

Victims’ Rights Revisited

Benjamin Levin*

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INTRODUCTION

In the summer of 2019, I first heard Bennett Capers describe an early draft of *Against Prosecutors*. We were at a national conference of criminal law professors, and Capers was presenting to a crowded room. The draft that would turn into Capers’s 2020 *Cornell Law Review* article posed a novel question: given prosecutors’ role in driving mass incarceration, would we be better off with a system of private, victim-led prosecution?¹ Capers answered yes. Public prosecutors don’t serve the interests of victims, he argued, and empowering victims might have the counterintuitive effect of creating a more lenient system. The packed house for the presentation was no surprise—Capers’s work is always a big draw, and the title was eye-catching, to say the least. What was a bit surprising to me was the reaction. Capers succeeded in doing something that I thought impossible: he unified the audience, bringing together former prosecutors and former public defenders, liberals and conservatives, reformers

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1. See I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1563–65 (2020).

and abolitionists. As audience member after audience member commented, the refrain became apparent: Capers couldn't possibly be right.

That shared reaction helped me appreciate what makes *Against Prosecutors* such a valuable contribution—it hits a nerve, challenging unquestioned assumptions about how the world works. As I'll explain in this Essay, I disagree with Capers. But—like all Capers's work—*Against Prosecutors* pushes us to think differently and to question features of the criminal system that we might have taken for granted.² The unified opposition showed me that Capers had identified an area of unexamined consensus.

In this Essay, I argue that private prosecution won't solve what I see as the fundamental problems with the U.S. criminal system. I worry that the victim-driven prosecution that Capers envisions risks re-entrenching punitive impulses and legitimating institutions of punishment. And, rather than solving the problems of a society that sees punishment and justice as synonymous, privatization risks exacerbating many of the existing pathologies of U.S. political economy. The turn to a "private" model of "criminal justice" resembles other neoliberal governance projects, where core state functions are outsourced and where social problems are addressed at the individual level, rather than structurally.³

To be clear, my critiques of private prosecution aren't meant to suggest that public prosecution is a good, or perhaps even a better alternative. Indeed, I've argued elsewhere that the promise of so-called "progressive prosecutors" as an antidote to mass incarceration is largely illusory.⁴ But, I take *Against Prosecutors* as an invitation to ask whether a private, victim-driven approach to prosecution would be a step in the right direction.⁵ And, I conclude that it wouldn't be.

My response proceeds in two Parts. In Part I, I offer four critiques of Capers's proposal: (A) that shifting power to victims still involves shifting power to the carceral state and away from defendants; (B) that defining the class of victims will pose numerous problems; (C) that privatizing prosecution reinforces a troubling impulse to treat social problems at the individual level; and (D) broadly, that these critiques suggest that Capers has traded the pathologies of "public" law for the pathologies of "private" law. In Part II, I step back from the implementation of Capers's proposal to argue that the article reflects a new, left-

2. See *id.* at 1608 (arguing that "we should always 'ask the other question'" that might not be immediately apparent (quoting Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991))).

3. Cf. Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 112 (2001) (describing this dynamic in the context of private prisons).

4. See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1450 (2021).

5. I don't read Capers as suggesting that victim-driven prosecution is the answer to the violence and injustice of mass incarceration. Rather, I read *Against Prosecutors* as offering private prosecution as one method of beginning to address the inequities of the criminal apparatus.

leaning vision of victims' rights. I see *Against Prosecutors* as illustrating an impulse among many progressive and left commentators to prioritize victims' interests and to suggest that decarceration and victims' rights actually could go hand-in-hand. Ultimately, I argue that this (re)turn to victims' rights has some promise but should be cause for concern for abolitionists, criminal law minimalists, or others skeptical about institutions of criminal punishment.⁶

I.

THE LIMITS OF VICTIM-DRIVEN PROSECUTION

In this Part, I raise four concerns about privatizing prosecution. As a preliminary matter, Capers is careful to note that he isn't focused on questions of "implementation" in his article.⁷ And, I appreciate that move to focus on bigger picture questions. My goal, therefore, isn't to suggest that the failure to trace out the exact contours of prosecution in action dooms the project. Instead, I see these questions of application as reflecting fundamental problems with any system of private prosecution.

