx took office as Cook County Illinois District Attorney in 2016, “the honeymoon period lasted a whole two days before racist memes began” and then she was “targeted by white nationalist groups.”¹⁴⁷ Foxx remarked,

“It’s a constant. I don’t know that there’s not been a time that I’ve been in this position where I’ve not been the recipient of hate mail, hate speech, hate rhetoric,” she says. “It is vigorous, it’s relentless. And the lack of shame that the people who engage in this type of behavior have is actually quite astonishing, particularly in the social media space.”¹⁴⁸

On January 15, 2020, Baltimore City State Attorney Marilyn Mosby received what can only be described as a hate-filled, racist, vulgar and misogynistic voicemail from a St. Louis resident for having supported and stood with St. Louis Circuit Attorney Kim Gardner, another Black female chief prosecutor under attack.¹⁴⁹ The St. Louis caller said, “There’s only one thing worse than a badass, empowered black woman—that’s a badass, empowered black woman who’s got [the] public’s reins in her hands. If we’d known you all were gonna be this much fucking trouble we would’ve picked our own fucking cotton.”¹⁵⁰ Similarly threatening,

146. Christina Carrega, *For the Few Black Women Prosecutors, Hate and ‘Misogynoir’ Are Part of Life*, ABC NEWS (Mar. 21, 2020, 9:05 AM), <https://abcnews.go.com/US/black-women-prosecutors-hate-misogynoir-part-life/story?id=68961291> (“Marilyn Mosby is part of the 1%—an elite group of 45 women of color among the nearly 2,400 elected prosecutors in the United States. . . . but for many of these pioneering women, the process has not only been fraught, but filled with outright danger, with people not only targeting them because they are women, but because they are Black as well—what some call “misogynoir”); Melba Pearson, *More Women of Color Are Getting Elected as District Attorneys, but Can They Stay There?*, ESSENCE (June 24, 2019), <https://www.essence.com/news/politics/women-of-color-district-attorneys/> (comparing the reaction to reformers like the white male Philadelphia District Attorney Larry Krasner with those of female district attorneys of color); Rhonda Stewart, *How Black Female Prosecutors Are Challenging the Status Quo and Fighting for Reform*, ABA J. (Sept. 10, 2020, 12:22 PM), <https://www.abajournal.com/web/article/how-black-female-prosecutors-are-challenging-the-status-quo-and-fighting-for-reform> (discussing how, “[i]n late July 2020, Gardner brought felony charges against Mark and Patricia McCloskey, a white couple who had brandished a semiautomatic rifle and a semiautomatic handgun at Black Lives Matter protesters passing by their mansion the month before . . . [and] Gardner began to receive racist hate mail and death threats”).

147. Stewart, *supra* note 146.

148. *Id.*

149. Carrega, *supra* note 146.

150. Eli Hager & Nicole Lewis, *Facing Intimidation, Black Women Prosecutors Say: ‘Enough’*, MARSHALL PROJECT (Jan. 16, 2020, 2:00 PM), <https://www.themarshallproject.org/2020/01/16/facing-intimidation-black-women-prosecutors-say-enough>.

when Orlando State Attorney Aramis Ayala, also a Black female top prosecutor, decided to pursue life in prison rather than the death penalty for a first-degree murder case, a noose arrived at her office and an employee of the county clerk's office wrote on Facebook that she should be "*tarred and feathered if not hung from a tree . . .*"¹⁵¹ The attacks were not only from unnamed harassers. Another female prosecutor of color, DeKalb County District Attorney Sherry Boston, was compared to the Nazis and the Klan by a neighboring white District attorney¹⁵² when she decided not to prosecute doctors who perform abortions or women who seek them as a result of new legislation criminalizing those actions.¹⁵³ In response to these attacks, Essence Magazine remarked "*There has been great discussion about the wide latitude prosecutors have to exercise their discretion; do African-American female top prosecutors have that same level of freedom?*"¹⁵⁴

C. Listening to the Wisdom of Survivors of Color

Anti-violence advocates emphasize the importance of listening carefully to the safety wisdom and actual goals of survivors as opposed to the assumptions made by well-meaning professionals.¹⁵⁵ Social science research has given us information generally, and from the viewpoint of survivors who interacted with the criminal justice system about the ineffectiveness of certain domestic violence interventions for members of specific communities¹⁵⁶ and specified preferences as regards interaction with the criminal justice system.¹⁵⁷

At least by the turn of the 21st century, anti-violence advocates and social science researchers began to focus on the multicultural differences

151. 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, 9:08 PM), <https://www.orlandosentinel.com/news/crime/os-ne-aramis-ayala-leaves-state-attorney-20191031-uz25n7oiv5bhpn7cvcmmojafaa-story.html>.

152. See Raphael Warnock & Peter Berg, *Opinion: Weaponizing Racism Endangers Us All*, ATLANTA J. CONST. (June 14, 2019), <https://www.ajc.com/news/opinion/opinion-weaponizing-racism-endangers-us-all/s1f1gdDkSPueYBgLe6YtaJ/> (discussing how Cobb County Acting District Attorney John Melvin disparaged D.A. Boston).

153. Pearson, *supra* note 146.

154. *Id.* (comparing the reaction to reformers like the white male Philadelphia District Attorney Larry Krasner with those of female district attorneys of color).

155. See generally Robert Hampton et al., *Evaluating Domestic Violence Interventions for Black Women*, 16 J. AGGRESSION MALTREATMENT & TRAUMA 330, 342, 348 (2008).

156. See generally Robert Hampton et al., *Evaluating Domestic Violence Interventions for Black Women*, 16 J. AGGRESSION MALTREATMENT & TRAUMA 330, 346, 348 (2008) ("The value of informal sources of social support among African Americans has been well documented, and such sources are often more trusted and more frequently available than traditional and formal services [Farrow, 1997].")

157. See generally Grossman & Lundy, *supra* note 40, at 1029.

in survivor experiences and responses to “domestic violence interventions.”¹⁵⁸ They found that factors such as the relationship between victims and abusers or the type of abuse experienced did not appear to vary across race or ethnicity.¹⁵⁹ Demographic characteristics, however, did influence the “path into services” and the service needs¹⁶⁰ as did economics and language difficulties. Federal crime data show that Black women survivors in urban settings are more likely to contact the police and to be referred to social services by police, despite those survivor’s communities having historically negative experience with law enforcement.¹⁶¹ But more research is needed in order to cut through any superficial assumptions about these data points.

