

# PROGRESSIVE PROSECUTORS ARE NOT TRYING TO DISMANTLE THE MASTER’S HOUSE, AND THE MASTER WOULDN’T LET THEM ANYWAY

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[T]he master’s tools will never dismantle the master’s house.

—Audre Lorde<sup>1</sup>

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## INTRODUCTION

The first thing to note about Audre Lorde’s famous phrase “the master’s tools will never dismantle the master’s house” is that it cannot literally be true. If tools can dismantle the master’s house, the master’s own tools would be good as anyone’s. The main problem would not be that the tools don’t work, but rather how to get them to the people who most need the master’s house dismantled—the enslaved ones.

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1. AUDRE LORDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110, 112 (2007) (emphasis omitted).

But the considerable work that the phrase does in social justice movements and critical theory is figurative rather than literal. It is usually intended as a rebuke of liberal reformist efforts, or at least as a caution against high expectations for them.<sup>2</sup>

In this Essay, which is part of a colloquium on “subversive lawyering,” I examine the progressive-prosecutor movement as a way of interrogating Lorde’s claim. I conclude that she was right, but that should not disrupt the project because most progressive prosecutors have less ambitious goals than wholesale transformation of the criminal legal system. They are mainly reformers rather than radicals. But in two recent cases, elected progressive prosecutors who are Black women were stripped of their discretion—probably the most potent master’s tool for prosecutors—when they tried to exercise it in a way that displeased some powerful elites. These cases demonstrate the limits of reform in the criminal legal system. Not only will the master’s tools never dismantle the master’s house, sometimes they will not even renovate it.

The Essay proceeds as follows. Part I offers a brief exegesis of how Lorde’s phrase has travelled in the legal academy and among activists. Part II applies it to subversive and/or resistance lawyering. Part III focuses on progressive prosecutors. The conclusion offers some observations for people who understand the urgency of dismantling the master’s house and for people who are doing, or are contemplating doing, legal work as part of this project.

#### I. THE MASTER’S TOOLS THESIS: HOW IT STARTED/WHERE IT LANDED

*The Master’s Tools Will Never Dismantle the Master’s House* is a 1984 essay by Audre Lorde, compiled in a book of her essays and speeches entitled *Sister Outsider*.<sup>3</sup> While the essay’s title has become an essential part of the canon of critical race theory,<sup>4</sup> the essay itself mainly makes a nonradical point about what might be called, in today’s parlance, “diversity and inclusion.”

Lorde offers a scathing critique of the New York University Institute for the Humanities Conference, where she had been invited to comment on essays regarding the lives of American women and how their experiences differ across the intersectionalities of race, age, class, and sexuality.<sup>5</sup> The problem was that no women from some of the impacted groups (poor women, Black women, queer women, old women) were invited to speak at the conference, except for Lorde and one other Black woman.<sup>6</sup>

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2. See I. Bennett Capers, *Reading Michigan v. Bryant*, “Reading” *Justice Sotomayor*, 123 YALE L.J.F. 427, 441 (2014) (discussing the shortcomings of using legal precedent as a tool for criminal justice reform); Portia Pedro, *A Prelude to the Critical Race Theorist Account of Civil Procedure*, 107 VA. L. REV. ONLINE 143, 157 (2021) (“I admit the possible futility in ever attempting to use ‘the master’s tools’ to ‘dismantle the master’s house.’”).

3. LORDE, *supra* note 1, at 110.

4. See Capers, *supra* note 2, at 441.

5. LORDE, *supra* note 1, at 110.

6. *Id.* at 110–11.

Lorde questions how a conference that doesn't include the stories of marginalized women can accurately analyze the issues of marginalized women.<sup>7</sup> She asks, "What does it mean when the tools of a racist patriarchy are used to examine the fruits of that same patriarchy?"<sup>8</sup> Lorde describes the goal of some women of marginalized identities to work within the larger feminist movement—even when the movement excluded their narratives as poor, queer, and/or non-white women.<sup>9</sup> These marginalized women believe that looking past differences, despite their exclusion of other identities, will bring about change.<sup>10</sup> Lorde writes:

Those of us who stand outside the circle of this society's definition of acceptable women; those of us who have been forged in the crucibles of difference—those of us who are poor, who are lesbians, who are Black, who are older—know that *survival is not an academic skill*. . . . It is learning how to take our differences and make them strengths. *For the master's tools will never dismantle the master's house*. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.<sup>11</sup>

More than two hundred law review articles have cited the essay, mainly for its title. Most use it as a framework for analyzing the efficacy of law as a vehicle for social transformation rather than writing about the legal meaning of the quote itself. For example, one author used the title to note that the civil rights movement embraced mainstream American values like integration and democracy, and this was a major shortcoming.<sup>12</sup> Another author asserted that land reparation to native Hawaiians is a necessary restitution, although grabbing land back will not dismantle the figurative house.<sup>13</sup> Few articles argue that a certain change does actually dismantle the figurative master's house.<sup>14</sup> Professor Bennett Capers took a middle ground, using the phrase as a sustained analogy to assess the legacy of Justice Sotomayor and finding that her jurisprudence had meaningful but limited success in creating social change.<sup>15</sup>

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7. *Id.* at 111.

8. *Id.* at 110–11.

9. *Id.* at 112 ("Poor women and women of Color know there is a difference between the daily manifestations of marital slavery and prostitution because it is our daughters who line 42nd street.").

10. *Id.* ("But community must not mean a shedding of our differences, nor the pathetic pretense that these differences do not exist. . . . And this fact is only threatening to those women who still define the master's house as their only source of support.").

