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From the Legal Literature

Francesca Laguardia*

PRIVATE PROSECUTIONS

Three years ago, former federal prosecutor Bennett Capers suggested that private prosecutions could be a productive way to limit the overwhelming power of prosecutors in the criminal justice system.¹ The suggestion is shocking to most criminal justice scholars and practitioners, as our current understandings of crime and criminal prosecution rely heavily on the distinction between public and private harms, and the state's perceived objectivity and independence from emotion.² In response, the *California Law Review* hosted a symposium on this issue, where critics of the criminal justice system criticized, as well, Professor Capers's proposed solution.³ Capers was also given the space to respond to his critics.⁴

The Symposium, however, is not the only exploration to be found on this issue. Instead, several additional scholarly works have been published in recent months exploring the history and modern echoes of the hybrid public and private prosecutorial model that characterized criminal justice in the United States, prior to the 20th Century.⁵ Together, this scholarship brings some much needed perspective to

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¹I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1587–92 (2020).

²Capers, *supra* note 1, at 1581 (“[W]e tend to think of it as natural, as just *how things are*.”); see also Jonathan Barth, *Criminal Prosecution in American History: Private or Public?*, 67 SAN DIEGO L. REV. 119, 183–84 (2022) (describing harsh criticisms of the idea of private prosecution).

³Online Symposium, *Against Prosecutors*, 13 CAL. L. REV. ONLINE 1 (2022).

⁴I. Bennett Capers, *Still Against Prosecutors*, 13 CAL. L. REV. ONLINE 95 (2022).

⁵Barth, *supra* note 2, *passim* (describing the history of private prosecution in the United States); Randy Beck, *Popular Enforcement of Controversial Legislation*, 57 WAKE FOREST L. REV. 553 (2022) (examining the history of the use of “‘popular action,’ a once common method of statutory enforcement closely related to *qui tam* litigation,” to criticize the creation of S.B. 8 in Texas, allowing popular enforcement of anti-abortion legislation); see also Farhang Heydari, *The Private Role in Public Safety*, 90 GEO. WASH. L. REV. 696 (2022) (exploring the overlap of public and private aspects of public safety and very briefly touching on private prosecutions); Maryanne Magnier, Note, *Unusual (and Unconstitutional?) Prosecutorial Models and a Recommendation for Reform*, 35 GEO. J. LEGAL ETHICS 887 (2022).

Professor Capers's suggestion. This scholarship is explored in this issue's *From the Legal Literature*.

I. THE ARGUMENT FOR PRIVATE PROSECUTORS

Professor Capers frames his critique in the double bind of the criminal justice system in the United States: while we arrest, prosecute, and incarcerate at a shocking rate, we simultaneously *under* prosecute heinous crimes, such as rape and domestic violence crimes, particularly when defendants are wealthy.⁶ Capers sees the root of both of these problems in prosecutors' unchecked authority to choose to charge (and overcharge) defendants, or to choose to decline to pursue charges.⁷ Capers paints the picture of the powerless victim, who can neither force a prosecutor to pursue charges (for instance in rape cases), nor exert force on the prosecutor to be lenient.⁸ Later, Capers notes as well that victims receive no benefit from these prosecutions, the criminal justice system rarely requires that victims receive any restitution, instead it has created the perverse incentive of the state receiving fees, sometimes at the expense of any restitution the victim might have otherwise received.⁹ In fact, this financial incentive might well have been influential in encouraging the United States' transition to public prosecutors.¹⁰

As an alternative, Capers suggests we return not to a system of private prosecution, but to a hybrid system, wherein victims can bring cases themselves, either independently or with the help of a hired attorney or a public prosecutor or a community representative, or can choose not to have the case prosecuted at all.¹¹ Capers would maintain the possibility that the state prosecute (or prevent prosecution) even against the victim's wishes, but would require judicial oversight of the state's decision in these instances.¹² Capers argues that this would re-empower the public to pursue prosecutions for sexual assault and police violence, which are currently dropped all too often.¹³ While it is not a complete solution in and of itself, Capers sees empowering victims as a way to check prosecutors' power in the criminal justice system, both through the direct aspect

⁶Capers, *supra* note 1, at 1563–65.

⁷Capers, *supra* note 1, at 1567, 1568.

⁸Capers, *supra* note 1, at 1571, 1583–85.

⁹Capers, *supra* note 1, at 1580–81, 1585–86.

¹⁰Capers, *supra* note 1, at 1580 (quoting Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 4 (1977)).

¹¹Capers, *supra* note 1, at 1588.

¹²Capers, *supra* note 1, at 1589.