Similarly, we need more examination on the effect of language, cultural and religious barriers. Native Americans had the greatest documented need for services while “Hispanic Americans”, who have comparable rates of poverty, had the lowest numbers.¹⁶² Asian Americans had a large need for shelter and emergency assistance, housing, and other services due to the likelihood that they have cut off access to their community.¹⁶³ Challenges continue for researchers in simultaneously avoiding conflation or “the trap of combining diverse and distinct racial and ethnic groups” while empirically researching and remaining alert for “cultural borderlines” or zones of overlap among groups.¹⁶⁴

Overall, there is limited research regarding the preferences of Black women/women of color for having the state proceed or not with criminal prosecution. The first study to explore the feelings of survivors of color about prosecution was conducted in 1999.¹⁶⁵ Goodman, Bennett and Dutton interviewed 49 domestic violence victims involved in “pressing charges”¹⁶⁶ against their partners, 90% of the interviewees were African

158. Hampton et al., *supra* note 156, at 341.

159. Grossman & Lundy, *supra* note 40, at 1047.

160. *Id.* at 1047–48 (citing M.Y. Lee, *Asian Battered Women*, in HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES: POLICIES, PROGRAMS AND LEGAL REMEDIES 472 (A.R. Roberts ed., 2002)).

161. *Id.*; LAWRENCE A. GREENFELD ET AL., U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS AND GIRLFRIENDS 19 (1998).

162. Grossman & Lundy, *supra* note 40, at 1047–48.

163. *Id.* at 1048–49 (citing M.Y. Lee, *Asian Battered Women*, in HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES: POLICIES, PROGRAMS AND LEGAL REMEDIES 472 (A.R. Roberts, ed., 2002)).

164. Grossman & Lundy, *supra* note 40, at 1029–32, 1048.

165. See generally Lauren Bennett et al., *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 J. INTERPERSONAL VIOLENCE 761 (1999).

166. Hampton et al., *supra* note 155, at 339. Although many use the term “press charges” to describe when prosecution goes forward, it is inaccurate and dangerous to use in intimate partner crime situations. In criminal prosecutions, only the state can go forward with

American women.¹⁶⁷ The research showed that victims who had “*social support from friends and family in the form of transportation, child care, and emergency financial assistance were twice as likely to follow through [and engage] with prosecution.*”¹⁶⁸ The risk of losing resources provided by the offender and the need for extra physical protection, new housing or new employment during the prosecution all work against pursuing prosecution.¹⁶⁹

The women reported a variety of factors creating systemic obstacles.¹⁷⁰ They found the prosecution process to be complex, confusing, and uncertain and noted the abuser and his family seemed to know more about the case than the victims did.¹⁷¹ This also applied to procedures for addressing or following through on the processes needed to enforce orders of protection.¹⁷² When orders were not enforced, the interviewees concluded that the system did not engage to “protect them.”¹⁷³ The study participants also expressed bewilderment and aggravation at the slowness of the process as well as the demands made upon the victim. One remarked that she felt as if she “*was doing time instead of the defendant.*”¹⁷⁴

Victims reported both “a great deal of fear during the “process of prosecuting their partners” and “that the court does not make them feel ‘protected.’”¹⁷⁵ Many noted fear of retaliation when the abusive partner was not in jail.¹⁷⁶ Researchers noted the reasonableness of this fear since 20% of IPV victims are threatened or attacked within 3 months of contact with the court system.¹⁷⁷ At the same time, guilt and distress over sending partners and fathers to jail was also documented.¹⁷⁸

Another study in 2002 revealed that a substantial number of Black women survivors desired help from prosecutors.¹⁷⁹ The study consisted of

prosecution. The victim-survivor is a witness whose choice is to engage with the prosecution or avoid engagement—a choice fraught with danger and emotional ambivalence.

167. Bennett et al., *supra* note 165, at 765; see Hampton et al., *supra* note 155, at 339.

168. Hampton et al., *supra* note 155, at 339 (emphasis added).

169. *Id.*

170. *Id.* at 339–41.

171. *Id.* at 339–40.

172. *Id.* at 339.

173. *Id.*

174. *Id.* at 340.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* Similar findings were made by a 2011 study. Dichter et al., *supra* note 40, at 21–37 (finding that notably, fear of retaliation, love and dependence, concerns for children, and privacy and stigma all contributed to why these victims did not seek prosecution).

179. Arlene N. Weisz, *Prosecution of Batterers: Views of African American Battered Women*, 17 VIOLENCE & VICTIMS 19, 28 (2002). This study is considered noteworthy, in part because the sample did not come from domestic violence shelters which are not

interviews with 207 “urban African American”¹⁸⁰ women who were listed as victims in domestic violence police reports and asked why they favored or opposed having the prosecutor proceed¹⁸¹ against their abusers.¹⁸² Sixty-five (65) percent of the respondents favored prosecution “stating that abuse is illegal” or “unacceptable” and that prosecution “provided a means to stop the abuse.”¹⁸³ Unsurprisingly, violence and severity of the abuse were linked with favoring prosecution.¹⁸⁴ Of course, since this study asked about the state proceeding with the prosecution, it did not evaluate the victim’s feelings about *her active* participation in the prosecution, which we know from previous research is a fraught interaction.¹⁸⁵

A 2011 study of Black, White and Latina women emphasized that survivors often desire that the “system” take over more control of the prosecution and not rely on them as much.¹⁸⁶ The women indicated that they felt their part in the process was the act of contacting the police.¹⁸⁷ From there, they wanted the prosecution to proceed without needing to participate further in the process.¹⁸⁸

Another 2011 study sheds light on the perceptions of survivors of color as to the helpfulness of courts, both civil and criminal.¹⁸⁹ This study used focus groups with a sample size of 81% Black women and four percent (4%) other women of color.¹⁹⁰ Again, the research showed that women and women of color generally want to prosecute their abusers.¹⁹¹ Many of the women indicated that getting the abuse “on the record” was helpful but that incarceration does not solve the problem when substance

representative of the population of those who experience abuse since only a fraction of women ever go to shelters. *Id.* at 27; Hampton et al., *supra* note 155, at 341.

180. Weisz, *supra* note 179, at 19.

181. Hampton et al., *supra* note 155, at 341 Note again the term “pressing charges” was used to describe victim preference.

182. Hampton et al., *supra* note 155, at 341 (citing Bennett et al., *supra* note 165).

183. *Id.* (citing Weisz, *supra* note 179).

184. *Id.*

185. *See id.* at 342–44.

186. Dichter et al., *supra* note 40, at 34.

187. *Id.*

188. *Id.*

189. Margaret E. Bell et al., *Battered Women’s Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcome and Process*, 17 VIOLENCE AGAINST WOMEN 71, 71–72 (2011). Note this study consisted of focus groups in which the participants discussed both civil and criminal court experiences. The researchers were unable to distinguish to which courts the participants referred. *Id.* at 74–76.

190. *Id.* at 74.

