

Private Prosecution of Rape

Corey Rayburn Yung*

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INTRODUCTION

At this unprecedented moment for criminal justice in the United States, the spotlight is directed at the “overs”: over-policing, over-prosecution, over-criminalization, and over-incarceration.¹ This focus has led many to support bold anti-carceral reforms designed to curtail criminal law and its enforcement.² But activists and other civilians have also expressed concerns about equity and

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* William R. Scott Research Professor at the University of Kansas School of Law. Consistent with the belief expressed by Bennett Capers, that our subjective position is of importance to understanding our work, I would also note that, although I was never a prosecutor in the United States, I have done work on behalf of prosecutors and defense lawyers in this country and in international forums before becoming a professor focused on criminal justice. See, I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1562, 1563 (2020) (citing PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 3 (1991)). That experience necessarily informs my views described herein.

1. I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1562, 1586 (2020) (discussing how this particular “moment” offers a window for types of reform that would otherwise be unthinkable); see also, Youngjae Lee, *Proxy Crimes and Overcriminalization*, 15 LAW & PHILOSOPHY __ (2022); Benjamin Levin, *Decarceration and Default Mental States*, 53 ARIZ. ST. L. J. 747 (2021); Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020).

2. See, e.g., MICHAEL J. COYLE & MECHTHILD EUPHROSYNE NAGEL, *CONTESTING CARCERAL LOGIC: TOWARDS ABOLITIONIST FUTURES* (2021); ALEX S. VITALE, *THE END OF POLICING* (2021).

under-enforcement that are often lost in overly simplistic media coverage.³ To his credit, Bennett Capers captures the nuance in calls for systemic change in formulating his argument for private prosecutions in *Against Prosecutors* to address both “over” and “under” problems.⁴ And, while others may direct their attention as to whether Capers’s proposal addresses the “overs,” this essay targets one particular “under”: the under-prosecution of rape and sexual assault.⁵

Whereas Capers’s argument that we should favor private prosecutions over public prosecutions is, to my mind, persuasive in many cases, there are significant reasons to doubt its efficacy in addressing the under-prosecution of nonconsensual sex crimes. So many agents in the criminal justice system, including victims, police, prosecutors, judges, and jurors, are positioned to hinder the implementation of a transition to private prosecutions. So, it is helpful to keep in mind Stephen Schulhofer’s cautionary observation: “Social attitudes are tenacious, and they can easily nullify the theories and doctrines found in the law books. The story of failed [rape law] reforms is in part a story about the overriding importance of culture, about the seeming irrelevance of law.”⁶

Thankfully, these obstacles are not necessarily fatal to Capers’s overall position – they may only necessitate greater elaboration of exactly how private prosecutions should address the unusual dynamics present in cases of sexual violence. In this response to Capers’s provocative and important article, I first describe the concerns that I have based on the status quo failures to prosecute rape. I follow that by outlining proposals that should ameliorate at least some of the issues that I describe.

I.

OBSTACLES TO PROSECUTING RAPE

As Capers notes at the outset of his important and engaging article, his proposal is a “radical” departure from the status quo.⁷ That can make it difficult to forecast the direct and collateral effects of its implementation. The historical experiences of private prosecution that Capers discusses are, by their nature,

3. Hunter M. Boehme, Deanna Cann & Deena A. Isom, *Citizens’ Perceptions of Over- and Under-Policing: A Look at Race, Ethnicity, and Community Characteristics*, 68 CRIME & DELINQUENCY 123, 141 (2020) (discussing how framing public concerns as indicative of a distrust of police often masks worries about under-policing and equitable treatment by law enforcement).

4. See generally, Capers, *supra* note 1.

5. There is not a universally agreed upon distinction between “rape” and “sexual assault” in criminal statutes. Indeed, some jurisdictions eschew the word “rape” entirely, choosing to define all non-consensual sex acts as different forms of “sexual assault.” See, e.g., NJ REV STAT § 2C:14-2 (2014). For purposes of this article, I use “rape” to refer to non-consensual (but not necessarily forcible) acts of penetration. “Sexual assault” refers to all non-penetrative sex acts.

6. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 17 (1998); see also, ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 3–5 (2013); ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 10 (1999).

7. Capers, *supra* note 1, at 1563.

dated and likely have limited applicability to the modern environment. Further, because criminal justice is politically and culturally salient, such speculation is filtered through contested social space. Nonetheless, if Capers's suggestions are to be implemented, it is important to consider and assess possible outcomes and impediments.

In regard to sexual violence, the situation is presently dire. Relative to other, similar crimes, under-prosecution of rape is a longstanding endemic problem.⁸ Failure to prosecute is not only due to prosecutors' actions but also due to those of police, judges, and other agents within the criminal justice system.⁹ Prosecutors typically rationalize their declinations to prosecute by asserting that there is insufficient evidence to proceed.¹⁰ Thankfully, that is an obstacle that private prosecutions can easily overcome because victims will be able to make their own determinations as to the quality and quantity of evidence.¹¹ But there are other impediments that are not so obviously addressed.

To his credit, Capers is fully aware of the difficulties associated in prosecuting sexual violence cases and puts them at the forefront of his article.¹² So, I do not wish to repeat his engaging and informative discussion of them here.¹³ But a brief review is helpful to highlight the elements of under-prosecution that might complicate a switch to a private prosecution system.

8. Michal Buchhandler-Raphael, *Underprosecution Too*, 56 U. RICHMOND L. REV. 409, 410-11 (2022).

9. Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1297 (2016); RAPE IN THE UNITED STATES: THE CHRONIC FAILURE TO REPORT AND INVESTIGATE RAPE CASES: HEARING BEFORE THE SUBCOMM. ON CRIME & DRUGS OF THE S. COMM. ON THE JUDICIARY, 111th Cong. 13 (2010).

10. Buchhandler-Raphael, *supra* note 8, at 411.

11. People disagree about whether it is better to refer to those who have been raped as "victims" or "survivors." I choose to use "victim" for two reasons. First, many of those who have been raped feel that it is truer to their experience. *See, e.g.*, Dana Bolger, "Hurry Up and Heal": Pain, Productivity, and the Inadequacy of 'Victim vs. Survivor,' FEMINISTING (Dec. 10, 2014) <http://feministing.com/2014/12/10/hurry-up-and-heal-pain-productivity-and-the-inadequacy-of-victim-vs-survivor/> [https://perma.cc/4L9Z-ZUER]; Kate E. Bloch, *A Rape Law Pedagogy*, 7 YALE J.L. & FEMINISM 307, 308 n.6 (1995); Andrea Dworkin, *Woman-Hating Right and Left*, in *THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM* 28, 38 (Dorchen Leidholdt & Janice G. Raymond eds., 1990). Second, as I have explained elsewhere, a major theme of my work in this area is that rape "victims" should be treated with the same respect as other crime "victims." Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, n. 14 (2017) (hereinafter "Gatekeeping"); So, using that term helps to emphasize that connection while highlighting the disparate treatment that rape complainants receive in the criminal justice system. Nonetheless, this decision conflicts with the conclusions of some persons who have been raped and, for that, I offer my sincere apologies.

12. *See* Capers, *supra* note 1, at 1565-67.

13. To increase the overall value of the symposium on the article by Capers, I also do not wish to repeat some of the same claims and contentions that other involved authors have made. In particular, because my contribution is similarly focused on a gendered crime shaped by a long history of systemic misogyny, many of my concerns and contentions parallel those of my co-symposiumist, Carolyn Ramsey, in her discussion of intimate-partner violence. *See generally*, Carolyn Ramsey, *Against Domestic Violence: Public and Private Prosecution of Batterers*, __ CAL. L. REV. ONLINE __ (2022). So, to the degree possible, I have tried to avoid repeating overlapping observations with a greater concentration on those dynamics specific to sexual violence.