11. *Id.*

12. See Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L.J. 2698, 2706 (2014).

13. See *Chapter Four Aloha 'Āina: Native Hawaiian Land Restitution*, 133 HARV. L. REV. 2148, 2171 (2020).

14. See, e.g., Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819, 1885–86 (1992).

15. See Capers, *supra* note 2, at 441.

## II. LAWYERING THE MASTER'S HOUSE

Much of the legal scholarship that cites Lorde's phrase posits law as the "master's tool," but fails to identify, beyond generalities, the "master's house" that needs dismantling. In a less pithy expression than Lorde's, Victor Rabinowitz offered a more specific description of the limits of the law to effect broad social transformation:

All systems of law are constructed to protect the State and its economic base. Conduct that seriously threatens the survival of the State or that would effectuate a basic change in the economic system is, *ipso facto*, 'illegal.' Those in whose interests the State exists will necessarily make laws to protect those interests and that state, and a government that will tolerate effective seditious conduct is almost beyond our imagination.<sup>16</sup>

Rabinowitz, a cofounder of the National Lawyers Guild, was a radical labor lawyer. His description of the role of law in sustaining the economic interests of the powerful resonates with how many scholars and activists have used Lorde's master's tools thesis, with one crucial exception: they would include race and gender hierarchies along with economics as vital interests that the State seeks to protect, including through law.<sup>17</sup>

If we think of (some of) the master's houses as racial capitalism, white supremacy, and patriarchy, assessing whether lawyering can overthrow them becomes easier. As many scholars, activists, and artists have long described, these are constitutive features of U.S. identity. The idea that they might be crushed through lawyering is, if not "almost beyond our imagination,"<sup>18</sup> inconsistent with an informed understanding of American history and politics.

In this sense, the only way that "subversive lawyering" is not oxymoronic is if the meaning of "subversive" is watered down. It is revealing that the announcement of this Colloquium describes subversive lawyering as seeking "to reform, disrupt, or subvert aspects of the legal system that [lawyers] personally regard as unjust."<sup>19</sup> But there is a huge gulf between reforming the law and overthrowing the law.<sup>20</sup> The concept of subversive lawyering has more coherence if its objective is the former rather than the latter.

16. Victor Rabinowitz, *The Radical Tradition in the Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 680, 682 (David A. Karys ed., 1998). I first read this quote, somewhat ironically, on the cover of the Harvard Law School yearbook for the Class of 1986. It was superimposed over a drawing of Nelson Mandela.

17. Lorde frequently described herself as a radical Black lesbian feminist. See *Audre Lorde*, POETRY FOUND., <https://www.poetryfoundation.org/poets/audre-lorde> [<https://perma.cc/RN3W-S9H5>] (last visited Mar. 4, 2022).

18. Rabinowitz, *supra* note 16, at 682.

19. *Scholarly and Professional Programming*, FORDHAM UNIV. SCH. OF L., [https://www.fordham.edu/info/23508/scholarly\\_and\\_professional\\_programming#:~:text=The%202021%20colloquium%20on%20Subversive,they%20personally%20regard%20as%20unjust](https://www.fordham.edu/info/23508/scholarly_and_professional_programming#:~:text=The%202021%20colloquium%20on%20Subversive,they%20personally%20regard%20as%20unjust) [<https://perma.cc/X7RB-VVLD>] (last visited Mar. 4, 2022).

20. I understand the incentives, including in the legal academy. The prospect of "incrementalist lawyering" is unlikely to send a bunch of Black Lives Matter activists racing to law school. "Reformist lawyering" does not inspire quite like "subversive lawyering," but at least it does not raise false hopes.

Subversion, in the Colloquium's description, requires that legal actors not be "out" about their ultimate objectives. I understand that subversive lawyering's "down-low" component raises important ethical and professional responsibility issues for attorneys. There has not been, in the U.S. legal academy, significant focus on subversive lawyering, and I applaud the *Fordham Law Review*; the Center on Race, Law, and Justice; and the Stein Center for Law and Ethics for selecting this topic. There has been, however, more attention paid to the related concept of "resistance" lawyering, including through important articles by the legal scholar Daniel Farbman.<sup>21</sup> A resistance lawyer, according to Farbman, "engages in a regular, direct service practice within a procedural and substantive legal regime that she considers unjust and illegitimate. Through that practice, she seeks both to mitigate the worst injustices of that system and to resist, obstruct, and dismantle the system itself."<sup>22</sup>

Resistance lawyering shares the objectives of (radical) subversive lawyering but is more transparent in its methods. Resistance lawyering is perhaps the most direct application of Lorde's master's thesis to lawyering. Indeed, Farbman describes its goal as "using a legal process as a tool to dismantle that *legal process itself*."<sup>23</sup> The distinction between a "zealous advocate" and a "resistance lawyer" is that the former "accepts the rules of the game and seeks to play within them to win" and the latter "sees the game as rigged and tries to destroy it from within."<sup>24</sup>

In Farbman's view, resistance lawyering was an important component of the effort to overturn the Fugitive Slave Act of 1850,<sup>25</sup> and in that context, it worked: the master's tools helped dismantle the master's house.<sup>26</sup> One important disclaimer is that the master's house, in Farbman's view, is less capacious than Lorde's. Resistance lawyering can defeat "legal processes," including, in Farbman's telling, some applications of the Fugitive Slave Act as opposed to the institution of slavery or white supremacy.<sup>27</sup> Farbman's evidence of the success of resistance lawyering is that it resulted in the freedom of some enslaved people who, under "law," should have been sent back to slavery.<sup>28</sup>

Another disclaimer is Farbman's recognition that resistance lawyering succeeds only as a supplement to nonlegal activism. Accordingly, "the people most responsible for the successes were undoubtedly the alleged fugitives themselves, followed closely in importance by the (usually black) movement activists who fought tirelessly for their freedom."<sup>29</sup> But, as

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21. See, e.g., Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877 (2019).

22. *Id.* at 1880.

23. *Id.* at 1932–33.

24. *Id.* at 1933.

25. Ch. 60, 9 Stat. 462 (repealed 1864).

26. Farbman, *supra* note 21, at 1879–80.

27. *Id.* at 1881–82.

28. *Id.* at 1895–932.

29. *Id.* at 1879–80.

Farbman notes, “What is more surprising is a third leading explanation: lawyers.”<sup>30</sup>

I can’t help but read the optimism in some calls for “subversive” and “resistance” lawyering, including in some of the essays in this Colloquium, as an implicit critique. For example, the cause of racial justice for African Americans has enjoyed some of the best lawyers that the legal academy has produced, including Pauli Murray, Justice Thurgood Marshall, Derrick Bell (when he worked for the NAACP Legal Defense and Educational Fund), Charles Hamilton Houston, Kimberlé Crenshaw, Sherrilyn Ifill, and Bryan Stevenson. One might think that if excellent lawyering, including the subversive kind, was all it took, Black people would have realized equal justice decades ago.

