

# Still Against Prosecutors

## I. Bennett Capers\*

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When I was a prosecutor, I relished closing arguments, especially standing in front of the jury to deliver my rebuttal to defense attorney summations—plural since many of my trials involved multiple co-defendants and hence multiple defense summations.

When I tell my students this, they assume I loved rebuttals for the intellectual one-upmanship. And they’re right to an extent. Closing arguments were like a jousting match between the defense lawyers and me, but with *logos* and *pathos* instead of swords. Or, to keep it real, it was like playing the dozens.

The truth is I equally loved the rebuttals for the theatrics. “Does the Government wish for a brief recess before commencing its rebuttal?” the judge would routinely ask. Other prosecutors in my office might treat this invitation as a gift: a welcomed breather to organize their thoughts. I was different. Before the judge had even finished the invitation, I was usually on my feet, striding toward the jury box, convinced that my display of confidence and readiness would signal to the jury how overwhelming the evidence was, and how quick their deliberations should be. Time to gather my thoughts? What for when the

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evidence was on my side? Or rather, on *our* side, since part of what I was good at was convincing the jurors *we* were on the same side *together*. *We* stood on one side of the “v.” while the defendants and their attorneys stood on the other. During their summations, one defense attorney may have tried to poke holes in the wall of evidence. Another defense lawyer may have tried to distract the jury by suggesting other possibilities. In my rebuttal, I’d dismantle a handful of defense arguments and dismiss the others with a wave of the hand, as if they were so trivial the jury could just ignore them. I’d redirect the jury’s attention to the incriminating evidence and emphasize the bulk of the proof was incontrovertible. The evidence still stood strong, I’d argue. Just as I was standing strong before the jury. I’d walk the length of the jury box, making eye contact with each juror, calmly persuading them point by point by point as if I were a friend urging them to vote me victor in this game. Or rather vote themselves victors since again we were on the same side. I, as an Assistant United States Attorney, representing the United States of America, represented them. Only near the end of my rebuttal would I turn from the jury box to point at the defendants, and then only after I’d primed the jurors to look at the defendants as already guilty. And then I’d fall back on my standard conclusion: “In closing, I ask you to do three things. Consider the evidence, keep your eyes on the ball, and use your common sense. If you do those three things, you will find the defendants guilty.”

And the jury almost invariably did, giving me another notch in my belt. Another victory.

I mention this because in a sense I am doing something similar here, offering a rebuttal to the arguments of my interlocutors. But I also mention this because it goes to one of the reasons we should abandon public prosecutors, at least in their current incarnation. There is something terribly unfair about the way we frame criminal cases as the People, or the State, or the Government, against the defendant.<sup>1</sup> Framing it this way, the deck is already stacked. We may tell the jurors the Government has the burden of proof, and that burden never shifts to the defendant, but of course this is undercut by the other messages we send: that the prosecutor represents them, that the prosecutor is a stand in for the people.<sup>2</sup> This message is so embedded, if rarely said out loud, that it is little wonder the vast majority of defendants who dare go to trial are convicted. Similarly, given that prosecutors negotiate pleas from defendants in the shadow of trial, it is little wonder that the government easily strong-arms so many defendants into pleading

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1. For more on this argument, see Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 250-55 (2019) (exploring and challenging the assumption that prosecutors represent the people).

2. Similarly, we may say that defendants are being tried by a jury of their peers, but given how we disqualify jurors, it would be more accurate to say the defendant is tried by a jury of the prosecutor’s peers.

guilty. Indeed, the Court has given such strong-arming its blessing in cases such as *Brady v. United States*<sup>3</sup> and *Bordenkircher v. Hayes*.<sup>4</sup>

Beyond this, this frame conveniently erases victims. Or if not entirely erases them, reduces them to bit players, at least in cases involving actual victims.<sup>5</sup> In the trial narrative, the victim may be the catalyst for the plot, but more often than not, their lines are few and already scripted. The victim is at most a witness, but nothing more.