There are four major, relevant obstacles to rape prosecutions that suggest private prosecution may not work.

A. *Police Gatekeeping*

The first major obstacle that rape victims encounter occurs at the reporting stage. Police are aggressive gatekeepers that prevent rape complaints from advancing through the criminal justice system.¹⁴ As I have previously concluded, “police are the largest obstacle to the prosecution and conviction of rapists in the United States.”¹⁵ This reality can be traced to several factors, not all of which are germane to the potential efficacy of private prosecution.¹⁶ But it is important, for purposes of discussing Capers’ proposal, to specifically note police’s widespread adoption of rape myths as a basis for disbelieving rape victims.¹⁷

Any solution to the under-prosecution of rape must address police intransigence due to their cultural beliefs. If police were to maintain a “veto” of specific rape complaints, private prosecutions would be a poor reform tool. Moreover, even assuming a private prosecution overrides police opinion, an officer’s disbelief might make a successful private prosecution impossible. At a minimum, a skeptical officer or detective will not be a witness for the prosecution, which is a notable omission to jurors. More likely, the defense may call a hostile police officer as a witness, making proving a complaint beyond a reasonable doubt extremely difficult. Private prosecutions need to develop a mechanism to ensure at least some police “buy-in.”

B. *Retaliation*

The fear of retaliation and actual retaliation are major concerns of rape and sexual assault victims.¹⁸ The nature of the retaliation varies based on the status of the accused and other contextual factors. For example, Donald Trump regularly threatens, and sometimes actually follows through with, lawsuits

14. See generally, Gatekeeping, *supra* note 11; Corey Rayburn Yung, *How to Lie with Rape Statistics: America’s Hidden Rape Crisis*, 99 IOWA L. REV. 1157 (2014).

15. Gatekeeping, *supra* note 11, at 209; Melinda Tasca, Nancy Rodriguez, Cassia Spohn & Mary P. Koss, *Police Decision Making in Sexual Assault Cases: Predictors of Suspect Identification and Arrest*, 28 J. INTERPERSONAL VIOLENCE 1157, 1158 (2012).

16. Gatekeeping, *supra* note 11, at 211-229 (describing how police culture, professional incentives, sex exceptionalism, institutional design, and training encourage police gatekeeping).

17. Amy Dellinger Page, *Judging Women and Defining Crime: Police Officers’ Attitudes Toward Women and Rape*, 28 SOCIOLOGICAL SPECTRUM 389, 401 (2008) (reviewing research showing wider adoption of rape myths by police); COLLEEN A. WARD, ATTITUDES TOWARD RAPE: FEMINIST AND SOCIAL PSYCHOLOGICAL PERSPECTIVES 61 (1995) (outlining data showing that police accept rape myths at a much higher rate than other agents in the criminal justice system).

18. Marjorie R. Sable, Fran Danis, Denise L. Mauzy & Sarah K. Gallagher, *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. COLLEGE HEALTH 157, 159 (2006).

against those who have accused him of rape and sexual assault.¹⁹ Whereas, in the workplace environment, a supervisor can retaliate against a victim of sexual assault through an employment action.²⁰ In the military, the fear of a commanding officer's retaliation has been a significant impediment to rape reporting.²¹ The potential for backlash and counteractions by the accused and others is simply greater in rape and sexual assault cases than other criminal matters.

Retaliation, already a problem for many public prosecutions, will be a greater impediment to private prosecutions because the victim will lose any plausible deniability as to the direction prosecution takes. Whereas a victim can reasonably state that the prosecutor's decisions are "out of their hands," in public prosecution, that would no longer be true. Capers does not address whether the absolute immunity afforded to public prosecutors, which is controversial on its own terms, will be extended to victims leading private prosecutions. If not, the avenues for retaliation would be greater in a private prosecution system. The ability to keep the identity of the victim anonymous might also be compromised, opening the possibility of retaliation by third parties not directly involved in the case. Ultimately, private prosecutions must limit retaliation against victims to make them a viable tool.