The only semi-persuasive version of an argument that the master’s tools can dismantle the master’s house is that crafty lawyers can, on occasion, use law’s shifty, inconsistent logics against itself to achieve a discreet, temporary legal victory. This is also, as I understand it, the project of “resistance lawyering.”<sup>31</sup> It may, quoting from Lorde’s essay, “allow us temporarily to beat [the master] at his own game, but [it] will never enable us to bring about genuine change.”<sup>32</sup>

The next part considers whether progressive prosecutors engage in either subversive or resistance lawyering and what our realistic expectations should be for the transformative potential of their work.

### III. PROGRESSIVE PROSECUTORS

In response to liberal critiques of the criminal legal system on mass incarceration, race disparities, and police accountability, some jurisdictions have elected a new type of prosecutor.<sup>33</sup> The progressive-prosecutor movement began with the publication of the legal scholar Angela J. Davis’s seminal articles and book on the potential of prosecutors to be leaders of reform.<sup>34</sup> Davis emphasized the vast discretion that prosecutors enjoy and their responsibility as agents of mass incarceration and race disparities to mitigate the damage they have done.<sup>35</sup>

Progressive prosecutors push for reform from within the criminal legal system, including by making commitments to reduce incarceration, hold

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30. *Id.* at 1880.

31. See Mairi N. Morrison, *May It Please Whose Court?: How Moot Court Perpetuates Gender Bias in the “Real World” of Practice*, 6 UCLA WOMEN’S L.J. 49, 83 (1995); David Nahmais, *The Changemaker Lawyer: Innovating the Legal Profession for Social Change*, 106 CALIF. L. REV. 1335, 1352 (2018).

32. LORDE, *supra* note 1, at 112.

33. See Darcy Covert, *The False Hope of the Progressive-Prosecutor Movement*, ATLANTIC (June 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141/> [<https://perma.cc/C35Y-8GEP>].

34. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 17–19 (1998) [hereinafter Davis, *Prosecution and Race*].

35. Davis, *Prosecution and Race*, *supra* note 34, at 16.

police officers accountable, and reallocate funds to public services.<sup>36</sup> Their far-reaching discretionary power includes virtually unreviewable decisions over which charges are pursued, whether to recommend bail, the offers to make in plea bargaining, and what sentences are recommended.<sup>37</sup> Progressive prosecutors effectuate their reform agendas by declining to prosecute low-level offenses, expanding diversion programs, and appointing reform-minded individuals to critical positions.<sup>38</sup>

Progressive prosecution is an example of resistance lawyering but probably not subversive lawyering. Progressive prosecutors are “out” about their goals, generally. Because one hallmark of progressive prosecution is transparency, and one hallmark of subversion is secrecy or stealth, progressive prosecutors might be the antithesis of subversive prosecutors.

I have previously written about one version of a subversive prosecution, which is line prosecutors who work in offices that are not run by “progressive prosecutors” but who nonetheless have reformist agendas.<sup>39</sup> They engage in acts like offering plea deals and sentence recommendations that are more lenient than the guidelines or practices of their offices. I know, based on interviews, that these prosecutors regard this work as “subversive lawyering,” but to the extent it is, it is extremely limited in its impact (on a large scale, but obviously it makes a difference to an individual accused person).

I have been a sympathetic critic of progressive prosecutors. For example, in a book chapter entitled “Should Good People Be Prosecutors?”<sup>40</sup> I discouraged reformers from working as line prosecutors because I thought reports of their discretion were overstated. Head prosecutors have extraordinary discretion; indeed, they may be the most unregulated actors in the U.S. legal system (so I did not discourage reformers from seeking that office), but their employees only have delegated authority. I observed that the boss typically sets policy that limits the individual discretion of line prosecutors and that, in many jurisdictions, the policies of the office on issues like charging, plea bargaining, and sentencing are determined by racist and dysfunctional politics of criminal justice. I noted that

[b]ecoming a prosecutor to help resolve unfairness in the criminal justice system is like enlisting in the army because you are opposed to the current war. It’s like working as an oil refiner because you want to help the

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36. See Allison Young, *The Facts on Progressive Prosecutors*, CTR. FOR AM. PROGRESS (Mar. 19, 2020), <https://www.americanprogress.org/article/progressive-prosecutors-reforming-criminal-justice/> [<https://perma.cc/ZYB3-RYER>].

37. See Pedro L. Gonzalez, *It’s Time to Stand Up to Progressive Prosecutors*, NEWSWEEK (Dec. 3, 2021, 7:00 AM), <https://www.newsweek.com/its-time-stand-progressive-prosecutors-opinion-1655026> [<https://perma.cc/HX6K-62ZZ>].

38. See Covert, *supra* note 33.

39. PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* ch. 6 (2007). Another kind of subversive prosecutor would be someone who wins an election as a district attorney by keeping her real agenda on the down-low, and then uses her power as head prosecutor (as opposed to line prosecutors who, as I have argued in other work, don’t have discretion as much as authority delegated from the boss) to do some real damage to the criminal legal system.

40. See *id.*

environment. Yes, you get to choose the toxic chemicals. True, the boss might allow you to leave one or two pristine bays untouched. Maybe, if you do really good work as a low-level polluter, they might make you the head polluter. But rather than calling yourself an “environmentalist,” you should think of yourself as a polluter with a conscience.<sup>41</sup>

Since I wrote those words in a book published in 2009, there has been a shift in the politics of criminal justice, mainly as a result of the movement for Black lives. Some reformers, including former defense attorneys, have been elected as head prosecutors across the country. For reasons I will discuss later, I have not changed my views, but I want to give appropriate credit to these leaders and acknowledge some of their successes in instituting reform while in office. Next, I highlight a few representative cases.