Which connects to the third reason I began this essay by invoking the rebuttals I made as a prosecutor. Shamefully, that reason has everything to do with me. If the defendant was the villain of the cases I tried—whether it was for insider trading or racketeering; mail fraud or witness retaliation; theft of honest services or drug conspiracy—then the person cast as the hero was always the prosecutor, i.e., me. My colleagues and I might have professed the opposite, but the truth is trials were too often about self-aggrandizement; too many of us already had one eye on the door, thinking how these trials would burnish our resumes and the careers we would have after. It was rare that we thought of the actual victims in our cases, or at least in any compassionate way. They were witnesses, and a means to an end. But rarely anything else. Even when I tried violent gang cases and had to relocate witnesses out of state, my moving them was less about concern for their well-being than about making sure they were available and willing to testify at trial.

To be clear, I might not have put these things so crudely when I was in the thick of things as a prosecutor. But when I became an academic and began to reflect on my time as a prosecutor and the monopolistic power we wielded, and how little agency we permitted victims, this is precisely what I came to think. And these thoughts only got stronger when I realized how recent public prosecutors are, and how we once did things differently, and how many countries still do. And it was these thoughts which of course led to my writing “Against Prosecutors.”<sup>6</sup>

Now, in this symposium issue, seven scholars have written their own essays, each responding to my article. Before I put the gloves on, or don my fencing mask, or whatever metaphor you prefer, I have to say how humbled and honored I am to have such brilliant scholars engage with my work. It is something I suspect every scholar aspires to. To each of them, I offer a thank you, and I offer a special thanks to Ben Levin and Carolyn Ramsey for proposing this symposium and then organizing it. There is one more thing to say before I

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3. 397 U.S. 742 (1970) (rejecting the claim that a plea to lesser charges to avoid the threat of additional punishment, even the death penalty, renders the plea involuntary).

4. 434 U.S. 357, 364-65 (1978) (defendant’s rights not violated when prosecutor made good on threat to seek life imprisonment if defendant went to trial).

5. There’s perhaps an even more problematic bit of sleight of hand taking place in cases involving victimless crime, like drug possession. Here, the frame is that, through a sleight of hand, there still is a victim, but the victim is the state.

6. I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1562 (2020).

begin this rebuttal, and that relates to the comparison I made earlier to delivering rebuttals when I was a prosecutor. One of the best things about hearing opposing arguments and then having the opportunity to respond is that it permitted me to sharpen, clarify, and where appropriate modify my own thinking. The same is true here, and for that too I am grateful.

Now, on to my rebuttal. For the sake of ease—it’s seven against one—I’ve grouped my responses under the following parts. In Part I, “The Agreement,” I show where my interlocutors and I agree. In Part II, “The Generalists,” I respond to the scholars who are critical of my proposal in general. In Part III, “Drugs, Domestic Violence, and Sexual Assault,” I respond to the scholars who focus on how particular types of cases would fare under my proposal. Finally, in Part IV, “The Abolitionist,” I respond to the abolitionist in the group.

## I.

### THE AGREEMENT

Continuing the analogy to a rebuttal, I’ll begin with where my interlocutors and I agree: The criminal system is broken. Consider just a sampling of the common ground among us. As Angela Davis observes in her essay, the “United States has the highest incarceration rate in the world, and the criminal system is rife with unwarranted racial disparities.”<sup>7</sup> Davis adds that “prosecutors play a substantial role in perpetuating these problems” and “often ignore the needs of victims and treat them unfairly.”<sup>8</sup> From Jeff Bellin: “[W]e should dramatically shrink the footprint of American criminal law.”<sup>9</sup> Ben Levin similarly agrees that “criminal legal institutions come to reflect the will of the powerful (despite the illusion of democratic accountability) at the expense of the powerless,”<sup>10</sup> and agrees that the state’s inserting itself as the victim in cases “allows for almost limitless criminalization,” and has “helped spawn an enormous number of criminal offenses and an over-reliance on ‘governing through crime.’”<sup>11</sup> Carolyn Ramsey, whose response focuses on domestic violence prosecutions, “concur[s] . . . that modern approaches to prosecuting the perpetrators of intimate-partner assault and homicide are unsound,” and that the “assumption that the state knows best actually leads to the erasure of the victim.”<sup>12</sup> Roger Fairfax too seems to be in agreement about the many problems that bedevil the criminal system, and agrees that my proposal—abolishing the state’s monopoly on prosecution—would have

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7. Angela Davis, *The Perils of Private Prosecution*, 13 CALIF. L. REV. ONLINE 7, 7-8 (2022).

8. *Id.* at 7.