191. *Id.* at 77.

abuse is part of the problem.¹⁹² The goal of many women in that study was to “create consequences” and “hold him accountable.”¹⁹³

Many of the women in the 2011 focus groups felt that jail time, probation, and protection orders could be helpful for peace of mind and for having time to meet long-term safety needs.¹⁹⁴ However, some women indicated that incarceration was not long enough to provide meaningful security (more or less indicating a desire for harsher punishments).¹⁹⁵ Similarly, they found the system negligent in enforcing violations of court orders.¹⁹⁶ For example, one woman reported that her abuser was not incarcerated after violating parole five times.¹⁹⁷ These women wanted more reinforcement and enforcement from the court and other systems.¹⁹⁸

As to their experience with the prosecutors themselves, many women were frustrated because their voices appeared to become lost as the process proceeded.¹⁹⁹ They felt the prosecuting attorneys were not very responsive. Although the prosecution needed the women to be physically *and* repeatedly present, the women did not feel *meaningfully* involved in the process.²⁰⁰ Further, the need to make so many court appearances actually interfered with many of them having time to heal or obtain services.²⁰¹

In sum, according to the social science research, Black women survivors often express desire for criminal prosecution to proceed. They want prosecutorial assistance in stopping the violence, establishing peace of mind, effecting long-term safety strategies and preventing future violence. However, the actual engagement with the state is frustrating, fraught with the possibility of retaliation, disempowering and often at odds with cultural support and/or building stronger communities of color.

Before moving on, some important context must be provided for the preceding research. First, survivor perspective research has inherent limits as a basis for comprehensively addressing the “interlocking oppressions that Black women [and other women of color] face.”²⁰² It has greater value when prosecutors join knowledge of the research with knowledge of these systemic oppressions. Second, “[n]o clear picture

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 79.

200. *Id.* at 78.

201. *Id.* at 77.

202. RICHIE, *supra* note 91, at 131.

exists” regarding the impact of prosecution on the offender’s likelihood to recidivate.²⁰³ One study which focused on “no-drop” prosecution—that is prosecuting with or without victim engagement—found that victims who “followed through with prosecution were less likely to experience violence within the subsequent 6 months only if they made a personal choice to participate.”²⁰⁴ Further, “those whom the government coerced into participation experienced no similar reduction in violence.”²⁰⁵ Third, vulnerability in terms of re-abuse is multifaceted and needs more attention and research. For example, when studying mandatory arrest laws, researchers found that the employment status of the offender made a difference in the likelihood of re-abuse of the victim, with unemployed offenders reoffending at a much higher rate.²⁰⁶ Social scientists have theorized that the difference might stem from “a lower stake in conformity” on the part of unemployed batterers.²⁰⁷

This section detailed the role of local prosecutors in the criminal justice system’s handling of intimate crimes against women. While women and LGBTQ+ survivors of color are at high risk for injury, harm and death from intimate crimes,²⁰⁸ prosecutorial reforms tend to be based on a “one-size-fits-all approach” that fails to respond to the particular situations and perspectives of individual survivors.²⁰⁹ The consistent theme from the research on survivors of color and their preferences is that the “criminal . . . justice system[] need[s] to become more individualized so as to meet the diverse needs and priorities” of a variety of survivors.²¹⁰ The next section explores this theme based on my law clinic’s work with survivors, district attorneys’ offices and community partners.

III. OBSERVATIONS AND SUGGESTIONS FOR ANTI-RACISM WORK AND

203. Epstein & Goodman, *supra* note 63, at 48.

204. *Id.* (emphasis removed).

205. *Id.*

206. *Id.*

207. *Id.* (internal quotation marks omitted).

208. *Sexual Assault and the LGBTQ Community*, *supra* note 28.

209. Epstein & Goodman, *supra* note 63, at 46.

210. *Id.* at 54.

PROSECUTION OF INTIMATE CRIMES

*I am the woman offering two flowers whose roots are twin. Justice and Hope. Hope and Justice. Let us begin.*²¹¹

Afro-futurism teaches that creatively imagining a more peaceful and anti-racist society is an important endeavor for sustaining hope and joy, empowering Black identity, and breaking out of old ways of thinking about complicated systemic oppressions.²¹² So too, keeping *all* intimate crime survivors safe, free, and healthy starts by envisioning a more multiculturally and queer-sensitive community which economically and socially empowers women and LGBTQ+ persons. Such reimagining could include a new and evolving identity for SVU prosecutors.

At present, of course, there is an inevitable practical conflict between prosecuting violent crime—including violence against women—and overturning the carceral machine.²¹³ In an effort to move past this impasse, scholars have suggested a variety of approaches. Some advocate that in order to remove systemic oppression and the “punitive” nature of the criminal justice system, feminists should stop working with criminal law tools altogether when addressing intimate violence.²¹⁴ Some recommend replacing prosecutors with public accountability tools.²¹⁵ Others, including social scientists, encourage restorative justice²¹⁶ as the solution.²¹⁷ Whether these approaches will prove effective in keeping

211. Alice Walker, *Remember Me?*, in *HORSES MAKE A LANDSCAPE LOOK MORE BEAUTIFUL* 1-2 (Hardcort ed. 1984).

212. Jennifer Neal, *Speculative Fiction and Black Feminist Thought: Walking Through the Door of My Own Imagination*, GAY MAG. (Aug. 20, 2019), <https://gay.medium.com/speculative-fiction-and-Black-feminist-thought-7240d6a2e0c2>; I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 11 (2019) (“[Afrofuturism is] the intersection between [B]lack culture, technology, liberation and the imagination, with some mysticism thrown in, too. . . . It’s a way of bridging the future and the past and essentially helping to reimagine the experience of people of color[r. . . . [T]he insistence that people of color in fact *have* a future, and a commitment to disrupting racial, sexual, and economic hierarchies and categories.”).

213. RICHIE, *supra* note 91, at 170–71 (noting that sex offenders constituted a higher percentage of prisoners than burglars and assaulters and nearly as high a percentage as all drug offenders).

214. See GRUBER, *supra* note 92, at 170–71.

215. See, e.g., I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1586–1587 (2020).

216. See Gajwani & Lesser, *supra* note 19, at 90-92 (“A traditional prosecutor has no tools with which to ease the fear of victims; even if a prosecutor asks for a stay-away order for the accused, the order lapses when the cases ends, leaving the victim to fend for himself.”)

217. Hampton et al., *supra* note 155, at 342. (“The theories underlying restorative justice approaches suggest that rather than giving sole power to law enforcement, judicial, and

survivors of color safer, freer and healthier is less certain but deserves experimentation and further study.

Before proceeding further, a caveat is needed. Although I have studied, taught, theorized, spoken and written about violence against women issues, those endeavors do not give me the perspective of being an underprotected Black Woman or girl, a marginalized Native or Asian victim, a transwoman of color, or an Hispanic/Latina survivor. I do not know what it is like to have lived in fear of potentially fatal contact between myself, my family members and the police. Thus, cultural humility²¹⁸ requires that deference be given to those who have lived those realities.

My experience with survivors of Domestic Violence (DV) and Intimate Partner Violence (IPV) started in the 1990's as part of a clinical project in which law students and I represented incarcerated survivors, most of whom were women of color, who fought back against and killed their abusers.²¹⁹ Then, for the last twenty-plus years, I have directed the Albany Law School Domestic Violence Prosecution Hybrid (DVPH) Clinic, in which students work on domestic violence and sexual assault cases and have been engaged with anti-violence work.²²⁰ Albany Law students and I have worked with survivors, anti-violence community coalitions, and specialized court taskforces for almost 30 years.