C. Recovery

The criminal justice process itself is often antithetical to the psychological recovery of those who have experienced sexual violence, especially for traumatized victims.²² Private prosecution, even in its most victim-centric design, likely requires more of a victim than simply checking a box that states their preference for a prosecution to proceed. Capers leaves open the degree to which victims will be responsible for managing the logistics of a prosecution. Whatever burdens fall to the victim are left for later elaboration. But, it is reasonable to worry that whatever extra role that victims must take on will impede their recovery.

The criminal justice process is grueling. The expression that we "put the victim on trial" is often literal, not metaphorical.²³ Victims are assessed against

19. See, e.g., *Judge Blocks Donald Trump's Effort to Countersue Rape Accuser E. Jean Carroll*, THE GUARDIAN (Mar. 11, 2022) <https://www.theguardian.com/us-news/2022/mar/11/donald-trump-e-jean-carroll-countersue-blocked>.

20. Stefanie K. Johnson, Jessica F. Kirk & Ksenia Keplinger, *Why We Fail to Report Sexual Harassment*, HARV. BUS. REV. (Oct. 04, 2016) <https://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment>.

21. Elisabeth Jean Wood & Nathaniel Toppelberg, *The Persistence of Sexual Assault within the U.S. Military*, 54 J. PEACE RESEARCH 620, 621 (2017) ("Both peers and unit leaders – not just the perpetrator – often aggressively retaliate against victims who report sexual assault.").

22. Jo-Anne Wemmers, *Victims' Experiences in the Criminal Justice System and Their Recovery from Crime*, 19 INT'L REV. VICTIMOLOGY 221, 229 (2013).

23. Corey Rayburn Yung, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUMBIA J. GENDER & L. 437, 444-450 (2006).

a mythical “perfect victim” and deviations from that role frequently result in not-guilty verdicts.²⁴ When victims experience the pains of the criminal justice system, they often decide that they are too much and do not continue with the prosecution.²⁵ To the degree that a private prosecution increases stress and impedes recovery, we would expect a large percentage of such prosecutions to fail.

Even if a private prosecution results in a guilty verdict, the process is often far from over. Consider two high-profile cases where the victim weathered a trial, conviction, and appeals but decided not to cooperate with a retrial. As a result, both defendants were free to go. In *Massachusetts v. Blache*, a police officer was accused of raping a highly intoxicated woman.²⁶ At trial, he was convicted of rape, but the state high court reversed the conviction because it rejected the longstanding rule for determining the incapacitation level over which consent was impossible. Nothing in the Massachusetts Supreme Court opinion implied that the victim’s testimony was not credible. Nonetheless, the victim decided not to participate in a retrial, and the charges against the defendant were dropped.²⁷

Similarly, in *Utah v. Barela*, the state high court overturned the conviction of a masseuse accused of raping a client.²⁸ The Court found fault with a jury instruction but did not hold that the evidence was otherwise insufficient for a conviction. Nonetheless, the victim chose not to cooperate with a retrial, and the state did not pursue a new prosecution, making it yet another case of sexual assault by a masseuse working for the Massage Envy chain where there was no final conviction.²⁹ Those examples illustrate how private prosecutions, even when not worsening victim recovery, simply might not be able to overcome the collateral effects and burdens that the criminal justice process entails.

D. Judges and Jurors

Judges and jurors might simply make the entire private prosecution process futile as they often do in public prosecutions. For a large range of reasons, rape prosecutions have often failed because the trial factfinders and appellate judges have not believed victims.³⁰ It is not obvious that private prosecutions would

24. Kimberlé Crenshaw, *Whose Story is it Anyway?*, in RACE-ING JUSTICE AND ENGENDERING POWER 402, 409 (Toni Morrison ed., 1992).