9. Jeffrey Bellin, *A World Without Prosecutors*, 13 CALIF. L. REV. ONLINE 1, 1 (2022).

10. Benjamin Levin, *Victims’ Rights Revisited*, 13 CALIF. L. REV. ONLINE 30, 38 (2022).

11. *Id.* at 8.

12. Carolyn Ramsey, *Against Domestic Violence: Public and Private Prosecutions of Batterers*, 13 CALIF. L. REV. ONLINE 45, 45.

many advantages.<sup>13</sup> He is just concerned that the proposal would also come with “serious costs.”<sup>14</sup> Ditto for Corey Rayburn Yung.<sup>15</sup>

And on this latter point—about the collateral consequences and costs—my interlocutors are again mostly in agreement, albeit with each other and not me.

## II.

### THE GENERALISTS

The interlocutors that I’m calling the generalists—Jenia Turner, Roger Fairfax, and Angela Davis—raise concerns about how my proposal would impact the criminal system in general, and offer their own interventions as perhaps less risky alternatives. *My proposal has risks*, they seem to say. *So how about this instead?* That said, they each bring their own expertise to the issue.

Jenia Turner, for example, brings her comparative law expertise to argue that “giving victims a central role in criminal case decision making is not likely to be the most promising way to ensure fair and just prosecutions in the U.S. context.”<sup>16</sup> After reviewing how several European countries handle victim participation—in general, victim participation there is far stronger, at least on paper—she raises multiple concerns, including some of which point in different directions. She notes that giving victims prosecutorial power may result in harsher outcomes for defendants;<sup>17</sup> that empowering victims may result in too few prosecutions, and thus “conflict with the public interest in defining and enforcing criminal laws”;<sup>18</sup> and that the public interest in enforcing criminal laws “is better assessed by democratically elected, or administratively accountable prosecutors, as well as grand juries who represent the community.”<sup>19</sup> As an alternative to my proposal, Turner argues for something far more modest: that we give victims the right to challenge prosecutorial declination decisions.<sup>20</sup> This, she argues, will “expand victims’ rights in a way that benefits society without undermining defendant’s constitutional rights.”<sup>21</sup>

Turner’s examination of how victim decision-making has fared in several European counties is illuminating, though of course not a perfect fit since these are mostly civil-law counties. But my disagreement with Turner goes back to the gravity of the problem, and hence the need for a bigger solution. We have a criminal *injustice* problem, where we over-incarcerate and over-criminalize so much—including for victimless crimes—that one in three Americans has an

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13. Roger Fairfax, *For Grand Juries*, 13 CALIF. L. REV. ONLINE 20, 20 (2022).

14. *Id.*

15. Corey Rayburn Yung, *Private Prosecution of Rape*, 13 CALIF. L. REV. ONLINE 86 (2022).

16. Jenia Turner, *Victims as a Check on Prosecutors, a Comparative Perspective*, 13 CALIF. L. REV. ONLINE 72, 73 (2022).

17. *Id.* at 81.

18. *Id.*

19. *Id.*

20. *Id.* at 73.

21. *Id.* at 73.

arrest record.<sup>22</sup> And this system can continue in part because we've given public prosecutors a monopoly to prosecute as much as they want with little input from the communities they purportedly serve. Given this state of affairs, it is hard to imagine that merely giving victims the right to challenge a prosecutor's decision not to prosecute would do much to transform the system. What is needed is radical change, not tinkering with the machinery of this criminal system.<sup>23</sup>

For his part, Roger Fairfax is sympathetic to my project, but also offers a more modest alternative. He maintains that we could reduce the pathologies of our criminal system, and reap the benefits I limn in my proposal, through a much more limited change: We should restore the power of grand juries to function as a check on prosecutors, to "provide valuable community perspective" on which crimes are worthy of prosecution, to "be a locus of mercy," and more. In short, Fairfax argues that we let grand juries be grand juries.

Part of my response to Fairfax is that we can do both: empower victims and empower grand juries; the two are not mutually exclusive. But my response also returns me to why empowering ourselves and eliminating the monopoly public prosecutors enjoy is so important. Right now, public prosecutors control the grand jury system. Public prosecutors decide which cases to bring before the grand jury, and which witnesses to call. The prosecutor does the questioning, tells the jurors what the law is, and tells the jurors what charges are appropriate. There is a reason it is often said that a prosecutor could indict a ham sandwich, and that reason has everything to do with the power public prosecutors have already taken away from grand juries. As long as public prosecutors enjoy monopoly power, it is hard to imagine them ceding any power to the grand jury. That is why my proposal insists on reducing the power of prosecutors.