In informal capacities, I have consulted with, and been consulted by, local district attorneys who desire to respond more comprehensively to intimate crime survivors *and* by local community organizations and policymakers who want to communicate more intentionally with district attorney offices. During this time period, scores of law students and I have worked primarily with four county Special Victim Units (SVU) and their assistant district attorneys. We have been able to see the

other governmental systems, the concerns of the victim, offender, and the community are brought in to determine the appropriate responses to the domestic violence.”)

218. Andrea A. Curcio et al., *A Survey Instrument to Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 NOVA L. REV. 177, 187 (2014) (“To remedy the theoretical problems inherent in the cultural competency model, medical educators began talking about developing students’ *cultural sensitivity* or *cultural humility*. These models defined culture more broadly and encompassed a much wider range of cultural factors, including race, ethnicity, gender, religion, sexual orientation, socio-economic status, and other factors that influenced people’s worldviews.”).

219. Jane Gross, *A New Life Opens, After Prison and Battering*, N.Y. TIMES (Feb. 18, 1997), <https://www.nytimes.com/1997/02/18/nyregion/a-new-life-opens-after-prison-and-battering.html>; Elizabeth Gallagher, *The Case for Clemency: Linda White’s Story*, ALBANY L., https://www.albanylaw.edu/media/user/clinic/news_articles/the_case_for_clemency_linda_whites_story_albanylawmag_springsummer_2003.pdf (last visited June 29, 2021).

220. See generally Mary A. Lynch, *Designing a Hybrid Domestic Violence Prosecution Clinic: Making Bedfellows of Academics, Activists and Prosecutors to Teach Students According to Clinical Theory and Best Practices*, 74 MISS. L.J. 1177 (2005).

commonalities and the contrast in approaches based on the politics of each community. We have also participated in Coordinated Community Response (CCR) initiatives.²²¹

Over this long period, I have observed gradual changes in the way communities and district attorney's offices respond to intimate partner survivors – including survivors of color - as a result of intersectional advocacy, education, social science research, and community collaboration. Personnel in community advocacy organizations are not only more intentionally diverse, but bring to the table more diverse perspectives. Coalitions have become more inclusive of prominent voices arguing for racial justice practices and prioritize the particularized issues of LGBTQ+ people of color in our work.²²² These changes are not yet transformative, and are a far cry from what we can envision. But while we work toward the tipping point of transforming our communities and our country, we should be clear about the positive as well as the negative.

Based on the documented research on survivors' perspectives and on my experience in New York, I make the following suggestions.

1: Continue to Advocate for Racial Impact Studies at District Attorney Offices

Professor Angela J. Davis has long advocated for examination of ostensibly “race-neutral” decision-making that has a racial effect.²²³ In 2013, she examined the Vera Institute for Justice's Prosecution and Racial Justice Program (PRJ) as a “model for reform that could help to eliminate unwarranted racial disparities in the criminal justice system.”²²⁴ As part of that program, Vera Institute staff partnered with

221. *E.g.*, *Coordinated Community Response*, N.C. COAL. AGAINST DOMESTIC VIOLENCE, <https://nccadv.org/our-services/coordinated-community-response>; *see also* Leonard P. Edwards, *Reducing Family Violence: The Role of the Family Violence Council*, 43 JUV. & FAM. CT. J. 1 (1992); Gwendolyn Griffith, *Lessons in Collaboration from Local Domestic Violence Councils*, 33 WILLAMETTE L. REV. 931 (1997). One such local group is the Albany County Coalition Against Domestic Abuse. *Albany County Coalition Against Domestic Abuse*, EQUINOX, <https://www.equinoxinc.org/page/albany-county-coalition-against-domestic-abuse-24.html> (last visited Aug. 11, 2021).

222. For example, In Our Own Voices has played a significant role in the Albany County Coalition Against Domestic Abuse work since its founding because of the extraordinary leadership of its representatives. *See* IN OUR OWN VOICES, <http://inourownvoices.org/> (last visited July 31, 2021).

223. Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 836 (2013) (referring to her 1998 article, “Prosecution and Race: The Power and Privilege of Discretion[.]” in which she advocated the use of racial impact studies).

224. *Id.* at 823. For more on the Vera Institute's model, *see Promoting Racial Equity in Prosecution*, VERA INST. OF JUST., <https://www.vera.org/securing-equal-justice/promoting-racial-equity-in-prosecution> (last visited July 31, 2021) (“For roughly a decade, beginning in 2005, district attorneys in Charlotte, Milwaukee, San Diego, Lincoln, Nebraska, and

selected district attorney offices across the country to help local prosecutors analyze the racial impact of their discretionary decisions “at various points of the process.”²²⁵ Notable findings in Domestic Violence cases included whether interracial cases were treated differently from intra-racial cases.²²⁶ Interestingly, in Milwaukee, PRJ staff found that “the odds of charging in cases involving [B]lack victims were 16% lower than in cases involving white victims”²²⁷ I agree with Professor Davis’ conclusion that “[p]rosecutors are particularly suited to help eliminate racial disparities because of their power and discretion.”²²⁸ If Prosecutors use evidence about racial disparities to question and change their policies for charging, plea bargaining, and recommending sentences, that could have real impact. It also may create an “Aha” moment that could mitigate against the psychological tendency of prosecutors to become more punitive over time.²²⁹

2: Continue to Reject a Cookie Cutter Approach in Responding to Intimate Crimes and Advocate for More Programmatic Options

The research detailed in the previous section establishes that each survivor’s intersectional identity and circumstances, as well as the circumstances of the offender, change the risk and safety analysis. The employment of the offender, the decision of the survivor to engage with prosecution, and the amount of social, family and/or community support received if she engages with prosecution all affect safety and the

most recently Manhattan worked with us to take a step back and look at whether charging and plea decisions are influenced by race, leading [B]lack people, Latino people and other people from minority backgrounds to be punished more severely than white people for the same crimes. The method and lessons from these cities are captured in a detailed guide designed to help any district attorney’s office engage in the same type of self-reflection and reform.”).

225. Davis, *supra* note 223, at 823, 836; *see also* Wayne McKenzie et al., *Prosecution and Racial Justice: Using Data to Advance Fairness in Criminal Prosecution*, VERA INST. OF JUST. (March 2009), https://www.vera.org/downloads/Publications/prosecution-and-racial-justice-using-data-to-advance-fairness-in-criminal-prosecution/legacy_downloads/Using-data-to-advance-fairness-in-criminal-prosecution.pdf.

226. *See* Davis, *supra* note 223, at 842–43.

227. *Id.* at 823, 843.

228. *Id.* at 850. Note that the Vera Institute of Justice’s work on Prosecutors and Racial Justice continues. On July 15, 2020, it hosted an event that focused on the power of district attorneys in the criminal justice system. *We’ve Got the Power: A Virtual Event on the Power of District Attorneys in Criminal Justice*, VERA INST. OF JUST., <https://www.vera.org/research/weve-got-the-power> (last visited July 31, 2021).