Marilyn Mosby is the state’s attorney for the city of Baltimore and is the youngest chief prosecutor in a major American city.<sup>42</sup> Her campaign platform promised an end to mass incarceration and racial disparities, sentencing review and conviction integrity, and focused resources on repeat violent offenders.<sup>43</sup> After being sworn into office in January 2015, Mosby created positions, such as the Policy and Legislative Affairs Unit, to increase transparency and repair trust with the community.<sup>44</sup> In January 2019, Mosby announced that her office would no longer prosecute individuals for marijuana possession regardless of the amount and planned to vacate approximately 5000 convictions.<sup>45</sup> During the COVID-19 pandemic, Mosby announced her office would no longer prosecute drug possession, prostitution, minor traffic violations, and other low-level offenses to slow the rapid transmission of the coronavirus in Baltimore prisons.<sup>46</sup> In March 2021, she made this change permanent, noting that the changes during the pandemic did not lead to a spike in more serious crimes.<sup>47</sup> Mosby has also prosecuted several high-profile repeat violent offenders since she took office, including Darryl Anderson, Capone Chase, Nelson Clifford, and Mustafa Eraibi.<sup>48</sup> With regard to police reform, Mosby took center stage in 2015 for

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41. *Id.* at 102.

42. Ray Sanchez & Dana Ford, *Prosecutor in Freddie Gray Case Has Talked of Need to “Repair” Trust*, CNN (May 2, 2015, 5:05 PM), <https://www.cnn.com/2015/04/30/us/baltimore-freddie-gray-prosecutor/index.html> [https://perma.cc/9B7S-54NJ].

43. *Marilyn Mosby’s Platform*, MARILYN MOSBY FOR BALT. CITY STATE’S ATT’Y, <https://web.archive.org/web/20200607232949/http://www.marilynmosby.com/our-campaign/> (last visited Mar. 4, 2022).

44. *Legislative Affairs*, OFF. OF THE STATE’S ATT’Y FOR BALT. CITY, <https://www.stattorney.org/policy-legislative-affairs/legislative-affairs> [https://perma.cc/JF3C-B8ME] (last visited Mar. 4, 2022).

45. See Shaila Dewan, *A Growing Chorus of Big City Prosecutors Say No to Marijuana Convictions*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/us/baltimore-marijuana-possession.html> [https://perma.cc/Y9Y3-QPTL].

46. See Jon Schuppe, *Baltimore Will No Longer Prosecute Drug Possession, Prostitution, Low-Level Crime*, NBC NEWS (Mar. 26, 2021, 5:15 PM), <https://www.nbcnews.com/news/us-news/baltimore-will-no-longer-prosecute-drug-possession-prostitution-low-level-n1262209> [perma.cc/9S4Y-YRMD].

47. *See id.*

48. See Jessica Anderson, *Man Sentenced in Canton Attack, Robbery*, BALT. SUN (June 16, 2015, 9:54 AM), <https://www.baltimoresun.com/news/crime/bs-md-ci-eraibi-sentenced->

charging the six police officers who arrested Freddie Gray prior to his death.<sup>49</sup>

Kim Foxx is the state's attorney for Cook County, Illinois, which encompasses Chicago and the surrounding areas.<sup>50</sup> She manages the second largest prosecutor's office in the United States.<sup>51</sup> Her campaign platform focused on criminal justice reform and fairness, allocating resources toward violent crime, rectifying the damage of the War on Drugs, and standing up to former President Donald Trump.<sup>52</sup> Foxx's most notable successes include incarceration rates dropping by 19 percent in her first full year in office.<sup>53</sup> In 2019, she pushed for the legalization of recreational marijuana and expunged over one thousand low-level nonviolent marijuana convictions.<sup>54</sup> With regard to police reform, Foxx expanded the Conviction Integrity Unit to help investigate the torture allegations by former Chicago Police Chief Jon Burge.<sup>55</sup> Her office also drafted a law that would give jurisdiction to the state appellate prosecutor to review police shootings when the state's attorney declines to prosecute.<sup>56</sup> Foxx has also made significant strides in bail reform. Foxx pushed for legislation that removed the requirement to post cash bail

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20150613-story.html [https://perma.cc/U36P-FR9B]; Justin George & Justin Fenton, *Jury Convicts Sex Offender in Fifth Trial*, BALT. SUN (May 8, 2015, 8:42 PM), <https://www.baltimoresun.com/news/crime/bs-md-ci-nelson-clifford-20150508-story.html> [https://perma.cc/7QZZ-DPAZ]; Justin Fenton, *Killer Gets Life Plus 240 Years, Flips Off Top Prosecutor*, BALT. SUN (Mar. 24, 2015, 8:12 PM), <https://www.baltimoresun.com/news/crime/bs-md-ci-darryl-anderson-fallin-sentencing-20150324-story.html> [https://perma.cc/F843-85N3]; Saliqa Khan, *Former Public Enemy No. 1 Sentenced to Life in Fatal Shooting*, WBAL TV (Mar. 4, 2015, 5:06 PM), <https://www.wbal.com/article/former-public-enemy-no-1-sentenced-to-life-in-fatal-shooting/7092240#> [https://perma.cc/VSY2-HRJC].

49. See Scott Calvert & Joe Palazzolo, *After Baltimore Riots, Focus Turns to New Prosecutor*, WALL ST. J. (Apr. 30, 2015, 7:56 AM), <https://www.wsj.com/articles/after-baltimore-riots-focus-turns-to-new-prosecutor-1430356697> [https://perma.cc/B4W3-S7S5].

50. *About The Cook County State's Attorney's Office*, COOK CNTY. STATE'S ATT'Y, <https://www.cookcountystatesattorney.org/about> [https://perma.cc/WW4P-EQHQ] (last visited Mar. 4, 2022).

51. See *id.*

52. *Priorities*, KIM FOXX FOR COOK CNTY. STATE'S ATT'Y, <https://www.kimfoxx.com/priorities> [https://perma.cc/6ZZJ-GHEN] (last visited Mar. 4, 2022).