But what if we simply insured that all prosecutors are "committed to a fair and just criminal legal system for all"?<sup>24</sup> Wouldn't that "alleviate the ills of the current system more than moving to a system of private prosecution"?<sup>25</sup> These are the questions Angela Davis asks in her essay. And she answers them in the affirmative. Davis *is* sympathetic to my project's goals, which she describes as "laudable,"<sup>26</sup> and to the problems I'm hoping to address. Davis, who literally wrote the book on race and the power of prosecutors to discriminate,<sup>27</sup> acknowledges too that the status quo suffers from racial disparities in prosecution and sentencing, largely flowing from prosecutors' implicit biases and unfettered

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22. *Barriers to Work: People with Criminal Records*, NAT'L CONF. OF STATE LEGISLATURES (June 17, 2018).

23. In a sense, I'm going a step further than Justice Blackmun, who famously refused to continue to "tinker with the machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

24. Davis, *supra* note 7, at 8.

25. *Id.*

26. *Id.* at 7.

27. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007).

discretion. As she points out, even the consideration of “legitimate factors”—like how well-spoken and well-dressed the victim is—can create “unwarranted class and race disparities.”<sup>28</sup>

In the end, though, Davis fears that rather than reducing these disparities, a turn to private prosecutions would exacerbate them.<sup>29</sup> For starters, she fears that a system “in which victims decide whether and how they want to prosecute would have problems similar to those that existed in the private prosecution system during the colonial period,”<sup>30</sup> including the inequality that benefited those who could afford to prosecute their own cases and harmed those who could not.<sup>31</sup> She also notes that during the colonial period, many victims did not have the education to handle cases themselves, and thus couldn’t prosecute cases.<sup>32</sup> These are valid concerns, which is why I have tried to emphasize that I am not suggesting a return to purely private prosecutions.<sup>33</sup> (“The goal is not to pay obeisance or offer blind fealty to our forbears by suggesting we adopt whole cloth their system of private prosecution.”)<sup>34</sup> For example, I suggested that “instead of using the public fisc to solely fund public prosecutions, we use[] that fisc to also fund private prosecutions.”<sup>35</sup> I’m also imagining all victims having the access to assistance from prosecutor-advocates provided by the state, and being able to seek assistance from others.<sup>36</sup> Beyond these possible inequities, Davis also worries about the harm that may redound to defendants and communities, especially since permitting victims to decide how and whether a case “will be prosecuted will result in similarly-situated defendants being treated differently—an outcome that is unfair to the defendant and the entire community.”<sup>37</sup> But the reality is this is true of the status quo. There is little reason to think my proposal would make things worse.

Which brings me to Davis’s main argument, which seems to be that rather than focusing on radical change, we should work on improving the status quo.

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28. Davis, *supra* note 7, at 10.

29. *Id.*

30. *Id.* at 11.

31. *Id.* at 12. Of course, as legal historian Carolyn Ramsey notes in her contribution, scholars differ on whether poor people were disadvantaged by the private prosecution system. She writes, “[T]he most positive view holds that the ability of ordinary folk to bring charges and exercise discretion over case outcomes—often reading reaching settlement without a formal verdict—ensured that a wide range of social groups could use the criminal law to protect their interests.” Ramsey, *supra* note 12 at 51.

32. Davis, *supra* note 7, at 11. My own experience as a prosecutor suggests that, out of professional interest, we exaggerate the knowledge and skills necessary to prosecute cases. As Maybell Romero adds in her sobering article “Ruined,” in many respects, prosecuting cases “is not challenging at all. . . . Being a prosecutor, depending on how your approach it, is actually pretty easy.” Maybell Romero, *Ruined*, — GEO. L.J. — (forthcoming, 2023), available [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4044826](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044826).

33. Capers, *supra* note 6, at 1586.

34. *Id.* at 1573.

35. *Id.* at 1586-87.

36. *Id.* at 1588-89.