229. *See supra* note 80 and accompanying text; *see also* Gajwani & Lesser, *supra* note 19, at 71 (noting that “line prosecutors across the country become increasingly punitive over time”).

likelihood of revictimization.²³⁰ As Professors Goodman and Epstein have emphasized repeatedly:

The reforms that have been implemented across the country tend to be based on a one-size-fits-all approach that fails to respond to the particular situations and perspectives of many individual women (Goodman & Epstein, 2008). As a result, the justice system still frequently fails to effectively support battered women; in some cases, it may even have a detrimental impact on their emotional and physical wellbeing.²³¹

Over time, I have observed that SVU prosecutors have increased their exercise of deference to survivor's desires regarding whether to prosecute and what sentencing options to offer an offender. In intimate partner cases, evidence of misdemeanor behavior often appears as the tip of the iceberg, with the red flags for extreme violence and danger lurking below the surface. By working with survivors and community advocates to realize survivor goals on misdemeanor and violation cases, prosecutors can provide survivors the opportunity to reveal slowly the full nature of the situation.

In practical terms, prosecutors who work with survivors need the time²³² and the professional humility to develop trusting relationships with survivors, an understanding of the individual and systemic burdens survivors face, and the willingness to allow the survivors' input to be meaningful and influential in terms of prosecutorial decision-making. They need mindful patience and tolerance as they are frequently presented with changes in survivor articulation of goals. Rather than using the interaction to simply build evidence for a specific case, prosecutors can view trust building as a primary goal of the interaction with the survivor. Similarly, prosecutors could view increasing the likelihood that the survivor will re-engage with system supports when in danger as a critical part of a just outcome.

With regard to prosecutorial sentencing recommendations, the prosecutor, however, can only recommend the range of options available in the particular county. For example, the absence of effective abusive partner intervention programs²³³ or sufficiently staffed and

230. See Epstein & Goodman, *supra* note 63, at 46, 49.

231. *Id.* at 46 (citing Epstein & Goodman, *Listening to Battered Women: A Survivor-Centered Approach to Advocacy, Mental Health, and Justice*, AM. PSYCH. ASS'N (2008)).

232. Unfortunately, in my experience, many district attorneys offices do not appropriately manage SVU caseloads in recognition of this need to slowly build trust and gain wide-ranging sources of information about survivors.

233. For example, as of this writing, there is not an Abusive Partner Intervention Program in Albany County, wherein New York's capital city, Albany, is located. See *Abusive*

multiculturally aware probation departments, limits local prosecutors' options when survivors seek accountability tools but want to limit further engagement with the court system. Pursuing probation violations or program noncompliance does not require the survivor's attendance in court and thus aligns with survivor goals documented elsewhere.²³⁴

Similarly, prosecutors are limited by the support resources of the community in which they serve. Some communities use the interaction with the criminal justice system to offer survivors free civil legal assistance, effective housing options, advocacy connections, or child care assistance.²³⁵ Communities vary not only in the services provided to survivors, but also in the options available for enforcement. Absence of other options can create a default toward more punitive methods than necessary. Thus, advocating for a wider range of educational, substance abuse, culturally sensitive and non-punitive programs as alternatives to jail can be helpful in securing the goals of survivors.

3: Continue to Improve and Support Coordinated Community Response (CCR) Teams, Elevating the Voices of Marginalized Survivors and Assessing Prosecutors Based on Broader Metrics

Coordinated Community Response (CCR)²³⁶ teams develop community strategies around social service, health, and other community resources. These community coalitions can push for and prioritize survivor agency and safety over offender accountability, safeguarding against practices which although intended to make survivors more secure, instead may create longer term safety risks for survivors of color. Members of such coalitions, including the law enforcement and

Partner Intervention Programs: New York State Guidelines, N.Y. ST. OFF. FOR THE PREVENTION OF DOMESTIC VIOLENCE, <https://opdv.ny.gov/professionals/abusers/APIPGuidelines/Abusive-Partner-Intervention-Programs-New-York-State-Guidelines.pdf> (last visited July 31, 2021).

234. See Bell et al., *supra* note 189, at 71–88.

235. For example, the Legal Project, a not for profit which operates in the Capital Region of New York, offers survivors assistance through its Crime Victims Assistance Program. *Crime Victims Assistance Program*, LEGAL PROGRAM, <https://legalproject.org/crime-victims-assistance> (last visited July 31, 2021); see also *About Family Justice Centers*, ALLIANCE FOR HOPE INT'L, <https://www.familyjusticecenter.org/affiliated-centers/family-justice-centers-2/> (last visited July 31, 2021). As Jane K. Stoeber notes, “[a]buse survivors often benefit from being able to access multiple services in one location, but the presence of mandatory reporters at the Centers, along with the Centers’ criminal justice locus, can create unanticipated criminal justice and governmental involvement, monitoring, and control, contrary to the help survivors expect to receive.” Jane K. Stoeber, *Mirandizing Family Justice*, 39 HARV. J. L. & GENDER 189, 189 (2016).

236. See *Coordinated Community Response*, N.C. COAL. AGAINST DOMESTIC VIOLENCE, <https://nccadv.org/our-services/coordinated-community-response>. See also MELANIE SHEPARD, *EVALUATING COORDINATED COMMUNITY RESPONSES TO DOMESTIC VIOLENCE* 1 (1999).

prosecutor partners, are encouraged to recognize that in most cases, leaving is not necessarily a safe, or likely a feasible, option. These CCR coalitions exist to improve community responses to survivors, as well as to hold members accountable in improving responses, including culturally sensitive ones.²³⁷ When they work to create a circle of support around survivors, and involve partners from communities that have been most marginalized, CCRs can be effective change agents.

Prosecutors who are open to learning from the wisdom of stakeholders other than law enforcement appear to benefit from involvement with community coalitions. These prosecutors learn about the challenging realities of survivors lives away from the court system which can influence their discretionary decision-making and better support survivors of color. Valuing prosecutors who focus on a long-range vision of survivor safety and engagement with help-seeking - whether or not the specific case prosecution is successful - could be a new metric by which communities assess and judge local prosecutors.

4. Continue to Advocate for Diverse Representation, Multicultural Awareness and Cultural Sensitivity Addressing the Special Oppression of LGBTQ+ and Transgender Survivors

Over time, social service partners and community organizations have become not only increasingly diverse as to representation but also more assertive in raising multicultural concerns, and in prioritizing the voices of LGBTQ persons of color, when communicating with their law enforcement and prosecution partners.²³⁸

Diversifying the upstate New York legal profession and their prosecution offices²³⁹ is a slow process. Albany County has been led since

237. See MEGAN CLARK ET AL., BEST PRACTICES IN THE CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE AND SEXUAL ASSAULT: GUIDANCE FOR CCR/SART RESPONSE PROTOCOLS 1 (2007).