53. See *Independent Analysis of State Attorney Data*, PEOPLE'S LOBBY, <https://www.thepeopleslobbyusa.org/independent-analysis-of-states-attorney-data/> [https://perma.cc/MM5D-LJLX] (last visited Mar. 4, 2022); Curtis Black, *Report: Kim Foxx Reforms Show Reducing Incarceration Does Not Compromise Public Safety*, CHI. REP. (July 31, 2019), <https://www.chicagoreporter.com/report-kim-foxx-reforms-show-reducing-incarceration-does-not-compromise-public-safety/> [https://perma.cc/3ELZ-TC2N].

54. See Matthew Hendrickson, *1,000 Pot Convictions Tossed as Kim Foxx Expunges Records of Marijuana Busts*, CHICAGO SUN-TIMES (Dec. 11, 2019, 6:17 PM), <https://chicago.suntimes.com/cannabis/2019/12/11/21011470/kim-foxx-expunge-marijuana-cannabis-pot-convictions-drug-war> [https://perma.cc/Y42Y-R7GK].

55. See Patrick Smith, *Foxx Budget Would Expand to Take on Burge Torture Cases*, WBEZ CHI. (Oct. 29, 2019, 7:44 PM), <https://www.wbez.org/stories/foxx-budget-would-expand-to-take-on-burge-torture-cases/bf2c9024-6ef7-43d2-9052-491c9a1060a9> [https://perma.cc/Q72Q-5XFH].

56. See *State's Attorney Foxx Announces Special Prosecutor Legislation*, COOK CNTY. STATE'S ATT'Y (Apr. 27, 2017), <https://www.cookcountystatesattorney.org/news/state-attorney-foxx-announces-special-prosecutor-legislation> [https://perma.cc/4L62-3FHP].

for minor crimes and announced that her office no longer requests pretrial detention for those charged with low-level nonviolent offenses.<sup>57</sup>

Larry Krasner is the district attorney for the city of Philadelphia.<sup>58</sup> He has been in office since 2017.<sup>59</sup> His platform promised to end the failed “tough-on-crime” policies of the past, work to support the community and victims, and hold the powerful accountable.<sup>60</sup> In 2018, his office announced that it would no longer pursue criminal charges against those caught with marijuana.<sup>61</sup> Krasner instructed prosecutors to stop seeking cash bail for some misdemeanors and nonviolent felonies and to stop charging sex workers with fewer than three convictions.<sup>62</sup> Furthermore, the Philadelphia city jail population has decreased by 40 percent under Krasner’s tenure, dropping to its lowest point since 1985.<sup>63</sup> Krasner has also taken a tough stance on police misconduct. In 2018, Krasner’s office began keeping track of all officers who lied while on duty, used excessive force, and violated civil rights.<sup>64</sup> By May 2021, Krasner’s office exonerated twenty people convicted under other district attorneys.<sup>65</sup>

In the interests of full disclosure, I am a member of an advisory board that advises elected progressive prosecutors, including some of the people described above, on best practices. I hope they succeed in their missions to make the criminal legal system fairer and more equitable. I remain, however, a friendly skeptic of the utility of a person becoming a line prosecutor as a

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57. See Kim Geiger, *Rauner Signs Law to Change Rules for Paying Cash to Get Out of Jail*, CHI. TRIB. (June 9, 2017, 4:57 PM), <https://www.chicagotribune.com/politics/ct-bruce-rauner-bail-bill-met-0610-20170609-story.html> [<https://perma.cc/446Q-CCQ9>]; Kiran Misra, *Keeping Tabs on Kim Foxx*, S. SIDE WKLY. (Mar. 10, 2020), <https://southsideweekly.com/keeping-tabs-kim-foxx-2016-promises/> [<https://perma.cc/2YBN-CBZJ>].

58. Jennifer Gonnerman, *Larry Krasner’s Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration> [<https://perma.cc/GX9Q-CLA2>].

59. See *id.*

60. See *Promises Kept*, LARRY KRASNER FOR DIST. ATT’Y, <https://krasnerforda.com/promises-kept> [<https://perma.cc/5MPF-B78W>] (last visited Mar. 4, 2022).

61. Joe Trinacria, *Larry Krasner Sues Big Pharma, Drops All Marijuana Possession Charges*, PHILA. MAG. (Feb. 16, 2018, 9:17 AM), <https://www.phillymag.com/news/2018/02/16/krasner-big-pharma-marijuana-possession> [<https://perma.cc/WE7M-YDXA>].

62. See Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He’s Exceeding Expectations*, INTERCEPT (Mar. 20, 2018, 3:59 PM), <https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da/> [<https://perma.cc/45JP-4GFE>]; Chris Palmer, *Philly DA Larry Krasner Won’t Seek Cash Bail in Certain Crimes*, PHILA. INQUIRER (Feb. 21, 2018), <https://www.inquirer.com/philly/news/crime/philadelphia-larry-krasner-cash-bail-reform-20180221.html> [<https://perma.cc/HA5B-34KZ>].

63. See *Promises Kept*, *supra* note 60.

64. Mark Fazlollah, Craig R. McCoy & Julie Shaw, *Under Court Order, District Attorney Krasner Releases List of Tainted Police*, PHILA. INQUIRER (Mar. 6, 2018), <https://www.inquirer.com/philly/news/larry-krasner-philadelphia-police-tainted-misconduct-secret-list-20180306.html> [<https://perma.cc/VSA5-H4JM>].

65. Chris Brennan, *4 Takeaways from the Only TV Debate Between Philly DA Larry Krasner and Challenger Carlos Vega*, PHILA. INQUIRER (May 6, 2021), <https://www.inquirer.com/politics/election/philadelphia-district-attorney-larry-krasner-carlos-vega-debate-20210505.html> [<https://perma.cc/CTS7-8M8J>].

route to instituting change or transformation in the criminal legal system.<sup>66</sup> Each of the prosecutors referenced above runs a system marked by extraordinary race and class disparities, especially regarding who gets incarcerated. For all their valuable efforts, which absolutely reduce human suffering, reform is not the main work of any prosecutor, including a progressive one.