37. Davis, *supra* note 7, at 14.

She writes, “The current system of public prosecution is not perfect, but the flaws in the system are the result of prosecutors who abuse their power and discretion, not the system itself. In theory, the current system with elected prosecutors should produce just results.”<sup>38</sup> For Davis, “A system with prosecutors committed to a fair and just criminal system for all will alleviate the ills of the current system more than moving to a system of private prosecution.”<sup>39</sup> Davis especially sees promise in the movement to elect “progressive” prosecutors, some of whom are “declining the prosecution of many low-level offenses, diverting cases out of the system, and working to achieve justice for all—victims, defendants, and their communities.”<sup>40</sup>

Davis may be right that progressive prosecutors, “in theory,” could produce just results. One problem is that, using Davis’s own numbers, for every progressive chief prosecutor, there are twenty-three chief prosecutors who are not progressive.<sup>41</sup> But the bigger problem is this: Davis’ theory about progressive prosecutors has not borne out, or at least not in a way that amounts to anything other than a “reformist reform.”<sup>42</sup> There is a reason why, with respect to public prosecutors, Paul Butler rhetorically asked “Should Good People Be Prosecutors,” a question he answered in the negative.<sup>43</sup> Because the system itself is predicated on carceral logics, even a progressive prosecutor who sets out to do “justice” is likely to fail.<sup>44</sup> But my more fundamental problem goes back to my main argument against public prosecutors. If I am robbed, does it really make sense to take away my agency by saying I have no power to decide whether my robber should be prosecuted or not? If I want my property returned, and an apology, shouldn’t that be my choice? Are we really satisfied with a system that strips me of that power to decide and instead gives it to a “democratically”<sup>45</sup> elected prosecutor? I am not.

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38. *Id.*

39. *Id.* at 8.

40. *Id.* at 15.

41. *Id.* at 18.

42. See, e.g., Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 171 (2022).

43. PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 101 (2009).

44. As Davis concedes, progressive prosecutors make up a tiny minority of elected prosecutors. “There are over 2,300 chief prosecutors in the United States, and less than 100 are part of the movement.” She adds that these prosecutors have faced backlash, included from other actors in the system. Davis, *supra* note 7, at 18-19.

45. Davis also falls back on democratic elections to hold prosecutors accountable, but can we even call those elections democratic when there is often a mismatch between the electoral power of the communities most policed, and the power of the electorate? For that matter, can we call those elections democratic when the people who have faced prosecution are disenfranchised? Isn’t the deck already stacked at that point?



## III.

## DRUGS, DOMESTIC VIOLENCE, AND SEXUAL ASSAULT

Let's turn to the specialists, the title I am giving to the scholars who chose to engage with my proposal by focusing on how it would play out with respect to particular types of crime. I begin with Jeff Bellin, who focuses on my proposal as it relates to drug prosecutions and mass incarceration, and then turn to Carolyn Ramsey, who focuses on domestic violence. I conclude by discussing Corey Rayburn Yung's response, which in truth probably deserves its own part. Rather than arguing that my proposal is wrong, Yung argues that my proposal might actually accomplish what it sets out to do, and offers some useful suggestions for implementation.

A. *Drugs*

In his essay, Jeff Bellin concedes that he is sympathetic to my argument, which he describes as “characteristically smart and provocative, forcing us to think deeply about the failings of a complex system.”<sup>46</sup> But he disagrees with my casting of public prosecutors as a problem, or more specifically, the source of the problem when it comes to mass incarceration, overcriminalization, and the War on Drugs. Previewing his forthcoming book *Mass Incarceration Nation*, Bellin argues that instead of laying mass incarceration at the feet of public prosecutors, we should lay blame on “all the actors involved: legislators, police, prosecutors, judges, parole boards, and so on . . . . [I]n a system with numerous on and off ramps, it is misleading to highlight one ramp while ignoring the others. Keeping people moving down the prison road requires the cooperation of all the actors.” Instead of focusing on prosecutors, Bellin suggests we should work to “reverse widespread public (and legislative) perceptions that incarceration is a pragmatic response to crime.”

I don't disagree with Bellin that we need to change public (and legislative) perceptions about mass incarceration. I just think my proposal—disrupting the monopoly of public prosecutors and shifting power to “the people”—can accomplish that goal. In fact, Bellin acknowledges this in his next sentence: “Capers' proposal, by connecting the public more closely to individual prosecutions, could help to achieve that.”<sup>47</sup> As to whether prosecutors, or all of the actors involved, should be blamed for mass incarceration, I leave that for Bellin to hash out with other scholars, such as my colleague John Pfaff.<sup>48</sup> I do so because, in a way, reducing mass incarceration is my second goal, but not my primary goal. My primary goal is about returning power to the people. I do hope that my proposal will result in far fewer prosecutions and the complete non-prosecution of victimless “crimes,” thus “quite possibly, reducing mass

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46. Bellin, *supra* note 9, at 5.