¹³Capers, *supra* note 1, at 1590.

of victims' ability to fight prosecutors' decisions¹⁴ and via the reintroduction of considerations of costs of both time and money, which are generally avoided by public prosecutors.¹⁵ It might also decrease overcharging and excessive sentences, by empowering victims to be merciful, and offer agency to domestic violence victims who are often harmed by the prosecution of their abusers.¹⁶ As crime victims are much more likely than prosecutors to come from the same community as offenders, they are more likely to be merciful and to perceive the overwhelming costs of incarceration, both to the defendant and the community.¹⁷ Capers believes it would also refocus the public on crimes that are harmful, and away from victimless crimes,¹⁸ as well as encouraging personal involvement in, and consideration of, the criminal justice system, thereby encouraging participatory citizenship and democratic norms and awakening democratic sentiment.¹⁹

One of Capers's most interesting suggestions is that it might allow criminal prosecutions to more directly fulfill its Durkheimian role of arguing out what exactly should be considered a crime, who is a victim, and who is an offender (Capers does not refer to Durkheim).²⁰ It might also enable invention in the law, by empowering the otherwise powerless public to push at legal norms.²¹ Capers offers several fascinating examples, such as "if Dollree Mapp had been empowered not just to verbally protest the warrantless search of her home but also to argue that the officer's reaching into her bosom was a battery,"²² that prove both enlightening as to his point and enticing as to the benefits his solution might offer.

But Capers's suggestion is made in broad strokes. He offers a hybrid approach, where victims would have "the option to pursue justice themselves."²³ But throughout fifty pages, Capers omits the details of how these options would change criminal justice.

¹⁴Capers, *supra* note 1, at 1593–94.

¹⁵Capers, *supra* note 1, at 1599–1600.

¹⁶Capers, *supra* note 1, at 1591–92.

¹⁷Capers, *supra* note 1, at 1600–04.

¹⁸Capers, *supra* note 1, at 1592–93.

¹⁹Capers, *supra* note 1, at 1595–98, 1604.

²⁰Capers, *supra* note 1, at 1605–07; David Garland, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 57–61 (1993).

²¹Capers, *supra* note 1, at 1605–06.

²²Capers, *supra* note 1, at 1606.

²³Capers, *supra* note 1, at 1588 ("I am not suggesting that we rely exclusively on private prosecutions where victims are involved. But I am suggesting a system where victims have a range of options, including the option to pursue justice themselves.").

Unsurprisingly, other scholars are not convinced that the overall outcome would be what he imagines. Some of those criticisms are described below.

II. CONCERNS REGARDING SEX CRIMES AND DOMESTIC VIOLENCE

Under-prosecution of rape and domestic violence is one of Capers's primary criticisms of the contemporary criminal justice system, and a central area in which he expects his hybrid system to offer solutions.²⁴ Corey Rayburn Young and Carolyn Ramsey, however, suggest that many of the main stumbling blocks to prosecutions in these contexts would remain unchanged in Capers's proposed system, or even increase.²⁵

Indeed, Professor Ramsey points out that the histories of both private and public prosecutions of domestic violence have been riddled with similar problems, that women are constrained by social and structural factors that pressure them to forego or block prosecutions, whether those prosecutions are private or public.²⁶ She warns that empowering the victim, while laudable from the perspective of added agency, would also empower the victim to stop needed prosecutions, and might reduce pressure to provide resources to victims to enable them to gain the independence necessary to pursue freedom and possible prosecutions.²⁷ And just as women suffer now from the threat of incarceration if they refuse to cooperate with the prosecution of their abusers, women were at risk of similar punishment through the cross-complaint of their abusers when private prosecutions were the norm.²⁸

Professor Young further points out that the threat of retaliation from defendants and from the community would be increased, as victims' ability to claim that the police were going ahead without their approval would disappear.²⁹ Professor Ramsey adds to this critique, noting that even in restorative justice contexts, "community-based programs may inappropriately privilege culture, race, family loyalties, and other factors over gender Pressure not to betray their

²⁴Capers, *supra* note 1, at 1563, 1592.

²⁵Carolyn B. Ramsey, *Against Domestic Violence: Public and Private Prosecution of Batteries*, 13 CAL. L. REV. ONLINE 45, 53, 59–61 (2022); Corey Rayburn Young, *Private Prosecution of Rape*, 13 CAL. L. REV. ONLINE 86 (2022) (recounting several challenges in pursuing rape prosecutions, and why they are unlikely to be rectified by private prosecutions).

²⁶Ramsey, *supra* note 25, at 47–48, 51–53.

²⁷Ramsey, *supra* note 25, at 47, 53, 59, 70.

²⁸Ramsey, *supra* note 25, at 53.