238. One example of a persuasive and influential local community partner is In Our Own Voices. IN OUR OWN VOICES, <http://inourownvoices.org/> (last visited July 31, 2021). See, e.g., *Albany DA's Outreach Office to Host "Her Health Block Party"*, ALBANY DISTRICT ATTY (May 9, 2014), http://www.albanycountyda.com/bureaus/crimevictimsunit/news/14-05-09/Albany_DA_s_Outreach_Office_to_Host_%E2%80%9Cher_Health_Block_Party%E2%80%9D-766084060.aspx (discussing the partnership between the Albany DA and In Our Own Voices).

239. JUD. FRIENDS ASS'N, INC., REPORT TO THE NEW YORK STATE COURT'S COMMISSION ON EQUAL JUSTICE IN THE COURTS (2020), <https://www.nycourts.gov/LegacyPDFS/ip/ethnic-fairness/pdfs/Judicial-Friends-Report-on-Systemic-Racism-in-the-NY-Courts.pdf>. For a complete list of New York's District Attorneys, see *New York District Attorneys*, N. Y. PROSECUTORS TRAINING INST., <https://www.nypti.org/new-york-district-attorneys/> (last visited July 31, 2020). Many of my students of color have gone onto more prestigious prosecutor offices in larger cities. However, recent inroads into diversification have been

2005 by its first district attorney of color, David Soares, who made national news when he overturned the incumbent by running as a Working Families Party candidate.²⁴⁰ Notably, his office has the strongest local diversion program.²⁴¹ Although representation is not itself transformative,²⁴² it is a first step.²⁴³

Law clinics can play an important community partner role too. For example, our law students of color and their allies have been instrumental in highlighting bias in court or office culture and have reported concern about the degrading way that some in the criminal justice system refer to offenders or how court officers address students of color. Our law school clinical program, like many others, engages in conversations with supervising attorneys on issues of bias observed or raised by our students.²⁴⁴ Through our partnership relationship, training events, and regularized communications, students and professors can support advocacy voices on issues of systemic oppression and bias.²⁴⁵

5: “Start by Believing” that Women of Color are Harmed by Intimate Crimes

As discussed earlier, our current cultural norms trivialize or dismiss intimate crimes against women of color, by overly sexualizing or

made by thoughtful leaders who understand the responsibility of bringing in the first standard bearer in any profession.

240. Michael Slackman, *Labor-Backed Third Party Emerges as Statewide Force*, N.Y. TIMES (Nov. 7, 2004), <https://www.nytimes.com/2004/11/07/nyregion/laborbacked-third-party-emerges-as-statewide-force.html>.

241. *Clean Slate*, ALBANY CNTY. DIST. ATT'YS OFF., <http://www.cleanslate.albanycountyda.com/#overview> (last visited July 31, 2021). Cf. Bill Mahoney, *The Left Turns Against Its One-Time Criminal Justice Reform Champion*, POLITICO (Feb. 11, 2020, 5:57 PM), <https://www.politico.com/states/new-york/albany/story/2020/02/11/the-left-turns-against-its-one-time-criminal-justice-reform-champion-1260516>.

242. Paul Butler, *Locking Up My Own: Reflections of A Black (Recovering) Prosecutor*, 107 CALIF. L. REV. 1983, 1988 (2019) (“[While] racial representation is not a sufficient condition of racial justice, it remains a revealing context.”). Butler’s article reflects upon the author’s own experience and the work of JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 13 (2017).

243. Mary Kielar, *What Needs to Change for a More Diverse and Equitable Justice System?*, CNYCENTRAL (Feb. 18, 2021), <https://cnycentral.com/news/police-community-relations/what-needs-to-change-for-a-more-diverse-and-equitable-justice-system>.

244. *Creating a More Inclusive Learning Environment*, ALB. L. SCH., <https://www.albanylaw.edu/about/creating-more-inclusive-learning-environment> (last visited Nov. 4, 2021).

245. Prosecutors across the country are engaged with each other and with experts in these conversations about implicit bias and systemic oppression. See, e.g., *Rebutting the Rhetoric: A Virtual Implicit Bias Training*, PROSECUTORS’ CENTER FOR EXCELLENCE (Nov. 12, 2020, 4:00 PM), <https://pccinc.org/events/rebutting-the-rhetoric-a-virtual-implicit-bias-training/>.

fetishizing Asian and Native women, finding racially and ethnically diverse women less credible, or underprotecting Black girls, women of color and transgender people of color from sexual assault and sexually harassing campaigns.²⁴⁶

Criminal justice system actors engage in harmful victim-blaming and oppression, when they communicate to women, and particularly to girls, that lived experiences of violence sound incredible or unworthy of belief. Initial skeptical reactions by law enforcement and prosecutors creates alienation and trauma, perpetuates misogynistic myths and fails to offer culturally appropriate support and protection from intimate violence. Research documents that negative reactions can even increase a survivor's risk of sexual assault and revictimization in the future.²⁴⁷ These negative reactions have a number of detrimental effects on victims, and their harmful impact compounds as the number of negative reactions increases.²⁴⁸

The *Start by Believing* Campaign was founded to change the way society responds to sexual assault because of our cultural norms.²⁴⁹ The movement was based on decades of research documenting that disclosures by sexual assault victims often elicit responses of doubt and blame, rather than compassion and support, to the detriment of the victim-survivors²⁵⁰ and the community. Police and prosecutors are now trained about the gender bias that distorts an assessment of credibility and are being asked to question outdated notions of "neutrality" in investigating.²⁵¹ A pragmatic description of the thrust of the campaign is

246. See discussion *supra* Part II.B

247. See Rebecca Campbell et al., *Social Reactions to Rape Victims: Healing and Hurtful Effects on Psychological and Physical Health Outcomes*, 16 VIOLENCE AND VICTIMS 287 (2001).

248. *Id.*

249. See Jerald Monahan, *The Effect of Cultural Bias on the Investigation and Prosecution of Sexual Assault*, INT'L ASS'N OF THE CHIEFS OF POLICE, <https://www.policchiefmagazine.org/the-effect-of-cultural-bias-on-the-investigation/#:~:text=Cultural%20biases%20influence%20prosecutors%20to,rape%2C%20so%20too%20are%20prosecutors> (last visited June 28, 2021) (discussing the Start by Believing Campaign).

250. START BY BELIEVING, startbybelieving.org/home/ (last visited Aug. 11, 2021). Note that some organizations which assist those who are affected by sexual assault refer to these individuals as either "survivors" or "victims." *Key Terms and Phrases*, RAINN, <https://www.rainn.org/articles/key-terms-and-phrases> (last visited Aug. 1, 2021).

251. Monahan, *supra* note 249 ("Educator Phyllis Rose said, 'There is no neutrality. There is only greater or lesser awareness of one's bias.' The #MeToo movement and other campaigns have brought to light how the issue of gender bias is a factor in this conversation. Even professionals have biases that may impact their approach, interest, and willingness to conduct an in-depth investigation into a report of sexual violence.") (internal citation omitted).

found on the website of the International Association of the Chiefs of Police:

Cultural biases influence prosecutors to focus on the victim's credibility when making the charging decision. Just as members of the public—and potential jurors—are influenced by the myths of a real rape, so too are prosecutors. While a victim's credibility is very important in any case, the charging decision should not start with an attack on his or her believability. The “old school” process for charging a sexual assault case generally begins with questioning the victim's credibility. Does he or she have a motive to lie? Why did he or she not report immediately? If the victim was drunk, how does he or she know what really happened?