47. *Id.*

48. See, e.g., JOHN F. PFAFF, LOCKED IN 72 (2017).

incarceration.”<sup>49</sup> But to my mind this is a collateral benefit to the greater project, which is reconfiguring the balance of power between the state and all of us.

### B. Domestic Violence

A legal historian, Carolyn Ramsey uses her response to focus on domestic violence, and how the history of domestic violence prosecutions, both public and private, reveals the limitations of my proposal. Ramsey concedes that in some respects, private prosecutions permitted victims, including domestic violence victims, a measure of agency. But for her, once one steps back to look at the full picture, it is evident this agency was still limited. As she puts it, the history of private prosecutions of domestic violence cases reveals “a central fact that the mechanics of prosecution obscure: the social context of domestic violence constrains victims’ choices.”<sup>50</sup> Indeed, per Ramsey, putting “the burden to prosecute on domestic violence victims, or even allowing them to veto public prosecutorial decisions, individualizes the harm they experience in a way that allows society and the state to avoid responsibility for devising structural remedies.”<sup>51</sup> She adds:

[T]he relief that battered women accepted—an interruption of the violence, combined with a reprimand to the abusive man and an order that he provide a peace bond, pay a fine, or serve a brief jail term—was satisfactory only within these survivors’ socially-constrained circumstances. Historically, women lacked the ability to obtain well-paying jobs and affordable childcare; they could divorce only at considerable expense for limited reasons and faced social stigma for doing so. Safely leaving a formal marriage or common-law relationship and providing for their children on their own was very difficult.<sup>52</sup>

For Ramsey, we “must be wary of claims that history demonstrates the success of *either* public or private prosecutions in handling gender-based violence.”<sup>53</sup> Rather, “before we ask public prosecutors (especially feminist Deputy District Attorneys who genuinely want to end gender-based violence) to step away, we need to make sure there is an adequate, fully-funded support system to step in.”<sup>54</sup> And “we need to address the pressures that still shape domestic victims’ reluctance to prosecute” as a first step “before we advocate ‘returning decision-making authority to victims of crime.’”<sup>55</sup>

Ramsey is right of course about the constraints victims of domestic violence face, whether in the form of economic constraints or constraints that stem from ingrained societal expectations about the “duty” of women. Where we

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49. Capers, *supra* note 6, at 1609.

50. Ramsey, *supra* note 12, at 48.

51. *Id.*

52. *Id.* at 53.

53. *Id.* at 55-56.

54. *Id.* at 59.

55. *Id.* at 59 (quoting Capers, *supra* note 6, at 1593).

disagree is in what to do about it. For me, restoring agency to victims of domestic abuse and empowering them to chart their own course still remains better than the status quo, where we disempower them, deprive them of decision-making authority, even hold them in contempt when they refuse to cooperate with the state,<sup>56</sup> even impose de facto divorce when we think we know what's best for them,<sup>57</sup> and do nothing to remedy the structural problems or lack of a safety net or neoliberalism that made their victimization possible in the first place.

I do not mean to suggest that Ramsey is content with the status quo. Neither one of us is.<sup>58</sup> But whereas I embrace radical change that at least tries to empower victims, Ramsey believes “caution [is] imperative—in both theory and practice—when designing a more victim-centric criminal legal system.”<sup>59</sup> Rather than “radically curtailing” the monopoly prosecutors have in charging and prosecuting cases,<sup>60</sup> Ramsey argues for a far more modest reform: restorative justice “*within* the criminal legal system.”<sup>61</sup>

Ramsey admits she is a “reluctant convert” to restorative justice.<sup>62</sup> But given the “manifest shortcomings of criminal justice approaches to intimate-partner violence,”<sup>63</sup> Ramsey sees appeal in a restorative justice process that operates in tandem with the criminal legal system, such that the latter “can [also] continue to play a backup role to ensure compliance.”<sup>64</sup> For example, she argues that processes “such as victim-offender dialogues and group conferencing can play a role in pre- or post-conviction diversion.”<sup>65</sup> She then provides an overview of several programs she admires. One such program is the RESTORE program, a federally funded pre-conviction diversion program out of Pima County, Arizona, which was successful along several metrics, including from the point of view of victims.<sup>66</sup> Another is the “Circles of Peace” program for defendants who have pled guilty, but participate in a therapeutic batterer intervention program to receive leniency at sentencing.<sup>67</sup> Both programs involve substantial state involvement.

