

A World Without Prosecutors

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Bennett Capers' article *Against Prosecutors* challenges us to imagine a world where we “turn away from prosecution as we know it,” and shift “power from prosecutors to the people they purport to represent.”¹ In this world, crime victims decide whether to prosecute their own cases, and public prosecutors play a subsidiary role, taking primary responsibility only for cases “where the state is truly a victim (such as tax fraud).”² This leaves a large category of cases – victimless crimes – without any prosecutor at all; Capers singles out drug offenses as “the biggest examples.”³ Without prosecutors championing these and analogous cases, there would be far fewer prosecutions, “quite possibly, reducing mass incarceration.”⁴

Capers joins a long line of authors seeking to attack mass incarceration by reducing the role of prosecutors. I agree with these authors that we should dramatically shrink the footprint of American criminal law and ending the war on drugs is a good place to start. But while Capers styles his proposal as a “[r]adical change,”⁵ I find the focus on prosecutors in this context decidedly indirect. This follows from my distinct diagnosis of the drivers of criminal justice policy. While Capers acknowledges that “judges, legislators, [and] police play [a] role in the criminal justice system,” he echoes a dominant theme in legal scholarship that “their power pales in comparison to that of prosecutors.”⁶ This argument has roots in the writings of the influential scholar Bill Stuntz⁷ and was energized, more recently, by John Pfaff's provocative claim that a change in prosecutorial filing practices was the “one thing” that largely caused Mass

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* Professor, William & Mary Law School. Thanks to Carolyn Ramsey and Ben Levin for the invitation to participate in this symposium and to one of my favorite scholars Bennett Capers for writing an article worthy of a symposium.

1. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1563, 1609 (2020).
2. *Id.* at 1593.
3. *Id.* at 1592.
4. *Id.* at 1564.
5. *Id.* at 1609.
6. *Id.* at 1570-71.
7. See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 173 (2019) (tracing ubiquitous prosecutorial preeminence claims).

Incarceration.⁸ Capers draws on both these scholars⁹ and follows their contentions to a logical conclusion. If we want a different system, Capers argues, we must rebuild it without prosecutors or, more precisely, we must “turn away from public prosecutors.”¹⁰

The problem with all of this is that both the Stuntzian view of prosecutors as America’s dominant criminal justice actor and Pfaff’s empirical claims about their primary agency in generating mass incarceration are flawed.¹¹ Prosecutors

8. John F. Pfaff, *LOCKED IN* 73 (2017) (“It’s important to be wary of ‘one thing explains it all’ theories, especially for a phenomenon as complex as prison growth. These results, however, certainly support a claim of ‘one thing explains most of it.’”); *id.* at 72 (“The only thing that really grew over time was the rate at which prosecutors filed felony charges against arrestees”).

9. *Against Prosecutors*, *supra* note 1, at 1568 (“There is a reason John Pfaff, in his analysis of mass incarceration, concluded that much of the blame lies with prosecutors.”); *id.* at 1570 (arguing that “through charges and lobbying, prosecutors play a role in law making, enough to prompt Bill Stuntz to describe prosecutors as ‘the criminal justice system’s real lawmakers’”).

10. *Id.* at 1564.