A. *Power Shifting, Uncertainty, and State Violence*

In recent work, Jocelyn Simonson has argued that the study of criminal law would benefit from a greater engagement with questions of political power.⁸ Specifically, Simonson has argued for an approach to criminal scholarship and policymaking that prioritizes "power-shifting"—the goal should be providing voice and power to marginalized communities.⁹ Capers's argument strikes me as an example of this move. He claims that the system as it exists has failed to advance the interests of marginalized victims.¹⁰ As Capers contends, "[a]t the same time that prosecutors have amassed power, actual victims have lost power."¹¹ By empowering victims to direct the prosecution of their own cases, Capers argues, the legal system would effectuate the sort of power shift that Simonson envisions.¹²

I am sympathetic to this goal, and I find prioritizing the redistribution of power to be admirable. At the same time, I remain skeptical at best that *any* system of prosecution could produce such a seismic shift in social and political

6. Cf. Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42 (2020) (distinguishing between abolitionism and minimalism).

7. Capers, *supra* note 1, at 1608.

8. See generally Jocelyn Simonson, *Police Reform through a Power Lens*, 130 YALE L. J. 778 (2021).

9. See *id.* at 787; see also Monica C. Bell, Katherine Beckett & Forrest Stuart, *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 U.C. IRVINE L. REV. 1291, 1326 (2021) ("[J]ust governance requires careful attention to (though not uncritical deference to) knowledge from 'below,' or expertise that emanates from lived experience.").

10. See Capers, *supra* note 1, at 1571.

11. *Id.*

12. See *id.* at 1583–1608.

power.¹³ No matter how it is conceived or designed, private prosecution would still rely on a host of state institutions for enforcement. If a victim chose to seek punishment, it would be the state, not the victim, who would do that punishing. Any private power to bring charges or seek punishment would operate against the backdrop of brutal, state-run jails and prisons. If a victim chose other forms of non-carceral state intervention (as Capers hopes would be the case in many situations),¹⁴ power would still rest in the hands of the state actors or state-sanctioned institutions that would do that intervening. And, as recent critical work has shown, such models of diversion or alternatives to punishment often are much less benign than they sound.¹⁵ That is, private prosecution might shift *some* power from prosecutors to victims. But, as Capers rightly notes, prosecutors aren't the only actors who hold power in the criminal system.¹⁶ Other actors (police, judges, probation officers, wardens, and so forth) would continue to hold power in a world of private prosecution.¹⁷ And, it's not clear that victims necessarily would hold more power than these other actors.

Even to the extent that Capers's proposal would shift some power to marginalized victims, it would still maintain inequalities and retain structures of marginalization or subordination. The power wielded by marginalized victims would have a target—it would be defendants. The shift to victim-driven prosecution would not undo structures of inequality for the simple reason that defendants, as Capers rightly notes, tend to come from the same race-class subordinated groups as victims.¹⁸ Even putting demographics aside, a system of state-sanctioned punishment that punishes or excludes a class of people (i.e., the defendants) wouldn't become more egalitarian or anti-authoritarian by changing

13. See Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429, 1494 (2021) (“[T]he turn to criminal law is shifting more power not just to the state, but to its punitive arm. . .”).

14. See Capers, *supra* note 1, at 1598–1603.

15. See, e.g., ERIN HATTON, *COERCED: WORK UNDER THREAT OF PUNISHMENT* (2020); MAYA SCHENWAR & VICTORIA LAW, *PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS* (2020); Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1628 (2021); Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 597 (2016); Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1333 (2016); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1591 (2012); Noah D. Zatz, *Better Than Jail: Social Policy in the Shadow of Racialized Mass Incarceration*, 1 J.L. & POL. ECON. 212, 214–15 (2021).

16. See Capers, *supra* note 1, at 1570–71; see also Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 187–203 (2019) (arguing that prosecutorial power is constrained by power held and exercised by police, legislators, and judges); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 856–57 (2018) (same).

17. Cf. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2087 (2017) (“[I]ncreasing the power of the state bears at most a spurious relationship to the outcome of concern, which is social inclusion across groups.”).

18. See Capers, *supra* note 1, at 1600.

the class of people who hold the reins of power.¹⁹ Rather than eliminating power imbalances, private prosecution would shift the site of power.²⁰ As I'll discuss in Part II, that persistent imbalance might not bother some proponents of power shifting. But this move to private prosecution would retain a system in which some people (here, defendants) are treated as deserving objects of punishment, subordination, or control.²¹

B. Defining the Class of "Victims"

Capers justifies a potential turn to private prosecution on distributive terms—it would lead to more power in the hands of victims from marginalized communities.²² That's one possible outcome, but one reason for my skepticism is the indeterminacy of victimhood as a legal concept.²³ Who is a victim? Answering this question is essential to Capers's argument and any theory of private prosecution. If the state is going to cede tremendous power to victims, then defining that class takes on the utmost significance. Further, if private prosecution is justified on distributive terms,²⁴ it becomes even more important to understand whom the state would recognize as a victim.