For example, a study by The Marshall Report revealed that Kim Foxx had declined to pursue 5000 criminal cases that the previous elected prosecutor would have pursued.<sup>67</sup> Foxx did not bring charges in some low-level shoplifting and drug cases, and she recommended alternatives to prosecution in some other cases. Still, Foxx leads an office that sends thousands of people to prison each year, the vast majority of whom are racial minorities and 40 percent of whom are prosecuted for drug crimes.<sup>68</sup> Progressive prosecutors, just like other prosecutors, likely spend much more of their work hours strategizing about winning cases than reforming the system.

I suspect that many, if not most, progressive prosecutors would acknowledge that and not be troubled by it. They are, after all, prosecutors. The legal scholar Benjamin Levin divides progressive prosecutors into four categories, including the “prosecutorial progressive” and the “anti-carceral prosecutor.”<sup>69</sup> “The prosecutorial progressive embraces her role as prosecutor and the power of state violence, but she does so with an eye towards advancing political ends favored by progressives and the political left (broadly conceived).”<sup>70</sup> She “embraces criminal law as a desirable tool for righting social wrongs and balancing an unequal political and economic system.”<sup>71</sup> In contrast, the anti-carceral prosecutor views the criminal legal system as “fundamentally flawed.”<sup>72</sup> Her work is “not to repurpose the existing institutional structures for good (as the prosecutorial progressive would wish) but rather to shrink those institutions, or perhaps do away with them altogether.”<sup>73</sup>

Anti-carceral prosecutors would be the ones attempting to dismantle the master’s house. But despite Levin’s template, it’s hard to find real-world examples of those exotic creatures. When they run for office, progressive prosecutors typically express commitments to law and order, especially with regard to going after violent “offenders.” I am not aware of any elected district attorney who is an out abolitionist, which is the criminal legal

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66. I would certainly advise this person to seek work with an elected progressive prosecutor as opposed to a district attorney who does not support this movement.

67. *The Kim Foxx Effect: How Prosecutions Have Changed in Cook County*, THE MARSHALL PROJECT (Oct. 24, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/10/24/the-kim-foxx-effect-how-prosecutions-have-changed-in-cook-county> [<https://perma.cc/N98Y-SWNX>].

68. *See id.*

69. Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1418 (2021).

70. *Id.* at 1438.

71. *Id.* at 1444.

72. *Id.*

73. *Id.*

philosophy that most closely approximates the anti-carceral prosecutor's professed commitments. Indeed, given the pushback that progressive prosecutors frequently face from police unions and some moderates and conservatives, most candidates for district attorney would probably view an anti-carceral philosophy as a political nonstarter.

Accordingly, the progressive prosecutor movement might not be the best test case for the master's thesis because almost none seem to have goals as radical as crushing the criminal legal system. Still, it is instructive to examine two extraordinary cases in which elected progressive prosecutors had power stripped away from them. These episodes demonstrate the ways that law protects the master's house even when it is not especially threatened.

#### A. *Black Women Progressive Prosecutors*

Both examples involve elected district attorneys who are Black women. Black women make up 1 percent of all top prosecutors nationwide across all political affiliations.<sup>74</sup> Reform-minded prosecutors across the nation have faced pushback from the seasoned prosecutors who work for them, from elected officials and local law enforcement, and from the media.<sup>75</sup> However, Black women progressive prosecutors face a unique type of intransigence on their paths of reforming the criminal justice system from within.<sup>76</sup> This is to be distinguished from the pushback that Black women prosecutors face—progressive or not—which has always been marked by racialized insubordination and resistance to their authority.<sup>77</sup> But Black women progressive prosecutors experience an even more virulent strain of misogyny and racism.<sup>78</sup> They are targeted by white supremacist groups, experience litanies of personal attacks and lawsuits, and undergo levels of scrutiny rare for public officials.<sup>79</sup>

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74. Christine Carrega, *For the Few Black Women Prosecutors, Hate and "Misogynoir" Are Part of Life*, ABC NEWS (Mar. 21, 2020, 10:05 AM), <https://abcnews.go.com/US/black-women-prosecutors-hate-misogynoir-part-life/story?id=68961291> [<https://perma.cc/6SM6-WCRD>].

75. See Richard A. Oppel Jr., *These Progressive Prosecutors Promised Change. Their Power Is Being Stripped Away*, N.Y. TIMES (Dec. 19, 2019), <https://www.nytimes.com/2019/11/25/us/prosecutors-criminal-justice.html> [<https://perma.cc/9DSH-HVRH>].

76. See Maria Carmen Hinayon, *Who Needs The Old Boys' Club?: Let's Make Our Own—Highlights from the WCJ Bay Area Listening Session*, AM. BAR ASS'N (Jan. 21, 2020), [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal-justice-magazine/2020/winter/who-needs-old-boys-club-lets-make-our-ownhighlights-the-wcj-bay-area-listening-session/](https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2020/winter/who-needs-old-boys-club-lets-make-our-ownhighlights-the-wcj-bay-area-listening-session/) [<https://perma.cc/ZVP6-YCHU>].

77. See Nicole Lewis & Eli Hager, *Facing Intimidation, Black Women Prosecutors Say: "Enough,"* THE MARSHALL PROJECT (Jan. 16, 2020, 2:00 PM), <https://www.themarshallproject.org/2020/01/16/facing-intimidation-black-women-prosecutors-say-enough> [<https://perma.cc/C7UT-R8C5>].

78. See *id.*

79. See Richard A. Oppel Jr., *The St. Louis Prosecutor Went After the Establishment. Now the Tables Are Turned.*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/us/st-louis-prosecutor-kim-gardner.html> [<https://perma.cc/GKC8-4UVM>]; Tim Schuba & Matthew Hendrickson, *How Groups Tied to White Supremacy Are Targeting Chicago and Kim Foxx*, CHICAGO SUN-TIMES (Apr. 27, 2019, 9:00 AM),

Perhaps the most pointed type of backlash that Black women progressive prosecutors face is checks on their discretion from other actors in the legal system. In Maryland, for example, Governor Larry Hogan directed the state's attorney general to prosecute more violent crimes in Baltimore specifically, saying that "far too often in Baltimore City, violent offenders get a slap on the wrist and are released back onto the streets to commit yet another violent offense."<sup>80</sup> This was a direct attack on Marilyn Mosby, who announced that her office would roll back money bail rules and no longer prosecute certain low-level crimes.<sup>81</sup> When Maryland Attorney General Brian Frosh explained that his office did not have the capacity to take second looks at Baltimore charges, Governor Hogan expanded the state's budget, adding an additional twenty-five prosecutors and support staff to Frosh's office.<sup>82</sup>

In the final part of this Essay, I tell the stories of two other Black women progressive prosecutors who had power taken away from them by the legal system in especially dramatic and unprecedented ways. I think these narratives demonstrate the profound limits of the master's tools.

