Victims’ Rights Revisited

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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? 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

DOI: https://doi.org/10.15779/Z38CZ3260G
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* Associate Professor, University of Colorado Law School. First and foremost, many thanks to Bennett Capers for writing a characteristically thought-provoking article and for welcoming these responses. Thanks to Carolyn Ramsey and Bennett (again) for helping to organize this Symposium and to Amina Fahmy, Will Ward, and the California Law Review Online editors for their assistance and for giving these essays a home. Thanks, as well, to the other Symposium participants: Jeff Bellin, Angela J. Davis, Roger Fairfax, Jenia Iontcheva Turner, and Corey Rayburn Yung. Thanks, as always, to Jenny Braun for comments, conversations, and criticisms.

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. 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.

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. 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. 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)).


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

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7. Capers, supra note 1, at 1608.
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. 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), 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. 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. Other actors (police, judges, probation officers, wardens, and so forth) would continue to hold power in a world of private prosecution. 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. 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) (“The turn to criminal law is shifting more power not just to the state, but to its punitive arm. . . .”).


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. Rather than eliminating power imbalances, private prosecution would shift the site of power. 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.

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. That’s one possible outcome, but one reason for my skepticism is the indeterminacy of victimhood as a legal concept. 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, it becomes even more important to understand whom the state would recognize as a victim.

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19. See Benjamin Levin, Criminal Justice Expertise, 90 FORDHAM L. REV. 2777, 2828 (2022); cf Bernard E. Harcourt, Matrioskka 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.


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. 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. Judges, lawmakers, and commentators frequently struggle to define the class of injured parties entitled to bring a civil suit. 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. This approach—the “harm principle”—offers an ostensibly bright line between damaging conduct that is the proper province of criminal law and so-called victimless crimes. 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.

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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).


Bernard Harcourt has argued compellingly that the harm principle “collapses” if we adopt a more capacious understanding of harm. 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? 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. 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. 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. 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. 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. 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.
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. 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. 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. He argues that seeing law breaking as doing harm to the social order allows for almost limitless criminalization. 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.” 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. 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.”).
40. See Capers, supra note 1, at 1585.
41. See id.
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 TEMPEST. 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{46} Yet in Against Prosecutors, he argues that victims might help improve things.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textbf{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.\textsuperscript{50} So, I think it might be helpful as a frame to understand the challenge of Capers’s proposal.

\textsuperscript{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”).


\textsuperscript{46} See Capers, supra note 1, at 1598–1600.

\textsuperscript{47} See id.

\textsuperscript{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).

\textsuperscript{49} See infra Part II.

\textsuperscript{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


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).


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

extreme financial costs of policing, prosecuting, and punishing don’t justify the benefits in terms of reduced harm.\textsuperscript{62}

More radical activists, academics, and commentators frame these claims differently, but similarly argue that the system doesn’t keep us safer.\textsuperscript{63} (Yet they often claim that the system “works” because its very goal is entrenching inequality, which it does well.)\textsuperscript{64} Reliance on police increases the likelihood of harm, trauma, and violence, and it fails to provide communities with the social services they need.\textsuperscript{65} Jails and prisons do violence to incarcerated people, shifting the site of harm and risk, rather than reducing harm and risk.\textsuperscript{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.\textsuperscript{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

\begin{footnotes}
\item[62] See, e.g., John Conyers, Jr., \textit{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)).
\item[64] See, e.g., MARIAME KABA, \textit{WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE} 13 (Tamara K. Nopper ed., 2021); Rachel Herzing, \textit{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, \textit{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.”).
\item[65] See Anna A. Akbar, \textit{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.”).
\end{footnotes}
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.”).
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”).
interests. 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. 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. As an empirical matter, victim-driven prosecution might reduce the scope of state violence. Or it might not. 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.

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

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