19. See Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2828 (2022); cf. Bernard E. Harcourt, *Matrioshka Dolls*, in TRACEY L. MEARES & DAN KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 81, 87 (Joshua Cohen & Joel Rogers eds., 1999) (suggesting that shifting control of policing to a marginalized community won't necessarily lead to equality because of "the risk that the majority (now of the minority community) won't bear the burdens of its laws but instead will infringe upon the liberty of a powerless or despised minority within it").

20. Cf. Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 5 (2010) ("[T]he distributive aspects of criminal law are quite visible, as discourse regarding closure and 'making victims whole' normatively endorses that criminal law should ensure a fair outcome by distributing pain to offenders and thereby satisfaction to victims.").

21. See Levin, *Criminal Justice Expertise*, *supra* note 19, at 2828.

22. See Capers, *supra* note 1, at 1571, 1583–1608.

23. See Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1222 n.112 (2022) (describing "the constructed nature of both crime and victimhood that is central to abolitionist analysis"); cf. MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 3 (2002) (discussing the relationship between victims, "victimless crimes," and the state).

24. By "distributive terms" I mean that the identity of the victims and defendants matter such that the policy is a success if it distributes right—*i.e.*, if the right sorts of victims are empowered or the right sorts of defendants are punished. This move—a "distributive" or "distributional" analysis—is a feature of certain critical approaches to law. See, e.g., Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir, *Preface* to GOVERNANCE FEMINISM: NOTES FROM THE FIELD, at xvii (2019); Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3213 (2015); Levin, *Wage Theft Criminalization*, *supra* note 13, at 1476–77. As Capers explains, this is a project of asking: "Who benefits from the status quo of allowing public prosecutors to decide what cases to pursue? Who benefits when the predominance of public prosecutors enables the state to create a swath of victimless crimes and claim itself as the victim? Who benefits? And who does not?" Capers, *supra* note 1, at 1608.

At first blush, the question of who is a victim may seem easy. But, I'm not so sure that it is.²⁵ There might be straightforward examples: if Dylan kills Vic or steals Vic's car, Vic certainly would be the victim. But does that mean that Vic is the only victim? If Vic is dead (as in the homicide example), are Vic's friends or family members also victims? If so, how should society go about limiting the class of victims? What about a relative who doesn't see Vic often, but who is devastated by the news? What about neighbors who didn't know Vic well but whose sense of safety is shattered by the crime? Such questions recur even if Vic is alive—others could experience secondary trauma or suffer harms as a result of criminal conduct that also victimized Vic. Even if Vic comes from one of the communities that Capers is particularly concerned about, other members of this broader class of victims might not (*e.g.*, Vic's car insurance company, a wealthy neighbor or landlord, etc.).

Some of these questions may sound familiar—they arise in tort law and the fraught case law on standing in private rights of action.²⁶ Judges, lawmakers, and commentators frequently struggle to define the class of injured parties entitled to bring a civil suit.²⁷ Such inquiries lead to a host of (largely unsatisfactory) line-drawing exercises: how proximate was the party? How were they affected by the unlawful conduct? Did they suffer enough harm?

That question of harm is particularly significant to defining who is a victim. Many criminal law theorists have argued that the state should only punish conduct that harms others.²⁸ This approach—the “harm principle”—offers an ostensible bright line between damaging conduct that is the proper province of criminal law and so-called victimless crimes.²⁹ The principle is intuitively appealing, and the bright line offers clarity. The problem, though, is that there is no such bright line and therefore no such clarity.³⁰

25. Cf. Anna Roberts, *Victims, Right?*, 42 *CARDOZO L. REV.* 1449, 1453 (2021) (arguing that “victim” as a label and victimhood as a concept are more complicated than they initially appear).

26. See, *e.g.*, Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 *VAND. L. REV.* 1, 4 (1998) (“A plaintiff cannot win unless the defendant’s conduct was a wrong relative to her, *i.e.*, unless her right was violated. I shall call this principle the ‘substantive standing’ rule and shall show that it is a fundamental feature of tort law.”); William B. Rubenstein, *On What A “Private Attorney General” Is—and Why It Matters*, 57 *VAND. L. REV.* 2129, 2157 (2004).

27. See, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); John C.P. Goldberg & Benjamin C. Zipursky, *Torts As Wrongs*, 88 *TEX. L. REV.* 917, 958 (2010); Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 *YALE L.J.* 350, 388 (2011) (collecting sources).

28. See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 *J. CRIM. L. & CRIMINOLOGY* 109, 114 (1999) (collecting sources).

29. See, *e.g.*, JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 10, 14, 26 187 (1984); H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 60–61, 75–77 (1963) Harcourt, *supra* note 28, at 129–34 (collecting sources).