²⁹Young, *supra* note 25, at 90.

racial identity, family, or sexual orientation could dissuade victims from favoring [punishment or even monitoring of batterers].”³⁰

Professor Young points out that problems such as police disbelief of disagreement might remain, even if victims were able to override officers’ gatekeeping function, as it would be incredibly difficult to bring a prosecution when antagonistic police are still likely to appear as witnesses.³¹ Young argues that the fact that convictions are often appealed, and the troubling attitudes of jurors and judges are likely to undermine the impact of private prosecution, because traditional criminal justice pressures will have multiple opportunities to overwhelm any convictions.³² Young suggests that any system, with or without private prosecutions, would be improved by methods which wholly bypass hostile police gatekeepers, and by training in, and implementation of, trauma-informed methods to support victims as they move through the system.³³

III. COMPARATIVE AND HISTORICAL PERSPECTIVES

The absence of detail in Capers’s suggestion is highlighted by the comparative critiques offered in several other articles. One blatantly comparative critique comes as part of the *California Law Review Online* Symposium. There, Professor Jenia Turner offers a description of some inquisitorial jurisdictions, where the criminal justice systems “engage victims more extensively than the U.S. system does.”³⁴ In several civil-law countries, victims may be able to veto prosecution in certain cases, or challenge a prosecutor’s decision to decline a prosecution.³⁵ Yet these countries have also realized that these powers are of limited desirability. Because “society may have an independent interest” in some prosecutions, the ability to veto prosecution is heavily limited.³⁶ And while challenging declinations to prosecute is more widely available, it is used surprisingly rarely (for instance, in fewer than 1% of cases that were declined in Germany), and when a challenge is brought it is very rarely successful (Turner cites a success rate of 13% in England, less than 1% in Germany).³⁷ Many European countries offer the chance for the victim to be involved in the case as an “accessory prosecutor,” but victims rarely utilize this option, either because it is expensive and time consuming

³⁰Ramsey, *supra* note 25, at 62.

³¹Young, *supra* note 25, at 89.

³²Young, *supra* note 25, at 91–92.

³³Young, *supra* note 25, at 93–4.

³⁴Jenia I. Turner, *Victims as a Check on Prosecutors: A Comparative Assessment*, 13 CAL. L. REV. ONLINE 72, 74 (2022).

³⁵Turner, *supra* note 34, at 75–76.

³⁶Turner, *supra* note 34, at 75.

³⁷Turner, *supra* note 34, at 76.

or because of the expanding use of negotiated dispositions, which cannot be challenged by accessory prosecutors.³⁸

Even though they have been used rarely, the system of accessory prosecutors has also been criticized in Europe for being unfair, in that “it forces the defense to have to respond to two adversaries” and undermines defendants’ abilities to cross examine victims (by allowing victims to review witnesses’ statements).³⁹ Studies in Germany and France also lend credence to the idea that victim involvement might make the system unduly punitive and harsh; victim prosecutions are characterized by harsher outcomes in Germany, and a high rate of dismissals in France (suggesting they may have been brought out of maliciousness rather than genuine injury).⁴⁰

Our own history with private prosecution brings similar concerns. As Professor Capers notes, private prosecution is far from foreign to the United States.⁴¹ Instead, private prosecution was the default in colonial America, and existed as part of a hybrid system well into the 19th century, with New York and New Jersey as outliers due to their colonization by the Dutch (who had an inquisitorial, rather than adversarial justice system, and therefore utilized public prosecutors).⁴² And historian Jonathan Barth suggests that, in some ways, this hybrid system existed for many of the exact reasons that Capers suggests it now—the English who are primarily responsible for our adversarial system of justice were concerned about the power of government and the possibility that prosecutorial power could be used limit personal freedom or ignore the complaints of victims.⁴³ In England, to allow government to have this power would be to allow the King the power to prosecute enemies of the state.⁴⁴

But, contrary to Professor Capers’s hopes for democratic reinvigoration, Professor Barth’s history of the turn to public prosecutors restates many of the concerns expressed by critics of private prosecution—namely that such a system could increase economic disparities in the justice system, by securing superior outcomes for

³⁸Turner, *supra* note 34, at 78–79.

³⁹Turner, *supra* note 34, at 79, 82.

⁴⁰Turner, *supra* note 34, at 81.

⁴¹Capers, *supra* note 1, at 1573–74.

⁴²Capers, *supra* note 1, at 1573–81; *see also* Barth, *supra* note 2, at 121, 124–29, 150–51.

⁴³Barth, *supra* note 2, at 151–52.