But if the charging decision begins—and ends—with an attack on the victim's credibility based on the victim's behavior and the prosecutor's pre-conceived stereotypes of a real rape, a case is never truly given a chance. A better, fairer way to analyze the case is to begin the case analysis by building a circle of credibility around the victim.²⁵²

Many disadvantaged and marginalized women of color are targeted as prey exactly because of their presumed tensions with law enforcement. In a prime example, Oklahoma City Police Officer Daniel Holtzclaw, who was found guilty of multiple counts of rape and sexual assault of Black women he thought were unlikely to be believed because they “had records and lived in a high-crime neighborhood.”²⁵³ Prosecutor Lori McConnell argued “[h]e counted on the fact no one would believe them and no one would care.”²⁵⁴

An anti-racist prosecution system will create a circle of support and affirmation around the victim-survivor of color. Such affirmations are proven to be effective in supporting healing, recovery, and transformation for many, many survivors. In addition, the more we as a community express care and belief for those most marginalized, the riskier it becomes for offenders to target the survivor of color.

252. *Id.*

253. Jessica Testa, *The 13 Women Who Accused a Cop of Sexual Assault, in Their Own Words*, BUZZFEED NEWS (Dec. 10, 2015, 10:33 PM), <https://www.buzzfeednews.com/article/jtes/daniel-holtzclaw-women-in-their-ow> (“He allegedly chose them because they didn't want any trouble and because they feared the police—because they likely wouldn't report their assaults to the police. He was the police.”).

254. Sarah Kaplan, *A Serial Rapist Cop's “Mistake”: Assaulting the Grandmother Who Finally Reported Him*, WASH. POST (Dec. 11, 2015, 4:48 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/12/11/daniel-holtzclaws-mistake-assaulting-the-grandmother-who-finally-reported-him/>.

6. Adopt Trauma-Informed Thinking

Many professional spheres, including the law, have more recently embraced trauma informed ideas and processes.²⁵⁵

Put simply, the hallmarks of trauma-informed practice are when the practitioner . . . puts the realities of the clients' trauma experiences at the forefront in engaging with clients and adjusts the practice approach informed by the individual client's trauma experience. Trauma-informed practice also encompasses the practitioner employing modes of self-care to counterbalance the effect the client's trauma experience may have on the practitioner.²⁵⁶

Trauma-informed SVU prosecutors with whom I have partnered put the health, welfare, and psychological wellbeing of the survivor-victim at the center of the case. They defer to survivors' expertise on what makes their lives safer and why. As with Coordinated Community response, trauma-informed responses demonstrate action on a survivor's goals, so when the violence *happens again* the victim-survivor will connect with emergency help or services.²⁵⁷ These prosecutors view the trauma experienced by witnesses – and even the offender and his family²⁵⁸ – not only as an important part of clear-eyed case assessment of what *really happened* but also as important to figuring out what justice *really means* in each case.²⁵⁹

In terms of sentencing, trauma informed prosecutors defer in many cases to the survivor's expertise on what makes their lives safer and why.

255. Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 361 (2016) (“‘Trauma-informed practice’ is an increasingly prevalent approach in the delivery of therapeutic services, social and human services, and now legal practice.”).

256. *Id.*

257. KARIN V. RHODES ET AL., VICTIM PARTICIPATION IN INTIMATE PARTNER VIOLENCE PROSECUTION: IMPLICATIONS FOR SAFETY 21 (2011), <https://www.ojp.gov/pdffiles1/nij/grants/235284.pdf>.

258. See Shonna Carlson, *Why Prosecutors Need to Understand the Impact of Trauma*, CRIME REP. (Mar. 20, 2020), <https://thecrimereport.org/2020/03/20/why-prosecutors-need-to-understand-the-impact-of-trauma/> (“Every day, prosecutors work closely with crime survivors, witnesses, and people accused of crimes Developing a trauma-informed approach to prosecution holds great promise for developing systems that will better serve everyone.”). Admittedly, in most cases prosecutors don’t get a glimpse into defendants as humans given the adversarial relationship. See Gajwani & Lesser, *supra* note 19. However, in intimate partner cases in which the survivor witness is engaged the former partner knows both the good and the bad if the relationship lasted for any length of time.

259. *Offender Intervention*, BATTERED WOMEN’S JUST. PROJECT, <https://www.bwjp.org/our-work/topics/offender-intervention.html> (last visited Aug. 1, 2021).

They try to stop the violence through the least restrictive means and avoid sanctions and programs which sound like accountability but are the opposite – such as “anger management” programs.²⁶⁰ As to their own potential for vicarious trauma, they know that lack of self-care makes for biased, cynical, and often wrongheaded decision-making.²⁶¹

In addition to having trauma-informed prosecutors, offering trauma informed abusive partner intervention programs²⁶² may offer potential and should be further explored, as long as programs comply with effective survivor-centered principles²⁶³ such as: 1) victim safety above all else; 2) coordinated community response; and 3) accountability.²⁶⁴

One of the dangers of offering “programs” for intimate partner offenders is the creation of false hope in survivor-victims who may let their guard down around the abuser just because the abuser is attending a program. The New York State Office for the Protection of Domestic Violence outlined clearly for survivors and the public what such programs can and cannot do.²⁶⁵ They can:

260. *Understanding Domestic Abusers*, N.Y. ST. OFF. FOR THE PREVENTION OF DOMESTIC VIOLENCE, <https://opdv.ny.gov/professionals/abusers/excuse1.html> (last visited Aug. 1, 2021) (“Control, not anger, is the reason for domestic abuse.”).

261. For examples of wellness materials aimed at prosecutors, see *Wellness*, PROSECUTORS CTR. FOR EXCELLENCE, <https://pceinc.org/issues/wellness/> (last visited Aug. 1, 2021).

262. *Offender Accountability*, N.Y. ST. OFF. FOR THE PREVENTION OF DOMESTIC VIOLENCE, https://opdv.ny.gov/public_awareness/bulletins/docs/opdv-summer-bulletin-2017.pdf (last visited Aug. 1, 2021) (“We know that we cannot truly prevent domestic violence until abusers commit to stop abusing. Our role in helping to achieve that reality, however, has always seemed less concretely defined. Historically, batterer programs have served as one element of offender accountability, although assessing them for consistency or effectiveness in preventing domestic violence has always proven challenging because they are neither regulated nor overseen by a single entity. While some groups focus on changing participants’ abusive behaviors, others may engage in practices that compromise victims’ rights and safety.”). The issue of assessing the effectiveness of any of these programs is a really thorny problem best left for a different article. See *Incorporating Comprehensive Assessment in Abusive Partner Intervention Programming*, VAWNET, <https://vawnet.org/events/incorporating-comprehensive-assessment-abusive-partner-intervention-programming> (last visited Aug. 1, 2021).