30. See Kimberly Kessler Ferzan, *Prevention, Wrongdoing, and the Harm Principle’s Breaking Point*, 10 *OHIO ST. J. CRIM. L.* 685, 691 (2013).

Bernard Harcourt has argued compellingly that the harm principle “collapses” if we adopt a more capacious understanding of harm.³¹ That is, if harm isn’t only experienced by an individual who suffers violence, but also by a community or society at large, how do we figure out what constitutes harmless conduct?³² Viewed in this light, harm functionally becomes an indeterminate concept because so much conduct could lead to eventual harm, even if the relationship isn’t immediately apparent.³³ For example, many civil libertarians would identify possession of (consensual adult) pornography as the sort of conduct that shouldn’t be criminalized under the harm principle. But, many radical feminists and pornography critics argue that pornography possession does harm, either by fostering an abusive production market, or by entrenching violent or dangerous views about sex.³⁴ The point isn’t who’s right in their assessment; it’s that there isn’t a clear line between harmful and harmless conduct.

Capers cites to Harcourt and, indeed, critiques the way that expansive understandings of harm have led to the criminalization and prosecution of conduct that has no real victims.³⁵ I agree with Capers. But I also think this same critique applies just as forcefully to the concept of victimless crimes. That is, the sort of capacious understanding of harm that Harcourt describes might also lead to a capacious understanding of victimhood. To use the pornography example, if the possession of pornography is harmful, then that might mean that there is a large, and difficult-to-define class of victims. Capers certainly might counter that this conception of victimhood is flawed or over-broad and that these aren’t the victims he’s talking about.³⁶ But, in a model of private prosecution, the definition of victimhood becomes critically important. Rather than shifting power to victims (at least directly), this model also might shift power to the institutions and actors who define victimhood.³⁷ And such definitions might depend heavily on the values, assumptions, and ideology of the definers. So, a turn to “victims” might simply empower judges, lawyers, legislators, and interest groups who will undertake the project of defining who is a victim and who has the power to prosecute.

31. See generally Harcourt, *supra* note 28.

32. See *id.* at 182.

33. See *id.*

34. See, e.g., CATHARINE A. MACKINNON, ONLY WORDS 4 (1993); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

35. See Capers, *supra* note 1, at 1593.

36. Cf. Dubber, *supra* note 23, at 191 (noting that “[t]he victims’ rights movement had no use for derivative victims . . .”).

37. Cf. Levin, *Criminal Justice Expertise*, *supra* note 19, at 2829 (“[R]ather than shifting authority or power to the experiential expert, there’s a risk that power (at least some amount of it) will continue to rest with the arbiter of expertise.”).

C. Individualizing Harm and Responsibility

For private prosecution to make sense, we would need to accept an individualized theory of crime. That is, harm would need to be understood as the product on an individual defendant (or specific group of defendants). And, harm would need to be understood as something experienced by an individual or discreet group of individuals—*i.e.*, the victims.

Of course, some aspect of this dynamic is a feature of contemporary public prosecution—instead of focusing on broader social dynamics, criminal prosecutions identify individual defendants.³⁸ But private prosecution goes even further. Public prosecution relies on an underlying claim that crimes are a public wrong—that we as members of society are all victims; as is the state.³⁹ That's why the state has the authority to prosecute and punish. Private prosecution, then, does away with such collective understanding and reinforces an understanding of crime as involving individual actors and individual harm.

Capers—quite rightly, in my opinion—critiques the logic of crimes against the state or crimes against society.⁴⁰ He argues that seeing law breaking as doing harm to the social order allows for almost limitless criminalization.⁴¹ I agree with him that this understanding of criminal law has helped spawn an enormous number of criminal offenses and an over-reliance on “governing through crime.”⁴² If the way that society defends itself or deals with risk is to criminalize conduct (including conduct that presents risk but does no harm), then the one-way ratchet of more criminal statutes, more prosecutions, and more punishment seems almost inevitable.

But just because that public understanding of crime is objectionable doesn't mean that a private one is better.⁴³ Indeed, as Capers notes, much critique of U.S.

38. See, e.g., Nicola Lacey, *Differentiating Among Penal States*, 61 BRIT. J. SOC. 778, 779 (2010) (“The ‘neoliberal’ impetus to economic deregulation, welfare state retraction, and individualization of responsibility . . . has, paradoxically, gone hand in hand with the burgeoning of state powers, state pro-activity, and state spending in the costly and intrusive business of punishment.”).

39. See, e.g., Capers, *supra* note 1, at 1582–84; CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 149 (1993) (describing the characterizations of labor organizing as a crime against society); Benjamin Levin, *American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law As Market Control*, 48 HARV. C.R.-C.L. L. REV. 105, 110 (2013).