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56. Leigh Goodmark, *The Impact of Prosecutorial Misconduct, Overreach, and Misuse of Discretion on Gender Violence Victims*, 123 Dick. L. Rev. 627, 638-40 (2019) (discussing the practice of using material witness warrants and incarceration to force domestic violence victims to “cooperate”).

57. Jeannie Suk, *Criminal Law Comes Home*, 116 Yale L.J. 2, 53, 56-58 (2006) (describing a panoply of prosecutorial practices that deliberately override the preferences of domestic violence victims, including the imposition of protective orders that function as “de facto divorce”).

58. I’ve known Ramsey for over a decade, so I feel comfortable is saying neither one of us is comfortable with the status quo.

59. *Id.* at 48.

60. *Id.* at 61.

61. *Id.*

62. *Id.* at 62.

63. *Id.* at 63.

64. *Id.* at 61.

65. *Id.* at 63.

66. *Id.* at 64-65

67. *Id.* at 67.

Ramsey makes a persuasive argument for restorative justice, and though I may quibble about the criminal system functioning as a hammer “to ensure offender accountability,” that’s not my main issue. Nor is my main issue the success of these programs, which I will assume were successful notwithstanding the fact that RESTORE was discontinued after just four years.<sup>68</sup> My main issue is that her vision of restorative justice can work in tandem with my proposal to give more agency to victims. A victim who wants restorative justice can receive restorative justice. But I want to give victims more options, including the option to not involve the state at all, an option that Ramsey seems to find troubling.<sup>69</sup> For me, restorative justice does some work, but not nearly enough. But there is another sense in which Ramsey’s proposal falls short, at least with respect to the radical change I seek. If the real issue with subordination along lines of gender is structural—and I am convinced that it is—then “sentencing circles” that “address substance abuse, mental illness, past trauma” and other factors that contribute to intimate-partner abuse still won’t address the underlying structures that constrain victims’ choices. The goal of the programs Ramsey discusses is to change the batterer, to reduce recidivism. I laud that goal. I share that goal. But I think what Ramsey and I also care about is addressing the structures that draw women to such relationships in the first place and constrain their ability to exit those relationships. If a victim is poor, if a victim has no safety net, if the victim relies on her partner for financial support, if the victim is the primary caretaker of children, then reforming the abuser may take care of the abuse. But it does nothing to disrupt the underlying problems of poverty, dependency, lack of safety net, etc. Indeed, if we want to be more radical, it does nothing to unsettle gender roles, or for that matter what Adrienne Rich terms “compulsory heterosexuality.”<sup>70</sup> I am not suggesting my proposal addresses these underlying problems any better, and I don’t make that claim. But at least my proposal gives agency to victims and allows them to chart their own course. I will say something else. Maybe by empowering victims with respect to addressing their abuse, we are also allowing them to see that they have agency more broadly. Not just with respect to their relationship with their partner, but also in their lives more generally.

### C. *Sexual Assault*

Although I have framed this entire essay as a rebuttal to opposing arguments, that analogy falls short when it comes to Corey Rayburn Yung’s response, which of all the responses seems most sympathetic to my argument, and indeed so sympathetic that I’d like to claim him as on “my side.” As he puts it, my argument is “persuasive in many cases.”<sup>71</sup> That said, he does wonder about

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68. *Id.* at 64.

69. *Id.* at 46-47.

70. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).