263. *Core Principles*, COAL. ON WORKING WITH ABUSIVE PARTNERS, <https://cowapnyc.weebly.com/core-principles.html> (last visited Aug. 1, 2021); *Abusive Partner Intervention Programs: New York State Guidelines*, N.Y. ST. OFF. FOR THE PREVENTION OF DOMESTIC VIOLENCE, <https://opdv.ny.gov/professionals/abusers/APIPGuidelines/Abusive-Partner-Intervention-Programs-New-York-State-Guidelines.pdf> (last visited Aug. 1, 2021).

264. Máire Cunningham, *Broadening Our Lens: Abusive Partner Intervention Programs: New York State Guidelines*, N.Y. ST. OFF. FOR THE PREVENTION OF DOMESTIC VIOLENCE, https://opdv.ny.gov/public_awareness/bulletins/docs/opdv-summer-bulletin-2017.pdf (last visited Aug. 1, 2021).

265. *Abusive Partner Intervention Programs: New York State Guidelines*, N.Y. ST. OFF. FOR THE PREVENTION OF DOMESTIC VIOLENCE, <https://opdv.ny.gov/professionals/>

- Provide a method of accountability
- Offer a chance to change behavior for those who want it
- Educate offenders about dynamics and patterns they may never have identified
- In some cases, identify dangerous offenders who may be inappropriate for such intervention[.]²⁶⁶

Those who witness and accompany survivors on their journey to safety know, it is important to make clear what programs *cannot* promise, such as: safety for victims, *fixing* the abuser, or changing someone who does not want to change.²⁶⁷

7. Support Prosecutors Who Prioritize Meaningful Input from Intimate Crime Survivors, and Stand Against the Attacks on Female District Attorneys of Color

Supporting prosecutors and prosecutorial reforms can be an act of antiracism. Standing with progressive prosecutors and getting them re-elected is a political act but one with significant justice and antiracism consequences. “Progressive” prosecutors can attend to the neglected needs and goals of intimate crime survivors of color, *as well as* the imperative to reduce mass incarceration.

Prosecutors of color, and in particular female prosecutors, are often under attack by both the right and the left no matter what they do.²⁶⁸ Such attacks on the authority and power of female prosecutors must be withstood²⁶⁹ especially when they are tied to defending a corrupt status quo.²⁷⁰ For example, Circuit Court Attorney Kim Gardner was elected on

abusers/APIguidelines/Abusive-Partner-Intervention-Programs-New-York-State-Guidelines.pdf (last visited Aug. 1, 2021) (on file with author).

266. *Id.* (discussing the guidelines created by OPDV staff with expertise in the criminal justice, victim services and abusive partner fields).

267. *Id.*

268. Hanna Trudo, *The Right and the Left Troll Kamala Harris as a ‘Cop’*, DAILYBEAST (July 6, 2019, 4:49 AM), <https://www.thedailybeast.com/the-right-and-the-left-troll-kamala-harris-as-a-cop>.

269. Samantha Michaels, *Top Prosecutor Kim Gardner Has Faced Racism and Death Threats. Now She Faces Reelection.*, MOTHERJONES (Aug. 4, 2020), <https://www.motherjones.com/2020-elections/2020/08/top-prosecutor-kim-gardner-has-faced-racism-and-death-threats-now-she-faces-reelection/>.

270. Meagan Flynn et al., *‘A Modern-Day Night Ride’: St. Louis Prosecutor Receives Death Threats as Trump Defends Couple who Pointed Guns at Protesters*, WASH. POST (July 15, 2020), <https://www.washingtonpost.com/nation/2020/07/15/trump-st-louis-mccloskeys/> (describing the “vile and racist” messages Prosecutor Kim Gardner received, including a note on her car that read, “I hope you hang from a tree”).

a mandate to effect change.²⁷¹ She launched a conviction integrity unit and created a “do not call” list of perjuring police witnesses.²⁷² Her conviction integrity unit found that former prosecutors and police fabricated evidence to obtain the conviction of an innocent Black man.²⁷³ When Gardner moved to set aside the 1995 murder conviction, the judge brought in someone else to represent the state even though that’s “what voters elected Gardner to do.”²⁷⁴ Defending her authority in court, Washington University in St. Louis Professor Daniel Scott Harawa argued, “[a]n elected prosecutor must have the ability to present the evidence that she has found credible.”²⁷⁵

CONCLUSION

In the past decade, a new progressive image of a prosecutor and of a prosecutorial system has begun to emerge, making the building of an anti-racist prosecution system a potentially feasible endeavor. Although criminal prosecution is both a blunt and consequential tool, it can play an important role in supporting the documented desire of survivors of color to legally stop intimate partner violence and establish that abusive intimate partner or sexually assaulting behavior is unacceptable.

Intimate violence and injury against female survivors of color is alarming and matters, as do the other types of state sponsored and community violence which marginalized survivors endure. The danger for transgender and nonbinary people of color is even more frightening and fatal and calls for more acknowledgment, attention and action.

271. See Michaels, *supra* note 269.

272. See Justin George & Eli Hager, *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>; Vaidya Gullapalli, *Defending the Conviction Integrity Unit in St. Louis*, APPEAL (Aug. 19, 2019), <https://theappeal.org/defending-the-conviction-integrity-unit-in-st-louis/>; see also Michaels, *supra* note 269. After Gardner was elected, a police union spokesperson described her as a “menace” who needed to be removed from office “by force or by choice.” She more recently found a note on her car that read, “I hope you hang from a tree.” *Id.* Baltimore State Attorney Marilyn Mosby recently released a similar list. Tim Prudente and Jessica Anderson, *State’s Attorney Mosby releases names of Baltimore Police officers she won’t call to testify, but most are no longer with the department*, BALT. SUN (Oct. 29, 2021), <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-marilyn-mosby-do-not-call-list-20211029-rplz7z7nlnbfnhfnslhtrmmphu-story.html>.

273. Rebecca Rivas, *Lamar Johnson Case Goes Before Missouri Supreme Court – Remotely*, ST. LOUIS AM. (Apr. 14, 2020), http://www.stlamerican.com/news/local_news/lamar-johnson-case-goes-before-missouri-supreme-court-remotely/article_d437f4c8-7e71-11ea-82ab-0b24ff2636a5.html.

274. *Id.*

275. *Id.*; see *State v. Johnson*, 617 S.W.3d 439 (Mo. 2021); *State v. Johnson*, No. ED 108193, 2019 WL 7157665 (Mo. Ct. App. Dec. 24, 2019).

The tension between addressing the most violent intimate crimes and undoing mass incarceration is real and stark. However, we cannot just throw up our hands and say this is too hard to do all at the same time, or too controversial to contemplate. We need to meaningfully protect those most at risk *and* undo mass incarceration, while empowering survivors of color. The intersection of racism, misogyny and police power presents daunting challenges but our assessment of progress needs to include the experiences and preferences of the people of color subjected most frequently to intimate crimes.