### 1. Aramis Ayala

Aramis Ayala was the first Black person elected to be a head prosecutor in Florida.<sup>83</sup> She served as the state attorney for the Ninth Judicial Circuit Court of Florida from 2017 to 2021. In 2017, her office prosecuted a high-profile case in which Markeith Loyd was accused of killing his pregnant ex-girlfriend and, about a month later, a police officer who was trying to arrest him for the crime.<sup>84</sup> In a controversial decision, Ayala announced that her office would not seek the death penalty in the event that Loyd was found guilty.<sup>85</sup> At a press conference she stated,

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<https://chicago.suntimes.com/2019/4/27/18623600/how-groups-tied-to-white-nationalists-are-targeting-chicago-and-kim-foxx> [<https://perma.cc/C5MB-3ZTM>].

80. *Black Women Prosecutors Under Fire: Reform-Minded Prosecutors—Especially Black Women—Face Pushback*, VERA INST. OF JUST., <https://www.vera.org/state-of-justice-reform/2019/prosecution> [<https://perma.cc/65JK-AB6J>] (last visited Mar. 4, 2022).

81. *See id.*

82. Kevin Rector & Pamela Wood, *Mosby Says Hogan's Idea to Fund New AG Staff Is "Problematic," Shouldn't Be in Budget*, BALT. SUN (Dec. 12, 2019, 7:39 PM), <https://www.baltimoresun.com/politics/bs-md-mosby-reaction-20191213-nol7jeyqyzhcx5ph7rh5oth2u-story.html> [<https://perma.cc/866U-NWBW>].

83. Allison Ross, *Florida's First Black State Attorney Defends Opposition to Death Penalty*, TAMPA BAY TIMES (Feb. 12, 2020), <https://www.tampabay.com/florida-politics/buzz/2020/02/12/floridas-first-black-state-attorney-defends-opposition-to-death-penalty/> [<https://perma.cc/7RTN-ZYVL>].

84. *See* Monivette Cordeiro, *State Attorney Aramis Ayala Won't Pursue the Death Penalty During Her Term*, ORLANDO WKLY. (Mar. 16, 2017, 12:27 PM), <https://www.orlandoweekly.com/Blogs/archives/2017/03/16/state-attorney-aramis-ayala-wont-pursue-the-death-penalty-during-her-term> [<https://perma.cc/HV95-2EK9>].

85. WKMG News 6 ClickOrlando, *State Attorney Aramis Ayala Says She Won't Pursue Death Penalty*, YOUTUBE (Apr. 6, 2018), <https://www.youtube.com/watch?v=i1LEhKtzuE> [<https://perma.cc/V3MG-5UPL>].

I have given this issue extensive, painstaking thought and consideration . . . . What has become abundantly clear through this process is that while I currently do have discretion to pursue death sentences, I have determined that doing so is not in the best interests of this community or in the best interests of justice. After careful review and consideration of the new statute, under my administration I will not be seeking the death penalty.<sup>86</sup>

That same day, Florida Governor Rick Scott issued an executive order removing Ayala from the Loyd case and appointing Brad King, the (white male) elected prosecutor from another Florida district, to the case. Scott later removed Ayala and appointed King in at least twenty-six other murder cases.<sup>87</sup> The Florida Supreme Court upheld Scott's decision by a 5–2 vote.<sup>88</sup>

## 2. Kim Foxx

In January 2019, Jussie Smollett reported that he was a victim of a hate crime in Chicago.<sup>89</sup> Smollett, who is Black and gay, claimed that late one night, two men accosted him, called him racist and homophobic slurs, and put a rope around his neck.<sup>90</sup> Smollett was one of the lead actors in a popular television program and his allegation stirred a sympathetic public outcry and a speedy and extensive hunt for the culprit by the Chicago Police Department.<sup>91</sup> The police quickly suspected that Smollett himself had manufactured the event by paying two brothers to attack him.<sup>92</sup>

Smollett was indicted on sixteen felony counts of disorderly conduct related to making a false report to police about the alleged incident in Chicago.<sup>93</sup> The lead prosecutor, Kim Foxx, recused herself from the investigation before Smollett was charged in order to avoid any appearances of a conflict of interest because of conversations she had with Smollett's family members.<sup>94</sup> Instead, Foxx designated her top assistant, Joseph Magats, as acting state attorney of the case.<sup>95</sup> After several weeks, the prosecutor's office dropped all charges against Smollett in exchange for community service and forfeiture of his \$10,000 bond payment.<sup>96</sup>

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86. Cordeiro, *supra* note 84.

87. *Florida Supreme Court Upholds Removal of Prosecutor from Death-Eligible Cases*, DEATH PENALTY INFO. CTR. (Aug. 31, 2017), <https://deathpenaltyinfo.org/news/florida-supreme-court-upholds-removal-of-prosecutor-from-death-eligible-cases> [https://perma.cc/BN2Y-26G9].

88. *See generally* Ayala v. Scott, 224 So.3d 755 (Fla. 2017).

89. Sopan Deb & Julia Jacobs, *Jussie Smollett Timeline: A Case with Twists and Turns*, N.Y. TIMES (Dec. 9 2021), <https://www.nytimes.com/article/jussie-smollett-timeline.html> [https://perma.cc/2P5T-466T].

90. *See id.*

91. *See id.*

92. *See id.*

93. *In re* Appointment of Special Prosecutor, No. 19 MR 00014, slip op. at 4 (Ill. Cir. Ct. Cook Cnty. June 21, 2019).

94. *Id.* at 6–7.