40. See Capers, *supra* note 1, at 1585.

41. See *id.*

42. See generally JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

43. It also might be worth asking whether—or to what extent—that private understanding of crime already has gained ground due to the victims' rights movement. See Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 BUFF. L. REV. 433, 436 (2004) (“Like the tough-on-crime movement, the victims' rights movement has grown into a major socio-political force in the criminal system. Victims have been put in the forefront, propelling the once-exclusively public area of criminal law inexorably toward privatization.” (footnotes omitted)); Aya Gruber, *Victim Wrongs: The Case for A General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMP. L. REV. 645, 653 (2003) (“The victim, in modern criminal law, has emerged as an undeniable presence in all stages of a criminal case, shifting the criminal paradigm away from simple government enforcement to increased privatization.”).

criminal law focuses on its failure to recognize that interpersonal harm often results from broader social or state failures.⁴⁴ That's one reason why some commentators have linked mass incarceration to the rise of neoliberalism—rather than providing social services or addressing the social conditions that might lead to law breaking, the state focuses on individual bad actors and individual bad conduct as exceptional.⁴⁵

To be clear, Capers is critical of a punitive system that ignores context and the need for services instead of (or in addition to) punishment.⁴⁶ Yet in *Against Prosecutors*, he argues that victims might help improve things.⁴⁷ If the state were to provide victims with a menu of options beyond punishment or prosecution, we might see a shift away from mass incarceration.⁴⁸ That's an empirical question. And Capers might be right. But, retaining the option to punish harshly strikes me as dangerous—it makes decarceration a potential benefit of individual lenience, rather than a structural objective.⁴⁹ Further, even if some victims behaved the way that Capers hopes, this model of addressing social problems still relies on individuals making good decisions and—as a result—strikes me as both too uncertain to rely on and ill-suited to accomplish sweeping structural change.

D. Trading “Public Law” Pathologies for “Private Law” Pathologies

Putting each of these critiques together, I worry that Capers is trading the pathologies of “public law” for the pathologies of “private law.” To be clear, I would push back on the idea that we could distinguish public law from private law. But, it's a common distinction in the legal academy.⁵⁰ So, I think it might be helpful as a frame to understand the challenge of Capers's proposal.

44. See Capers, *supra* note 1, at 1601–02 (arguing for the need to “begin a conversation about the state's role in creating the conditions of crime”).

45. See, e.g., BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 203 (2011); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 2 (2005); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 1–2 (2016); LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* 41 (2009); Katherine Beckett & Bruce Western, *Governing Social Marginality*, 3 *PUNISHMENT & SOC'Y* 43, 55 (2001); Ruth Wilson Gilmore & Craig Gilmore, *Restating the Obvious*, in *INDEFENSIBLE SPACE: THE ARCHITECTURE OF THE NATIONAL INSECURITY STATE* 141, 150 (Michael Sorkin, ed. 2008).

46. See Capers, *supra* note 1, at 1598–1600.

47. See *id.*

48. See *id.* Capers's observation about the role of constrained choice strikes me as important. And, his argument is consistent with other scholars' claims that people's support for punitive policies often reflects constrained choice, rather than preference in the abstract. See generally LISA L. MILLER, *THE MYTH OF MOB RULE: VIOLENT CRIME AND DEMOCRATIC POLITICS* (2016); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

49. See *infra* Part II.

50. For critical takes on this distinction and its role in legal thought, see, e.g., ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY* 192–93 (1976); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1415 (1982) (“[N]o private

Criminal law that relies on public prosecution stands as the quintessential form of “public” law. The state, not a private party, initiates the action and does so in the name of the people, the community, or even the nation.⁵¹ Throughout *Against Prosecutors*, Capers compellingly critiques this dynamic. And the concerns that he raises are recurring worries with any public law institution: perhaps most notably that criminal legal institutions come to reflect the will of the powerful at the expense of the powerless (despite the illusion of democratic accountability). Prosecutors, like lawmakers and judges, have their own priorities, politics, and agendas, so “public” law ultimately rests on an aggregation of private decisions, views, and actions.⁵² By ignoring private interests or pretending that state action reflects the democratic will of “the people,” we miss that public decisions have winners and losers (and that the identity of those winners and losers may reflect specific ideological projects).⁵³ I am on board with that critical view as a general matter. And, I am very much on board with Capers as he presents it in the prosecutorial realm.⁵⁴

I worry, though, that Capers undersells the problems with *private* law. The use of private suits to produce broader structural change has been met with limited success elsewhere—from tort suits, to civil rights claims, or *qui tam* actions.⁵⁵ Just as public law is private, so too is private law public.⁵⁶ That is, any private suit implicates the state as enforcer, but also helps to shape the broader social ordering.⁵⁷ Unfortunately, using individual cases to achieve a broader public purpose often has significant limitations. Each of the concerns raised in this part—the limits of power shifting, the challenge in defining a class of victims, and the problem of treating collective issues as individual ones—are all

ordering system is autonomous, or, to put it another way, . . . the notion of a public/private distinction is incoherent.”); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reforms*, 96 HARV. L. REV. 1497, 1499–501 (1983).