11. Pfaff’s claim is derived from surveys of state courts conducted by the National Center for State Courts (NCSC) which, he argues, show that felony filings increased by about the same percentage as prison admissions “between 1994 and 2008.” *LOCKED IN*, *supra* note 8, at 71-73. Pfaff argues, counter to the weight of other scholarship, that nothing else changed over this period, revealing that “prosecutors bringing more and more felony cases” was the “one thing” primarily responsible for Mass Incarceration. *Id.* There are substantial flaws in Pfaff’s analysis as explained in my review, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835 (2018), and a subsequent review by sociologist Katherine Beckett. *See Mass Incarceration and Its Discontents*, 47 CONTEMP. SOC. 11, 16 (2018) (“Pfaff’s analysis is undermined by methodological flaws, logical errors, and conceptual limitations.”). Pfaff has only engaged with one aspect of these critiques, involving the late start date for his range, 1994, well into the era of mass incarceration. And even on that point his response is unconvincing. In his book and earlier scholarship, Pfaff wrote that he started with 1994 because the NCSC “changed the way it gathered the data in 1994.” *See LOCKED IN* at 257 n.50 (“The NCSC gathered data on felony filings before 1994, but it changed the way it gathered the data in 1994, making it hard to compare across years.”); John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 Ga. St. U. L. Rev. 1239, 1250 (2012) (“the NCSC revised how it gathered the data in 1994”). In my review, I pointed out that the data-gathering change occurred in the middle of his date range (2003) not prior to it (1994) – a correction Pfaff appears to accept. *See* John F. Pfaff, *Prosecutors Matter: A Response to Bellin’s Review of Locked In*, 116 MICH. L. REV. ONLINE 165 (2018) (“Response”) (“Bellin points out, correctly, that starting in 2003 the NCSC changed how it gathered its felony-filing data, leading to a discrete jump in the number of felony filings.”); *cf.* Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 741 (2018) (“In 2003, the NCSC made significant changes to state reporting requirements.”). Pfaff, however, discounts the 2003 change because, he argues in his Response, he did not rely on the NCSC’s published data but instead worked from an internal Excel spreadsheet emailed to him by an NCSC analyst in which the data had been “retrofit[ed]” “back to 1994.” *Response* at 166 (“the internal spreadsheet has the data corrected back to 1994”). It is good that Pfaff tried to resolve the problems in the NCSC data, but it is beyond dispute that retrofitting across a methodological change, particularly one involving the *gathering* of data, introduces additional uncertainty. *See* Beckett, *supra*, at 19 & n.14 (quoting NCSC analyst explaining that the retrofitted data Pfaff relied on suffers from “a data quality issue” whose “extent is unknown”); Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CALIF. L. REV. 1123, 1142 & n. 99 (2021) (“historical comparisons before and after 2003 are discouraged due to methodology changes by the NCSC”) (citing NCSC’s 2004 report); Stevenson & Mayson, *supra*, at 740-41 (“Currently, 2007 is as far back as the NCSC recommends going to evaluate time trends in criminal caseloads.”). Indeed, Pfaff himself (using the wrong date) previously described comparisons across the NCSC’s data-gathering change as “impossible.” Pfaff, *The Micro and Macro Causes of Prison Growth*,

certainly contribute to mass incarceration and the drug war, but there is little evidence that they are leading the way.

As I explain in a new book, *Mass Incarceration Nation: How the United States Became Addicted to Prisons and Jails and How it Can Recover*, the unprecedented growth of imprisonment in this country arose through a consensus of law enforcement actors pushing people down the “prison road”:

“If someone asks, why there are so many people in prison, one can point to any of the actors involved: legislators, police, prosecutors, judges, parole boards, and so on. After all, each actor could dramatically decrease the number of folks in prison. But in a system with numerous on- and off-ramps, it is misleading to highlight one ramp while ignoring the others. Keeping people moving down the prison road requires the cooperation of all the actors.”¹²

Beginning in the 1970s, the growing “tough on crime” consensus among official actors generated two basic changes: a vertical increase in sentence lengths and a horizontal expansion of the types of crimes that people were incarcerated for. Capers’ target in this context, drug crimes, show up in both places. And there is no aspect of American criminal law enforcement that changed as dramatically over the past decades. In 1980, 6 percent of the State prison population and 25 percent of the federal prison population was serving time for a drug offense. By 2000, these numbers shot up to 20 percent (State) and 57 percent (federal) respectively.¹³ Jail populations reflect the same trend, with 9 percent of jail inmates incarcerated for drug offenses in the early 1980s, increasing to over 20 percent in the 1990s and then plateauing.¹⁴

Reversing the seismic shift in people incarcerated for drug offenses (and more generally) requires an accurate assessment of its cause. Over the period, politicians embraced a “War on Drugs.” To fight this war, legislators enacted laws imposing harsh penalties for drug offenses and funded increasingly aggressive enforcement. The number of sworn police officers (officers with arrest authority) rose from 496,143 in 1986 to 765,246 by 2008.¹⁵ These changes had a dramatic effect. Annual drug arrests rose from 583,000 per year in 1980 to

supra, at 1250 (“the NCSC revised how it gathered the data in 1994 [sic], making it impossible to compare data before and after 1994”).

12. Jeffrey Bellin, *MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER* (2023) [hereinafter *MASS INCARCERATION NATION*].

13. Drug Policy Facts, *Drugs and Prisons, Jails, Probation, and Parole*, REAL REPORTING FOUND., https://www.drugpolicyfacts.org/chapter/drug_prison# (sourced from the U.S. Justice Department’s Bureau of Justice Statistics (BJS)).