71. Yung, *supra* note 15, at 87.

whether my proposal can truly address the “under-prosecution of nonconsensual sex crimes,”<sup>72</sup> the focus of his scholarship.<sup>73</sup> Quoting Stephen Schulhofer, one of the preeminent rape law scholars, Yung notes that “Social attitudes are tenacious, and they can easily nullify the theories and doctrines found in the law books. The story of failed [rape law] reforms is in part a story about the overriding importance of culture, about the seeming irrelevance of the law.”<sup>74</sup> Specifically, he makes an argument that recalls Bellin’s: “So many agents in the criminal justice system, including, victims, police, prosecutors, judges, and jurors, are in a position to hinder the implementation of a transition to private prosecutions.” He notes the role police play in screening cases, one reason why so many rape complaints are closed as “unfounded.” He notes the role judges and jurors play in not crediting victims, or otherwise finding ways to favor defendants. He notes the very real risk of trauma and retaliation rape victims face, issues that might be exacerbated if victims were given decision-making authority in such cases. Turner makes this argument as well, and they are both right. But Yung uses those problems as an opportunity to propose solutions and increase the efficacy of private prosecutions. For example, he suggests fashioning private prosecutions so that they “can bypass recalcitrant police” and be “trauma-sensitive.”<sup>75</sup> I would like to think of these as friendly amendments to my proposal. Consider them accepted.

#### IV.

##### THE ABOLITIONIST

Finally, there is the abolitionist argument put forward by Ben Levin in his insightful essay. As I mentioned earlier, Ben Levin is sympathetic to my proposal, and in fact is incredibly generous. He describes “Against Prosecutors” as “hit[ting] a nerve, challenging unquestioned assumptions about how the world works [and] push[ing] us to think differently and to question features of the criminal system that we might have taken for granted.”<sup>76</sup> In the end, though, he worries “that the victim-driven prosecution” I envision “risks re-entrenching punitive impulses and legitimating institutions of punishment.”<sup>77</sup> While his argument is multi-faceted, at bottom his concern is my proposal may very well reduce the pathologies of public prosecutions, but only to shift those very same pathologies to private prosecutions. Rather than eliminating the power imbalance defendants face, my proposal would merely “shift the site of power” from public

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72. *Id.*

73. *See, e.g.,* Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205 (2017); Corey Rayburn Yung, *How to Lie with Rape Statistics: America’s Hidden Rape Crisis*, 99 IOWA L. REV. 1157 (2014).

74. Yung, *supra* note 15 at 87 (quoting STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE LAW 17 (1998)).

75. Yung, *supra* note 15, at 94.

76. Levin, *supra* note 10, at 30.

77. *Id.* at 30-31.

prosecutors to victims.<sup>78</sup> He adds, “For those of us who are concerned about institutions of punishment and deploying institutional violence against people deemed guilty or dangerous,” my article “is answering the wrong question.”<sup>79</sup> He concludes, my “(re)turn to victims’ rights has some promise but should be cause for concern for abolitionists or others opposed to institutions of criminal punishment.”<sup>80</sup>

In a sense, I share many of Levin’s concerns. More precisely, while I hope shifting power to all of us (my primary goal) will reduce incarceration (my secondary goal)—through an elimination of most victimless “crimes,” and through a better sense of restorative justice—I realize it is an empirical question. It might. Or it might not. My ambition is that my proposal is at least a step towards abolition, and one that passes the test of being a non-reformist reform capable of enabling true radical change in the criminal system. This too is an empirical question. But we will only know the answer if we try. There is nothing in my proposal that is irreversible. Nor is there anything that requires every jurisdiction to adopt my proposal in total and all at once. Just as the turn to public prosecutors happened gradually, the turn from public prosecutors can happen gradually. And just as the turn to public prosecution was an experiment, the return to private prosecution can be an experiment. What I am certain of is that doing nothing is to accept the status quo, which is unsustainable. Scratch that. The truth is it is very sustainable, it is self-sustaining, and that is the problem.

#### CONCLUSION

The ambition of my “Against Prosecutors” article was to argue for a different way. It was to suggest that “in this criminal justice moment, we open ourselves up to the possibility of real change. Radical change.”<sup>81</sup> My ambition for a different world hasn’t changed. It has only strengthened.

So, in the fashion of a true rebuttal, I will leave things in the hands of you, the jury, to decide. Do we keep the status quo in which prosecutors wield a monopoly, choosing which cases are worthy of prosecution and which are not, which victims will make good witnesses and which will not, and so on and so on? Or will we find a way to return some power to the people, so that a victim can have decision-making authority to determine what will make her whole? Consider the evidence, keep your eyes on the ball, and use your common sense. And you decide.

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78. *Id.* at 34.

79. *Id.* at 43.

80. *Id.* at 31.

81. Capers, *supra* note 6, at 1609.