51. See, e.g., PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 115 (2009); Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 250 (2019).

52. See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, 51–52, 63–66 (1977); Levin, *American Gangsters*, *supra* note 39, at 118.

53. Further, such a characterization of public law understates the individuals whose labor constructs and defines public institutions. See Zohra Ahmed, *Bargaining for Abolition*, 90 FORDHAM L. REV. 1953, 1955 (2022).

54. Valuable new research on prosecutorial elections helps to shine a light on these dynamics and what interests are at play when a district attorney is elected. See, e.g., Carissa Byrne Hessick & Nathan Pinnell, *Special Interests in Prosecutor Elections*, 19 OHIO ST. J. CRIM. L. 39 (2021); Ronald F. Wright, Jeffrey L. Yates, & Carissa Byrne Hessick, *Electoral Change and Progressive Prosecutors*, 19 OHIO ST. J. CRIM. L. 125 (2021).

55. See, e.g., Alexander Reinert, Joanna C. Schwartz, James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 740 (2021); Stephen I. Vladeck, *The Disingenuous Demise and Death of Bivens*, CATO SUP. CT. REV., 2019-2020, at 263, 285.

56. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 19 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471–72 (1923); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 329–30 (1991).

57. See sources cited *supra* note 56.

weaknesses of any *private* solution to a *public* problem. And, the rise of qualified immunity, the death of *Bivens*, the aggressive manipulation of standing doctrine, and the heavy regulation of both class actions and tort suits suggests that a progressive approach to private law has run up against a brick wall. Relying on *private* approaches to criminal law means placing faith in the same actors and institutions (judges, legislators, etc.) who have shown hostility to progressive approaches to tort and civil rights law.⁵⁸

II.

VICTIMS' RIGHTS FOR THE LEFT?

Stepping back from the practicalities of victim-driven prosecution, I see it as worth considering *Against Prosecutors'* place in the contemporary discourse about criminal justice reform, transformation, or abolition. *Against Prosecutors* highlights a critical division in contemporary debates about criminal policy: are institutions of policing and punishment objectionable because they don't work, or are they objectionable because institutions of policing and punishment are fundamentally objectionable? I read Capers's article as reflecting the first impulse.

Increasingly, commentators argue that the criminal system doesn't work.⁵⁹ Of course, such arguments implicitly presume a shared agreement on the purpose of criminal law (one that I believe is sorely lacking).⁶⁰ But, the argument generally reflects a view that the contemporary institutions of policing and punishment don't make society safer and don't actually serve the interest of victims.

Notably, this line of argument has adherents with otherwise divergent views and commitments. Reformers think that the system doesn't work correctly, so it must be reformed. For example, commentators across the political spectrum who argue for "data driven" or "rational" approaches to public safety generally contend that the institutions that we have are irrational.⁶¹ Sentences are dramatically longer than necessary to respond to risk. Criminal laws and punishments often reflect moral panic, anger, or revulsion, as opposed to well-reasoned judgements about what will reduce harm and suffering. And, the

58. Cf. Benjamin Levin, *Values and Assumptions in Criminal Adjudication*, 129 HARV. L. REV. F. 379, 385–87 (2016) (arguing that proposals that rely on judges must reckon with judges' troubling track records on racial justice).

59. See Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27, 35 (2020).

60. See Benjamin Levin, *De-Democratizing Criminal Law*, 39 CRIM. JUST. ETHICS 74, 81 (2020) (reviewing RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019)).

61. See, e.g., RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019); DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* (2016); Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597, 616 (2011).

extreme financial costs of policing, prosecuting, and punishing don't justify the benefits in terms of reduced harm.⁶²

More radical activists, academics, and commentators frame these claims differently, but similarly argue that the system doesn't keep us safer.⁶³ (Yet they often claim that the system "works" *because* its very goal is entrenching inequality, which it does well.)⁶⁴ Reliance on police increases the likelihood of harm, trauma, and violence, and it fails to provide communities with the social services they need.⁶⁵ Jails and prisons do violence to incarcerated people, shifting the site of harm and risk, rather than reducing harm and risk.⁶⁶ And, criminalizing conduct doesn't actually address the root causes of crime and social suffering—widespread inequality and a meager social safety net.