95. *Id.*

96. *Id.* at 5.

This resolution received a lot of attention in the national media, much of it unfavorable. Then President Donald Trump tweeted it was “an embarrassment to our nation.”<sup>97</sup> Chicago’s mayor called it a “whitewash.”<sup>98</sup>

Shortly after the charges were dropped, Sheila O’Brien, a retired state judge, filed a petition in Chicago’s criminal court to appoint a special prosecutor

to reinstate and further prosecute the charges in the matter entitled the People of the State of Illinois v. Jussie Smollett, dismissed by the Cook County State’s Attorney on March 26, 2019, and *inter alia*, to investigate the actions of any person or office involved in the investigation, prosecution, and dismissal of that matter.<sup>99</sup>

When Foxx challenged O’Brien’s standing, O’Brien claimed that as a former judge, “she has sustained personal harm from the derogatory manner in which the Smollett case was handled” and that “the community [has] been subjected to ridicule and disparaging media commentary to the extent that her ability to live peacefully has been diminished.”<sup>100</sup>

Michael Toomin, the presiding judge of the criminal court, ruled that O’Brien had standing and granted her petition. His opinion begins:

The instant petition has its genesis in a story unique to the annals [sic] of the Criminal Court. The principal character, Jussie Smollett, is an acclaimed actor known to the public from his performances in the television series, “Empire.” But his talents were not destined to be confined to that production. Rather, in perhaps the most prominent display of his acting potential, Smollett conceived a fantasy that propelled him from the role of a sympathetic victim of a vicious homophobic attack to that of a charlatan who fomented a hoax the equal of any twisted television intrigue.<sup>101</sup>

Judge Toomin ruled that when Foxx recused herself from the case, the only remedy under Illinois law was appointment of a special counsel. Foxx’s designation of Magats as the acting state’s attorney was improper because “[t]here was and is no legally cognizable office of Acting State’s Attorney known to our statutes or to the common law.”<sup>102</sup> Toomin appointed Dan Webb as the special prosecutor. Webb was the special counsel in the Iran-Contra scandal, and in private practice, he has represented some of the most powerful people and businesses in the world, including Bill Gates, Microsoft, General Electric, and Verizon. *The Washington Post* reported that

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97. Veronica Stracqualursi & Jeremy Diamond, *Trump Calls Jussie Smollett Case ‘An Absolute Embarrassment,’* CNN (Mar. 28, 2019, 5:17 PM), <https://www.cnn.com/2019/03/28/politics/donald-trump-jussie-smollett-doj-fbi/index.html> [<https://perma.cc/5Q3S-F37B>].

98. Julie Bosman & Sopan Deb, *Jussie Smollett’s Charges Are Dropped, Angering Mayor and Police,* N.Y. TIMES (Mar. 26, 2019), <https://www.nytimes.com/2019/03/26/arts/television/jussie-smollett-charges-dropped.html> [<https://perma.cc/SDA6-9E5Z>].

99. *In re* Appointment of Special Prosecutor, slip op. at 8 (order granting appointment of special counsel).

100. *Id.* at 12.

101. *Id.* at 2.

102. *Id.* at 16.

then President Donald Trump wanted Webb to defend him in the Mueller investigation, but Webb declined.<sup>103</sup>

Webb prosecuted Smollett for six counts of “felony disorderly conduct.”<sup>104</sup> In 2021, a jury convicted Smollett of five of those counts.<sup>105</sup>

### B. Reforming the Master’s House

What happened to both Ayala and Foxx was bizarre and virtually unprecedented as a response to an exercise of prosecutorial discretion. That is different from saying that the legal resolutions were “correct” or “incorrect.” The progressive-prosecutor movement is premised on the idea that prosecutors have virtually unbridled and unreviewable discretion. It turns out that, for two elected Black women prosecutors, that is not the case. When these elected prosecutors made decisions that were unpopular in some quarters, their acts of discretion were reviewed and their power in those situations ultimately removed (and handed, in both cases, to white men).

Ayala’s problem may have been that she was not subversive. Her announcement of a “blanket” decision not to seek the death penalty in any case was the reason the Florida Supreme Court used to justify her removal from those cases. If Ayala had not been transparent but rather in every individual case refused to seek death, the Court would not have been able to use the same rationale to remove her.

### CONCLUSION

The progressive-prosecutor movement is still too new to evaluate its success, regardless of the metric. On its own terms, however, it is a reform project rather than a radical one. Its goals are not as ambitious as dismantling the master’s house. This could reflect the values of people who run for office on a progressive-prosecutor platform, but it could also reflect their realistic assessment of the limits of law. The experiences of two Black women progressive prosecutors reveal the “legal” ways that resistance lawyering can be defeated. Both prosecutors were transparent about their goals, which may have made their actions easier to challenge. To that extent, their experience may demonstrate the benefits of subversive lawyering over resistance lawyering. But their stories mainly reveal that Audre Lorde was right: the master’s tools will never dismantle the master’s house.

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103. See Carol D. Leonnig & Rosalind S. Helderman, *Another Prominent Lawyer Declines Offer to Represent Trump in Russia Investigation*, WASH. POST (Mar. 26, 2018), [https://www.washingtonpost.com/politics/another-prominent-attorney-declines-offer-to-represent-trump-in-russia-investigation/2018/03/26/568ddce6-3142-11e8-8abc-22a366b72f2d\\_story.html](https://www.washingtonpost.com/politics/another-prominent-attorney-declines-offer-to-represent-trump-in-russia-investigation/2018/03/26/568ddce6-3142-11e8-8abc-22a366b72f2d_story.html) [<https://perma.cc/CEE2-5MPF>].

104. Julia Jacobs & Mark Guarino, *Key Moments as Jussie Smollett Is Found Guilty in Fake Hate Crime Case*, N.Y. TIMES (Dec. 9, 2021), <https://www.nytimes.com/live/2021/12/09/arts/jussie-smollett-trial-verdict#jussie-smollett-is-found-guilty-of-filing-a-false-police-report-in-a-fake-hate-crime-case> [<https://perma.cc/8LJ2-E5H4>].

105. See *id.*