25. Jody Freeman, *The Disciplinary Function of Rape’s Representation: Lessons from the Kennedy Smith and Tyson Trials*, 18 LAW & SOC. INQUIRY 517, 530-33 (1993).

26. 880 N.E.2d 736 (Mass. 2008).

27. Alex Bloom, *Rape Charge Dropped Against Ex-Methuen Cop*, THE EAGLE TRIBUNE, Sep. 21, 2010, https://www.eagletribune.com/news/local_news/rape-charge-dropped-against-ex-methuen-cop/article_822a5fe9-886f-556a-8b0a-ef5bd4b7ff10.html.

28. 2015 UT 22 (Utah 2015).

29. Katie J.M. Baker, *More than 180 Women Have Reported Sexual Assaults at Massage Envy*, BUZZFEED NEWS, (Nov. 26, 2017) <https://www.buzzfeednews.com/article/katiejmbaker/more-than-180-women-have-reported-sexual-assaults-at#.eqb9j19mX>.

30. TASLITZ, *supra* note 6, at 6.

make this pattern more frequent. But, it limits the upside of Capers' proposed reforms on addressing the net harms of under-prosecution of rape. It does little for prosecutions to increase if the number of upheld convictions remains constant.

Dan Kahan's study of public attitudes in analyzing a rape vignette as a hypothetical juror is particularly discouraging.³¹ The experiment used the infamous fact-pattern from *Pennsylvania v. Berkowitz*, wherein the victim repeatedly said "no," but the defendant did not use force.³² His research found that the applied legal rule did not substantially affect experimental subjects' judgments about whether the defendant was guilty.³³ Kahan has attributed the seeming irrelevance of law to "sticky norms" of American society that are hostile to rape victims.³⁴ These norms are not easily displaced and will temper any positive results from enacting a private prosecution system.

II.

PRIVATE PROSECUTION OF RAPE

To determine how existing problems in rape prosecutions would affect private prosecutions, it is important to consider how Capers' proposal would be implemented. So, what would a private prosecution of a rape or sexual assault look like? Capers answers some important parts of that question. One factor sure to be lost on some readers is that Capers proposes that private prosecutions supplement and not replace public prosecutions.³⁵ In areas of under-enforcement, that complementary aspect of his idea is important – it likely ensures that it will not make things worse than the current system.

However, other details remain underspecified. How much of the decision-making will be left to the victim? What other aspects of case management will they be responsible for? How will the private prosecution system address hostile police and skeptical prosecutors? If a victim decides to no longer proceed with a private prosecution, what happens next? To address those questions and related concerns, I offer a few suggestions for administrative design that can hopefully ameliorate the significant concerns described in the previous section.

A. Prosecutorial Administration

Unlike intimate-partner violence, there does not appear to be any significant history of private prosecution of sexual assault or rape in the United

31. Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, And Why*, In *Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010).

32. 609 A.2d 1338 (Pa. 1994).

33. See Kahan, *supra* note 31, at 781.

34. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000).

35. Capers, *supra* note 1, at 1586-87.

States.³⁶ That barren empirical record is not necessarily a major concern – novel ideas lack prior evidence of success. But, it means that we should look more broadly at research that might indicate how private prosecution of sexual violence should be administered. So, with the absence of a private prosecution history, it is worth considering other past examples of how rape accusations fared under criminal law when not made by a public prosecutor.³⁷ Further, it is essential to examine how private prosecutions would interact with other institutional design decisions.

The efficacy of private prosecutions may vary substantially based on the model of prosecution currently used in a jurisdiction. There are two general models for prosecutor involvement in rape cases.³⁸ In some jurisdictions, police are the primary gatekeepers that decide whether a case should be considered for prosecution. Other jurisdictions, often those with specialized sex crimes divisions, involve prosecutors in almost all reports. And between those two poles, there are blended structures with prosecutors involved in higher percentages of reported rape cases.