In short, the discourse on crime and victimization has become more complicated than it was decades ago. The traditional Victims' Rights Movement rose to prominence in the 1980s and 1990s on the strength of a similar narrative that the system wasn't working, and specifically wasn't working for victims.⁶⁷ The narrative and the movement, though, generally reflected a singular vision of what victims wanted and what it meant for a system to serve the interests of

62. See, e.g., John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL'Y REV. 377, 378 (2013) ("[A] criminal justice system based on mass incarceration, in which we lock up more and more people, and particularly more people of color, with no crime reduction impact, and at a tremendous financial cost to our federal and state budgets, accomplishes none of those goals." (Emphasis omitted)).

63. See, e.g., Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not "Transformative Justice." Here's Why*, THE APPEAL (Feb. 5, 2018), <https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645/>; Mariame Kaba & Andrea J. Ritchie, Opinion, *We Want More Justice for Breonna Taylor than the System that Killed Her Can Deliver*, ESSENCE (Dec. 6, 2020), <https://www.essence.com/feature/breonna-taylor-justice-abolition/>; Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 183 (2022) (arguing that "abolitionism was born, in many ways, out of the criminal legal system's failure to address the needs of survivors").

64. See, e.g., MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 13 (Tamara K. Nopper ed., 2021); Rachel Herzing, Commentary, "Tweaking Armageddon": *The Potential and Limits of Conditions of Confinement Campaigns*, 41 SOC. JUST. 190, 193–94 (2015) ("Far from being broken . . . the prison-industrial complex is actually efficient at fulfilling its designed objectives—to control, cage, and disappear specific segments of the population."); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1426 (2016) ("The Court has sanctioned racially unjust criminal justice practices, creating a system where racially unjust police conduct is both lawful and how the system is supposed to work.").

65. See Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1833 (2020) ("Police are unlikely to offer any real resources or opportunities for healing. They are likely to make arrests and exercise additional violence in response to calls from Black and brown people, arresting and escalating rather than deescalating the violence against both victims/survivors and people who caused the harm.").

66. See, e.g., Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1180 (2015).

67. See generally Dubber, *supra* note 23; MARIE GOTTSCHALK, THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA 80–96 (2006); AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION HARDCOVER 87–91 (2020).

victims.⁶⁸ In the name of a unified set of victims' interests, activists sought (and successfully obtained) a host of policies that increased punishment and restricted the rights of criminal defendants.⁶⁹

Against Prosecutors operates as an illustration of a new moment in left-leaning victims' rights. Many people of many different politics agree that the system doesn't help victims. But, rather than framing that observation as support for more punitive policies, progressive and left commentators increasingly suggest that advancing victims' interests isn't tantamount to embracing the law-and-order politics of yesterday.⁷⁰ Reformers contend that taking victims' rights seriously might require providing social services or institutions that prevent crime in the first place.⁷¹ And, abolitionist activists increasingly stress the importance of victims and frame their arguments not only in terms of criminal punishment's inhumanity, but in terms of the criminal system's failure to do justice for victims.⁷²

There's power in this move. Critics of "tough-on-crime" politics were often tarred as being hostile to victims or not taking, harm, violence, or crime seriously.⁷³ And, it would be both morally and politically wrong to discount harm and the all-too-real experiences of harm. So, this prioritization of victims among critics of the carceral state has an intuitive appeal. It suggests that many of us pushing to scale back or do away with the carceral state are the *real* victims' rights advocates.

At the same time, this move has its limitations. And *Against Prosecutors* demonstrates why there should be cause for concern. If your view of what's wrong with the criminal system is its failure to advance victims' interests or its failure to empower subordinated groups, then perhaps the turn to private prosecution might be appealing. From this perspective, the persistence of incarceration or criminal punishment might be less objectionable (or perhaps desirable) if those tools were deployed in service of marginalized victims'

68. See Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 772 (2007) ("[T]he victim must occupy a specific, predefined legal space, such that granting her 'rights' will necessarily lead to more incarceration for the defendant.").

69. See generally Dubber, *supra* note 23; Gottschalk, *supra* note 67, at 82–92; Gruber, *Victim Wrongs*, *supra* note 43, at 736 ("In society, 'victim-talk' pits victim character against offender character, nearly exclusively to the detriment of the defendant.").

70. See, e.g., LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* 5 (2018); Andrea James, *Ending the Incarceration of Women and Girls*, 128 YALE L.J.F. 772, 787 (2019).

71. See, e.g., Farhang Heydari, *The Private Role in Public Safety*, 90 GEO. WASH. L. REV. 696, 717 (2022); Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 980 (2021).