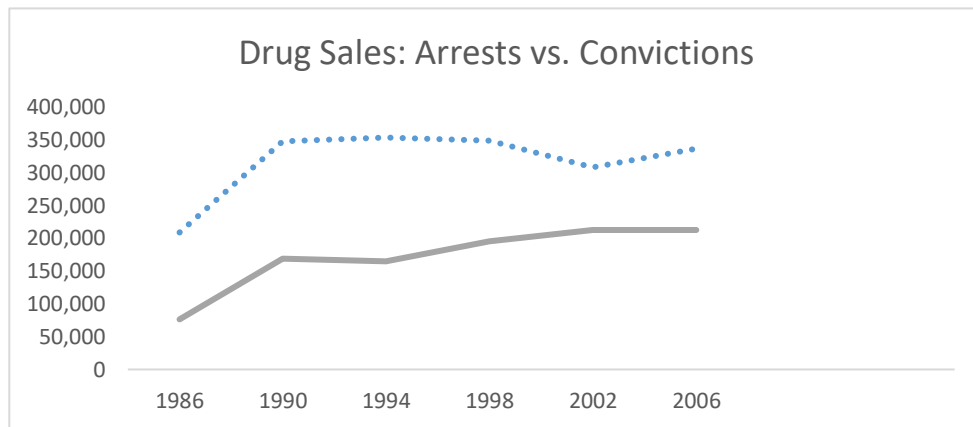
14. Hindelang Criminal Justice Research Center, *Sourcebook of Criminal Justice Statistics, 2003*, BUREAU JUST. STAT., 494 tbl.6.19 (2005), <https://www.albany.edu/sourcebook/pdf/t619.pdf>.

15. See Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 1992*, BUREAU JUST. STAT. 1, 3 tbl.2 (1993), <https://bjs.ojp.gov/content/pub/pdf/cs1lea92.pdf>; Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008*, BUREAU JUST. STAT. 1, 2 tbls.1, 2 (2011), <https://bjs.ojp.gov/library/publications/census-state-and-local-law-enforcement-agencies-2008>.

1.6 million per year in 2010.¹⁶ The magnitude of that change is startling. In the space of a few decades, American police were making over a million more arrests *every year* just for drug offenses. These arrests had numerous consequences, leading most obviously to criminal prosecutions, but also to probation and parole revocations – which have grown to about a third of prison admissions.¹⁷

Of course, the drug war is more than just laws and arrests. It also includes incarceration and that typically requires prosecutors and judges. Prosecutors could have declined to prosecute all the new drug arrests pouring into their offices, appellate judges could have rejected the overbearing tactics that typify drug arrests, and trial judges could have resisted incarcerating folks for victimless crimes. That didn't happen. Steeped in the same rhetoric as legislators and police, prosecutors and judges also embraced the War on Drugs.

Prosecutors uncritically processed the increase in drug cases authorized by legislators and initiated by police, turning the explosion of arrests into an explosion of convictions. Here is a graph from *Mass Incarceration Nation* that illustrates the clear correlation between nationwide arrests (dotted line) and convictions (solid line) for the most serious drug offense, distribution.



Tougher prosecutors, tougher sentencing laws, and tougher judges also meant longer sentences. Consistent with other studies, a study by the Pew Research Center demonstrates that sentence lengths increased across the board even as the number of convictions increased; specifically, drug “[o]ffenders released in 2009 served [an average of] 2.2 years, up from 1.6 years in 1990.”¹⁸

16. See *Arrest Data Analysis Tool*, BUREAU JUST. STAT., www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm.

17. See *Reassessing Prosecutorial Power*, *supra* note 7, at 844.

18. The PEW Center on the States, *Time Served: The High Cost, Low Return of Longer Prison Terms*, PEW CHARITABLE TR. 1, 3 (2012), https://www.pewtrusts.org/-/media/assets/2012/06/06/time_served_report.pdf.

The foregoing discussion reflects a theme that is fleshed out in detail in my book. For drugs the picture is as clear as any, but a similar picture emerges in every area of American criminal law that contributed to mass incarceration, from weapons offenses to assaults to sex crimes. The historical record does not point to a prosecution-led increase in enforcement. Instead, it shows all the criminal justice actors moving together. Legislators enacted harsher laws (and funded more aggressive enforcement), police made more arrests, prosecutors filed more cases, and judges imposed longer sentences. And a fifth punitive mechanism was also increasingly important: parole and probation officers sent more and more people back to prison.