⁴⁴Barth, *supra* note 2, at 122.

those with more money to pay for better attorneys.⁴⁵ Barth suggests that “[p]rivate prosecutors . . . were increasingly perceived as elitist, corruptible, money-hungry, and unresponsive to the people at large,” while public prosecutors “became popularly elected; the American people were more likely to trust a government official who was responsive to the will of the electorate.”⁴⁶

Professor Barth does not seem to agree with these criticisms, and, like Professor Capers, uses the long history of private prosecution in the United States to argue that it could make a successful return, and should be seriously considered. But Professor Randy Beck, offering some history of private prosecutors as part of his exploration of public enforcement of statutes, retells several stories that bolster the popular perspective described by Professor Barth, that private prosecutors might be corrupt and money hungry. Professor Beck recounts several instances of private prosecutors “entic[ing] naïve young thieves into committing offenses in order to prosecute them and collect the reward money.”⁴⁷ Private prosecutors would also purposefully file frivolous suits in remote locations, or have defendants arrested, only to demand payment in order to drop the charges; they might also extort potential defendants, or collude with offenders to be paid an amount less than what would be required of a judgement against the defendant, in order to grant the defendant the ability to prevent payment of the full penalty in some future litigation (as the already paid judgement would be a defense against future litigation).⁴⁸ In two case studies, Professor Beck offers fascinating examples of much of what can go wrong in private prosecution; his section II would be worthwhile reading for students looking to understand why private prosecution became unpopular.

IV. PERHAPS THE PROBLEM IS NOT JUST PROSECUTORS

One more critique, articulated by several of these scholars, is worthy of note. That is, that it may well be that we are overestimating the centrality of prosecutors to many of the problems plaguing the criminal justice system.⁴⁹ Jeffrey Bellin argues that, while prosecutors are certainly powerful actors in the system, multiple other actors are similarly predisposed towards punishment, leading

⁴⁵Angela Davis, *The Perils of Private Prosecutions*, 13 CAL. L. REV. ONLINE 7, 11 (2022); see also Barth, *supra* note 2, at 191–92 (“[T]he major criticism of private prosecutors [is] that they will be overzealous to convict.”).

⁴⁶Barth, *supra* note 2, at 156.

⁴⁷Beck, *supra* note 5, at 575–78 (quoting J.M. Beattie, *CRIME AND THE COURTS IN ENGLAND 1660–1800*, at 56 (1986)).

⁴⁸Beck, *supra* note 5, at 580–81.

⁴⁹Jeffrey Bellin, *A World Without Prosecutors*, 13 CAL. L. REV. ONLINE 1, 2–3 (2022) (arguing that mass incarceration resulted from a consensus of law enforcement actors, rather than the power or practices of prosecutors primarily).

to the availability of extraordinarily high sentences and the steady increase in criminalization in the United States.⁵⁰ Professor Angela Davis similarly notes that, while she does believe prosecutors to be the most powerful actors in the system, there are multiple other criminal justice officials who similarly exhibit implicit bias, and also respond to various valid factors in sentencing, such as likelihood of conviction and the interests of the victim, that still may have racially disparate origins and effects.⁵¹ She notes that not just prosecutors, but crime victims “have all kinds of motivations—some worthy and some not so worthy.”⁵² These concerns, expressed most directly by professors Davis and Bellin, professors Young and Ramsey also highlight the structural barriers to rape and domestic violence victims pursuing prosecution of their abusers.⁵³ Professor Davis echoes these concerns regarding domestic violence, focusing on the context and barriers to domestic violence victims participating in prosecutions, and the fact that those barriers are likely even more severe in the context of a private prosecution.⁵⁴

V. CONCLUSION

Professor Capers offers an invitation to fundamentally rethink the way we look at prosecution. Our history of private prosecution in this country strongly supports the idea that private prosecution is not inimical to the legal structure of the United States. In both Professor Capers’s and Professor Barth’s historical retelling, we can see that private prosecution existed well into our history. And Professor Capers has offered a provocative thought experiment that clarifies the need to increase civic participation in the development of criminal law and its enforcement, facilitate that involvement, and create accountability in the criminal justice system.

But the simple fact that private prosecution did exist is insufficient to say it should exist again. Professor Beck’s closer examination of the gradual eradication of private prosecution offers more reasons for its disappearance. There is clear evidence that it was, in fact, corrupt and abusive. This history actually reinforces contemporary understandings of the need for public prosecutors, subject to democratic accountability.

Moreover, it is valuable to consider whether prosecution can be singled out in the way so many scholars have, or whether many of the problems we see are reflections of broader social problems instead. Particularly when discussing the lack of rape and domestic

⁵⁰Bellin, *supra* note 49, at 3.

⁵¹Davis, *supra* note 49, at 8–9, 10.

⁵²Davis, *supra* note 49, at 12.

⁵³See *supra*, Part II.

⁵⁴Davis, *supra* note 49, at 14.

violence prosecutions, it is important to remember the influence of structural barriers, the need for social support and financial independence, in order to be able to fight back against one's attacker. When looking to improve the criminal justice system, if we focus on prosecutors, or even on police, we may well miss the broader social influences that truly control our actions. We should beware of adding to our problems while trying to control a scapegoat.