72. See *supra* notes 63–64 and accompanying text; see also Morgan, *supra* note 23, at 1212 (describing "the work that survivors of sexual violence and state violence have done to reject the carceral state as the only mechanism for obtaining justice").

73. See SUSAN ESTRICH, *GETTING AWAY WITH MURDER: HOW POLITICS IS DESTROYING THE CRIMINAL JUSTICE SYSTEM* 64–66 (1998).

interests.⁷⁴ For those of us who are concerned about institutions of punishment and deploying institutional violence against people deemed guilty or dangerous, though, *Against Prosecutors* is answering the wrong question. And the (re)turn to victims' rights more broadly should raise red flags.

In a sense, the question of victims' roles brings us back to Simonson's concept of power shifting.⁷⁵ If the problem with the criminal system is who holds the reins of power, then there might be reason to celebrate (or, at least, cautiously experiment with) institutional arrangements designed to empower marginalized victims. Such changes might shift power. But, if the problem is punishment itself, then a project like Capers's isn't necessarily responsive.⁷⁶ As an empirical matter, victim-driven prosecution might reduce the scope of state violence.⁷⁷ Or it might not.⁷⁸ But, it's important to recognize that shifting power and reducing the carceral state are different objectives, even if at times they overlap or reflect similar anti-subordination logics.⁷⁹

CONCLUSION

Ultimately, much of what makes *Against Prosecutors* so important is that it functions less as a proposal than a provocation—an invitation for readers to think collectively about a set of hard questions. That's one reason I'm so glad to have the opportunity to respond to *Against Prosecutors* and to do so alongside so many other thoughtful commentators. Even if many of us still agree that private prosecution would be bad news, we now realize that we do so for different reasons.⁸⁰ And, to my mind, that means the article succeeded—it has forced us to grapple with our own assumptions and opinions about prosecutors and what's wrong with them. Articulating the reasons for those disagreements strikes me as critically important—it surfaces or brings to light positions and priorities that affect the way that each of us sees the criminal system. Each of these disagreements is a key component of the contemporary movements to address the injustices of mass incarceration. Questioning the basic architecture

74. Cf. Kate Levine & Benjamin Levin, *Redistributing Justice* (manuscript on file with author) (outlining and critiquing this position); Benjamin Levin, *Carceral Progressivism and Animal Victims*, in *CARCERAL LOGICS: HUMAN INCARCERATION AND ANIMAL CONFINEMENT* 87, 87–99 (Lori Gruen & Justin Marceau, eds.) (Cambridge University Press 2022) (same).

75. See *supra* notes 8–12, and accompanying text.

76. See Trevor George Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 *YALE L.J. FORUM* 798, 805 (2021).

77. See Capers, *supra* note 1, at 1598–99.

78. See Gardner, *supra* note 76, at 810–12; John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 *U. CHI. L. REV.* 711, 808 (2020).

79. See Levin, *Criminal Justice Expertise*, *supra* note 19, at 2828; Gardner, *supra* note 76, at 805; Simonson, *supra* note 8, at 789–90.

80. Cf. Roger A. Fairfax, Jr., *For Grand Juries*, 13 *CALIF. L. REV. ONLINE* 20, 29 (2022) ("Even those who would not subscribe to Capers's proposal are now forced to explain why the current system of public prosecution is superior to his vision—and what would make it better.").

of U.S. criminal legal institutions strikes me as a valuable project. So, I am grateful for *Against Prosecutors* as a vehicle for initiating such a re-examination.

Personally, I share Capers's criticisms of criminal legal institutions' role in entrenching inequality and marginalizing the already marginalized. But, my first-order concern is state violence and the use of institutional power to control, exclude, and punish. So, I am less worried about who holds the prosecutorial power than I am that the prosecutorial power persists and is strengthened. At the end of the day, I don't believe that a redistributive or power-shifting project that retains criminal punishment as a desirable tool can ever achieve its ends. State violence, whether mobilized in the name of reactionary, conservative, liberal, progressive, or socialist goals, remains state violence.⁸¹ That means there always will be outsiders who are subjected to that violence and insiders who do that subjecting. Criminal punishment and institutions of social control always will function to marginalize and create an ingroup and an outgroup. We can reorient who the insiders and outsiders are or who can harness that violence, but as long as the capacity to exercise that violence remains and is enhanced, I don't believe that a truly egalitarian project is possible.

81. Cf. DAVID GARLAND, PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRUGGLES vi (Quid Pro Books 2018) (1985) (“[E]conomic structures [don’t] . . . determine penal outcomes but rather . . . penal outcomes are consciously negotiated within the limits that economic, political, and ideological structures impose.”).