Prosecutors matter. But they are one piece of a large and complex puzzle. And most importantly, prosecutors are primarily reactive, responding to the laws enacted by legislators and the arrests made by police. Getting this diagnosis right is critical to evaluating proposals like the one offered by Capers. Capers' proposal makes perfect sense if prosecutors are truly the "one thing" responsible for mass incarceration and the primary driver of drug enforcement. If, however, politicians and police are also (or even primarily) pushing the "tough on crime" agenda, jettisoning public prosecutors becomes a murky policy prescription and may even prove counterproductive.

With respect to Capers' primary example for reducing the footprint of the criminal law (the drug war), legislators and police were not only forceful proponents, but also major drivers of, aggressive drug enforcement. And since they lay the foundation from which everything else follows, they (not prosecutors) are the logical place to push for change. Of course, if those actors resist, prosecutors offer another lever. But it is important to see that shrinking American criminal law through reforms targeting prosecutors is an indirect and generally second-best approach. If Capers succeeds in stripping public prosecutors of the power to prosecute victimless crimes, politicians are unlikely to throw in the towel. Legislators will seek alternative enforcement mechanisms for the laws they enact. As I illustrate in my book, the key to understanding the changes that brought us mass incarceration was that politicians were not content with rhetorical "crime-fighting." Republicans and Democrats united to transform the system of the 1970s and abolish the "revolving door" of criminal justice. They did this by pushing for greater enforcement and dramatically curtailing the then-prevailing model of indeterminate sentencing and early parole release to ensure that the severe determinate punishments they authorized would be imposed.

The legislators who enacted and maintain the drug laws would have little trouble turning Capers' framework in their favor. Deprived of the services of locally elected prosecutors, legislators could create more centralized enforcement bureaucracies, staffed with attorneys who would be more, not less, willing to implement legislative directives. Or they could authorize a broad

swath of “victims” of drug crimes to pursue these cases, including police. Police prosecutions are already a common phenomenon in some jurisdictions.¹⁹

All of which is to say, privatizing prosecution does not appear to be an especially promising route to ending the drug war or mass incarceration. But that does not mean I am not sympathetic. Capers article is characteristically smart and provocative, forcing us to think deeply about the failings of a complex system. Capers takes on reformers’ biggest challenge: how to reduce the system’s swollen footprint without support from the legislators who most directly shape that footprint, and the public, who elect those legislators. I think the only lasting answer to this puzzle is to fight the hypothetical and reverse widespread public (and legislative) perceptions that incarceration is a pragmatic response to crime.²⁰ Capers’ proposal, by connecting the public more closely to individual prosecutions, could help to achieve that. As the public turns against mass incarceration (and, more importantly, the micro mechanisms by which it persists), direct reforms will become increasingly available. Reformers could then reduce over-prosecution, particularly of victimless crimes, through the most promising mechanism for lasting change: changing the law.

Reformers understandably target prosecutors when they are unable to influence the true drivers of American criminal law: legislators and, ultimately, the broader public. The weakness of prosecutor-focused policy reforms is that if politicians oppose those reforms, the only solutions likely to last are those that fly under the radar. Replacing public with private prosecution is not such a change. By contrast, a reduction in charging by the public prosecutors we have, such as that implemented across the country by locally elected (“progressive”) prosecutors, can have a modest real-world impact.²¹ Rather than turn away from public prosecutors, it may make more sense to support them, stressing the importance of declinations and dismissals as a core function of the public prosecutor’s role.²²

19. Alexandra Natapoff, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018).

20. MASS INCARCERATION NATION, *supra* note 12 (“The path back to the 1970s[-era incarceration rates] depends on building a new consensus that incarceration is rarely (if ever) the solution, especially to achieve policy goals, as opposed to justice.”).

21. See Angela J. Davis, *The Perils of Private Prosecution*, 13 CALIF. L. REV. ONLINE 7 (2022).

22. Cf. Jeffrey Bellin, *Defending Progressive Prosecution: A Review of Charged by Emily Bazelon*, 39 YALE L. & POL’Y REV. 218, 245 (2020) (“When it comes to prosecutorial lenience, then, more prosecutor power is better and (contrary to traditional academic voices) the best reform *for that power* is no reform. Prosecutors can already offer leniency without check. This is the power reform-minded prosecutors and their supporters can leverage unapologetically to temper the overly punitive dynamics of American criminal justice.”).