If private prosecutions can bypass recalcitrant police, they likely promise substantial improvement over the current system. It is also important that prosecutors aiding the victims have experience in handling such matters. For that reason, we should expect private prosecutions to succeed more in jurisdictions that already have a high degree of prosecutor involvement. However, in jurisdictions where police gatekeeping is the norm, other reforms would need to be coupled with the advent of private prosecutions. Perhaps, national training could be implemented for prosecutors to better handle sexual violence cases when victims initiate them.

B. *Limiting Victim Responsibility*

At the most basic level, I expect there is universal agreement that a victim of sexual violence should not have all the responsibilities of a public prosecutor. Indeed, without legal training and experience, such a shift would be doomed to fail. But where to draw the line as to how much responsibility a victim should have is unlikely to garner consensus. Because of the worries outlined in the

36. *Id.*, at 1573-76 (discussing “peace warrants” as a form of private prosecution for intimate-partner violence cases in the Eighteenth and Nineteenth Centuries).

37. For example, consider Anne Coughlin’s work tracing the origins of criminal rape law in America to adultery prosecutions, in the form an affirmative defense. *See generally*, Anne Coughlin, *Sex and Guilt*, 84 VIRGINIA L. REV. 1 (1998). Coughlin found that modern rape law in the United States did not start as an independent crime. Rather, the government eventually recognized that adultery prosecutions of women who were raped might be manifestly unjust. So, the affirmative defense of rape was introduced. Coughlin connects that unusual history to many of the failings and oddities of modern rape law: disbelief of victims, being focused on preserving the chastity of women, judgment of victims based on their sexual history, and focusing on the victim rather than the defendant during a trial.

38. I do not know of any data about these institutional arrangements. I base my discussion here on my experiences in working with and discussing structural reforms with city and county prosecutors in cases of sexual violence.

previous section, I think it would be wise to minimize the duties and burdens on a rape or sexual assault victim, as much as possible. Consequently, the net role of a sexual violence victim would likely be less than other crime victims.

Although trauma or other psychological harms are not unique to sexual violence, there are heightened concerns in such cases.³⁹ Indeed, the diagnosis of rape-trauma syndrome is differentiated from other forms of post-traumatic stress disorder for that reason.⁴⁰ To make private prosecutions viable, the accompanying system must be trauma-sensitive. It simply cannot require victims to constantly relive their pain and face the types of stress that ordinary prosecutors must confront.

Limiting the responsibility of victims in private prosecutions would also ensure that the skepticism of judges, jurors, and other agents in the criminal justice system does not have extra undue effects. With a public prosecutor advising and implementing the suggestions of the victim, mistakes resulting from a lack of experience or training should not occur at a rate any higher than the present system. So, the effects of gatekeeping would not be worsened.

Ensuring victims are not at the center of prosecutions might also allow public prosecutors to continue to act as a shield against certain types of retaliation. Coupled with the extension of absolute immunity for victims' actions within their role in the criminal justice system and maintaining anonymity in public records, victims should not be any more vulnerable than they currently are. To that end, it is essential such measures are included in any pilot project or implementation of a private prosecution program from the outset.

CONCLUSION

A radical proposal like the one Capers offers is easy to attack because of a lack of specificity. But, vagueness and a lack of detail are inherent in the nature of any suggested substantial change – such ideas cannot simply lean on the status quo to fill the gaps. So, I think it is important to couple the skepticism we might have of Capers's pitch for private prosecutions with charity that allows for further development to address potential shortcomings. In the area of sexual violence crimes, additional wrinkles to a general policy shift are certainly needed. Such is the case in public prosecutions as well. In this essay, I have attempted to highlight the unique issues that should be addressed while tempering those objections with potential ameliorative measures. My hope is that by doing so, the discussion of private prosecutions might move forward and be potentially tested in the real world so that needed positive change might be affected.

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39. See generally, Laura C. Wilson & Angela Scarpa, *The Unique Associations between Rape Acknowledgment and the DSM-5 PTSD Symptom Clusters*, 257 PSYCHIATRY RESEARCH 290 (2017).

40. *Id.*